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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 Charles Mastowski, et al.,

10 Plaintiffs,

11 v.

12 American National Property and Casualty
13 Company,

14 Defendant.

No. CV-15-01893-PHX-NVW

ORDER

15
16 Before the Court is a Motion for Summary Judgement (Doc. 99) filed by
17 defendant American National Property and Casualty Company (“American National”)
18 against plaintiffs Charles and Sondra Mastowski (“the Mastowskis”). After this motion
19 had been briefed, the parties provided supplemental briefing at the Court’s request.
20 (Docs. 127, 128, 130.) Also before the Court are two motions to preclude expert
21 testimony: one filed by American National (Doc. 104), and one filed by the Mastowskis
22 (Doc. 98). The Court now considers these and all accompanying briefing.
23

24 **I. FACTUAL BACKGROUND**

25 The following facts are construed in the light most favorable to the plaintiffs.

26 In the early morning hours of August 29, 2014, police received a call from an
27 unknown male reporting light smoke emanating from the Mastowskis’ home in Superior,
28 Arizona. (Doc. 101 at 2; Doc. 118 at 2.) Fire crews arrived and extinguished what

1 turned out to be a substantial fire that had done considerable damage to the house and its
2 contents. (Doc. 101-6 at 17.) Police also arrived on scene, including Detective Bryan
3 Lawrence, Chief of Police Mark Nipp, and Officer Anthony Doran from the Superior
4 Police Department. (Doc. 101 at 2; Doc. 118 at 2.) The Mastowskis, however, were not
5 home. Several hours earlier they had embarked on an overnight drive to Henderson,
6 Nevada, where they planned to visit their son. (Doc. 101 at 2; Doc. 118 at 13.) A
7 restaurant receipt shows they had made it to Kingman, Arizona, about 250 miles from
8 Superior, by 6:42 AM that morning. (Doc. 101-5 at 31; Doc. 118 at 14.) After assessing
9 the scene, the police department called Sondra and suggested she and her husband return
10 as soon as possible. (Doc. 101 at 4; Doc. 118 at 2.) The Mastowskis immediately filed a
11 claim under their fire insurance policy; their provider, defendant American National,
12 opened a claim on the policy on August 29, 2014. (Doc. 118 at 19.) The claim was for
13 \$102,993.11. (Doc. 101 at 11; Doc. 118 at 5.)

14 The day the claim was filed American National hired investigator Robert
15 Buffington and appraiser Scott Bumm to evaluate the Mastowskis' losses. (Doc. 101 at
16 4; Doc. 118 at 2.) Over several reports stretching from one day to ten months after the
17 fire, Buffington found no evidence of flammable liquids starting the fire, forced entry to
18 the home, or that the fire was started by accident.¹ (Doc. 101 at 4, 7, 21; Doc. 118 at 2-3,
19 4, 10.) The final report he submitted to American National in June of 2015 concluded
20 that the fire, which started in four separate areas of the house, was the product of "human
21 involvement," though he could draw no conclusions about the source of ignition. (Doc.
22 101 at 21; Doc. 118 at 8.) Under a section entitled "Recommended work to be
23 performed," Buffington listed, among other things, "Fire modeling can be completed by
24 an engineer, if necessary." (*Id.*) "Fire modeling" is a form of mathematical modeling
25 used to calculate a fire's duration and trajectory. (Doc. 118 at 24.) American National
26 did not conduct fire modeling, though an expert retained by the Mastowskis insists it

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28 ¹ The Mastowskis' private investigator says he found evidence of forced entry
when he examined the house in December of 2015—well over one year after the fire took
place. (Doc. 118 at 26.)

1 should have been done in the course of the investigation. (Doc. 118 at 24.)

