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**XL AMERICA, INC., XL INSURANCE AMERICA, INC.,  
XL SELECT PROFESSIONAL, PEARL INSURANCE GROUP, LLC,  
AND GREENWICH INSURANCE COMPANY**

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

VICTORIA NELSON, In Her Capacity As The  
Chapter 7 Trustee Of AMERI-DREAM  
REALTY, LLC,

Plaintiff,

v.

XL AMERICA, INC.; XL INSURANCE  
AMERICA, INC.; XL SELECT  
PROFESSIONAL; PEARL INSURANCE  
GROUP, LLC; GREENWICH INSURANCE  
COMPANY; and DOES I through X; and ROE  
CORPORATE DEFENDANTS XI through XX.

Defendants.

Case No.: 2:16-cv-00060-JAD-GWF

**DEFENDANTS XL AMERICA, INC., XL  
INSURANCE AMERICA, INC., XL SELECT  
PROFESSIONAL, AND PEARL  
INSURANCE GROUP, LLC'S REPLY IN  
SUPPORT OF THEIR MOTION TO  
DISMISS PURSUANT TO FED. R. CIV.  
PRO. 12(b)(6)**

**ORAL ARGUMENT REQUESTED**

NOW COME Defendants XL America, Inc., XL Insurance America, Inc., XL Select Professional (collectively the "XL Entities") and Pearl Insurance Group, LLC ("Pearl"), by and through undersigned counsel, for their Reply in Support of Their Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(6) state as follows:

**I. INTRODUCTION**

The terms of the Greenwich Policy and the allegations of the Trustee's own Complaint make clear that Defendant Greenwich Insurance Company ("Greenwich") is the only defendant with any potential obligation for the claims asserted by the Trustee; namely, declaratory action, breach of contract, bad faith, breach of fiduciary duty and violations of NRS 686A.310. The Policy makes

1 clear that the sole insurer of Ameri-Dream is Greenwich. Moreover, the Trustee herself alleges that  
2 only Greenwich has coverage obligations under the Policy. *See* Compl at ¶33. As a result, the  
3 Trustees attempts to bring in entities that have no contractual connection or duty to Ameri-Dream  
4 Realty. As such, the claims against XL America, Inc., XL Insurance America, Inc., XL Select  
5 Professional, and Pearl Insurance Group, LLC should be dismissed pursuant to Fed. R. Civ. Pro.  
6 12(b)(6).

## 7 **II. FACTUAL BACKGROUND**

8 The Trustee ignores her own pleading and the plain language of the insurance policy at issue  
9 which is specifically referenced and incorporated into the Trustee's Complaint. *See* Compl. at ¶11.  
10 A fair and objective reading of these documents reveals that no potential liability can attach to any  
11 named defendant except Greenwich Insurance Company.

12 The Trustee in the Complaint makes a specific and unequivocal allegation that "Pursuant to  
13 the terms of the Policy, Greenwich agreed to pay for claims, up to \$1,000,000.00, resulting from an  
14 act or omission in the performance of real estate services for which the insured (the Company) is  
15 obligated to pay." The Trustee's assertion is correct that the party to the contract with Ameri-Dream  
16 is Greenwich. The Trustee specifically did not allege that any Defendant, other than Greenwich, was  
17 responsible for any obligations under the Greenwich Policy.

18 Moreover, the Policy relied on by the Trustee to support her alleged claims for failure to  
19 reimburse Ameri-Dream makes clear that the Policy is issued solely by Greenwich. The Policy  
20 further defines "Company" as "the Insurance Company named in the Declarations." The  
21 Declarations Page specifically states "The Company providing the insurance afforded by this  
22 coverage is indicated above." Above this statement on the Declarations Page "Greenwich Insurance  
23 Company" is listed as "Members of the XL America Companies." XL America, Inc., XL Insurance  
24 America, Inc., XL Select Professional, and Pearl Insurance Group, LLC are not listed at the top of  
25 the Declarations Page of the Policy. Furthermore, the Greenwich Policy in several places  
26 specifically notes that "Policy No. -PEG9145932-6 issued to Ameri-Dream Realty, LLC by  
27 **Greenwich Insurance Company**". *See* Exhibit A to Motion, Policy at Endorsements #1 - #4.  
28 Furthermore, the first page of the Greenwich Policy containing the Insuring Agreement specifically

