**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK**

AGP HOLDINGS TWO LLC; AGP HOLDINGS THREE LLC; and AGP HOLDINGS ONE LLC,

Plaintiffs,

—*against*—

CERTAIN UNDERWRITERS AT LLOYD'S OF LONDON INCLUDING SYNDICATE NOS. 4000, 5000, 2121, 2987, 4020, 1861, 1221, 1183, 4711, 5151, 1686, AND 4472 AT LLOYD'S, LONDON AND THEIR UNDERWRITING MEMBERS; GREAT LAKES INSURANCE SE; SWISS RE INTERNATIONAL SE; AIG PROPERTY CASUALTY COMPANY; and FEDERAL INSURANCE COMPANY,

Defendants.

Index No.: 654742/2020
Hon. Joel M. Cohen
Part 3

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION (I) TO EXCLUDE THE OPINIONS AND TESTIMONY OF PLAINTIFFS' PROFFERED BAD FAITH CLAIMS-HANDLING EXPERT, LARRY GOANOS, AND (II) FOR SUMMARY JUDGMENT ON COUNT II (BAD FAITH)

STEPTOE LLP
1114 Avenue of the Americas
New York, New York 10036
(212) 506-3900

CLYDE & CO US LLP
405 Lexington Avenue
New York, New York 10174
(212) 710-3900

O'MELVENY & MYERS LLP
7 Times Square
New York, New York 10036
(212) 326-2000

QUINN EMANUEL URQUHART & SULLIVAN, LLP
51 Madison Avenue, 22nd Floor
New York, New York 10010
(212) 849-7000

January 18, 2024

TABLE OF CONTENTS

Page

PRELIMINARY STATEMENT 1
BACKGROUND 3
I. The Primary Insurers Pay $141 Million for Artworks Confirmed to Be Damaged in the Fire 3
II. MAFCO Attempts to Extract a Payment From the Primary Insurers for Undamaged Paintings 4
III. Perelman Claims Molecular Damage to the Five Paintings Nearly Two Years After the Fire 4
IV. Insurers Promptly and Thoroughly Investigate Dr. Mass's Novel and Theoretical Damage Claims 5
V. Insurers Deny Coverage 8
VI. Plaintiffs Add a Bad Faith Claim 8
VII. Plaintiffs Hire Goanos 8
ARGUMENT 10
I. The Court Should Exclude Goanos's Testimony 10
A. Goanos Is Not Qualified to Opine on Claims Handling 10
B. Goanos's Speculative Opinions Lack Foundation 11
C. Goanos's Opinions Invade the Factfinder's Province 13
II. The Court Should Grant Summary Judgment Dismissing Plaintiffs' Bad Faith Claim 14
A. The Undisputed Facts Show that the Insurers Did Not Act Egregiously or in Gross Disregard of Their Obligations Under the Policies 14
1. The Admissible Evidence Does Not Demonstrate Egregious Conduct or Gross Disregard 15
2. The Insurers Had an "Arguable Basis" for Investigating Plaintiffs' Insurance Claim and Denying Coverage 17
B. Plaintiffs Have No Evidence of Distinct Bad Faith Damages 20
CONCLUSION 22

TABLE OF AUTHORITIES

Page(s)

Cases

99 Wall Development, Inc. v. Allied World Specialty Insurance Co.,
2021 WL 4460638 (S.D.N.Y. Sept. 29, 2021) .... *passim*

Apogee Handcraft, Inc. v. Verragio, Ltd.,
155 A.D.3d 494 (1st Dep't 2017) 21

Automatic Findings, Inc. v. Those Certain Underwriters at Lloyds at London & Elsewhere Subscribing to Jewelers Block Policy No. 243883100,
1994 WL 273367 (S.D.N.Y. June 20, 1994) 21, 22

Bogart v. City of New York,
200 N.Y. 379 (1911) 14

Cantaloupe, Inc. v. Axis Insurance Co.,
2023 WL 8237245 (E.D. Pa. Nov. 28, 2023) 19

Clifford v. White Plains Hospital Medical Center,
217 A.D.3d 405 (1st Dep't 2023) 11

D.K. Property, Inc. v. National Union Fire Insurance Company of Pittsburgh,
168 A.D.3d 505 (1st Dep't 2019) 20

Diaz v. New York Downtown Hospital,
99 N.Y.2d 542 (2002) 12

East Ramapo Central School District v. New York Schools Insurance Reciprocal,
199 A.D.3d 881 (2d Dep't 2021) 18

GEICO Marine Insurance Co. v. Mandel,
2023 WL 2464271 (E.D.N.Y. Mar. 10, 2023) 17

Gomez by Gomez v. New York City Housing Authority,
217 A.D.2d 110 (1st Dep't 1995) 12, 13

H&H Environmental Systems Inc. v. Evanston Insurance Co.,
2019 WL 1129434 (W.D.N.Y. Mar. 12, 2019) 20

Hawthorne Group, LLC v. RRE Ventures,
7 A.D.3d 320 (1st Dep't 2004) 21

Hugo Boss Fashions, Inc. v. Federal Insurance Co.,
252 F.3d 608 (2d Cir. 2001) 14, 15

Jacobson Family Investments, Inc. v. National Union Fire Insurance Company of Pittsburgh,
102 A.D.3d 223 (1st Dep't 2012) 17, 19

TABLE OF AUTHORITIES
(Continued)

Page(s)

Jane Street Holding, LLC v. Aspen American Insurance Co.,
2014 WL 28600 (S.D.N.Y. Jan. 2, 2014),
aff'd, 581 F. App'x 49 (2d Cir. 2014)....18

Jian Liang v. Progressive Casualty Insurance Co.,
172 A.D.3d 696 (2d Dep't 2019)....14, 17, 19

Jonas v. New York Central Mutual Fire Insurance Co.,
244 A.D.2d 916 (4th Dep't 1997)....15, 17

McBride v. New York Property Insurance Underwriting Association,
152 A.D.3d 505 (2d Dep't 2017)....20

Newell v. City of New York,
204 A.D.3d 574 (1st Dep't 2022)....10, 11

Pacelli v. Peter L. Cedeno & Associates, PC,
220 A.D.3d 596 (1st Dep't 2023)....21

Parker v. Mobil Oil Corp.,
7 N.Y.3d 434 (2006)....12, 13

Pavia v. State Farm Mutual Automobile Insurance Co.,
82 N.Y.2d 445 (1993)....15

People v. Diaz,
15 N.Y.3d 40 (2010)....13

Process America, Inc. v. Cynergy Holdings, LLC,
839 F.3d 125 (2d Cir. 2016)....20

