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11 Attorneys for Plaintiff

12 SUPERIOR COURT OF THE STATE OF CALIFORNIA
13 FOR THE COUNTY OF SAN BERNARDINO

14 THE CITY OF UPLAND, a California
15 Municipal Corporation.

16 Plaintiff,

17 vs.

18 INDEPENDENT CITIES RISK
19 MANAGEMENT AUTHORITY, a
20 California Joint Powers Authority, THE
21 INSURANCE COMPANY OF THE
22 STATE OF PENNSYLVANIA, a
23 Pennsylvania Corporation, and DOES 1
24 - 100.

25 Defendants

Case No.:

COMPLAINT AND DEMAND FOR
JURY TRIAL

1. BREACH OF THE IMPLIED
COVENANT OF GOOD FAITH
AND FAIR DEALING
2. BREACH OF CONTRACT
3. DECLARATORY RELIEF



1 GENERAL ALLEGATIONS

2 I.

3 INTRODUCTION

4 1. Plaintiff, the City of Upland ("Upland"), brings this action in connection
5 with a lawsuit in which Upland was sued by the San Bernardino County Flood Control
6 District and the County of San Bernardino (collectively "San Bernardino") in connection
7 with property damage allegedly caused by Upland ("the Underlying Action"). At the
8 time of the conduct alleged against Upland in the Underlying Action, Upland was
9 covered by a memorandum of coverage issued by defendant, Independent Cities Risk
10 Management Authority ("ICRMA") and an excess liability insurance policy issued by
11 defendant, Insurance Company of the State of Pennsylvania ("ISOP"). Unless
12 separately identified, ICRMA and ISOP are collectively referred to in this Complaint as
13 "Defendants".

14 2. Upland promptly and timely tendered a claim for defense and
15 indemnification of the Underlying Action to ICRMA and ISOP. In response, Defendants
16 unreasonably and wrongfully denied coverage, for both defense and indemnification, in
17 conscious disregard of the rights of Upland. Upland was then forced to fund its own
18 defense in the Underlying Action.

19 3. After years of hard-fought litigation in the Underlying Action, Upland
20 reached a settlement with San Bernardino. But Upland expended over \$6 million in
21 attorney fees and costs defending itself in the litigation before settling.

22 4. Upland brings this action against Defendants for breach of contract and
23 breach of the implied covenant of good faith and fair dealing for unreasonably refusing
24 to defend Upland in the Underlying Action.

25 5. Upland also brings a cause of action for declaratory relief against all
26 Defendants. Upland is asking this Court to declare the rights, duties, and obligations of
27 Upland and Defendants pursuant to the memorandum of coverage and insurance
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1 policy. Specifically, Upland is asking this Court to declare that Defendants had a duty
2 to defend Upland against claims brought against Upland in the Underlying Action.

3 **II.**

4 **PARTIES**

5 6. Plaintiff, the City of Upland, is, and at all relevant times was, a municipal
6 corporation and is a citizen of the State of California.

7 7. Defendant, Independent Cities Risk Management Authority (“ICRMA”),
8 is, and at all relevant times was, a joint powers authority and is a citizen of the State of
9 California.

10 8. Defendant, Insurance Company of the State of Pennsylvania (“ISOP”), is,
11 and at all relevant times was, a Pennsylvania corporation with its principal place of
12 business located in New York, New York. ISOP was authorized to transact in the
13 business of insurance in the State of California.

14 9. The true names or capacities, whether individual, corporate, associate, or
15 otherwise, of defendants DOES 1 through 100, inclusive, are unknown to Upland, who
16 therefore sues said defendants by such fictitious names. Upland is informed and
17 believes and thereon alleges that each of the defendants sued herein as a DOE is legally
18 responsible in some manner for the events and happenings referred to herein. Upland
19 will ask leave of this court to amend this complaint to insert their true names and
20 capacities in place and instead of the fictitious names when the same become known.

