UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Michael and April Higgins	)	
	)	Case No.: 22-CV-198
	)	
Plaintiffs,	)	
	)	
v.	)	
State Farm Fire and Casualty Company,	)	
	)	
Defendant.	)	

DEFENDANT STATE FARM FIRE AND CASUALTY COMPANY'S BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR DECLARATORY JUDGMENT AND PARTIAL SUMMARY JUDGMENT; BRIEF IN SUPPORT OF STATE FARM'S CROSS-MOTION FOR SUMMARY JUDGMENT

State Farm Fire and Casualty Company ("State Farm"), by and through its counsel, Meissner Tierney Fisher & Nichols S.C., submits the following Brief in Opposition to Plaintiffs' Motion for Declaratory Judgment and Partial Summary Judgment and Brief in Support of State Farm's Cross-Motion for Summary Judgment.

INTRODUCTION

The long-standing rule in Wisconsin has been that the standard appraisal provision located in most homeowners and rental dwelling insurance policies applies when parties disagree as to the pricing or valuation of an item. Plaintiffs Michael and April Higgins ("Plaintiffs") seek to dramatically expand the breadth of appraisal to include not just disputes regarding valuation but also disputes about scope of damages – meaning the causation, nature, and/or the extent of damages. Such an approach is simply not supported by existing Wisconsin case law.

The facts of this case are relatively straightforward and undisputed. Plaintiffs suffered a fire at their rental property on February 24, 2021, and subsequently submitted a claim to their insurer, State Farm Fire & Casualty Company ("State Farm"). The parties have competing estimates that differ not only in their valuation of certain items but also as to the scope of damages. Specifically, the parties have forty-one disagreements regarding scope and four that concern valuation. State Farm contends that only the valuation disputes are proper for appraisal. Plaintiffs, on the other hand, argue that the entire dispute should be resolved by the appraisal panel.

However, recent Wisconsin case law, both state and federal, makes clear that appraisal should only cover disputes of valuation and that issues of scope are beyond this determination. Additionally, allowing an appraisal panel to consider scope disputes would, in essence, grant appraisers the authority to determine coverage under the policy as the resolution of scope disputes necessarily includes a determination of whether there was an "accidental direct physical loss to the property" sufficient to trigger coverage under the applicable policy.

Furthermore, Plaintiffs' interpretation of the appraisal provision would transform the appraisal process into a de facto arbitration in which the appraisers resolve the entire dispute between the parties, leaving nothing for the parties to litigate. Such is improper under Wisconsin law as the Wisconsin Supreme Court has repeatedly stressed the distinction between appraisal and arbitration. The parties also did not contract for an arbitration provision.

For these reasons, this Court should deny Plaintiffs' declaratory judgment motion as well as the portion of their summary judgment dedicated to arguing that State Farm breached its contract by not submitting to appraisal. Regarding the Plaintiffs' argument that State Farm breached the insurance policy by not naming an appraiser within twenty days of the Plaintiffs' initial appraisal request, that argument must also be dismissed as Plaintiffs did not plead that State Farm failed to

timely name an appraiser, there are no damages available for a simple failure to name an appraiser, and, most importantly, Plaintiffs did not provide any clarity as to whether they wished to move forward with appraisal after State Farm provided its position that it would submit the valuation disagreements to appraisal.

Because appraisal was inappropriate for the bulk of the parties' disagreement[1], Plaintiffs' breach of contract claim stemming from State Farm's denial of the appraisal requests must partially be dismissed. Similarly, as breach of contract is a prerequisite to prove a bad faith claim in Wisconsin, this same portion of the Plaintiffs' bad faith claim must be dismissed. In the alternative, even if this Court agrees with Plaintiffs that appraisal was warranted for all of the disagreements in this case, Plaintiffs' bad faith claim on the refusal to submit to appraisal must still be dismissed because State Farm cannot be said to have acted unreasonably in interpreting existing Wisconsin case law to mean that appraisal cannot include disagreements on scope.

FACTS

The Court can rule on the parties' respective motions based on the following eight undisputed facts[2]:

1. On February 24, 2021, portions of Plaintiffs' rental property located at 1228 Day Street, Green Bay, Wisconsin 54302 ("the Home") sustained damage as a result of a fire on the premises. (State Farm Response to Plaintiffs' Proposed Fact No. 6)
2. State Farm insured the Home for "accidental direct physical loss to the property" under State Farm Rental Dwelling Policy No. 99-CL-Y030-0 ("the State Farm Policy"). The State Farm Policy further provided that either party may request appraisal for disputes

[1] State Farm again concedes that appraisal is appropriate for the four pricing/valuation disputes.
[2] State Farm hereby incorporates its Response to Plaintiffs' Proposed Findings of Fact and its Proposed Additional Facts filed separately contemporaneously with this Brief, as though fully set forth herein.

regarding the "amount of loss." (State Farm Response to Plaintiffs' Proposed Fact No. 7-8; State Farm Proposed Additional Fact No. 1).

