No. 23-

IN THE

Supreme Court of the United States

DAVID STREETER and KATJA STREETER,

Petitioners,

v.

USAA GENERAL INDEMNITY COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This Petition and recently filed *Randy Tarum et al. v. State Farm Mutual Automobile Ins. Co.*, No. 23-973, both raise the identical issue: have Ninth Circuit Panels and Montana federal district courts abused their discretion by denying certification to the Montana Supreme Court of "first impression" substantive law insurance issues?

1. Should cooperative federalism, comity, efficient federal practice, and the divergent decisions in the Circuits prompt the Court in the wake of *Lehman Bros. v. Schein*, 416 U.S. 386 (1974), to clarify and update the procedure for certifying questions of state law in diversity actions so that it is a predictable, if not mandated, process when an insurance question is one of "first impression," significantly affecting the welfare of citizens in the state, and determinative of the cause of action in the federal forum?

2. Were Petitioners denied a fair hearing in this diversity action when, after acknowledging that a state-law insurance issue is one of "first impression" in Montana, the Panel refused to certify the question to the state's highest court, relegating petitioners to an inappropriate "*Erie* guess" of Montana's insurance law?

PARTIES TO THE PROCEEDING

All the parties in this proceeding are listed in the caption.

STATEMENT OF RELATED CASES

Court of Appeals for the Ninth Circuit—

David Streeter; Katja Streeter v. USAA General Indemnity *Company*, C.A. Docket No. 23-35086. Judgment entered December 6, 2023.

United States District Court for the District of Montana—

David and Katja Streeter v. USAA General Indemnity Company et al., Civil Action No. CV 20-188–M-DLC. Judgment entered January 25, 2023.

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PETITION FOR WRIT OF CERTIORARI

Petitioners David Streeter and Katja Streeter respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit Court.

CITATION OF OPINIONS AND ORDERS

The unpublished Memorandum of the United States Court of Appeals for the Ninth Circuit in *David Streeter; Katja Streeter v. USAA General Indemnity Company*, C.A. Docket No. 23-35086, decided and filed December 6, 2023, and reported at 2023 WL 8449203 (9th Cir. Dec. 6, 2023), affirming the district court's grant of Respondent's summary judgment motion and denying Petitioners' motion to certify questions of state law to the Montana Supreme Court, is set forth in the Appendix hereto (App. 1a-7a).

The unpublished Order of the United States District Court for the District of Montana, Missoula Division, in *David and Katja Streeter v. USAA General Indemnity Company et al.*, Civil Action No. CV 20-188–M-DLC, decided and filed January 25, 2023, and reported at 2023 WL 402507 (D. Mont. Jan. 25, 2023), adopting the Magistrate's Findings and Recommendation, granting USAA General's motion for summary judgment, and denying Petitioners' pending motions as moot, is set forth in the Appendix hereto (App. 8a-30a).

The unpublished Findings and Recommendation of the Magistrate Judge for the United States District Court for the District of Montana, Missoula Division, in *David and Katja Streeter v. USAA General Indemnity Company*

et al., Civil Action No. CV 20-188–M-DLC-KLD, decided and filed September 27, 2022, and reported at 2022 WL 18460746 (D. Mont. Sept. 27, 2022), recommending that USAA General's summary judgment motion be granted and that Petitioners' pending motions be denied as moot, is set forth in the Appendix hereto (App. 31a-58a).

The unpublished Order of the United States Court of Appeals for the Ninth Circuit in *David Streeter; Katja Streeter v. USAA General Indemnity Company*, C.A. Docket No. 23-35086, decided and filed January 16, 2024, denying Petitioners' timely filed petition for Panel rehearing or for rehearing *en banc,* is set forth in the Appendix hereto (App. 59a-60a).

BASIS FOR JURISDICTION IN THIS COURT

The decision of the United States Court of Appeals for the Ninth Circuit affirming the district court's grant of Respondent's summary judgment motion and its denial of Petitioners' motion to certify questions of state law to the Montana Supreme Court was entered on December 6, 2023; and its order denying Petitioners' timely filed petition for panel rehearing or for rehearing *en banc* was decided and filed on January 16, 2024 (App. 1a-7a; 59a-60a).

This petition for writ of certiorari is filed within ninety (90) days of the date the Court of Appeals denied Petitioners' timely filed petition for panel rehearing or for rehearing *en banc*. 28 U.S.C. § 2101(c). Revised Supreme Court Rule 13.3.

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND RULE PROVISIONS IMPLICATED BY THIS PETITION

United States Constitution, Amendment V:

> No person shall ... be deprived of life, liberty, or property, without due process of law. ...

28 U.S.C. § 1332(a)(1) (Diversity of citizenship; amount in controversy; costs):

> (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between—
>
> (1) citizens of different States. ...

Fed. R. App. P. 32.1(a):

> **Citing Judicial Dispositions**
>
> (a) Citation Permitted. A court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions that have been:
>
> (i) designated as "unpublished," "not for publication," "non-precedential," "not precedent," or the like; and (ii) issued on or after January 1, 2007.

Ninth Circuit Rule 36-1. Opinions, Memoranda, Orders; Publication

Each written disposition of a matter before this Court shall bear under the number in the caption the designation OPINION, or MEMORANDUM, or ORDER. A written, reasoned disposition of a case or motion which is designated as an opinion under Circuit Rule 36-2 is an OPINION of the Court. It may be an authored opinion or a *per curiam* opinion. A written, reasoned disposition of a case or a motion which is not intended for publication under Circuit Rule 36-2 is a MEMORANDUM.

Any other disposition of a matter before the Court is an ORDER. A memorandum or order shall not identify its author, nor shall it be designated "*Per Curiam*."

All opinions are published; no memoranda are published; orders are not published except by order of the court. As used in this rule, the term PUBLICATION means to make a disposition available to legal publishing companies to be reported and cited.

Ninth Circuit Rule 36-2. Criteria for Publication

A written, reasoned disposition shall be designated as an OPINION if it:

(a) Establishes, alters, modifies or clarifies a rule of federal law, or

(b) Calls attention to a rule of law that appears to have been generally overlooked, or

(c) Criticizes existing law, or

(d) Involves a legal or factual issue of unique interest or substantial public importance, or

(e) Is a disposition of a case in which there is a published opinion by a lower court or administrative agency, unless the panel determines that publication is unnecessary for clarifying the panel's disposition of the case, or

(f) Is a disposition of a case following a reversal or remand by the United States Supreme Court, or

(g) Is accompanied by a separate concurring or dissenting expression, and the author of such separate expression requests publication of the disposition of the Court and the separate expression.

Ninth Circuit Rule 36-3(a). Citation of Unpublished Dispositions or Orders

(a) Not Precedent. Unpublished dispositions and orders of this Court are not precedent, except when relevant under the doctrine of law of the case or rules of claim preclusion or issue preclusion.

Montana R. App. P. 15(3):

Certification of Questions of Law

....

(3) Power to answer. The supreme court of this State may answer a question of law certified to it by a court of the United States or by the highest court of another State ..., if:

(a) The answer may be determinative of an issue in pending litigation in the certifying court; and

(b) There is no controlling appellate decision, constitutional provision, or statute of this State.

STATEMENT OF THE CASE

In 2017, David Streeter and Katja Streeter ("Petitioners") built their home near Kalispell, Montana. Respondent USAA General Indemnity Company ("GIC") insured Petitioners' house under a renewed policy covering sudden and accidental loss to Petitioners' dwelling, other structures, and tangible personal property (App. 9a).

