SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, COMMERCIAL DIVISION

AGP HOLDINGS TWO LLC; AGP HOLDINGS THREE LLC; and AGP HOLDINGS ONE LLC, Policyholders, v. 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 Justice Joel M. Cohen Motion Seq. No. 022 **Oral Argument Requested**

POLICYHOLDERS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT ON DEFENDANTS' AFFIRMATIVE DEFENSES

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INTRODUCTION

After paying the insurer defendants ("Insurers") substantial premiums for more than a decade to protect against physical damage to their property, the plaintiffs ("Policyholders") suffered a devastating fire. Now, faced with the exact risk they agreed to cover, Insurers advance convoluted arguments to avoid paying. Driven by their bottom line, they conducted a bad-faith investigation and denied coverage—focusing on and invoking the opinions of several experts that the fire did not damage the artwork at issue. Their reasoning—any damage is *de minimis*, largely because it is not "visible" to the naked eye—has no contractual basis.

Policyholders sued, alleging that Insurers breached the parties' contract. Insurers responded with several baseless affirmative defenses. Policyholders hereby move for summary judgment on several of Insurers' affirmative defenses, so this case can be focused and decided on the merits of the contract.

First, Insurers claim as an affirmative defense that Policyholders committed fraud and therefore, even if there is damage to the Five Artworks, Insurers should not have to pay. To support this defense, Insurers cherry-pick quotes from the examination under oath of Policyholders' ultimate beneficial owner. But the challenged statements were neither false, made with fraudulent intent, nor material to Insurers' investigation and coverage determination. *Second*, Insurers claim as affirmative defenses that Policyholders breached the doctrine of good faith and fair dealing, the doctrine of unclean hands, and/or should be equitably estopped from receiving the policy proceeds. Fatally, Insurers do not explain these defenses; instead, they provide only conclusory allegations. In any event, there is no material dispute that none of these doctrines applies here.

The Court should grant summary judgment on Insurers' meritless defenses.

FACTUAL BACKGROUND

I. The Insurance Policy

Insurers sold Policyholders insurance policies that cover art, including the five pieces of art at issue (the "Five Artworks"). As relevant here, the Primary Policy (the "Policy") includes a provision captioned "Innocent Non-Disclosure," which provides that misrepresentations or non-disclosures are not a defense to liability unless the misrepresentations or non-disclosures are fraudulent. NYSCEF Doc. 29 at 12-13.[1] In particular, the Policy states that Insurers will not "seek to avoid or repudiate this Contract of Insurance on any ground whatsoever including non-disclosure or misrepresentation other than fraudulent non-disclosure or fraudulent misrepresentation." *Id.* at 12. This language was specifically selected by Insurers, each of whom agreed in the "General Provisions" section of the Policy that "the language of [the Policy] is the language of Insurers." *Id.* at 19.

II. The Fire at The Creeks

The Five Artworks were located on the first floor of a residence in the Hamptons, known as The Creeks. A devastating fire enveloped The Creeks late in the evening of September 28, 2018. *See* NYSCEF Doc. 469 at 10. The fire started in the attic and quickly "consumed" the roof. Ex. 1 (Collum Dep.) 18:14-15; *see id.* (roof "was gone" before the fire was extinguished).[2] By the time firefighters arrived, the fire had "full-on engulfed" the "upper middle section of the house." Ex. 2 (Trigubovich Dep.) 25:17-26:2. One described it as among the "biggest fires" he'd ever

[1] The other policies follow form in all material respects. The provision at issue here should be treated as following form, just as the Court previously deemed the valuation provision. *Cf.* NYSCEF Doc. 249; NYSCEF Doc. 320.

[2] All citations to Ex. __ refer to the exhibits attached to the accompanying Affirmation of Steven M. Cady, NYSCEF Doc. 590.

seen. *Id.* 26:6-10; *id.* 51:1-4 ("[I]t was one of the . . . craziest fires I've ever been in."). Before long, the fire destroyed much of the third floor, collapsing it onto the floor below. *See* Ex. 1 18:11-17.

Firefighters had to turn back on their first attempt to reach the fire. Blistering temperatures blocked their progress; heavy black smoke blanketed the upper floors. *See* Ex. 2 36:2-11; *id.* 37:17-20 (firefighter agreeing it was "the hottest real-world structure fire that [he] had been in"). Smoke also suffused the first floor. *Id.* 41:4-6 ("You could hardly see."). Extreme conditions threatened to collapse the roof, so officers in charge of the response ordered the crew to leave the house. *Id.* 37:21:38-1.

All six companies of the East Hampton Fire Department mobilized to fight the fire. Ex. 1 38:2-12. A "tanker" was brought in to pump more water. *Id.* 36:10-17. And five other fire departments from Long Island rushed to the scene. *Id.* 38:16-20. Firefighters spent over four hours attacking the fire with water cannons that could pour up to 1,000 gallons per minute into the house, alternating between the inside and outside of the house. *Id.* 19:4-20:12; Ex. 3 (AIG_PCC00105735) at 2.

