IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

GARFIELD AURORA I, LLC., an Illinois Limited Liability Company; and GARFIELD AURORA II, LLC., an Illinois Limited Liability Company,	)	Case No.: 21-cv-5582
Plaintiffs,	)	
v.	)	
GREATER NEW YORK MUTUAL INSURANCE COMPANY, a New York Corporation,	)	
Defendant.	)	

DEFENDANT'S AMENDED MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGEMENT

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Defendant, Greater New York Mutual Insurance Company ("GNY"), by and through its attorneys, states as follows for its Memorandum of Law in support of its Motion for Summary Judgment.

INTRODUCTION

Summary judgment is warranted and should be granted to GNY in this property insurance coverage action for four independent reasons. *First*, Plaintiffs breached the "Loss Conditions" provisions of the GNY insurance policy (the "Policy") by filing suit before sitting for the examinations under oath ("EUO") requested by GNY in 2020.

Second, Plaintiffs breached the Policy's "Concealment, Misrepresentation or Fraud" provisions by falsely stating under oath that they had obtained a written $13,765 quote from manufacturer Metropolitan Industries, Inc. ("Metro"), representing alleged proof of damage repairs to the sump pump system claimed to be caused by a June 28, 2019 power outage. But the Metro quote was originally sent to Plaintiffs *before* June 28, 2019. Plaintiffs then requested the pump manufacture to redate the quote to July 23, 2019, to cover their tracks. Plaintiffs also concealed the *pre-loss* dewatering operations that occurred at their property in early-June 2019 where at least 3 temporary pumps were installed to try keep up with the rising water levels. Additional temporary pumps were installed after the alleged power outage/surge, and Plaintiffs falsely represented to GNY that all of the temporary pumps were installed *after* June 28, 2019. Plaintiffs then falsely stated under oath that it paid $29,313 in emergency water mitigation costs after the June 28, 2019 incident. Plaintiffs never paid $29,313. Plaintiffs' misrepresentations and concealments are a material breach that negates any coverage under the Policy.

Third, and in the alternative, summary judgment is appropriate because Plaintiffs cannot establish their *prima facie* case. In Illinois, it is well established that in situations like this, an insured must prove that: (1) a loss occurred, (2) the loss resulted from a fortuitous event, and (3)

an all-risk policy covering the property was in effect at the time of the loss. *Harbor House Condo. Ass'n v. Massachusetts Bay Ins. Co*., 915 F.2d 316, 318 (7th Cir. 1990). Because they cannot establish that the alleged damages and losses resulted from a fortuitous loss, Plaintiffs are not entitled to recovery under the Policy. Even if Plaintiffs can establish their *prima facia* case (they cannot), the alleged losses are excluded under the express terms of the Policy. The Policy's broad Water Damage Exclusion Endorsement provides that GNY will not pay for loss or damage caused *directly or indirectly* by flood or water that backs up or overflows from a sewer, drain or pump. The Policy also excludes any loss or damage caused by deferred maintenance and insufficient repairs, deterioration, wear and tear, and neglect. Under the Policy's unambiguous terms, Plaintiffs' alleged losses and damages are simply not covered.

Fourth, and in the alternative, Plaintiffs belated claims for vandalism, demolition, and total loss are time-barred because this suit was not timely filed under the Policy's Suit Limitation provision.

Lastly, Plaintiffs' Section 155 arguments fail under Illinois law. GNY's coverage position was correct or, at worst, objectively reasonable and there is no vexatious or unreasonable conduct.

INCORPORATION OF STATEMENT OF MATERIAL FACTS

GNY has contemporaneously filed its Statement of Material Facts in accordance with Local Rule 56.1. The SMF and referenced exhibits are incorporated herein by reference.

APPLICABLE LAW

F.R.C.P. 56 governs motions for summary judgment. Summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Feldman v. Am. Mem'l Life Ins. Co.*, 196 F.3d 783, 789 (7th Cir. 1999) (quoting Rule 56(c)). A genuine issue of fact exists only when a

"reasonable jury could find for the party opposing the motion based on the record as a whole." *Id.* Courts have explained that neither "the mere existence of some alleged factual dispute between the parties", nor the existence of "some metaphysical doubt as to the material facts", will suffice to defeat a motion for summary judgment. *Id.*

This is an insurance coverage dispute governed by Illinois law. Insurance policies are contracts, subject to normal rules of contract interpretation. *ABW Dev., LLC v. Cont'l Cas. Co.*, 2022 IL App (1st) 210930, ¶ 26. "To prevail on a breach of contract claim under Illinois law, a plaintiff must show: (1) a contract existed; (2) the plaintiff performed the contract's required conditions precedent; (3) the defendant breached the contract; and (4) damages. *McGraw Prop. Sols. LLC v. Westchester Surplus Lines Ins. Co.*, 22-CV-00396, 2024 WL 1702680, at *3 (N.D. Ill. Apr. 19, 2024) (citing *Smart Oil, LLC v. DW Mazel, LLC*, 970 F.3d 856, 861 (7th Cir. 2020)). "Illinois law defines a condition precedent as either a condition that must be met before a contract comes into effect or a condition that must be performed by one party before the other party is bound to perform." *Id*.

A. Law Applicable to GNY's Affirmative Defense for Breach of the Policy's "Duties in the Event of Loss" Provision

The GNY Policy provides:

> **3. Duties In The Event Of Loss or Damage**
> a. You must see that the following are done in the event of loss or damage to Covered Property:
>
> ***
> (6) As often as may be reasonably required, permit us to inspect the property proving the loss or damage and examine your books and records. Also permit us to take samples of damaged and undamaged property for inspection, testing and analysis, and permit us to make copies from your books and records.
>
> ***
> (8) Cooperate with us in the investigation or settlement of the claim.

> b. We may examine any insured under oath, while not in the presence of any other insured and at such times as may be reasonably required, about any matter relating to this insurance and the claim, including an insured's books and records. . . . SMF ¶ 6, Ex. 2, Policy at GNY1280.

The Policy's "Duties in the Event of Loss" ("Duties") provision contains three important conditions that Plaintiffs breached when they filed this lawsuit. The Policy's Duties require Plaintiffs to give sworn testimony concerning the claim and the books and records (the "EUO" requirement), to produce books and records when requested by the insurer ("books and records" clause), and to generally cooperate with the insurer's investigation ("cooperation clause").

The EUO requirement affords an insurer the opportunity to explore the nature of the claim with the insured and "possess itself of all knowledge, and all information as to other sources and means of knowledge, in regard to the facts, material to their rights, to enable them to decide upon their obligations, and to protect them against false claims." *McGraw Prop. Sols. LLC v. Westchester Surplus Lines Ins. Co*., 22-CV-00396, 2024 WL 1702680, at *3 (N.D. Ill. 2024) (citing *Passero v. Allstate Ins. Co.*, 196 Ill. App. 3d 602, 606-07 (1st Dist. 1990). "An insured's failure to cooperate with the insurer provides a valid defense to a breach of contract claim." *McGraw Prop. Sols. LLC v. Westchester Surplus Lines Ins. Co*., 22-CV-00396, 2024 WL 1702680, at *3 (N.D. Ill. 2024) (citing *Piser v. State Farm Mut. Auto. Ins. Co*., 938 N.E.2d 640, 647, (Ill. App. Ct. 2010) (finding that the insured-plaintiff failed to cooperate where, *inter alia*, it did not submit to an EUO or provide all the requested financial documentation). Whether an insured breached a policy's cooperation clause is typically a question of fact, but an insurer is entitled to summary judgment where the insured makes "virtually no effort" to provide relevant requested information. *McGraw*, 2024 WL 1702680, at *3 (citations omitted). The insured's duty to cooperate and to sit for an EUO arise from the fact that the insurer usually "has little or no knowledge of the facts surrounding a claimed loss, while the insured has exclusive knowledge of

such facts," resulting in the insurer being "dependent on its insured for fair and complete disclosure." *See Id*., citing *Piser v. State Farm Mut. Auto. Ins. Co*., 938 N.E.2d 640, 647, (Ill. App. Ct. 2010). *See also Waste Mgmt. v. Int'l Surplus Lines,* 144 Ill. 2d 178, 204 (Ill. 1991) (finding that the cooperation clause is an important policy provision because it mandates the insured "disclose all of the facts within his knowledge and otherwise to aid the insurer in its determination of coverage under the policy.") The importance of the books and records clause was confirmed by the Illinois Supreme Court, noting that production of such documentation which purportedly supports a claim is a reasonable condition precedent to seeking a recovery under an insurance policy and the failure to comply can result in the barring of a claim. *Horton v. Allstate Ins. Co.*, 125 Ill. App. 3d 1034 (1st Dist. 1984) (citation omitted).

