CASE NO. 25-3439

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

3371 Reading, LLC,

Plaintiff-Appellant,

V.

Liberty Mutual Group, Inc., Ohio Casualty Insurance Company, Jonathan Jones,

Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of Ohio, Western Division
Originating Case No. 1:22-cv-00062

BRIEF OF DEFENDANTS-APPELLEES LIBERTY MUTUAL GROUP, INC.; THE OHIO CASUALTY INSURANCE COMPANY; AND JONATHAN JONES

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Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 25-3439 Case Name: 3371 Reading, LLC v. Liberty Mutual Gro

Name of counsel: William M. Harter

Pursuant to 6th Cir. R. 26.1, Liberty Mutual Group, Inc.
Name of Party

makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 25-3439 Case Name: 3371 Reading, LLC v. Liberty Mutual Grc

Name of counsel: William M. Harter

Pursuant to 6th Cir. R. 26.1, The Ohio Casualty Insurance Company
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

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STATEMENT REGARDING ORAL ARGUMENT

This appeal involves a straightforward application of well-established Ohio law regarding contracts and, more specifically, an insurance policy ("the Policy"). The Policy's clear and unambiguous language should be applied, and doing so confirms that the claims of Plaintiff-Appellant 3371 Reading, LLC ("Plaintiff") lack merit as a matter of law.

Defendants-Appellees The Ohio Casualty Insurance Company ("Ohio Casualty"), Liberty Mutual Group, Inc. ("Liberty Mutual") and Jonathan Jones (collectively, "Defendants") do not believe that oral argument is necessary in this action, as the Court can simply review the Policy and apply it to the undisputed facts. But, Defendants would welcome the opportunity to address any questions the Court may have if the Court believes oral argument would be helpful.

STATEMENT OF JURISDICTION

Defendants agree with Plaintiff's Jurisdictional Statement.

STATEMENT OF THE ISSUES

Defendants agree with Plaintiff's Statement of the Issues.

INTRODUCTION

This action involves an insurance coverage dispute arising out of a commercial fire at 3371 Reading Road in Cincinnati, Ohio ("the Property"). While Plaintiff has attempted to transform the suit into more than that, by adding claims of bad faith, fraud in the inducement and violation of the Ohio Deceptive Trade

Practices Act ("ODTPA"), this action remains at its core an insurance coverage dispute. And the District Court appropriately resolved this dispute in Defendants' favor as a matter of law.

According to Plaintiff:

> [T]he district court ignored Defendants' admitted fraud in the inducement, rewrote the Policy in a legally spurious effort to give it "vitality" so as to avoid the conclusion the coverage was illusory, thus resulting in yet another denial of coverage Plaintiff. The district court then carried over its erroneous and legally flawed conclusions to the other claims asserted by Plaintiff, despite the stunning admissions from Defendants' corporate witnesses who substantiated the factual bases of those other claims.

(Pl. Brief, Doc. 18, p. 14.)

If this had actually happened, such a decision would be outrageous. But, it did not. Defendants never admitted fraud; their representatives did not make any "stunning" admissions; the District Court did not rewrite the Policy; and the District Court's decision is neither erroneous nor legally flawed. Instead, Plaintiff grossly mischaracterizes the facts of this case and unjustifiably attacks the validity of the District Court's decision.

As discussed more fully herein, the following facts are undisputed:

1. Ohio Casualty issued Plaintiff the Policy for the Property.

2. A protective devices endorsement ("the PD Endorsement") and a protective devices schedule ("the PD Schedule") were specifically added to the Policy.

3. These indicate that, for fire claims, the Policy will not provide coverage unless Plaintiff "maintain[s]" a "fenced jobsite," defined to mean "a fence, not less than six (6) feet in height, that completely surrounds the jobsite, with no openings unless gated,"

4. Plaintiff, Ohio Casualty and its underwriter, Mr. Jones, knew before the Policy was placed that on its south side, the building on the Property ("the Building") shared a common wall with an adjacent structure.

5. It is physically impossible for a fence to exist through the shared wall.

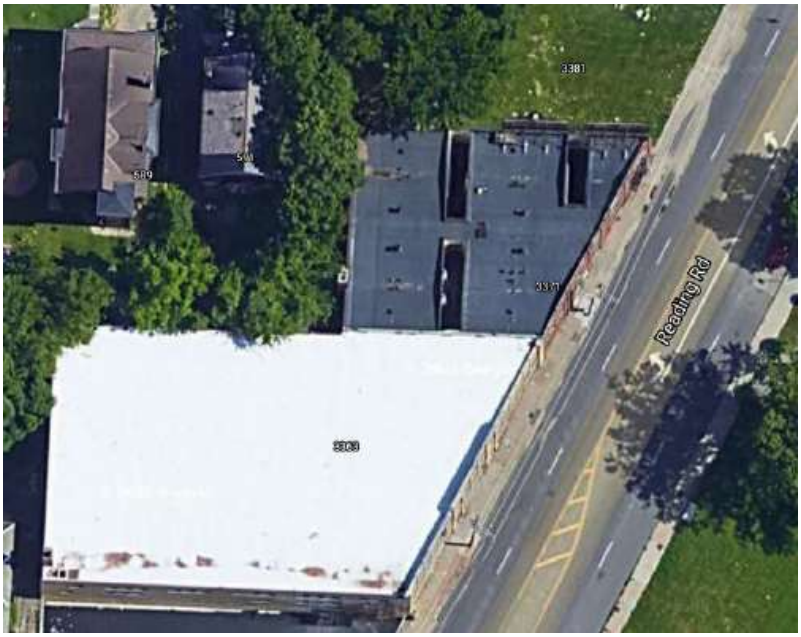
6. Though physically possible, Plaintiff never installed or tried to install any fence around the other three sides of the Property.

7. A fire occurred at the Property.

8. After investigation, Ohio Casualty denied the fire claim under the PD Endorsement and PD Schedule.

The insurance coverage question in this case is: When the PD Schedule and PD Endorsement were added to this particular Policy for this precise Property, and when everyone knew the characteristics of the Property beforehand, should the provisions be interpreted: (a) in a way that renders compliance impossible; or (b) in a way that gives the provisions vitality as part of the Policy? Plaintiff incorrectly urges the former result, while Defendants and the District Court correctly believe the latter is appropriate.

The parties agree that, before the fire, the Building was the dark-roofed, trapezoid-shaped building in this image:



If a picture is worth a thousand words, the dispositive question in this case is: If Plaintiff had installed a fence around the Property as approximated below, would Plaintiff have complied with the fenced-jobsite provisions of the Policy?

Plaintiff's Brief completely ignores this Court's decision in *New Hamilton Liquor Store, Inc. v. AmGuard Ins. Co.*, 2021 WL 5974158 (6th Cir. Dec. 16, 2021), although the District Court correctly found the same instructive. Therein, this Court affirmed a summary judgment decision finding that a legally identical protective devices schedule and endorsement required an insured not just to "maintain" the described protective device, but also to "install" and "have" the same. *Id.* at 2, 5, 6. Because the insured therein did not, the insured was not entitled to coverage for a subsequent fire loss. *Id*. Plaintiff's failure to alert this Court to *New Hamilton* is more "stunning" than anything identified in Plaintiff's Brief.

It also bears mention that Defendants and the District Court were not the only ones to understand the purpose and intent of the PD Schedule and PD Endorsement. When Ohio Casualty's claim investigator asked Lynn Plona, Plaintiff's account manager at Plaintiff's independent insurance broker, about these provisions, she admitted that she did not see them when she placed the coverage for Plaintiff. But,

when she was shown them during the claim investigation, she immediately told Ohio Casualty that if she had seen them when the Policy was placed, she would have told Plaintiff, "Put up a fence or you won't get insurance."

The District Court correctly ruled that, as a matter of law, the Policy does not provide coverage for Plaintiff's fire claim. Plaintiff's breach of contract claim and Plaintiff's bad faith claim are therefore not viable. Plaintiff's other claims also fail, because Defendants did not make any misrepresentations about the Policy's scope of coverage. The District Court correctly denied Plaintiff's Motion for Partial Summary Judgment and granted Defendants' Motion for Summary Judgment. Defendants respectfully request that this Court affirm that decision.

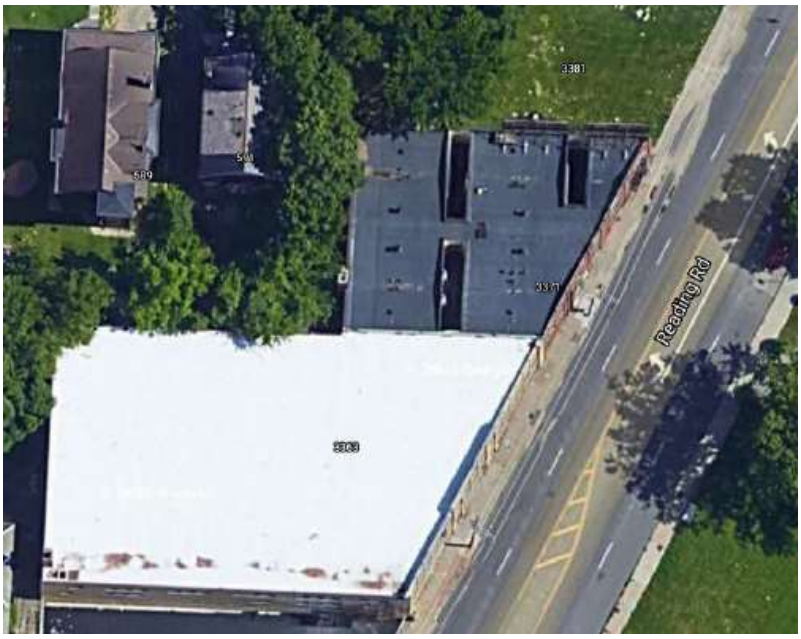
STATEMENT OF THE CASE

A. The Parties

Plaintiff is an Ohio entity which at one point owned the Property. (Am. Comp., R. 76, PageID # 3731.) Ohio Casualty wrote the Policy for the Property. (Policy, R. 76-1, PageID # 3755.) Ohio Casualty is one of the underwriting companies within Liberty Mutual. (J. Wormington Depo., R. 91-1, PageID # 3909.) Mr. Jones is an underwriter working for Liberty Mutual who underwrote the Policy. (J. Jones Depo., R. 92-1, PageID # 4156, 4188.)

B. The Property

The Building is the dark-roofed, trapezoid-shaped building in this image:



(Property Photo, R. 76-3, PageID # 3825.) On the Property's east boundary, the Building abuts the Reading Road sidewalk; on the Property's north boundary line, the Building abuts another privately owned property; on the west side of the Property, some vegetation exists between the Building and boundary line; and on the Property's South boundary, the Building has a shared wall with a neighboring, white-roofed structure. *Id*.