2 As for who started the fire, the Superior Police Department considered the
3 Mastowskis themselves the prime suspects. (Doc. 101 at 5; Doc. 118 at 3.) A report
4 produced by the Casa Grande Fire Department on September 3, 2014, concluded the fire
5 was “incendiary,” and that ignition “by an open-flame ignition source such as a match or
6 a lighter” was the “most probable cause of the fire.” (Doc. 101-1 at 25.) The report also
7 noted that the house was “secured” (i.e., locked) when firefighters arrived. (*Id.* at 18.)
8 There were no signs of forced entry noted at the time. (*Id.* at 25.) In light of all this,
9 American National transferred the claim to its special investigation unit based on a
10 decision by its Property Loss Claims Committee. (Doc. 101 at 6; Doc. 118 at 3.) On
11 September 5, 2014, American National also retained a lawyer to investigate the claim.
12 (Doc. 99 at 4; Doc. 101 at 6; Doc. 118 at 3.)

13 American National’s continued investigation yielded a report about the
14 Mastowskis’ neighbors, who, according to the report, told investigators that the
15 Mastowskis were “loners” who kept to themselves and had recently put significant work
16 into their home. (Doc. 101 at 8; Doc. 118 at 4.) American National went on to collect
17 the Mastowskis’ financial records, cell phone records, and service call records from the
18 Superior Police Department. (Doc. 101 at 9-10.) At American National’s behest,
19 Charles and Sondra then each completed two oral examinations under oath, one on
20 November 6, 2014, and one on March 13, 2015.² (Doc. 101 at 12; Doc. 118 at 5; Doc.
21 101 at 19) The first round turned up inconsistencies in the Mastowskis’ respective
22 accounts of whether and when they might have lost an extra electronic opener to their
23 garage. (Doc. 101-4 at 31.) A detective also submitted a report to American National’s
24 attorney noting, among other things, that nothing of value was stolen from the home

25
26 ² American National makes several assertions about what the Mastowskis said in
27 the second round but fail to attach any of their actual testimony to the record. (Doc. 101
28 at 19; Doc. 101-4 at 17-25; Doc. 101-5 at 22-29.) The Mastowskis dispute American
National’s characterization. (Doc. 118 at 8.) In light of the standard of review on
summary judgment, the Court’s decision therefore does not give any weight to American
National’s assertions about the testimony given in the March 13 examinations.

1 before the fire and that Charles never retrieved several guns police officers had removed
2 from the property the day of the fire. (Doc. 101-5 at 10.)

3 On May 31, 2015, American National's retained counsel produced a
4 recommendation and opinion letter detailing his investigation findings. (Doc. 101-5.)
5 Many of the findings echoed those made previously by local fire officials and by
6 American National's hired investigator. However, the letter also set out a theory that the
7 Mastowskis may have had a financial motive to set the fire. While the investigation
8 revealed the Mastowskis had kept up timely payments on their automobiles, the letter
9 detailed several other indications that they may have been experiencing financial
10 hardship at the time of the fire. Specifically, the letter stated that the Mastowskis had
11 once filed for bankruptcy (without specifying when), that they purchased their house in
12 2013, but that Charles was periodically unemployed between August of 2013 and April
13 of 2014, at which time a serious illness caused him to leave his job with a mining
14 company indefinitely. (Doc. 101-5 at 51-52.) The letter informed American National
15 that the Mastowskis had recently cashed out Charles's pension worth \$35,000 and used
16 about \$28,000 to repay their daughter for money they had borrowed to pay off credit card
17 and gambling debts. (Doc. 101-5 at 52.) The letter also stated that "\$20,000 was
18 transferred to savings on August 26, 2014" (*id.*), though it offered no details about where
19 that money came from, whose savings account it went to, and whether that money was
20 readily accessible to the Mastowskis afterward. The letter noted two other possible
21 suspects for the fire: one of several individuals connected to a December 2013 break-in
22 across the street from the Mastowskis, as well as an unknown male who was
23 photographed in the Mastowskis' driveway on September 10, 2014. (Doc. 101-5 at 53.)
24 The letter provided no other details regarding evidence for or against either of these
25 suspects, except to note that "[t]he involvement of a disgruntled contractor or person or
26 persons in possession of keys or the garage controller to the Mastowski residence is
27 possible." (Doc. 101-5 at 54.)