1 refers to Greenwich Insurance Company. The Policy also makes clear that XL Select Professional  
2 and Pearl Insurance Company are nothing more than “authorized representatives” of Greenwich, and  
3 not the insurance company obligated under the Greenwich Policy. *See* Policy at p. 11, Condition B.  
4 Condition B of the Policy specifically states that “Notice should be sent to the Company or to its  
5 authorized representative at the address stated in Item 8. in the Declarations.” Item 8 lists XL Select  
6 Professional as the authorized agent to which claims should be sent and Pearl as the authorized agent  
7 to which material changes to the risk should be sent.

8 **A. Pearl and the XL Entities cannot be held liable for a breach of a contract**  
9 **(Count I) without being in privity of contract with Plaintiff.**

10 To prove a breach of contract claim a plaintiff must show four elements: (1) formation of a  
11 valid contract, (2) performance or excuse of performance by the plaintiff, (3) material breach by the  
12 defendant, and (4) damages. *Donell v. Fid. Nat’l Title Agency of Nev., Inc.*, 2012 U.S. Dist. LEXIS  
13 66070, \*24 (D. Nev. May 11, 2012). “The contract must be formed between the defendant and the  
14 plaintiff.” *Blades v. Wells Fargo Bank*, 2012 U.S. Dist. LEXIS 97234, \*4 (D. Nev. July 12, 2012).

15 The Trustee does not dispute that a breach of contract claim must be premised on the  
16 formation of a valid contract between the parties. Plaintiff’s Complaint contains no allegations that  
17 Ameri-Dream or Mr. Brown entered into any contract with Pearl. On the contrary, Plaintiff in  
18 paragraph 33 states “Pursuant to the terms of the Policy, *Greenwich* agreed to pay for claims, up to  
19 \$1,000,000.00, resulting from an act or omission in the performance of real estate services for which  
20 the insured (the Company) is obligated to pay.” Furthermore, a review of the Greenwich Policy,  
21 attached to the Motion as Exhibit A, reveals that neither Pearl nor the XL Entities were party to any  
22 insurance contract with Ameri-Dream or Mr. Brown. Simply put, neither Pearl nor the XL Entities  
23 are mentioned as being a party to the insurance contract and the Trustee’s arguments do nothing to  
24 dispute that fact.

25 The Trustee attempts to circumvent the lack of a contractual relationship between Ameri-  
26 Dream and Pearl and the XL Entities by stating that the insurance policy contains references to those  
27 names. However, the clear language of the Policy states that the Greenwich Policy was issued by  
28 Greenwich Insurance Company and no other entity.

1 Therefore, Plaintiff's allegations of breach of contract should be dismissed against Pearl and  
2 the XL Entities for failing to state a claim upon which this Court can grant relief as Ameri-Dream  
3 and Pearl/the XL Entities were not in privity of a contract.

4 **B. Pearl and/or the XL Entities cannot violate any implied covenants of good-faith**  
5 **or fair dealing (Count II) without the existence of a contract.**

6 Nevada courts have recognized that all contracts impose a covenant of good-faith and fair  
7 dealing on contracting parties unless the parties expressly agree otherwise. *See generally, Nelson v.*  
8 *Heer*, 123 Nev. 217, 226 (Nev. 2007); *The State of Nev., Univ. and Cmty. Coll. Sys. v. Suttin*, 120  
9 Nev. 972 (Nev. 2004). If a party breaches this covenant, then that gives rise to a bad-faith claim. *Id.*  
10 The Nevada Supreme Court has defined "bad faith" to mean "an actual or implied awareness of the  
11 absence of a reasonable basis for denying benefits of the [insurance] policy." *Allstate Ins. Co. v.*  
12 *Miller*, 212 P.3d 318, 324 (Nev. 2009)(quoting *Am. Excess Ins. Co. v. MGM*, 102 Nev. 601, 605  
13 (Nev. 1986)). Showing that the insurer had no reasonable basis for denying or disputing a claim is  
14 necessary to establish a prima facie case for a bad-faith claim. *Powers v. United Services Auto.*  
15 *Ass'n and USAA Cas. Ins. Co.*, 114 Nev. 690, 703 (Nev. 1998). As noted above, the Trustee fails to  
16 allege a necessary element of a claim for breach of good-faith and fair dealing—that Ameri-Dream  
17 and Pearl/the XL Entities had entered into a contractual agreement establishing a relationship  
18 between them. Without a contract as set forth above, Pearl and the XL Entities have absolutely no  
19 obligations or duties to Ameri-Dream, good-faith or otherwise.