Because of the importance of these conditions in investigating claims and detecting insurance fraud, compliance with the EUO and cooperation provisions of the Policy is a condition precedent to seeking recovery under a policy. *See McGraw*, 2024 WL 1702680, at *3-4; *Piser v. State Farm Mut. Auto. Ins. Co.*, 405 Ill. App. 3d 341, 347 (1st Dist. 2010); *Horton*, 125 Ill. App. 3d at 1036-37. If an insured fails to comply with the Policy's conditions precedent to bringing suit, the insurer is entitled to summary judgment on the insured's breach of contract and declaratory judgment action. *McGraw*, 2024 WL 1702680, at *7; *Hartshorn v. State Farm Ins. Co.*, 361 Ill. App. 3d 731 (2nd Dist. 2005) (failure to produce documentation requested and not appear for an EUO after several requests supported lawsuit's dismissal); *Emps. Mut. Cas. Co. v. Skoutaris*, 453 F.3d 915, 925 (7th Cir. 2006); *Wood v. Allstate Ins. Co.*, 21 F.3d 741, 746 (7th Cir. 1994).

B. Law Applicable to GNY's Affirmative Defense for Breach of the Policy's Concealment, Misrepresentation or Fraud Provisions.

The GNY Policy provides:

> **CONCEALMENT, MISREPRESENTATION OR FRAUD**
> ***

> b. We do not provide coverage under this Coverage Part or Coverage Form to you or any other insured ("insured") who, at any time subsequent to the issuance of this insurance, commit fraud or intentionally conceal or misrepresent a material fact relating to:
>
> (1) This Coverage Part or Coverage Form;
> (2) The Covered Property;
> (3) Your interest in the Covered Property; or
> (4) A claim under this Coverage Part or Coverage Form. SMF ¶ 7, Ex. 2 at GNY1286, GNY1209).

Illinois state and federal courts have found that similar contractual provisions prohibiting misrepresentations by policyholders are valid and enforceable. *See Pittsfield Development LLC et al v. The Travelers Indem. Co.*, 2024 WL 3292797, at * 7 (N.D. Ill. July 3, 2024); *Barth v. State Farm Fire & Cas. Co.*, 228 Ill. 2d 163, 173 (Ill. 2008); *Folk v. Nat'l Ben Franklin Ins. Co.*, 45 Ill. App. 3d 595, 599 (4th Dist. 1976); *Passero*, 196 Ill. App. 3d at 609. "Under these contractual provisions, 'when an insured willfully makes false statements in proofs of loss with intent to deceive the insurer, the insured cannot recover any amount.'" *Pittsfield*, Ex. 2 at PDF p. 15, quoting *Trzcinski v. Am. Cas. Co*., 953 F.2d 307, 313 (7th Cir. 1992).

Unlike common law fraud, detrimental reliance is not a component of this contractual defense. *Pittsfield*, PDF pp. 15-16. An insured does not need to successfully "trick" the insurer into making a payment for this type of provision to apply – even where no payment is made, courts have granted summary judgment to insurers when an insured has made a misrepresentation in breach of the policy. *See e.g.*, *Passero*, 196 Ill. App. 3d at 610 ("While false swearing is ordinarily a jury question, it becomes a question of law when the insured's misrepresentations cannot be seen as innocent."); *Barth*, 228 Ill. 2d at 172 ("[I]n both *Passero* and the instant case, the insurer discovered the misrepresentations before paying the filed claims in reliance on the misstatement.")

Pittsfield, *Passero*, and *Barth* provide the roadmap for assessing the breach of a policy based on insured's misrepresentations. The elements are: (i) a concealment, misrepresentation or

false statement; (ii) knowingly made by the insured; (iii) calculated to discourage, mislead or deflect the insurer's investigation in any area that could be relevant to the insurer at the time of the investigation. *Passero,* 196 Ill. App. 3d at 609; *Barth*, 228 Ill. 2d at 172–73. A misrepresentation is considered material if it "might have affected the insurer's action or attitude, or if [it] may be said to have been calculated to discourage, mislead, or deflect the insurer's investigation in any area that might have seemed to it, at that time, a relevant area to investigate." *Passero*, *supra*.

When a policy states that "We do not provide coverage" due to a material misrepresentation, the policyholder may not recover any amounts under the policy. *See Folk*, 45 Ill. App. 3d at 599 (because plaintiff "knowingly and willfully made false statements and through omission concealed material facts with intent to defraud . . . plaintiff is not entitled to recover under his policies"); *Tenore v. Am. & Foreign Ins.*, 256 F.2d 791, 795 (7th Cir. 1958) (because plaintiffs "knowingly and willfully made false statements with regard to a material matter . . . they are not entitled to recover any sum under their policies"); *see also Trzcinski*, 953 F.2d at 313.

C. Law Applicable to the Plaintiffs' Breach of Contract Claim.

Policyholders seeking coverage under an insurance policy also have the burden of demonstrating that a claim falls within the policy's terms. *Harbor House*, 915 F.2d at 318; *Addison Ins. Co. v. Fay*, 232 Ill. 2d 446, 453 (Ill. 2009). Insurers bear the burden of proof on policy exclusions. *See Id.* "Whether a loss falls within the terms of the policy is determined not only by analyzing whether the type of loss is covered by the policy, but also by determining whether the loss falls within the effective dates of coverage." *Fidelity v. Mobay Chem. Corp.*, 252 Ill.App.3d 992, 1003 (1st Dist. 1992). In a case like this one involving alleged storm damage, an insured must prove that the storm caused damage to specific property components within the policy period. *See e.g. New Life Celebration Church of God. v. Church Mut. Ins.*, No. 22 C 3192, 2024 WL 4528338, at *5 (N.D. Ill. 2024). It is not enough to merely establish that a storm occurred on a particular

date at a particular location, or even that the storm caused damage to nearby property components. *Id.* This Court has held, with respect to necessary proof to sustain storm claims, that there must be evidence both (1) that the storm had sufficient characteristics (velocity, force, etc.) to cause damage at the property during the time when the alleged damage occurred, and (2) that the storm caused the damage alleged. *Church v. Church Mut. Ins. Co*., 2016 WL 772787, at *9 (N.D. Ill. 2016), *aff'd sub nom*. The Seventh Circuit has held that in an insurance case like this one, it is not enough to show that a loss *may* have occurred – the insured must prove the nature, extent and amount of their loss to a reasonable degree of certainty before any award of damages can be made under the policy. *Harbor House*, 915 F.2d at 318-320.