28 Ultimately the letter stated:

1 Taken as a whole evidence of a greater weight, more convincing evidence,
2 establishes the following:

- 3 1. The Mastowskis had motive and opportunity to cause the loss;
- 4 2. There was no forced entry;
- 5 3. Nothing was stolen or removed from the premises including items
6 with street value like tools, golf clubs, guns and electronics;
- 7 4. The next door burglary involved forced entry and theft as well as
8 damage to the premises;
- 9 5. There was no damage to the Mastowski residence except by the
10 fires;
- 11 6. The fires were set in an attempt to burn the premises completely
12 however [sic], an obvious and useful tool for this arson, charcoal
13 lighter fluid, was left unused on the Kitchen island despite the fact
14 that at least three fires were attempted to be started in the Kitchen;
- 15 7. The Mastowskis would have gained a new residence, a personal
16 property check in the amount of tens of thousands of dollars and had
17 their living expenses paid while waiting for the premises to be
rebuilt;
- 18 8. The Mastowskis would have been able to live in Mesa, AZ where
19 Mr. Mastowski was receiving treatment for his medical condition.

20 (Doc. 101-5 at 57.) The letter recommended denying the claim “due to the insured’s,
21 Charles and Sondra Mastkowskis’ intentional involvement.” (*Id.*)

22 Days after its retained counsel issued this letter, American National denied the
23 Mastowskis’ insurance claim in a sixteen-page letter dated June 23, 2015. (Doc. 101 at
24 22; Doc. 118 at 9.) The denial letter laid out American National’s rationale for its
25 decision, which hinged largely on evidence from its ten-month investigation pointing to
26 the Mastowskis as having some involvement in burning down their house. (Doc. 101-6 at
27 19-34.) The letter quoted language from the Mastowskis’ policy that excluded coverage
28 where the policyholder engages in “Concealment or Fraud” either before or after a loss.

1 (Doc. 101-6 at 28-29.) It further quoted language reserving the company’s right to deny
2 claims “[d]ue to material failure to cooperate and/or concealment.” (Doc. 101-6 at 31-
3 32.) In arriving at its conclusion, American National stated that the company

4 has also considered the expressed positions of the Mastowskis including but
5 not limited to, their position that they did not cause the fires and their
6 counsel’s position that the fires were set by using multiple delay devices
7 and, that the Mastowskis could not have caused the fires because they were
8 not present at the fires [sic] discovery, instead [sic] they were in or near
Kingman, AZ.

9 (Doc. 101-6 at 26.) The letter closed repeating word for word the eight conclusions
10 reached by American National’s retained counsel. (Doc. 101-6 at 27-28.) The primary
11 justification American National cited for denying the claim was “the intentional act of
12 arson and concealment of information from the company.” (Doc. 101 at 24; Doc. 118 at
13 10.) The secondary justification cited was “material noncooperation.” (*Id.*)

14 The Mastowskis filed suit in Maricopa County Superior Court on August 26,
15 2015, alleging breach of contract and bad faith. The case was removed to this Court on
16 September 21, 2015. (Doc. 1.)

17 **II. LEGAL STANDARDS**

18 Summary judgment should be granted if the evidence reveals no genuine dispute
19 about any material fact and the moving party is entitled to judgment as a matter of law. Fed.
20 R. Civ. P. 56(a). A material fact is one that affects the outcome of the action under the
21 governing law, and a factual dispute is genuine “if the evidence is such that a reasonable jury
22 could return a verdict for the nonmoving party.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S.
23 242, 248 (1986).

24 It is the moving party’s burden to show there are no genuine disputes of material fact.
25 *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Upon such a showing, however, the
26 burden shifts to the non-moving party, who must then “set forth specific facts showing that
27 there is a genuine issue for trial” without simply resting on the pleadings. *Anderson*, 477
28 U.S. at 256. To carry this burden, the nonmoving party must do more than simply show

1 there is “some metaphysical doubt as to the material facts.” *Matsushita Elec. Indus. Co. v.*
2 *Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Where the record, taken as a whole, could
3 not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for
4 trial. *Id.* at 587. “A court must view the evidence ‘in the light most favorable to the [non-
5 moving] party.’” *Tolan v. Cotton*, — U.S. —, 134 S. Ct. 1861, 1866 (2014) (quoting
6 *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970)). “A ‘judge’s function’ at summary
7 judgment is not ‘to weigh the evidence and determine the truth of the matter but to determine
8 whether there is a genuine issue for trial.’” *Id.* (quoting *Anderson*, 477 U.S. at 249).