The Creeks was built using an "old construction type" that leaves "nothing to impede" water flowing down through the house. Ex. 1 23:8-24. As a result, the deluge quickly flooded the house. It rushed down the stairs to the first floor; it burst through light fixtures, cracks in the plaster, and tape seams in the drywall. *Id.* 19:19-23; *id.* 18:10-11 ("The first floor appeared to be almost like raining in the structure."); Ex. 4 (Zeledon Dep.) 61:19-22 ("I saw water coming down walls and ceilings."). The "gushing water" brought with it all manner of debris, leaving the floors "covered in water[,] mud, [and] ash." *Id.* 43:13-44:1. So much water poured into the first floor

that one piece of art (not among the Five Artworks) wound up with "three to four inches of water . . . floating at the bottom of the casing," which "slush[ed] around in the case." *Id.* 64:3-8.

III. Policyholders Seek Coverage

The following day, Policyholders notified Insurers of the fire, and the adjuster, Richard Mancuso (the "Adjuster"), immediately started investigating. Within two months, Policyholders notified the Adjuster that all Five Artworks were being monitored for damage and reserved their rights to seek coverage. *See* Ex. 5 (AGP0021688) at -1688-1689; Ex. 6 (Mancuso Dep.) 137:21-141:11.

Policyholders kept Insurers apprised of developments regarding the Five Artworks over the following year. For example, during several meetings in March 2019, Policyholders emphasized the fire's severity, and explained that they were conducting "[o]ngoing surveillance" of the Five Artworks, including by comparing pre- and post-fire condition reports. *See* Ex. 7 (AGP0002740) at -2743-44. And in December 2019, Policyholders provided the Adjuster with post-fire condition reports on the Five Artworks. *See* NYSCEF Doc. 469 at 19. On March 10, 2020, Policyholders notified the Adjuster of their intent to pursue coverage for the Five Artworks. Ex. 8 (PrimaryInsurers_067907). Then, in June 2020—nearly two years after learning about the fire—Insurers began demanding large amounts of new information. Ex. 9 (PrimaryInsurers_065555) at -5558-60.

Because Insurers' improperly saddled Policyholders with the burden of investigating the extent of damage, Policyholders hired Dr. Jennifer Mass to analyze the Five Artworks. Dr. Mass holds a Ph.D. in inorganic chemistry from Cornell University and performed a postdoctoral fellowship in conservation at the Metropolitan Museum of Art. She prepared five reports containing nearly 400 pages of detailed scientific findings, and concluded that the fire event caused irreversible damage to the Five Artworks. *See* NYSCEF Doc. 469 at 21; NYSCEF Doc. 470 at

20. Between August and December 2020, Policyholders provided these reports, along with partial proofs of loss for the Five Artworks, to Insurers. Ex. 10 (AGP0017118); Ex. 11 (AGP0016622); Ex. 12 (AGP0016836); Ex. 13 (AGP0016916); Ex. 14 (AGP0017765); Ex. 15 (AGP0018451). Despite the extensive documentation Policyholders submitted, Insurers gave no indication that they would acknowledge coverage.

Instead, Insurers hired several of their own experts to counter Dr. Mass. *See, e.g.*, Ex. 16 (AIG_PCC00048208) at -8208; Ex. 17 (PrimaryInsurers_273402) at -3402. During the investigation, they engaged Dr. James Mason, a materials engineer; Dana Cranmer, an art conservator; Drs. Richard Roby and Michael Klassen, mechanical engineers; and Chris McGlinchey, an art conservator with a Master's degree in polymer science and engineering.

Policyholders commenced this action on September 25, 2020. *See* NYSCEF Doc. 1. Policyholders nevertheless continued to participate in Insurers' lengthy investigation. In total, Policyholders provided more than 500 documents and more than 1,000 photographs or videos in response to Insurers' requests. NYSCEF Doc. 69 ¶ 8. As part of the investigation, Insurers' experts also inspected the Five Artworks on several occasions in March and April 2021. NYSCEF Doc. 468 at 19, NYSCEF Doc. 469 at 22-23; NYSCEF Doc. 470 at 21-22.

Throughout the investigation, Insurers never requested any information or documents about the sale of paintings other than the Five Artworks that were at The Creeks during the fire.

IV. Insurers' Examination of Mr. Perelman

On March 12, 2021, Insurers sought for the first time to conduct "examinations under oath" ("EUOs"), purportedly as part of their investigation. Ex. 18 (PrimaryInsurers_065476). Between April 29 and July 29, 2021, Insurers conducted ten EUOs of Policyholders' affiliates' employees and executives. NYSCEF Doc. 69 ¶ 5. Insurers also interviewed Dr. Mass for five days over a

period of three months—even though Dr. Mass was not employed by Policyholders and was therefore not covered by the Policy's EUO provision. *Id.* ¶ 6.

Insurers saved Mr. Perelman for last, questioning him after gathering over a thousand pages of testimony from people who manage his affairs. On July 29, 2021—ten months after Policyholders filed suit and nearly four months after Insurers' experts finished inspecting the Five Artworks—Mr. Perelman sat for a six-hour EUO via Zoom. At the outset, Insurers' attorney told Mr. Perelman that the EUO was "an informal proceeding, notwithstanding all the lawyers." Ex. 19 (Perelman EUO) 10:17-19.

During the EUO, Insurers' counsel showed Mr. Perelman a picture of *Box Smashed Flat*—one of the Five Artworks. *Id.* 61:16-21; Ex. 20 (*Box Smashed Flat*). Counsel then asked pages of questions about the piece's value, and whether Mr. Perelman offered it for sale. Ex. 19 61:21-72:20. Mr. Perelman said that he would not be able to identify "the value . . . in the marketplace" of this or of any of the Five Artworks because "the whole world knows about" the fire. *E.g.*, *id.* 64:8-15.

