

The Hon. John C. Coughenour

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UNITED STATE DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

THE PHOENIX INSURANCE COMPANY,
a foreign insurance company,

Plaintiff,

v.

DIAMOND PLASTICS CORPORATION, a
Nevada corporation; and H.D. FOWLER
COMPANY, a corporation,

Defendants.

No. 19-cv-01983-JCC

**DIAMOND PLASTICS
CORPORATION’S ANSWER AND
COUNTERCLAIMS**

Diamond Plastics Corporation (“Diamond Plastics”) answers The Phoenix Insurance Company’s (hereinafter “Travelers”) Complaint for Declaratory relief as follows:

I. PARTIES

1. Diamond Plastics admits the allegations contained Paragraphs “1.1,” and “1.2.”

2. Diamond Plastics is without sufficient knowledge to admit the truth of Paragraph “1.3,” and therefore denies the same.

II. JURISDICTION AND VENUE

3. Diamond Plastics admits the allegations contained in Paragraphs “2.1,” “2.2,” and “2.3.”

III. FACTUAL BACKGROUND

4. Diamond Plastics admits the allegations contained in Paragraphs “3.1” and “3.2.”

5. As to Paragraph “3.3”, Diamond Plastics admits the first sentence, but is without sufficient information to admit or deny the second sentence and therefore denies the same.

6. As to Paragraph 3.4” Diamond Plastics is without information to admit or deny and therefore denies the same.

7. As to Paragraph “3.5” Diamond Plastics admits it delivered pipe “drop ship direct to Kiewit” at its jobsite but denies the remainder of that paragraph.

8. As to Paragraph “3.6’ Diamond Plastics admits the same,

9. As to Paragraph “3.7” Diamond Plastics is without sufficient information to admit or deny, and therefore denies the same.

10. As to Paragraph “3.8” Diamond Plastics admits that on or about June 21, 2017, Fowler notified Diamond Plastics of assembly issues encountered by Kiewit and Tunista with the 18” Lok-21 pipe but denies the remaining allegations of said paragraph.

11. As to Paragraph “3.9,” Diamond Plastics alleges that the project records speak for themselves, and therefore denies the same.

12. As to Paragraph “3.10” Diamond Plastics admits that on or about June 30, 2017 a representative of Diamond Plastics appeared at the project site, but Diamond Plastics does not know the exact number of linear feet of pipe that had been installed, and therefore denies the same.

13. As to Paragraph “3.11” Diamond Plastics alleges that the correspondence speaks for itself, and therefore it denies and allegations of said paragraph.

14. As to Paragraph “3.12” Diamond Plastics alleges that the correspondence speaks for itself, and therefor denies the same.

15. As to Paragraph “3.13” Diamond Plastics admits the first sentence. In response to the second sentence of Paragraph “3.13”, Diamond Plastics alleges that the H. D. Fowler Complaint speaks for itself, and therefore incorporates the entire pleading in answering the allegations of the second sentence of Paragraph “3.13”, and except as admitted, denies the same.

1 16. As to Paragraph 3.14 Diamond Plastics admits that on June 3, 2019 Travelers first
2 began providing a defense to the Diamond Plastics to the *H. D. Fowler Co. v. Diamond Plastics Corp.*
3 litigation (the “Underlying Litigation”) under an express reservation of rights through the firm of
4 Floyd, Pflueger & Ringer, and except as admitted, denies the same.

5 **IV. POLICY OF INSURANCE**

6 17. Diamond Plastics admits the allegations contained in paragraph “4.1” of the
7 Complaint for Declaratory Relief and incorporates by reference the original or a true copy of the
8 insurance policy as to the terms and conditions contained therein, referring all questions concerning
9 the construction of the policy to the Court.

10 18. Diamond Plastics neither admits nor denies the allegations contained in paragraph
11 “4.2,” “4.3,” “4.4,” “4.5,” “4.6,” and “4.7” of the Complaint for Declaratory Relief and incorporates
12 by reference the original or a true copy of the insurance policy as to the terms and conditions
13 contained therein, referring all questions concerning the construction of the policy to the Court.

