Docket #10720 Date Filed: 08/23/2021

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

In re: RESIDENTIAL CAPITAL, LLC, *et al.*, Debtors.	Case No. 12-12020 Chapter 11 Jointly Administered
ROWENA DRENNEN, FLORA GASKIN, ROGER TURNER, CHRISTIE TURNER, JOHN PICARD AND REBECCA PICARD, individually and as the representatives of the KESSLER SETTLEMENT CLASS, STEVEN AND RUTH MITCHELL, individually and as the representatives of the MITCHELL SETTLEMENT CLASS, And RESCAP LIQUIDATING TRUST, Plaintiffs, vs. CERTAIN UNDERWRITERS AT LLOYD'S OF LONDON, *et al.*, Defendants.	Adv. Case No. 15-01025 (DSJ)

TWIN CITY FIRE INSURANCE COMPANY'S REPLY IN SUPPORT OF DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADING

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Defendant Twin City Fire Insurance Company ("Twin City") submits this Reply in Further Support of Defendants' Motion for Judgment on the Pleadings (Dkt. 699). Twin City joins the arguments set forth in the Reply Memorandum in Support of Their Motion for Judgment on the Pleadings filed concurrently by the other Insurer Defendants ("Joint Reply"); and it makes the additional arguments below.

PRELIMINARY STATEMENT

While many issues remain in this case for summary judgment, Daubert hearings, and potentially trial, the issues raised in Defendants' Motion for Judgment on the Pleadings can be addressed now. Defendants seek judgment on the pleadings as to Plaintiffs' claims for consequential damages. Adjudicating these issues now will streamline remaining motions practice, both summary judgment motions and motions regarding experts on "bad faith" claims-handling and damages.

Plaintiffs principally argue that the motion is procedurally improper because the Court resolved Plaintiffs' entitlement to consequential damages in allowing them to file the Third Amended Adversary Complaint ("TAAC") over Defendants' objections. This argument is easily dispensed. The hearing transcript setting forth Judge Lane's ruling from the bench shows that he specifically left open the issue of consequential damages. After he denied leave to add separate-count bad faith claims, he allowed additional factual allegations, and he left for another day the "degree and nature of consequential damages that plaintiffs may be entitled to recover." Jan. 21, 2020 Hearing Tr. (Dkt. 408 at 10). Even if the Court squarely had ruled on the present issues (it didn't), the "law of the case" doctrine still allows the Court discretion to revisit past rulings. In addition, numerous cases reject Plaintiffs' contention that damage theories cannot be dismissed via Rule 12(b)(6) or Rule 12(c).

Similarly, there was no choice of law ruling at the motion to amend stage nor any concession by Twin City that New York law governs attorney fees. Michigan law governs the Twin City policy and does not permit Plaintiffs to obtain their attorney fees for this case. Plaintiffs argue that forum (New York) law applies and permits attorney fees here. For the reasons set forth in the Joint Reply, Twin City submits that neither New York nor Michigan law allows Plaintiffs to obtain their attorney fees. But Plaintiffs' argument that forum law applies here because attorney fees are a procedural matter is mistaken. Some federal courts in this district have applied New York law as a procedural matter to impose the state's default American Rule, that each party bears its own attorney fees. But Plaintiffs do not cite any case where a New York court applied forum law to ***grant*** attorney fees where the substantive governing law of another state would deny them. Here, recovery of attorney fees for alleged insurance bad faith is closely tied to the cause of action and therefore is a substantive issue governed by Michigan law. Class Plaintiffs' claims for consequential damages of 12% penalty interest under Michigan law, on the one hand, and attorney fees under New York law, on the other hand, are an improper attempted "double dip."

Finally, Class Plaintiffs' theory of "foregone prejudgment interest" against Twin City and the other excess insurers in this case has never made any sense and should be dismissed from the case now. At a future juncture, the Court can decide whether Plaintiffs are entitled to prejudgment interest on any damages they are awarded. But Class Plaintiffs' theory of foregone prejudgment interest as a consequential damage is internally contradictory and deficient as a matter of law. As Plaintiffs recognize, each excess policy contains an "exhaustion" clause providing that coverage is not owed until all underlying carriers actually pay the full limit of liability of their policies. Plaintiffs complain they have been deprived of prejudgment interest

because each insurer's failure to exhaust its limit gave each higher-layer insurer a basis not to pay. Here, none of the insurers has paid its policy limit, and so none of the excess insurers has a present duty to pay. If no excess insurer has a present duty to pay, then no excess insurer can be liable for a higher layer's failure to pay because it failed to exhaust.

