UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MATTHEW M. PEARSON, Plaintiff, -against- ACE AMERICAN INSURANCE COMPANY, a/k/a CHUBB, Defendant.	:	Civil Case No.: 26-CV-01353

MEMORANDUM OF LAW IN SUPPORT OF ACE AMERICAN INSURANCE COMPANY'S MOTION FOR PARTIAL DISMISSL OF THE COMPLAINT PURSUANT TO FED. R. CIV. P.12

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Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure ("FRCP"), Defendant ACE American Insurance Company ("ACE") respectfully submits this memorandum of law in support of its motion for dismissal of Count I and Count III of Plaintiff Matthew M. Pearson's ("Pearson" or "Plaintiff") Complaint, filed on or about February 18, 2026 (the "Complaint")(Dkt. 2). Dismissal is sought on the grounds that (i) Plaintiff's Count I for declaratory judgment fails to state a claim as relief would be wholly duplicative of Plaintiff's breach of contract claim (Count II); (ii) Plaintiff's Count III for breach of the implied covenant of good faith and fair dealing is duplicative of Plaintiff's breach of contract claim (Count II); (iii) Plaintiff fails to state a claim for breach of the implied covenant of good faith and fair dealing because the insurance policy expressly authorized the survey process and preserved ACE's coverage position; and (iv) Plaintiff fails to allege sufficient facts supporting that ACE breached the duty of good faith and fair dealing in its conduct with respect to the survey process.

PRELIMINARY STATEMENT

This action arises from a straightforward insurance coverage dispute concerning whether alleged engine damage discovered more than two years after a vessel grounding is covered under a marine insurance policy issued by Defendant ACE.

Although Plaintiff attempts to characterize this matter as involving claim-handling misconduct, bias, and bad faith, the Complaint reveals a far simpler dispute. Following an initial claim in 2022 due to a grounding, Plaintiff submitted a supplemental claim for engine damage in late 2024 after running the engine for more than 50 hours. ACE denied the supplemental claim in February 2025, as unrelated to the original grounding in 2022. The parties then engaged in a survey process pursuant to the policy's contractual survey provision, and after the surveyors found in favor of ACE, Plaintiff commenced this action challenging ACE's coverage position.

The Complaint asserts three causes of action: (I) declaratory judgment; (II) breach of contract; and (III) breach of the implied covenant of good faith and fair dealing. ACE does not presently move against Plaintiff's breach of contract claim (Count II). Instead, ACE seeks dismissal of Counts I and III because both are legally defective and entirely duplicative of the breach of contract claim.

In particular, Count I should be dismissed because it seeks no relief independent from Plaintiff's breach of contract claim. The declaration requested by Plaintiff—that coverage exists and ACE must indemnify him—is precisely the issue that will be resolved through Count II.

Likewise, Count III fails because New York law does not recognize a separate cause of action for breach of the implied covenant of good faith and fair dealing where, where, as here, the claim arises from the same facts as a breach of contract claim. Every allegation supporting Count III stems from ACE's denial of coverage and participation in the contractual survey process. Those allegations do not create an independent cause of action.

Count III fails for an additional reason. The conduct challenged by Plaintiff was expressly authorized by the policy itself. The survey provision specifically permits either party to invoke a survey when a dispute exists concerning the amount of loss and expressly provides that participation in the survey process is "without prejudice" and does not waive any rights under the policy. Plaintiff cannot transform ACE's exercise of express contractual rights into a claim for bad faith conduct.

Count III further fails because the Complaint contains purely conclusory allegations of fraud, collusion, bias, or misconduct in connection with the survey process. Plaintiff's allegations amount to little more than speculation regarding prior professional relationships among marine surveyors, and no specific conduct on the part of ACE that would, if proven, establish any fraud

or other misconduct on the part of ACE. Such allegations are insufficient under well-settled United States Supreme Court and Second Circuit law.

Accordingly, Counts I and III should be dismissed with prejudice.