Seeking to test this assertion, Insurers' counsel asked why Mr. Perelman thought that potential purchasers knew about the fire:

- "What knowledge do you think that the public has as to this piece that had been through the fire?"
- "[W]hat is it that you're saying is out there in the public about this piece that makes it difficult for you to establish or tell me what the fair market value of the piece is?"

Id. 64:16-18, 65:3-7.

Mr. Perelman responded that "all somebody would have to do is ask if this piece was in the fire." *Id.* 65:15-17. That led to the following exchange, in which counsel repeatedly characterized as non-responsive Mr. Perelman's statements about which pieces had been sold:

> Q: "For any of the other pieces you've sold in the last year, did anybody ask?"
>
> A: "Those pieces were not in the fire."
>
> Q: "*I understand that. I'm asking you a very precise question*. When you sold pieces in the last year, did any of the purchasers or any of the prospective purchasers ask you if those pieces had been in the fire?"
>
> A: "Those pieces were sold where they hung at [a location other than The Creeks]. So, they saw where they were."
>
> Q: "Ron, *if you could just answer the question that I asked you*. Terri, would you read it back to him please?"
>
> [Reporter reads back the question]
>
> A: "Nobody – nobody asked me. But I think it would – they would take it for granted that the pictures were where they saw them which was at [a location other than The Creeks]. I'll leave it there."

Id. 65:18-66:23 (emphasis added).

In the middle of this line of questioning, Mr. Perelman explained that he could not recall all the artworks he sold in the prior year. *Id.* 67:10-68:21. This should have come as no surprise. Mr. Perelman is a busy businessman and an avid art collector. Between March 10, 2020 and January 10, 2022, for example, he sold 71 pieces of fine art for just under *$1 billion*. *See* Ex. 21 (Pls.' Objs. & Confidential Resps. to Defs.' 2d Set of Interrogs.) at 5–7.

But counsel was interested only in the art market's awareness of the fire—an issue that Policyholders had raised with Insurers during the investigation, *e.g.*, Ex. 8—not an accounting of Mr. Perelman's sales. Accordingly, Insurers' counsel confirmed that Mr. Perelman had "no recollection of anyone making an inquiry as to whether or not [certain pieces sold through Sotheby's] had been in the fire." Mr. Perelman responded, "That is correct." Ex. 19 68:22-25.

Hours later, and in response to a different line of questioning, Mr. Perelman reaffirmed his "assum[ption]" that the fire damaged everything in The Creeks "[t]o some extent." *Id.* 156:11-158:5.

Finally, Mr. Perelman said he "didn't consider selling" the Five Artworks out of concern that he "could have some potential liability in the sale," but clarified that any legal obligations "would be for the lawyers to decide." *Id.* 188:5-191:5.

At no point during the lengthy EUO did Insurers' counsel ask whether Mr. Perelman considered selling any other artwork that was at The Creeks during the fire—even though the Policy's schedule listed each such artwork. Nor did counsel ask any questions about two paintings by Brice Marden, even though Insurers knew over *a year before the EUO* that the Mardens had been under surveillance for damage but not included in the insurance claim. *See* Ex. 9 at 2 n.2 (Adjuster noting that the Mardens were not in the claim).

V. Other Affiliated Entities Sell Unrelated Art.

Mr. Perelman has a longstanding business relationship with the well-known art dealer Larry Gagosian. Over the years, Mr. Perelman has repeatedly purchased and sold art through Mr. Gagosian. In August 2020, Mr. Gagosian brought hedge fund founder Kenneth Griffin to The Creeks to view several pieces, including one of the Five Artworks—Cy Twombly's *Untitled*. Ex. 22 (AGP0023665).

Before the visit, Mr. Gagosian had contacted Mr. Griffin and "suggested . . . that [Mr. Griffin] . . . mak[e] an offer for [Mr. Perelman's] entire collection." Ex. 23 (Griffin Dep.) 46:12-17. But Mr. Gagosian did not "say [he] was authorized by Mr. Perelman" to make such an offer. *Id.* 46:23-47:6. Rather, as is his common practice, Mr. Gagosian was attempting to generate an offer for a piece that was not for sale. *See id.* 47:7-12 ("Larry will come to me and say I think we can possibly buy this painting from XYZ."); *see also* Ex. 24 (Hatch Dep.) 220:22-221:6 ("[B]ecause it's their job to sell art . . . [Sotheby's and Gagosian] would include [pieces] . . . that we had not specifically asked . . . for them to include."); *id.* 254:13-18 (Gagosian "sometimes" attempted "to make a sale" of Mr. Perelman's art without permission); Ex. 23 47:22-25 (Mr. Gagosian "is an art dealer" who "want[s] to be involved in selling major works."). There is no evidence that Mr. Perelman authorized Mr. Gagosian to sell *Untitled*.

Entities affiliated with Mr. Perelman later sold two paintings that were at The Creeks during the fire—but are not among the Five Artworks—to Mr. Gagosian. First, on December 8, 2020, BFXP Investments LLC sold Brice Marden's *Letter About Rocks #2* to the Gagosian Gallery. Ex. 25 (AGP0023563). The Gagosian Gallery then sold the painting to Mr. Griffin. Ex. 26 (KG_ART_00536). Then, on July 20, 2021, AGP Holdings Three, LLC sold Brice Marden's *River 4* to the Gagosian Gallery. Ex. 27 (GG0000086). The Gagosian Gallery then sold the painting to Mr. Griffin. Ex. 28 (KG_ART_00001).