The GIC policy provided coverage for Petitioners' dwelling in the amount of $395,000; "other structure" coverage totaled $39,500; "personal property" coverage was in the amount of $197,500; and there was "loss of use" coverage in an unlimited amount for up to twelve months (*Id.*). GIC's policy also contained conditions requiring Petitioners to "cooperate with [GIC] in the investigation of a claim" and "provide [GIC] with records and documents [which GIC] request[s]" during a claim investigation (*Id.*).

On July 11, 2019, Petitioners were on a camping trip miles away from their home when they were advised that there was a fire in their home. According to GIC's hired fire investigator Norm Loftin ("Loftin"), who was at the scene of the fire within hours, it was a plausibly accidental fire caused by a "halogen work light [left] on in the crawl space of the house." The fire, which partially destroyed their home, was also classified by the Fire Department as "accidental."

After the fire was extinguished and thought to be out, the property was released to Petitioners who then went to a hotel, leaving their new camper and pickup truck in their driveway. In the early morning hours of July 12, 2019, fire broke out again, totally destroying Petitioners' home and significantly damaging their new camper. Petitioners immediately reported all these losses to GIC and submitted a claim under the policy for the total loss of their home and personal property.

GIC began its investigation on July 12, 2019. It confirmed that Petitioners' remaining mortgage balance on the property was $467,519.92. On July 15, 2019, GIC conducted an in-person, recorded interview with petitioners who explained that they had been away on a camping trip at the time of the first fire and were staying in a hotel when the second fire broke out. Petitioners then signed a blanket authorization giving GIC access to all their personal information with any entity without any notice. On July 18, 2019, GIC's investigator Angela Ritchie ("Ritchie") took another recorded statement from Petitioners verifying events regarding the fires.

Loftin, GIC's "cause and origin" fire expert, also interviewed Petitioners in person on July 15, 2019. As

Loftin reported to GIC, there were two fires on the property: the first one was caused by the halogen lamp in the crawl space having been left plugged in, while the second fire's cause was "undetermined at this time ... [but] there is the possibility that [it] may have been a rekindle ..." of the first fire. Loftin subjected debris samples from the second fire to laboratory testing for accelerants; the four samples tested *negative* for the presence of ignitable substances.

GIC's claims representative Ritchie informed Petitioners that GIC would be requesting additional information including their mortgage refinance records, proof of income, and cell phone records for the period from July 8, 2019, to July 15, 2019, along with "data pulls" from both of their cell phones to be carried out by a third-party contractor, OneSource Discovery ("OneSource"). Ritchie also asked Petitioners to cooperate "in preserving electronically stored information that may contain information relevant to [the] claim," including data on all smart devices including cell phones (App. 10a; 33a). In response, Petitioners promptly provided GIC with the requested refinance documents, proof of income, and Verizon phone records with call and text data from June 14, 2019, to July 13, 2019 (10a; 33a-34a).

On August 1, 2019, Petitioners met with OneSource's data pull technician and presented him with an authorization which limited the data OneSource could access. While Petitioners agreed to grant access to all their text messages, phone logs, GPS locations, search history, and emails from July 8, 2019, to July 15, 2019, Petitioners did *not* agree to grant access to their "personal files, pictures, notes, or any other technical data from any of the cell phones owned by [them] or from the iPad

that will be inspected" (App. 11a; 34a). When informed of Petitioners' limited authorization, GIC's Ritchie told OneSource that all the data could be pulled and stored until GIC, and Petitioners could agree "on what data is consented to be released" (App. 11a; 35a).

On August 15, 2019, when Ritchie compared OneSource's extracted reports with Petitioners' Verizon phone records previously supplied, she noted that several calls listed on the Verizon records between Petitioners from July 10, 2019, to July 12, 2019 were *not* documented in OneSource's extraction report (App. 12a; 36a). The data technician explained that a search for other data in this time frame would require an expanded authorization to include voicemail records for both phones from July 8, 2019, to July 15, 2019, as well as any indication of factory resets, data hiding, or similar activity (App. 12-13a; 36a).

On August 19, 2019, Ritchie emailed Petitioners seeking this authorization (App. 12a-13a; 36a-37a). Petitioners immediately responded by authorizing OneSource "to look into any communication apps such as WhatsApp and Messenger to confirm communication attempts during the week of 7-8-19 to 7-15-19" and to "also look into voicemail from the devices that were downloaded" (App. 13a; 37a). However, Petitioners did not authorize GIC to reexamine their devices (37a-38a). Petitioners ultimately provided expert testimony including an opinion that there was no evidence of any factory resets, data hiding, or similar actions. Petitioners' expert's opinions were not referenced by the district court's ultimate findings.

The Petitioners were concerned over GIC's claims of deletions and, on August 26, 2019, Petitioners informed GIC via email that they were "*suspending* the right of

OneSource … to share any further personal information" from the information under OneSource's control until a GIC supervisor called them to discuss the claim (App. 13a; 37a) (emphasis supplied). GIC *never followed up on Petitioners' request to discuss the claim* or their suspension of authorization. Petitioners hired an attorney who made numerous communications to GIC's attorney, requesting what was necessary to obtain insurance proceeds. Petitioners voluntarily submitted to GIC's request for sworn statements under oath on November 27, 2019, during which time GIC never pursued with Petitioners or their attorney about their suspended authorization of August 26, 2019, despite repeated written requests by Petitioners' counsel for the reasons payments were delayed and what actions were necessary to expedite payment.

After over seven months of delays in payment of insurance benefits, in January and February of 2020, Petitioners' counsel demanded full payment from GIC under the policy consistent with their proofs of loss. On February 18, 2020, GIC finally paid Petitioners the $395,000 policy limits for dwelling coverage, as well as payments totaling $143,125 under the policy's personal property coverage provisions. In March and May of 2020, GIC issued additional payments to Petitioners under the policy's personal property, "other structure," and loss of use coverage provisions. GIC's payments under the policy totaled about $640,000 (App. 13a; 38a). Despite these payments, substantial benefits under the policy totaling more than $110,000 remained unpaid, including personal property and additional structure coverage, for rebuilding costs greater than petitioner's policy's stated value coverage.

After months of non-productive negotiations for payment of the remaining policy benefits, Petitioners initiated a civil action in December of 2020 against GIC in the federal district court for the District of Montana to recover the unpaid benefits due them under the policy.

GIC answered, denying liability. During discovery, Petitioners deposed Loftin, GIC's initial "cause and origin" expert. Loftin testified that, in his opinion, the first fire was accidental and there was a 30%-50% chance that the second fire was a rekindle of the first fire. Further, Loftin testified that had he been in charge of superintending the first fire of July 11, 2019, he would have sent the firemen into the crawl space and the attic to check for hot spots he would have directed the firemen to use a probing pole to open up the ceiling to check for hot spots. After GIC abandoned him as its expert, Loftin was designated by Petitioners as one of their cause-and-origin experts to testify at trial.

GIC also accessed Petitioners' cell phone data retained by OneSource after litigation began. GIC contended data had been deleted from Petitioners' cell phones (App. 14; 39a). Yet GIC's conclusions were disputed by Petitioners' expert. A few weeks before trial, GIC was allowed to amend its answer to allege a lack of cooperation by Petitioners as an additional defense (*Id.*). On the same day, GIC moved for summary judgment on all of Petitioners' claims on the grounds *inter alia* that Petitioners had failed to comply with the policy's cooperation and record-disclosure provisions (14a-15a; 39a). Petitioners cross-moved for partial summary judgment on their breach of contract claim under Montana law, inclusive of the untimely payment of amounts due under Montana's stated value law (*Id.*).