Schechter v. 3320 Holding, LLC,
64 A.D.3d 446 (1st Dep't 2009)....10

Scottsdale Insurance Co. v. McGrath,
549 F. Supp. 3d 334 (S.D.N.Y. 2021)....15

Smith v. General Accident Insurance Co.,
91 N.Y.2d 648 (1998)....18

Sukup v. State,
19 N.Y.2d 519 (1967)....14, 15

Sunrise One, LLC v. Harleysville Insurance Company of New York,
293 F. Supp. 3d 317 (E.D.N.Y. 2018)....15

Train v. General Electic Capital Corp.,
8 A.D.3d 192 (1st Dep't 2004)....21, 22

TABLE OF AUTHORITIES
(Continued)

Page(s)

U.B. Vehicle Leasing Inc. v. Atlantic Mutual Insurance Co.,
2004 WL 503729 (S.D.N.Y. Mar. 12, 2004) 14

United States v. Scop,
846 F.2d 135 (2d Cir. 1988)....................13

Utica Mutual Insurance Co.,
238 F. Supp. 3d 314 (N.D.N.Y. 2017) 19, 20

Zhong v. Matranga,
208 A.D.3d 439 (1st Dep't 2022) 12

PRELIMINARY STATEMENT

In September 2018, a fire broke out in the attic of Ronald Perelman's East Hampton estate, The Creeks.[1] Plaintiffs submitted insurance claims for artwork and furniture damaged in the fire, for which the Primary Insurers promptly paid approximately $141 million—work Perelman's team recognized as "outstanding." Other art, including the Five Paintings that were hung on the ground floor, two floors away from the fire, sustained no observable damage; when The Creeks was rebuilt, Perelman re-displayed it. Nevertheless, between August and December 2020 (more than two years after the fire), Plaintiffs submitted $410 million in claims for the Five Paintings, accompanied by more than 400 pages of analysis purporting to show that conditions during the fire necessarily caused "molecular" damage.

Notwithstanding Plaintiffs' belated and novel claim, the Insurers promptly launched a thorough investigation. They (i) requested relevant documents; (ii) retained fire dynamics, materials science, conservation science, and art conservation experts to assess the claimed damage; (iii) conducted examinations under oath of eyewitnesses and other MAFCO personnel; (iv) interviewed firefighters; and (v) interviewed Plaintiffs' conservation scientist, Dr. Jennifer Mass. When the experts reported their findings in late November 2021, the Insurers promptly reviewed the available evidence, consulted the policy and denied the claim based on Plaintiffs' failure to demonstrate "physical damage."

Plaintiffs assert that the Insurers breached the policies' implied covenant of good faith and fair dealing in handling the claim and denying coverage. They submitted a report from Larry Goanos—a self-styled industry custom-and-practice expert who has never worked as a claims

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[1] Capitalized terms are defined in the contemporaneously filed Rule 19-a statement. Unless noted, all citations and quotations are omitted. "Ex." denotes exhibits to the Michael Affirmation.

adjuster—who opines that the Insurers conducted a protracted and "one-sided" investigation to support their "premature," "unfounded, unreasonable, and deceitful" determination that the Five Paintings were undamaged. But at his deposition, Goanos disclaimed offering any opinions about "what the[] [Insurers] should or shouldn't have done," what their "motivation[s]" were, or "what they were thinking," or whether "there was coverage." And despite his report, he testified the Insurers were *not* "deceitful," and he did not identify anything the Insurers should or should not have done during their investigation.

Goanos's testimony should be excluded and, regardless, the Court should grant summary judgment dismissing Plaintiffs' bad faith claim.

Motion to exclude Goanos. Goanos's testimony is inadmissible for three reasons: *First*, he has no relevant "industry custom-and-practice" experience: he has never been a claims handler, is not an expert in art or fire insurance claims, admittedly cannot opine on how art or fire claims should be handled, and could not identify anything an insurer should do when faced with a claim for non-visible damage to art. *Second*, Goanos lacks foundation to opine on the Insurers' investigatory steps and coverage decision, because he reviewed only a curated fraction of the record—not including any of Dr. Mass's reports (the support for the insurance claim), any of the Insurers' expert reports (the Insurers' basis for rejecting the claim), any of the claims handlers' depositions in full, or much of the claim files. *Third*, Goanos's core opinion that the Insurers predetermined the investigation's outcome makes credibility and state-of-mind conclusions that invade the factfinder's province.

Motion for summary judgment. The Court should grant summary judgment for two reasons. *First*, without Goanos's inadmissible testimony, Plaintiffs have no evidence that the Insurers acted egregiously or with gross disregard, as they must to overcome New York's strong

presumption against bad faith insurer liability. Even crediting Goanos's testimony, the record cannot support the conclusion that the Insurers acted egregiously. The Insurers clearly had at least an arguable basis for denying coverage, which the Court of Appeals, First Department and other courts have explained requires summary judgment dismissal. *Second*, Plaintiffs produced no evidence of damages distinct from the damages they seek under their contract claim.

BACKGROUND

I. The Primary Insurers Pay $141 Million for Artworks Confirmed to Be Damaged in the Fire

In November 2018 MAFCO announced it was monitoring paintings on "which there ha[d] been no visible damage detected"—including the Five Paintings—to determine whether damage might "materialize over the coming months." (Ex. 69, at AGP0021689.) Over the following year, the Insurers paid Plaintiffs $141 million for damage to other artworks and furniture, including artwork with minimal damage—an effort that MAFCO commended as "outstanding" and "excellent." (Northcott Aff. Ex. 2, at PrimaryInsurers_218713-18; Mancuso Aff. Ex. 1, at PrimaryInsurers_066563; Ex. 69, at AGP0021689; Ex. 77, at PrimaryInsurers_070732; Ex. 3 ¶ 16.) But no damage materialized on the Surveillance Paintings, which were never even near the fire. By Memorial Day 2019, Perelman re-displayed the Five Paintings at his properties. (*Id.* ¶¶ 83-84; Ex. 137; Ex. 27, at 471:6-473:6.)

In December 2019 MAFCO's vice president of risk management, John Winkel, told the Primary Insurers it still had not identified evidence of fire-related damage to the Surveillance Paintings. (Ex. 42, at 38:23-39:06, 93:15-94:02, 98:24-99:25, 229:19-230:12.) In discussions with Winkel, the Primary Insurers suggested a plan to resolve potential Surveillance Paintings claims (Ex. 36, at 186:22-191:13) that struck Winkel as "a very good and fair plan" that he thought would be agreed. (Mancuso Aff. Ex. 2, at PrimaryInsurers_249570.)

II. MAFCO Attempts to Extract a Payment from the Primary Insurers for Undamaged Paintings

In January 2020 Perelman rejected the plan. (Ex. 42, at 81:05-85:13.) Winkel warned that requiring proof of physical damage (as the policies require) "would result in the claim getting nasty." (Ex. 36, at 189:16-191:07; Mancuso Aff. Ex. 9, at PrimaryInsurers_265970.)