3. Following numerous inspections of the Home, State Farm estimated that the cost of repairs would total $72,166.96 while Plaintiffs' public adjuster, Jordan Masters of Miller Public Adjusters ("MPA"), estimated the total cost of repair at $156,993.49 plus $8,373.63 for debris removal. (State Farm Response to Plaintiffs' Proposed Fact No. 12-16).

4. The differences in the parties' estimates included disagreements in how the parties priced/valued certain items as well as the scope of damages. (State Farm Response to Plaintiffs' Proposed Fact No. 20-24; State Farm Additional Proposed Fact No. 2-6)

5. On October 1, 2021, Mr. Masters sent State Farm a letter, purporting to invoke the appraisal clause for the Plaintiffs but not identifying what specific items Plaintiffs wanted appraised. (State Farm Response to Plaintiffs' Proposed Fact No. 19; State Farm Proposed Additional Fact No. 2-3).

6. On October 6, 2021, State Farm representative Terri Moore sent Mr. Masters a letter denying the appraisal request because (based on the limited information State Farm had regarding the appraisal request) the appraisal concerned issues of scope, which State Farm contended was improper for appraisal. (State Farm Response to Plaintiffs' Proposed Fact No. 20).

7. After a request for clarity on State Farm's position on appraisal, Ms. Moore sent another letter to Mr. Masters on November 16, 2021, in which she outlined forty-five disagreements between the parties based on their respective estimates. Of these issues, forty-one related to scope while four related to pricing/valuation. State Farm agreed to

submit to appraisal for the differences in pricing/valuation, if Plaintiffs wished. (State Farm Response to Plaintiffs' Proposed Fact No. 21-24).

8. Mr. Masters never provided clarity as to whether Plaintiffs wished to move forward with the appraisal on the issues of pricing/valuation despite a follow-up request from State Farm for clarity on this issue. (State Farm Proposed Additional Fact No. 7-9).

ARGUMENT

I. PLAINTIFFS' MOTION FOR DECLARATORY JUDGMENT MUST BE DENIED AS APPRAISAL WAS INAPPROPRIATE UNDER THE CIRCUMSTANCES

A. Legal Standard

Under 28 U.S.C. § 2202(a), a court may "declare the rights and other legal relations of any interested party seeking such declaration." A declaratory judgment action under this section is "ripe and otherwise justiciable when 'the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.'" *Amling v. Harrow Indus. LLC*, 943 F.3d 373, 377 (7th Cir. 2019), *quoting MedImmune, Inc. v. Genetech, Inc.*, 549 U.S. 118, 127 (2007). Here, though the parties disagree on the proper breadth of a common appraisal provision in an insurance policy, they are in agreement that a judicial declaration on this issue is a justiciable controversy.

B. Appraisal Was Inappropriate Under the Circumstances for the Bulk of Plaintiffs' Claimed Damages

i. The authority cited by Plaintiffs does not support appraisal in this case

Wisconsin law is clear that the typical appraisal provision contained in a first-party liability policy is solely to determine issues of valuation and that a disagreement on "scope" of damages – the nature, extent, and/or cause of damages resulting from a covered event (in this case, the

February 24, 2021 fire) – is **not** to be determined at appraisal. The Wisconsin Supreme Court has unambiguously explained that "[a]n appraisal process is an agreement by parties to a contract to allow third party experts to determine the ***value of an item***." *Farmers Auto. Ins. Ass'n v. Union Pacific Ry. Co.* 2009 WI 73, ⁋ 42, 319 Wis.2d 527, 68 N.W.2d 596 (emphasis added). The Court has further described that "an agreement for an appraisal extends merely to the resolution of the specific issues of actual cash value and the amount of loss, all other issues being reserved for settlement by negotiation, or litigated in an ordinary action upon the policy." *Lynch v. American Family Mut. Ins.* 163 Wis.2d 1003, 1009-10, 473 N.W.2d 515 (1991) (citation omitted).

In an attempt to get this Court to contravene the long-standing Wisconsin principle that appraisals solely concern valuation, Plaintiffs point towards a number of irrelevant authorities. First, Plaintiffs cite *RTE Corp. v. Maryland Cas. Co.,* 74 Wis. 2d 614, 624, 247 N.W.2d 171, 176 (1976) for the proposition that "loss" in the insurance context means "ruin or destruction" or "the state or fact of being destroyed or placed beyond recovery." (Dkt. 16, pp. 4-5). However, the Court here is not being asked to define the *word* "loss" in an insurance policy generally but rather the *phrase* "amount of loss" as it specifically relates to appraisal.