14 19. Paragraph “4.8” of the Complaint for the Declaratory Relief does not appear to
15 contain any allegations requiring an answer. To the extent an answer is required, Diamond Plastics
16 denies the allegations contained in Paragraph No. “4.8.”

17 **V. NO INDEMNITY OR DEFENSE COVERAGE UNDER THE POLICY**

18 20. As to Paragraph 5.1 Diamond Plastics repeats, reiterates and realleges each and
19 every answer to the allegations contained in paragraph “1.1” through “4.8” as if fully set forth
20 herein.

21 21. Diamond Plastics neither admits nor denies the allegations contained in paragraph
22 “5.2,” “5.8,” “5.11,” “5.13,” “5.15,” “5.17,” “5.19,” “5.21,” “5.23,” and “5.25” of the Complaint for
23 Declaratory Relief and incorporates by reference the original or a true copy of the insurance policy
24 as to the terms and conditions contained therein, referring all questions concerning the construction
25 of the policy to the Court.

26 22. Diamond Plastics denies each and every allegation contained in paragraph “5.3,”
27 “5.4,” “5.5,” “5.6,” “5.7,” “5.9,” “5.10,” “5.12,” “5.14,” “5.16,” “5.18,” “5.20,” “5.22,” “5.24,”
28 “5.26” of the Complaint for Declaratory Relief.

1 23. Paragraph “5.27” of the Complaint for the Declaratory Relief does not appear to
2 contain any allegations requiring an answer; therefore, Diamond Plastics neither admits nor denies
3 the allegations contained in paragraph “5.27.”

4 **VI. CAUSE OF ACTION FOR DECLARATORY RELIEF**

5 24. Diamond Plastics repeats, reiterates and realleges each and every answer to the
6 allegations contained in paragraph “1.1” through “6.1.” as if fully set forth herein.

7 25. Diamond Plastics admits the allegations contained in paragraph “6.2” of the
8 Complaint for Declaratory Relief.

9 26. Diamond Plastics denies each and every allegation contained in paragraph “6.3,”
10 “6.4,” and “6.5” of the Complaint for Declaratory Relief and refers all issues of law to the Court.

11 **AS AND FOR A FIRST AFFIRMATIVE DEFENSE**

12 27. Any determination concerning Travelers’s indemnity obligations should be stayed
13 pending resolution of the Underlying Lawsuit to avoid prejudice to the defense of the liability
14 issues. *Expedia, Inc. v. Steadfast Insurance Co.*, 180 Wn.2d 763, 802, 329 P.3d 59 (2014).

15 **AS AND FOR A SECOND AFFIRMATIVE DEFENSE**

16 28. Diamond Plastics has no present existing obligation to pay any sum to H. D.
17 Fowler and therefore a judicial determination of Travelers obligation to indemnify Diamond
18 Plastics in the Underlying Lawsuit is not ripe for determination and is premature.

19 **AS AND FOR A THIRD AFFIRMATIVE DEFENSE**

20 29. One or more of Travelers’s claims are contrary to the policy concern of wanting
21 “[t]o eliminate the risk of inconsistent factual determinations that could prejudice the insured”
22 *Expedia, Inc. v. Steadfast Insurance Co.*, 180 Wn.2d 763, 806, 329 P.3d 59 (2014) and therefore
23 should be denied.

24 **AS AND FOR A FOURTH AFFIRMATIVE DEFENSE**

25 30. Travelers has failed to state a claim upon which relief can be granted.

26 **COUNTERCLAIMS**

27 Diamond Plastics, defendant and counterclaimant herein, and in further answer to
28 Travelers’s Complaint for Declaratory Relief, hereby alleges as follows:

I. PARTIES

31. Diamond Plastics is a Delaware corporation with its principal place of business in Grand Island in the State of Nebraska.

32. Travelers is organized under the laws of the State of Connecticut with its principal place of business in the State of Connecticut. Travelers is licensed to transact business in Washington and at all material times has transacted business in Washington.

II. VENUE AND JURISDICTION

33. Jurisdiction is properly before this Court pursuant to 28 U.S.C. §1332, *et. seq.*, as complete diversity exists among the parties and the amount in controversy exceeds \$75,000.