ARGUMENTS

I. Plaintiffs' failure to appear for an EUO or produce requested documentation mandates summary judgment in GNY's favor.

There is no dispute the Policy here contains a duty to cooperate clause, a books and records clause and an EUO clause. SMF ¶ 6, Policy Loss Conditions. There is also no dispute that in January 2020, GNY requested: (1) the EUO's of Plaintiffs' principal (John E. Thomas, "JET"), building consultant (Ron Basara, "Basara"), property manager (Lou Giordano, "Giordano"); and (2) additional (missing) documentation be provided in connection with the EUOs. *See* SMF ¶¶ 32-34. There is also no dispute that the Plaintiffs failed to appear for the EUOs or produce the requested documentation. (SMF ¶¶ 35-44; Ex. 14, Denial Ltr. at GNY1007-12; Ex. 23, Baroncini Decl. at ¶ 8, authenticating denial letter and enclosures referenced therein). Rather, Plaintiffs prematurely filed this lawsuit. SMF ¶ 45. The failure to appear for the EUOs and produce requested documentation despite several requests mandates the dismissal of Plaintiffs' claims. *McGraw*, 2024 WL 1702680, at *7; *Skoutaris*, 453 F.3d at 925; *Wood*, 21 F.3d at 746.

This case is factually analogous to *McGraw*. There, like here, the undisputed facts reflected that the policyholder agreed to appear for an EUO only to later renege and file suit prematurely. *See McGraw*, 2024 WL 1702680, at *4. Because of this, *McGraw* found that "as a matter of law, McGraw [the policyholder] failed to perform its obligations under the policy by not cooperating with the insurer in its investigation of the insurance claim and not complying with the EUO clause—***a contractual condition precedent to suit***." *See Id.* (emphasis added). But, as will now be shown, the facts here are even more egregious than those in *McGraw*.

In December 2019, Plaintiffs submitted to GNY: (1) a signed sworn statement in proof of loss form for $627,296.78 for certain emergency service expenses, repair costs, code upgrades and fines, loss of revenue and extra expenses (the "POL"); and (2) some documentation in support of certain amounts claimed within the POL. SMF ¶¶ 17-19. Because the POL was largely unsupported, in January 2020, GNY requested the EUOs of JET, Basara, and Giordano and copies of missing documentation for certain damages claimed within the POL. SMF ¶¶ 33-34. For instance, among other things, GNY requested Plaintiffs to provide: (1) estimates that support Plaintiffs' claim on its POL for $8,595 for emergency repair to the fire alarm; (2) invoices and drawings that support the claimed amount of $38,560 for electrical engineer design fees for replacement power service; and (3) proposals that the claimed amount of $88,620 for the removal and replacement of power service. *See* Ex. 14 at GNY 1033-34. In late-January 2020, Plaintiffs entered into a written agreement with the City of Aurora to demolish 460-480 Garfield and to provide a timeline for demolition work to start in spring 2020. *See* Ex. 5 at RTAs 33-34.

In February 2020, Plaintiffs agreed to present these three representatives for the mandatory EUOs. SMF ¶ 35. Thereafter, GNY reiterated that the EUOs could be scheduled as soon as it received the requested missing documentation from Plaintiffs. SMF ¶ 36, Ex. 14 at GNY1040-43 [Mar. & Apr. Emails]. In May 2020, Plaintiff's counsel informed GNY that he was still reviewing

the documents obtained from his client and that certain information (invoices, proposals, receipts, etc.) was still being collected from vendors. SMF ¶ 37. Plaintiffs also withdrew certain portions of their claim and reduced other amounts claimed. *See Id*. However, none of the information allegedly being reviewed by counsel was ever provided to GNY before suit was filed. *See* Ex. 14, Denial Letter at GNY 1008-09.

In September 2020, Plaintiffs' counsel informed GNY that "the City of Aurora filed an order to demolish 460-480 Garfield on conditions related to a fire loss and subsequent order vacating and shuttering of the building." SMF ¶ 38. Plaintiffs provided a copy of the demo-complaint, but did not provide any of the requested missing documents so the EUOs could proceed. *See Id*.; *see also* Ex. 14 at GNY 1009, 1049.

On October 16, 2020, Plaintiffs' counsel advised "that Insureds intend on seeking full value of the building for additional losses arising from the sustained direct fire damage, including but not limited to loss of rental business income, loss due to vandalism, and loss under ordinance or law limited additional coverage related to demolition. Amending documents are forthcoming." (Emphasis supplied). SMF ¶ 39. This was the first time that Plaintiffs notified GNY of any alleged fire or vandalism damage. In response, also on October 16, GNY informed Plaintiffs that if they intended on claiming that the alleged fire or vandalism damage warranted demolition of the Building, Plaintiffs were obligated to support those claims. *See Id*. In December 2020, GNY's counsel discussed the claim and GNY's January 2020 requests with Plaintiffs' counsel and sent a follow-up email on December 18, 2020 attaching a copy of the policy as well as GNY's prior document and EUO requests. SMF ¶ 40.

Plaintiffs again ignored the requests. *See* SMF ¶ 42. Doubling down further, Plaintiffs instead brazenly issued a demand letter on June 21, 2021, asserting that this was their "final attempt to update or supplement" their claim for the stated policy value of $14.5M. SMF ¶ 43, Ex. 25, Pl.

Demand. Counsel asserted in this demand that Plaintiffs provided proper notice to GNY that they were updating their claim seeking $14.5M in damages. *This is also false.* Plaintiffs admitted in June 2024 that they did not tender a $14.5M demand prior to June 21, 2021. *See* Ex. 5 at RTA 48. Counsel also asserted in this demand that *after* Plaintiffs reported that they were seeking the full stated value of the Building, they never received any communication from GNY on their "Original Claim", which was reported on August 9, 2019. *This is also false*. As discussed above, after GNY first received notice of the total loss being claimed, it had direct communications with Plaintiffs on October 16 and December 18, 2020 where Plaintiffs claims were discussed with counsel and additional information/documentation was requested from Plaintiffs. Counsel also asserts that GNY never provided any reservation of rights letter. *This too is false*. Plaintiffs received and responded to GNY's reservation of rights letter dated December 13, 2019 (which requested on POL on the entire claim) when they provided their POL on December 16, 2019. Counsel also asserts that GNY received notice of Plaintiffs' Original Claim two years ago (or around June 21, 2019). *This is also a false statement*. GNY received notice of Plaintiffs initial claim on August 9, 2019 (which reported a June 28, 2019 DOL). In any event, Plaintiffs again failed to provide any of the requested documents with their June 2021 demand so that requested EUOs could proceed. In other words, Plaintiffs elected to stonewall GNY on the EUO and records requests, while at same time they inflated its original claim from $628K (POL) to $14.5M without providing any reasonable explanations or support that suggested that a total loss occurred on June 28, 2019.

Compliance with the cooperation clause in an insurance policy and appearing for an EUO is a condition precedent to pursuing legal action. *McGraw*, 2024 WL 1702680, at *3-4; *Piser*, 405 Ill. App. 3d at 347. Compliance with a condition precedent is mandatory and must be enforced. *Piser*, 405 Ill. App. 3d at 345. Here, the Policy's Commercial Property Conditions require the appearance for an EUO by noting:

> D. LEGAL ACTION AGAINST US
>
> No one may bring a legal action against us under this Coverage Part unless:
>
> 1. There has been full compliance with all of the terms of this Coverage Part; and
>
> 2. The action is brought within 2 years after the date on which the direct physical loss or damage occurred. SMF ¶ 8, Ex. 2, Policy at GNY1286.

It is undisputed that the Policy contains an EUO requirement, that there was a request for EUOs before suit was filed, that attendance for the EUOs was agreed upon, but later reneged upon by Plaintiffs, and a lawsuit was filed without the EUOs ever occurring. *See* SMF ¶¶ 33-45. As a result, Plaintiffs filed this lawsuit without satisfying this mandatory, not discretionary, condition-precedent. Because Plaintiffs did not satisfy the Policy "Duties" which are mandatory conditions precedent under Illinois law, GNY is entitled to summary judgment on Plaintiffs' breach of contract and declaratory judgment action. *See McGraw*, *supra*.