FACTUAL BACKGROUND

A. The Policy

ACE issued a Masterpiece Yacht Select Policy (the "Policy") to Plaintiff, insuring his 2003 Sea Ray 560 Sedan Bridge vessel (the "Vessel") subject to the terms, conditions and exclusions under the Policy. *See* Complaint (Dkt. 2) ¶¶8-10 and Policy (Dkt. 2-1), attached as Exhibit ("Ex.") A to the Declaration of Eridania Perez in Support of ACE American Insurance Company's Motion for Partial Dismissal of Plaintiff's Complaint ("Perez Decl.").[1] The Policy set forth the policy's terms and conditions. ACE renewed the Policy annually, and each renewal policy continued coverage under the Policy while identifying any changes for that policy period. Perez Decl. Ex. A ¶¶9-10, 14. The renewal Policy at issue in this action, Policy No. Y09973801, was effective from April 2, 2022, through April 2, 2023. *Id.* ¶¶10-11 and Ex. 1 therein attaching the terms of the April 2, 2022, through April 2, 2023 Policy; *see also* Perez Decl. ¶4, Ex. B.[2]

The Complaint alleges that the Policy "insure[s] ensuing covered loss due to fire, explosion, sinking, demasting, collision or stranding[,]." *See* Perez Decl. Ex. A ¶13. The Policy contains a survey provision, which provides as follows:

> **Survey**
> If you or we fail to agree on the amount of loss, you or we may demand a survey of loss. Each party will select a licensed, independent marine surveyor within 20 days after receiving written request from the other. The two surveyors will select a

[1] The Complaint (Dkt. 2) has been attached as Ex. A to the Perez Decl. pursuant to the Hon. Kenneth M. Karas' Individual Rules of Practice II.B (Motions). The Complaint attaches as Exhibit 1 the Policy year at issue. (Dkt. 2-1).
[2] Exhibit B to Perez Decl. is Policy Form RM240000 (11/17), containing the survey provision referenced in the Complaint. Perez Decl. Ex. A ¶51. Policy Form RM240000 forms part of the Policy. *See* Perez Decl. ¶4, Ex. B; *see also* Perez Decl. Ex. A, attaching the Policy as Exhibit 1, which contains the Form Schedule that lists the forms and endorsements that comprise the Policy.

> third marine surveyor. If they cannot agree on a third surveyor within 15 days, you or we may request that the selection be made by a judge of a court having jurisdiction. Written agreement signed by any two of the three surveyors shall set the amount of the loss. However, the maximum amount we will pay for a loss is the applicable amount of coverage even if the amount of the loss is determined to be greater by survey. Each surveyor will be paid by the party selecting the surveyor. Other expenses of the survey and the compensation of the third surveyor shall be shared equally by you and us. However, any such survey will be without prejudice, and we will not waive our rights under this policy by agreeing to a survey.

See Perez Decl. Ex. B, p. O-4 (emphasis added); *see also* Perez Decl. Ex. A ¶ 51. As shown above, under the survey provision, if the parties fail to agree on the amount of loss, either party may demand a survey "without prejudice" and without waiving the parties' rights "under this policy by agreeing to a survey."

B. The Claim

According to the Complaint, Plaintiff's vessel allegedly grounded in North Carolina waters on April 28, 2022 (the "Incident"). Perez Decl. Ex. A ¶15. Following the Incident, Plaintiff undertook repairs relating to visible damage to the vessel and its running gear. *Id.* ¶¶16-24. Plaintiff submitted a claim to ACE in connection with the Incident, and ACE indemnified Plaintiff for the resulting repair costs. *Id.* ¶20.

Despite Plaintiff's alleged concerns regarding possible engine damage, Plaintiff continued operating the vessel for years after the grounding. *Id.* ¶26. The Complaint specifically alleges that Plaintiff operated the vessel between July 2022 and November 2024 following the Incident. *Id.*

More than two years later, Plaintiff alleges that technicians dismantled the engines and identified previously undiscovered internal damage. *Id.* ¶¶ 32-35. Plaintiff thereafter submitted a supplemental claim to ACE seeking coverage for those alleged "latent" engine damages. *Id.* ¶42. On February 18, 2025, ACE denied the supplemental claim. *Id.* ¶ 43.