Moreover, the policy provision the court was called on to interpret in *RTE* bears no resemblance to the appraisal provision in this case. In *RTE*, a shipping company (RTE) was issued a cargo insurance policy, covering the transformers it owned. 74 Wis. 2d at 616-17. After a carrier damaged five of RTE's transformers in a trucking accident, RTE initially attempted to make a claim against the carrier's insurance company. *Id.* at 618-19. More than nine months later, RTE notified its insurer for the first time about the damage to the transformers but still maintained its claim against the carrier's insurer. *Id.* After the carrier's insurer denied the claim, RTE then submitted a claim with its own insurer (Maryland Casualty). *Id.* When the matter went to suit,

Maryland Casualty filed a motion to dismiss, arguing that RTE did not notify them within ninety days of the "loss," as was required by the policy. *Id.* at 617-19. RTE responded that they did not have notice of the "loss" until the carrier's insurance company denied the claim. *Id.* at 619-20. Citing the dictionary definition of "loss" as "the state or fact of being destroyed or placed beyond recovery," the court held that the applicable "loss" was the accident damaging the transformers and thus that RTE's notification of Maryland Casualty nine months after that was untimely. *Id.* at 620-26.

In this case, the Court's determination as to meaning of the phrase "amount of loss" in a rental dwelling policy's appraisal clause has no similarity to the *RTE* court's definition of "loss" sufficient to trigger a cargo policy's time period to submit a claim.

Plaintiffs next cite two dictionary definitions of the word "loss" as either "destruction or ruin" or "amount of the insured's financial detriment by damage that the insurer is liable for" to support their argument. (Dkt. 16, p. 5). Again, the word "loss" is not at issue, particularly when it is provided completely devoid of context. Rather, the phrase "amount of loss" specific to the appraisal context is the proper inquiry.

Plaintiffs further claim that this Court must find that appraisal was appropriate because "it was and is reasonable for the Higgins to understand the appraisal provision to apply" even when scope (rather than valuation) is at issue. (*Id.* at, p. 9). Their only support for this contention is the *RTE* definition of "loss," the dictionary definitions of "loss," and their misinterpretation of a recent Wisconsin Court of Appeals opinion (discussed in the following section). However, while Plaintiffs cite definitions irrelevant to this dispute, they fail to acknowledge definitions much more germane to this matter. Specifically, Black's Law Dictionary defines "appraisal" and "appraiser" as follows:

appraisal, *n* (1817) **1.** The determination of what constitutes a fair price for something or how its condition can be fairly stated; the act of assessing the worth, value, or condition of something. **2.** The report of such a determination; specif., a statement or opinion judging the worth, value, or condition of something.

appraiser. (16c) An impartial person who estimates the value of something, such as real estate, jewelry, or rare books.

(***appraisal*,** Black's Law Dictionary (11th ed. 2019); ***appraiser*** Black's Law Dictionary (11th ed. 2019)).

The relevant appraisal standards also provide support for State Farm's position. Specifically, the Uniform Standards of Professional Appraisal Practice ("USPAP")[3] defines "appraisal" as "the act or process of developing an opinion of value; an opinion of value." Appraisal Standards, BD., Uniform Standards of Professional Appraisal Practice (The Appraisal Found., 2020-2021 ed.), p. 3. The USPAP further defines "appraiser" as "one who is expected to perform valuation services completely and in a manner that is independent, impartial, and objective." *Id.* Both the leading legal dictionary and the leading standard in the industry regarding appraisal support the commonsense understanding of appraisal as a determination of the value or worth of an item. As such, it was not reasonable for Plaintiffs' to assume that an appraisal panel would consider the causation of damage as well as the nature and extent of damage to their property (i.e. scope).

[3] Commentators have described the USPAP as a "governing standard, against which appraisals must be measured." *See e.g.* Chad J. Pomeroy, *Appraising Problems, Not Stuff*, 52 St. Mary's L.J. 495, 513 (2021). In fact, the USPAP is a congressionally authorized standard for appraisal in the United States. *See* 12 U.S.C. § 3339. To that end, multiple states have held that appraisals must follow the USPAP. *See e.g. Matter of Target Corporation*, 55 Kan. App. 234, 28, 410 P.3d 939 (Kan. App. 2017); *Dwiggins v. Mo. Real Estate Appraisers Comm'n*, 515 S.W.3d 765, 767 (Mo. Ct. App. 2017).

ii. Recent Wisconsin case law indicates appraisal was inappropriate

Recent Wisconsin cases have affirmed the above general principles. The Wisconsin Court of Appeals commented on the proper breadth of appraisal in *St. Croix Trading Co. v. Regent Ins. Co.*, 2016 WI App. 49, 370 Wis. 2d 248, 882 N.W.2d 487. In that case, the plaintiff, St. Croix, suffered wind damage to its building and estimated the loss at $103,533.00. St. Croix's insurer, Regent, estimated the loss at $3,224.00. *Id.* at ⁋ 2. Regent invoked the appraisal clause in its policy. *Id.* at ⁋ 3. After appraisal, two of the three appraisers certified the replacement cost of the loss at $7,265, and the actual cash value at $2,800. *Id.* at ⁋ 5. The award itemized the seven parts of the property that were assessed. *Id.* The panel awarded actual cash value and replacement cost for three of items – a shingle roof, a slate roof, and a fence. *Id.* The panel further valued the remaining items claimed by St. Croix – interior water damage, a rubber roof, window damage, and lawn damages – at zero. *Id.* Finally, the panel noted that the that the award on the fence was "advisory only" because the panel "ha[d] not confirmed coverage on the fence." *Id.*

St. Croix filed suit and moved to vacate the appraisal award, arguing that the panel exceeded its authority by deciding "coverage issues"[4] when its sole duty was to assess value. *Id.* at ⁋ 6. Upon review, the Court of Appeals affirmed the Circuit Court's decision to vacate the award, holding "that the appraisal panel's contractually assigned task was ***limited to assessing the value of the damaged property*** and that the panel exceeded its authority by determining which losses were covered by the Regent policy." *Id.* at ⁋ 7 (emphasis added).