II. Plaintiffs' material misrepresentations also bar any recovery under the Policy.

It is undisputed that Plaintiffs submitted a POL to GNY in December 2019, representing, *under oath*, that: (1) "a power surge loss occurred around 10AM on June 28, 2019"; and (2) the cause of the loss was "a power surge from a storm". *See* SMF ¶¶ 17-18, 32; Ex. 15, POL. The POL was executed by Basara. *See Id*. It is also undisputed that on December 19, 2019, Plaintiffs provided certain documentation to support the amounts claimed on the POL. SMF ¶ 19, Ex. 16, 12/19/2019 Email. This supportive POL documentation included, among other things:

a. An invoice from Michels Plumbing for $29,313 for dewatering services performed on June 29 & July 2, 2019, Invoice No. 52850 ("Michels Invoice") (Ex. 16 at GNY 766);

b. A quote from Metro for $13,765 to replace the sump pump system dated July 23, 2019, Quote No. 619C16088MP (the "Metro Quote") (*Id.* at GNY 771).

Plaintiffs maintain that the amounts claimed on the POL to repair mechanical, electrical, and plumbing ("MEP") equipment were for repairs that were completed "*after* the June 2019

incident." SMF ¶ 18, Ex. 4 at ROG 16.[1] However, this is simply not true based on several critical disclosures that have been made by Michels Plumbing ("Michels"), Metro, and others about the conditions of the property and events that took place prior to the alleged power surge event on June 28, 2019 (the date of loss, or "DOL"). These disclosures, as discussed *infra*., reflect that Plaintiffs concealed and mispresented material facts from GNY before suit was filed. As will now be shown below, Plaintiffs misled and misinformed GNY during its investigation.

a. The *Pre-Loss* Dewatering Operations and Electrical Failures

During GMY's claim investigation, Plaintiffs attempted to pass off the work reflected in the Michels Invoice and Metro Quote as being necessary repair work that was all performed *after* and in direct response to the June 28, 2019 storm surge event. The reality, however, was much different. As it turned out the Michels Invoice and Metro Quote included work performed to address flooding conditions that occurred *before* the June 28, 2019 storm surge event.

After the claim was belatedly reported by Plaintiffs on August 8, 2019, Plaintiffs' property manager (Lou Giordano) provided a copy of the Michels' Invoice to GNY's adjuster, Rick Grganto of Crawford & Company ("Crawford"). SMF ¶¶ 27, 29. After meeting with Giordano (and others) during a site inspection of the Building, Crawford reported based on the representations made by Giordano at that time that the Michels' Invoice was for the material and labor costs to install 7 temporary sump pumps to dewater the basement of the Building from June 29 to July 24, 2019. SMF ¶ 30; Ex. 21, Grganto Decl. at ¶¶ 7-8; Crawford Reports at PDF pp. 39, 77 of Ex. 21. Based on Giordano's representations, Crawford also reported that Plaintiffs paid $8,000 towards Michel's invoice for the dewatering operations performed *after* the June 28, 2019 outage. SMF ¶ 68; Ex. 21 at ¶¶ 8,12. Relately, Plaintiffs also represented to GNY's building consultant, Matt Thurow of

[1] Plaintiffs' amended answers to GNY's Interrogatories and Requests to Admit served on 12/23/2024 (*see* Exs. 4-5).

Amset Inc. ("Amset") in fall 2019 that all 7 temporary pumps were installed *after* June 28, 2019. SMF ¶ 31, Ex. 22, Thurow Decl. at ¶ 15 (sic). In December 2019, Plaintiffs filed their POL, specifically identifying the $29,313 amount for "emergency response (water mitigation)" and produced a copy of Michels' invoice in support. SMF ¶¶ 17-19; Ex. 15, POL at GA3220; Ex. 16, December 2019 Email at GNY766 (Michels Invoice 52850).

However, GNY later discovered during this litigation that Michels was retained by Plaintiffs in *early*-June 2019 to perform dewatering operations to remediate flooding conditions *before* the June 28, 2019 outage. SMF ¶¶ 57, 62; Ex. 40, Michels' Invoice 52571. According to Michels, Plaintiffs' $8K payment was for: (1) the dewatering services provided on June 6, 8, and 13, 2019, as described on Invoice 52571, and (2) a partial pre-payment of $1,021.58 towards the additional plumbing services that were provided after June 28, 2019, as described on Invoice 52850. SMF ¶¶ 67-68, Ex. 41, Michels Tr. at pp. 45-46, 71-72. Michels was never paid the remaining balance owed on Invoice 52850, or $28,291. *See Id*. During GNY's claim investigation, Plaintiffs never disclosed that at least 3 of the 7 temporary pumps were installed *before* June 28, 2019. *See* Ex. 21, Grganto Decl. at ¶ 12; Ex. 22, Thurow Decl. at ¶ 15-16 (sic); Ex. 25, Baroncini Decl. at ¶ 9(b). Giordano later admitted at his 2024 deposition that the $29,313 amount listed on the POL for "water mitigation" included costs incurred for dewatering operations performed *before* and *after* June 28, 2019. SMF ¶ 18.

Relatedly, Plaintiffs also failed to disclose critical information on the conditions of the MEP equipment that led to the *pre-loss* dewatering operations at the Building in early-June 2019. For instance, during GNY's claim investigation, Plaintiffs concealed the following *undisputed* events that occurred within weeks/months of the alleged outage/surge event on June 28, 2019:

- That pump failures occurred in February 2019 in the basement mechanical room of 460 Garfield where "water was spraying everywhere". SMF ¶ 54.

- That water backed-up into the basement in late-May 2019 because of "delayed maintenance and neglect". SMF ¶ 56.

- That Michels (with Giordano) found on June 6, 2019 that only one pump of two was operational and it was not able to keep up with water coming into the basement. SMF ¶ 57.

- That the Aurora Fire Department also responded to the Building on June 6, 2019 and found (with Giordano) that water was touching the electrical panel, which was smoking. ComEd also respond to the Building on June 6, 2019 at the request of the City. SMF ¶ 58.

- That on June 7, 2019, Giordano reported to JET and Dan Olswang[2] that there was a "major issue with the second sump pump in the basement shutting down". SMF ¶ 59.

- That on June 11, 2019, Plaintiffs received a pump replacement quote. SMF ¶ 60.

- That on June 12, 2019, the Aurora Fire Department was called back to the Building for an activated fire alarm and found water running down walls into electric panels. SMF ¶ 61.

- That on June 13, 2019, Michels added additional pumps to keep up with rising water in the basement. SMF ¶ 62.

See also Ex. 21, Grganto Decl., ¶¶ 9-12; Ex. 22, Thurow Decl., ¶¶ 11-16; Ex. 25, Baroncini Decl., ¶¶ 9-12 (each discussing the foregoing pre-loss events not disclosed during GNY's investigation).

b. The *Redated* Pump Replacement Quote

During this litigation, it was also discovered that the Metro Quote (dated July 23, 2019) that Plaintiffs provided in December 2019 in support of the amounts claimed, was originally circulated to Plaintiffs *before*, not after, the alleged loss on June 28, 2019. Specifically, the Metro Quote was *first* circulated to Plaintiffs on June 11, 2019 after the pump system and controller failed and caused damage to the basement electrical panel system and switchgears. SMF ¶ 60, Ex. 44, June 11, 2019 Email. It is undisputed that when the original quote was sent to Plaintiffs on June 11, 2019, the manufacturer (Metro) recommended that "the existing discharge piping and valves be replaced due to the condition and based on the photographs reviewed of the existing system." *See Id*. It is also undisputed that Plaintiffs did not perform *any* of the recommended replacements

[2] Mr. Olswang is a representative of Plaintiffs expected to testify at trial in support of Plaintiffs' claims. SMF ¶ 16.

to the pump system or its components prior to the alleged loss on June 28, 2019. SMF ¶ 52. According to Giordano, the flooding conditions would have been remediated ***if*** Plaintiffs replaced the damaged pumps before the outage occurred on June 28, 2019. SMF ¶ 60. After the outage, Plaintiffs requested Metro to redate the quote in July 2019 to cover their tracks. *See* SMF ¶ 69.