ARGUMENT

I. Defendants' motion is procedurally proper, and the Court has the authority to dismiss Plaintiffs' claims for consequential damages.

Plaintiffs argue that the Court cannot dismiss a claim for damages on a Rule 12(c) motion. Plaintiffs further argue that the Court is constrained from granting Defendants' motion under the law of the case doctrine. Both contentions are incorrect.

Federal courts in New York routinely dismiss damages claims under Rule 12(b)(6), which Plaintiffs agree imposes the same standard as Rule 12(c). *See Constellation Brands, Inc. v. Keste, LLC*, No. 14–CV–6272 CJS, 2014 WL 6065776, at *4 (W.D.N.Y. 2014) ("[T]he Court is also aware of decisions in which courts have dismissed damages claims under Rule 12(b)(6), as well as decisions of the Second Circuit Court of Appeals, affirming such dismissals, that do not hint at the alleged procedural bar upon which Plaintiff relies."); *Globecon Grp., LLC v. Hartford Fire Ins. Co.,* 434 F.3d 165, 176 (2d Cir. 2006) ("The district court dismissed under Rule 12(b)(6) New Globecon's claims for consequential damages, including attorneys' fees, resulting from Hartford's refusal to compensate it for Old Globecon's losses. We affirm the district court's decision."); *see also Fishberg v. State Farm Fire and Cas. Co.*, 20-cv-6664 (LJL), 2021 WL 3077478 (S.D.N.Y. July 20, 2021) (dismissing claim for punitive damages and attorney fees); *Dahlinger v. First Am. Specialty Ins. Co.*, No. 1:19-CV-0020 (LEK/TWD), 2020 WL 1511261, at *6 (N.D.N.Y. 2020) (dismissing claim for consequential damages); *Pacs Indus., Inc. v. Cutler-Hammer, Inc.,* 103 F.Supp.2d 570, 573 (E.D.N.Y. 2000) (dismissing claim for

punitive damages). The Court thus has the authority to dismiss Plaintiffs' various claims for consequential damages under Rule 12(c).

Plaintiffs also argue that the law of the case doctrine prevents the Court from entertaining Defendants' motion for judgment on the pleadings. As an initial matter, Plaintiffs are wrong to suggest that the issues now before the Court were actually decided by the Court at the motion to amend stage. *See Gordon v. City of New York*, No. 14 Civ. 6115 (JPO) (JCF), 2016 WL 4618969, at *3 (S.D.N.Y. Sep. 2, 2016) (law of the case doctrine "only forecloses consideration of issues that have already been decided."). In their opposition to Plaintiffs' motion to amend, Defendants' futility arguments centered on whether Michigan and New York law recognized standalone claims for bad faith. At oral argument, Plaintiffs conceded that they would be content to amend their pleading to add new factual allegations and claims for consequential damages without adding standalone counts for bad faith. Judge Lane allowed the more limited amendment and remarked as follows:

> Defendants argue that this is all duplicative of the contract claims that seek coverage. So more specifically, defendants contend that the vast majority of cases decided under New York law, including recent cases, have similarly dismissed purported bad-faith claims as being duplicative of breach-of-contract claims. And this is in defendants' opposition memo at 10.
>
> And in discussing Michigan law, defendants say a similar thing: "The degree and nature of consequential damages that plaintiffs may be entitled to recover under their existing breach-of-contract counts is an issue that the parties may or may not have to address at some point in this litigation. Such damages, however, are contract damages, to be sought only under a breach-of-contract claim." And again, that's also at defendants' memorandum in opposition at page 10.
>
> Applying the applicable standards to the case before the Court, the Court will grant the amendments to permit the new factual allegations and changes to the prayer for relief, but deny amendment to allow the new counts.
>
> So this is actually consistent with the legal arguments made by the defendants to which I've just referred, and in fact, there was no real objection to the new factual allegations made by the defendants, other than to argue that the claims are

> meritless.
>
> But in that argument, defendants argue about the facts and the evidence and the inferences. . . . Of course, it cannot -- the Court cannot and will not weigh the facts on a motion to amend. That's for another time.