On September 27, 2022—almost six weeks from the scheduled jury trial— the Magistrate issued her Findings and Recommendation (App. 31a-58a). She noted that the substantive law of Montana did *not* address whether and under what circumstances an insured's alleged failure to cooperate with a claim investigation will preclude the insured from recovering under the policy (App. 41a). Yet, relying upon decisions by two federal courts applying Pennsylvania law and a Circuit Court decision applying Washington law, the Magistrate made an "*Erie* guess" that Montana law would not regard Petitioners' substantial cooperation as raising a triable fact question for a jury. (App. 46a-47a; 51a-52a).

Applying this foreign law, the Magistrate determined that when Petitioners "entirely *revoked* all authorization" for GIC to review the data OneSource had gathered, "no reasonable juror could conclude based on the evidence of record that [Petitioners] substantially cooperated with ... GIC's claim investigation" (App. 52a-53a). The Magistrate also determined that no reasonable jury could find that Petitioners' "revocation" of their authorization had not impeded GIC's ability to investigate the claim, thereby creating actual and material prejudice (App. 55a-56a). Noteworthy is the undisputed fact that the Petitioners never "revoked" any authorization: GIC always had Petitioners' signed authorization it could have used at its discretion.

Even though there was no dispute on this record that Petitioners had only "suspended"—*not* "revoked"—their authorization on August 26, 2019, the Magistrate nonetheless used the term "revoked" or "entirely revoked" no less than *eight* times to describe Petitioners'

"suspended" authorization. GIC's summary judgment failed to mention Petitioners' blanket authorization of July 15, 2019, giving GIC access to all their personal information with any entity without any notice. She recommended the entry of summary judgment in GIC's favor on all of Petitioners' claims and that Petitioners' cross motion for partial summary judgment be denied as moot (App. 58a).

Petitioners objected to the Magistrate's rulings. Petitioners challenged the standard of "noncooperation" the Magistrate used to measure their actions as an incorrect "*Erie* guess" founded on inapposite foreign law; that under Montana's likely substantive law, any alleged noncooperation on Petitioners' part did not obviate coverage absent notice from GIC and an opportunity to remedy; and that Petitioners' substantial cooperation in GIC's investigation created a jury question under Montana law whether they violated the policy's cooperation clause, precluding the entry of summary judgment.

On January 25, 2023, District Court Judge Christensen, J. issued an order adopting the Magistrate's Findings and Recommendation (App. 8a-30a). Like the Magistrate, Judge Christensen acknowledged the absence of Montana law addressing the standard for whether noncooperation had occurred in order to preclude coverage under GIC's policy (App. 17a). The district judge therefore conceded that his ruling was only a "predict[ion of] how the state's highest court would decide the question" (*Id.*, quoting *Orkin v. Taylor*, 487 F.3d 734, 741 (9th Cir. 2007)).

Relying upon decisions from three foreign courts, the district court ruled the standard of noncooperation

used to measure Petitioners' conduct was one devoid of any responsibility on the part of the insurer to seek cooperation from the insureds. The standard is only required if the insured: (1) failed to cooperate in a material and substantial degree; (2) with an insurer's reasonable and material request; (3) thereby causing actual prejudice to the insurer's ability to evaluate and investigate the claim (App. 19a). The district judge ruled that despite Petitioners' initial cooperation with GIC's investigation, they failed to substantially cooperate. All this conduct, the court concluded, was a failure to cooperate "in some material and substantial respect" (App. 22a). Petitioners argued that whether there was substantial failure to cooperate was an issue of fact glossed over by the Magistrate.

Since the data GIC requested was reasonable and material to its investigation, the district judge ruled that Petitioners' "suspension" of its authorization for access to their data caused actual prejudice to GIC even though GIC never followed up with Petitioners' request that it further communicate with them regarding the need for their electronic data (App. 24a-25a). The district court concluded that "[a]lthough the question of prejudice may be left to the jury … no reasonable juror could conclude that [GIC] was not prejudiced by [Petitioners'] failure to cooperate" (App. 26a).

The district court ruled that, under the elements of the noncooperation standard it was applying, GIC was *not* obligated to notify Petitioners of their noncompliance with the policy and provide them with the opportunity to cure before it sought to enforce the noncooperation clause, resulting in a forfeiture of Petitioners' additional

insurance benefits (App. 26a-28a). The district court also concluded GIC's partial payment of Petitioners' claim did not waive the noncooperation defense (App. 28a-29a). The district court entered summary judgment for GIC(App. 30a).

Petitioners appealed. Besides challenging the district court's rulings, Petitioners in their appellate brief asserted that both courts below abused their discretion in failing to certify to the Montana Supreme Court the unsettled question of the standard for determining when noncooperation terminates insurance benefits. Identifying the requirements for certification in *Kremen v. Cohen*, 325 F.3d 1035, 1037-38 (9th Cir. 2003), Petitioners requested the Circuit Court certify the unsettled question of Montana law as to when non-cooperation clauses can result in forfeiture under circumstances where there were extensive acts of cooperation, to the Montana Supreme Court under Mont. R. App. P. 15(3).

On December 6, 2023, the court of appeals issued an unpublished Memorandum affirming the grant of summary judgment to GIC and denying Petitioners' motion to certify the state-law question (App. 1a-7a). Applying foreign law cited by the district court and inapplicable total non-cooperation Montana case law, the Panel affirmed the district court (App. 3a; 4a-6a). The Panel without any expert proof referenced the case as a "potential arson" and wrongly characterized Petitioners' suspension of authorization as a "revocation," omitting any reference to Petitioners' extensive cooperation with GIC.

Regarding certification, the Panel concluded petitioners asserted no compelling reason for its self-

imposed presumption against certification when raised for the first time on appeal. (App. 6a-7a).

On January 16, 2024, the Panel and the court of appeals denied Petitioners' timely filed Petition for Rehearing (App. 64a-65a.)

REASONS FOR GRANTING THE PETITION

1. The Court Should Grant Certiorari Because the Court, in the Wake of *Lehman Bros. v. Schein*, 416 U.S. 386 (1974), Should Clarify and Update the Procedure for Certifying Questions of State Law in Diversity Actions So That It is a Predictable, If Not Mandated, Process When the Issue is One of "First Impression," Significantly Affecting the Citizens in the State, and is Determinative of the Cause of Action in the Federal Forum.

a. Controlling Circuit Procedures Circumvented

In the matter *sub judice,* there is a novel unanswered question of Montana substantive law, recognized by the district court to be of first impression, concerning the circumstances under which an insurer can utilize an insuring agreement's cooperation language to claim lack of cooperation sufficient to result in the forfeiture of an insured's indemnity benefits. Here, even though substantial insurance benefits were ultimately paid to the Streeters, the district court ruled that remaining substantial unpaid insurance benefits were forfeited by the Streeters based upon the district court's "*Erie* guess" as to Montana's likely substantive law. Given the substantial acts of cooperation exhibited by the Streeters, forfeiture

of over $110,000 in unpaid benefits and loss of collateral claims for attorney fees and costs is a harsh result, not justified by a procedural denial based on timeliness of Streeters' detailed request for certification inclusive of support for all the *Kremen* factors, as referenced in a recent Ninth Circuit decision.

> "We invoke the certification process only after careful consideration and do not do so lightly." *Kremen v. Cohen*, 325 F.3d 1035, 1037 (9th Cir. 2003). In deciding whether to exercise our discretion, we consider: (1) whether the question presents 'important public policy ramifications' yet unresolved by the state court; (2) whether the issue is new, substantial, and of broad application; (3) the state court's caseload; and (4) 'the spirit of comity and federalism.' *Id.* at 1037-38.