The Complaint alleges that following ACE's denial, ACE invoked the survey provision contained in the Policy to the extent Plaintiff disputed the denial. *Id.* ¶¶47, 51; Perez Decl. Ex. B, p. O-4. As shown above, the survey provision provided for each party to "select an independent marine surveyor, that a third surveyor shall be selected, and that any agreement signed by two of the three surveyors shall determine the amount of loss." Perez Decl. Ex. A ¶51; *Id.* Ex. B, p. O-4.

Accordingly, Plaintiff selected marine surveyor Ken Weinbrecht. Perez Decl. Ex. A ¶52. ACE selected George Stafford. *Id.* ¶53. The surveyors then jointly selected Bill Trenkle to serve as umpire. *Id.* The Complaint acknowledges that Plaintiff selected his own surveyor without any factual allegation that ACE influenced or controlled Plaintiff's selection of Mr. Weinbrecht. *Id.* The survey process concluded on February 9, 2026. *Id.* ¶65. Plaintiff alleges that the umpire's findings "mirrored [ACE]'s original denial" regarding the claimed engine damage. *Id.* Plaintiff then commenced this action.

On May 31, 2026, ACE filed a pre-motion letter setting forth the grounds for its anticipated motion to dismiss Count I and Count III of the Complaint on the grounds that both claims are duplicative of Plaintiff's breach of contract claim asserted in Count II. *See* Dkt. 11. The Court held a conference regarding ACE's pre-motion letter and thereafter entered a briefing schedule for ACE's anticipated motion. Accordingly, ACE now moves pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure to dismiss Plaintiff's declaratory judgment claim (Count I) and claim for breach of the implied covenant of good faith and fair dealing (Count III).

LEGAL STANDARD

A complaint that fails "to state a claim upon which relief can be granted" must be dismissed. *See* FRCP Rule 12(b)(6). A claim can only survive a Rule 12(b)(6) motion if the plaintiff alleges facts sufficient "to state a claim that is plausible on its face." *Bell Atl. Corp. v*

Twombly, 550 US 544, 127 S Ct 1955, 167 L Ed 2d 929 (2007); *see also Fox v. Liberty Mutual Fire Ins. Co.*, Case No. 24-CV-7330, 2026 WL 867150, at *2 (S.D.N.Y. Mar. 30, 2026). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 US 662, 129 S Ct 1937, 173 L Ed 2d 868 (2009).

By contrast, "a pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.' Nor does a complaint suffice if it tenders 'naked assertion(s)' devoid of 'further factual enhancement.'" *Id.* (quoting *Twombly*, 550 U.S. at 555). If a plaintiff "has not nudged [its] claims across the line from conceivable to plausible, [its] complaint must be dismissed." *Twombly*, 550 U.S. at 570; *Harris v. Mills*, 572 F.3d 66, 72 (2d Cir. 2009)(finding that under the "plausibility standard", although a court must accept all of the non-moving party's factual allegations as true, that "tenet" is "inapplicable to legal conclusions," and "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.").

In considering a motion to dismiss, a district court may consider documents incorporated into the complaint by reference, and facts judicially noticed. *Cybercreek Entertainment, LLC v. U.S. Underwriters Ins. Co.*, 696 F. Appx. 554 (2d Cir. 2017)(district Court correctly ruled that insurance policy was incorporated by reference and that insured failed to state a claim under the policy)(*citing New York Pet Welfare Ass'n, Inc. v. City of New York*, 850 F.3d 79, 86 (2d Cir. 2017)).

ARGUMENT

I. COUNT I FOR DECLARATORY JUDGMENT SHOULD BE DISMISSED AS DUPLICATIVE OF COUNT II FOR BREACH OF CONTRACT

Count I seeks a declaration that the Policy covers the alleged supplemental engine damage and that ACE is obligated to indemnify Plaintiff for repair costs. Perez Decl. Ex. A ¶¶75-77.