Jan. 21, 2020 Hearing Tr. (Dkt. 408 at 10-11). As Judge Lane's remarks show, the Court did not rule on any argument about the "degree and nature of consequential damages that plaintiffs may be entitled to recover." *Id.* Nor did the Court rule on any choice of law issue.

Even if Judge Lane had ruled on the present issues at the motion to amend stage, the law of the case doctrine would not preclude the Court from taking up the issues now. "The decision to grant a request to amend a complaint and the decision to deny a motion to dismiss are two different issues, and one cannot constitute the law of the case for the other." *See Env't Corp. v. M2 Tech., Inc.*, No. CV-05-1600 (CPS), 2006 WL 148913, at *8 (E.D.N.Y. 2006). And the law of the case doctrine "is discretionary and does not constitute a limitation on a court's power." *641 Ave. of Ams. Ltd. P'ship v. 641 Assoc., Ltd.*, 189 B.R. 583, 588 (S.D.N.Y. 1995). The Court has the authority to exercise its discretion and revisit the issues of Plaintiffs' claims for consequential damages. In this district, "[t]he major grounds justifying reconsideration are 'an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice.'" *Tompkins v. Allied Barton Sec. Servs.*, No. 09 Civ.1954 RMB JLC, 2010 WL 1416066, at *1–2 (S.D.N.Y. 2010) (internal citations omitted).

Even if one assumes that Judge Lane actually ruled on the issues, there would be a need to correct a clear error on two issues: (1) that applicable Michigan law allows Plaintiffs to recover attorney fees from Twin City as consequential damages; and (2) that Class Plaintiffs have stated a viable claim for "foregone prejudgment interest" as consequential damages. Both issues are addressed below.

II. Under Michigan law, Plaintiffs cannot recover attorney fees as consequential damages.

Plaintiffs raise two arguments to support their contention that New York law governs an award of attorney fees.[1] First, Class Plaintiffs assert that the Defendants conceded that New York law applies to the issue. Second, Plaintiffs argue that the award of attorney fees is procedural, and therefore forum law governs. Neither argument is well-taken.

Twin City has not represented that New York law governs an award of attorney fees under its policy. Swiss Re's policy contains a New York choice of law provision, but the other Defendants consistently have noted that Michigan law applies to interpret their policies. Consistent with these positions, at oral argument on the motion to amend, Swiss Re's counsel noted that New York law applies to its policy. However, counsel for Clarendon, one of the other carriers on the First Excess Layer, noted that Michigan law applies to the other policies. December 5, 2019 Hearing Tr. (Dkt. 393 at 81).

Under Michigan law, Plaintiffs cannot recover attorney fees for their breach of contract claim. *Burnside v. State Farm Fire and Cas. Co.*, 528 N.W.2d 749, 753 (Mich. Ct. App. 1995) (holding that "the recovery of attorney fees incurred as a result of an insurer's bad-faith refusal to pay an insured's claim is governed by the American rule" and refusing "to carve out an exception" in the context of bad faith); *see also No Limit Clothing, Inc. v. Allstate Ins. Co.*, No. 09–13574, 2011 WL 96869, at *6 (E.D. Mich. 2011) (holding "attorney fees are not available as consequential damages in a breach of an insurance contract claim, even if the breaching party acted in bad faith"). Plaintiffs do not dispute that Michigan law governs their substantive claims

[1] In their opening motion, Defendants stated that New York and Michigan law do not conflict since neither state's law allows attorney fees. The Joint Reply demonstrates that, even if New York law applies, Plaintiffs are not entitled to attorney fees. If the Court finds that Plaintiffs are not entitled to attorney fees under New York law, then it need not reach the argument whether Michigan law applies.

against Twin City as a general matter. (Indeed, they are claiming the Michigan prejudgment interest rate of 12% against Twin City.) And, by insisting that New York law applies to an award of attorney fees, they implicitly concede that Michigan law does not award such fees.