Murray v. BEJ Minerals, LLC, 924 F.3d 1070, 1072 (9th Cir. 2019).

The determination of which criteria apply to the lack of cooperation affirmative defenses by insurers should be with the Montana Supreme Court—not the federal court. *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938);*Lehman Bros.*, *supra.*

The Magistrate, district court, and the appellate panel all conceded that the standard for determining whether noncooperation precluded coverage under GIC's policy was unsettled Montana substantive law. The unsettled status among jurisdictions is proven by the fact that many states have reached a variety of answers as to

under what circumstances noncooperation can be used to void insurance benefits. As Petitioners contended, some states require the insurer first to act diligently to bring about cooperation; that the insured must thereafter show a deliberate or willful noncooperation; and that this noncooperation must actually prejudice the insurer. Some other states require the insurer to notify insureds of their noncompliance and provide them the opportunity to cure it before enforcing a noncooperation clause. *Staples v. Allstate Ins. Co.*, 176 Wash. 2d 404 (2013); *Thomson v. State Farm Ins. Co.*, 232 Mich. App. 38 (1998); *State Farm Mut. Auto. Ins. Co. v. Curran*, 135 So. 3d 1071 (Fla. 2014)

Contrary to the cited authority where no cooperation occurred, Petitioners contend if the Montana Supreme Court were to receive the proposed certification request, most likely when there is the extensive cooperation as exhibited by the Petitioners, any claims of non-cooperation will result in a judicial determination that genuine issues of fact exist, thus requiring determinations by a jury. Other components in the cooperation narrative may well include the condition precedent of the imposition of a notice requirement to the insured before forfeiture of benefits can be invoked.

Petitioners extensively cooperated with GIC's investigation of their fire loss, as evidenced by the following chronology:

- On July 12, 2019, David Streeter gave a statement and participated in a recorded interview with Detective Schuster of the Flathead County Sheriff's Department, where he answered all questions regarding

his activities and knowledge of the fire event.

- On July 15, 2019, Petitioners participated in an in-person recorded interview with GIC Agent Lisa Heisey where they fully answered every question asked.

- On the same date, Petitioners signed a blanket authorization for the release of any information.

- On July 15, 2019, Petitioners participated in an in-person interview with GIC cause-and-origin expert, Norm Loftin, where they answered all questions asked about their activities and knowledge of the fire event.

- On July 17, 2019, Petitioners signed authorizations for the release of information, as GIC requested; that authorization included their consent to the "release, disclosure, collections, and use of the information described in this paragraph. The term "information" includes, but is not limited to, records and knowledge in analog, digital, written, graphic, video and data form; documentation; notes; billing records or similar statements; credit-related information such as application for credit and credit reports; account statements; video and sound recordings; computer records and data; any other method or form that the record and knowledge is stored and retained. ..."

- On July 18, 2019, Petitioners participated in a recorded interview with GIC's Ritchie wherein she requested copies of mortgage refinance records, proof of income, and text and detail logs from only the dates of July 8, 2019, through July 15, 2019.

- On July 24, 2019, Petitioners sent via email to Ritchie the refinance documents, proof of income, and complete Verizon phone records from June 14, 2019, through July 13, 2019.

- On August 1, 2019, Petitioners met with OneSource and allowed a complete data extraction of their phones per GIC's request, subject only to the requested parameters requested by Ritchie.

- On August 19, 2019, Petitioners agreed to an expanded data pull of their phones per Ritchie's request, which was forwarded to OneSource the same day.

- On August 26, 2019, David Streeter emailed a suspension of transfer of digital data.

- On August 26, 2019, GIC informed Petitioners it was hiring an attorney and preparing for an examination of Petitioners under oath, forcing them to retain their own counsel and prompting suspension of direct communications.

- On September 4, 2019, Petitioners' attorney wrote GIC and requested *inter alia* a complete copy of GIC's claims file and any documents and information upon which GIC was relying to suggest Petitioners had failed to cooperate in GIC's investigation; and he received *no* direct response to these inquiries.

- On September 13, 2019, Petitioners' attorney again wrote GIC requesting that if it was contesting Petitioners' claim, to provide all facts, documents, and/or insurance policy provisions upon which it was relying or which it believed supported a basis to contest Petitioners' claim; and he received *no* direct response to this inquiry.

- On October 19, 2019, Petitioners' attorney again wrote GIC, repeating his requests for facts or information from GIC as detailed in his prior requests of September 4, 2019, and September 13, 2019; and he received *no* direct response to these inquiries.

- On November 27, 2019, Petitioners participated in their examinations under oath with GIC's attorney where they answered every question under oath.

- On December 30, 2019, Petitioners' attorney wrote a final letter to GIC asserting Petitioners' full cooperation and demanding

a coverage decision. GIC did not respond, forcing Petitioners to hire new counsel and submit proofs of loss, which finally prompted GIC's first payments of the claim in February of 2020.

- From February of 2020 until Petitioners filed suit in December of 2020, they continued participating in GIC's investigation and accepted multiple Policy payments from GIC without ever receiving a reservation of rights letter or notice of noncompliance.

Petitioners' extensive acts of cooperation were emphasized in their Objections to the Magistrate's Findings but entirely *ignored* by the Article III Judge in his summary judgment decision (App. 8a-9a) and the Panel in its Memorandum (App. 1a-7a).

As detailed, Petitioners made initial and continued good-faith acts of cooperation throughout the investigation, even signing a never-revoked blanket authorization on July 15, 2019, giving GIC access to all their personal information with any entity without any notice. Petitioners provided the very records which GIC used to justify more data pulls, and then Petitioners suspended—but *never* revoked—their authorization for release of further data pending further communications with GIC. The insurer *never followed up* on their repeated requests, leaving Petitioners in limbo on their pending claims, never diligently responding to Petitioners' requests for further communications, and failing to notify them of any specifics of noncompliance until months into the litigation process.

Nor did GIC show, as was its burden, that it suffered *actual* prejudice by petitioners' single August 26, 2019 suspension email. The courts below simply *presumed* prejudice. The prejudice GIC now claimed was shown to be purely fictional.

Therefore, after the certification response, potential genuine issues of material fact may well prevent the entry of summary judgment. *See Tolan v. Cotton*, 572 U.S. 650, 659-60 (2014) (*per curiam*). Petitioners requested that, instead of relying upon the lower courts' speculative "*Erie* Guess" founded on inapposite law from some foreign courts and inapplicable Montana law, the Panel certify the crucial question of the appropriate standard for determining noncooperation to the very court which should have the last word on the subject—the Montana Supreme Court. Petitioners deserved to have the benefit of definitive Montana substantive law, instead of "cherry-pick[ed]" out-of-jurisdiction case law and inapplicable Montana case law to preclude their remaining claims, while ignoring other jurisdictions' case law disallowing summary judgment and requiring factual determination[s] by a jury.

The Panel denied Petitioners' certification request based upon timeliness, faulting Petitioners for not seeking certification in the district court before summary judgment had been entered (App. 6a-7a). But the only real opportunity to seek certification was on appeal.

The Panel's denial of certification based solely on timing undermines the basic reason for the process: a correct determination of state law by the court authorized to have the final and definitive word on the question. The Panel's citation to authority precluding certification on

appeal ignored the Ninth Circuit's recent *Murray* decision allowing certification requested in a petition for rehearing.