34. The Court has jurisdiction over this declaratory judgment action pursuant to 28 U.S.C. § 2201 because there is an actual and justiciable controversy between the parties with respect to the existence of insurance coverage under the policy of insurance issued by Travelers. A judicial determination and declaration of the rights and obligations of the parties is necessary and appropriate at this time because Diamond Plastics has no adequate remedy at law which will resolve the current controversy.

35. Venue is proper in this Court pursuant to 28 U.S.C. § 1391 as this action involves a dispute over the application of insurance coverage under policies written out of the state of Nebraska, events and omissions which gave rise to this claim occurred in this district, and because Travelers is subject to this Court’s personal jurisdiction.

III. FACTUAL BACKGROUND

36. This lawsuit is an insurance coverage dispute arising out of the allegations set forth in the Complaint filed in Underlying Lawsuit.

37. The subject claim arises from alleged construction project damages occurring to a utility construction project in the Kent/Auburn area involving general contractor Kiewit Infrastructure West Co, which, on information and belief, contracted with H.D. Fowler to provide pipe materials which were to be used in the construction.

38. As alleged in the Underlying Lawsuit, H.D. Fowler entered into a contract with Diamond Plastics in which Diamond Plastics agreed to supply pipe to H.D. Fowler for use on the

1 utility project. *See Complaint in Underlying Litigation*

2 39. On March 27, 2019, the H. D. Fowler filed the Underlying Lawsuit against Diamond
3 Plastics, in which it alleged, in part, as follows:

4 Diamond [Plastics] knew at the time it shipped the pipe that it was to be installed by
5 workers underground, and that if the pipe physically failed during normal installation
6 there was a risk of physical harm to persons and/or property. Specifically, Diamond
7 [Plastics] knew or reasonably should have known that if sudden physical damage
8 occurred to the pipe after it had been put to its intended use (installation by
9 construction workers), that physical damage to other property and loss of use of other
10 property would occur. Given the foreseeability of such damage and loss of use of
property other than the pipe, Diamond had an independent duty in tort to exercise
reasonable care so that such damage and loss of use of property other than the pipe
itself would not occur.

11 *See id.* ¶ 9.

12 40. In the Complaint filed in the Underlying Litigation, H. D Fowler alleged that
13 “Fowler furnished the pipe to Kiewit to be used by Kiewit and one of its subcontractors for
14 installation at the Project.” *See id.* ¶ 10. H.D. Fowler also alleged that “[f]ollowing initial
15 installation work, Kiewit informed Fowler, who in turn informed Diamond [Plastics], that
16 during installation [,]the Diamond [Plastics] pipe suddenly and physically failed as workers
17 attempted to install it (the “occurrence”).*See id.* ¶ 11.

18 41. In the underlying Complaint, H. D. Fowler also alleges:

19 Fowler immediately notified Diamond [Plastics], who sent a representative to the site.
20 Fowler inquired of Diamond [Plastics] as to its instructions on what to do to avoid
21 ongoing and continuing physical failure of the pipe during installation. Nothing
22 worked to Kiewit’s satisfaction, and eventually Kiewit directed its subcontractor
23 Tunista to excavate out the damaged pipe. Kiewit would subsequently claim that
24 during the process of re-excavating the damaged pipe, other property at the Project
site was physically damaged during “rip and tear”, and portions of the Project site
could not be used for construction.

25 *See id.* ¶ 12.

26 42. In the underlying Complaint, H. D. Fowler also alleges that “[e]ventually Kiewit
27 back charged Fowler an amount in excess of \$1.4 million for its alleged damages stemming from
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1 the occurrence. *See id.* ¶ 13.

2 43. In the underlying Complaint, H. D. Fowler also alleges that:

3 As a proximate result of Diamond [Plastics'] act, omissions, fault and conduct, Fowler
4 has been damaged in an amount to be proven at trial, including the full amount of
5 earned contract balance which Kiewit has backcharged Fowler, attorneys fees and
6 other costs Fowler has incurred in connection with these claims, and other damages
Kiewit may seek or obtain against Fowler.

7 *See id.* ¶ 14.

8 44. After the Complaint in the Underlying Litigation had been filed, Diamond Plastics
9 tendered the defense to Travelers on March 28, 2019. On information and belief, on March 29,
10 2019, Travelers opened claim file "FEQ9090" for the Diamond Plastics claim and eventually
11 assigned it to adjuster Mark Croom, who began his investigation that same day.