VI. Insurers Amend their Defenses

Seizing on the above-described statements from Mr. Perelman's EUO, as well as the Policy's fraud provision, Insurers amended their answers to include a "false swearing" defense. NYSCEF Docs. 340, 468, 469 & 470. Insurers allege that Mr. Perelman made four false statements:

- All the artworks at The Creeks were less valuable and difficult to sell because they were damaged;
- Mr. Perelman did not consider selling after the fire any of the artworks hanging at The Creeks, including any of the Five Artworks;
- Mr. Perelman did not make any of the works hanging at The Creeks, including any of the Five Artworks, available for sale after the fire; and
- The only artwork Mr. Perelman sold after the fire was located elsewhere, at his Manhattan home.

NYSCEF Doc. 470 at 36; *see also* NYSCEF Doc. 468 at 29; NYSCEF Doc. 469 at 33.

LEGAL STANDARD

Summary judgment should be granted when there are no material facts in dispute. *Sheiffer v. Shenkman Cap. Mgmt., Inc.*, 291 A.D.2d 295 (1st Dep't 2002); *see also* CPLR 3212(b). Once the moving party shows that it is entitled to judgment, "the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact." *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). "It is incumbent upon a defendant who opposes a motion for summary judgment to assemble, lay bare and reveal his proofs, in order to show that the matters set up in his answer are real and are capable of being established upon a trial." *Di Sabato v. Soffes*, 9 A.D.2d 297, 301 (1st Dep't 1959).

ARGUMENT

I. The Court Should Grant Summary Judgment on the False Swearing Affirmative Defense.

Because the Policy exempts misrepresentations or non-disclosures that are not fraudulent, to successfully assert a false swearing defense, Insurers must clear a high bar. Under New York

law, "[t]o establish the affirmative defense of fraud, the insurer must show that the insured intentionally made material misrepresentations to the insurer," and must do so by "clear and convincing evidence." *Varda, Inc. v. Ins. Co. of N. Am.*, 45 F.3d 634, 639 (2d Cir. 1995); *see also Prendergast v. Pacific Ins. Co.*, 2012 WL 1044568, *6 (W.D.N.Y. 2012) ("The insurer bears the burden of proving both the materiality of the misrepresentation, as well as the insured's fraudulent intent.").

"Courts have been assiduous to prevent the use of [a false swearing defense] to bar a recovery where the alleged fraud or false swearing was not intentional, or the false statements were matters of opinion honestly, although mistakenly, held by the assured." *Azzato v. Allstate Ins. Co.*, 99 A.D.3d 643, 645 (2d Dep't 2012) (citation omitted).

Summary judgment is appropriate because (1) Mr. Perelman's statements were not false; (2) there is no evidence of fraudulent intent; and (3) any misstatements were immaterial.

A. The Statements Were Not False.

Insurers' first alleged false statement turns exclusively on Mr. Perelman's statements of opinion. In particular, Insurers rely on Mr. Perelman's statement that he "would imagine that after going through that horrific fire that [*Box Smashed Flat*] got some damage," Ex. 19 65:3-11, as well as his "assum[ption] . . . that everything in the house had to have been damaged . . . [t]o some extent or other," *id.* 157:19-22. These are common sense opinions, and were shared by people like Ms. Hatch and Brian Callahan, as well as non-parties like Mr. Griffin. Ex. 24 371:18-19 ("I think that everything that was in that house suffered some sort of damage."); Ex. 29 (Callahan Dep.) 132:8-11 (confirming "concern[] that all of the artworks in the house could potentially be damaged"); Ex. 23 38:14-38:25 ("I would have expected to have been told" that *River 4* was in the fire because "that information would be material to the value of the painting.").

Mr. Perelman's statements of opinion cannot form the basis of a fraud claim, which "requires proof that a defendant made [a] *misrepresentation of fact* which was false and known to be false." *Waterscape Resort LLC v. McGovern*, 107 A.D.3d 571, 572 (1st Dep't 2013) (emphasis added) (citation omitted).

Regarding Insurers' second alleged false statement, Insurers misrepresent Mr. Perelman's testimony. Mr. Perelman never testified that he did not consider selling *any* of the artworks that hung at The Creeks; Insurers never asked that question. Instead, Insurers focused only on the Five Artworks. *See* Ex. 19 186:22-24 ("these five paintings"); *id.* 187:11-20 ("these five pieces"); *id.* 188:10-13 ("a claim on these"); *id.* 189:8-13 ("consider simply selling them"); *id.* 190:8-9 ("consider selling them").

Third, Mr. Perelman never denied that art from The Creeks had been "made available for sale." Insofar as counsel for Insurers inquired about works being made "available for sale," he did so with reference to documents in a database that tracked art owned by Mr. Perelman or his companies. *See id.* 48:14-19, 52:18-21, 188:5-9. Mr. Perelman noted that he was not familiar with the documents and did not think they were accurate. *See id.* 49:14-50:3, 52:18-25, 62:3-25, 74:6-9, 188:5-17.