In February 2020, the parties' agreed adjuster Rich Mancuso, asked MAFCO whether it would be making a claim on the Surveillance Paintings and, if so, to specify "those pieces" and "identify the damage for each." (Ex. 85.) On March 10, 2020, Winkel emailed Mancuso that MAFCO *was* submitting a claim on twelve Surveillance Paintings because of their supposed exposure to "heat, smoke, water… steam, humidity, and vapors."[2] (*Id.*; *see* Ex. 42, at 10-11.) But MAFCO did not actually specify any damage. (Ex. 85.).

Winkel has admitted that the March 10, 2020 email was a negotiating tactic (Ex. 42, at 84:08-85:13, 115:21-24), and that MAFCO had not identified any damage (*id.* at 38:23-39:06, 98:24-99:25, 115:21-24, 154:14-155:10, 229:19-230:12). That did not stop MAFCO from proposing that the Insurers pay $208 million to settle the unidentified claims, with Perelman keeping the Surveillance Paintings—an offer the Primary Insurers declined. (*Id.* at 75:13-77:24; Ex. 36, at 205:20-206:05, 215:7-13; Mancuso Aff. Ex. 9, at PrimaryInsurers_265970.)

III. Perelman Claims Molecular Damage to the Five Paintings Nearly Two Years After the Fire

In April and May 2020 Perelman quietly contacted and then hired Dr. Mass to examine the Surveillance Paintings. (Ex. 87, at AGP0023882; Ex. 89, at AGP0024842.) On June 2, 2020, Mancuso sent MAFCO the first of several requests for information, including information and

[2] MAFCO and Perelman's pivot coincided with mounting financial troubles. This and other red flags are detailed in the Insurers' Motion for Summary Judgment on Count I (Coverage).

supporting documents about the alleged damage. (Ex. 90, at PrimaryInsurers_06554.) MAFCO sat silent for two months as it and Dr. Mass worked behind the scenes.

Between August 17 and December 21, 2020, MAFCO provided five claims and corresponding "partial proofs of loss" for the Five Paintings—the five Surveillance Paintings with the highest scheduled values—alongside executive summaries and (eventually) reports from Dr. Mass claiming "molecular" damage. (Ex. 3, ¶¶ 139-44, 148-49, 158-59; Exs. 10, 11, 12, 13, 14; Ex. 42, at 126:11-14.) On September 25, 2020, before the Insurers had a chance to fully investigate, Plaintiffs filed this lawsuit alleging breach of contract for the Insurers' failure to pay the contemporaneously-submitted claims. (Ex. 1.)

Dr. Mass's reports were technical, novel, and flawed. They begged for scrutiny. In more than 400 pages of analysis, she opined—despite not being a fire-dynamics expert—that extreme heat and humidity had caused water vapor, smoke, and soot to penetrate the Five Paintings' Plexiglas encasements, resulting in detrimental chemical reactions, such as mobilization of "free fatty acids," formation of "metal soaps," and "entrainment of soot and soil in the synthetic polymer regions," all of which would likely "materialize" into visible damage at a later date, perhaps decades later. (Exs. 10, 11, 12, 13, 14; Finn Aff. Ex. A ¶ 187.)

IV. Insurers Promptly and Thoroughly Investigate Dr. Mass's Novel and Theoretical Damage Claims

As the proofs of loss and Dr. Mass's reports filtered in, the Insurers began investigating. (*See, e.g.*, Ex. 99; Ex. 40, at 11-15.) By that time, the Primary Insurers had already retained coverage counsel. (Ex. 120 ¶¶ 8-9.) When Perelman's claims breached AIG's and Federal's layers, they also retained counsel. (*See, e.g.*, Ex. 40, at 36:19-37:5; Ex. 45, at 38:12-39:7.) Goanos deemed this consistent with industry standards. (Ex. 54, at 17:11-18:7; *see also* Finn. Aff. Ex. A ¶ 216.)

The Insurers promptly issued further requests for information, following up on Mancuso's June 2, 2020 requests, and reserved their rights under their policies:

- On October 9, 2020, Federal issued a request for information—to which MAFCO responded on December 24, 2020. (Ex. 102, at FED_AGPH_CLAIM_ESI_008823; Ex. 107.)
- On October 20, 2020, Mancuso issued a request identifying outstanding items from his June 2020 letter and focusing on information related to Dr. Mass's reports (not all of which had been sent)—to which MAFCO first responded in November 2020. (Mancuso Aff. Exs. 4-5; Ex. 36, at 244:05-18; Ex. 3 ¶ 160.)
- On December 24, 2020, Mancuso issued a follow-up request, identifying gaps in MAFCO's prior responses. (Ex. 108; Ex. 3 ¶ 162).
- On January 7 and 13, 2021, MAFCO provided documentation that Mancuso had requested in June and October 2020. (Mancuso Aff. Exs. 6-7.)

As the Insurers' claims-handling expert, Erin Finn, explained, January 2021 is "the earliest point in time that the Insurers … were even arguably positioned to begin meaningfully evaluating Dr. Mass's reports and the scope of the investigative measures required." (Finn Aff. Ex. A ¶ 184.) They had received the last of Dr. Mass's reports only the previous month. *Supra* at 5. And until January 7 and 13, MAFCO had not answered the Insurers' most basic, initial questions concerning the alleged damage. (Exs. 90, 109-10.)

Nevertheless, by January 2021 the Insurers retained—consistent with industry custom and practice (Ex. 54, at 110:6-13)—the following experts: materials scientist James Mason, Ph.D.; retired Met and MoMA conservation scientist Christopher McGlinchey, M.S.; and leading art conservator Dana Cranmer. (Mason Aff. Ex. A; McGlinchey Aff. Ex. A; Cranmer Aff. Ex. A.) And, shortly thereafter, they retained fire dynamics engineers Richard Roby, Ph.D., and Michael Klassen, Ph.D., of CSE. (Roby Aff. Ex. A.) The Insurers asked each expert to evaluate Dr. Mass's assumptions and conclusions—including whether (i) the first floor experienced high heat and humidity during the fire, (ii) humidity or smoke penetrated the paintings' Plexiglas encasements,

and (iii) Dr. Mass had a scientific basis for attributing the paintings' chemical conditions to the fire as opposed to natural aging and use.[3] *Supra* at 6.

That work began with Dr. Mason, McGlinchey, and Cranmer inspecting the Five Paintings in March and April 2021, using the scanning techniques Dr. Mass had used. (Ex. 3 ¶ 172.) The experts were unable preliminarily to discern any damage caused by the fire, but more work needed to be done. (Finn Aff. Ex. A ¶¶ 184-86; Ex. 52, at 121:01-122:09; Ex. 49, at 35:14-25.)