12 45. On information and belief, on April 1, 2019, Travelers adjuster Mr. Croom left a
13 voice mail message for Diamond Plastics, acknowledging receipt of the claim.
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15 46. On information and belief, on April 2, 2019, Travelers adjuster Croom received
16 internal confirmation from Travelers that it has issued CGL policy No. GN-630-804X1781 (11/1/16
17 to 11/1/17) to Named Insured Diamond Plastics, with \$1,000,000 occurrence and aggregate limits.
18 On information and belief, at the same time, Mr. Croom was advised that a Travelers company has
19 issued an umbrella policy No. GSMJ-CUP-1104A525 (11/1/16 to 11/1/17) to Named Insured
20 Diamond Plastics with \$25,000,000 occurrence and aggregate limits.

21 47. Also on April 2, 2019, Mr. Croom spoke with Diamond Plastics representatives and
22 on information and belief was advised that Diamond Plastics had retained counsel to file a
23 protective notice of appearance for Diamond Plastics in the H. D. Fowler while it waited for
24 Travelers to respond to its tender of the claim. On the same day, on information and belief, Mr.
25 Croom sent an email to Diamond Plastics acknowledging receipt of the claim and requesting
26 information and copies of documents related to the claim. Diamond Plastics promptly responded to
27 the requests for information and continuously cooperated with Travelers during the claim
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1 investigation process.

2 48. On information and belief, on April 4, 2019, Mr. Croom consulted with his
3 supervisor and in-house counsel regarding the claim. Based on this conversation Mr. Croom made
4 an entry in his claims' notes:

5 The language in the complaint regarding the process of re-excavating the damaged
6 pipe, other property damage at the project site was physically damaged during rip and
7 tear, and portions if the project site could not be used for construction, would trigger
our duty to defend.

8 49. On information and belief, on April 4, 2019, shortly after making the claims note
9 entry alleged in paragraph 48, supra, Mr. Croom arranged to have a second Travelers file opened,
10 under claim number "ACQ7521", as the "Washington defense file", and it was assigned to
11 Travelers adjuster Brian Skinner. Mr. Skinner noted that no defense attorney had been assigned. On
12 information and belief, on April 8, 2019 Mr. Croom informed Mr. Skinner that "he was going to
13 accept the defense of the insured." However, on information and belief, on April 10, 2019, Mr.
14 Croom sent Mr. Skinner an email stating "I'm going to hold off assigning counsel. I'll get back
15 with you in about three weeks."

16 50. On information and belief, on receipt of Mr. Croom's email that he was holding off
17 on assigning defense counsel, Mr. Skinner entered a claim's note stating:

18 I hate to have a new file and do nothing with it but given my file is the Washington
19 defense file and no defense is being provided and no defense attorney assigned there
20 is no defense for me to manage. I'll set a diary for about 3 weeks and check with
Mark at that time.

21 However, despite the decisions first to provide a defense, and then to hold off providing a
22 defense, Travelers failed to advise Diamond Plastics of these events. Accordingly, Diamond Plastics
23 continued to have its own counsel as the only attorney representing it in the Underlying Litigation.

24 51. On information and belief, on May 6, 2019, Mr. Skinner emailed Mr. Croom "just
25 checking in to see if you've made a coverage/defense position yet?" Mr. Croom responded by email
26 stating "[s]till waiting on Troy Edwards. I followed up with him Friday. I'll follow up again this
27 week." On information and belief, Mr. Skinner made a claim note that day that "a coverage decision
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1 has not been made yet.”

2 52. Because Diamond Plastics had not received any response from Travelers to its
3 defense tender, nor any report of the status of Travelers’ investigation and any developments
4 regarding its coverage, Diamond Plastics—in order to minimize its own attorneys’ fees and costs—
5 on May 4, 2019, agreed to H.D. Fowler’s proposed Stipulation which stayed the Underlying
6 Litigation, and limited litigation activity prior to a yet unscheduled mediation to only pleadings or
7 events required under the Case Scheduling Order.