Certification was a *necessity* in this insurance case. In an insurance context, where requested States have prominent roles in the oversight and regulation of insurance companies doing business within their borders, the consequences of a wrong prediction by federal courts of unsettled state insurance law can be substantial and enduring. Petitioners lost components of their insurance coverage *not* because of a decision by the Montana Supreme Court, but because of a result of questionable discretionary actions by federal courts, ignoring options for insurance issues properly the domain of the Montana court.

The "*Erie* guess" affirmed by the Panel has even more serious consequences beyond this single case. Ignoring certification corrodes the fundamental principle of federalism underlying *Erie R. Co.*, *supra*, i.e., the state court's ability as a sovereign to decide and develop important questions of state law for itself, uncontaminated by speculative "*Erie* guesses" founded on mere hunches as to how the state court might rule.

The Panel's Memorandum denying certification of this unsettled question of insurance law wrongly deprived Petitioners of an opportunity to obtain their full policy benefits under Montana law. Petitioners submit that when it appears that the substantive state-law insurance question is of "first impression," novel or unsettled; when it implicates an important public issue affecting the welfare of thousands of state citizens; and when its resolution determines Petitioners' cause of action in the federal

forum, certifying the question to the state's highest court should be a *required* procedure, not one subject to the unfettered, undefined discretion of the federal courts. The Panel ignored the Ninth Circuit's *Kremen* requirements, which did not even receive a citation in the Panel's cursory conclusion to affirm the district court.

The States have primary responsibility for regulating insurance companies doing business within their borders. *See* McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015 (exempting the "business of insurance" from federal antitrust laws as long as states regulate in this area). Therefore, when the unsettled state-law question involves insurance law, there should be a heightened duty on federal courts, one beyond the mere exercise of discretion, to certify the issue to the state courts for resolution. In the absence of state-law guidance, federal courts must leave the balancing of pros and cons of a certain interpretation of insurance policies to state courts, especially where states have reached a variety of answers to the same question. *See Murray*, 924 F.3d at 1072.

As Circuit Judge O'Scannlain warned in *Bliss Sequoia Ins. & Risk Advisors, Inc. v. Allied Prop. & Cas. Ins. Co.*, 52 F.4th 417, 425 (9th Cir. 2022), "[a]though federal judges may be tempted to take an '*Erie* guess,' even the best judges should proceed with caution when filling the void of state [insurance] law with our intuition of what is 'reasonable.'" (O'Scannlain, J., dissenting) (citations omitted). Certification should be a *required* procedure in the insurance arena. Petitioners submit that the Panel's denial of certification is a violation of its heightened duty requiring mandatory certification in insurance cases where current state substantive law lacks specific guidance.

The present Ninth Circuit and other Circuits' procedures are a chaotic crapshoot for litigants, with success complicated by arbitrary time limits. Federal courts certainly possess the power *sua sponte* to certify. A Panel's resort to an unpublished, non-precedential Memorandum to deny certification while creating new state substantive law affecting thousands of state citizens ought not be an allowable alternative to the clarity created by certification.

For litigants seeking to vindicate their state-created rights in a federal forum, the certification procedure is a valuable lifeline to avoid dismissal of their suits when federal courts make untethered "*Erie* guesses" about unsettled questions of state insurance law. The Circuits in the wake of *Lehman Bros.*, 416 U.S. 386 lack guidance about when there is an abuse of discretion for not certifying such unsettled or novel questions. The Court should take this opportunity to provide the needed guidance as to the parameters of federal courts' discretion to deny certification.

b. Streeters Never Revoked Access to Information

The Magistrate, the Article III judge, and now the Circuit Panel adopt a material misconception that was created by GIC but remains totally absent from the actual record. Specifically, the Streeters never revoked the authorization for USAA to examine their digital records that were given to OneSource. The undisputed evidence shows that, on August 26, 2019, David Streeter sent an email suspending the right of OneSource to share any further information in its control from the data pulls Streeters had supplied until a supervisor called them to

discuss the claim and other mundane requests. The word "suspend" was specifically utilized, whereas "revoked" is nowhere in the communication. This is a vital distinction continually raised by the Streeters and was ignored by the Panel's incorrect adoption of the communication as a "revocation" while overlooking the clear language of the email (App. 5a).

c. Supplemental Authority Supported Need for Certification

In their supplemental authority (DktEntry:46), the Streeters provided specific Montana substantive law, totally omitted from the Panel's Memorandum, concerning the inappropriate references in oral argument by GIC's counsel, and also emphasizing the need under Montana substantive law to have admissible evidence in support of denial of coverage, citing *Britton v. Farmers Group*, 721 P.2d 303 (1986). So, what is the prejudice that was presumed to have resulted from the suspension of the transfer of digital data fully provided by the Streeters to

GIC's data collecting agent? There simply is none other than the previously noted inadmissible references to arson precluded under Montana substantive law (DktEntry:46). Further, as referenced in oral argument and briefing (DktEntry:31, p. 20), the Streeters' digital technology expert, Joel Henry, submitted testimony by declaration that there was no prejudice created by the suspension email. ("In reviewing the Extraction Report it is my opinion that definitive information was in the possession of the Defendant per the Extraction Report demonstrating that accusations of spoilation, data hiding, deleted messages, and factory resets, as made by the

Defendants and the Defendant's experts are completely refuted.") (DktEntry:31, p. 20).

The Panel cited Washington case law, *Tran v. State Farm Fire & Cas. Co.*, 136 Wn. 2d 214, 961 P.2d 358, 363 (Wash. 1998), supportive of the loss of coverage based upon the failure to cooperate (App. 3a). The *Tran* case is inapplicable to the petitioners' facts and finds no support under existing Montana substantive law. First, contrary to the facts here, *Tran* involved total noncooperation. Secondly, Montana substantive law determined by a federal court and cited to the Panel, but ignored in the Panel's Memorandum, concluded prejudice resulting from noncooperation was an issue for the jury. ("Prior to trial, the district court ruled that State Farm must show that it was somehow prejudiced by the delay in notification and that prejudice would not be presumed from the delay.") *State Farm Mutual Automobile Ins. Co. v. Murnion*, 439 F.2d 945, 947 (9th Cir. 1971). Proof of actual prejudice is lacking in the Memorandum, as it was also in the district court's decision.

d. The Case for Mandatory Certification of State-Law Questions

Certifying state-law questions reduces delay, saves time, eliminates "*Erie* guesses," lessens litigation/administrative costs, discourages forum-shopping, and most likely produces a definitive response from the state court on an important question of state law, thereby respecting our system of cooperative federalism and the state's own sovereignty in deciding state-law issues for itself. *See Carney v. Adams*, ___ U.S.___, ___; 141 S.Ct. 493, 504 (2020) (Sotomayor, J., concurring); *McKesson*

v. Doe, ___ U.S.___;___; 141 S.Ct. 48, 50-51 (2020) (*per curiam*) (certification advisable when issue involves value judgments peculiarly deserving of state-court attention); *Arizonans for Official English v. Arizona*, 520 U.S. 43, 76; 78-79 (1997); *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 396 (1986) (certification "expeditious" way to obtain a state court's construction of a statute); *Lehman Bros.*, 416 U.S. at 390-91 and *id.* at 394-395 (Rehnquist, J., concurring); *Bush v. Gore*, 542 U.S. 692, 740-42 (2000) (Rehnquist, C.J., concurring).

The decision to certify rests in the sound discretion of the federal court. *Lehman Bros.*, 416 U.S. at 391. When state law is clear, a federal court should *not* certify. *Houston v. Hill*, 482 U.S. 451, 471 (1986). On the other hand, when state law is unclear or nonexistent, and the issue is significant to the state or its citizens, the federal court *should* certify. *See Arizonans for Official English*, 520 U.S. at 78; *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 510 (1985). Other than these broad strokes, this Court has provided little guidance for the fifty years since *Lehman Bros.* established basic certification standards.