The final purported misstatement came in the context of counsel for Insurers asking Mr. Perelman whether any prospective buyers inquired about the fire. Insurers have focused myopically on Mr. Perelman's statement that the pieces he sold in the last year "were not in the fire." *Id.* 65:21-22. But they ignore the surrounding testimony in which he repeatedly explained that he could not recall all his sales from the prior year. *Id.* 67:10-68:21. In context, Mr. Perelman's testimony was equivocal.

B. There Is No Evidence of Fraudulent Intent.

Insurers must show that Mr. Perelman made false statements with an "intent to defraud,"—"a necessary element" of the false-swearing defense. *Deitsch Textiles, Inc. v. New York Prop. Ins. Underwriting Ass'n*, 62 N.Y.2d 999, 1001 (1984); *C-Suzanne Beauty Salon, Ltd. v. Gen. Ins. Co. of Am.*, 574 F.2d 106, 111 (2d Cir. 1978) ("[T]here is a world of difference between falsity and fraud."). Where, as here, an insurer asks questions that are plagued with "ambiguity," the insurer's mere "perception and evaluation" of that testimony is insufficient to prove an intent to defraud; the insurer must offer more than "speculative and conclusory allegations of the plaintiff's alleged willful misrepresentation." *Chang v. Gen. Acc. Ins. Co. of Am.*, 193 A.D.2d 521, 521-22 (1st Dep't 1993). The burden to prove fraudulent intent by clear and convincing evidence falls on Insurers. *Varda, Inc.*, 45 F.3d at 639.

Insurers claim that Mr. Perelman knew his testimony was false because the Twombly was purportedly offered for sale, and because the sale of another artwork that had been at The Creeks closed eight days before the EUO. Neither contention has merit.

First, the Twombly was not "offered for sale." Ex. 24 178:14-180:21. Mr. Griffin, the supposed prospective purchaser of the Twombly, did not understand it to be "for sale" any more than the other paintings at The Creeks. In fact, when pressed at his deposition on the Twombly, Mr. Griffin could barely remember viewing it. Ex. 23 12:8-10 ("[M]y recollection of the Cy Twombly would be m[u]rky at best."); *id.* 12:16-17 ("I cannot remember with specificity the Twombly that I saw."). Insurers' counsel suggested to Mr. Griffin that he was "shown [the Twombly] to potentially buy" it, but Mr. Griffin demurred: "My understanding was pretty much everything was for sale." *Id.* 14:6-12. In fact, Mr. Griffin testified that Mr. Gagosian often tries to sell pieces that are not for sale, and that Mr. Gagosian did *not* say he was authorized by Mr.

Perelman to sell the Twombly. *Id.* 46:23-47:12; *see also* Ex. 24 220:22-221:6, 254:13-18 (describing Gagosian's attempts to sell artwork without authorization).

The lack of documentary evidence confirms that the Twombly was not offered for sale. There is no dispute that Mr. Perelman did not offer any definite terms for the Twombly, which terms sophisticated businessmen like Mr. Perelman and Mr. Griffin would know are required formally to "offer" a sale. Moreover, the record contains no evidence of negotiations: no term sheets, no offer, no communications about the potential purchase price, and no draft contract—all of which were generated in connection with the Marden sales. If the Twombly—insured at *$125 million*—were in fact offered for sale, there would be documents showing negotiations and an offer. *Cf.* Ex. 26 (sales documents for *Letter About Rock #2*); Ex. 28 (same for *River 4*). Nor was the Twombly offered for sale by Sotheby's, which was selling other pieces for Mr. Perelman at the time. *See* Ex. 30 (Cappellazzo Dep.) 123:21-23 ("Q: Did you ever offer Twombly 'Untitled' 1971 for sale? A: No.").

Second, Insurers never asked whether Mr. Perelman sold any of the artwork that hung at The Creeks during the fire. Instead, Mr. Perelman provided truthful testimony that no prospective purchaser asked about the fire. *See* Ex. 24 211:8-14 (Sotheby's "never asked" about the fire); *id.* 240:8-23 (Gagosian "never asked" about the fire); *id.* 379:3-21 (Gagosian and Griffin "never asked" about the fire).

Under pressure from Insurers' counsel, Mr. Perelman made a non-responsive comment that the art he sold in the previous year had not been at The Creeks. Ex. 19 65:21-22. He then immediately clarified that he was not familiar with all the sales that occurred in the previous year. *Id.* 67:10-68:21. And he has since testified that, at his EUO, he did not recall the Marden sales. Ex. 31 (Perelman Dep.) 260:2-25. This cannot support a finding of fraud.

C. Any Misstatements Were Not Material.

Finally, Insurers cannot show that the purported misstatements were material. *Magie v. Preferred Mut. Ins. Co.*, 91 A.D.3d 1232, 1234 (3d Dep't 2012) (concluding, in the face of proof "that a significant fire occurred which destroyed or damaged virtually everything at the location," statements by the insured about certain items being damaged when they were not were not material). Here, there is nothing beyond conclusory assertions supporting the idea that any of Mr. Perelman's statements "discouraged, misled or deflected [Insurers'] investigation." *Pac. Indem. Co. v. Golden*, 985 F.2d 51, 56-57 (2d Cir. 1993); *see also Duane Reade, Inc. v. St. Paul Fire & Marine Ins. Co.*, 279 F. Supp. 2d 235, 240 (S.D.N.Y. 2003) (false swearing defense fails where the "allegedly concealed [information] . . . occasioned no reliance").