Plaintiff acquired the Property effective May 4, 2020. (S. Grinberg Depo., R. 94-1, PageID # 4476.) Plaintiff intended to renovate the abandoned structure on the Property into a mixed-use building, with commercial space and apartments to lease. (*Id*. at PageID # 4548-4549.)

C. The Process of Procuring Insurance

When purchasing the Policy, Plaintiff had an existing relationship with Camargo Insurance Agency ("Camargo"). (Am. Compl., R. 76, PageID # 3733.) According to its principal, Jacob Mueller, Camargo is an independent insurance broker which places policies through several insurers, including Liberty Mutual's companies. (J. Mueller Depo., R. 95-1, PageID # 4750-4754.)

On December 11, 2020, Camargo began the process of securing property insurance for the Property from Ohio Casualty. (R. 95-2 PageID # 4985.) Mr. Mueller and Plaintiff's account manager at Camargo, Lynn Plona, worked directly with Mr. Jones to place the coverage. (J. Mueller Depo., R. 95-1, PageID # 4782.)

As part of the underwriting process, Mr. Jones reviewed images of the Property. (J. Jones Depo., R. 92-1, PageID # 4212.) Mr. Jones was aware of the location of the Building within the Property and knew that it shared a wall with the structure to the south and bordered a sidewalk to the east. (*Id.* at PageID # 4213.)

Mr. Jones also ran a Risk Meter Report on the Property, which is a third-party's compilation of crime statistics. (*Id.* at PageID # 4211.) The Risk Meter Report showed that the Property was across the street from a higher-than-usual property crime area. (*Id.* at PageID # 4246-4247.) Nine days prior to the application for the Policy, a City of Cincinnati Building Code violation had also been issued for the Property which indicated:

This building located at 3371 Reading Road
is now vacant and is in a state of disrepair, neglect and a vandalized dilapidated structure open to trespassers and the deteriorating effects of the weather. The roof has large holes visible from the exterior. The roof is rotten, unsound and there is considerable sag in the roof structure. The windows are broken, missing and/or boarded up. The exterior doors are broken, missing and/or boarded up and need to be repaired or replaced. There is considerable storage of furniture, debris, rubbish, and miscellaneous items in the street level rooms of the building which increases the fire load. The concrete floor structure has dropped and sunk due to excessive water leakage from the roof. The wood beams between the first and second floor are rotted and unlikely to perform their intended functions. It is unsafe for anyone to enter this area. This building has not been maintained, does not provide the basic elements for shelter or safety and is indecent, unsafe, and insanitary for human habitation. This building is not compliant with the VBML requirements. It does not meet 1101.77 CMC.

(Code Violation Notice, R. 94-2, PageID # 4700-4703.)

On December 14, 2020, Mr. Jones sent Camargo a proposal ("the Proposal") for the Policy. (R. 95-2, PageID # 5002-5011.) The Proposal was a quote with several provisions, including as most pertinent to this case the Protective Devices Schedule and the PD Endorsement. (*Id.* at PageID # 5008.) Mr. Jones specifically chose to add the PD Schedule and PD Endorsement to the Proposal being quoted for this particular Property. (J. Jones Depo., R. 92-1, Page ID 4216-4217.)

Mr. Jones testified about why, when underwriting the Policy, he would include the PD Schedule and the PD Endorsement requiring that a fenced jobsite be maintained at the Property, even though he did not know whether a fence existed at the time:

> I don't have to know whether there is a fence there. I know that in order for the policy conditions to apply, a fence would have to be there during construction.

(J. Jones Depo., R. 92-1, PageID # 4179-4180.) Per Mr. Jones, the fence would have to be in place not during underwriting, but instead "once the builders risk policy was

put into effect." (*Id.* at PageID # 4178.) Therefore, Mr. Jones testified that asking during underwriting whether Plaintiff has a fence at that time is "irrelevant," because in providing the Proposal and then the Policy, Mr. Jones is saying: "[H]ere is what I am writing. You need to apply this as part of your coverage." (*Id.* at PageID # 4178.)

It is standard practice for Camargo to review proposals for insurance independently and with its customers, and nothing about Plaintiff's account would have been handled any differently. (J. Mueller Depo., R. 95-1, PageID # 4804-4805.) But, Mr. Mueller could not recall anyone actually reviewing the Proposal with Plaintiff. (*Id.* at PageID # 4809-4810.) It is undisputed that Plaintiff subsequently purchased the Policy as quoted, however. (S. Grinberg Depo., R. 94-1, PageID # 4475.)

By December 16, 2020, both Camargo and Plaintiff had received a copy of the Policy, including the PD Endorsement and the PD Schedule. (J. Mueller Depo., R. 95-1, PageID # 4817-4818; Camargo-Plaintiff Email, R. 95-2, PageID # 5041-5045.) At no point in time did anyone from Camargo ask Ohio Casualty or Mr. Jones why the Policy included the PD Endorsement or the PD Schedule. (J. Mueller Depo., R. 95-1, PageID # 4822-4823.)

D. The Policy

The Policy bears number BMO 62480292 and has effective dates of December 11, 2020 – December 11, 2021. (Policy, R. 76-1, PageID # 3754.) Generally, the Policy provides property coverage for the Property while it is "in the course of rehabilitation or renovation." (*Id.* at PageID # 3799.) Pursuant to the Policy's Schedule of Coverages, the Property is the only Scheduled Location. (*Id.* at PageID # 3784.) The coverage is provided by "we" or "us," which the Policy defines as "the company providing this coverage." (*Id.* at PageID # 3799.) Ohio Casualty is the company providing the coverage. (*Id.* at PageID # 3755-3760: "Coverage is Provided By: The Ohio Casualty Insurance Company.")

The PD Endorsement modifies the Policy's coverage:

> PROTECTIVEDEVICES ENDORSEMENT
>
> If indicated on the Protective Devices Schedule, the following conditions apply to the locations described on the schedule.
>
> OTHER CONDITIONS
>
> Protective Devices - "You" are required to maintain, at all times during the policy period, the protective devices and services described on the Protective Devices Schedule.

(*Id.* at PageID # 3762.)

The PD Schedule then provides:

PROTECTIVEDEVICES SCHEDULE

(The entries required to complete this schedule will be shown below or on the "schedule of coverages".)

Protective Device or Service

Fenced Jobsite. Fenced jobsite means a fence, not less than six (6) feet in height, that completely surrounds the jobsite, with no openings unless gated. All gates to such fence shall be closed and locked, to secure against entry to the jobsite, during all non-working hours

(*Id.* at PageID # 3761.)

Further, pursuant to the PD Endorsement:

PERILS EXCLUDED

As respects the locations specified in the Protective Devices Schedule, the following exclusion is added to Perils Excluded:

"We" do not pay for loss caused by fire or theft if, prior to the fire or theft, "you":

1. had knowledge of any suspension or impairment in any protective device or service described on the Protective Devices Schedule and did not notify "us"; or

2. failed to maintain in complete working order, any protective device or service described on the Protective Devices Schedule which "you" control.

(*Id.* at PageID # 3762.)

The Policy also provides, "'We' do not cover more than 'your' insurable interest in any property." (*Id.* at PageID # 3808.) "You" and "your" as used in the Policy mean "the persons or organizations named as the insured on the declarations" – in this case, Plaintiff. (*Id.* at PageID # 3799 and 3755.)

E. Plaintiff never maintained a fence on the Property.

Plaintiff has confirmed that, unless the walls of the Building are considered a fence, there was never a fence on the Property. (S. Grinberg Depo., R. 94-1, PageID # 4524-4526.) Plaintiff could not put a fence along the south side of the Property,

because of the shared wall with the adjacent structure. (*Id.* at PageID # 4539.) Plaintiff never applied for a permit to put up a construction fence along Reading Road on the east boundary of the Property. (*Id.* at PageID # 4532.) Plaintiff also believed that it was unable to install a fence along the north side of the Property, because the adjoining lot was owned by someone else. (*Id.* at PageID # 4534-4535.)

Plaintiff never asked Ohio Casualty if Plaintiff could satisfy the Policy requirements by putting a fence from one side of the shared wall around the Building to the north and back to the other side of the share wall. (*Id.* at PageID # 4539-4540.) Plaintiff also did not discuss with Ohio Casualty, prior to the fire, Plaintiff's belief that it was impossible to surround the Property with a fence. (*Id.* at PageID # 4540-4541.)

F. The Claim and its Investigation

On August 6, 2021, a fire significantly damaged the Building. (Am. Compl., R. 76, PageID # 3738.) Plaintiff reported the claim, and by August 11, 2021, Ohio Casualty's claims team had confirmed that the Policy contained the PD Endorsement and PD Schedule and that there was no fence at the jobsite at the time of the fire. (J. Wormington Depo., R. 91-1, PageID # 3989-3990.)

Continuing the investigation, though, on August 18, 2021, the claim investigator, Shawn Asselin, spoke with Mr. Jones to confirm the underwriting

history of the Policy and to confirm Mr. Jones' intent to include the PD Endorsement and PD Schedule in the Policy. (S. Asselin Depo., R. 93-1, PageID # 4321-4323.)

On August 25, 2021, Mr. Asselin next interviewed Camargo's principal, Mr. Mueller, to discuss the issuance of the Policy. (*Id.* at PageID # 4323.) Mr. Mueller confirmed that Ms. Plona was the agent involved in placing the Policy. (*Id.* at PageID # 4324.)

On September 8, 2021, Mr. Asselin took a recorded statement from Ms. Plona. (L. Plona Aff., R. 96-1, PageID # 5061-5062.) In her recorded statement, Ms. Plona confirmed that she was Plaintiff's account manager and that she had 35 years of insurance experience. (Plona Rec. Stmt., 8:26-8:30 and 11:36-11:39.)[1] She indicated that, despite the PD Endorsement being listed in the Proposal and being in the Policy, she had not seen the PD Endorsement. (*Id.* at 32:45-33:33.) Ms. Plona admitted that she did not have time within her job to review every endorsement. (*Id.* at 33:33-33:50.) After reviewing Camargo's records, Ms. Plona did confirm that she had forwarded the Policy to Plaintiff. (*Id.* at 34:14-36:28.)

[1] The designations regarding portions of the recorded statement identify the times therein. Ms. Plona identified and incorporated her recorded statement into her Affidavit as Exhibit A thereto, and Ms. Plona confirmed that she answered the questions during the recorded statement truthfully. (L. Plona Aff., R. 96-1, PageID # 5061-5062.) The audio file of Ms. Plona's recorded statement was delivered to the District Court Clerk's office, which then provided the statement to Chambers. (R. Note of December 9, 2024 at 4:05 PM.) A copy of the audio file was also delivered to this Court on October 24, 2025. (Doc. 20.)