Basara, who executed the POL, testified that: (1) he was working for a company in 2019 that John E. Thomas (Plaintiffs' principal), called "Jet Structures"; and (2) the POL was prepared based on documentation provided to Jet Structures by the ownership group of 460-480 Garfield. *See* SMF ¶¶ 17-19, Ex. 8, Basara Tr. at pp. 14, 85, 89. According to Basara, he was not involved in evaluating or determining the actual dollar amounts of the damages being claimed, nor was he involved in hiring contractors to perform the purported remediation work following the loss.[3] Ex. 8, p. 85. Instead, according to Basara, all of the costs identified on the POL came from somebody else with Plaintiffs so they "could be included in the loss."[4] *Id*. Basara did not evaluate the Metro quote to determine whether it was a valid amount that should be part of the claim. *Id*. at pp. 89, 93-94. According to Basara, he signed the POL because he "verified" that the invoices, quotes, receipts, etc. obtained from Plaintiffs collectively added up to approx. $600K. *Id*. at pp. 96-98.

Not surprisingly, Plaintiffs have not (and cannot) provide any reasonable explanation on why they had the pump manufacturer redate the quote to a *post*-loss date. But even if they could come up with some reason for doing so, any pivot does not save Plaintiffs from the consequences of their false representations. It does not create an issue of fact to allege that Basara did not know that the Metro Quote was circulated before the date of loss – even if Basara were to testify as such,

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[3] Basara also admitted that he was not at the Building on June 28, 2019 and that he has no personal knowledge or information about (1) whether ComEd caused a power failure or surge at the Building in June 2019 and/or (2) whether any flooding occurred at the Building prior to June 28, 2019. Ex. 8, at pp. 44-45, 50-51, 82, 114-115.

[4] Basara also testified that the documentation that he sent to GNY in support of the amounts claimed on the POL was gathered and developed by someone else with Plaintiffs. Ex. 8, p. 89.

that would not explain-away the false representations made by Plaintiffs when they provided the redated copy of the Metro Quote in support of their claim. By producing only the redated quote, Plaintiffs concealed that the pumps actually needed to be replaced *before* June 28, 2019. In other words, by only producing the redated quote, Plaintiffs represented that the pump system needed to be replaced *because of* the alleged loss event on June 28, 2019. Which is simply not true.

There is no issue for trial – the GNY Policy states that there is no coverage under the Policy if the insured commits fraud or intentionally conceals or misrepresents a material fact relating to a claim under the Policy. SMF ¶ 7; Ex. 2, Policy at GNY1209, 1286. While materiality might be a jury issue in some situations, the decisions in *Pittsfield* and *Passero* confirm that it is a question of law when the misrepresentation cannot be seen as innocent. *Pittsfield*, Ex. 62 at PDF p. 23; *Passero*, 196 Ill. App. 3d at 610; *see also* Ex. 23 [Baroncini Decl.] at ¶ 12, addressing materiality. *Passero* and *Pittsfield* confirm that summary judgment is proper.

The *Passero* case, which was decided on summary judgment, involved a claim for stolen property, including $963 for stereo system and $1,500 in video equipment. *Passero*, 196 Ill. App. 3d at 604. The Passeros' testified that a receipt that they turned into Allstate was the true receipt for the stereo, but it was not – the Passeros only paid $455 for the stereo, not $963. *Id.* at 605. As to the video equipment, the amount was accurate, but the buyer was not – the buyer was a different person. *Id.* The *Passero* court explained that policyholders are required to be truthful, and misrepresentations that discourage, mislead, or deflect investigation into aspects of the claim are material. *Id.* at 609 ("A reasonable insurer would undeniably attach importance to such facts."). The court rejected the Passeros' arguments that the statements were immaterial – the misrepresentations were made and the consequence was that coverage was negated under the policy. *Id.* at 610 ("[I]t is settled that false swearing by the insured renders the policy void if, as here, the policy provides for that result from such conduct.").

Similarly, in July 2024, the Northern District of Illinois found that a material misrepresentation was made when the insured attempted to include a generalized and hypothetical $950,000 oral quote for asbestos removal within its claim for damages. *Pittsfield*, Ex. 62 at PDF p. 18. Relying on *Passero*, the *Pittsfield* court explained "the insured simply had no basis to include the quote as proof they were entitled to the damages being sought . . . . [and] in light of the misleading representations, the insured's behavior could not be seen as innocent." *Id*. at PDF pp. 24-25. Accordingly, the court held that the insured's misrepresentation was a breach of the policy and entered summary judgment in favor of the insurer. *Id*. at PDF p. 27.

Here, Plaintiffs told GNY they were owed (1) $13,765 to replace the pump system that was allegedly damaged by the June 28, 2019 loss, and (2) $29,313 for water mitigation services. Just like the policyholders in *Pittsfield*, and *Passero*, they told GNY something that was false – here, that (1) the Metro quote was proof that the pump system was damaged because of the June 28, 2019 outage, and (2) the Michels invoice was proof that temporary pumps needed to be installed to dewater the Building following such outage. And just like the policyholders in *Pittsfield* and *Passero*, Plaintiffs have tried to explain-away their representations or assert it does not matter that such representations were given. They are wrong, for the same reasons those courts found Pittsfield's hypothetical $950K quote was material, and Passeros' $500 stereo receipt was material. Policyholders cannot lie about the support for a seven-figure claim or a $500 claim, as the plain language of the GNY Policy and the foregoing authorities demonstrate.

The consequence of the Policy being negated due to breach of the misrepresentation provision is that Plaintiffs are entitled to nothing from GNY. *Folk*, 45 Ill. App. 3d at 599 (because plaintiff "knowingly and willfully made false statements and through omission concealed material facts with intent to defraud . . . plaintiff is not entitled to recover under his policies"); *see also Neidenbach v. Amica Mut. Ins. Co*., 842 F.3d 560, 563-64 (8th Cir. 2016) (affirmed that the

insurance policy was breached due to the insureds' material misrepresentations in their Proof of Loss); *Pittsfield* and *Passero*, *supra*. Thus, summary judgment should be granted in favor of GNY for the foregoing reasons alone.

c. Plaintiffs' misrepresentation that the June 28, 2019 loss resulted in a total loss

For similar but separate reasons, summary judgment should also be granted in favor of GNY based on Plaintiffs' concealments and false representations that the June 28, 2020 incident resulted in a total loss. As discussed above, during the claim investigation, Plaintiffs asserted in fall 2020 that: (1) "the City of Aurora filed an order to demolish 460 and 480 Garfield Avenue on conditions related to a fire loss and subsequent order vacating and shuttering of the building"; and (2) they were seeking the full value of the building for additional losses arising from "the sustained direct fire damage", including "loss of rental business income, loss due to vandalism, and loss under ordinance or law limited additional coverage related to demolition." SMF ¶¶ 38-39. GNY timely requested in response to these assertions, but never obtained, *any* additional information or support from Plaintiffs for any of the additional damage being claimed that purportedly required demolition of the Building. SMF ¶¶ 39-40, 42; Ex. 14 at GNY 1009-10. Instead of cooperating with GNY, Plaintiffs issued a demand letter littered with false statements (see above at page 10) to try to assert a valid claim for a total loss.