The case that Insurers repeatedly cited to support their motions to amend, *Fine v. Bellefonte Underwriters Ins. Co.*, 725 F.2d 179 (2d Cir. 1984), involved a wintertime apartment fire that caused extensive damage because the building's sprinkler system did not turn on. Seeking to force tenants out of the building, the landlord allowed temperatures inside the apartment to drop to 25-30 degrees, freezing the sprinkler system's pipes. *Id.* at 181-82. During a subsequent insurance investigation, the owner lied about the temperature inside the building. *Id.* at 182. This lie struck at the core of the case—the cause of the fire that led to the claim—and the court accordingly found that it was material.

Insurers' argument for materiality, by contrast, is profoundly attenuated. Insurers contend that Mr. Perelman's statements about artworks not at issue were material to their investigation because of their supposed need "to understand whether Mr. Perelman was acting consistent with the allegation that the allegedly ambient conditions at The Creeks damaged everything." NYSCEF Doc. 363 at 22.

But it is of no significance whether Mr. Perelman considered offering for sale, or in fact offered for sale, any pieces that hung at The Creeks. The sole relevant question in this case is whether the Five Artworks suffered physical damage as a result of the fire—a question that will be resolved by expert testimony (or common sense, viewing the facts of the fire event itself) and will be answered without any reference to market value, as the Policy's list of scheduled values makes it unnecessary to quantify the extent of damage. Mr. Perelman had the right to sell other artworks he owned, even if they had been through the fire. *See, e.g.*, Ex. 32 (Mackay Dep.) 160:17-21 ("The insured is able to sell their own items."); Ex. 33 (Marsden Dep.) 280:7-15 (confirming that, if Mr. Perelman "wished to sell" damaged items, "he could do so"). Whether he did so, or his subjective intent in doing so, is not relevant.

Insurers' entire claim rests on Mr. Perelman's EUO responses, which came after Insurers (1) spent 34 months purportedly investigating, (2) completed their expert evaluation of the Five Artworks, (3) received over a thousand documents from Policyholders, and (4) conducted ten EUOs of those Policyholders' affiliates' employees. Insurers' letters denying coverage contend that their investigation revolved around expert testimony; the EUO of Mr. Perelman—the 81-year-old ultimate beneficial owner of Policyholders, who was not present the night of the fire and does not manage Policyholders' operations—was not material. Each letter focuses on the asserted damage to each of the Five Artworks, and relies on Insurers' experts to address this critical question. *See* Ex. 34 (PrimaryInsurers_065536); Ex. 35 (FED_AGPH_ORD-NONPRIV_0000592); Ex. 36 (AIG_PCC00068136). None mentions the sale or condition of other works. Moreover, none of the experts' analysis, which were attached to Insurers' denials, discussed or relied on anything that Mr. Perelman said. *See* Ex. 37 (PrimaryInsurers_202233); Ex. 38 (PrimaryInsurers_202154); Ex. 39 (PrimaryInsurers_105693).

The deposition testimony of Insurers' representatives—each of whom was prepared at length by counsel before their deposition—underscores that Insurers' investigation was singularly focused on expert evaluation of the Five Artworks, not on what Mr. Perelman said about other artwork:

- The Primary Insurers' lead claims handler did not attend a single EUO and never read *any* of the testimony. Ex. 32 104:19-105:21. Instead, he based his coverage recommendation on Insurers' expert reports, and confirmed that he would have recommended paying the claims if the experts found physical damage. *See id*. 275:17-276:23;
- The Adjuster could not identify a single aspect of EUO testimony that had any impact on the claim investigation. Ex. 6 262:8-22;
- Nobody from AIG attended any of the EUOs. Ex. 40 (Howard Dep.) 157:3-7. And, after reviewing the transcript of Mr. Perelman's EUO, AIG's corporate representative found "noteworthy" only Mr. Perelman's testimony that the paintings had "lost [their] luster." *Id.* 157:15-21, 158:19-23. By contrast, he said that Insurers' "action plan" for the investigation was that they "agreed that [they] were going to retain experts." *Id.* 66:14-18. And he learned that other insurers had decided to deny coverage "around the time when the experts' reports were finalized." *Id.* 294:13-17. More generally, he testified that expert investigations determine AIG's response to a claim. Asked "what happens with [a] claim" when "AIG hires an expert that agrees with the policyholder's expert," he replied: "We pay it." *Id.* 317:2-5. Accordingly, he testified that

"AIG would have paid the claim" if Insurers' experts agreed with Dr. Mass. *Id.* 317:6-10;

- Swiss Re's original claims handler did not attend any of the EUOs, and his successor never "communicate[d] [her] views about the EUOs to anyone else within Swiss Re" or "to any of the other primary insurers." Ex. 41 (Hughes Dep.) 66:12-14, 109:23-110:6. The only portion of Mr. Perelman's EUO testimony that stood out to her was his contention that the Five Artworks "lack[ed] luster" and "lost [their] pop." *Id.* 111:22-112:6. She further testified that Insurers conducted EUOs in order to "ultimately . . . question Jennifer Mass on the reports that she issued." *Id.* 107:3-18. Contemporaneous evidence confirms Insurers' investigative focus on expert reports. Shortly before Insurers formally denied coverage, the Swiss Re handler wrote that Insurers "have agreed as a market to decline the claim for the 5 paintings subject to the litigation, based on our substantial expert evidence." Ex. 42 (PrimaryInsurers_232402) at -232407;
- Susanna Marsden, of Travelers and Lloyd's, could not "recall any specific action that [Insurers] took" based on their review of Mr. Perelman's EUO transcript. Ex. 33 183:12-16. And the only "noteworthy" aspect of Mr. Perelman's testimony was his view that "the colors no longer pop" and that there was a "loss of oomph" in his paintings. *Id.* 183:17-184:19. Like the claims handler for Swiss Re, Marsden confirmed that Insurers' "primary purpose was to evaluate the claim as expressed by Jennifer Mass." *Id.* 261:18-20. Indeed, she recommended denying coverage based on "the overwhelming

consensus between the [Insurers'] experts" that the fire did not damage the Five Artworks. *Id.* 200:8-10;