9 **III. ANALYSIS**

10 **A. Breach of Contract**

11 American National first seeks summary judgment on the Mastowskis’ breach of
12 contract claim. American National argues that the Mastowskis’ insurance policy
13 expressly excluded coverage for losses caused by the policyholders’ “intentional acts.”
14 (Doc. 127 at 3-4.) The Mastowskis argue that American National is precluded from
15 making this argument because it “had not raised this defense of coverage in the denial
16 letter.” (Doc. 128 at 3.) Alternatively, they argue that a factfinder could reasonably
17 conclude from the direct and circumstantial evidence on the record that they did not
18 commit arson, rendering summary judgment inappropriate. (Doc. 128 at 7-9.)

19 In its letter denying coverage, American National specifically said: “The first basis
20 for the Company’s denial of the claim is *the intentional act of arson* and its concealment
21 from the Company under the policy language which appears at page 17 of Form SH-3.02
22 (8-07).” (Doc. 101-6 at 28 (emphasis added).) True, American National did not cite to
23 the policy’s exact exclusion provision dealing with intentional acts. The letter quotes
24 policy language only from a separate provision addressing “Concealment or Fraud.” (*Id.*)
25 But American National made crystal clear that “the intentional act of arson” was its first
26 basis for denying coverage. The Mastowskis had sufficient notice that their claim was
27 being denied for that reason and are in no way prejudiced by American National’s
28 argument made here.

1 However, summary judgment is not appropriate because whether American
2 National breached the insurance agreement depends on whether the intentional acts
3 exclusion did in fact apply—i.e., whether the Mastowskis had intentional involvement in
4 setting the fire. American National bears the burden of showing, by a preponderance of
5 the evidence, that the intentional acts exclusion applied. *See Keggi v. Northbrook*
6 *Property & Cas. Ins. Co.*, 199 Ariz. 43, 46, 13 P. 3d 785, 788 (Ct. App. 2000)
7 (“Generally, the insured bears the burden to establish coverage under an insuring clause,
8 and the insurer bears the burden to establish the applicability of any exclusion.”).
9 American National may have a strong case from circumstantial evidence and
10 improbability of any other cause, but it has not shown conclusively that the Mastowskis’
11 intentional involvement is the only conclusion a factfinder could reach.

12 **B. Bad Faith**

13 American National also seeks summary judgment on the Mastowskis’ claim of
14 bad faith. Arizona law recognizes in every contract an implied covenant of good faith
15 and fair dealing. *Wells Fargo Bank v. Arizona Laborers, Teamsters & Cement Masons*
16 *Local No. 395 Pension Trust Fund*, 201 Ariz. 474, 490, 38 P.3d 12, 28 (2002). The
17 accompanying duty requires “that neither party will act to impair the right of the other to
18 receive the benefits which flow from their agreement or contractual relationship.”
19 *Rawlings v. Apodaca*, 151 Ariz. 149, 153, 726 P.2d 565, 569 (1986). An insurer acts in
20 bad faith where it “intentionally denies, fails to process, or pay a claim without a
21 reasonable basis.” *Zilisch v. State Farm Mut. Auto. Ins. Co.*, 196 Ariz. 234, 237, 995
22 P.2d 276, 279 (2000) (quoting *Noble v. Nat’l Am. Life Ins. Co.*, 128 Ariz. 188, 190, 624
23 P.2d 866, 868 (1981)). For an insurer to have a good faith basis to deny a claim, the
24 claim’s validity must be fairly debatable. *See Rawlings*, 151 Ariz. at 156, 726 P.2d at
25 572 (“A failure to pay a claim is unreasonable unless the claim’s validity is ‘fairly
26 debatable’ after an adequate investigation.”). However, “while fair debatability is a
27 necessary condition to avoid a claim of bad faith, it is not always a sufficient condition.”
28 *Zilisch*, 196 Ariz. at 238, 995 P.2d at 280. Rather, the test is whether “reasonable jurors