During this litigation, it was discovered that Plaintiffs concealed material information about the purported total loss sustained. SMF ¶ 38-39; Ex. 5 at RTAs 33-34. For instance, it was disclosed during discovery that Plaintiffs actually entered into an agreement with the City in January 2020 to demolish the Building. SMF ¶ 38-39; Ex. 5 at RTAs 33-34. After entering into the demolition agreement, Plaintiffs abandoned the Building, which eventually resulted in additional water back-ups and vandalism damage. *See* SMF ¶ 41, Ex. 14 at GNY at 1012, 1055-60. Also after Plaintiffs agreed to demolish the Building, they retained a public adjuster in March

2020 to prepare a total loss estimate, but never notified GNY that it retained a public adjuster before demanding $14.5M. *See* Ex. 5 at RTA 20. It is also uncontested that Plaintiffs claim for a total loss is based on their public adjusters' estimates from December 2020, which were never provided to GNY *until June 2022*. SMF ¶¶ 71-72, Ex. 53 [Pl. Expert Disclosures with estimates enclosed]; Ex. 5 at RTAs 21-22; *see also* Ex. 10, M. Santoro Tr. at pp. 44-46, 80-81 (Plaintiffs' public adjuster admitting, among other things, that: (1) He does not know the reason(s) *why* the City condemned property, but was told by the insured (Plaintiffs) that the City's 2020 Notice to Vacate Letter identified a list of damages (code violations) that all stemmed from the loss on 6/28/2019; and (2) he has no idea how any of the fire damage was caused to the electrical panels).

However, it is clear is that Plaintiffs' neglect and abandonment of the Building resulted in it being condemned. Plaintiffs have not (and cannot) provide any actual evidence to the contrary that could even suggest that a "fire loss" occurred that eventually led to Building being shuttered. The Building was cited for several building code and life safety violations before, on, and after June 28, 2019. SMF ¶¶ 46-47, 55. Plaintiffs were aware of the conditions of the Building by as early as July 2018 (11 months before the DOL) when it reported that it wanted to clear out (demo) 460 Garfield, but did nothing thereafter to address the defective MEP equipment in the basement. *See* SMF ¶¶ 48-52, Ex. 68, Curley Tr. at pp. 72-73, 83-84. Plaintiffs' attempt to tie in a total loss into their original claim of $628K is simply baseless and cannot go unnoticed. Moreover, it is based on a lie – Plaintiffs' representation that they sustained a fire loss that resulted in the Building being condemned. The Building was condemned because of the conditions that were present at the Building before June 28, 2019 (discussed further *infra*.) and because of Plaintiffs' own actions and inactions, and their failure to protect their property. The Building was not condemned because of a fire on June 28, 2019, nor was shuttered for any other incident that occurred on such DOL.

III. In addition, Plaintiffs Cannot Establish Their *Prima Facie* Case

In an insurance dispute like this, the insured bears the initial burden of presenting sufficient facts establishing a prima facie case. *Johnson Press*, 339 Ill. App. 3d at 871. This requires a showing that (1) a loss occurred, (2) the loss resulted from a fortuitous event, and (3) an all-risk policy covering the property was in effect at the time of the loss. *Id*. "Fortuitous"" means happening by chance or accident, or occurring unexpectedly or without known cause. *Id.* at 870-71. Here, Plaintiffs must prove that their Building was destroyed by a storm on June 28, 2019, which, if it actually happened, would undisputedly qualify as a fortuitous event. However, Plaintiffs cannot establish that their losses resulted from a storm, or any other fortuitous event, on June 28, 2019.

a. Plaintiffs' evidence of a fortuitous event

Plaintiffs' evidence that there was a fortuitous weather event on June 28, 2019 comes from testimony provided by their own representatives, none of which have any actual personal knowledge of how or when the loss occurred. SMF ¶ 16, 24, 75. In short, these witnesses testified that they were told by undisclosed third parties that the outage occurred on June 28, 2019, either because of a storm event and/or because of ComEd's failed attempt to try re-energizing the power supply to the Building on such date. *See Id*. This evidence is inadmissible hearsay and cannot be used by Plaintiffs to support their claim that a severe weather event caused the power outage on June 28, 2019. *See Eisenstadt v. Centel Corp*., 113 F.3d 738, 742 (7th Cir. 1997); *Barnes v. Wexford Health Sources*, 2024 WL 3165793, at *7 (N.D. Ill. 2024) ("hearsay offered at summary judgment is every bit as inadmissible as hearsay offered at trial unless it falls within an exception").

Collectively, Plaintiffs fail to identify any witness that has personal knowledge of *how* or *when* the electrical failure occurred on June 28, 2019 that can offer admissible testimony at trial. Plaintiffs also fail to disclose any expert witness (or any other consultant) that investigated the actual cause of said outage and/or the weather conditions on the DOL. *See* SMF ¶¶ 15, 20-24, 71,

74-75, 82. There is simply no evidence to support Plaintiffs' claim that a storm (or any other fortuitous event) occurred on June 28, 2019 that caused the Building to become unhabitable, or to rebut GNY's experts' opinions that: (1) there was no significant storm that impacted the Building on or around June 28, 2019; and (2) water/moisture damage, wear and tear, deterioration, and insufficient maintenance were the cause of the electrical failures on the DOL. *See* SMF ¶¶ 76-81.

b. The June 28, 2019 storm did not cause the outage or any property damage

During this litigation, GNY's meteorologist expert, Dr. Jason Webster, performed a *site-specific* forensic meteorological investigation of the storm activity on and around June 28, 2019. SMF ¶ 77, Ex. 55; Webster Decl. at ¶¶ 4-6. In short, based on the meteorological evidence and upon a reasonable degree of scientific certainty, Dr. Webster concluded that the Building: (1) was not impacted by strong or high winds, or any severe thunderstorms and/or lightning strikes on or around the DOL; (2) only experienced a total of 0.06 inches of precipitation on June 28, 2019; and (3) was not impacted by an unusual amount of precipitation accumulation between May 30 and July 2, 2019. *See Id*.; Ex. 66, Webster Report at pp. 4, 21-22, 29. In addition, Dr. Webster opines to a reasonable degree of scientific certainty that there was no area-wide power outage(s) that occurred at the Building or within the Region (defined as: DuPage, Kane, and/or Kendall Counties) on the DOL. SMF ¶ 78; Ex. 55 at ¶¶ 7-8; Ex. 66. at pp. 4, 22-32. According to Dr. Webster, (1) only one outage was reported within the region between May 30 and July 2, 2019, ***but it occurred on June 30, 2019 and was not at or within 5-miles of 460-480 Garfield***; and (2) ComEd's outage records do not discuss any meteorological activity associated with the outages that occurred specifically at the Building on the DOL. *See Id*.

Relatedly, GNY's causation expert, Steven Claxton, concluded that there is no evidence of direct storm damage occurring on June 28, 2019 to the electrical power supply, electrical transformers, or electrical supply components outside the building. SMF ¶ 81; Claxton Report, Ex.

31 at PDF p. 22; *see also* SMF ¶¶ 63-66. Plaintiffs have not contested or rebutted the findings and opinions of Mr. Claxton and/or Dr. Webster. Accordingly, based upon the undisputed record, Plaintiffs simply cannot establish that the alleged loss was caused by a fortuitous storm event.

c. The critical conditions that developed were present long before June 28, 2019

The record is clear – there were several critical conditions that developed at the Building over an extended period of time *prior to* the inception of the Policy[5] and the alleged outage/surge; and because of this, Plaintiffs simply cannot establish that a fortuitous loss occurred on June 28, 2019. For instance, in 2017, the City of Aurora (the "City") observed hazardous plumbing and electricals conditions at the Building. SMF ¶ 46. The hazardous conditions got worse, not better, when the City inspected the Building in January 2018 and reported 20+ total building code violations, noting that: (1) the "entire plumbing systems was not operational, had not been properly capped [and there are] substantial signs of deterioration and damage from lack of maintenance"; (2) the electrical equipment "has not been maintained and does not appear in good working order"; and (3) the basement electrical equipment "has been open and exposed in a damp location for an unknown long duration of time and will likely not function up to expected level". SMF ¶ 47. Plaintiffs were aware of the critical conditions by at least July 2018 when it met with representatives of the City at a Development Services Team ("DST") meeting. SMF ¶ 48.