[4] There is nothing in the *St. Croix* decision that references the appraisers performing a traditional "coverage" analysis (i.e. whether an exclusion applies to preclude coverage for the loss). Rather, it appears that the "coverage" issues that were inappropriately addressed were whether certain damages claimed – interior, rubber roof and lawn damages – were actually caused by the subject wind event. Those are the exact type of "coverage" issues that are in dispute in this case. Plaintiffs contend certain damages were caused by the fire and require replacement. State Farm disputes that contention. Plaintiffs seem to agree with State Farm on this point, arguing that the parties in *St. Croix* "differed in their valuation of the damages by more than $100,000.00 which suggests more than 'pricing differences' were at issue for purposes of the appraisal." (Doc. 16, p. 6, n. 1).

Contrary to Plaintiffs' contention, the *St. Croix* court did ***not*** "agree[] with Regent's position that causation was an appraisable issue." (Dkt. 16, p. 8). There is no support for that assertion anywhere in the *St. Croix* decision. While the *St. Croix* court favorably cited *Quade v. Secura Insurance*, 814 N.W.2d 703 (Minn. 2012) – a Minnesota decision that allowed for a determination of causation at appraisal – the quote from that decision the *St. Croix* court cited concludes by saying "[c]overage questions, such as whether damage is excluded because it was not caused by wind, are legal questions for the court." *St. Croix*, 2016 WI App. 49, ⁋ 13 (quoting *Quade*, 814 N.W.2d at 706-07). Indeed, the *St. Croix* court unambiguously held that the appraisal panel's task "was limited to assessing the value of the damaged property." *Id.* at ⁋ 7.

Federal courts applying Wisconsin law have also universally agreed that a determination of scope of damages is inappropriate at an appraisal. In *Gronik v. Balthasar*, the plaintiffs refused to complete appraisal because they believed their insurer's chosen appraiser was biased. 2013 WL 5376025, at *2 (E.D. Wis. September 24, 2013). In ordering that appraisal be completed, the Eastern District of Wisconsin stated:

> ***[T]he appraisers should not consider what caused each item of damage. They should simply assess the cost of repairing it.*** This court will decide what caused the damage and whether damage caused by particular perils, such as wear and tear or poor maintenance, are covered by plaintiffs' policy.

(*Id.* at *3). (Emphasis added).

Similarly, in *Stone Creek Condo. Owners Ass'n, Inc. v. Charter Oak Fire Ins. Co.*, the plaintiffs filed an action for a declaratory judgment that their insurer (Charter Insurance) violated the terms of its policy by not allowing an appraisal panel to set an amount of loss for alleged hail damage. 2021 WL 354180, at *4 (W.D. Wis. February 2, 2021). Following the plaintiffs' request for appraisal, Charter sent plaintiffs a letter requesting clarification as to what specifically they wanted appraised. *Id.* at *3-4. The plaintiffs did not respond to that letter, filing suit instead. *Id.* at

*4. In denying the plaintiff's motion for summary judgment, the Western District of Wisconsin held that the appraisal provision was "limited to determining the amount of loss, and ***does not include resolving coverage disputes, including whether damage to plaintiff's roofs was caused by a hail storm within the coverage period***." *Id.* at *5. (Emphasis added).

Beer v. Travelers Home and Marine Ins. Co., 2020 WL 5095470 (W.D. Wis. Aug. 28, 2020) presented a nearly identical fact pattern to this case. The plaintiffs invoked an appraisal clause as to fourteen items in dispute following hail damage to their property. For nine of the fourteen disagreements between the parties, the plaintiffs' insurer, Travelers, disputed that the "invocation of the appraisal provision was proper since the parties disputed the cause and existence of numerous items." *Id.* at *2. However, Travelers conceded that five of the fourteen disagreements were appraisable. *Id.*

The Western District granted Travelers' motion for summary judgment as to the nine items it did not agree to submit to appraisal because those nine items presented issues of causation, which is a coverage determination. *Id.* at *2, 9. Specifically, it held:

> The plain language of the Policy reinforces these holdings under Wisconsin law. As set forth above, the Appraisal provision of the Policy is limited to situations where the insured and insurer "fail to agree on the amount of loss." [citation omitted]. Practically speaking, this limitation also makes sense. Without it, insureds would always simply invoke appraisal, short-stepping any requirement to show that the loss is covered by the policy. As best as the court can discern, the Beers' position is that upon entering into the appraisal process as to certain losses, Travelers could no longer dispute coverage. That position, however, is not supported by the language in the Policy, Wisconsin cases discussing similar arbitration provisions, common sense, or Travelers' April 9 letter.