Between April and July 2021, the Insurers took 10 EUOs: six MAFCO employees who witnessed the fire, two MAFCO risk management employees who submitted the insurance claim, a MAFCO art registrar about the paintings' history and condition, and Perelman. (Ex. 3 ¶¶ 174-78, 181, 186, 191-94, 197-99.) These examinations yielded information concerning the observed conditions on the ground floor of The Creeks before and during the fire, evidence that the fire "vented" through a hole in the roof (thus drawing cold air into the ground floor, contrary to Dr. Mass's assumption of high temperatures), and testimony regarding MAFCO's pre-claim painting surveillance. (Roby Aff. Ex. A; Finn. Aff. Ex. A ¶¶ 132, 189-94.) The Insurers also interviewed Dr. Mass (Plaintiffs would not agree to her EUO) over five days—one for each painting. (Ex. 3 ¶¶ 173, 183-85, 198.)

In parallel, the Insurers' experts were working to assess Dr. Mass's conclusions. This included empirical testing done by CSE on an encasement similar to the one protecting the paintings during the fire; a detailed literature review by Dr. Mason that delved into the sources cited by Dr. Mass; and a painstaking analysis by Cranmer of the hundreds of physical imperfections ("conditions," in art parlance) to see if any could be attributed to the fire (they could

[3] The Insurers also arranged interviews of responding firefighters. (Finn Aff. Ex. A ¶ 196.)

not). (Roby Aff. Ex. A, at 22; Mason Aff. Ex. A, at 67; Cranmer Aff. Ex. A.) The experts submitted their final reports to the Insurers in November 2021. (Ex. 120 ¶ 18.)

V. Insurers Deny Coverage

On January 7 and 10, 2022, after each Insurer separately analyzed the experts' conclusions and the investigative record, they denied coverage. (Exs. 114, 115, 116; Ex. 44, at 192:16-193:24, 210:14-211:10; Ex. 39, at 108:15-20, 135:14-136:18; Ex. 41, at 164:18-165:13, 282:03-13; Ex. 40, at 146:8-147:20; Ex. 45, at 86:11-15.) The denial letters explained that Plaintiffs had "not met their burden of establishing that the Five Paintings sustained physical loss or physical damage, as is required by the Primary Policy," because, among other reasons, "Dr. Mass's … purported scientific methods for determining Fire damage have [] been shown by [the Insurers'] experts to be unreliable or inaccurate." (Ex. 115; *see also* Exs. 114, 116.)

VI. Plaintiffs Add a Bad Faith Claim

On February 8, 2022, Plaintiffs filed an amended complaint alleging that the Insurers breached the implied covenant of good faith and fair dealing by prejudging their claim and unreasonably delaying the coverage decision. (Ex. 2, ¶¶ 71-75.) The Insurers moved to dismiss, arguing that the allegations did not approach the level of egregiousness required for bad faith, and that the claim duplicated the underlying contract claim. (Ex. 117.) The Court denied the motion but stated that the "candidly persuasive arguments that the insurers have made [about the bad faith claim] are better left for summary judgment." (Ex. 122, at 34:3-35:18.)

VII. Plaintiffs Hire Goanos

Plaintiffs retained Goanos in the spring of 2023, to evaluate whether the Insurers' claims-handling and coverage position were reasonable, in good faith, and consistent with the Insurers' internal guidelines and industry custom and practice. (Ex. 19 ¶ 20.) Goanos is an attorney who has worked as a full-time litigation expert from 2011 to 2022, and previously worked as an

underwriter. He has never been a claims handler, is admittedly neither an art nor a fire insurance claims expert, and the overwhelming majority of his industry experience is in the third-party context (typically, D&O and E&O insurance), except for first-party fidelity bonds. (Ex. 54, at 14:7-10, 15:4-14, 47:12-16, 50:12-14, 73:19-23, 78:5-10.) He concluded after an initial review of documents Plaintiffs' counsel selected—not including any scientific expert reports, the Insurers' full claims files, or any claims handler's deposition transcript—that the Insurers failed a supposed industry standard for claims handling. (Ex. 19 ¶ 42; Ex. 54, at 12:24-13:6, 56:2-58:19, 65:15-66:2, 100:10-104:18, 176-9:23.)

In his report, Goanos applied a self-created "two-pronged" test for minimum good-faith claims-handling standards; the first prong looks generally to claims handling, and the second focuses on the carrier's coverage decision. (Ex. 19 ¶¶ 44-47.) As to the first prong, he opined that the "Insurers reached a premature determination," then conducted a protracted and "one-sided process to [] support" it that "included many burdensome, irrelevant, and overbroad requests for information." (*Id.* ¶ 49.) As to the second prong, he opined that the Insurers' "coverage decision was … influenced by improper considerations—principally by their own profitability concerns," and was "unfounded, unreasonable, and deceitful." (*Id.* ¶¶ 50, 170.)

During his deposition, however, Goanos essentially recanted these opinions:

- He could not identify one thing that the Insurers should have done during the investigation that they did not do, or a single thing that they did that they should not have done. (Ex. 54, at 16:18-17:05.)

- He is not "offering a[ny] substantive opinion on why any carrier needed or did not need any information in the investigation." (*Id.* 146:10-13.) Indeed, his "opinions … are not centered on the insurers' investigation" or "what they should or shouldn't have done." (*Id.* 16:17-17:5.)

- It was "completely appropriate" for the Insurers to ask MAFCO to specifically "identify the damage for each" painting. (*Id.* 133:25-134:11.)

- The Insurers "absolutely" were "entitled to seek independent advice from experts." (*Id.* 14:14-20, 17:11-18:7.)
- He does not believe the Insurers acted "deceitfully" (*id.* 156:21-157:9), and is not offering an opinion about their "honesty," "motivation[s]," or "what [they] were thinking" (*id.* 61:12-62:7).
- He is not "render[ing] an opinion that there was coverage" and is "not in a position to say whether" the Insurers' "concerns about Mass['s] report were reasonable or not." (*Id.* 13:7-14, 68:18-21.)

Goanos further admitted that he did not review (i) Dr. Mass's reports, so he does not know what, if any, assumptions needed to be tested; (ii) the Insurers' expert reports, so he cannot opine on the Insurers' bases for denial; or (iii) the EUOs, so he cannot say whether any were overly broad or unnecessary. And though he opines that certain of the Insurers' emails evince an intent not to pay (despite disclaiming any opinions about the Insurers' "honesty" or "motivations"), he did not review the full claim file or any claims-handler depositions in their entirety—including testimony about the emails on which he relied—because, in his view, they are "irrelevant." (*Id.* 48:4-6, 57:23-58:4, 100:10-104:18, 176:9-23.)

ARGUMENT

I. The Court Should Exclude Goanos's Testimony

Goanos's opinions are inadmissible on three independent grounds.