After the DST Meeting, BTR Engineering LLC ("BTR") was commissioned by Plaintiffs "to study and opine on the mechanical, electrical, plumbing, and fire protection systems for the conversion of the existing YMCA facility [460 Garfield] into a new mixed-use structure." SMF ¶49. Significantly, based on its evaluation of the conditions at that time, BTR recommended in January 2019 for Plaintiffs to remove *all* of the existing mechanical equipment in the basement,

[5] The Policy was in effect from December 21, 2018 to December 21, 2019. SMF ¶ 5.

including the pumps. *Id*. BTR also recommended Plaintiffs to remove and replace *all* of the existing electrical equipment at 460 Garfield, explaining that: "The existing facility has been abandoned for many years and has not been weathertight. As such, any remaining electrical equipment or distribution is in poor condition and should be removed in its entirety." SMF ¶ 50. It is undisputed that BTR warned Plaintiffs as to what would happen if the MEP equipment was not replaced. *See Id*. Plaintiffs' engineer even recommended that a new emergency backup generator be installed to provide a power supply to the pumps in case of an emergency (power outage). SMF ¶ 51. Despite BTR's recommendations, Plaintiffs never replaced *any* of the basement MEP equipment, nor did they install a new back-up generator. SMF ¶¶ 51-52. In other words, Plaintiffs elected to ignore their engineer's findings despite the open and obvious conditions of the MEP equipment that were present at that time in 2018 and early 2019.[6]

Collectively, the City's code violations observed in 2017/2018 and the January 2019 BTR Report, reflect that not only was the Building not properly maintained/repaired prior to the issuance of the Policy, but the conditions giving rise to Plaintiffs' June 2019 loss were present well *before* the Policy became effective in December 2018.

It is also clear that *after* the Policy went into effect, there were several occurrences of pump failures between February and early-June 2019 that exposed the basement electrical equipment (as well as the non-submersible pump controller) to (additional) water and moisture intrusion prior to the outage on June 28, 2019. *See* SMF ¶¶ 54-62, discussed *supra.* These pump failures caused water to back-up into the basement before the DOL. The high-water levels in the basement (*i.e*., flooding conditions) were observed and reported on by Plaintiffs around May 30, June 6, and June 13, 2019. Plaintiffs' own property manager (Giordano) attributed the May 30 water back-up to

[6] *See e.g*., Ex. 31 at PDF pp. 15-19, photos showing the deteriorated MEP equipment in 2018 and early-June 2019.

"delayed maintenance and neglect". The conditions got worse by early-June 2019 where the high-water eventually made contact with the basement electrical panels, causing them to smoke on June 6. This led to Plaintiffs obtaining a pump replacement quote on June 11 and performing some dewatering operations where at least 3 temporary pumps were installed before the DOL. There is no dispute that Plaintiffs were aware of these ongoing equipment failures and back-ups but did nothing to remediate the defective electrical and pumping equipment before the outage. Moreover, it is uncontested that these pre-existing conditions, due to deferred and insufficient maintenance/repairs, water intrusion, and deterioration, caused the electrical failure on June 28, 2019. SMF ¶¶ 79, 81; Claxton Report, Ex. 31 at PDF pp. 6, 21.[7]

Coverage under a property insurance policy extends only to a loss caused by a fortuitous event. *Harbor House Condo. Ass'n v. Mass. Bay Ins. Co.*, 703 F. Supp. 1313, 1316 (N.D. Ill. 1988), *aff'd*, 915 F.2d 316 (7th Cir. 1990); *Johnson Press*, 339 Ill. App. 3d at 872. Damage due to causes such as known pre-existing problems are not fortuitous. *Harbor House*, 703 F. Supp. at 1317. A fortuitous loss event is one that is dependent on chance. *Johnson Press*, 339 Ill.App.3d at 872. A loss that was an inevitable certainty at the time of contracting is not fortuitous; and thus, not covered. *Id*. Whether a loss is fortuitous is a legal question for the court to determine. *Id*.

Here, any water damage or electrical failures that occurred when the Policy was in effect did not result from a fortuitous event. The dilapidated conditions (*i.e*., the rusted and deteriorated MEP equipment) were present long before the Policy issued. There were also ongoing, known issues with the pump system between February and early-June 2019 that had exposed the electrical equipment to water/moisture intrusion prior to the outage on June 28, 2019. Plaintiffs have not produced any relevant records reflecting that *any* necessary repair work was ever performed on

[7] Claxton's expert findings on the cause of the electrical failures and outage have not been contested by Plaintiffs.

any of the MEP equipment before June 28, 2019. Improper or no maintenance to electrical equipment exposed to water/moisture leads to failure of such equipment; and damaged and malfunctioning circuit breakers can impact operation of utility transformers. SMF ¶¶ 79-81; *see also* Ex. 65, G. Long Tr. at 18-21 (Plaintiffs' electrician testifying that the high-water levels caused power outage). The electrical failure was expected on June 28, 2019. Plaintiffs cannot ignore the conditions and then seek to impose liability on GNY for any alleged increase in property damage (or any ensuing loss) that resulted directly from the conditions they had ample opportunity to remedy. Plaintiffs cannot demonstrate that their "losses" resulted from a fortuitous event. Accordingly, they cannot establish their *prima facie* case since the conditions giving rise to the electrical failures were present long before the DOL. *Harbor House*, 703 F. Supp. at 1316-17.

d. Several policy exclusions also apply

Even assuming *arguendo* that Plaintiffs can establish their *prima facie* case (they cannot), their losses resulted from perils expressly excluded from coverage. *See Johnson Press*, 339 Ill. App. 3d at 872-874 (holding that even if the insured could establish a *prima facie* case, the insured's loss [a collapse] was due to lack of maintenance and water seepage that caused decay that weakened the wood structures; and as such, the court held that the cause of the roof collapse fell squarely within the exclusion clauses of the policy for: (1) faulty, inadequate or defective maintenance; (2) deterioration, (3) wear and tear; and (4) continuous or repeated seepage or leakage of water that occurred over a period of 14 days).

Like the policy exclusions in *Johnson Press*, the Policy here also does not cover any losses caused by or resulting from faulty, inadequate or defective maintenance or repairs, deterioration, wear and tear; and/or continuous or repeated seepage or leakage of water that occurred over a period of 14 days. *See* SMF ¶ 9, Ex. 2 at GNY1291-92. Here, the undisputed facts discussed above demonstrate that the basement MEP equipment had extensive rust and decay due to repeated water

intrusion and high moisture and humidity levels. SMF ¶¶ 79, 81; Claxton Opinion Report, Ex. 31 at PDF pp. 6, 13-22. *See also* Ex. 22, Thurow Decl. at ¶¶ 5(f), 11-12 (sic), 15 (sic). It is also clear that the power outage was due to the failure of the electrical equipment in the basement caused by improper maintenance and long-term exposure to moisture and water intrusion; that the deteriorated/rusted MEP equipment occurred over numerous months and years, rather than a short time period; and that the dilapidated conditions were open and obvious. *See* SMF ¶¶ 46-52, 54-62, 79, 81. Thus, based upon the undisputed record, Plaintiffs' loss falls squarely within these exclusion clauses of the Policy, and summary judgment should be entered in favor of GNY.[8] *Johnson Press*, 339 Ill. App. 3d at 872-874; *City Brewing Co. v. Liberty Mut. Fire Ins. Co.,* 2013 IL App (1st) 111996-U (affirmed summary judgment in favor of insurer, finding the loss due to hydrogen induced cracking was excluded as the loss was caused by deterioration); *Tracy Holdings LLC v. W. Bend Mut. Ins. Co.*, 333 F. Supp. 3d 809 (C.D. Ill. 2018) (finding that the "continuous or repeated leakage" exclusion barred coverage for claim involving water damage in an area that had experienced leaks and dampness for years); *Bd. of Educ. of Maine*, 292 Ill. App. 3d at 21 (affirmed judgment in favor of insurer finding the damages were caused by wear and tear).