Mr. Asselin questioned Ms. Plona on whether she would have placed the Policy had she known about the PD Endorsement and the absence of a fence at the Property:

> Q: In layman's terms, we're trying to understand if you would you have written the Policy had you known about the protective safeguard, if the fencing was not completed?
>
> A: We would've said, ***"Put up a fence or you won't get insurance."*** We do that all the time. If an underwriter says. "This is what you need to do," then we tell this client, "This is what you need to do," and they do it.

(*Id.* at 40:16-40:43.) (Emphasis added.) Camargo took that approach – advising Plaintiff and its related companies about various underwriting conditions for the placement of different policies – because if Plaintiff did not address such concerns, for "many of their accounts," they "won't get insurance." (*Id.* at 40:55-41:22.)[2]

On September 21, 2021, Mr. Asselin took the recorded statement of Plaintiff's principal, Stanislav Grinberg. (S. Asselin Depo., R. 93-1, PageID # 4361.) Mr.

[2] Defendants deny the assertion that these statements are "taken out of context" or a "red herring." (Pl. Brief, p. 46, n. 5.) Mr. Asselin was questioning Ms. Plona about what she would have done as Plaintiff's insurance account manager if she had realized what was in the Policy. Her statement goes directly to the heart of the question regarding the meaning of the Policy. If Plaintiff can be heard to argue that the Policy did not require it to put up a fence, then Ms. Plona can certainly be heard to assert that it did.

Grinberg advised Mr. Asselin that he was unaware of any fence requirement within the Policy. (*Id.* at PageID # 4361.)

With Ohio Casualty having done a full investigation into coverage, claim adjuster James Wormington made the decision to deny the claim. (J. Wormington Depo., R. 91-1, PageID # 4008.) The underwriter, Mr. Jones, played no role in the decision to deny the claim. (J. Jones Depo., R. 92-1, PageID # 4223.) A denial letter was issued on September 30, 2021. (Denial Letter, R. 76-2, PageID # 3815.) The denial letter cites the above-quoted provisions of the PD Endorsement and PD Schedule. (*Id.* at PageID # 3816.) The denial letter then provides within its "application of policy" discussion, "No fencing was placed around the jobsite as required by the Protective Devices Endorsement on the policy." (*Id.* at # 3817.)[3]

Mr. Wormington testified that if Plaintiff had installed a fence from one point on the shared wall, around the other three sides, to the other point on the shared wall, he would have considered Plaintiff to have complied with the PD Endorsement as written in the Policy. (J. Wormington Depo., R. 91-1, PageID # 4094.) Such a fence would have looked something like this:

[3] The assertion that Mr. Wormington misquoted or "rewrote" the Policy (Pl. Brief, Doc. 18, p. 33) simply ignores that the denial letter sets forth the language of the PD Endorsement and PD Schedule *verbatim* before applying the same to Plaintiff's claim on the next page of the letter. (Denial Letter, R. 76-2, PageID # 3816, 3817.)

G. Plaintiff's Causes of Action

Plaintiff's Amended Complaint is the operative pleading. (R. 76.) Therein, Plaintiff alleges breach of contract, bad faith, and violation of the ODTPA claims against Ohio Casualty and Liberty Mutual. Plaintiff also alleges a fraud in the inducement claim against Ohio Casualty, Liberty Mutual and Mr. Jones.

H. Mr. Jones and Mr. Wormington did not offer any "shocking" testimony or make any "stunning" admissions contrary to the positions taken by Ohio Casualty in denying Plaintiff's claim.

Plaintiff's Brief repeatedly suggests that, while testifying as the corporate representatives of Ohio Casualty and Liberty Mutual regarding underwriting and claim handling, respectively, Mr. Jones and Mr. Wormington made admissions which establish Defendants' liability in this action. That is simply not true.

Per Plaintiff, Mr. Jones "shockingly admitted that the Policy would never cover any fire loss at the [Property] because he knew it was impossible to comply with the [PD Endorsement] he added to the Policy, at least based on the plain language of the [PD Endorsement] and how Defendants planned, from the start, to

interpret the PD Endorsement." (Pl. Brief, Doc. 18, pp. 10-11.) This simply did not happen. At no point in Mr. Jones' deposition did anyone use the words "possible" or "impossible," for example. (J. Jones Depo., R. 92-1, generally.)

What Mr. Jones actually testified was that he did not believe Ohio Casualty would ever pay a fire claim if Plaintiff "fail[ed] to maintain in complete working order a 6 foot high fence completely surrounding the job site[.]" (*Id.* at PageID # 4225.) But why would this testimony be "shocking" or "stunning"? Setting aside that Mr. Jones was not the corporate representative on claims decisions, and that he testified that he played no role in the denial of Plaintiff's claim (*Id.* at PageID # 4223), Mr. Jones' testimony is consistent with what the Policy says. If Plaintiff does not meet the terms of the PD Endorsement and PD Schedule, no coverage exists, and without coverage, there would be no reason to pay a claim. It is not stunning or shocking that an underwriter would expect a claim to be denied if the Policy provisions are not met. It is only shocking and stunning that Plaintiff so fervently believes that its claim should be paid despite not satisfying the Policy's provisions.

Unlike Mr. Jones, Mr. Wormington did testify as both the person who made the decision to deny the claim and the corporate representative for claim handling. And he testified that, had Plaintiff installed the physically possible fence from one point of the shared wall, around three sides of the Property, to the other point of the shared wall, he would have considered Plaintiff to have satisfied the Policy

provisions in question. (J. Wormington Depo., R. 91-1, PageID # 4094: doing this, Plaintiff would have "compl[ied] with the protective devices endorsement as it was written on this policy.") Again, this is neither shocking nor stunning. Instead, Mr. Wormington's testimony confirms that Plaintiff could have met the Policy's conditions and had its claim paid – refuting all "impossibility" arguments in Plaintiff's Brief.

I. A genuine issue of material fact exists regarding the amount of any breach of contract damages Plaintiff might have otherwise been entitled to recover.

Defendants do not believe that Plaintiff is entitled to any relief on its breach of contract claim. But, if the Court disagrees, questions of fact exist regarding the amount of any such damages.

As more fully explained in Plaintiff's Brief, Plaintiff obtained the Property on May 4, 2020 from a related entity, 4588 LLC. (Pl. Brief, Doc. 18, p. 14.) The Hamilton County, Ohio Auditor's website confirms Plaintiff's ownership at that time. (Auditor's Website, R. 94-2, PageID # 4581.) The ownership interest did not change between May 4, 2020 and December 2020 when the Policy was issued. (*Id.*) On April 21, 2021, however, after the issuance of the Policy and before the fire, Plaintiff transferred the Property to Mayost Vision I LLC. (*Id.*) Mayost Vision I LLC was therefore the titled owner of the Property on the date of loss in August 2021. (*Id.*)

Mayost Vision 1 LLC[4] was organized as a joint venture between Mayost Partners LLC and Vision & Beyond Group LLC. (S. Grinberg Depo., R. 94-1, PageID # 4466-4467; Joint Venture Agreement, R. 94-2, PageID # 4589.) The Property was the only asset of Mayost Vision 1, and Mayost Vision 1 was designed to be owned 75% by Mayost Partners LLC and 25% by Vision & Beyond Group LLC. (Joint Venture Agreement, R. 94-2, PageID # 4590.) Vision & Beyond Group LLC, Mayost Partners LLC and Mayost Vision 1 LLC are not parties to this action. (Am. Compl., R. 76.)

Mr. Grinberg testified that on February 20, 2021, an Amended and Restated Operating Agreement was executed for Mayost Vision 1 LLC. (S. Grinberg Depo., DRoc. 94-1, PageID # 4472.) This Amended and Restated Operating Agreement purports to change the ownership of Mayost Vision 1 LLC from 25% owned by non-party Vision & Beyond Group LLC to 25% owned by Plaintiff. (Am. Operating Agreement, R. 94-2, PageID # 4625, 4638.) While Defendants believe many questions exist regarding whether this actually happened, even assuming for purposes of summary judgment briefing only that it did, Plaintiff at most has a 25% ownership interest in the Property, with the other 75% interest belonging to non-party Mayost Partners LLC. (S. Grinberg Depo., R. 94-1, PageID # 4475.)

[4] While the Auditor's website uses "I" in Mayost Vision I, other documents, including those filed with the Secretary of State, use "1."

SUMMARY OF THE ARGUMENT

The District Court correctly entered judgment in Defendants' favor, granting Defendants' Motion for Summary Judgment and denying Plaintiff's Motion for Partial Summary Judgment.

First, Ohio Casualty and Liberty Mutual did not breach the Policy. Liberty Mutual is not even a party to the Policy, and therefore cannot breach it. Ohio Casualty is a party to the Policy, but the Policy must be construed in a way which gives the fenced-jobsite provisions vitality. The way to do so is to construe the PD Schedule and PD Endorsement as requiring a fence around the three sides of the Property which do not consist of a shared wall. Construing the provisions as such, the Policy as a whole is not ambiguous or illusory. Plaintiff simply never complied with the fenced-jobsite provisions, and the Policy therefore provides no coverage for Plaintiff's claim.

Finally, even if Plaintiff does have an otherwise-viable breach of contract claim – which Ohio Casualty and Liberty Mutual deny – questions of fact exist as to the amount of potential contract damages.

Second, Ohio Casualty and Liberty Mutual did not act in bad faith in denying Plaintiff's claim. Again, Liberty Mutual is not a party to the Policy, and it thus owes Plaintiff no duty of good faith. While Ohio Casualty owes Plaintiff a duty of good faith, Ohio Casualty satisfied the same by taking a claim position that is reasonably

justified. Plaintiff would only be entitled to summary judgment on its bad faith claim if Plaintiff's claim was not even "fairly debatable," which is certainly not the case.

Third, Plaintiff's fraud claim fails because the only purportedly fraudulent "representations" made by Defendants are set forth in the Policy. Plaintiff cannot base a fraud claim on written representations indisputably provided to Plaintiff prior to Plaintiff suffering its claimed damages.

Fourth, Plaintiff's ODTPA claim fails because this claim is nothing more than a re-cast breach of contract claim. Further, as with Plaintiff's fraud claim, Plaintiff does not even allege any misrepresentation by Ohio Casualty or Liberty Mutual other than in the Policy itself. But, Plaintiff had a copy of the Policy long before the fire at issue and simply did not follow it. Without misrepresentations separate from the Policy, Plaintiff has no viable ODTPA claim.

For these reasons, the District Court correctly granted Defendants' Motion for Summary Judgment and denied Plaintiff's Motion for Partial Summary Judgment. Defendants urge this Court to affirm the District Court's decision.

ARGUMENT[5]

A. Ohio Casualty and Liberty Mutual are entitled to summary judgment on Plaintiff's breach of contract claim, and Plaintiff is not.