A. Goanos Is Not Qualified to Opine on Claims Handling

Expert testimony is admissible only when the expert "possess[es] the requisite skill, training, knowledge or experience to render the opinion from which it can be assumed that the opinion rendered is reliable." *Schechter v. 3320 Holding, LLC*, 64 A.D.3d 446, 449 (1st Dep't 2009). Courts routinely exclude experts whose education, training, and experience are incongruous with their opinions. *See, e.g.*, *Newell v. City of N.Y.*, 204 A.D.3d 574, 574 (1st Dep't 2022) (internist physician, having no familiarity with general or abdominal surgery, unqualified to

offer opinions about appendectomy); *Clifford v. White Plains Hosp. Med. Ctr.*, 217 A.D.3d 405, 405 (1st Dep't 2023) (emergency medicine doctor unqualified to testify about spinal conditions he had never diagnosed or treated). Goanos should be excluded for that reason: he is not qualified to opine about an insurer's handling of a first-party property claim for fire damage to artwork.

By his own admission, Goanos has "never been a claims handler." (Ex. 54, at 47:12-16.) Nor has never managed a first-party property claim, except in the inapposite fidelity-bond context (*id.* 15:4-14)—which stands in stark contrast to the decades of first-party claims experience of the Insurers' expert (Finn Aff. Ex. A, at 1-2) and which may explain why his report is erroneously centered on an inapplicable third-party standard for insurer conduct (*infra* note 4). Goanos is not an expert in art or fire insurance, has handled "[z]ero" claims that involved art property damage, and admittedly "can't really opine on how [art or fire claims] should be handled." (Ex. 54, at 14:7-10, 15:4-7, 50:5-25.) Unsurprisingly, therefore, he could not identify *anything* an insurer is supposed to do "[i]n the case of a fire [with] claims for damage to art where there's no visible damage." (*Id.* 17:6-10.)

Goanos's admissions are disqualifying. Just as an internal medicine physician is unqualified to provide expert testimony on complex surgeries, *Newell*, 204 A.D.3d at 574, and an emergency medicine doctor cannot offer expert testimony on spinal conditions, *Clifford*, 217 A.D.3d at 405, an insurance *underwriter* is unqualified to provide expert testimony on industry custom-and-practice for handling art- and fire-related *claims*. After admitting that he cannot opine on how a first party property art or fire claim should be handled (Ex. 54, at 50:4-25, 17:6-10), this Court should not allow Goanos to speak authoritatively at trial on that subject.

B. Goanos's Speculative Opinions Lack Foundation

Admissibility of any evidence, including expert testimony, turns on "whether there is a proper foundation—to determine whether the accepted methods were appropriately employed in a

particular case." *Parker v. Mobil Oil Corp.*, 7 N.Y.3d 434, 447 (2006). That question focuses on "the specific reliability of the procedures followed to generate the evidence proffered." *Id.* Relatedly, "[a]n expert cannot speculate, guess, or reach their conclusion by assuming material facts not supported by the evidence." *E.g.*, *Zhong v. Matranga*, 208 A.D.3d 439, 443 (1st Dep't 2022); *Diaz v. N.Y. Downtown Hosp.*, 99 N.Y.2d 542, 544 (2002) (plaintiffs' expert opinion did not create triable issue as to existence of accepted industry practice or standard). Neither may expert opinions "be founded upon surmise or supposition." *Gomez by Gomez v. N.Y.C.H.A.*, 217 A.D.2d 110, 117 (1st Dep't 1995).

Goanos's opinions must be excluded because they lack foundation and are speculative. They lack foundation because Goanos reviewed only a sliver of the relevant factual record curated by Plaintiffs' counsel. (Ex. 54, at 56:2-58:19.) Remarkably, he opines on the Insurers' conduct "without having read what the insured submitted or what evidence was garnered in the [claims] investigation" (*id.* 14:21-15:3), or any of the claims handlers' depositions fully (*id.* 100:10-104:18). He did not review Dr. Mass's reports (*id.* 12:20-23, 71:2-9)—the foundation of Plaintiffs' insurance claim—so he could not say whether the Insurers' concerns about her assumptions and conclusions were reasonable (*id.* 68:18-21). Nor did he review any of the Insurers' expert reports (*id.* 12:24-13:6), so he cannot opine on the reasonableness of the Insurers' reliance on them. And he does not know what information the Insurers obtained or sought in the EUOs (*id.* 47:24-48:6), so he is not "offering a substantive opinion on why any carrier needed or did not need any information in the investigation" (*id.* 146:10-13). In fact, Goanos conceded that his opinions "are not centered on the insurers' investigation" at all (*id*. 16:21-17:5; *see* Ex. 19, at 14), and he has no "opinion [whether] there was coverage for these paintings" (Ex. 54, at 13:11-14).

Goanos's admissions require exclusion. Without reviewing the key facts, documents, and testimony, Goanos has no foundation to opine on the reasonableness of the Insurers' investigation or whether it conformed to industry custom and practice. *See, e.g.*, *Parker*, 7 N.Y.3d at 446.

A prime example of Goanos's speculation is his proffered testimony that the Insurers "had decided in advance [the claim] was going to be declined." (Ex. 54, at 61:12-62:7.) This opinion necessarily entails a judgment about the claims handlers' state of mind; yet Goanos disclaims any opinion on the Insurers' "honesty," "motivation[s]," or "what [they] were thinking." (*Id.*) The opinion also requires factual support rooted in the claims-handling record; yet Goanos reviewed neither the full claim files nor the entirety of the claims handlers' deposition transcripts concerning their actual motivations (because, he says, they could have "lie[d] [under oath] about their intent in retrospect"). (*Id.* 100:10-104:18, 176:24-177:16.) The opinion is thus textbook inadmissible speculation. *See Gomez*, 217 A.D.2d at 117 (holding "hunch" and "conjecture" inadmissible).

C. Goanos's Opinions Invade the Factfinder's Province

Goanos's speculative opinions are separately inadmissible because they wade into the factfinder's function. Under the guise of "expert" testimony, Goanos merely conveys Plaintiffs' version of the claims handlers' state of mind, interpreting the communications Plaintiffs sent him as "a paper trail to evidence the fact that the [Insurers] were not providing an impartial assessment of the claim." (Ex. 54, at 61:18-62:7.) Interpreting credibility and state of mind is the factfinder's job. *See*, *e.g.*, *People v. Diaz*, 15 N.Y.3d 40, 48 (2010) (expert "invaded the province of the jury to determine defendant's credibility"); *U.S. v. Scop*, 846 F.2d 135, 142 (2d Cir. 1988) (similar); *U.B. Vehicle Leasing Inc. v. Atl. Mut. Ins. Co.*, 2004 WL 503729, at *9 (S.D.N.Y. Mar. 12, 2004) (excluding bad-faith expert who "substitute[s] his judgment for the jury's," "largely by speculating as to [insurer's] motivations and what [it] was thinking"); *Bogart v. City of New York*, 200 N.Y. 379, 385 (1911) (similar). Thus, even if Goanos had the requisite qualifications (he admittedly

does not), and even if he had reviewed the claims-handling record and relevant testimony (he admittedly did not), his state-of-mind and credibility opinions would impermissibly step on the factfinder's role.