The Circuits have developed widely divergent approaches as to their exercise of certification discretion. For example, the D.C Circuit asks whether the local law is "genuinely uncertain" and the case of "extreme public importance" (*Nationwide Mut. Ins. Co. v. Richardson*, 270 F.3d 948, 950 (2001)); the First Circuit requires that the state law issue be "controlling" precedent and determinative of the case (*Nett ex rel. Nell v. Bellucci*, 269 F.3d 1, 8 (1st Cir. 2001)); the Fourth Circuit asks whether the state-law question is "novel" (*Grattan v. Bd. of Sch. Com'rs of Baltimore City*, 805 F.2d 1160, 1164 (4th Cir.

1988)); the Fifth Circuit is generally hesitant to certify at all without "compelling reasons to do so" (*Wiltz v. Bayer CropScience, Ltd. P'ship*, 645 F.3d 690, 703 (5th Cir. 2011)); the Seventh Circuit requires a recurring issue of "vital public concern" (*United States v. Franklin*, 895 F.3d 954, 961 (7th Cir. 2018)); the Ninth Circuit will certify "significant" questions not yet resolved by state courts (*Kremen v. Cohen*, 325 F.3d 1035, 1037-1038 (2003)); and the Tenth Circuit will not routinely certify even with an unsettled question of state law (*Anderson Living Trust v. Energen Res. Corp.*, 886 F.3d 826, 839 (10th Cir. 2018)).

Confirming this confusion is a 2021 study by the Federal Judicial Center, the education and research agency of the United States Federal Courts. Using a sample of 218 instances of certification from 2010 to 2018 by the Third, Sixth, and Ninth Circuit courts of appeals, the Center found these Circuits varied dramatically in their respective certification rates. Cantone, J. A. & Giffin, C., *Certified Questions of State Law: An Empirical Examination of Use in Three U.S. Courts of Appeals*, 53 U. Tol. L. Rev. 1, 32-33; 43 (2021). The Ninth Circuit certified 93% of questions inviting certification, denying just one certified question motion. *Id.* The Third Circuit certified just 49% of those questions and denied 22 certified question motions while Sixth Circuit certified only 17% of those questions inviting certification while denying 30 certified question motions. *Id.* at 44.

According to the study, 85% of the certified questions in the Ninth Circuit were ordered *sua sponte* while only 15% resulted from motions. *Id.* at 34. The Third Circuit decided 90% of its certifications *sua sponte* and the Sixth Circuit's *sua sponte* rate was 60%. *Id.* Significantly, the

study found that "[i]nsurance cases are the most commonly certified type of case in both the Ninth and Third Circuit[s] ..." *Id.* at 44. The study also found that while certification makes more work for state court judges, "several findings ... suggest that it is not the deluge some expected." *Id.* at 48.

The widely divergent certification rates among the Circuits suggest that *Lehman Bros.'* abuse of discretion standards has led to an *ad hoc* approach to the certification process devoid of predictable standards. This Court with its superintendence power over the federal courts now has an opportunity to establish a defined process especially when it appears that the substantive state-law question is of "first impression," novel or unsettled; when unknown state law implicates an important issue of public safety affecting the welfare of the state's citizens; and when, resolution involves an insurance cause of action in the federal forum. *See also* Clark, B. R., *Ascertaining the Law of the Several States: Positivism and Judicial Federalism*, 145 U. Pa. L. Rev. 1459, 1549 & n. 476 (1997) (presumption that certification should be used when unsettled state law combines with significant policymaking discretion).

A timely, early decision by the Montana Supreme Court addressing the determinative issue of when noncooperation voids coverage under an insurance policy would have lessened the burden on the district court, reduced uncertainty in the litigation, and avoided needless federal appellate judicial resources and administrative time while building a cooperative judicial federalism.

The federal court always possessed the power to certify *sua sponte*, especially when state insurance law will

be determinative and there is no "controlling precedent in the decisions of the Montana Supreme Court." *High Country Paving, Inc. v. United Fire & Casualty Co.*, 14 F. 4th 976, 978 (9th Cir. 2021). Once certified, the question of when noncooperation voids coverage is treated by the Montana Supreme Court as "purely an interpretation of the law as applied to the agreed facts underlying the action." *N. Pac. Ins. Co. v. Stucky*, 338 P.3d 56, 60 (Mont. 2014). In this pragmatic way,

> [c]ertified questions can ... help establish uniform, definitive judgments on unsettled issues of state law. From one perspective, it is inherently more efficient for state courts to weigh in on unsettled questions of state law, rather than have federal courts decide without state input. As a state supreme court is the final arbiter of that state's laws, its decision would be definitive.

Cantone, J. A. & Giffin, C., *supra*, 53 U. Tol. L. Rev. at 16 citing Eisenberg, E., *A Divine Comity: Certification (At Last) in North Carolina*, 58 Duke L. J. 69, 76 (2008). *See also Resolving Unsettled Questions of State Law: A Pocket Guide for Federal Judges*, Fed. Jud. Ctr. (2022) at 18, reproduced at https://www.fjc.gov/content/373468/resolving-unsettled-questions-state-law-pocket-guide-federal judges ("When [state–federal judicial] relationships are strong, [certification] can help promote comity and cooperation between federal and state courts, which benefits judges, litigants, and the rule of law.").

When *Lehman Bros.* was decided, only a few state courts, authorized certification. Now nearly every state court has implemented rules. This Court needs to advance

specific certification criteria so that all federal courts will know when certification is not only an elective choice, but also the required choice. This option was unavailable at the time of *Lehman Bros.* because of the dearth of state statutes implementing certification. Certification would provide clarity as to when noncooperation voids coverage, which could only have the positive result of promoting resolution.

e. The Panel's Use of an Unpublished Memorandum Decision was Inappropriate Given the Substantial Matters at Issue

The Panel resorting to an unpublished decision compounds the unfairness of the refusal to certify the issue of when noncooperation voids coverage. Petitioners submit that the use of an unpublished Memorandum by the Panel is incompatible with a fair hearing, a denial of due process, and contrary to the *Erie* and *Lehman Bros.* requirements. There is no definitive review of the reasons certification was denied under the Ninth Circuit's own guidelines. *See Kremen*, *supra*.

The right of every litigant to meaningful appellate review is deeply embedded in the federal rules' concept of fair play and substantial justice. *See Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1,13-14 (1978); *Arnett v. Kennedy*, 416 U.S. 134, 142-46 (1974); *Mullane v. Central Hanover Tr. Co.*, 339 U.S. 306, 314 (1950). These embedded notions are founded on the principle that petitioners' cause of action and their right to have their claims fairly heard and decided in federal court is a valuable property right entitled to due process protection. *See Board of Regents v. Roth*, 408 U.S. 564, 571-72 (1972).

Ninth Circuit Rule 36-2 provides that decisions will be published and therefore become precedential when certain preconditions are met, e.g., if the opinion alters, modifies, or clarifies a rule of federal law or when it involves a legal or factual issue of unique interest or substantial public importance. There is no requirement that the Panel explain why none of these preconditions exist or to identify which of the reasons apply for publishing its opinion and making it precedential.