1. Standard for Insurance Policy Interpretation

An insurance policy is a contract and must be interpreted by utilizing "the familiar rules of construction and interpretation applicable to contracts generally." *Whitt Mach., Inc. v. Essex Ins. Co.*, 377 Fed.Appx. 492, 496 (6th Cir. 2010), *citing Gomolka v. State Auto. Mut. Ins. Co.*, 436 N.E.2d 1347, 1348 (Ohio 1982) and *Hybud Equip. Corp. v. Sphere Drake Ins. Co., Ltd.*, 597 N.E.2d 1096 (Ohio 1992). In interpreting a contract, including an insurance policy, Courts "are required, if possible, to give effect to every provision of the contract." *Sunoco, Inc. (R&M) v. Toledo Edison Co.*, 953 N.E.2d 285, 295 (Ohio 2011). *See also*, *Columbia Cas. Co. v. State Auto Mut. Ins. Co.*, 2025 WL 1082120, *5 (6th Cir. Apr. 10, 2025).

Every contract "is to be given a reasonable construction in conformity with the intention of the parties as gathered from the ordinary and commonly understood meaning of the language employed." *Whitt*, 377 Fed. Appx. at 496, *citing Andersen v. Highland House Co.*, 757 N.E.2d 329, 332 (Ohio 2001). *See also*, *Ironshore Indem., Inc. v. Evenflo Co., Inc.*, 2025 WL 1356414, *2 (6th Cir. Apr. 25, 2025), *citing Tera, LLC v. Rice Drilling D, LLC*, 248 N.E.3d 196, 200-201 (Ohio 2024)

[5] Defendants agree with Plaintiff's Standard of Review. (Pl. Brief, Doc. 18, p. 30.)

("[W]e must apply 'the plain and ordinary meaning of the language used in the [Policy] unless another meaning is clearly apparent from the [Policy's] contents.")

Ambiguous provisions of an insurance policy are generally construed against the insurer. *Westfield Ins. Co. v. Galatis*, 797 N.E.2d 1256, 1262 (Ohio 2003). But, "that rule will not be applied so as to provide an unreasonable interpretation of the words of the policy." *Id*. Further, "a court cannot create ambiguity in a contract where there is none," and "[a]mbiguity exists only when a provision at issue is susceptible of more than one reasonable interpretation." *Whitt*, 377 Fed. Appx. at 496, *citing Lager v. Miller-Gonzalez*, 896 N.E.2d 666, 669 (Ohio 2008). Where contractual language is "clear," the Court "look[s] no further than the Policy itself to find the intent of the parties." *Ironshore*, 2025 WL 1356414 at *3 (citations omitted).

"Courts disfavor interpretations that render contracts illusory or unenforceable, and prefer a meaning which gives the contract vitality." *Northgate Lincoln-Mercury, Inc. v. Ford Motor Co.*, 507 F.Supp.3d 940, 947 (S.D. Ohio 2020) (citation omitted). "If one construction of a doubtful condition written in a contract would render a clause meaningless and it is possible that another construction would give that same clause meaning and purpose, then the latter construction must prevail." *Sunoco, Inc.*, 953 N.E.2d at 295. *See also*, *Columbia*, 2025 WL 1082120

at *5 (declining to interpret policy in a way which rendered a provision "superfluous").

For policies of insurance in particular, when "construing an agreement the court should prefer a meaning which gives it vitality rather than a meeting which renders its performance illegal or impossible." *Talbert v. Continental Cas. Co.*, 811 N.E.2d 1169, 1172 (Ohio Ct. App. 2004). *See also*, *Carolina Cas. Ins. Co. v. Canal Ins. Co.*, 555 Fed.Appx. 474, 478 (6th Cir. 2014), *citing Talbert*, 811 N.E.2d at 1172 (Court should avoid "contract interpretations which render contracts illusory or unenforceable").

2. *Dominish v. Nationwide Insurance Company* is critically important, but Plaintiff steadfastly refuses to acknowledge the same.

Explaining a trap that some Courts fall into, the Ohio Supreme Court held:

> In isolation, any word or phrase in the contested policy language may be ambiguous. When considered as a whole, however, the provision is unambiguous.

Dominish v. Nationwide Ins. Co., 953 N.E.2d 820, 822 (Ohio 2011).[6]

In *Dominish*, an insured challenged the meaning of "action" and "started" within a provision providing: "No action can be brought against us unless there has

[6] This Court has repeatedly cited *Dominish* and its standard for unambiguity. *See, e.g., Wilkerson v. Am. Family Ins. Co.*, 997 F.3d 666, 670 (6th Cir. 2021); *Ceres Enterprises, Inc. v. Travelers Ind. Co. of Am.*, 2022 WL 17830722, *2 (6th Cir. Dec. 21, 2022).

been full compliance with the policy provisions. Any action must be started within one year after the date of loss or damage." *Dominish*, 953 N.E.2d at 821. The insured urged the Court to consider definitions of these everyday words outside the policy, and based on those everyday definitions in isolation, to find ambiguity. *Id*.

Considering whether the words were ambiguous, the Court held, "Even though most words in the English language have multiple meanings, ambiguity should not be created where it does not exist." *Id*. The Court then concluded that, ***within the context of the policy provision***, the words "action" and "started" were not ambiguous, even though "the two sentences could have been written more clearly." *Id*. (Emphasis added.) Per the Court, "[T]here are limitations in the English language with respect to being both specific and manageably brief, and it seems to us that although the prohibitions may not satisfy those intent on finding fault at any cost, they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with." *Id*. *citing United States Civ. Serv. Comm. v. Natl. Assn. of Letter Carriers AFL–CIO*, 413 U.S. 548, 578–579 (1973).

Defendants have relied on *Dominish* throughout dispositive motion practice. (Defs. Mot, R. 99, PageID # 5413, 5424; Defs. Resp. to Pl. Mot., R. 108, PageID # 6048; Defs. Reply, R. 114, PageID # 6282-6283.) But Plaintiff has doggedly refused to acknowledge or rebut the same, including in their Brief to this Court. Rather than

ignoring *Dominish*, as Plaintiff has repeatedly done, Ohio Casualty and Liberty Mutual urge the Court to follow it in this case.

3. Plaintiff has no viable breach of contract claim against Liberty Mutual.

Plaintiff asserts its breach of contract claim against Ohio Casualty and Liberty Mutual. But, Ohio Casualty issued the Policy to Plaintiff, not Liberty Mutual. (Policy, R. 76-1, PageID # 3755-3760: "Coverage is Provided By: The Ohio Casualty Insurance Company.") Because Liberty Mutual did not issue the Policy, Plaintiff and Liberty Mutual are not in privity of contract with each other, and Plaintiff has no viable contract claim against Liberty Mutual. *Mahalsky v. Salem Tool Co.*, 461 F.2d 581, 584 (6th Cir. 1972) ("Ohio has no remedy for and does not recognize an action in contract absent privity.")

Plaintiff's Brief does not identify any reason why Plaintiff would have a viable breach of contract claim against Liberty Mutual, given that they are not in privity. Before the District Court, however, Plaintiff asserted that, because the Policy includes references to "Liberty Mutual Insurance" and a "Liberty Mutual Insurance" logo, and because Liberty Mutual employees were involved in the events giving rise to this action, a breach of contract claim exists against Liberty Mutual. (Pl. Mot., R. 105, PageID # 5978-5980.)

These arguments are unavailing. *See Day v. Golden Rule Ins. Co.*, 2023 WL 5209365, *3, fn. 3 (S.D. Ohio Aug. 14, 2023) (rejecting argument that an insurer's

affiliate is in privity with an insured simply because the affiliate and its logo are mentioned in the policy); *Ohio Valley Physicians, Inc. v. Scottsdale Ins. Co.*, 2020 WL 6220062, *3 (S.D. Ohio Sept. 28, 2020), report and recommendation adopted, 2020 WL 6204464 (S.D. Ohio Oct. 22, 2020) (same regarding an affiliate entity's logo and argument that affiliate also signed the policy and adjusted the claim); *Howard Indus., Inc. v. Ace Am. Ins. Co.*, 2014 WL 978445, *4 (S.D. Ohio Mar. 12, 2014) (no privity exists between an insured and an insurer's affiliate simply because employees of the insurer's affiliate underwrote the policy and handled the claim).

Plaintiff also asserted during summary judgment briefing that courts "have routinely (and uniformly) held that Liberty Mutual Group is a proper party defendant and has liability under both contractual and other claims." (Pl. Mot., R. 105, PageID # 5979. Emphasis added.) If Plaintiff advances this same argument in its Reply Brief, Defendants encourage the Court to note that this argument relies solely on non-Ohio authorities in which the Courts involved could not determine whether Liberty Mutual Insurance Company was the plaintiff's insurer, not whether Liberty Mutual Group, Inc. – the defendant herein – was a proper defendant. *See SF Associates v. Liberty Mut. Ins. Co.*, 2019 WL 10189959, *1-2 (C.D. Cal. Oct. 10, 2019); *OEM Pac., Inc. v. Liberty Mut. Ins. Co.*, 2018 WL 5099481 (C.D. Cal. April 30, 2019); and *Summit Labels, Inc. v. Liberty Mut. Ins. Co.*, 2017 WL 3881768

(N.D. Okla. Sept. 5, 2017).) These cases had nothing to do with Liberty Mutual Group, Inc.

Plaintiff last asserted to the District Court that Liberty Mutual is part of the definition of "we" and "us" within the Policy. (Pl. Mot., R. 105, PageID # 5978.) Plaintiff neglected to advise the District Court, however, that this reference is only located within a "California Privacy Notice," which by its terms only applies "**if [Plaintiff is] a Liberty Mutual commercial line insured or a commercial line claimant *residing in California*.**" (Policy, R. 76-1, PageID # 3774. Bold emphasis in original; italics added.) Plaintiff resides in Ohio, not California. (Am. Compl., R. 76, PageID # 3731.) The California Privacy Notice therefore has no application in this case.

Given the lack of privity between Liberty Mutual and Plaintiff and the lack of any additional persuasive argument to the contrary, Plaintiff has no viable breach of contract claim against Liberty Mutual.

4. Plaintiff has no viable breach of contract claim against Ohio Casualty.

For the Policy to provide coverage on a fire claim, Plaintiff had to maintain a fence, as defined in the Policy, which completely surrounded the jobsite. At the time of the fire, there was indisputably no fence. Plaintiff never even installed, had or put up a fence at the jobsite, and thus certainly never maintained such a fence.

Therefore, under the clear and unambiguous language of the Policy, Plaintiff's fire claim is not covered, and Ohio Casualty properly denied the claim.

a. The PD Endorsement applies, as the Property is on "the schedule."

Plaintiff first argues that the PD Endorsement and PD Schedule do not apply because no location is listed on the PD Schedule. (Pl. Brief, Doc. 18, p. 42.) But, the Policy does not require the Property to be listed on the "PD Schedule." Instead, the PD Endorsement applies "to the locations described in the schedule." (Policy, R. 76-1, PageID # 3762.) The Policy's Schedule of Coverages in turn identifies the Property as the Policy's only scheduled location. (*Id.* at PageID # 3758.) The listing of the Property on the Policy's Schedule of Coverages satisfies the requirement of the PD Endorsement.