II. The Court Should Grant Summary Judgment Dismissing Plaintiffs' Bad Faith Claim

The Insurers should be granted judgment as to Plaintiffs' claim for breach of the implied covenant of good faith and fair dealing because Plaintiffs (i) have failed as a matter of law to demonstrate the requisite egregiousness or gross disregard required to sustain a bad faith claim, and (ii) have no evidence of distinct bad faith damages.

A. The Undisputed Facts Show that the Insurers Did Not Act Egregiously or in Gross Disregard of Their Obligations Under the Policies

It has long been the rule in New York that it takes much more than "an arguable difference of opinion between carrier and insured over coverage to impose an extra contractual liability" upon an insurer. *Sukup v. State*, 19 N.Y.2d 519, 522 (1967). It is not enough that the insurer was wrong in interpreting the policy; there must be a "gross disregard for its policy obligation by the insurer in asserting noncoverage." *Id.*; *accord* *99 Wall Dev. Inc. v. Allied World Specialty Ins. Co.*, 2021 WL 4460638, at *11 (S.D.N.Y. Sept. 29, 2021) (quoting *Hugo Boss Fashions, Inc. v. Fed. Ins. Co.*, 252 F.3d 608, 624 (2d Cir. 2001)).[4] Proving extra-contractual liability for bad faith requires

[4] The "gross disregard" standard is sometimes articulated as "gross disregard for [the insurer's] policy obligations" and sometimes as "gross disregard for the insured's interests." To the extent there is any difference, the record fails to show Insurer conduct meeting either. *See Jian Liang v. Progressive Cas. Ins. Co.*, 172 A.D.3d 696, 699 (2d Dep't 2019); *Jonas v. N.Y. Cent. Mut. Fire Ins. Co.*, 244 A.D.2d 916, 917 (4th Dep't 1997). Nor can Plaintiffs demonstrate "gross disregard" by pointing to Goanos's testimony that the Insurers failed to "place the Policyholder's interests on at least equal footing" with their own. (Ex. 19 ¶ 140.) Aside from Goanos's opinions being inadmissible (*supra* Part I), that rule exists only when insurers undertake to defend and settle third-party claims. *See Pavia v. State Farm Mut. Auto. Ins. Co.*, 82 N.Y.2d 445, 452 (1993) (under "agency principles," insurers who "exercise complete control over the settlement and defense of claims against their insureds" must "act in the insured's best interests"). The first-party Insurers

showing that "no reasonable carrier" would have denied the claim. *Sukup*, 19 N.Y.2d at 522. This standard amounts to "a 'very strong presumption [in New York] against [a finding of] bad faith liability' on the part of an insurer" that can only be overcome by a showing of "egregious conduct." *99 Wall*, 2021 WL 4460638, at *11 (quoting *Hugo Boss*, 252 F.3d at 624); *see also Sunrise One, LLC v. Harleysville Ins. Co. of N.Y.*, 293 F. Supp. 3d 317, 328 (E.D.N.Y. 2018) (courts "have generally found that the plaintiff was unable to meet the high standard to prevail on" bad faith claim). Based on the undisputed facts, Plaintiffs can neither sustain their heavy burden nor overcome the strong presumption.

1. The Admissible Evidence Does Not Demonstrate Egregious Conduct or Gross Disregard

No factfinder could conclude from this record that the Insurers engaged in egregious conduct or acted with gross disregard for its policy obligations. Judge Abrams's decision in *99 Wall* illustrates why. 2021 WL 4460638, at *12-13. There, the court granted summary judgment dismissing a bad faith claim where the record showed that the insurer "promptly investigated [the insured]'s claims, made fairly typical (if duplicative) requests for information, paid the costs of repairing [covered] damage, and engaged in efforts to" resolve the claims, including by retaining its own expert (whom the policyholder claimed was biased). *Id.* Further, the insured "produced a report from its bad-faith expert" opining that its actions were reasonable and "consistent with industry custom and practice," and the policyholder "did not file a rebuttal report." *Id.* Thus, "[v]iewed as a whole," the record "d[id] not support a finding that, even separate and apart from

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here were not "required to submerge [their] own interest in order that the insured's interests may be made paramount." *99 Wall*, 2021 WL 4460638, at *12; *see also* Scottsdale Ins. Co. v. McGrath, 549 F. Supp. 3d 334, 344 (S.D.N.Y. 2021) (heightened standards of *Pavia* apply "in the context of defending and settling [third-party] claims").

the merits of [their] interpretation of the contract, [the Insurers] engaged in 'egregious conduct.'" *Id.*

The same conclusion applies here. At every stage, the Insurers promptly investigated and paid for covered physical loss. When the fire caused visible but minor damage to some artwork and furniture, the Primary Insurers paid $141 million, performing what MAFCO commended as "outstanding" work on the claim. *Supra* at 3. When MAFCO submitted claims and "partial proofs of loss" for the Five Paintings, accompanied by more than 400 pages of analysis concerning "fatty acid" mobilization and other novel forms of invisible damage—and sued for $410 million—the Insurers launched a thorough investigation. *Supra* at 4-8. As Goanos agreed, the Insurers had a duty to do so. (Ex. 54, at 14:14-16, 133:25-134:11.)

There can be no genuine dispute that the Insurers promptly initiated a comprehensive investigation. In October 2020, well before MAFCO had even finished submitting Dr. Mass's reports, the Insurers made follow-up requests for information. *Supra* at 5-6. The Insurers retained experts (as in *99 Wall*) to evaluate Mass's theories; and those experts took several months to prepare and finalize their opinions after inspecting the paintings. *Supra* at 7-8. Over those months, they analyzed the relevant scientific literature, conducted experiments, and reviewed the evidence yielded by the Insurers' requests. Between April and July 2021, the Insurers took EUOs of relevant witnesses and interviewed Mass to better understand the Five Paintings' history, the claimed loss, and the fire. *Supra* at 7-8. When the Insurers' experts provided written reports in November 2021 detailing the reasons for their conclusions that none of the Five Paintings sustained damage during the fire, the Insurers promptly evaluated those conclusions in light of the Policy language and denied the claim. *Supra* at 8.