Plaintiffs are incorrect in asserting that New York law governs an award of attorney fees here. While forum (New York) law applies to procedural issues, the issue of whether Plaintiffs are entitled to attorney fees is substantive, not procedural. New York courts classify legal rules as "substantive" when they "relate closely to the nature and existence of an underlying right." *See RLS Assocs., LLC v. United Bank of Kuwait PLC*, 464 F.Supp.2d 206, 218 (S.D.N.Y. 2006). "New York courts also take into account policy considerations that underlie the substance-procedure distinction. These policy concerns relate to: (1) judicial efficiency, (2) forum-shopping, (3) fairness to the parties, and (4) New York public policy." *Id.* at 219

Plaintiffs' claim for attorney fees is substantive under New York choice of law principles because it "relate[s] closely to the nature and existence of [Plaintiffs'] underlying right" to assert bad faith. As a general matter, both New York and Michigan follow the American Rule on attorney's fees. *See RLS Assocs., LLC*, 464 F.Supp.2d at 214; *Burnside*, 528 N.W.2d at 753. Plaintiffs argue, however, that under New York law attorney fees are recoverable where an insured makes "a showing of such bad faith in denying coverage that no reasonable carrier would, under the given facts, be expected to assert it." *Sukup v. State*, 19 N.Y.2d 519, 522 (N.Y. 1967). Plaintiffs' asserted right to attorney fees here is directly related to "the nature and existence" of their bad faith claim and substantive under New York choice of law principles. As argued in Plaintiffs' opposition briefs, the question whether Plaintiffs are entitled to attorney fees in this case involves substantive questions about the insurers' alleged conduct as measured by New York law. While the default application of the American Rule as a general matter might be

procedural, here the remedy (attorney fees awarded as an exception to the American Rule) runs directly with the cause of action. In *Seidel v. Houston Casualty Co.*, 375 F.Supp.2d 211, 226 (S.D.N.Y. 2005), the court found that the prevailing policyholder was entitled to award of attorney fees under governing Maryland law despite New York's default American Rule. While not directly on point, *Seidel* supports the argument that an exception to the American Rule for a particular cause of action should be viewed as substantive, not procedural.

Plaintiffs' claim for attorney fees also should be considered substantive when measured against the additional considerations of forum shopping and fairness to the parties. As noted above, Michigan law applies to Plaintiffs' substantive claims against Twin City. Twin City did not contract to have New York law apply to the question whether it issued a denial of coverage "that no reasonable carrier would, under the given facts, be expected to assert." While Michigan law does not allow policyholders to recover attorney fees in coverage actions, Michigan law provides that an "insurer which acts in bad faith … does not do so with impunity" because the Uniform Trade Practices Act provides that "an insurer is liable for a penalty interest if it fails to timely pay a claim not reasonably in dispute." *Burnside*, 528 N.W.2d at 753; *see* MCL 500.2001 *et seq.;* MSA 24.12001 *et seq.* By arguing that their right to attorney fees is procedural and controlled by New York law, but their right to allege bad faith is substantive and controlled by Michigan law, Plaintiffs shamelessly seek to "double dip" and collect both attorney fees under New York law, and a statutory penalty under Michigan law, which the state awards in lieu of attorney fees. Plaintiffs' gambit here would encourage other insureds to forum shop when bringing bad faith claims in hopes of receiving attorney fees under New York law in addition to whatever other bad faith penalties other states' governing law may impose.

The cases Plaintiffs cite to support application of New York law are readily

distinguishable. *See* Class Pls. Opp'n (Dkt. 724 at 29 n.56); Trust Opp'n (Dkt. 725 at 31 n.86). Plaintiffs' cases involve the default application of the American Rule under New York law. Courts have held that a claim for attorney fees is procedural when the American Rule applies as a matter of "default" without regard to the "subject matter of the underlying litigation." *See Deutsche Bank Trust Co. v. Am. Gen. Life Ins. Co.*, No. 1:15-cv-3869-GHW, 2016 WL 5719783, at *14 (S.D.N.Y. 2016) ("New York courts would deem the law on attorneys' fees procedural, because it generally applies by default, regardless of the subject matter of the underlying litigation"); *Ins. Co. of PA v. Equitas Ins. Ltd.*, No. 17 Civ. 6850 (LTS) (SLC), 2021 WL 3501597, at *3 (S.D.N.Y. 2021) ("The universal applicability of New York's rule—absent an express statutory or contractual exception—'weigh[s] heavily in favor of finding that New York courts would deem the law on attorneys' fees procedural.'"); *Bensen v. Am. Ultramar Ltd.,* No. 92 CIV. 4420 KMW NRB, 1997 WL 317343, at *13 (S.D.N.Y. June 12, 1997) ("In New York, the American rule is applied to every case, regardless of subject matter, unless an exception is specified by statute or contract. It is a fundamental part of the framework of litigation in the state, relied on by litigants and counsel as a matter of course.").