21 10. At all relevant times, defendants, and each of them, were the agents and
22 employees of each of the remaining defendants, and were at all times acting within the
23 purpose and scope of said agency and employment, and each defendant has ratified
24 and approved said agency and employment, and each defendant has ratified and
25 approved the acts of its agent.

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1 III.

2 FACTUAL ALLEGATIONS

3 11. The Underlying Action arose from events that took place in Upland in the
4 mid to late 1990s. The first was the extension of the 210 freeway through Upland and
5 neighboring cities in San Bernardino County. The Second Amended Complaint in the
6 Underlying Action (“SAC”) alleges that the freeway extension was built below grade
7 through Upland to preserve Upland’s historic character and appeal. The below grade
8 design of the 210 allegedly impacted the natural storm drainage patterns in the area.

9 12. Drainage was built in Upland which was designed to protect the freeway
10 from flooding and to collect storm water in both Upland and San Bernardino County
11 unincorporated areas. San Bernardino and Upland entered into an agreement on
12 January 11, 2000 regarding the construction and future status of the 20th Street drain as a
13 regional flood control facility. The agreement stated the drain would terminate at the
14 San Bernardino County flood control district basin No. 6.

15 13. In the late 1990s the Colonies acquired approximately 400 acres of land in
16 Upland adjacent to the proposed 210 freeway extension. Colonies’ property was located
17 in an area which had been used a flood control facility pursuant to easements held by
18 San Bernardino. Colonies planned to develop the area as a single family residential and
19 commercial development. San Bernardino claimed it held blanket flood control
20 easements over the entirety of the Colonies’ property.

21 14. The termination point and discharge location for the 20th Street drain was
22 San Bernardino’s basin No. 6 which was located on the Colonies’ property. San
23 Bernardino’s position was that its blanket flood control easements provided it with the
24 requisite authority to discharge water from the 20th Street drain onto the Colonies’
25 property. Colonies disputed the validity and scope of San Bernardino’s easements
26 which resulted in a series of lawsuits between them.

27 15. The Colonies filed a quiet title action on March 2002 to determine the
28 validity of San Bernardino’s flood control easements. Subsequent and separate litigation



1 was also filed between the parties in which the Colonies filed a damages cross-
2 complaint action in February 2004 against San Bernardino. Colonies' damages action
3 was stayed pending the results of the quiet title action. The quiet title action went
4 through two trials and an appeal. The court in the second trial issued a Statement of
5 Intended Decision on July 31, 2006. The tentative decision concluded San Bernardino's
6 easements had been surcharged and extinguished. The court's tentative decision was
7 never finalized by the court and did not become a binding judgment.

8 16. San Bernardino and the Colonies reached a settlement of the pending
9 lawsuits in early November 2006. The settlement was approved by the San Bernardino
10 Board of Supervisors on November 28, 2006. Pursuant to the settlement, San Bernardino
11 paid the Colonies \$102 million. In addition, San Bernardino agreed to take over the
12 Colonies' obligations to construct, maintain, and operate the required final flood control
13 facilities on the Colonies' property.

14 17. San Bernardino filed the the original complaint against Upland on
15 November 2, 2004. The action was stayed shortly thereafter on December 17, 2004. The
16 action was to be stayed until final resolution of the actions between San Bernardino and
17 the Colonies. The stay was lifted on December 27, 2007 following the November 2006
18 settlement. San Bernardino filed a First Amended Complaint ("FAC") on July 10, 2008.
19 Upland and its co-defendants, SANBAG and Caltrans, filed demurrers which were
20 sustained with leave to amend by the trial court.

21 18. San Bernardino filed a Second Amended Complaint ("SAC") on December
22 15, 2008 which was the operative complaint through the remainder of the Underlying
23 Action. A true and correct copy of the SAC is attached hereto as Exhibit 1.

24 19. In the SAC, San Bernardino alleged causes of action against Upland for
25 equitable indemnification, comparative equitable indemnity, breach of contract, express
26 contractual indemnity, breach of the covenant of good faith and fair dealing, and
27 declaratory relief.