See id. at *8.

Summarizing its holding, the court held that appraisal "is limited under Wisconsin law to the areas for which the parties *only* dispute the amount of loss, and necessarily cannot cover areas for which there is a dispute as to coverage." *Id.* at *9 (emphasis in original). The *Beer* court further

held that "the parties must agree on coverage (or set that dispute aside) in pursuing appraisal." *Id.* The court specifically noted that to hold otherwise would be to encourage insureds to "always simply invoke appraisal, short-stepping any requirement to show that the loss is covered by the policy." *Id.* at *8.[5]

The holdings in these cases make perfect sense. Under the plain language of the typical appraisal provision (State Farm Policy included), only disputes as to "the amount of loss" are appropriate for appraisal. Moreover, in the State Farm Policy, disputes related to "coverage" are expressly excluded from the appraisal process. The insuring agreement of a policy defines the scope of "coverage" under that policy. Here, the State Farm insuring agreement states "[w]e insure for accidental direct physical loss to the property." (Affidavit of Mark D. Malloy, Ex. 7, State Farm Policy, p. 5). Thus, contrary to Plaintiffs' assertion that State Farm has not raised any coverage issues, if the insurer argues that certain items claimed are not the result of the accidental physical loss, that *is* a coverage issue as such a determination necessarily entails an interpretation of the phrase "direct physical loss."[6] In turn, allowing an appraisal panel to resolve scope disputes would authorize the appraisers to determine whether there is coverage under the policy as resolution of these types of issues requires an analysis as to whether there has been a "direct physical loss" sufficient to trigger coverage. Here, the vast majority of the disputes that Plaintiffs attempted to

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[5] In their brief, Plaintiffs cite to two unpublished Wisconsin Circuit Court decisions holding that appraisal panels can consider issues of scope for the proposition that "[s]ince the St. Croix decision, multiple Wisconsin courts have held that disputes as to the scope of damage or method of repairs are disputes as to the 'amount of loss.'" (Dkt. 16, pp. 9-10). However, Plaintiffs fail to acknowledge *Stone Creek* or *Beer*, both of which were decided after *St. Croix.* In fact, both *Stone Creek* and *Beer* were decided after the Circuit Court decisions Plaintiffs cite. Furthermore, the cited Circuit Court decisions are not precedential for this Court nor any court in Wisconsin. *See Brandt v. Labor and Industry Review Com'n*, 160 Wis. 2d 353, 365, 466 N.W.2d 673 (1991) (holding that decisions from the Wisconsin Circuit Courts are persuasive authorities).

[6] The *RTE* case cited by Plaintiffs supports this proposition, holding that the interpretation of the phrase "loss under this policy" was "a question of law to be determined by the trial court." 74 Wis. 2d at 621-22.

submit to appraisal included disagreements on scope, and thus were not appropriate for appraisal under the State Farm Policy, Wisconsin law, or common sense.

Furthermore, under the Plaintiffs' interpretation of the State Farm Policy, the appraisal process would be transformed into a de facto arbitration. However, the Wisconsin Supreme Court has gone to great lengths to note that "[a]lthough the words 'appraisal' and 'arbitration' are occasionally used interchangeably, there is a distinction between the two terms." *Lynch*, 163 Wis. 2d at 1009; *see also Farmers Auto Ins. Ass'n*, 2009 WI 73 at ⁋ 54 (Bradley, J. dissenting) (noting the "significant differences" between arbitration and appraisal). Specifically, the state Supreme Court has stated:

> An agreement for arbitration, as that term is now generally used, encompasses the disposition of the entire controversy between the parties upon which award a judgment may be entered, whereas an agreement for an appraisal extends merely to the resolution of the specific issues of actual cash value and the amount of loss, all other issues being reserved for settlement by negotiation, or litigated in an ordinary action upon the policy.
>
> (*Lynch*, 163 Wis. 2d at 1009) (*quoting* 14 Couch on Insurance 2d (rev. ed. 1982) § 50:5).

If the Plaintiffs' interpretation of the appraisal clause is correct, there would be no distinction between arbitration and appraisal. Rather, in essence, the entire dispute would be decided by the appraisal panel, leaving nothing for the parties to litigate. There is simply no support for this approach under existing Wisconsin case law. To the contrary, longstanding Wisconsin precedent establishes the differences between arbitration and appraisal, and the parties did not contract for an arbitration provision. Thus, consistent with the Wisconsin courts' approach to this issue, this Court should limit the breadth of the appraisal in this instance to the four discrete disagreements of pricing.