20 **C. Nevada Law Does Not Recognize a Separate and Distinct Cause of Action for**  
21 **Breach of Fiduciary Duty As Plead in Count III.**

22 The Trustee's Opposition Brief admits that while Nevada courts have held that "an insurer's  
23 duty to its policyholder is ... 'akin' to a fiduciary relationship" *Powers v. U.S. Auto. Ass'n*, 114 Nev.  
24 690, 962 P.2d 596, 602 (1998)), Nevada does not recognize a cause of action for breach of fiduciary  
25 duty between an insurer and insured. While the Trustee may be able to ask for a jury instruction  
26 regarding fiduciary duty obligations as was done in *Powers v. U.S. Auto Ass'n*, 962 P.2d 596, 602  
27 (Nev. 1998) should her bad faith claim survive, the Trustee cannot proceed on a breach of fiduciary  
28 duty action because it is not a recognized claim between insured and insurer in Nevada.

1 Furthermore, as discussed above, even if the duties between insured and insurer are “akin to”  
2 fiduciary duties, neither Pearl nor the XL Entities were the insurer of Ameri-Dream. Moreover,  
3 none of the Defendants were ever the insurer of the Trustee and no such allegation has ever been  
4 made.

5 Therefore, both factually and legally, Count III of the Complaint is duplicative of Count II of  
6 the Complaint and must be dismissed. Furthermore, for the reasons set forth above, no cause of  
7 action against Pearl and the XL Entities for breach of the duty of good faith and fair dealing can  
8 stand.

9 **D. Pearl and the XL Entities Are Not Subject to Liability Under NRS 686A.310.**

10 The Nevada Supreme Court has held that in determining what the legislature intended, the  
11 title of a statute may be considered in construing the statute. *A Minor v. Clark Co. Juvenile Ct.*  
12 *Servs.*, 87 Nev. 544, 548, 490 P.2d 1248, 1250 (1971). The title of NRS 686A.310 reads “Unfair  
13 practices in settling claims; liability of insurer for damages.” The Nevada Supreme Court held that  
14 from a plain reading of its title, there is no indication that the legislature intended NRS 686A.310 to  
15 apply to other entities beyond insurers. *Albert H. Wohlers & Co. v. Bartgis*, 969 P.2d 949 (Nev.  
16 1999). The Trustee argues that because Pearl and the XL Entities are referenced on the Declarations  
17 Page of the Greenwich Policy in non-contractual positions, those entities must be deemed “insurers”  
18 of Ameri-Dream. As discussed at length above, Paragraph 33 of the Complaint and Exhibit A to the  
19 Motion expressly state that Greenwich is the insurer of Ameri-Dream Realty.

20 In addition, in *Gunny v. Allstate Ins. Co.*, 108 Nev. 344, 346 830 P.2d 1335 (1992), the Court  
21 expressly said that a third-party “has no private right of action as a third-party claimant under NRS  
22 686A.310.” Thus, if the Trustee is a third party and therefore not subject to the insured v. insured  
23 exclusion, Exclusion I, of the Greenwich Policy as she argues in her Opposition to Greenwich’s  
24 Motion to Dismiss, then the Trustee has no right of action under NRS 686A.310 against any  
25 Defendant. Therefore, because neither Pearl nor the XL entities is the insurer of Ameri-Dream and  
26 the Trustee now asserts she is a third party to the insurance contract, no liability can attach to Pearl  
27 and/or the XL entities pursuant to NRS 686A.310

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1           **E. Because the Trustee is An Outsider to the Relationship Between Ameri-Dream and the**  
2           **Defendants, She Lacks Standing to Bring Any of the Claims Asserted in the Complaint.**

3           In light of the Trustee's recent arguments in opposition to Greenwich's Motion to Dismiss,  
4           the Trustee now argues that she does not stand in the shoes of Ameri-Dream and as such is a third-  
5           party to the contract. If the Trustee is, in fact, a third-party to the insurance contract she has no  
6           standing to assert any of the claims set forth in the Complaint.