None of Plaintiffs' cited cases addresses the specific situation here: an award of attorney fees under New York law for alleged bad faith when another state's substantive law otherwise applies. The closest Plaintiffs come is *Manheim Automotive Financial Services, Inc. v. Fleet Funding Corp.*, No. 09CV4357 (NGG) (RER), 2010 WL 1692954, at *6 (E.D.N.Y. Mar. 22, 2010), but the case ultimately does not help them. In that case, a commercial contract provided for an award of attorney fees and contained a Georgia choice of law clause. The court held that the specific calculation of attorney fees would be governed by New York law, not Georgia law, because such calculation was a procedural matter and "not a specific law attached to a particular

cause of action." *Id*. at *6. If anything, *Manheim* shows that an award of attorney fees here would be a substantive, not procedural, issue.

In other words, when the American Rule can be applied to the issue of attorney fees as a matter of default in New York, some courts have held that the issue of attorney fees is procedural. This case, however, does not involve a procedural application of New York's default rule against fee shifting. Instead, this case involves a substantive inquiry into Plaintiffs' bad faith allegations to determine whether they are sufficient to trigger an exception to the American Rule under New York law. As such, the issue of attorney fees here is not a matter of default procedure and instead is substantive under New York choice of law principles.

III. Class Plaintiffs cannot claim prejudgment interest as consequential damages from Twin City.

In addition to attorney fees, Class Plaintiffs claim "foregone prejudgment interest" as consequential damages. As Class Plaintiffs recognize, each excess policy provides that coverage will attach only after the underlying carriers have exhausted their policies by actual payment of their limits. *See, e.g.*, Twin City Policy (Dkt. 698-6 at 4) (Twin City's liability for any loss shall attach "only after" all underlying insurers "shall have duly admitted liability and shall have paid the full amount of their respective liability"). According to Class Plaintiffs, by failing to pay its policy limits, each insurer permitted the insurer in the layer above it to decline payment based on these exhaustion provisions. Class Plaintiffs assert that, as a result, they have been prevented from obtaining prejudgment interest from excess carriers. The theory is internally inconsistent, and the claim for prejudgment interest as consequential damages should be dismissed.[2]

[2] Somewhat tellingly, the Trust has not asserted a similar claim for prejudgment interest as consequential damages. The Trust does have a normal claim for prejudgment interest. While Twin City contends that the Trust is not entitled to prejudgment interest from Twin City because such interest only accrues from the date of breach, and Twin City cannot have breached its contract absent underlying exhaustion, that argument is not the subject of the present motion.

As the Court is likely aware, the insurance at issue in this case is a "tower" of $400 million as follows:

Primary Layer - $50M **Certain Underwriter Members at Lloyd's, London**
First Excess Layer - $50M excess of $50M **Twin City $20M/Certain Underwriters $10M/Continental $10M/Clarendon $10M**
Second Excess Layer - $100M excess of $100M **Swiss Re**
Third Excess Layer - $100M excess of $200M **Bermuda Carriers (policies subject to arbitration)**
Fourth Excess Layer - $100M excess of $300M **Steadfast $50M/St. Paul $25M/North American $25M**

Class Plaintiffs' theory of foregone prejudgment interest is roughly as follows: Underwriters should have exhausted the $50M primary layer by Date A, and prejudgment interest should accrue on that $50M from Date A. If Lloyd's had so exhausted, then the First Excess Layer should have exhausted its $50M layer by Date B, and prejudgment interest should accrue on that $50M from Date B. If the First Excess Layer had so exhausted, then Swiss Re (the Second Excess Layer) should have exhausted its $100M layer by Date C, and prejudgment interest should accrue on that $100M from Date C. And so forth. But, because Underwriters never exhausted, the First Excess Layer's payment obligation was not triggered, and therefore no prejudgment interest ever could accrue on their layer. Likewise, because the First Excess Layer never exhausted, Swiss Re's payment obligation was not triggered, and therefore no prejudgment interest ever could accrue on its layer.

Class Plaintiffs claim they have been deprived of prejudgment interest by operation of the exhaustion provisions in the excess policies. Their theory of foregone prejudgment interest thus

assumes the enforceability of the exhaustion provisions in the excess policies. With good reason: courts routinely enforce such exhaustion provisions. *See, e.g., Ali v. Fed. Ins. Co.,* 719 F.3d 83, 90-91 (2d Cir. 2013); *Forest Lab'ys., Inc. v. Arch Ins. Co.*, 984 N.Y.S.2d 361, 362 (N.Y. App. Div. 2014); *Goodyear Tire & Rubber Co. v. Nat'l Union Fire Ins. Co.*, 694 F.3d 781, 782 (6th Cir. 2012); *Comerica, Inc. v. Zurich Am. Ins. Co.*, 498 F. Supp.2d 1019, 1032 (E.D. Mich. 2007).