INDEX NO. 654742/2020
RECEIVED NYSCEF: 01/18/2024

The Insurers' industry expert, Erin Finn, opined—based on nearly 30 years of first-party property claims-handling experience—that the Insurers' response was reasonable and consistent with industry practice. (*E.g.*, Finn Aff. Ex. A ¶ 237.) Plaintiffs have no admissible expert testimony to undercut that conclusion. This record thus does not support a finding of egregious conduct or gross disregard for Plaintiffs' interests. *See 99 Wall*, 2021 WL 4460638, at *12; *Jian Liang*, 172 A.D.3d at 699; *Jonas*, 244 A.D.2d at 917. Goanos's testimony could not change this conclusion even if admitted, given that his deposition revealed how little (if anything) he has to offer. *Supra* at 9-10. Either way, Plaintiffs cannot overcome the "very strong presumption against bad faith liability on the part of an insurer." *99 Wall*, 2021 WL 4460638, at *11.

2. The Insurers Had an "Arguable Basis" for Investigating Plaintiffs' Insurance Claim and Denying Coverage

Plaintiffs' bad faith claim should also be dismissed because the undisputed evidence shows that the Insurers had at least an arguable basis for investigating and denying coverage. Bad faith requires, at a minimum, "that defendants had 'no arguable basis' for denying coverage," *Jacobson Fam. Invs., Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 102 A.D.3d 223, 235 (1st Dep't 2012), or that "no reasonable carrier would, under the given facts, challenge the claim," *99 Wall*, 2021 WL 4460638, at *13. Thus, where an insurer comes forward with evidence demonstrating that it carried out an investigation and disclaimed based on a reasonable policy interpretation, courts routinely dismiss bad faith claims at summary judgment. *See, e.g.*, *Jacobson Fam. Invs.*, 102 A.D.3d at 235; *Jian Liang*, 172 A.D.3d at 699; *GEICO Marine Ins. Co. v. Mandel*, 2023 WL 2464271, at *3 (E.D.N.Y. Mar. 10, 2023); *99 Wall*, 2021 WL 4460638, at *11-12; *Jane St.*

Holding, LLC v. Aspen Am. Ins. Co., 2014 WL 28600, at *10-11 (S.D.N.Y. Jan. 2, 2014), *aff'd* 581 F. App'x 49 (2d Cir. 2014).[5]

The Insurers' conduct here was indisputably at least arguably correct (and, in fact, demonstrably correct). Plaintiffs took almost two years to make a $410 million claim for admittedly visibly unharmed artwork on the basis of Dr. Mass's (faulty) theories concerning mobilization of "free fatty acids" and development of "metal soaps" that would later "materialize" into damage. Quite reasonably, the Insurers did not take that claim at face value: they investigated by requesting evidence pertinent to the Five Paintings and the fire, and retaining five independent experts—in fire dynamics, materials science, and art conservation—to evaluate Dr. Mass's claims in light of that evidence. When the experts unanimously agreed that Dr. Mass's approach was "unreliable or inaccurate" and that the paintings did not sustain damage, the Insurers denied the claim. *Supra* at 8.

There is absolutely no evidence that the Insurers lacked an "arguable basis" for denial. Whether the Insurers' experts are in fact right (they are), and whether Dr. Mass is wrong (she is), is beside the point—what matters is that "the Insurers' decision here was based on solid expert

[5] At the motion to dismiss stage, Plaintiffs relied on *East Ramapo Central School District v. New York Schools Insurance Reciprocal*, 199 A.D.3d 881 (2d Dep't 2021)—a motion to dismiss case—for the proposition that "the implied covenant of good faith and fair dealing means that the insurer must investigate claims for coverage in good faith, must not manufacture factually incorrect reasons to deny insurance coverage, must not deviate from its own practices or from industry practices, and must not act with gross disregard of the insured's interests." *Id.* at 884. These factors are at best relevant but non-dispositive. No case holds, for example, that deviation from internal practices alone constitutes bad faith. *See Smith v. Gen. Acc. Ins. Co.*, 91 N.Y.2d 648, 655 (1998) (explaining that "practice in the insurance industry" was, under the circumstances, "appropriate[to] consider" in assessing a bad faith claim, but not necessarily "sufficient to establish … bad faith"). By contrast, when the record shows that the insurer investigated and had an arguable basis for denying coverage, that *is* dispositive of bad faith, and requires summary judgment dismissal. *Supra* at 18-21.

findings that disputed Dr. Mass's notion of invisible, or future damage." (Finn Aff. Ex. A ¶¶ 230-231.) This requires dismissal of Plaintiffs' bad faith claim. *See Jacobson Fam. Invs.*, 102 A.D.3d at 235; *Jian Liang*, 172 A.D.3d at 699.

Plaintiffs cannot overcome the "arguable basis" test by pointing to what they characterize as evidence that the Insurers conducted some aspects of the investigation unfairly. The law requires that insurers investigate and have an arguable basis for denying coverage—not that they perform a perfect investigation. *See, e.g.*, *99 Wall*, 2021 WL 4460638, at *13.[6]

Two cases illustrate this point. In *Utica Mutual Insurance Co.*, a policyholder alleged bad faith claims handling based on its insurer's "repeated requests for documents … it did not need" and other delays. 238 F. Supp. 3d 314, 331 (N.D.N.Y. 2017). The policyholder contended that "misconduct in a claims investigation can lead to bad faith liability," irrespective of the ultimate determination. *Id.* at 329. The court disagreed, explaining that "[e]ven drawing inferences from the facts in a light most favorable to" the non-movant policyholder, the insurer had "legitimate grounds for investigating and not yet paying [the] claim." *Id.* at 332. The policyholder could not show that "no reasonable carrier would, under the given facts, challenge the claim" or that the carrier had "no arguable basis" for its position, requiring summary judgment dismissal. *Id.* So, too, here.

In *99 Wall*, the policyholder similarly argued that its bad faith claim "focus[ed] not on whether or not there existed a legitimate coverage dispute, but rather on whether or not the [insurer] performed its obligations under the contract in good faith"—including, for example, whether the

[6] In another case featuring Goanos, a court recently granted summary judgment dismissing the policyholder's bad faith claim, explaining that "[w]hat matters" under Pennsylvania law "is that [the insurer] had a reasonable basis to deny the claim." *Cantaloupe, Inc. v. Axis Ins. Co.*, 2023 WL 8237245, at *7 (E.D. Pa. Nov. 28, 2023). So, too, under New York law.

insurer appropriately "retain[ed] an expert … that would support its interpretation of the insurance policy" and "benefit itself." 2021 WL 4460638, at *12. As in *Utica*, the court rejected the policyholder's attempt to bifurcate the claims handling and ultimate claims decision. The court explained that "these questions are not so distinct," because "[m]uch of the conduct that *99 Wall* says amounts to bad faith [claims handling] was grounded in [the insurer]'s interpretation of the insurance policy." *Id.* at *12-13.