iii. Foreign cases support State Farm's interpretation

In their supporting brief, Plaintiffs cite several foreign cases to support their proposition that appraisal can determine issues of scope. State Farm acknowledges that there is a split among jurisdictions on this issue but notes that (1) those other jurisdiction rulings hold no precedential value here, and (2) a significant amount of other jurisdictions also agree that appraisal is limited solely to valuation. *See e,g. Kirkwood v. California State Automobile Ass'n Inte-Insurance Bureau*, 122 Cal. Rptr. 3d 480, 489 (Cal. App. 2011) (holding that "an appraisal panel exceeds its authority when it does anything beyond deciding the worth of the property in question."); *Rogers v. State Farm Fire and Cas. Co*., 984 So. 2d 382, 392 (Ala. 2007) (holding that "an appraiser's duty is limited to determining the 'amount of loss'—the monetary value of the property damage"); *Merrimack Mut. Ins. Co. v. Batts*, 59 S.W.3d 142, 152 (Tenn. 2001) (holding that "[t]he appraisal clause in [the insured's] homeowners policy is limited to determining the 'amount of the loss'—the monetary value of the property damage"); *Munn v. National Fire Ins. Co. of Hartford,* 237 Miss. 641, 115 So.2d 54, 55, 58 (Miss. 1959) ("The chancellor should have judicially determined what force caused the walls to lean and twist[;] [t]hat was not a question for the appraisers to decide. If that damage was the result of the storm, then the appraisers should have been directed to estimate the value of the loss occasioned by the walls being damaged."); *Kawa v. Nationwide Mut. Fire Ins. Co.,* 174 Misc.2d 407, 409-10, slip op., 664 N.Y.S.2d 430 (N.Y. 1997) ("a more formal proceeding, ordinarily encompasses the disposition of the entire controversy while appraisal extends merely to the specific issues of cash value and the amount of loss, leaving all other issues for determination in a plenary action.").

iv. Because scope of repairs was at issue here, appraisal was inappropriate for the vast majority of Plaintiffs' claimed damages

Here, the parties agree that issues of scope – meaning issues of causation as well as the nature and extent of damages – make up the vast majority of the parties' dispute. In his letter attempting to invoke appraisal, Jordan Masters of MPA stated "[m]y review of your estimate reveals that it does not accurately reflect the correct cost and scope of repairs needed to return the property back to its pre-loss condition." (Affidavit of Mark D. Malloy, Ex. 8, October 1, 2021, MPA Letter). Mr. Masters sent several follow-up emails in which he reiterated that the parties disagreed on both scope and pricing. (*See* Affidavit of Mark D. Malloy, Ex. 9, October 8, 2021, Masters Email ; *Id.,* Ex. 10, November 24, 2021 Masters Email). For its part, in its multiple letters and emails to MPA denying the bulk of the appraisal request, State Farm clearly articulated that it would not submit to appraisal for the differences regarding scope of repairs but did agree to appraisal for the pricing differences.[7] (Affidavit of Mark D. Malloy, Ex. 4, October 6, 2021, Letter to MPA; *Id.*, Ex. 5, November 16, 2021, Letter to MPA; *Id.*, Ex. 6, November 29, 2021, Email to MPA).

The law in Wisconsin is clear. Appraisals are limited to the amount of the loss (i.e. pricing/valuation) and not coverage issues. In this case, the issues Plaintiffs purported to submit to appraisal are issues of scope rather than valuation by their own admission. As such, Plaintiffs' request for appraisal was inappropriate under the circumstances, and their Motion for Declaratory Judgment should be denied.

[7] MPA never provided clarity as to whether it wished to move forward with the appraisal on pricing issues.

II. PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT MUST BE DENIED

In addition to requesting declaratory judgment on their incorrect interpretation of the appraisal provision, Plaintiffs also seek partial summary judgment on their breach of contract claim. In particular, Plaintiffs argue that, as a matter of law, State Farm breached the State Farm Policy by (1) failing to submit to the appraisal process and (2) failing to timely name an appraiser. (Dkt. 16, p. 13). Plaintiffs' argument on both points is highly flawed.

A. Legal Standard

Summary judgment is only appropriate where there is no genuine issue as to any material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). In reviewing a motion for summary judgment, a Court is to view the record and all reasonable inferences therefrom in the light most favorable to the non-moving party. *Perdomo v. Browner*, 67 F.3d 140, 144 (7th Cir. 1995). "In the light most favorable" simply means that summary judgment is not appropriate if the court must make "a choice of inferences." *Smith on Behalf of Smith v. Severn*, 129 F.3d 419, 426 (7th Cir. 1997). Summary judgment "will not lie if the dispute about a material fact is "genuine," that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

B. Plaintiffs Cannot Argue That a Failure to Name an Appraiser is a Breach of Contract Because They Did Not Plead As Much

As noted above, Plaintiffs proffer two distinct theories as to why State Farm breached the State Farm Policy: a failure to submit to appraisal and a failure to name an appraiser within twenty days of Plaintiffs' appraisal request. As to the latter theory, that argument must be dismissed because Plaintiffs did not plead in their Complaint that State Farm was required to name an appraiser within a certain time period.