But this tenet likewise shows why Class Plaintiffs' theory makes no sense. Here, none of the subject insurance policies has been exhausted. As Class Plaintiffs recognize, the primary carrier's failure to exhaust means that Twin City does not have a present obligation to pay. If Twin City has no present obligation to pay, its failure to pay cannot make it responsible for Swiss Re's failure to pay. Because none of the excess carriers has a present obligation to pay, none of the excess carriers has breached its contract, and therefore none of the excess carriers can be liable for consequential damages in the form of prejudgment interest that never accrued.

Class Plaintiffs have never cited any case support for this theory. In fact, the one court of which Twin City is aware that has squarely addressed the theory has rejected it. In *TIAA-CREF v. Illinois National Insurance. Co.*, C.A. No. N14C–05–178 JRJ [CCLD], 2017 WL 5197860 (Del. Super. Ct. Oct. 23, 2017), the policyholder obtained a declaration of coverage against its primary insurer and two excess carriers. The policyholder sought prejudgment interest. The excess carriers argued that no prejudgment interest should be awarded because the primary carrier had never exhausted its policy. The policyholder argued that if the court declined to award prejudgment interest against the excess carriers, it should find that the primary carrier owed the same amount as consequential damages.

The court agreed that the excess carriers owed no prejudgment interest in light of the

exhaustion provisions in their policies. *Id.* at *8. The court also rejected TIAA-CREF's theory of foregone prejudgment interest as consequential damages, a theory it noted was "so novel that TIAA–CREF cannot identi[fy] specific authority either for or against the proposition." *Id.* at *9. Notably, unlike Class Plaintiffs here, TIAA-CREF only sought prejudgment interest as consequential damages from the primary carrier, not any excess carrier. The court reasoned that "non-accrual of prejudgment interest against [the excess carriers]—a consequence of the operation of the plain terms of the attachment provisions—was a part of the bargain between TIAA–CREF and [its excess carriers]." *Id.* at *9. The court held there was no basis for the policyholder to effectively rewrite its excess polices by obtaining consequential damages from the primary carrier. *Id.* The Delaware Supreme Court affirmed the trial court on appeal. *See In re TIAA-CREF Ins. Appeals*, 192 A.3d 554 (Del. 2018).[3]

As Defendants' joint opening motion argued, prejudgment interest is just that—prejudgment interest, not consequential damages. As the court in *TIAA-CREF* held, there is no reason why a lower-level carrier, not a party to the excess contract, should compensate an insured for the consequences of plain contact terms that the insured agreed to with a higher-level carrier. Class Plaintiffs accordingly cannot articulate how their theory of foregone prejudgment interest would be a foreseeable damage in the contemplation of the parties when they contracted.

CONCLUSION

As the above discussion shows, the Plaintiffs' claims for consequential damages in the form of attorney fees and prejudgment interest are deficient as a matter of law and logic. Plaintiffs have designated experts on "bad faith" and damages in order to support these claims. Defendants will soon be designating rebuttal experts. Then the parties will be taking expert

[3] TIAA-CREF appealed the straight prejudgment interest issue; it did not appeal its "novel" theory of prejudgment interest as consequential damages.

depositions, moving for summary judgment, and moving to strike experts as appropriate. Plaintiffs' claims for consequential damages are thin reeds indeed on which to force the parties to embark on the activity that is to occur by the end of the year.

For the reasons set forth above, Twin City respectfully requests that the Court grant Defendants' motion for judgment on the pleadings and dismiss Plaintiffs' request for consequential damages in the form of attorney fees and prejudgment interest.

Date: August 23, 2021

Respectfully submitted,

/s/ Karen L. Toto

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CERTIFICATE OF SERVICE

I hereby certify that on August 23, 2021, I caused the foregoing document to be filed with the Clerk of the District Court using the CM/ECF system, which will provide electronic notification of such filing to all counsel of record registered with the Court's ECF system, in accordance with Local Bankruptcy Rule 9078-1.

Date: August 23, 2021

/s/ Karen L. Toto
Karen L. Toto