The Panel's decision ratifies the lower courts' wrong "*Erie* guesses" to justify the entry of summary judgment in GIC's favor based on foreign law, or inapplicable Montana law where there was complete lack of cooperation. The citations by the Panel to Montana case law appear supportive of affirmation. However, the specific citations in the Memorandum upon analysis are inapplicable to the petitioners' factual circumstances, e.g. *Steadele v. Colony Ins. Co.*, 2011 MT 208, 361 Mont. 459, 260 P.3d 145, 150-51 (Mont. 2011) (App. 3a), [Insureds failed to notify their insurers of third-party claim.]; *Seymour* (App. 3a, 4a) [Absolute non-compliance of a material matter by the failure of the insured to provide a hail loss estimate.]; *Contractors Bonding & Ins. Co. v. Sandrock*, 321 F. Supp. 3d 1205, 1211-12 (D. Mont. 2018) (App. 3a) [citing *Steadele* and again an absolute failure of an insured to provide notice of a third-party claim]. None of the Montana citations utilized by the Panel to support its affirmation of the district court are applicable to the undisputed facts in the record. Here, GIC's claims of singular non-cooperation based upon one email are coupled with continuous and substantial efforts by the insured Petitioners to cooperate.

Contrary to *Erie* and its own requirements in *Kremen*, *supra*, the Panel failed to certify the unique cooperation

question raised by the matter *sub judice*. *See Lehman Bros., supra*, 416 U.S. at 390-91; *Clay v. Sun Insurance Office*, 363 U.S. 207, 210-212 (1960). The Panel's conjecture as to controlling Montana law adversely affects all future Montana insureds who are subject to cooperation clauses.

In the absence of any reasoned explanation for the Panel's decision to invoke Ninth Circuit Rule 36-1 an unpublished Memorandum: (a) denies equal justice to the parties who have briefed and argued the case, *see U.S. v. Commonwealth of Massachusetts*, 781 F. Supp.2d 1, 19 (D. Mass. 2011) (Young, J.); (b) prevents meaningful review by the Supreme Court, *see McIncrow v. Harris County*, 878 F.2d 835, 836 (5th Cir. 1989); (c) avoids or inhibits *en banc* review by the Circuit court, *see Sambrano v. Airlines, Inc.*, 2022 U.S. App. LEXIS 4347 at *89 n.95 (5th Cir. Feb. 17, 2022); (d) could prevent similar cases from being brought in Montana state courts, foreclosing them from weighing in on the issue, *see Herrara v. Zumiez*, Inc., 953 F.3d 1063, 1080-81 (9th Cir. 2020); (e) creates needless conflict in both state and federal outcomes involving the same issue, *see Matter of McLinn*, 739 F.2d 1395 (9th Cir. 1984); (f) sets up potential conflicts between published and unpublished federal court decisions involving state law; (g) undermines the Circuit Court's ability to provide meaningful guidance to lower federal courts for future decisions involving the same issues; and (h) fails to demonstrate to the public that the Circuit is providing transparent doctrinal development and proper judicial oversight of a vital part of its jurisdiction, the enforcement of state-created rights in diversity civil actions involving insurance interpretations.

Once the Panel initially decided to utilize a Memorandum instead of a detailed decision, Petitioners'

certification request lost traction. Petitioners' request to certify, no matter how meritorious, could never receive a review on the merits because certification by its own terms requires as a precondition an opinion or published order initiating the process. By deciding not to publish, the Panel has thrown out the baby (certification) with the bath water (an unpublished ruling) and, potentially precluding a jury determination of Petitioners' valid state-law claims.

2. Petitioners Were Denied a Fair Hearing When the Panel Refused to Certify aState-Law Issue of "First Impression" to the State's Highest Court, Relegating Petitioners to an Inappropriate "*Erie* guess" in an Unpublished Memorandum

The fairest route, exemplified by *Murray*, 924 F.3d at 1071-73, would have been to timely certify this insurance question involving "important policy ramifications for Montana that have not yet been resolved by the Montana Supreme Court." *Id.* at 1072. In *Murray*, the Circuit Court *en banc* reconsidered and withdrew its prior published opinion determining the rights to deposits of vertebrate fossil specimens worth millions of dollars so that the state's highest court could have the first and last word on the controlling substantive law issue. *Id.* at 1073.

Murray illustrates how early certification can greatly reduce federal administrative time and conserve judicial resources. In *Murray*, final disposition of litigation removed to federal court hinged on the simple question of whether dinosaur fossils belong to the surface estate or mineral estate, thus being capable of reservation in a mineral deed. *Id.* at 1072. Significant dinosaur discoveries worth millions were uncovered after a real estate transfer subject to a mineral reservation, including two dueling

Tyrannosaurus Rex dinosaurs locked in combat. *Id.* at 1073. Huge dollars flowed with the answer to the question: Are dinosaur fossils minerals under Montana substantive law? Why the federal district court or none of the litigants initially requested certification of the controlling question of first impression to the Montana Supreme Court is puzzling. Certification finally was ordered by an *en banc* court based upon one sentence in a petition for rehearing. Perhaps *Lehman Bros.*' deference to discretion resulted in discounting certification into an obscure option for courts and litigating parties. The result is discretion so unfettered it has devoured *Erie's* edict.

Think of the substantial saving of appellate resources had the *Murray* litigants or district court simply certified the same question ultimately raised for the first time on rehearing early in the proceedings. No appeal, no panel hearing, no petition for rehearing resulting in huge administrative savings and conservation of judicial resources. Similar benefits of certification as in the matter *sub judice* are being relegated into improper disposition because certification as an on-target arrow in the federal courts' quiver is being woefully overlooked. This Court has within its powers the ability to right the certification ship by implementing procedures as to the required judicial processes for all federal courts to use when certification is requested or considered *sua sponte*.

The difficulty in ascertaining uncertain state law is no excuse for not certifying the question; in fact, it is one of the best reasons for doing so. *Lehman Bros.*, 416 U.S. at 391 ("[R]esort to [certification] would seem particularly appropriate in view of the novelty of the question and the great unsettlement of [state] law.").

The Court in *Lehman Bros.*, 416 U.S. at 390-91, and *Clay*, 363 U.S. at 212, instructed lower federal courts to employ certification in circumstances like these where it would save time, energy, and resources and "build a cooperative judicial federalism." The Panel and the district court recognized the use of a cooperation clause to void coverage was an open question of "first impression" in Montana. Both courts should have been bound to give the Montana Supreme Court the opportunity to decide in the first instance whether and when noncooperation by an insured voids coverage under an insuring agreement.

The standard the Montana Supreme Court might adopt for determining when noncooperation voids coverage could identify genuine issues of material fact for trial. *See Amberboy v. Societe de Banque Privee*, 831 S.W.2d 793, 799 n.9 (Tex. 1992) ("By answering certified questions for those federal appellate courts that are *Erie*-bound to apply Texas law, we avoid the potential that the federal courts will guess wrongly on unsettled issues, thus contributing to, rather than ameliorating confusion about the state of Texas law. We find such cooperative effort to be in the best interests of an orderly development of our own unique jurisprudence. ...").

In both *Lehman Bros.* and *Murray*, the certification request was made in petitions for rehearing and the timing of the certification requests was not deemed a reason for denying certification. The same result should apply here. The following question should be certified to the Montana Supreme Court:

WHAT IS THE STANDARD TO BE UTILIZED TO IMPLEMENT COOPERATION CLAUSES WHEN BEING USED TO TERMINATE INSURANCE BENEFITS?