Moreover, the Court must give a "reasonable" interpretation to the PD Endorsement. *Westfield*, 797 N.E.2d at 1262; *Whitt*, 377 Fed. Appx. at 496. The only "reasonable" explanation of the PD Endorsement is that it applies to the Property. The Policy was written for only one location – the Property – and, per Plaintiff, the Property was the only location owned by Plaintiff. (S. Grinberg Depo., R. 94-1, PageID # 4432-4433.) The Property is the only location listed on the Schedule of Coverages. If the PD Endorsement was not meant to apply to the Property, even though the Property is the only location insured under the Policy, why would the PD Endorsement have been added to the Policy? Quite simply, it

would not have been. Plaintiff's argument to the contrary is not a reasonable interpretation of the Policy, and the PD Endorsement applies.

b. Plaintiff had to install and have a fence in order to maintain a fence under the PD Endorsement.

The parties agree that, unless the Building's walls count – a nonsensical argument discussed subsequently – there was no fence at the Property when Mr. Jones added the PD Endorsement to the Policy. Plaintiff asserts, though, that because no fence was at the Property, Plaintiff had no duty to "maintain" a fence under the PD Endorsement. (Pl. Brief, Doc. 18, p. 44.) Agreeing with this conclusion would mean that the PD Endorsement – which was specifically added to the Policy because of the Property's characteristics, which everyone knew – would be given no "vitality" and would instead be superfluous.

This Court has already rejected Plaintiff's argument in *New Hamilton*, *supra.*[7] In the facts giving rise to *New Hamilton*, a fire occurred at an insured's location. A protective safeguard endorsement within the insured's policy required the insured to "maintain" the identified protective safeguard, in that case an automatic fire alarm, in order to have fire coverage. *Id*. at *2. The insurer owed no fire coverage if the

[7] While *New Hamilton* was decided under Michigan law, Ohio and Michigan have the same pertinent rules of contract interpretation. *Compare New Hamilton*, 2021 WL 5974158 at *3-4 and *Whitt*, 377 Fed.Appx. at 496. *See also, PrimeOne Ins. Co. v. Grand Trumbull, LLC*, 2021 WL 3414170, *6 (6th Cir. Aug. 5, 2021) (*citing* Ohio decision to define term in Michigan policy).

insured "failed to maintain" the same. The pertinent language in *New Hamilton* is legally indistinguishable from that in the Policy. And, like Plaintiff, the insured in *New Hamilton* did not have the required protective safeguard. *Id*.

Affirming the District Court's entry of summary judgment for the insurer, this Court held that the policy in *New Hamilton* – which on its face required the insured to "maintain" the protective safeguard – required the insured "to install an automatic fire alarm" and to "have a functioning automatic fire alarm system." *Id*. at *5, 6. This Court further held that this protective safeguard endorsement was "unambiguous." *Id*.

The District Court cited *New Hamilton* in support of its decision (Opinion, R. 119, PageID # 6351), and *New Hamilton* is entirely consistent with Ohio authorities discussing how policies of insurance should be interpreted. But, Plaintiff does not cite *New Hamilton* in its Brief. Why not? Presumably to hide the fact that this Court has already held, in effect, that when no fence otherwise exists, a fence must be installed before it can be maintained.[8]

[8] Plaintiff asserted to the District Court that "anyone" reading the PD Endorsement would conclude that Plaintiff did not have to install a fence, and would instead have to "maintain only that which is already in place." (Pl. Mot., R. 105, PageID # 5971. Emphasis in original.) Clearly, Plaintiff's sweeping generalization of what "anyone" would conclude did not include this Court in *New Hamilton* or the District Court in its Opinion.

While not citing *New Hamilton*, Plaintiff does cite the non-binding *Praetorian Ins. Co. v. Axia Contracting, LLC*, 794 Fed.Appx. 791 (10th Cir. 2019). But, Plaintiff misrepresents the same. The Court therein did not hold that the insurer was prohibited from relying on the protective device provisions to deny a claim, as Plaintiff asserts. Instead, the Court held that the insurer could not void the policy based on the same. *Id*. at 793. The Court in fact noted that the claim could be denied under the protective devices provisions if factually applicable. *Id*. Plaintiff either misunderstands or ignores this holding.

Plaintiff also ignores that, when reading the PD Endorsement for the first time during her recorded statement, Plaintiff's own insurance account manager, Ms. Plona, immediately reached the exact opposite conclusion as Plaintiff advances:

> Q: In layman's terms, we're trying to understand if you would you have written the Policy had you known about the protective safeguard, if the fencing was not completed?
>
> A: We would've said, ***"Put up a fence or you won't get insurance."*** We do that all the time. If an underwriter says. "This is what you need to do," then we tell this client, "This is what you need to do," and they do it.

(Plona Rec. Stmt., 40:16-40:43.) Ms. Plona's reading of the PD Endorsement is exactly right. The Policy required Plaintiff to "put up a fence," and Plaintiff did not do so. Plaintiff's position to the contrary is unreasonable.

c. The Building's walls are not a fence.

Plaintiff next argues that, because the Policy does not define a "fence," the Court should consider the walls of the Building to be the fence. (Pl. Mot., R. 105, PageID # 5974.) According to Plaintiff, for the purposes of this case, the Building's walls – and indeed, the walls around any room – are a "fence." (S. Grinberg Depo., R. 94-1, PageID # 4528-4529.)

In making this argument, Plaintiff encourages the Court to look to a dictionary definition of "fence," which apparently includes "a barrier intended to prevent…. intrusion or to mark a boundary." (Pl. Brief, Doc. 18, p. 47.) This argument does nothing other than further confirm Plaintiff's lack of understanding regarding insurance coverage.

"[C]ommon words appearing in a written instrument are to be given their plain and ordinary meaning unless manifest absurdity results or unless some other meaning is clearly intended from the face or overall contents of the instrument." *Alexander v. Buckeye Pipe Line Co.*, 374 N.E.2d 146, 150 (Ohio 1978). "[A]bsent some special circumstance, such as a contractual definition, or a commercial or technical meaning acquired by usage and intended to be used by the parties, or a special meaning manifested in the contractual context, the entire policy must be considered and construed in a fashion which accords words and phrases therein their natural and usual meaning." *Gomolka*, 436 N.E.2d at 1351.

"If a term is not defined in an insurance policy, the term is 'accorded its commonly understood meaning.'" *Westport Ins. Corp. v. Coffman*, 2009 WL 243096 (S.D. Ohio, Jan. 29, 2009), *citing Minges Creek, L.L.C. v. Royal Ins. Co. of Am.*, 442 F.3d 953, 956 (6th Cir. 2006) (Michigan law). "There is no requirement that a dictionary definition can be used; however, [d]ictionary definitions can aid in determining a term's plain and ordinary meaning." *Id*., *citing Stiritz v. Motorists Mut. Ins. Co.*, 2002 WL 479826, *6 (Ohio App. 6 Dist. March 29, 2002). In *Stiritz*, however, an Ohio Court of Appeals affirmed a trial court's decision to not consider, or even allow the insured to introduce, the dictionary definition of "vehicle" when deciding whether a riding lawnmower was a "vehicle." *Stiritz*, 2002 WL 479826 at *6.

Plaintiff cites three non-Ohio decisions which purportedly support its argument. (Pl. Brief, Doc. 18, p. 47.) These authorities are non-binding and substantively unhelpful to Plaintiff's position.

In *Ebert v. Millers Mut. Fire Ins. Co.*, 155 A.2d 484 (Md. App. 1959), a Maryland court of appeals considered whether "an enclosing wall," which was a "remote wall, not a building nor a part of any building," fell within an insurance policy's definition of a "fence." *Id*. at 608-609. Specifically because the wall in *Ebert* was ***separate from the building*** on the property, the wall was deemed to fall under the definition. *Id*. at 612 ("[W]e think that the term 'fences' as used in this

policy may fairly be said to include the enclosing and protecting wall here in question as appurtenant to the building.") In direct contravention to Plaintiff's representation, however, the Court in *Ebert* did not conclude that walls that are part of a building are also a fence. *Id*.

Similarly, in *Cruciano v. Ceccarone*, 133 A.2d 911 (Del. Ct. Chancery 1957), a Delaware court found that a "so-called wall" of cinder block dividing two parties' front porches violated a restrictive covenant against "fences" there. *Id*. at 913. The Court did so, however, because the cinder block "performs no supporting function so far as appears and was inspired largely by a desire to 'black out' plaintiffs' porch from defendants for reasons of personal convenience." *Id.* Unlike the walls of the Building, the cinder block was not serving the same function as the walls of the structure therein, and the cinder block was certainly not the same as the walls. *See also*, *Bubis v. Kassin*, 878 A.2d 815, 821 (N.J. 2005) (14-foot high berm of sand and trees around an oceanfront property constituted a "fence," but there is no suggestion that the berm was the same as the structures on the property).

Unlike the non-Ohio authorities cited in Plaintiff's Brief, the Ohio Supreme Court's decision in *Dominish* is instructive on this issue: "Even though most words in the English language have multiple meanings, ambiguity should not be created where it does not exist." *Dominish*, 953 N.E.2d at 821. In this instance, there is no

need to contort a dictionary definition of a "fence" to confirm that a building's walls are different than a fence around the building.

Mr. Jones knew the characteristics of the Property when he added the PD Endorsement to the Policy. Mr. Jones knew that the Building, with its walls, existed. If all Mr. Jones cared about was that the Building had walls, there would be no reason to add the PD Endorsement requiring a fence, because the walls would be the fence. By adding the PD Endorsement, Mr. Jones was necessarily requiring something more than the already-existent Building walls – in this case, the fence.

Plaintiff also argues that because Mr. Wormington answered Plaintiff's counsel's questions regarding stand-alone dictionary definitions for a "fence," that those definitions have some bearing on the interpretation of the Policy. (Pl. Brief, Doc. 18, p. 46.) But, at no time did Plaintiff's counsel ask Mr. Wormington if those stand-alone definitions were reasonable meanings of "fence" ***in the context of the Policy***. (J. Wormington Depo., R. 91-1, generally.)

Instead, Mr. Wormington specifically testified that if he was looking up dictionary definitions, he "would want to put it in the context of the policy." (J. Wormington Depo., R. 91-1, PageID # 3953.) Similarly, Mr. Wormington testified that, if there are multiple meanings of a word within a dictionary, he would evaluate the reasonableness of each "in context" within the Policy. (*Id*. at PageID # 3958.) Under Plaintiff's counsel's repeated questioning, Mr. Wormington then testified a

third time that he would consider a reasonable definition "if it applies in context * * * to find coverage." (*Id*. at PageID # 3959.)