Again, the same reasoning applies here. Plaintiffs complain of unreasonable delays and unnecessary EUOs based on their view that Dr. Mass's reports demonstrated damage and thus triggered the Insurers' coverage obligation. The approximate year it took to investigate Plaintiffs' late-breaking $410 million claim was grounded in the Insurers' reasonable skepticism as to whether Dr. Mass's novel, highly technical theories demonstrated "physical damage" from the fire, as the policies required. Because the Insurers investigated Plaintiffs' claim and reached a "legitimate" coverage decision, Plaintiffs' bad faith claim must be dismissed as a matter of law. *Id.* (quoting *Utica Mut.*, 238 F. Supp. 3d at 332).[7]

B. Plaintiffs Have No Evidence of Distinct Bad Faith Damages

Plaintiffs' bad faith claim should also be dismissed because the record contains no evidence of distinct damages. "Proof of damages is an essential element of a [bad faith] claim." *Process Am., Inc. v. Cynergy Holdings, LLC*, 839 F.3d 125, 141 (2d Cir. 2016). Implied covenant claims

[7] At the motion to dismiss stage, Plaintiffs focused on cases where the insurer *refused* to investigate. *See McBride v. N.Y. Prop. Ins. Underwriting Ass'n*, 152 A.D.3d 505, 506 (2d Dep't 2017); *H&H Env'l Sys, Inc. v. Evanston Ins.* Co., 2019 WL 1129434, at *1, *7 (W.D.N.Y. Mar. 12, 2019) (citing *D.K. Prop., Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 168 A.D.3d 505, 506-07 (1st Dep't 2019)). These cases are not instructive here, where the Insurers did not sit on their hands, but promptly undertook a thorough investigation. Nor do they articulate a claims-handling-based bad faith standard; they merely hold that, for purposes of a motion to dismiss a bad faith claim as duplicative of a policy-breach claim, alleging failure to investigate makes the bad faith claim sufficiently distinct.

fail where the alleged breach is "'intrinsically tied to the damages allegedly resulting from a breach of the contract.'" *Hawthorne Grp., LLC v. RRE Ventures*, 7 A.D.3d 320, 323 (1st Dep't 2004) (dismissing claim at summary judgment); *see also Apogee Handcraft, Inc. v. Verragio, Ltd.*, 155 A.D.3d 494, 495-96 (1st Dep't 2017) (same). Failure to produce "any evidence of [non-duplicative] damages" thus requires summary judgment dismissal. *Train v. Gen. Elec. Cap. Corp.*, 8 A.D.3d 192, 193 (1st Dep't 2004); *see also Pacelli v. Peter L. Cedeno & Assocs., PC*, 220 A.D.3d 596, 597 (1st Dep't 2023).

At the motion to dismiss stage, Plaintiffs told the Court that their bad faith claim seeks (1) unspecified "legal fees and costs, as well as potentially other damages to be proven at trial," and (2) prejudgment interest that might differ from the statutory interest available under the contract claim. (Ex. 118, at 15-17.) The Court allowed the claim to proceed while expressing doubts about its chances at summary judgment. (Ex. 122, at 34:3-35:18.) Those doubts have been borne out.

No evidence of legal fees or costs. Plaintiffs have identified *no* evidence concerning legal fees, costs, or "other damages" stemming from the alleged bad faith. When asked to identify that evidence in an interrogatory, they cited their complaint. (Ex. 59, at 5-6.) But "allegations in the complaint … are insufficient to defeat summary judgment, absent any supporting evidentiary proof." *Pacelli*, 220 A.D.3d at 597. It is no answer that evidence of attorneys' fees typically contains privileged information. Plaintiffs could have produced redacted bills, a billing summary, or—at absolute minimum—responded to Defendants' interrogatories with an estimate of fees and costs, but did not.

No evidence of non-duplicative prejudgment interest. The interest available under Plaintiffs' contract claim runs from "the date the insured is first entitled to payment" under the Primary Policy. *See Automatic Findings, Inc. v. Those Certain Underwriters at Lloyds at London*

& Elsewhere Subscribing to Jewelers Block Pol'y No. 243883100, 1994 WL 273367, at *1 (S.D.N.Y. June 20, 1994). So, at this stage, Plaintiffs must have some evidence of interest that accrued *before* the date on which they were allegedly "entitled to payment" for purposes of their breach claim. *Id.*

They do not. When asked to identify evidence of bad faith damages, Plaintiffs could only point to the complaint seeking the same prejudgment interest undifferentiated from that available under their contract claim. (Ex. 59, at 5.) But Plaintiffs cannot have been entitled to payment on their bad faith claim before they were entitled to payment on their contract claim—bad faith liability turns on the arguable reasonableness of the ultimate coverage decision, which was not made until January 2022. *Supra* at 18-21. The date on which Plaintiffs are entitled to interest under either claim is, effectively, the same—requiring summary judgment dismissal. *See, e.g.*, *Train*, 8 A.D.3d at 193.[8]

CONCLUSION

The Court should exclude Goanos's opinions and grant Defendants summary judgment on Count II.

[8] Under Federal's policy, Plaintiffs are not "entitled to payment" for purposes of calculating prejudgment interest until the Primary Insurers and AIG "have paid, or admitted liability for, the full amount of their policy limits." (Ex. 9, at 3.)

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CLYDE & CO US LLP

By: /s/ Owen B. Carragher, Jr.
Owen B. Carragher, Jr.
Peter Rossi
John R. Gerstein
Ana Rita S.P. Tavares
The Chrysler Building
405 Lexington Avenue
New York, New York 10174
(212) 710-3900
Owen.Carragher@clydeco.us
Peter.Rossi@clydeco.us
Jack.Gerstein@clydeco.us
Rita.Tavares@clydeco.com

Counsel for Certain Underwriters at Lloyd's of London Including Syndicate Nos. 4000, 5000, 2121, 2987, 4020, 1861, 1221, 1183, 4711, 5151, 1686, And 4472 at Lloyd's, London and Their Underwriting Members, Great Lakes Insurance SE, and Swiss Re International SE

STEPTOE LLP

By: /s/ Charles Michael
Charles Michael
Joseph Sanderson
Julie Lascano
Joseph McClure (admitted *pro hac vice*)
1114 Avenue of the Americas
New York, New York 10036
(212) 506-3900
cmichael@steptoe.com
josanderson@steptoe.com
jlascano@steptoe.com
jmcclure@steptoe.com

Counsel for AIG Property Casualty Company

QUINN EMANUEL URQUHART & SULLIVAN, LLP

By: /s/ Maaren A. Shah
Maaren A. Shah
Rex Lee
51 Madison Avenue, 22nd Floor
New York, New York 10010
(212) 849-7000
maarenshah@quinnemanuel.com
rexlee@quinnemanuel.com

Counsel for AIG Property Casualty Company

O'MELVENY & MYERS LLP

By: /s/ Jonathan Rosenberg
Jonathan Rosenberg
Vino Jayaraman
Times Square Tower
7 Times Square
New York, NY 10036
(212) 326-2000
jrosenberg@omm.com
vjayaraman@omm.com

Counsel for Federal Insurance Company

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/s/ Charles Michael
Charles Michael