1 could conclude that in the investigation, evaluation, and processing of the claim, the
2 insurer acted unreasonably and either knew or was conscious of the fact that its conduct
3 was unreasonable.” *Id.* (citing *Noble v. Nat’l Am. Life Ins. Co.*, 128 Ariz. 188, 190, 624
4 P.2d 866, 868 (1981)). A finding of bad faith thus requires two inquiries, one objective
5 (reasonableness) and one subjective (the insurer’s state of mind). *See Nardelli v. Metro.*
6 *Group Property & Cas. Ins. Co.*, 230 Ariz. 592, 597-98, 277 P.3d 789, 794-95 (Ct. App.
7 2012). Fair debatability is merely one factor in assessing the objective aspect, i.e.,
8 whether the insurer’s denial was reasonable. *Milhone v. Allstate Ins. Co.*, 289 F. Supp.
9 2d 1089, 1094 (D. Ariz. 2003) (citing *Deese v. State Farm Mut. Auto Ins. Co.*, 172 Ariz.
10 504, 507, 838 P.2d 1265, 1268 (1992)).

11 The Court concludes as a matter of law that American National acted reasonably
12 in its handling of the Mastowskis’ claim. In the first place, the claim was fairly
13 debatable. Significant evidence drawn from a number of sources, both internal and
14 external to American National, pointed to the Mastowskis as having had at least some
15 role in starting the fire. Among other things, both American National’s expert and the
16 Casa Grande Fire Department concluded that at the time of the incident the house was
17 locked and showed no signs of forced entry. *See* Doc. 101-2 at 7; Doc. 101-1 at 25. The
18 only evidence to the contrary was the observation of the Mastowskis’ own private
19 investigator, who did not examine the house until December of 2015—six months after
20 American National denied their claim and four months after they filed this action. *See*
21 Doc. 118 at 26. The record contains no evidence of forced entry that existed when
22 American National denied the claim. Other circumstantial evidence also pointed to the
23 Mastowskis, including that the fire had been smoldering since roughly the time they left
24 on an overnight drive, the fires were lit with no chemical accelerants, nothing was taken
25 from the home, Charles and Sondra’s stories contained inconsistencies, and they may
26 have had financial difficulties motivating them to try and collect on the insurance.

27 True, there was also some evidence that pointed to the Mastowskis’ innocence,
28 such as the Mastowskis’ distance from their home at the time the fire was discovered, and

1 the possibility that a house key or garage door opener may have fallen into the hands of
2 others. Several other people, burglars who had once broken into a neighbor's home and
3 an unknown man observed near the Mastowskis' home several days after the fire, could
4 not be definitively ruled out as potential suspects. But American National expressly
5 acknowledged this evidence in its letter denying the Mastowskis' claim and nonetheless
6 reached the reasonable conclusion that the evidence pointing to the Mastowskis
7 convincingly outweighed anything to the contrary. Bad faith requires more than the mere
8 presence of some speculative evidence weighing against the insurer's decision.

9 The Mastowskis offer several lines of argument in opposition, none of which is
10 availing. First, they point to numerous supposed deficiencies in American National's
11 decision-making process: the failure "to follow up on leads" for other possible suspects;
12 reliance on "flimsy evidence and illogical conclusions of motive," particularly the
13 "speculation" of a "snoopy neighbor" and the testimony of Detective Bryan Lawrence,
14 one of the officers who initially responded to the fire, who they write off as not credible;
15 reliance on the assumption that the home was "far from ready" for sale based on a single
16 piece of sheet rock requiring replacement; concluding the Mastowskis were in financial
17 trouble despite their solvency at the time of the fire; the failure to interview the
18 Mastowskis' son in Nevada, "who would have corroborated his parents' travel habits";
19 reliance on Sondra's statement to a neighbor "that she did not like living in Superior"
20 because the home would have still remained there; and a catch-all accusation of
21 American National's reliance on "'evidence' that proved nothing." (Doc. 117 at 12-13.)