- Adam Smith of Ironshore did not review any EUO transcripts before the coverage denial. Ex. 43 (Smith Dep.) 99:1-13. He decided that the Five Artworks were not damaged because Insurers received "expert reports" concluding that any damage "wasn't caused by the" fire. *Id.* 109:12-19. He also recalled speaking to a claims manager who decided that the Five Artworks were not damaged because Insurers "received expert reports that said they weren't damaged." *Id.* 92:13-93:1; *see also id.* at 141:2-6 (concluding that "there was no physical damage to the" Five Artworks after the claims manager told him "about the various expert reports"). When Ironshore formally decided to decline coverage, it relied exclusively on Insurers' expert opinions. *See* Ex. 44 (PrimaryInsurers_234180) ("Underwriters have reviewed all expert reports in line with coverage under the policy . . . and concluded that the insured has not demonstrated . . . physical loss or damage. Therefore, please find attached primary underwriters letter of declinature.");
- Federal's adjuster could not recall "anything about Mr. Perelman's EUO testimony that impacted the claim determination." Ex. 45 (Giacobbe Dep.) at 208:15-21. But she viewed Insurers' expert reports as outcome-determinative. *Id.* 50:9-18 ("Q: So how did you decide whether the five artworks were damaged? . . . A: It was determined by the experts that were retained.");
- Munich Re's claims handler could not identify a single thing that Insurers "would have done differently" had they known that Mr. Perelman had sold other

paintings that were in The Creeks, instead repeatedly asserting that "the coverage decision was based on expert evidence." Ex. 46 (Vogel Dep.) 266:2-268:6; *see also id.* 149:7-9 ("I received the experts' reports at the end of November, which is the work product I reviewed in reaching my coverage determination.").

Moreover, Insurers' conduct confirms that Mr. Perelman's sale of other art was irrelevant to their investigation. Insurers knew that Mr. Perelman was liquidating some of his assets, and had considered selling artwork from The Creeks, yet they chose not to follow up. In January 2020, Policyholders' risk manager, who interfaced with the Adjuster "hundreds of times" about the claims, Ex. 6 64:21-65:2, told the Adjuster, who in turn advised the Primary Insurers' lead claims handler (Andrew Mackay) that Mr. Perelman in fact was considering selling some of the pieces that had been in The Creeks during the fire. *See* Ex. 47 (PrimaryInsurers_066182) at -6184 (noting that Perelman "is apparently considering" selling "at least a few of" the pieces that hung at The Creeks). Insurers also circulated news articles in September 2020 about Mr. Perelman's art sales, which had been publicly reported. *See, e.g.*, Ex. 48 (PrimaryInsurers_219216) at 219216; *see also* Ex. 49 (Bloomberg Article); Ex. 50 (Vanity Fair Article). They could have asked Mr. Perelman for sales records at that point, but they declined to do so.

Insurers were not shy about seeking information during the investigation. During that process, Insurers served no fewer than 27 requests for information ("RFIs"), yet did not request any documents or ask *any* questions about whether other pieces of art from The Creeks had been sold. *See* Ex. 9 at -5559-60 (ten RFIs); Ex. 51 (FED_AGPH_CLAIM_ESI_008932) at -8942 (ten RFIs); Ex. 52 (PrimaryInsurers_065493) at -5494-96 (seven RFIs, many with subparts). And despite having a list of all of the artwork at The Creeks, Insurers did not ask straightforward

questions at Mr. Perelman's EUO about whether he had sold any of them. These are not the actions of a party seeking to explore the sale of artwork that is not at issue, but somehow material.

Indeed, when Mr. Perelman testified that the pieces he sold in the last year "were not in the fire"—a comment that Insurers now contend is "unambiguously false," NYSCEF Doc. 425 at 6—counsel for Insurers repeatedly made clear that he was not interested in whether the pieces were in the fire. *See* Ex. 19 65:23-66:2 (indicating that counsel was "asking a very precise question" about whether prospective purchasers inquired about the fire); *Id.* 66:6-9 ("Ron, if you could just answer the question that I asked you. Terri, would you read it back to him please?"). Insurers thus seek a windfall based on statements that Insurers' counsel dismissed in real-time as non-responsive.

And of course, even after receiving the testimony that Insurers contend fraudulently misled them, Insurers *still denied* the claim. Insurers contend that any statement that "might have affected the attitude" of an insurer is material. NYSCEF Doc. 425 at 11 (citation omitted). Such a low bar for materiality would be inconsistent with the Policy, which requires a "fraudulent misrepresentation," NYSCEF Doc. 29 at 12, and with New York law. *Mandarin Trading Ltd. v. Wildenstein*, 16 N.Y.3d 173, 178 (2011) (fraud claim requires that misrepresentation was "made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury") (citation omitted); *First Nationwide Bank v. 965 Amsterdam, Inc.*, 212 A.D.2d 469, 471 (1st Dep't 1995) (granting summary judgment on fraud defense where defendant could not prove reliance). Finding otherwise would only incentivize obstructionist conduct like Insurers have engaged in here: Insurers would be encouraged to perform lengthy "investigations," deny claims, and—if challenged on the denial in litigation—trawl through the investigation record looking for any slip-up that could provide a further pretext to deny the claim. The materiality requirement does not allow this result.