Moreover, the Policy also contains a broad water damage exclusion, providing that GNY will not pay for loss or damage caused *directly or indirectly* by flood or water that backs up or overflows from a drain or pump "regardless of any other cause or event that contributes concurrently or in any sequence to the loss." SMF ¶ 10, Ex. 2 at GNY1268. Based on the undisputed record that reflects that the electrical and pump equipment were impacted by water/moisture intrusion prior to the outage on June 28, 2019, the Policy's broad water damage

[8] Plaintiffs' failure to preserve and protect their property also triggers the Policy's neglect and loss of use exclusions, which both serve as yet additional basis for barring coverage for the alleged vandalism, demolition, and total loss being claimed. However, for the reasons discussed below, these claimed losses are time-barred. GNY reserves its rights to assert these additional policy defenses if Plaintiffs can somehow establish that such losses are not barred.

exclusion serves as yet another reason to bar coverage for this entire loss. *See Wallis v. Cnty. Mut. Ins. Co.*, 309 Ill. App. 3d 566, 575 (2nd Dist. 2000) (upholding that the water damage exclusion barred coverage for "water damage, meaning: (a) flood… (b) water which backs up through sewers or drains, or water which enters into and overflows from within a sump pump"); *Ramirez v. Am. Family*, 652 N.E.2d 511, 516 (Ind. Ct. App. 1995) (holding that the fact that the sump pump failure was preceded by a power outage did not remove the insured's claim from the water damage exclusions); *Whitt v. State Farm*, 315 Ill. App. 3d 658, 664 (2nd Dist. 2000).

IV. In addition, Plaintiffs' claims for (i) a total loss and (ii) City fines are time barred.

Under the Policy, suit must be brought within two-years after the date of loss. SMF ¶ 8. This provision is valid and enforceable. *See Koclanakis v. Merrimack Mut. Fire Ins. Co*., 899 F.2d 673, 675 (7th Cir. 1990). In Illinois, the date utilized for determining the date of loss is the date on which the actual physical loss of property occurred. *Harvey Fruit Mkt. v. Hartford Ins. Co.*, 294 Ill.App.3d 668, 669 (1st Dist. 1998). The Policy (and IL statutory law) extends the 2-year suit limitation by the number of days between the date the proof of loss is filed by the insured and the date the claim is denied in whole or in part. SMF ¶ 8.

Here, for the reasons discussed above, Plaintiffs claims are barred because they cannot establish that their Building was physically damaged by a fortuitous loss event. But, to the extent they can establish a *prima facie* case (they cannot), Plaintiffs are time-barred from seeking recovery for: **[i]** the alleged total loss, vandalism, and demolition costs; and **[ii]** the alleged fines and penalties imposed by the City. It is undisputed that Plaintiffs' POL was filed on December 16, 2019. The POL was submitted 171 days after the alleged loss on June 28, 2019. GNY denied coverage: **[i]** in-full on August 3, 2021 for all of the alleged damages; and **[ii]** in-part on January 15, 2020 for certain fines claimed by Plaintiffs that were imposed by the City due to building code violations. SMF ¶¶ 34, 44. Plaintiffs filed suit on July 30, 2021. *See* Dkt. 1, ¶ 1.

Based on the foregoing undisputed facts, **[i]** the number of days between the date the POL was submitted and the date of GNY's full denial on August 3, 2021 is 596; thus, the number of days for Plaintiffs to file legal action was 425 days after the denial. Therefore, the time to pursue legal action would have expired on June 28, 2021 but was extended, in part, because Plaintiffs submitted a POL. However, as to the other claims not included in the POL (*i.e.*, for vandalism, demolition, and a total loss), the time for Plaintiffs to file suit on those claims was not extended and expired on June 28, 2021. Although a POL was submitted to GNY on December 16, 2019, Plaintiffs never submitted a new POL for any of these additional losses being claimed. Providing notice of loss is not equivalent to submitting a proof of loss. *Harvey Fruit Mkt.*, 294 Ill. App. 3d at 670. Thus, Plaintiffs cannot argue that the 2-year limitation was tolled for any amount of time in connection with the additional losses being claimed. Simply stated, Plaintiffs' legal action for a total loss, vandalism, and demolition costs are barred by the Policy's suit limitation provision.

Relatedly, **[ii]** the number of days between the date the POL was submitted and the date of GNY's partial denial on January 15, 2020 is 30; thus, the number of days for Plaintiffs to file legal action was 30 days after June 28, 2021. Therefore, the time to pursue legal action would have expired on June 28, 2021 but was extended, in part, by 30 days to July 28, 2021. Because Plaintiffs' complaint was filed *after* July 28, 2021, their alleged claims for indemnification of fines and penalties imposed by the City are time barred under the Policy's suit limitation provision.

V. Plaintiffs are not entitled to any statutory bad faith damages under Section 155

In order to recover under Section 155 an insured must succeed in establishing the insurer's breach of contract. *See Cramer v. Ins. Exch. Agency*, 174 Ill. 2d 513, 524 (1996). As explained above, Plaintiffs are unable to establish its breach of contract of claim against GNY. Section 155 does not permit a claim for damages where an insured is not entitled to coverage. *See O'Rourke v.*

Access Health, Inc., 282 Ill.App.3d 394, 406 (1996). Here, because Plaintiffs are not entitled to coverage, its Section 155 claim fails as a matter of law. *See Cramer*, 174 Ill. 2d at 524.

That said, even if Plaintiffs can establish they are entitled to coverage (they cannot), they will be precluded from obtaining Section 155 damages because this is nothing more than a *bona fide* coverage dispute. Illinois courts have concluded that an insurer's delay or conduct is not vexatious and unreasonable if a *bona fide* coverage dispute exists. *Golden Rule Ins. Co. v. Schwartz*, 203 Ill. 2d 456 (2003). *See also Citizens First Nat'l Bank of Princeton v. Cincinnati Ins. Co.*, 200 F.3d 1102, 1110 (7th Cir. 2000) (Section 155 is penal in nature and, therefore, is strictly construed. To prevail on a Section 155 claim the insured must prove that the insurer's behavior was willful and without reasonable cause. An insurer is *not* liable merely for taking an unsuccessful position in litigation or because it is found liable for breaching its contract with the insured. An insurer's conduct is not vexatious or unreasonable if "(1) there is a *bona fide* dispute concerning the scope and application of insurance coverage; (2) the insurer asserts a legitimate policy defense; (3) the claim presents a genuine legal or factual issue regarding coverage; or (4) the insurer takes a reasonable legal position on an unsettled issue of law.") (citations omitted).

Here, there is *bona fide* coverage dispute that precludes Plaintiffs from obtaining Section 155 damages even if Plaintiffs can somehow establish that it is entitled to coverage. Therefore, any Section 155 claim fails as a matter of law.

WHEREFORE, GNY prays for the entry of an Order of Summary Judgment in its favor and against Plaintiffs, together with its costs and for such other and further relief as may be deemed just and proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 27, 2025 a copy of the foregoing Memorandum was electronically filed with the Clerk of Court using the CM/ECF system, which will automatically send email notification of such filing to all attorneys of record.

/s/: Alexander J. Bialk