22 The Mastowskis' list is rife with confusion, mischaracterization, and irrelevance.
23 Many things they point to amount to further measures American National could have
24 taken to investigate the claim, none of which, together or individually, establishes a
25 triable issue over bad faith. Interviewing the Mastowskis' son, for instance, would have
26 done little to further the investigation. Nothing in the record—least of all American
27 National's denial letter—suggests American National ever believed that Charles and
28 Sondra were not actually on their way to visit him, nor that they would frequently leave

1 in the middle of the night to drive to Nevada. The Mastowskis point to no relevant
2 information that might have been gleaned from interviewing their son, and they should
3 know. Moreover, the Mastowskis accuse American National of relying on evidence that
4 the record does not suggest they relied on. For example, the denial letter does not say
5 that their house was “far from ready” for sale, only that “[t]here was at least one
6 unfinished room in the Mastowski residence that was in the process of rehabilitation.”
7 (Doc. 101-6 at 21.) The letter says nothing at all about whether Sondra liked living in
8 Superior. And the accusation that American National relied on evidence “that proved
9 nothing” is conclusory and not substantiated by the record. The record shows that
10 American National relied on evidence that the fire was started intentionally, evidence that
11 there was no forced entry into the home, and the independent conclusions of local fire
12 and police officials that no other suspects could be identified. The test for bad faith is not
13 whether the evidence American National relied on was watertight but rather whether
14 “reasonable jurors could conclude that in the investigation, evaluation, and processing of
15 the claim, the insurer acted unreasonably and either knew or was conscious of the fact
16 that its conduct was unreasonable.” *Zilisch*, 196 Ariz. at 238, 995 P.2d at 280. Nothing
17 in the record suggests American National behaved unreasonably, let alone that it did so
18 consciously.

19 The Mastowskis also assert that American National made them jump through
20 “unnecessary procedural hoops,” such as twenty-six separate requests for information,
21 some of which American National’s retained counsel may have had independent access
22 to. (Doc. 117 at 15-16.) They also point to American National requiring them to take
23 part in two examinations under oath “even though [American National] knew that fire
24 modeling could have established the Mastowskis innocence early on.” (Doc. 117 at 16.)

25 For starters, the record contains no evidence that American National “knew” fire
26 modeling could have proved the Mastowskis’ claim. American National’s investigator
27 noted on a single report that fire modeling “can be completed, if necessary.” With so
28 much evidence pointing to the Mastowskis’ involvement, American National was

1 reasonable to conclude in the circumstances of this case that fire modeling was not in fact
2 necessary. The evidence showed the fire was started in multiple places by matches or
3 lighters hours before the fire was discovered. If fire modeling was necessary, the
4 Mastowskis could have done it on this motion and shown its results. They did not. An
5 insurer can act in good faith without taking every possible step to investigate a claim so
6 long as the investigation is sufficiently thorough. The investigation here undoubtedly
7 was thorough.

8 In any event, the examinations and information requests did not amount to
9 “unnecessary procedural hoops” or a game of “cat and mouse.” The Mastowskis contend
10 that American National “continued to demand financial documents that proved little or
11 that quickly proved [they] were honest and had no financial issues.” (Doc. 117 at 16.)
12 Yet the Mastowskis cite no specific document requests that they deem were excessive,
13 pointing only to Charles’s examination testimony that he and Sondra made their car
14 payments on time. *See* Doc. 118 at 16. That testimony in no way shows that the
15 document requests were excessive.

16 In addition, the Mastowskis point to the fact that American National’s counsel
17 required that they provide him with several police reports despite the fact that he “was in
18 contact with Detective Lawrence, with whom he exchanged documents regularly, and
19 who told him of the information in the police reports.” (Doc. 117 at 16.) Yet elsewhere
20 in their briefing, the Mastowskis repeatedly deride Lawrence as possessing a “complete
21 lack of credibility” based on accusations that he lied to a former employer, misled a grand
22 jury, and admitted to destroying evidence from the scene of the fire. (Doc. 117 at 7, 12.)
23 If Lawrence is unreliable, American National could not have engaged in bad faith by
24 working around him and instead seeking documents and information from the
25 Mastowskis directly.