This is precisely the issue also presented in Count II. *Id.* ¶¶82-83, 92-94. The breach of contract claim requires this Court to determine whether coverage exists under the Policy and whether ACE breached the Policy by denying coverage. *Id.* ¶¶78-94. Resolution of that claim necessarily resolves every issue presented by the declaratory judgment claim in Count I. Accordingly, the declaratory judgment claim serves no useful purpose and would provide no relief beyond that already available through Plaintiff's breach of contract claim.

Courts in this District consistently dismiss declaratory judgment claims under such circumstances, *i.e.* where, as here, the declaratory relief sought would be wholly duplicative of a parallel breach of contract claim and would not resolve any issues beyond those already before the Court. *See Deutsche Alt-A Secs. Mortg. Loan Trust, Series 2006-OA1 v. DB Structured Prods., Inc.*, 958 F. Supp. 2d 488, 507 (S.D.N.Y. 2013)(quoting *Apple Records, Inc. v. Capitol Records, Inc.*, 137 A.D.2d 50, 529 N.Y.S.2d 279, 281 (App. Div. 1988)("A cause of action for a declaratory judgment is unnecessary and inappropriate when the plaintiff has an adequate, alternative remedy in another form of action, such as breach of contract."); *see e.g., U.S. Bank Nat'l Ass'n v. PHL Variable Ins. Co.*, No. 13 Civ. 1580 (CM)(JCF), 2014 U.S. Dist. LEXIS 35616 (S.D.N.Y. Mar. 14, 2014)(dismissing the insured's declaratory judgment and breach of implied covenant of good faith and fair dealing claims as duplicative of the breach of contract claim under New York law).

Additionally, declaratory relief is inappropriate where there is no ongoing uncertainty regarding the parties' rights and obligations, and the requested declaration would serve no purpose

beyond resolving issues already presented by a breach of contract claim. *See Fleisher v. Phoenix Life Ins. Co.*, 858 F. Supp. 2d 290, 302 (S.D.N.Y. 2012)(dismissing declaratory judgment claim where there would be no useful prospective purpose served as such a review would be subsumed within Plaintiffs' contract claim); *EFG Bank AG v. AXA Equit. Life Ins. Co.*, 309 F. Supp. 3d 89, 98 (S.D.N.Y. 2018)(dismissing Plaintiff's declaratory judgment where breach of contract claim would provide same relief as sought in declaratory judgment claim and provide no prospective relief from uncertainty).

Here, there is no future uncertainly requiring declaratory relief. This case concerns a single historical loss and a fixed claim for money damages. The breach of contract claim (Count I) can provide a complete and adequate remedy subject to Plaintiff's proof.

In short, because Count I seeks only a determination of coverage and ACE's obligations under the Policy – the same issues that will be fully resolved through Count II – it is entirely duplicative of Plaintiff's breach of contract claim. Moreover, the requested declaration serves no useful prospective purpose, as there is no ongoing uncertainty regarding the parties' rights and obligations beyond the coverage dispute before the Court. Accordingly, Count I of the Complaint for Declaratory Judgment should be dismissed as unnecessary and improper.

II. COUNT III FOR BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING SHOULD BE DISMISSED BECAUSE IT IS DUPLICATIVE OF THE BREACH OF CONTRACT CLAIM

Count III for breach of the implied covenant of good faith and fair dealing should be dismissed for failure to state a claim pursuant to FRCP 12(b)(6). Even accepting as true the facts alleged in the Complaint and drawing all reasonable inferences in favor of Plaintiff, Count III lacks the requisite factual allegations to state a claim upon which relief can be granted because it is duplicative of the breach of contract claim in Count II.