28



1 20. In the SAC, San Bernardino sought to recover the \$102 million settlement
2 payment to the Colonies, the future costs of building and maintaining the flood control
3 facilities, and its attorney fees in the Colonies' litigation.

4 21. San Bernardino alleged that the Colonies had alleged a massive storm
5 water discharge from the 20th Street Drain onto the Colonies' property that created a
6 dangerous condition and nuisance resulting in a taking of the Colonies' property by
7 inverse condemnation. The massive storm water discharge was alleged to have caused
8 physical damage to the Colonies' property. San Bernardino alleged that it compensated
9 the Colonies for these damages in the settlement.

10 22. At the time of the damages and conduct alleged in the Complaint and
11 SAC, Upland was covered by a Memorandum of Coverage ("MOC") issued by
12 defendant ICRMA. A true and correct copy of the MOC is attached hereto as Exhibit 2.

13 23. The MOC provided limits of \$2,000,000. The MOC provides coverage for:

14 SECTION I – COVERAGES

15 The ICRMA will pay those sums arising out of an OCCURRENCE on
16 behalf of the MEMBER and COVERED PARTIES for ULTIMATE NET
17 LOSS in excess of the RETAINED LIMIT stated in Item 6 of the
18 Declarations that the MEMBER becomes legally obligated to pay as
19 DAMAGES by reason of liability imposed by law or liability assumed by
20 contract because of BODILY INJURY, PROPERTY DAMAGE, PERSONAL
21 INJURY and/or PUBLIC OFFICIALS ERRORS AND OMISSIONS as those
22 terms are herein defined and to which this AGREEMENT applies. (Exhibit
23 2, pp.1.)

24 ...

25 COVERED INDEMNITY CONTRACT – means that part of any contract or
26 agreement pertaining to the COVERED PARTY'S routine governmental
27 operations under which the COVERED PARTY assumes the tort liability
28 of another party to pay for BODILY INJURY or PROPERTY DAMAGE to
a third person or organization. This definition applies only to tort liability
arising out of an OCCURRENCE to which this MEMORANDUM applies.
Tort liability means a liability that would be imposed by law in the
absence of any contract. (Exhibit 2, pp. 4.)



1 24. Included in ICRMA's obligation to pay are "DEFENSE COSTS" falling
2 within the definition of "COVERED ULTIMATE NET LOSS."

3 25. At the time of the damages and conduct alleged in the Complaint, FAC,
4 and SAC, Upland was also covered by an ISOP excess liability insurance policy ("Excess
5 Policy"). A true and correct copy of the Excess Policy is attached hereto as Exhibit 3.

6 26. The Excess Policy provided limits of \$8,000,000 after Upland exhausted
7 the retained limit of \$2,000,000. The retained limit is the amount Upland and/or ICRMA
8 is responsible for paying out prior to the Excess Policy's benefits being payable. The
9 retained limit was satisfied by payment from Upland of defense fees and costs. The
10 Excess Policy has a policy term of July 1, 2004 to July 1, 2005. The Excess Policy
11 provides coverage for:

12 SECTION I. WHAT WE SHALL PAY ON YOUR BEHALF

13 A. INSURING AGREEMENTS

14 1. BODILY INJURY AND PROPERTY DAMAGE

15 We shall pay you, on your behalf, the ultimate net loss, in excess of
16 the retained limit, that the insured becomes legally obligated to pay
17 by reason of liability imposed by law or assumed under an insured
18 contract because of bodily injury or property damage arising out of
19 an occurrence during the Policy Period.

20 2. ERRORS AND OMISSION LIABILITY

21 We shall pay you, or on your behalf, the ultimate net loss, in excess
22 of the retained limit, that the insured becomes legally obligated to
23 pay to compensate others for loss arising out of your wrongful act
24 that takes place during the Policy Period and arises solely in
25 performing or failing to perform duties of the public entity.

26 ...