26 The Mastowskis also make much ado over a deposition given by American
27 National’s retained attorney in which he testified he does not believe he is bound by a
28 duty of good faith and fair dealing when investigating an insurance claim on an insurer’s

1 behalf. (Doc. 117 at 11; Doc. 118-26 at 5.) This, the Mastowskis say, is “direct evidence
2 that the Defendant, its employees and agents, acted recklessly in handling the claim.”
3 (Doc. 117 at 11.) But regardless of what beliefs the attorney holds generally, the inquiry
4 here must turn on the things American National did—not what its retained counsel
5 professed to believe—in order to determine whether it acted reasonably and believed it
6 was doing so *in this case*. Even judging the facts in the light most favorable to the
7 Mastowskis, the record shows American National considered their claim, thoroughly
8 investigated it, and reasonably concluded it should be denied. The record contains no
9 evidence that either American National or any agent acting on its behalf actually behaved
10 unreasonably or believed their actions to be unreasonable in this case.

11 **C. Punitive Damages**

12 To receive punitive damages, a defendant must be liable for bad faith and “a
13 plaintiff must prove by clear and convincing evidence that the defendant’s conduct was
14 undertaken with an evil mind.” *Tritschler v. Allstate Ins. Co.*, 213 Ariz. 505, 517, 144
15 P.3d 519, 532 (Ct. App. 2006) (internal quotation marks omitted). American National is
16 not liable for bad faith, as discussed above. There would be no basis for punitive
17 damages in any event. An “evil mind” requires either that the “defendant intended to
18 injure the plaintiff” or that the “defendant consciously pursued a course of conduct
19 knowing that it created a substantial risk of significant harm to others.” *Rawlings*, 151
20 Ariz. at 162, 726 P.2d at 578. There is no evidence on the record that American National
21 did either of these. As a matter of law, American National cannot be liable for punitive
22 damages.

23 **D. Expert Witnesses**

24 Each party has also moved to exclude certain expert testimony proffered by the
25 other side. Summary judgment is warranted regardless of how the challenges to expert
26 testimony are decided. But the Court will address them anyway to some extent.

27 Rule 702 of the Federal Rules of Evidence governs opinion testimony from
28 qualified experts. Testimony is admissible if “the expert’s scientific, technical, or other

1 specialized knowledge will help the trier of fact to understand the evidence or to
2 determine a fact in issue,” “the testimony is based on sufficient facts or data,” “the
3 testimony is the product of reliable principles and methods,” and “the expert has reliably
4 applied the principles and methods to the facts of the case.” Fed. R. Evid. 702.

5 Where the basis for an expert’s testimony has been “sufficiently called into
6 question, . . . the trial judge must determine whether the testimony has a ‘reliable basis in
7 the knowledge and experience of [the relevant] discipline.” *Kumho Tire Co., Ltd. v.*
8 *Carmichael*, 526 U.S. 137, 149 (1999) (quoting *Daubert v. Merrell Dow Pharm., Inc.*,
9 509 U.S. 579, 592 (1993)) (citation omitted).

10 **1. Andler**

11 American National moves to preclude the testimony of Patrick Andler, an expert
12 offered by the Mastowskis to testify about a photograph of their home’s back door that he
13 says shows evidence of forced entry. American National offers three related arguments
14 for why Andler’s testimony should not be admitted. First, they argue that the photograph
15 he will interpret was taken in January of 2016, but that if evidence of forced entry had
16 existed at the time of the fire, the Mastowskis would have and could have documented it
17 then. (Doc. 104 at 7-8.) Second, and related, American National argues that Andler’s
18 testimony lacks foundation since neither he nor anyone else can establish that the
19 photograph depicts the door as it was at the time of the fire. (Doc. 104 at 9.) Third,
20 American National argues the photograph should be excluded as irrelevant since it was
21 taken so long after the fire actually happened. (Doc. 104 at 9-10.)