8 53. On information and belief, it was not until May 15, 2019, more than a month after
9 Travelers’ adjusters internally acknowledged on April 10, 2019 that Travelers’ duty to defend “was
10 triggered,” and after Diamond Plastics had agreed to the stay of the Underlying Litigation, that Mr.
11 Croom first contacted the Floyd Pflueger & Ringer firm to assign the defense of the Underlying
12 Litigation.

13 54. On June 3, 2019, some ten weeks after Diamond Plastics’ tender to Travelers,
14 Travelers gave Diamond Plastics its first written confirmation that it was accepting the defense of
15 the Underlying Litigation, subject to a reservation of rights, and assigning the Floyd, Pflueger &
16 Ringer firm as Diamond Plastics defense counsel.

17 55. Also, on June 3, 2019, Travelers sent a separate letter to Diamond Plastics advising
18 that it had opened two claims files related to the Underlying Litigation, one for coverage, handled
19 by Mr. Croom, and one for defense, handled by Mr. Skinner. That letter stated, in part:

20 In that the coverage investigation is being conducted separately from the defense
21 investigation your [Diamond Plastics] written permission is required for [Mr. Croom]
22 to have direct contact with Defense Counsel, Francis Floyd and Brian Skinner or to
23 receive any documents, evidence, or reports prepared or obtained by Brian Skinner
including his evaluation of the claim and damages.

24 Diamond Plastics signed the requested authorization. But this authorization letter failed to
25 advise Diamond Plastics that Travelers would use any confidential attorney client information
26 obtained from Mr. Floyd and Mr. Skinner to build its case for denial of coverage, or as a basis to file
27 a declaratory judgment action seeking a ruling that Travelers had no duty to defend or indemnify
28 Diamond Plastics in the Underlying Litigation.

1 56. Between the June 3, 2019 letters referenced in paragraphs 54 and 55 supra, and
2 September 16, 2019, Diamond Plastics received no information from Travelers (either the coverage
3 or defense adjusters) on the progress of the Underlying Litigation, or the fact that the case was set
4 for mediation on October 4, 2019. Because of the stay of litigation, Diamond Plastics and its
5 assigned defense counsel had no ability to conduct discovery of H.D. Fowler regarding the basis for
6 its claims, in order to prepare for the mediation.

7 57. On information and belief, at the mediation on October 4, 2019, Travelers made no
8 offers to settle any of the claims pending against Diamond Plastics nor did it convey any offers from
9 H. D. Fowler to settle the claims against Diamond Plastics, in violation of its enhanced duty of good
10 faith to keep Diamond Plastics fully advised of all developments related to its coverage.

11 58. On information and belief, Travelers has used confidential defense attorney work
12 product and privileged communications to develop its coverage defense positions, including the
13 denial of coverage for the claims against Diamond Plastics, in violation of its enhanced duty of good
14 faith owed to its insured, and used such improperly obtained information to institute this declaratory
15 judgment action, seeking a ruling that it has no duty to defend or indemnify Diamond Plastics in the
16 Underlying Litigation.

17 59. Diamond Plastics has incurred attorney's fees to defend the H.D. Fowler claims
18 between the date the Underling Litigation was filed (March 27, 2019) to the date when Travelers
19 first advised Diamond Plastics that it was accepting the defense, in an amount that will be proven at
20 trial, and under Travelers CGL policy, it is obligated to reimburse Diamond Plastics for said
21 reasonable defense fees and costs, as well as the reasonably related defense costs and fees Diamond
22 Plastics incurred prior to the filing of the Underlying Action.

23 **IV. POLICIES OF INSURANCE**

24 60. Travelers issued a commercial general liability insurance policy to Diamond Plastics
25 that was in effect during the policy period November 1, 2016 through November 1, 2017 under
26 policy number GN-630-804X1781 (hereinafter the "Policy").

27 61. The commercial general liability portion of the Policy states that Travelers "will pay
28 those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury'

1 or ‘property damage’ to which the insurance applies.” CG 0 1 10 01, p. 1.

2 62. The commercial general liability portion of the Policy states that Travelers will
3 “have the right and duty to defend the insured against any ‘suit’ seeking” bodily injury or property
4 damage. CG 0 1 10 01, p. 1.

5 **V. DECLARATORY RELIEF RE DUTY TO DEFEND**

6 63. Diamond Plastics realleges its allegations in paragraphs 31-62 above.