27 B. DEFENSE AND DEFENSE COSTS

28 1. We shall have the right and duty to defend, investigate and settle
any claim or suit seeking damages covered by the terms and
conditions of this Policy when the applicable limits of insurance of
the underlying Insurance listed in the Schedule of Underlying
Insurance, the limits of insurance of any other underlying

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insurance providing coverage for you, or your self insured retention of the retained limit have been exhausted by payment to a third party of judgments, settlements, or defense costs, or by payment of covered first party automobile expenses.

(Exhibit 3, pp. 1-2).

27. The MOC and Excess Policy are hereinafter referred to collectively as the “Policies” unless otherwise distinguished.

28. The liability and damages claimed by San Bernardino against Upland in the Complaint, FAC, and SAC were potentially covered under the terms of the Policies and therefore Defendants owed Upland a duty to defend. The Complaint, FAC, and SAC alleged property damages arising out of an occurrence under the Policies. Specifically, the SAC alleged, among other covered allegations triggering the duty to defend, the following:

12. Colonies contended that the storm water discharged from the 20th Street Drain and diverted onto the Colonies’ private property created a dangerous condition and nuisance and caused the taking of Colonies’ private property by inverse condemnation by flooding it with water that otherwise would have flooded the 210 extension. As a result, the amount of acreage available for development by Colonies was substantially reduced, development of Colonies’ remaining property was delayed, Colonies was subjected to additional regulation by State agencies, and Upland imposed an emergency action plan requiring Colonies to construct flood control improvements on its property.

...

15. By diverting and discharging massive amounts of water onto Colonies property, Colonies contended that the 20th Street Drain grossly overburdened and materially damaged Colonies’ private property, created a flood hazard, and required Colonies as a matter of necessity to construct facilities to contain the flood waters. In particular, solely to accommodate the discharge of the massive amounts of additional storm water from the 20th Street Drain, Colonies was required to use private property to provide, for public benefit and without compensation, flood



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control basins and improvements. Colonies contended that the new 20th Street Drain created a dangerous condition because Colonies property did not have adequate flood control facilities to control the storm water discharged from the 20th Street Drain, thereby creating a severe flooding hazard to the Colonies' property.

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99. A. The 20th Street Drain was in a dangerous condition at the time it caused damage to the Colonies and Colonies' property, i.e., it was designed to, and did discharge massive amounts of storm water directly onto the Colonies' property, which did not have adequate flood control facilities to control the storm water, thereby creating a serious risk of flooding of and damage to Colonies' property.

B. The 20th Street Drain proximately caused the damage to Colonies' property by grossly overburdening Colonies' property and making it the receiving ground for massive volumes of storm water discharged from the 20th Street Drain.

C. The 20th Street Drain created a reasonably foreseeable risk of the kind of injury which was incurred by Colonies, i.e., the flooding, damaging, and taking of the Colonies' property via the discharge of storm water from the 20th Street Drain.

101. A. Colonies owned the real property onto which the 20th Street Drain discharged.

B. The 20th Street Drain created a condition that was harmful to the health and was an obstruction of the free use of Colonies' real property, so as to interfere with the comfortable enjoyment of life or property by Colonies.

C. The condition created by the 20th Street Drain interfered with Colonies' use or enjoyment of its real property.

29. The allegations of the SAC included allegations for inverse condemnation and property damage. These allegations create a potential for coverage under the Policies. Therefore, Defendants had a duty to defend Upland.



1 30. The Underlying Action was tendered to ISOP on or about August 24, 2009.
2 A true and correct copy of the August 24, 2009 tender email is attached hereto as Exhibit
3 4.

4 31. ISOP denied the tender on or about April 6, 2011. A true and correct copy
5 of the April 6, 2011 denial is attached hereto as Exhibit 5.

6 32. The basis of ISOP's denial was the inverse condemnation exclusion in the
7 Excess Policy; however, that exclusion does not eliminate the potential for coverage
8 because it does not apply to property damage. Specifically, the exclusion states:

9 We will not defend or pay under this Policy for claims or suits against you

10 ...

11 Y. Arising out of direct condemnation of property or exercise of
12 power of eminent domain by you or on your behalf, or inverse
13 condemnation, or any taking of property by you which is
14 compensable under the Fifth or Fourteenth Amendments to the
15 United State Constitution, or any taking of property by you which
16 is compensable under the law of the State in which the claim or suit
17 is made.