New York law is unequivocal that a claim for breach of the implied covenant of good faith and fair dealing cannot survive where it is based upon the same facts as a breach of contract claim. *Harris v. Provident Life & Accident Ins. Co*., 310 F.3d 73, 81 (2d Cir. 2002)(New York law "does not recognize a separate cause of action for breach of the implied covenant of good faith and fair dealing, when a breach of contract claim, based upon the same facts, is also pled."); *see also Scottsdale Ins. Co. v. McGrath*, 549 F. Supp. 3d 334, 344 n.2 (S.D.N.Y. 2021)("In the first-party context, 'New York Law ... does not recognize ... an independent cause of action for bad faith denial of insurance coverage.'"); *Village on Canon v. Bankers Trust Col,* 920 F. Supp. 520, 534 (S.D.N.Y. 1996)("[T]he implied covenant …does not create any new contractual rights, nor does it provide an independent basis for recovery.").

"Accordingly, a claim for breach of the implied covenant will be dismissed as redundant where the conduct allegedly violating the implied covenant is also the predicate for breach of an express provision of the underlying contract." *Fleischer,* 858 F. Supp. 2d at 299; *Cruz v. FXDirectDealer, LLC,* 720 F.3d 115, 125 (2d Cir. 2013) ("When a complaint alleges both a breach of contract and a breach of the implied covenant of good faith and fair dealing based on the same facts, the latter claim should be dismissed as redundant."); *see also Grant & Eisenhofer, P.A. v. Bernstein Liebhard LLP*, 14-CV-9839 (JMF), 2015 U.S. Dist. LEXIS 51685 (S.D.N.Y. Apr. 20, 2015); *Vitrano v. State Farm Ins. Co.*, No. 08 CV 00103 (JGK), 2008 WL 2696156, at *3 (S.D.N.Y. July 7, 2008); *White v. State Farm Mut. Auto. Ins. Co.*, No. 3:24-CV-0613 (GTS/TWD), 2025 U.S. Dist. LEXIS 19310, at *15 (N.D.N.Y. Feb. 4, 2025); *Great Lakes Reinsurance (UK) SE v. Herzig*, 413 F. Supp. 3d 177, 180 (S.D.N.Y. 2019)(holding that allegations within proposed breach of the covenant of good faith and fair dealing counterclaim would not survive motion to dismiss where there were allegations related to failure to cover reasonable repairs of vessel).

Here, every allegation underlying Count III mirrors the allegations supporting Plaintiff's breach of contract claim – ACE's purported failure to provide coverage under the Policy – and seeks the same relief, namely a determination of coverage and indemnification. *See generally* Perez Decl. Ex. A ¶¶78-94 and ¶¶95-107. The claim is entirely dependent upon and derivative of ACE's alleged failure to provide coverage under the Policy. Indeed, Plaintiff expressly alleges in Count III that ACE deprived him of "the benefit of his bargain under the replacement value Policy." *Id.* ¶106. That allegation confirms that Count III merely repackages the contract claim under a different label. *See Fox*, 2026 WL 867150, at *2 (finding that allegations that defendant violated its duty of good faith and fair dealing that are predicated upon the claim that defendant failed or refused to pay the full amount of owned coverage under the insurance policy, "i.e., that [D]efendant had breached the terms of the policy," are appropriately dismissed on a Rule 12(b)(6) motion).

Further, "bad faith" allegations such as assertions of delay, lack of investigation, and deprivation of the "benefit of the bargain" do not identify any independent duty of the Policy under New York law. *See County of Orange v. Travelers Indem. Co., No.*, 7:13-cv-06790, 2014 WL 1998240, at *3 (S.D.N.Y. May 14, 2014)(dismissing the breach of the covenant of good faith and fair dealing as duplicative of the breach of contract claim because "[t]he facts giving rise to the two claims are the same: that Travelers did not perform its contractual duties as it had agreed to under the insurance policy" and that "[t]he delay and lack of investigation address the same ultimate grievance of failure to comply with the agreement"); *Ticheli v. Travelers Ins. Co.*, 1:14-CV-00172, 2014 WL 12587066 at *3 (N.D.N.Y. Dec. 23, 2014)(refusing to find a tort cause of action separate and independent from the breach of contract claim where the "insured merely used

'familiar tort language' – *i.e.*, malicious, reckless or intentional failure and refusal to pay . . . benefits' to describe the breach of contract").