7 64. In accordance with applicable law, Diamond Plastics now brings this claim for
8 Declaratory Judgment seeking a judicial determination that Travelers owes a duty to defend to
9 Diamond Plastics for the claims asserted in the Underlying Lawsuit.

10 65. There is an actual and justiciable controversy as to whether Travelers has a duty to
11 defend Diamond Plastics in the Underlying Lawsuit.

12 66. While the duty to indemnify exists only if the policy covers the insured’s liability,
13 the duty to defend is triggered if the insurance policy conceivably covers allegations in the
14 complaint. *Expedia, Inc. v. Steadfast Insurance Co.*, 180 Wn.2d 763, 802, 329 P.3d 59 (2014).

15 67. At this time, there is no actual or justiciable controversy as to whether Travelers has
16 a duty to indemnify Diamond Plastics, as such a judicial determination would be premature.

17 68. Pursuant to the *Olympic Steamship* doctrine, Diamond Plastics is entitled to recover
18 its reasonable litigation costs, including attorney’s fees for having to prove that Travelers has a duty
19 to defend the Underlying Litigation.

20 **VI. BREACH OF DUTY OF GOOD FAITH**

21 69. Diamond Plastics realleges paragraphs 31 to 68 above.

22 70. Travelers breached its enhanced duty of good faith owed to Diamond Plastics in
23 such a manner as will be shown at trial, including but not limited to: (1) unreasonable delay in
24 advising Diamond Plastics of the decision to accept its tender of defense, despite internal
25 acknowledgement as of April 10, 2019 that Travelers’ duty to defend was triggered; (2)
26 unreasonable failure to keep Diamond Plastics fully advised of the progress of its defense, and all
27 developments related to coverage; (3) Travelers’ unreasonable delay in advising Diamond Plastics
28 of the proposed mediation, and Diamond Plastics inability to engage in formal discovery in the

1 Underlying Litigation to prepare for the mediation; and (4) Travelers' failure to make any
2 reasonable attempt to negotiate a resolution of the H.D. Fowler claims against Diamond Plastics at
3 the October 4, 2019 mediation.

4 71. Travelers breached its enhanced duty of good faith towards Diamond Plastics by
5 instituting this declaratory judgment action, seeking a ruling that it has no duty to defend, despite
6 the fact that it internally acknowledged that as of April 10, 2019, its duty to defend was triggered.
7 Travelers has further breached its enhanced duty of fairness towards Diamond Plastics by seeking
8 adjudication in this coverage suit of factual matters disputed in the Underlying Litigation in
9 furtherance of its own financial interests but to the detriment of Diamond Plastics' interests *See*
10 *Mutual of Enumclaw Ins. Co. v. Dan Paulson Const., Inc.*, 161 Wn.2d 903, 914-15, 169 P.3d 1
11 (2007).

12 72. Said breaches of the duty of good faith alleged supra have damaged Diamond
13 Plastics, in an amount to be proven at trial.

14 73. Diamond Plastics has been harmed by Travelers' breaches of duties of good faith
15 alleged above, in an amount to be proven at trial, and further Diamond Plastics has been prejudiced,
16 which results in a rebuttable presumption of harm to support the remedy of coverage by estoppel
17 under *Safeco Ins. Co. of Am. v. Butler*, 118 Wn. 2d 383 (1992).

18 **VII. VIOLATION OF WASHINGTON CONSUMER PROTECTION ACT**

19 74. Diamond Plastics realleges paragraphs 31 to 73 above.

20 75. Travelers' conduct as alleged above violates Washington's Unfair Claims Settlement
21 Practices regulations (WAC 284-30 et. seq.) in ways that will be proven at trial, including, but not
22 limited to:

- 23 (a) failing to complete its investigation into whether Travelers owed Diamond Plastics a duty to
24 defend the Underlying Litigation within 30 days of its receipt of the tender of defense, WAC
25 284-30-370; and
26 (b) failing to provide Diamond Plastics with a written notice, within 45 days of after initial
27 notification, stating why its investigation into whether it owed a duty to defend the Underlying
28 Litigation, remained incomplete, and never explaining the reason or reasons additional time

1 was needed for its investigation into these questions. Further, Travelers failed to provide such
2 a notice and explanation every thirty days thereafter. WAC 284-30-380 (3).