II. The Court Should Grant Summary Judgment on Insurers' Conclusory Defenses.

Summary judgment is proper when a defendant "offer[s] only conclusory allegations" in support of affirmative defenses, "and fail[s] to provide any details to support the[] defenses." *Brown v. State Farm Ins. Co.*, 237 A.D.2d 476, 476 (2nd Dep't 1997). That rule applies here.

Insurers gesture to a smattering of meritless affirmative defenses. These defenses are (1) breach of the implied duty of good faith and fair dealing, NYSCEF Doc. 468 at 28; NYSCEF Doc. 469 at 32; NYSCEF Doc. 470 at 35, (2) unclean hands/estoppel, NYSCEF Doc. 468 at 28; NYSCEF Doc. 469 at 33; NYSCEF Doc. 470 at 35, and (3) violations of the Policy's EUO provision, NYSCEF Doc. 469 at 33; NYSCEF Doc. 470 at 33-34. In each instance, Insurers invoke the defense by name, but offer *zero* supporting allegations. That alone is sufficient to grant summary judgment to Policyholders on those affirmative defenses.

If the Court looks past the conclusory nature of the defenses, it should still reject them. New York caselaw does not support the implied covenant of good faith and fair dealing as a defense to an insured's bad-faith claim. And courts in other jurisdictions reject that defense. *See Kransco v. American Empire Surplus Lines Ins. Co.*, 2 P.3d 1, 4 (Cal. 2000). With respect to Policyholders' contract claims, New York law requires that neither party to a contract "shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." *Brown v. Erie Ins. Co.*, 207 A.D.3d 1144, 1144 (4th Dep't 2022) (citation omitted).

Here, there is no evidence that Policyholders have injured Insurers' contractual rights. To the contrary, Policyholders complied with Insurers' years-long investigation that ultimately led to the coverage denial, producing hundreds of documents and making available ten individuals for EUOs plus their expert for *five days* of recorded interviews. And there is no dispute that Policyholders timely paid the substantial premiums that were due.

Insurers' unclean-hands defense, meanwhile, fails at the outset. That doctrine comes from "the equitable maxim that 'he who *comes into equity* must come with clean hands,'" and it "closes the doors of a *court of equity* to one tainted with inequitableness or bad faith." *United for Peace & Just. v. Bloomberg*, 783 N.Y.S.2d 255, 260 (Sup. Ct. 2004) (quoting *Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co.*, 324 U.S. 806, 814 (1945)) (emphasis added). As a result, the defense of unclean hands "is unavailable in an action exclusively for damages." *Manshion Joho Ctr. Co. v. Manshion Joho Ctr., Inc.*, 24 A.D.3d 189, 190 (1st Dep't 2005). Policyholders have brought only legal claims seeking damages, and therefore Insurers cannot assert unclean hands as a defense.

Even if they could do so, there is no evidence to support its application here. "The doctrine of unclean hands applies when the complaining party shows that the offending party is guilty of immoral, unconscionable conduct and even then only when the conduct relied on is directly related to the subject matter in litigation and the party seeking to invoke the doctrine was injured by such conduct." *Toobian v. Golzad*, 193 A.D.3d 784, 787 (2021) (citation omitted).

Insurers have offered nothing that could satisfy this standard, save their unfounded claim that Mr. Perelman lied. As explained above, Mr. Perelman testified truthfully at his EUO. Moreover, there is no evidence that Insurers were injured by Mr. Perelman's testimony. Insurers conducted a lengthy investigation that considered evidence from many different sources. The investigators and decision-makers did not attach any weight to Mr. Perelman's testimony. And Insurers ultimately denied Policyholders' claims.[3]

Both AIG and the Primary Insurers' do not differentiate between their unclean hands and estoppel defenses. And Federal's standalone "estoppel" defense fails because there is no evidence

[3] Insurers' contention that Plaintiffs violated the Policy's EUO provisions fails for the same reason.

that Plaintiffs (1) engaged in "conduct which amounts to a false representation or concealment of material facts; (2) inten[ded] that such conduct will be acted upon by the other party; and (3) [had] knowledge of the real facts." *First Union Nat. Bank v. Tecklenburg*, 2 A.D.3d 575, 577 (2nd Dep't 2003).

CONCLUSION

The Court should grant summary judgment in favor of Policyholders on the Primary Insurers' Seventh, Eighth, and Ninth Affirmative Defenses; AIG's Sixth, Seventh, and Eighth Affirmative Defenses; and Federal's Eighth, Twelfth, Fourteenth, and Fifteenth Affirmative Defenses.

Dated: Washington, DC
December 22, 2023

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I hereby certify that the foregoing complies with the 7,000-word limitation under Commercial Division Rule 17. Based on Microsoft Word's word count function, the total number of words in this Memorandum of Law, excluding the portions of the Memorandum excluded by Commercial Division Rule 17, is 6,941.

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