18 *This exclusion shall not apply to physical injury or destruction of tangible*
19 *property, including all resulting loss of use of that property for which*
20 *you may be legally responsible and for which recovery is sought*
21 *for claims or suits for inverse condemnation, by whatever name*
22 *called; provided, however, that in any case which a claim or suit for*
23 *inverse condemnation, by whatever name called, is made against*
24 *you, coverage shall exist only for physical injury to or destruction*
25 *of tangible property, including all resulting loss of use of that*
26 *property, and there shall be no coverage for reduced value of*
27 *property (diminution in value), attorneys fees, expert fees,*
28 *severance damages, relocation costs or any other form of relief,*
 however denominated. (Exhibit 3, pp. 17, emphasis added)

26 33. The Underlying Action alleged property damages and resulting loss of
27 use, and therefore, the inverse condemnation exclusion, by its own terms, "shall not
28 apply."



1 34. The Underlying Action was also tendered to ICRMA, and on or about
2 June 24, 2009, ICRMA acknowledged that “there may be coverage for some of the
3 damages sought” in the Underlying Action, and that “[t]hose potentially covered
4 damages include physical damage to [Colonies] tangible property and loss of use of that
5 property.” A true and correct copy of the June 24, 2009 letter from ICRMA is attached
6 hereto as Exhibit 6.

7 35. Although ICRMA recognized that there may be coverage for Upland
8 based on the allegations in the Underlying Complaint, it did not provide a defense to
9 Upland.

10 36. On or about September 4, 2009, ICRMA denied Upland’s tender of the
11 Underlying Action. A true and correct copy of the September 4, 2009 denial letter is
12 attached hereto as Exhibit 7.

13 37. Defendants’ denial of the defense was unreasonable and in conscious
14 disregard of the rights of Upland. It breached the terms of the MOC and Excess Policy.
15 Defendants unreasonably withheld policy benefits that were owing and payable in the
16 form of defense fees and costs.

17 38. Upland has performed all acts and conditions, including exhaustion of
18 any and all administrative remedies, or was excused from performing such acts,
19 necessary for coverage to apply. The retained limits of \$500,000 and \$2,000,000 for the
20 MOC and Excess Policy, respectively, were met by Upland’s payment of defense fees
21 and costs.

22 39. As a result of Defendants’ unreasonable and wrongful denial of coverage
23 to Upland, Upland was forced to fund its own defense.

24 40. Defendants unreasonably, and in conscious disregard of Upland’s rights,
25 refused to provide a defense in the Underlying Action. This was a breach of the terms
26 of the Policies and a breach of the implied covenant of good faith and fair dealing.

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1 proof at the time of trial.

2 45. As a proximate result of the aforementioned unreasonable conduct of
3 Defendants, Upland has suffered, and will continue to suffer in the future, damages
4 under the Defendants' Policies, plus interest, and other economic and consequential
5 damages, for a total amount to be shown at the time of trial.

6 46. As a direct and proximate result of the conduct of Defendants, it became
7 reasonably necessary for Upland to engage the services of legal counsel and thereby
8 incur, and continue to incur, costs and attorneys' fees in an amount to be determined
9 according to proof. Upland claims these attorneys' fees as a distinct item of recoverable
10 damage, pursuant to *Brandt v. Superior Court* (1985) 37 Cal. App.3d 83 and *Cassim v.*
11 *Allstate* (2004) 33 Cal.4th 780.

12 47. ISOP's conduct described herein was intended by ISOP to cause injury to
13 Upland or was despicable conduct carried on by ISOP with a willful and conscious
14 disregard of the rights of Upland, or subjected Upland to cruel and unjust hardship in
15 conscious disregard of Upland's rights, or was an intentional misrepresentation, deceit,
16 or concealment of a material fact known to ISOP with the intention to deprive Upland
17 of property, legal rights or to otherwise cause injury, such as to constitute malice,
18 oppression or fraud under California Civil Code §3294, thereby entitling Upland to
19 punitive damages in an amount appropriate to punish or set an example of ISOP.