3 76. Travelers violation of the Unfair Claims Practices Act regulations is a per-se violation
4 of the Washington Consumer Protection Act (RCW 19.86. et. seq), entitling Diamond Plastics to
5 recover its actual damages, together with its reasonable attorneys' fees and costs, and such enhanced
6 damages as may be awarded at trial.

7 **VIII. BREACH OF CONTRACT TO PAY DEFENSE COSTS**

8 77. Diamond Plastics realleges paragraphs 31 – 76 above.

9 78. In the time period between Diamond Plastics' tender of defense and Travelers'
10 acceptance of Diamond Plastics' tender of defense—Diamond Plastics incurred defense costs and
11 attorney's fees that were reasonably related to the defense of the Underlying Litigation. In addition,
12 in the weeks before the Underlying Litigation was filed, Diamond Plastics incurred fees and costs
13 that were reasonable related to the defense once the Underlying Litigation was filed.

14 79. Under the Policy, Travelers has a contractual duty to pay reasonable defense costs
15 and attorney's fees incurred between the date the claim was filed and the date Travelers advised
16 Diamond Plastics that it was appointing defense counsel. These defense costs total in a sum to be
17 determined by the jurors at trial.

18 **IX. ANSWERING THE PRAYER FOR RELIEF**

19 80. Diamond Plastics prays this Court to enter judgment in favor of Diamond Plastics,
20 and against Travelers, and to issue a declaration settling the rights and obligations of the parties with
21 respect to the Underlying Lawsuit, and award such relief as follows:

- 22 A. A Declaratory Judgment that Travelers is obliged to defend Diamond Plastics;
23 B. Award to Diamond Plastics a judgment for its attorney's fees and cost incurred
24 to defend the Underlying Lawsuit, and for all damages proven at trial that
25 resulted from Travelers' breach of its enhanced duty of fairness, and
26 Washington's Consumer Protect Act;
27 C. A judicial determination that it is premature and not ripe to determine the
28 obligation to indemnify Diamond Plastics until the Underlying Litigation is

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concluded;

- D. Awarding to Diamond Plastics the costs of suit;
- E. Awarding to Diamond Plastics its reasonable attorney fees and litigation expenses of this action under the *Olympic Steamship* doctrine; and
- F. Awarding all other relief to which the answering defendant is entitled to in law and equity.

DATED: This 3rd day of February 2020.

FRIEDMAN | RUBIN PLLP

By: s/Richard Dykstra
Richard Dykstra, WSBA# 5114

By: s/Alexander E. Ackel
Alexander E Ackel, WSBA# 52073

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*Attorneys for Defendant
Diamond Plastics Corporation*

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CERTIFICATE OF SERVICE

I hereby declare under penalty of perjury under the laws of the State of Washington that on this 3rd day of February 2020, I caused a copy of the foregoing to be served on the below-listed counsel for the parties in the manner(s) so indicated:

Raymond E. Brown, WSBA #51001 THE AGUILERA LAW GROUP, APLC 650 Town Center Drive, Suite 100 Costa Mesa, CA 92626 T: 714-384-6600 / F: 714-384-6601 rbrown@aguileragroup.com <i>Counsel for The Phoenix Insurance Company</i>	<input checked="" type="checkbox"/> Via Court E-Filing System <input type="checkbox"/> Email <input type="checkbox"/> Legal Messenger <input type="checkbox"/> Facsimile <input type="checkbox"/> Federal Express <input type="checkbox"/> U.S. Mail
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Robert S. Marconi, WSBA #16369 ASHBAUGH BEAL LLP 701 5 th Avenue, Suite 4400 Seattle, WA 98104 bmarconi@ashbaughbeal.com <i>Attorneys for H.D. Fowler Company</i>	<input checked="" type="checkbox"/> Via Court E-Filing System <input type="checkbox"/> Email <input type="checkbox"/> Legal Messenger <input type="checkbox"/> Facsimile <input type="checkbox"/> Federal Express <input type="checkbox"/> U.S. Mail
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s/Nori Skretta
Nori Skretta, Paralegal