For instance, in *New York Univ. v. Continental Ins. Co*., 639 N.Y.S.2d 283 (1995), New York University ("NYU") sought coverage under a policy issued by Continental Insurance Company ("Continental") after discovering that an employee had engaged in a fraudulent scheme involving the diversion of university funds. Continental investigated the claim and ultimately denied coverage. NYU filed suit asserting breach of contract, fraud, and violations of state laws, among others. In particular, NYU alleged that the denial was the product of a "sham", "reckless, vindictive" and inadequate investigation designed to avoid payment of a valid claim. The New York Court of Appeals found that these allegations amounted to nothing more than a claim based on breach of the implied covenant of good faith and fair dealing, "and that the use of familiar tort language in the pleading does not change the cause of action to a tort claim." Therefore, the Court held that "the cause of action [was] duplicative of the first of cause of action for breach of contract and should be dismissed." *Id.* 319-320.

Here, as in *New York University*, Plaintiff's claim for breach of the implied covenant of good faith and fair dealing is premised on allegations that ACE conducted a delayed, biased, and inadequate investigation, engaged in a "sham" survey process" and deprived Plaintiff of the "benefit of the bargain" *See e.g.,* Perez Decl. Ex. A ¶103 (alleging breach of the duty of good faith and fair dealing based on the allegation that ACE "intentionally or unintentionally, caused unreasonable delay in resolving Mr. Pearson's claim for coverage.")(emphasis added); *see also id.* ¶¶71, 106. Because those allegations are inextricably intertwined with ACE's alleged failure to provide coverage under the Policy, the claim is duplicative of the breach of contract cause of action and should be dismissed.

Lastly, Plaintiff's allegations regarding the survey process are not independent of the coverage dispute. They are simply the manner in which Plaintiff claims ACE arrived at the denial decision. In other words, the Complaint expressly ties all of those allegations regarding the survey process back to the same alleged wrong: ACE's refusal to pay Policy benefits for the alleged engine damage. Perez Decl. Ex. A ¶¶103, 106. Those allegations do not identify a separate contractual promise breached independent of the coverage obligation. They merely challenge the adequacy of ACE's performance in adjusting the claim. Under New York law, that is duplicative.

Both Count II (breach of contract) and Count III (breach of the covenant of good faith) arise from the same nucleus of operative facts. Both claims depend upon the same alleged wrongdoing. Both claims seek damages flowing from ACE's denial of coverage. Dismissal is therefore warranted.

III. PLAINTIFF FAILS TO STATE A CLAIM FOR BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING BECAUSE THE POLICY EXPRESSLY AUTHORIZED THE SURVEY PROCESS AND PRESERVED ACE'S COVERAGE POSITION

A substantial portion of Plaintiff's breach of the implied covenant of good faith and fair dealing claim is premised upon the notion that ACE improperly relied upon or participated in the Policy's survey process after denying Plaintiff's supplemental claim for engine damage. Perez Decl. Ex. A ¶¶47-71, 102. Even though Plaintiff invoked the survey process, the Complaint repeatedly characterizes the survey process as a "sham" and suggests that ACE improperly utilized the survey mechanism to support its denial of coverage. *Id.* ¶¶ 49, 67, 71.