20 48. Defendants' conduct described herein was undertaken by its corporate
21 defendants' officers or managing agents, identified herein as DOES 1 through 100, who
22 were responsible for claims handling and/or decisions. The aforementioned conduct of
23 said managing agents and individuals was therefore undertaken on behalf of the
24 corporate defendants. Said corporate defendants further had advance knowledge of the
25 actions and conduct of said individuals whose actions and conduct were ratified,
26 authorized, and approved by managing agents and by other corporate officers or
27 directors whose precise identities are unknown to Upland at this time and are therefore
28 identified and designated herein as DOES 1 through 100.



1 SECOND CAUSE OF ACTION

2 (BREACH OF CONTRACT)

3 PLAINTIFF, THE CITY OF UPLAND, FOR A SECOND CAUSE OF ACTION
4 AGAINST DEFENDANTS, INSURANCE COMPANY OF THE STATE OF
5 PENNSYLVANIA ("ISOP"), INDEPENDENT CITIES RISK MANAGEMENT
6 AUTHORITY ("ICRMA"), AND DOES 1 THROUGH 100, FOR BREACH OF
7 CONTRACT, ALLEGES:

8 49. Upland refers to each and every preceding paragraph and incorporates
9 those paragraphs as though set forth in full in this cause of action.

10 50. Defendants owed duties and obligations to Upland under the Policies.

11 51. Defendants breached the terms and provisions of the insurance Policies by
12 failing to defend Upland.

13 52. Upland has complied with all of the terms and conditions of the
14 Defendants' Policies, including payment of all premiums due and any other costs
15 associated with the Defendants' Policies.

16 53. As a direct and proximate result of Defendants' conduct and breach of
17 their contractual obligations, Upland has suffered damages under the Policies in an
18 amount to be determined according to proof at the time of trial.

19 THIRD CAUSE OF ACTION

20 (DECLARATORY RELIEF)

21 PLAINTIFF, THE CITY OF UPLAND, FOR A THIRD CAUSE OF ACTION
22 AGAINST DEFENDANTS, INSURANCE COMPANY OF THE STATE OF
23 PENNSYLVANIA ("ISOP"), INDEPENDENT CITIES RISK MANAGEMENT
24 AUTHORITY ("ICRMA"), AND DOES 1 THROUGH 100, FOR DECLARATORY
25 RELIEF, ALLEGES:

26 54. Upland refers to each and every preceding paragraph and incorporates
27 those paragraphs as though set forth in full in this cause of action.

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- 1 7. For costs of suit incurred herein;
- 2 8. For interest and pre-judgment interest; and,
- 3 9. For such other and further relief as the Court deems just and proper.

4 **AS TO THE THIRD CAUSE OF ACTION AGAINST DEFENDANTS**
5 **INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA ("ISOP"),**
6 **INDEPENDENT CITIES RISK MANAGEMENT AUTHORITY ("ICRMA"), AND**
7 **DOES 1 THROUGH 100, INCLUSIVE, FOR DECLARATORY RELIEF:**

8 10. That the Court adjudicate and declare that Defendants had a duty to
9 defend Upland in the Underlying Action.

SHERNOFF BIDART
ECHEVERRIA BENTLEY
LAWYERS FOR INSURANCE POLICYHOLDERS



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DATED: July 19, 2013

SHERNOFF BIDART
ECHEVERRIA BENTLEY LLP

BY: Michael J. Bidart

MICHAEL J. BIDART
RICARDO ECHEVERRIA
GREGORY L. BENTLEY
Attorneys for Upland

DEMAND FOR JURY TRIAL

Upland hereby demands a jury trial of all claims appropriate for the jury.

DATED: July 19, 2013

SHERNOFF BIDART
ECHEVERRIA BENTLEY LLP

BY: Michael J. Bidart

MICHAEL J. BIDART
RICARDO ECHEVERRIA
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