In the Complaint, Plaintiffs state that State Farm breached its contract by failing to "(1) relay accurate information concerning the terms and conditions of the Policy; (2) acknowledge and indemnify the Higgins for all damage arising out of the loss; and (3) honor the Higgins' right to an appraisal under the Policy." (Dkt. 1, ⁋ 28). Notably, Plaintiffs did not claim that State Farm breached the contract by failing to *name* an appraiser within twenty days. In fact, there is not a single mention in the Complaint of State Farm's purported failure to name an appraiser within a certain period of time. (*See generally, id.*). As Plaintiffs did not make any allegations concerning the failure to name an appraiser in the Complaint, their argument that this failure constitutes a breach of contract must be dismissed. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 554-57 (2007) (holding that a failure to properly plead an allegation is grounds for dismissal of that allegation).

C. Both of Plaintiffs' Breach of Contract Arguments Must Be Dismissed Because Appraisal Was Inappropriate Under the Circumstances

Because, as State Farm demonstrated above, appraisal was inappropriate under the circumstances for the vast majority of the claimed damages, State Farm cannot be said to have breached the State Farm Policy for not submitting to appraisal or not naming an appraiser as to those issues.

D. Both of Plaintiffs' Breach of Contract Arguments Must Be Dismissed Because Plaintiffs Never Provided Clarity As to Whether They Wanted to Proceed with Appraisal on the Discrete Issues That Appraisal Was Appropriate

Plaintiffs argue that, even if State Farm's interpretation of the appraisal clause is correct, State Farm nonetheless breached the State Farm Policy because it never submitted to appraisal or named an appraiser for the four items it conceded were appraisable. (Dkt. 16, pp. 13-14). However, Plaintiffs fail to acknowledge that, on multiple occasions, State Farm requested clarity on whether

Plaintiffs planned to go forward with the appraisal on the issues both parties agreed were appraisable and that Plaintiffs never provided a response to that inquiry.

After a number of letters and emails had been exchanged regarding the parties' differences of opinion on the proper breadth of appraisal, on November 16, 2021, State Farm sent a letter to Mr. Masters listing the forty-one issues of scope State Farm contended were not appraisable and agreeing to appraisal for the four issues of pricing outlined in the letter. (Affidavit of Mark D. Malloy, Ex. 5, November 16, 2021 Letter to MPA). Eight days later, on November 24, Mr. Masters responded to that letter in an email again stating that he disagreed with State Farm's position that scope issues were not appraisable. (*Id.*, Ex. 10, November 24, 2021 Masters Email). Mr. Masters' November 24 email did not state whether Plaintiffs wished to move forward with the appraisal for the four issues of pricing. (*Id.*) Rather, he vaguely stated "I will be discussing the next steps with the insured next week." (*Id.*). The next week, State Farm followed up in an email to Mr. Masters stating, in part, "[i]f you wish to move forward with the appraisal on the pricing differences, please let us know and we will being [sic] the appraisal process." (*Id.*, Ex. 6, November 29, 2021 Email to MPA). Mr. Masters did not respond to that email until January 10, 2022, where he once again merely disagreed with State Farm's position but did not state whether Plaintiffs wished to move forward with appraisal on the pricing issues. (*Id.*, Ex. 11, January 10, 2022 Masters Email). Plaintiffs filed suit eight days later (Dkt. 1).

Considering Mr. Masters' complete lack of response on whether Plaintiffs wished to move forward with the appraisal on the pricing issues, Plaintiffs cannot now claim that it was State Farm who failed to move forward with this appraisal.

State Farm anticipates Plaintiffs will argue that, as MPA's initial attempt to invoke the appraisal clause occurred on October 1, 2021, State Farm should have already named an appraiser

by the time of their November 16, 2021, letter. However, State Farm did not have enough information to name an appraiser until their November 16, 2021, letter. In his initial letter attempting to invoke the appraisal clause, Mr. Masters did not specifically identify which items he wanted State Farm to have appraised, but rather just generally stated that Plaintiffs were "invoking the appraisal provision provided within our policy." (Affidavit of Mark D. Malloy, Ex. 8, October 1, 2021, MPA Letter). Mr. Masters never corrected that oversight, only ever generally stating that Plaintiffs wished to invoke appraisal but never identifying as to what issues. Thus, it was entirely left up to State Farm to compare the two parties' estimates and determine what the differences were, which it did in its November 16, 2021, letter – the same letter in which State Farm stated it would move forward on the appraisal for the pricing issues if Plaintiffs wished. (*Id.*, Ex. 5, November 16, 2021, Letter to MPA). Simply put, State Farm could not name an appraiser until it knew what exactly was to be appraised. State Farm did not have that information until its November 16, 2021, letter, after which point Mr. Masters never communicated whether Plaintiffs wished to move forward with the appraisal on the pricing issues.