This testimony is entirely consistent with what *Dominish* says should happen when an adjuster is analyzing coverage under a policy. In looking at a policy provision, an insurer must apply a reasonable definition of a word in the context of the policy, not in isolation. And, as set out herein, that is exactly what happened when Plaintiff's claim was denied.[9]

d. Enforcing the PD Endorsement does not render the Policy illusory.

Plaintiff next argues that the PD Endorsement renders the Policy illusory. (Pl. Mot., R. 105, PageID # 5973.) A policy is only illusory when it provides no benefit to the insured. *Ward v. United Foundries, Inc.*, 951 N.E.2d 770, 774 (Ohio 2011). Plaintiff's argument again completely ignores the mandates of multiple Courts to read insurance policies and other contracts in a way that gives their provisions meaning, rather than a way that renders portions superfluous.

Admittedly, it is impossible to put a fence through the shared wall between the Property and the building to its south. But, this admitted impossibility cannot be

[9] It bears mention that not even Plaintiff's purported insurance expert, Louis Fey, believes that the Building's walls constitute a fence. Per Mr. Fey, while the Building has three stand-alone walls and one shared wall, it has "no fence." (Fey Depo., R. 98, PageID # 5328.) Even among some of "those intent on finding fault at any cost," this argument is clearly a bridge too far.

the end of the Court's analysis of the Policy. Instead, the questions for the Court are whether and how the PD Endorsement can be interpreted in such a way as to give it vitality despite the impossibility of putting a fence through a shared wall.

In this case, the PD Endorsement can be given vitality, and the Policy is therefore not illusory. As Mr. Wormington testified, if Plaintiff had installed a fence from one point of the shared wall, around the other three sides of the Property, to the opposite point on the shared wall, Mr. Wormington would have considered Plaintiff to have complied with the PD Endorsement. (J. Wormington Depo., R. 91-1, PageID # 4094.) Nothing about such a fence is physically impossible.

Despite the physical possibility of installing such a fence, Plaintiff acknowledges that it never applied to the City of Cincinnati to install such a fence along the sidewalk and never considered putting such a fence along the north side of the Property because that lot was owned by someone else. (S. Grinberg Depo., R. 94-1, PageID # 4532 and 4534-4535.) The fact that Plaintiff did not try to install such a fence does not mean that installing such a fence is impossible; and it certainly does not mean that the Policy was illusory.[10]

[10] The Policy also excludes a fire loss from coverage if Plaintiff "had knowledge of any suspension or impairment in any protective device or service in the [PD Schedule] and did not notify us." (Policy, R. 76-1, PageID # 3754.) Under this provision, even if maintaining a fence was impossible – which it was not – Plaintiff had an obligation tell Ohio Casualty that. And Plaintiff never did, prior to the loss.

For all of the foregoing reasons, Ohio Casualty was entitled to summary judgment on Plaintiff's breach of contract claim, and Plaintiff was not.

5. Even if Plaintiff could show a breach of contract, its damages cannot be established as a matter of law.

Plaintiff asserts that it is entitled breach of contract damages in the amount of $1,150,000. (Pl. Brief, Doc. 18, p. 55.) Even if Plaintiff could prove breach of contract– which it cannot – Plaintiff is not entitled to $1,150,000 as a matter of law.

The Policy provides that Ohio Casualty does not "cover more than 'your' insurable interest in any property." (Policy, R. 76-1, PageID # 3808.) At most, Plaintiff has a 25% interest in the Property, as a 25% owner of Mayost Vision I LLC. (S. Grinberg Depo., R. 94-1, PageID # 4475.) Therefore, Plaintiff is only entitled to 25% of the value of the Building on the date of loss.

The other 75% of the value of the Building – again assuming Plaintiff's 25% ownership – would be owed to Mayost Partners, LLC. Plaintiff is not a member of Mayost Partners, LLC, and the only members thereof are Yuval Mayost and Oshri Mayost. (S. Grinberg Depo., R. 94-1, PageID # 4435-4436.) Neither Mayost Partners, LLC nor its members are parties to this case.

Therefore, if Plaintiff can prove that it has a 25% interest in the Property, then Plaintiff is entitled to 25% of the value of the loss, up to the limit of the Policy. *Simmons v. Ohio Cas. Ins. Co.*, 2025 WL 1078427 (N.D. Ohio April 10, 2025)

(Ohio's valued policy statute does not apply to builder's risk coverage, and insured must therefore prove amount of loss).

Plaintiff has certainly not shown that the Building was worth $4.6 million on the date of loss – and Plaintiff therefore cannot establish as a matter of law that it is entitled to 25% thereof, or $1,150,000. Indeed, if the Building was worth $1,150,000 on the date of loss, as suggested by Plaintiff, then Plaintiff's potential breach of contract damages are capped at 25% thereof, or $287,500.

Ohio Casualty does not believe this Court needs to reach this issue, because Plaintiff is not entitled to judgment on the breach of contract claim at all. But if the Court disagrees, Plaintiff is still not entitled to any specific sum as a matter of law.

B. Ohio Casualty and Liberty Mutual are entitled to summary judgment on Plaintiff's claim for violation of the duty of good faith, and Plaintiff is not.

1. Standard for Good Faith and Fair Dealing

An insurer has a duty to handle its insured's claim in good faith. *Hoskins v. Aetna Life Ins. Co.*, 452 N.E.2d 1315, 1316 (Ohio 1983); *Carpenter v. Liberty Ins. Corp.*, 2023 WL 6389041, *1 (6th Cir. Oct. 2, 2023). To act in good faith, however, an insurer must simply have a reasonable justification for its conduct. "An insurer fails to exercise good faith in the processing of a claim of its insured where its refusal to pay the claim is not predicated upon circumstances that furnish reasonable justification therefor." *Zoppo v. Homestead Ins. Co.*, 644 N.E.2d 397, 400 (Ohio 1994); *Carpenter*, 2023 WL 6389041 at *1.

"An insurer lacks reasonable justification when it denies an insurer's claim in an arbitrary and capricious manner." *Barbour v. Household Life Ins. Co.*, 2012 WL 1109993 at *5 (N.D. Ohio April 2, 2012), *citing Hoskins*, 452 N.E.2d at 1320 and *Thomas v. Allstate Ins. Co.*, 974 F.2d 706, 711 (6th Cir. 1992); *Ironshore*, 2025 WL 1356414 at *4. When a claim is "fairly debatable and the refusal is premised on either the status of the law at the time of the denial or the facts that gave rise to the claim," on the other hand, a denial is reasonably justified. *Tokles & Sons, Inc. v. Midwestern Indemn. Co.*, 605 N.E.2d 936 (Ohio 1992). "The test, therefore, is not whether the defendant's conclusion to deny benefits was correct, but whether the decision to deny benefits was arbitrary or capricious, and there existed a reasonable justification for the denial." *Thomas*, 974 F.2d at 711; *Barbour*, 2012 WL 1109993 at *5.

As this Court has explained on fire claims in particular, an insurer does not have to "conclusively" establish a policy defense to prevail as a matter of law on a bad faith claim; "it could [as a matter of law] deny coverage in good faith so long as the claim was 'fairly debatable.'" *Smith v. Allstate Indem. Co.*, 304 Fed. Appx. 430, 432 (6th Cir. 2008). *See also, Carpenter*, 2023 WL 6389041 at *1.

Therefore, if an insurer's denial of a fire claim was even arguably appropriate, then the insurer, not the insured, is entitled to judgment as a matter of law in its favor on a bad faith claim. *Waldren v. Allstate Vehicle and Prop. Ins. Co.*, 2020 WL

5214608, *7 (S.D. Ohio Sept. 1, 2020) ("[E]ven viewing the evidence in a light most favorable to [the insureds], there is sufficient evidence to create a genuine issue of material fact on [the insurer's] arson defense. This, in turn, creates the reasonable justification necessary to defeat the bad faith claim."); *Brewer v. State Farm Fire & Cas. Co.*, 2014 WL 12623359 (S.D. Ohio Sept. 30, 2014) ("While reasonable minds may differ as to whether this conclusion [that an insured's conduct had rendered a policy void] was ultimately correct, the Court finds reasonable minds could only agree that [the insurer's] decision was reasonably justified based on the evidence produced by its investigation.")

2. Plaintiff has no viable bad faith claim against Liberty Mutual.

As discussed above, Plaintiff and Liberty Mutual are not in privity of contract, and Plaintiff therefore has no viable breach of contract claim against Liberty Mutual. Plaintiff's bad faith claim against Liberty Mutual fails for this reason as well. *Day,* 2023 WL 5209365 at *3 ("Ohio courts have consistently rejected bad faith claims where the parties are not in privity with each other."); *Whitman v. Tucker*, 779 Fed. Appx. 336, 342 (6th Cir. 2019) *citing Gillette v. Est. of Gillette*, 837 N.E.2d 1283, 1286 (Ohio App. 2005) (same).

3. Plaintiff's bad faith claim fails because Plaintiff's contract claim fails.

This Court has recently repeatedly recognized that a "principle of Ohio law" is that "there is no independent cause of action for breach of the implied duty of good

faith and fair dealing apart from a breach of the underlying contract." *Ironshore*, 2025 WL 1356414 at *4, *citing Lucarell v. Nationwide Mut. Ins.*, 97 N.E.3d 458, 469 (Ohio 2018). *See also, Chemical Solvents, Inc. v. Greenwich Ins. Co.*, 2025 WL 2879982, *3 (6th Cir. Oct. 9, 2025). Under this analysis, because Plaintiff's breach of contract claim fails for the reasons above, Plaintiff's bad faith claim also fails.

4. At a minimum, Ohio Casualty was reasonably justified in denying Plaintiff's claim.

Even if Ohio Casualty was wrong on Plaintiff's breach of contract claim – which Ohio Casualty submits it is not – the insurance coverage question was at least "fairly debatable" under the PD Endorsement and the PD Schedule. In addition to all the authorities and rationales discussed regarding the breach of contract claim, the reasonableness of Ohio Casualty's decision is confirmed by the fact that the District Court entered judgment in Ohio Casualty's favor. If Ohio Casualty's decision was arbitrary and capricious, then so was the District Court's decision – a conclusion with which Ohio Casualty strongly disagrees. Further, according to Ms. Plona, if she had seen the PD Endorsement when the Policy was placed, she would have told Plaintiff, "Put up a fence or you won't get insurance." This assertion is the exact opposite of the coverage decision not even being fairly debatable.

5. The presence of a purported "insurance expert" for Plaintiff does not change this analysis.

Plaintiff's Brief suggests that Plaintiff was entitled to judgment on its bad faith claim, as opposed to Defendants, based on the opinion of Plaintiff's purported insurance expert, Louis Fey. (Pl. Brief, Doc. 18, p. 57.) But, the fact that a purported expert describes a claim as having been handled in bad faith does not mean that the insured is entitled to summary judgment on that cause of action, or even that the insured can survive an insurer's motion for summary judgment on the claim.