22 The testimony of Patrick Andler will be excluded. Andler’s interpretation of a
23 photograph taken more than a year after the fire occurred does not constitute a reliable
24 application of any expert methodology to the facts of this case. Moreover, Andler’s
25 “opinion” itself is difficult to follow and borders on unintelligible. It states:

26 **Conclusion:**

27
28 Based upon all the information available and the application of the
recommended scientific methodology it is the opinion of the investigators

1 from Andler & Associates that the fire detailed in this incident, has not
2 been proven to a reasonable degree of certainty within the fire investigative
3 profession, when it could have been initiated, by person/s unknown, that
4 either forcibly entered or gained entry by surreptitious means into the
5 residence owned by the Mastowskis. Once inside, person/s unknown
6 committed the act of arson by setting fire to available combustibles in
7 various locations. It is also opined, based upon all information considered,
8 that the Mastowskis did not possess motive or opportunity to commit this
9 arson and were not involved in the initiation of this fire.

10 (Doc. 104-1 at 6.) The first sentence says “the fire . . . has not been proven to a
11 reasonable degree of certainty” That formulation would be confusing to a jury.
12 Presumably Andler means that arson by the Mastowskis has not been proven, since it is
13 beyond question that their house burned in a fire. The same sentence continues to say
14 only that “it could have been initiated, by person/s unknown” who “either forcibly
15 entered or gained entry by surreptitious means into the residence” That just points
16 to a possibility, not to any level of probability. Yet the next sentence silently assumes
17 that it was not the Mastowskis and then says that once inside the house, “person/s
18 unknown committed the act of arson.” This falls far short of Rule 702’s requirements
19 that the opinion be “based on sufficient facts or data” and “the product of reliable
20 principles and methods” that have been “reliably applied.” *See* Fed. R. Evid. 702. It is
21 just a possibility and a guess.

22 Even if he could offer valid expert insight into what the photo depicts, Andler’s
23 testimony would still fall short under the balancing test of Rule 403: any minimal
24 probative value his testimony might offer is vastly outweighed by the risk of confusing
25 the issues, misleading the jury, and wasting time with evidence collected more than a
26 year after the fire. *See* Fed. R. Evid. 403.

27 As discussed above, the admissibility of Andler’s opinions does not change the
28 outcome on summary judgment. Those opinions would not create any material dispute of
fact on bad faith or punitive damages, and they do not change the conclusion that a triable
issue exists as to breach of contract.

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2. Plitt

The Mastowskis move to limit the testimony of Steven Plitt, an expert offered by American National to testify about the good faith standard for insurance claim handling. Again, the Court does not rely on Plitt’s testimony in granting summary judgment. The Mastowskis raise two main concerns with his expert report. First, they seek to preclude Plitt from testifying that “[t]he equality of consideration standard does not apply in first-party property claims,” which they contend is an incorrect statement of law. (Doc. 98 at 2-3.) Second, they seek to preclude Plitt “from commenting on the credibility of the Plaintiffs,” in light of a part of his report in which he characterizes Sondra’s interactions with police as exhibiting a “lack of clarity and evasiveness.” (Doc. 98 at 7-8.)

Regarding the first point, there is some subtlety and uncertainty to what exactly Plitt is saying about “equal consideration” and “fair debatability.” It is not necessary to pass judgment on Plitt’s opinion by filling in the gaps of his reasoning and analysis. Therefore, the Court declines to do so at this time.

As for the second point, Plitt would not be allowed to opine on credibility of witnesses or on how to interpret evidence the jury is capable of assessing. That is for the jury to determine without his input. Any such portions of his testimony and expert report would be excluded.

IT IS THEREFORE ORDERED that Defendant’s Motion to Preclude Testimony of Patrick A. Andler (Doc. 104) is granted.

IT IS FURTHER ORDERED that Plaintiffs’ Motion to Preclude Testimony of Steven Plitt (Doc. 98) is granted as to any testimony concerning witness credibility or interpretation of evidence and otherwise denied without prejudice.

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1 IT IS FURTHER ORDERED that Defendant's Motion for Summary Judgment
2 (Doc. 99) is granted as to bad faith and punitive damages and is denied as to breach of
3 contract.

4 Dated this 25th day of August, 2017.

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8 Neil V. Wake
9 Senior United States District Judge
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