E. Plaintiffs' Argument That State Farm Breached Its Contract By Not Naming an Appraiser Fails Because There Are No Damages Stemming From That Alleged Breach

Plaintiffs' argument that State Farm's failure to name an appraiser constitutes an independent breach of contract fails because they have submitted no evidence to indicate that this purported breach caused them any damages. While State Farm's alleged failure to submit to appraisal may have caused damages to Plaintiffs, there is nothing in the record to indicate that Plaintiffs suffered any damages merely by not naming an appraiser within twenty days after the attempted invocation of the appraisal clause. As such, Plaintiffs' argument on this point fails as a

matter of law. *See Miller Billboard Advertising, Inc. v. Outdoor Systems, Inc.*, 2000 WL 217553 (7th Cir. February 22, 2000) (dismissing case due to lack of proof of damages).

III. SUMMARY JUDGMENT SHOULD BE GRANTED IN FAVOR OF STATE FARM, PARTIALLY DISMISSING PLAINTIFFS' BREACH OF CONTRACT CLAIM

As was demonstrated above, appraisal was inappropriate for the vast majority of Plaintiffs' claimed damages. In addition, Plaintiffs never informed State Farm whether they wished to move forward with appraisal for the four items of pricing/valuation that could properly have been appraised. Thus, the portion of Plaintiffs' breach of contract claim related to State Farm's alleged failure to "honor the Higgins' right to an appraisal under the Policy" must be dismissed.

IV. SUMMARY JUDGMENT SHOULD BE GRANTED IN FAVOR OF STATE FARM, PARTIALLY DISMISSING PLAINTIFFS' BAD FAITH CLAIM

In addition to making a breach of contract claim against State Farm, Plaintiffs also allege bad faith, stemming partially from State Farm's denial of their appraisal request. (Dkt. 1, ⁋⁋ 32-33). However, regardless of the Court's ruling on the proper breadth of appraisal in this case, Plaintiffs' bad faith claim on the appraisal issue fails as a matter of law.

A. Plaintiff's Bad Faith Claim Fails as There Was No Breach of Contract

Under Wisconsin law, breach of contract is a fundamental prerequisite to a bad faith claim against an insurer. *Brethorst v. Allstate Prop. and Cas. Ins. Co.,* 2011 WI 41, ¶65, 334 Wis. 2d 23, 798 N.W.2d 467. As such, a bad faith claim cannot move forward unless a Plaintiff makes a showing of at least "some" breach of contract. *Id.* Here, for the same reasons that Plaintiffs' breach of contract claim on the appraisal issue fails, so must their bad faith claim.

B. Even if Appraisal Was Appropriate, State Farm Had a Good Faith Basis to Deny the Appraisal Request

In order to prove bad faith in Wisconsin, a Plaintiff must show (1) "the absence of a reasonable basis for denying benefits of the policy" and (2) "the defendant's knowledge or reckless disregard of the lack of a reasonable basis for denying the claim." *Anderson v. Continental Ins. Co.*, 85 Wis. 2d 675, 691, 271 N.W.2d 368 (Wis. 1978). Where a claim is "'fairly debatable,' the insurer is entitled to debate it, whether the debate concerns a matter of fact or law." *Id.*

Here, even if the Court holds that State Farm should have submitted the entire dispute to appraisal, the issue was, at least, "fairly debatable." The long-standing rule in Wisconsin has been that appraisal is "to determine the value of an item." *Farmers Auto. Ins. Ass'n v. Union Pacific Ry. Co.* 2009 WI 73, ⁋ 42, 319 Wis.2d 527, 68 N.W.2d 596. The most recent published Wisconsin decision on the matter – the same case (and only information) Mr. Masters provided to State Farm in support of Plaintiffs' position – expressly held that an appraisal panel's "contractually assigned task was limited to assessing the value of the damaged property." *St. Croix Trading Co. v. Regent Ins. Co.*, 2016 WI App. 49, ⁋ 7, 370 Wis. 2d 248, 882 N.W.2d 487. Each federal decision interpreting Wisconsin law agreed with State Farm's position. *Gronik v. Balthsar,* 2013 WL 5376025, at *2 (E.D. Wis. 2013); *Stone Creek Condo. Owners Ass'n, Inc. v. Charter Oak Fire Ins. Co.*, 2021 WL 354180 (W.D. Wis. February 2, 2021); *Beer v. Travelers Home and Marine Ins. Co.*, 2020 WL 5095470 (W.D. Wis. Aug. 28, 2020). There is also a split nationally on the issue with some jurisdictions adopting State Farm's position and others adopting Plaintiffs'. Thus, even if the Court disagrees with State Farm's position, State Farm plainly had a reasonable basis for its denial of the appraisal request.

CONCLUSION

The appraisal process in Wisconsin is solely limited to resolving disputes of valuation. For this reason, Plaintiffs' Motion for Declaratory Judgment and Motion for Partial Summary Judgment must be denied, and the portions of Plaintiffs' breach of contract and bad faith claims relating to appraisal must partially be dismissed. In the alternative, Plaintiffs' bad faith claim regarding appraisal must still be dismissed because State Farm had a reasonable basis for its position that appraisal was inappropriate.

Dated this 26th day of April 2022.

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