In *Corbo Properties, Ltd. v. Seneca Ins. Co., Inc.*, 771 F.Supp.2d 877 (N.D. Ohio 2011), the Court considered an insured's breach of contract and bad faith claim following a commercial fire for which the insurer denied coverage under an arson provision of the policy. The insured offered an expert report "conclud[ing] that [the insurer] lacked good faith because there is evidence that tends to controvert [the insurer's] evidence, and because [the insurer's] evidence is insufficient to prevail on an arson defense to a breach of contract claim at trial." *Id*. at 890.

The Court nevertheless entered summary judgment for the insurer on the bad faith claim, finding that the insured's expert's opinion was "irrelevant to the inquiry here, which is only whether [the insurer] had sufficient information to reasonably conclude that the [insured] set or participated in setting fire to the Building to obtain insurance proceeds." *Id*. *See also, Sabatine v. Paul Revere Life Ins. Co.*, 2011 WL 127487, *3-4 (N.D. Ohio Jan. 14, 2011) (same regarding disability claim); *Dorsey*

v. Campbell Hauling, 2003-Ohio-3341 (Ohio App. 2003) (same regarding underinsured motorist claim).

The fallacy of Plaintiff's argument is further demonstrated by an inherent, fundamental flaw in Mr. Fey's opinion. According to Mr. Fey, if an insurance claim is "fairly debatable," an insurance company cannot unilaterally deny the claim in good faith. (Fey Depo., R. 98, PageID # 5233.) Instead, in that situation, Mr. Fey believes that an insurer has a duty to "ask the Court to decide" the question of insurance coverage. *Id.* Per Mr. Fey, "The fact that it's fairly debatable would tend to make me believe that there's some issue there that could lead to coverage." *Id.* And as such, with regard to first-party property damage claims such as that of Plaintiff, Mr. Fey believes insurers "run the risk of being found to have acted in a wrongful manner" simply by making an incorrect coverage determination without asking the Court for guidance. *Id.* at 5235-5237.

This opinion is directly contrary to Ohio law. Courts applying Ohio law have repeatedly held that, when insurance coverage is questionable or even when an insurer is wrong on coverage, the insurer, not the insured, is entitled to summary judgment on a bad faith claim so long as the coverage question was at least fairly debatable. *Thomas*, 974 F.2d at 711; *Barbour*, 2012 WL 1109993 at *5; *Smith*, 304 Fed. Appx. at 432; *Carpenter*, 2023 WL 6389041 at *1; *Waldren*, 2020 WL 5214608 at *7; *Brewer*, 2014 WL 12623359. Importantly, not one of these cases involved an

insurer filing a declaratory judgment action or otherwise seeking guidance from the Court before denying the claim, as Mr. Fey suggests is necessary to avoid bad faith liability. *Id*., generally.

Because Mr. Fey fundamentally misunderstands the law of Ohio bad faith, Mr. Fey's opinion offers no support for Plaintiff's bad faith claim. Mr. Fey's opinion certainly offers no basis to enter judgment for Plaintiff on this claim as a matter of law. Ohio Casualty and Liberty Mutual instead remain entitled to judgment in their favor.

C. Defendants are entitled to summary judgment on Plaintiff's fraud in the inducement claim, and Plaintiff is not.

1. Standard for Fraud in the Inducement

"A claim of fraud in the inducement arises when a party is induced to enter into an agreement through fraud or misrepresentation." *ABM Farms, Inc. v. Woods*, 692 N.E.2d 574, 578 (Ohio 1998). "To prove fraud or fraudulent inducement, a plaintiff must establish (1) a false representation concerning a fact or, in the face of a duty to disclose, concealment of a fact, material to the transaction; (2) knowledge of the falsity of the representation or utter disregard for its truthfulness; (3) intent to induce reliance on the representation; (4) justifiable reliance upon the representation under circumstances manifesting a right to rely; and (5) injury proximately caused by the reliance." *Micrel, Inc. v. TRW, Inc.*, 486 F.3d 866, 874 (6th Cir. 2007).

The elements of fraudulent inducement are "essentially the same" as for fraud, and those elements must be pled with particularity. *Duff v. Centene Corp.*, 565 F.Supp.3d 1004, 1025 (S.D. Ohio 2021). "This means a plaintiff must at least allege the time, place, and content of the alleged misrepresentation on which he or she relied." *Id*. (Citation omitted.) A plaintiff must prove his fraud in the inducement claim with "clear and convincing evidence." *Colley v. Scherzinger Corp.*, 2016 WL 2998111, *4 (S.D. Ohio May 25, 2016).

A party's fraud in the inducement claim fails as a matter of law when it is based on purportedly not being told something that is in a written contract given to the party. *ABM Farms*, 692 N.E.2d at 578-579. As the Ohio Supreme Court explained, "A classic claim of fraudulent inducement asserts that a misrepresentation of facts ***outside the contract*** or ***other wrongful conduct*** induced a party to enter into the contract." *Id*. at 578. (Emphasis added.) But, where the "naked truth" is that a party simply "did not read the contract," that "drives a stake into the heart of her claim." *Id*. at 578-579. *See also, Upton v. Tribilcock*, 91 U.S. 45, 50 (1875) ("It will not do for a man to enter into a contract, and, when called upon to respond to its obligations, to say that he did not read it when he signed it, or did not know what it contained. If this were permitted, contracts would not be worth the paper on which they are written.")

In *ABM Farms*, the plaintiff alleged fraud in the inducement because her brokerage firm did not tell her that her account agreement, which the plaintiff had admittedly received, contained an arbitration provision. *ABM Farms*, 692 N.E.2d at 575-576. The plaintiff acknowledged, though, that other than as in the account agreement, she and the brokerage firm had never discussed arbitration. *Id*. at 578. The Court rejected the plaintiff's fraud in the inducement claim as a matter of law: "A person of ordinary mind cannot be heard to say that he was misled into signing a paper which was different from what he intended, when he could have known the truth by merely looking when he signed." *Id*. at 579, *citing McAdams v. McAdams*, 88 N.E. 542, 544 (Ohio 1909).

A fraud in the inducement claim also fails as a matter of law when the alleged misrepresentation is an opinion or a prediction as to what might happen in the future, rather than a misrepresentation of fact. *Colley*, 2016 WL 2998111 at *4. In *Colley*, the District Court entered judgment as a matter of law against a plaintiff who claimed only that the defendant had misrepresented how an arbitration clause would work if a future dispute arose between the parties. 2016 WL 2998111 at *4-5. *See also, Funding Advisors Claims Recovery, LLC v. Advanced Care Hospitalists PL*, 2024 WL 1804991 (S.D. Ohio April 24, 2024) (same).

2. Plaintiff has no viable fraud in the inducement claim.

Plaintiff's fraud claim is rooted in Ohio Casualty and Mr. Jones purportedly knowingly writing the Policy so that it was impossible for Plaintiff to comply and then purportedly rewriting the Policy after the fire loss. As is a theme with Plaintiff's case, Plaintiff's fraud claim is unsupported, both factually and legally.

a. It was possible for Plaintiff to have fire coverage under the Policy, and Defendants' representatives never said otherwise.

Plaintiff first bases its fraud claim on the purported testimony of the Policy's underwriter, Mr. Jones, that "there is never any fire coverage or theft coverage under this policy." (Pl. Brief, Doc. 18, p. 60.) But what Mr. Jones actually said is that "***if there is no 6 foot high fence completely surrounding the job site***, then it is Ohio Casualty's position there is never any fire coverage or theft coverage on this policy." (J. Jones Depo., R. 92-1, PageID # 4225. Emphasis added.) In other words, if Plaintiff did not comply with the Policy's requirements, Plaintiff would not get coverage. This is not fraud. This is Insurance 101.

Plaintiff also asserts that when Defendants "underwrote, drafted, assembled and authorized the Policy to be bound, [they] did so with the knowledge that (as far as they were concerned) the Policy would never provide any fire coverage for any loss at the insured location (ever) because Defendants knew it was impossible to

install a 6 foot high, separate fence, controlled by Plaintiff, completely surrounding the jobsite[.]" (Pl. Brief, Doc. 18, p. 60.)

Again, however, that assertion is directly contrary to Mr. Wormington's testimony, as both the adjuster who issued the denial and the corporate representative for claim handling. According to Mr. Wormington, if Plaintiff had simply installed the shared-wall-point to shared-wall-point fence, Plaintiff would have complied with the Policy and its claim would have been covered. (J. Wormington Depo., R. 91-1, PageID # 4094.) Mr. Wormington has not just suggested that there was some abstract way to have coverage for this claim, and he has certainly not indicated that it was "impossible" for Plaintiff to do so. Instead, he has sworn under oath how Plaintiff's claim could have been covered. There is no fraud here.

b. Plaintiff's fraud claim is improperly based on Plaintiff simply failing to review documents provided to it.

As above, a party's fraud in the inducement claim fails as a matter of law when it is based on purportedly not being told something that is in a written contract given to the party. *ABM Farms,* 692 N.E.2d at 578-579 (Ohio 1998). That is what happened here. Plaintiff did not know that it needed to maintain a fenced jobsite, because Plaintiff did not read the Policy. Plaintiff cites no other "inducement."

Indeed, absolutely no evidence exists regarding any representation regarding the scope of coverage from Defendants beyond the Policy itself. There is no evidence that Defendants made any representation to Plaintiff regarding the scope

of the Policy beyond providing the Proposal and then the Policy. Plaintiff did not discuss the insurance purchase with Defendants directly, and instead allowed Camargo to handle the same. There is no evidence that Camargo asked any questions about the Policy's scope of coverage or that Defendants made any statements about the scope of coverage other than transmitting the Proposal and the Policy. All parties agree that the PD Endorsement and the PD Schedule were listed on the Proposal and included in the Policy; that both were sent to Camargo; and that the Policy was sent to Plaintiff. Plaintiff's fraud claim fails for lack of any representations beyond these documents.

Plaintiff argues that this rule is inapplicable in this action, because Defendants purportedly "knew" when the Policy was issued that any eventual fire loss claim would not be covered. (Pl. Brief, Doc. 18, p. 60.) As discussed above, however, this argument is wholly unsupported by the evidence in this case.

Plaintiff's position is that that in underwriting the Policy, Mr. Jones – and therefore Ohio Casualty and Liberty Mutual – "knew" that any fire loss suffered by Plaintiff would be denied. But, Mr. Jones was not even the person who would have to make that coverage decision. Indeed, Mr. Jones played no role in the decision to deny the claim. (J. Jones Depo., R. 92-1, PageID 4223.) Instead, Mr. Wormington in the claims department made that decision based on his analysis of the Policy. (J. Wormington Depo., R. 91-1, PageID 4008.) What Mr. Jones thought when he issued

the Policy had no bearing on what Mr. Wormington decided after Plaintiff had bought the Policy, suffered a loss, and made a claim.