7           The Trustee does not allege the requisite third-party status to sue for breach of contract or  
8           declaratory judgment. *Olson v. Iacometti*, 91 Nev. 241, 533 P.2d 1360 (1975)(there must be a  
9           clearly apparent promissory intent to benefit the third party). Similarly, the Trustee's bad faith  
10          claims, common law and statutory, fail if she is in fact a third party to the contract. In Nevada,  
11          liability for bad faith is strictly tied to the implied covenant of good faith and fair dealing created by  
12          the contractual relationship between the insured and the insurer. *United Fire Ins. Co. v. McClelland*,  
13          780 P.2d 193, 197 (Nev. 1989). An insurer's duty to negotiate settlements in good faith arises  
14          directly from the insurance contract. *Allstate Ins. Co. v. Miller*, 212 P.3d 318, 330 (Nev. 2009).  
15          Therefore, a party who lacks a contractual relationship with an insurer does not have standing to  
16          bring a claim of bad faith. *Gunny v. Allstate Ins. Co.*, 830 P.2d 1335, 1335-36 (Nev. 1992). In  
17          Nevada, "[w]here no contract relationship exists, no recovery for bad faith is allowed." *McClelland*,  
18          780 P.2d at 197. Other states may recognize a duty to negotiate in good faith between insurers and  
19          third parties, however, Nevada does not recognize such a duty. *Tweet v. Webster*, 610 F. Supp. 104,  
20          105 (D. Nev. 1985); see also *Bergerud v. Progressive Cas. Ins.*, 453 F. Supp. 2d 1241, 1247 (D.  
21          Nev. 2006). This holds true for claims under NRS 686A.310A as well. See *Gunny v. Allstate Ins.*  
22          *Co.*, 108 Nev. 344, 436, 830 P.2d 1335 (1992).

23           **III. CONCLUSION**

24           WHEREFORE, Defendants Pearl Insurance Group, LLC, XL America, Inc., XL Insurance  
25           America, Inc. and XL Select Professional respectfully request that this Court dismiss the claims  
26           against them with prejudice pursuant to Federal Rule of Civil Procedure 12(b)(6) and award any and

27           ///

28           ///



1 all other relief this Court deems just and proper.

2 DATED this 20<sup>th</sup> day of January, 2017.

3 WILSON ELSER MOSKOWITZ EDELMAN &  
4 DICKER LLP

5   
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14 **GROUP, LLC, AND GREENWICH**

15 **INSURANCE COMPANY**

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**CERTIFICATE OF SERVICE**

Pursuant to FRCP 5(b), I certify that I am an employee of WILSON ELSER MOSKOWITZ EDELMAN & DICKER LLP, and that on this 20<sup>th</sup> day of January, 2017, I served a true and correct copy of the foregoing **DEFENDANTS XL AMERICA, INC., XL INSURANCE AMERICA, INC., XL SELECT PROFESSIONAL, PEARL INSURANCE GROUP, LLC'S REPLY IN SUPPORT OF MOTION TO DISMISS PURSUANT TO FED. R. CIV. PRO. 12(b)(6)** as follows:

by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada;

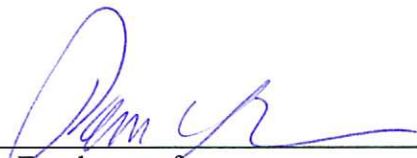
via electronic means by operation of the Court's electronic filing system, upon each party in this case who is registered as an electronic case filing user with the Clerk;

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via hand-delivery to the addressees listed below;

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by transmitting via email the document listed above to the email address set forth below on this date:

BY:   
An Employee of  
WILSON ELSER MOSKOWITZ EDELMAN & DICKER LLP

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