These allegations fail as a matter of law because the conduct challenged by Plaintiff was expressly authorized by the Policy. New York law is clear that the implied covenant of good faith and fair dealing cannot be used to create obligations inconsistent with express contractual provisions nor can it negate a right that the parties specifically negotiated and incorporated into

their agreement. *See Times Mirror Magazines, Inc. v. Field & Stream Licenses Co.,* 294 F.3d 383, 394–95 (2d Cir. 2002)(finding that plaintiff could not avoid the express terms of the contract by relying on the implied covenant of the good faith and fair dealing because "no obligation can be implied that would be inconsistent with other terms of the contractual relationship."); *Banco Espanol de Credito v. Sec. Pac. Nat'l Bank*, 763 F. Supp. 36, 44 (S.D.N.Y. 1991), *aff'd*, 973 F.2d 51 (2d Cir. 1992)("[T]he implied covenant of good faith and fair dealing does not provide a court *carte blanche* to rewrite the parties' agreement. Thus, a court cannot imply a covenant inconsistent with terms expressly set forth in the contract.... Nor can a court imply a covenant to supply additional terms for which the parties did not bargain.")(citing *Hartford Fire Ins. Co. v. Federated Department Stores, Inc.,* 723 F. Supp. 976 (S.D.N.Y. 1989)); *State Farm Mut. Auto. Ins. Co. v Metro Pain Specialists*, P.C., No. 21-CV-5523 (MKB), 2025 US Dist LEXIS 78894, at *20-21 (E.D.N.Y. Mar. 26, 2025)(citing *Woodard v. Reliance Worldwide Corp.*, 819 F. App'x 48, 49 (2d Cir. 2020))(finding that the covenant "only impose[s] an obligation consistent with other mutually agreed upon terms" in the policy; "[i]t does not add to the contract a substantive provision not included by the parties").

Here, Plaintiff's allegations necessarily depend upon the proposition that ACE somehow acted improperly by continuing to maintain its coverage position while participating in the survey process. But the Policy expressly authorized ACE to do exactly that. As shown above at pp. 3-4, pursuant to the Policy's survey provision, either party may demand a survey whenever the parties disagree regarding the amount of loss. Perez Decl. Ex. B, p. O-4; *Id.* Ex. A ¶51. The Policy's survey provision further prescribes the exact procedure to be followed, including the appointment of party-selected surveyors and a jointly selected umpire. *Id.*

Indeed, Plaintiff's own allegations demonstrate that ACE exercised rights expressly afforded under the Policy. Plaintiff acknowledges that the parties disagreed regarding the claimed engine damage and that Plaintiff invoked the survey process pursuant to the Policy after ACE informed him of the process to challenge the denial. Perez Decl. Ex. A ¶¶47-51. Also, pursuant to the survey process in the Policy, Plaintiff agreed to incur costs associated with the process: "[e]ach surveyor [was to] be paid by the party selecting the surveyor. Other expenses of the survey and the compensation of the third surveyor shall be shared equally by [the insured] and [the carrier]." *Id.* ¶51; Perez Decl. Ex. B, p. O-4. Plaintiff's dissatisfaction with the ultimate outcome of that contractual process does not transform ACE's exercise of express contractual rights into actionable bad faith.

Most notably, the survey provision specifically provides that ACE does not waive any rights under the Policy by participating in a survey: "Any such survey will be without prejudice, and we will not waive our rights under this policy by agreeing to a survey." Perez Decl. Ex. B, O-4 (emphasis added). This language is significant. The parties expressly agreed that participation in the survey process would not affect, impair, expand, or waive either party's rights under the Policy. Thus, the Policy specifically contemplates that ACE may participate in a survey while simultaneously preserving all contractual defenses, coverage positions, and Policy rights. ACE had no contractual obligation to abandon its coverage position, waive defenses, alter its interpretation of the Policy, or accept Plaintiff's theory merely because a survey was demanded.

Because the survey process was expressly contemplated and authorized by the Policy and the implied covenant of good faith and fair dealing cannot be used to rewrite the Policy or eliminate rights expressly reserved therein, Plaintiff's allegations concerning ACE's participation in the survey process fail to state a claim and provide an additional basis for dismissal of Count III.