As a matter of law, Plaintiff's authorities on this issue fall short of establishing a potentially viable fraud claim herein. In *Martin v. Ohio State Univ. Found.*, 742 N.E.2d 1198, 1206 (Ohio App. 2000), for example, a question of fact was found to exist regarding whether investment funds were going to issue immediately upon the opening of the fund. The Court specifically noted that the purportedly promised payment "was ***not*** contingent upon some unknown, hypothetical trust that had yet to be determined." *Id*. at 1207. (Emphasis added.) Unlike in *Martin*, when Mr. Jones issued the Policy, no loss had occurred for Mr. Wormington to evaluate, and such a loss may never have occurred.

Similarly, while Plaintiff correctly notes that this Court has repeatedly recognized that "a promise made with a present intention not to perform constitutes a misrepresentation of existing fact even if the promised performance is to occur in the future," this Court has also repeatedly affirmed summary judgment for defendants on those plaintiffs' fraudulent inducement claims. *Micrel, Inc. v. TRW, Inc.*, 486 F.3d 866, 874 (6th Cir. 2007); *Whisman v. Ford Motor Co.*, 157 Fed. Appx. 792, 799 (6th Cir. 2005); *Hardisty v. May Dept. Stores Co.*, 2001 WL 1301748 (6th Cir. Oct. 10, 2001).

At the end of the day, no testimony or evidence in this case suggests that, if Plaintiff had complied with the provisions of the Policy, Plaintiff's claim still would have been denied. Instead, Mr. Jones said that as the underwriter, he did not think a claim would be covered if Plaintiff did not comply with the Policy. And, Mr. Wormington said that, if Plaintiff had complied with the provisions of the Policy, Plaintiff's claim would have been covered. This undisputed testimony compels the Court to reject Plaintiff's fraud claim as a matter of law.

For these multiple reasons, Plaintiff therefore has no viable fraud in the inducement claim.

D. Defendants are entitled to summary judgment on Plaintiff's ODTPA claim, and Plaintiff is not.

1. Standard for ODTPA Claim

The ODTPA prohibits in pertinent part "[r]epresent[ing] that goods or services have * * * characteristics, * * * uses, [or] benefits * * * that they do not have[.]" Ohio Rev. Code §4165.02(A)(7). To prevail on an ODTPA claim, a plaintiff must prove: "(1) a false statement or statement that is misleading, (2) which statement actually deceived or has the tendency to deceive a substantial segment of the target audience, (3) the deception is material in that it is likely to influence a purchasing decision, and (4) the plaintiff has been or is likely to be injured as a result." *Torrance v. Rom*, 157 N.E.3d 172, 188 (Ohio Ct. App. 2020). An insured cannot assert a viable ODTPA claim against an insurer simply by re-casting a breach

of contract claim as an ODTPA claim. *JP Morgan Chase Bank, N.A. v. Safeco Ins. Co. of Am.*, 2012 WL 1945604 (N.D. Ohio May 30, 2014).

2. Plaintiff has no viable ODTPA claim.

Plaintiff makes the same unavailing assertions in support of its ODTPA claim that it makes in support of its fraud in the inducement claim. (Pl. Brief, Doc. 18, p. 63.) Plaintiff again asserts that Defendants "admittedly, misrepresented that the Policy provided coverage" when it did not. (Pl. Brief, Doc. 18, p. 64.) As demonstrated in the preceding sections, however, that is a blatant misrepresentation of the testimony in this case.

No authorities support Plaintiff's argument that, on the merits, it has a viable ODTPA claim. Plaintiff first cites *He v. Rom*, 751 Fed.Appx. 664 (6th Cir. 2018), a case arising out of misrepresentations regarding various investment properties' earning potential. In the trial giving rise to *He*, a jury found the properties' seller liable for fraud, negligent misrepresentation and violation of the ODTPA. *Id*. at 668. But, there was not even a breach of contract alleged, and the ODTPA claim was certainly not identical to a breach of contract claim. Instead, this Court upheld the jury verdict in part because "[a] reasonable jury could conclude on this record that [defendant] made representations to Plaintiffs, ***outside the terms of the contract***, on which they reasonably relied." *Id*. at 670. (Emphasis added.) Nothing in Plaintiff's ODTPA claim herein alleges a misrepresentation outside the terms of the Policy.

Plaintiff also relies on *Schumacher v. State Auto. Mut. Ins. Co.*, 47 F.Supp.3d 618 (S.D. Ohio 2014) for what could purportedly establish an ODTPA claim in the insurance context. (Pl. Brief, Doc. 18, p. 65.) But, the allegations in *Schumacher* are again markedly different from those herein, and well outside the question of whether an insurance policy will provide coverage for a claim. In *Schumacher*, the insureds pled that the insurer had "concocted a plot * * * to sizably increase their premium revenue by selling an overpriced and superfluous product to their insureds, particularly those with whom they have had an on-going relationship." *Id*. at 628. At the motion to dismiss stage, the Court held that such a claim could survive. Again, however, this "concocted plot" is far-removed from the actual evidence developed leading up to summary judgment briefing in this case on a denied insurance claim.

Unlike *He* and *Schumacher*, *JP Morgan* is on point and supports the entry of summary judgment in Defendants' favor. The plaintiff's ODTPA claim in *JP Morgan* was based on a series of purported misrepresentations "contained either in the contract documents or comfort letters, which confirmed and memorialized the provisions of the contract documents." *JP Morgan*, 2012 WL 1945604 at *4. The Court held that the plaintiff's claim failed because the plaintiff "does not identify a single misrepresentation outside these documents." *Id.* at *5.

Plaintiff's ODTPA claim is also based on a series of alleged misrepresentations which exist solely in documents provided to Plaintiff. (Pl. Brief, Doc. 18, p. 109, pp. 63-64, citing seven different sections of the Policy.) At no point has Plaintiff identified any action taken or statement made by Defendants – other than the providing of the Policy – which purportedly supports Plaintiff's ODTPA claim. Where Plaintiff "states claims, in essence, for contractual breach," "it fails to establish a violation of the ODTPA." *JP Morgan*, 2012 WL 1945604 at *5.

Like the insurer defendant in *JP Morgan*, Ohio Casualty and Liberty Mutual are entitled to summary judgment on Plaintiff's ODTPA claim, and Defendants request that the Court affirm the District Court's Opinion accordingly.

CONCLUSION

For the reasons herein, Defendants respectfully request that this Court affirm the decision of the District Court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that the foregoing Brief of Defendants-Appellees complies with the word limit of Fed. R. App. P. 32(a)(7)(B) because, excluding the parts of the documents exempted by Fed. R. App. P. 32(f) and 6 Cir. R. 32(b)(1), this document contains 12,898 words.

2. I further certify that the foregoing brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

/s/ William M. Harter
William M. Harter

CERTIFICATE OF SERVICE

On this 29th day of October, 2025, a true and accurate copy of the foregoing was filed with the Court and served via ECF on all counsel of record.

/s/ William M. Harter
William M. Harter

ADDENDUM

Defendants-Appellees identify the following:

Record Entry	PageID # Range	Description	Date Filed
1	1-70	Notice of Removal	02/02/2022
4	73-129	Complaint	02/02/2022
7	134-202	Answer	02/09/2022
49	427-2142	Deposition of Jonathan Jones	05/26/2023
50	2143-2259	Motion to Amend	05/26/2023
51	2260-2761	Corrected Exhibits to doc. 49	05/30/2023
53	2793-3005	Deposition of James Wormington	06/16/2023
61	3065-3208	Plaintiff's Expert Disclosures	10/27/2023
63	3392-3715	Witness List by Defendants	12/01/2023
65	3295-3374	Witness List of Defendants	12/01/2023
74	3392-3715	Deposition of Jay Mueller	05/16/2024
75	3716-30	Order granting Motion to Amend	05/30/2024
76	3731-3835	Amended Complaint	06/11/2024
81	3842-3855	Answer by Corporate Defendants	06/25/2024
82	3856-3867	Answer by Jonathan Jones	08/09/2024
91	3868-4114	Notice of Filing Deposition of James Wormington	12/06/2024
92	4115-4229	Notice of Filing Deposition of Jonathan Jones	12/06/2024
93	4230-4377	Notice of Filing Deposition of Shawn Asselin	12/06/2024
94	4378-4701	Notice of Filing Deposition of Stanislav Grinberg	12/06/2024
95	4702-5027	Notice of Filing Deposition of Jacob P. Mueller	12/06/2024
96	5028-5031	Affidavit of Lynn Plona	12/06/2024
No RE#	No PageID#	Docket Note: Flash drive (re doc. 96) received in clerk's office this date and forwarded to the Chambers of Judge Jeffery P. Hopkins	12/09/2024
97	5032-5148	Deposition of Shlomi Fatal	12/09/2024
98	5149-5380	Deposition of Louis G. Fey	12/09/2024
99	5381-5411	Motion for Summary Judgment by Defendants	12/09/2024
100	5412-5618	Deposition of J. Rudy Martin	12/09/2024
101	5619-5842	Deposition of Raymond Jackson	12/09/2024
102	5843-5870	Declaration of S. Fatal and S. Grinberg	12/09/2024
103	5871-5888	Motion to Exclude the Testimony of Raymond Jackson	12/09/2024

104	5889-5900	Motion to Exclude the Testimony of J. Rudy Martin	12/09/2024
105	5901-5991	Motion for Partial Summary Judgment by Plaintiff	12/09/2024
108	6027-6121	Motion for Partial Summary Judgment by Plaintiff	01/06/2025
109	6122-6155	Response in Opposition to Motion for Partial Summary Judgment	01/21/2025
110	6156-6167	Response in Opposition to Motion to Exclude the testimony of J. Rudy Martin	01/21/2025
111	6168-6177	Response in Opposition to Motion to Exclude the testimony of Raymond Jackson	1/21/2025
112	6178-6257	Motion for Leave to file supplemental response to Plaintiff's Motion for Partial Summary Judgment	1/23/2025
113	6258-6277	Reply in Support of Motion for Partial Summary Judgment	01/25/2025
114	6278-6299	Reply in Support of Motion for Summary Judgment	02/03/2025
115	6300-6302	Unopposed Motion for Extension of time to file response/reply	02/07/2025
116	6313-6315	Reply in support of motion to exclude the testimony of Raymond Jackson	02/19/2025
117	6316-6325	Reply in support of motion to exclude the testimony of J. Rudy Martin	02/19/2025
118	6326-6335	Response in Opposition to Motion for Leave to file Supplemental Response	02/19/2025
119	6336-6355	Opinion and Order	05/16/2025
120	6356	Judgment	05/16/2025
121	6357-6358	Notice of Appeal	06/09/2025

/s/ William M. Harter
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