IV. THE BREACH OF IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING CLAIM SHOULD BE DISMISSED BECAUSE PLAINTIFF FAILS TO ALLEGE FACTS SUPPORING ITS CHALLENGE TO THE SURVEY PROCESS

Even assuming the allegations concerning the survey process could support an independent cause of action, which they do not, the Complaint fails to plead sufficient facts to render such allegations plausible as required by the *Twombly* and *Ashcroft* standard. *Twombly*, 550 U.S. at 570 (if a plaintiff "has not nudged [its] claims across the line from conceivable to plausible, [its] complaint must be dismissed."); *Ashcroft*, 556 US at 662 ("a pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.' Nor does a complaint suffice if it tenders 'naked assertion(s)' devoid of 'further factual enhancement.'").

The Complaint asserts that the survey process was "biased," "compromised," and a "sham." *See e.g.,* Perez Decl. Ex. A ¶¶67, 70-71. Those allegations, however, are unsupported by well-pleaded factual allegations. The Complaint pleads no facts establishing actual collusion, improper influence, fraud, bias or misconduct by ACE. To the extent the Complaint suggests any impropriety in the survey process, those allegations are directed at the surveyor panel itself, not ACE. Perez Decl. Ex. A ¶¶56-66; *see Koffler v Cincinnati Ins. Co.*, 239 AD3d 840, 842 (2d Dept 2025)(finding that when a complaint fails to sufficiently allege fraud, bias, or bad faith dismissal is warranted).

At bottom, the Complaint alleges only that (1) ACE selected Stafford as its surveyor; (2) Plaintiff selected Weinbrecht as his surveyor; (3) Stafford and Weinbrecht had a prior professional relationship, and (4) certain surveyors had previously worked on matters involving ACE. Perez Decl. Ex. A ¶¶52-53, 55. Those allegations do not plausibly support Plaintiff's conclusory characterization of the survey process.

Most telling, Plaintiff acknowledges that Weinbrech was Plaintiff's own selected surveyor. *Id.* ¶53. The Complaint contains no factual allegations (and none exist) suggesting that ACE controlled, directed, or otherwise participated in Plaintiff's selection of Weinbrecht, communicated improperly with Weinbrecht, or that the survey process departed from the procedure contemplated by the Policy. Plaintiff fails to raise any allegations as to how, if at all, his surveyor's performance was in any manner the result of ACE having breached any duty, let alone the duty of good faith and fair dealing. Plaintiff's grievances with his own selected surveyor are his own to bear.

Lastly, Plaintiff's assertions regarding ACE's alleged relationships with any surveyor and any improper conduct affecting the survey process or its outcome amount is nothing more than speculation and conjecture. Such conclusory allegations are insufficient to state a plausible claim for relief. *See Harris*, 572 F.3d at 72 (finding that under the "plausibility standard", although a court must accept all of the non-moving party's factual allegations as true, that "tenet" is "inapplicable to legal conclusions," and "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice."). Nowhere does Plaintiff allege, or even come close to suggesting, that ACE breached any duty of disclosure or that ACE made some promise of future consideration to the surveyors if they found in ACE's favor.

In short, Plaintiff's theory rests entirely on conjecture and conclusory allegations rather than well-pleaded facts. Absent factual allegations plausibly connecting ACE to any misconduct in the survey process, the Complaint fails to state a claim and must be dismissed pursuant to Rule 12(b)(6).

CONCLUSION

For the foregoing reasons, ACE respectfully submits that the Court should dismiss Count I (declaratory judgment) and Count III (breach of the implied covenant of good faith and fair dealing) of the Complaint for Plaintiff's failure to state a claim upon which relief can be granted.

Dated: New York, New York
June 22, 2026

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CERTIFICATION OF COMPLIANCE

Pursuant to the Honorable Kenneth M. Karas' Individual Rules of Practice II.B (Motions), the undersigned hereby certifies that the foregoing Memorandum of Law in Support of ACE American Insurance Company's Motion for Partial Dismissal of the Complaint contains (exclusive of case caption, table of contents, table of authorities, certificate of service, and certificate of compliance) less than 8,750 words (as determined by word count of Microsoft Word).

Dated: June 22, 2026

Eridania Perez