CONCLUSION

A GVR ruling is appropriate. Certiorari should be granted and the Ninth Circuit's Memorandum affirming summary judgment vacated. The Court should remand with instructions for the Ninth Circuit to either directly certify to the Montana Supreme Court the first impression substantive law issue for the standard for determining under what circumstances the cooperation provisions of an insuring agreement can be utilized to void coverage, or instruct the Ninth Circuit to vacate its Memorandum and the district court's summary judgment and remand to the district court with instructions for the district court to certify the substantive law question and proceed in accordance with the substantive law as established by the Montana Supreme Court. The latter option has the advantage of clearing the Panel's docket.

Respectfully submitted,

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APPENDIX

TABLE OF APPENDICES

APPENDIX A — MEMORANDUM OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED DECEMBER 6, 2023

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 23-35086

D.C. No. 9:20-cv-00188-DLC

DAVID STREETER; KATJA STREETER,

Plaintiffs-Appellants,

v.

USAA GENERAL INDEMNITY COMPANY,

Defendant-Appellee.

Appeal from the United States District Court
for the District of Montana
Dana L. Christensen, District Judge, Presiding.

Argued and Submitted, November 16, 2023
Seattle, Washington

MEMORANDUM*

Before: McKEOWN and GOULD, Circuit Judges, and BENNETT,** District Judge.

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Richard D. Bennett, United States Senior District Judge for the District of Maryland, sitting by designation.

Appendix A

This is an insurance recovery case, resulting from two fires that occurred within a period of twenty-four hours and were investigated by law enforcement as potential arson. Plaintiffs-Appellants David and Katja Streeter—the owners of the subject property—promptly made a fire loss claim with their insurer, Defendant-Appellee USAA General Indemnity Company ("USAA GIC"). After USAA GIC issued payments in the amount of $644,328.72, the Streeters filed suit in the United States Court for the District of Montana, alleging claims for breach of contract, violations of Montana's Unfair Trade Practices Act, and declaratory judgment, and seeking punitive damages, attorney fees, and costs. At the close of discovery, USAA GIC moved for summary judgment based on the Streeters' failure to cooperate, and the district court ultimately entered summary judgment for USAA GIC on those grounds. On appeal, the Streeters challenge the district court's entry of summary judgment and secondarily seek certification of a question to the Montana Supreme Court regarding the enforcement of a contractual duty to cooperate.

1. We review the district court's grant of summary judgment *de novo* to determine whether, viewing the evidence in the light most favorable to the nonmoving party, there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *Frudden v. Pilling*, 877 F.3d 821, 828 (9th Cir. 2017). Having done so, we conclude that summary judgment was properly granted.

The duty to cooperate typically arises from the inclusion of a cooperation clause in an insurance policy—

such as the one included in the Streeters' policy. Because this cooperation can fairly be characterized as a duty, the failure to comply can result in the loss of coverage under the policy. *See, e.g., Tran v. State Farm Fire & Cas. Co.*, 136 Wn.2d 214, 961 P.2d 358, 363 (Wash. 1998) (applying Washington law).

As the Streeters filed this action in federal court on the basis of diversity of citizenship, we apply the substantive law of Montana, the forum state. *Med. Lab'y Mgmt. Consultants v. Am. Broad. Cos., Inc.*, 306 F.3d 806, 812 (9th Cir. 2002). The Montana Supreme Court has not specifically addressed the level of cooperation required in an insurance contract. However, that court has held that an insured's failure to comply with the notice requirement of an insurance policy precludes recovery under the policy if it causes prejudice to the insurer's ability to investigate the claim and participate in litigation. *Steadele v. Colony Ins. Co.*, 2011 MT 208, 361 Mont. 459, 260 P.3d 145, 150-51 (Mont. 2011); *Contractors Bonding & Ins. Co. v. Sandrock*, 321 F. Supp. 3d 1205, 1211-12 (D. Mont. 2018). Of import here, the United States District Court for the District of Montana addressed the issue of noncooperation in *Seymour v. Safeco Insurance Company*, an insurance diversity case in which the insured failed to provide the insurer with a written estimate to support a request for additional payment. No. CV 13-49-BU-DLC-RWA, 2014 U.S. Dist. LEXIS 190110 at *2-3 (D. Mont. 2014), *adopted by*, 2015 U.S. Dist. LEXIS 181837 (D. Mont. May 13, 2015). In holding that this noncooperation "preclude[d] any additional recovery under the [p]olicy" and thus the insured's claim for breach of contract failed, *id.* at *22-23, the court reasoned that "[a]n insured's failure to provide

documents requested by the insurer or to submit to an examination under oath impairs an insurer's ability to conduct a legitimate claim investigation to determine whether coverage exists." *Id.* at *21.

Considering the Montana Supreme Court's decisions in notice-prejudice cases and *Seymour*, we affirm the district court's entry of summary judgment in this case. The district court correctly held that an insurer prevails on a noncooperation defense under Montana law when the insurer establishes: (1) the insured failed to cooperate in a material and substantial respect, (2) with an insurer's reasonable and material request, (3) thereby causing actual prejudice to the insurer's ability to evaluate and investigate a claim.[1]

Considering whether the Streeters failed to cooperate in a material and substantial respect, the record shows that when the Streeters turned their phones over to One Source for the data pull, they presented an authorization that set parameters on the data that USAA GIC could access. After USAA GIC discovered a discrepancy between the Verizon cell phone records and the extracted data, the insurer requested an expanded scope, including an examination any and all indicators of factory resets,

1. On appeal, the Streeters argue that enforcement of a cooperation clause requires a showing of notice—whether that means a showing of the insurer's repeated requests for the insured's compliance, deliberate conduct by the insured, and/or the insurer's warning to enforce the clause. We decline to embrace such an unworkable, subjective standard, which, as USAA GIC correctly notes, is not part of the relevant policy language.

data hiding or similar. The Streeters authorized USAA GIC to review communications and voicemail but did not authorize USAA GIC to examine indicators of factory resets, data hidings, or the like. And before USAA GIC received additional extraction reports based on the expanded scope, the Streeters revoked the right for One Source to share any information from the data pulls with USAA GIC entirely. While the Streeters participated in interviews and provided some of the requested materials,[2] the Streeters refused to cooperate when USAA GIC requested more information to determine whether the Streeters' statements aligned with the evidence. The undisputed record clearly reflects that the Streeters failed to substantially cooperate with USAA GIC during its investigation.

"An insured's breach of a cooperation clause releases the insurer from its responsibilities if the insurer was actually prejudiced by the insured's breach." *Tran*, 961 P.2d at 365. When "insurers are inhibited in their effort

2. In an attempt to show cooperation, the Streeters argue that they "temporarily suspended" authorization until USAA GIC met their demands, and further that their cooperation with other requests is sufficient to establish cooperation. Both arguments are unpersuasive. With respect to the Streeters' first argument, placing conditions on cooperation would impede an insurer's ability to conduct a legitimate claim investigation and is contrary to the terms of the policy and the purpose of cooperation clauses more generally. Turning to the Streeters' second argument regarding evidence of their cooperation, state courts in other jurisdictions routinely reject the notion that initial or partial cooperation is sufficient. *See, e.g., Pilgrim v. State Farm Fire & Cas. Ins. Co.*, 89 Wn. App. 712, 950 P.2d 479, 484 (Wash. Ct. App. 1997).

to process claims due to uncooperativeness of the insured, they suffer prejudice" as a matter of law. *Id.* at 365-66.

Here, the Streeters did not cooperate with USAA GIC's request for additional information, which impaired USAA GIC's ability to investigate the validity of the claim before issuing substantial payment—$644,328.72—to its insured. Accordingly, the Streeters' failure to cooperate caused actual prejudice to USAA GIC's ability to evaluate and investigate the claim.

At bottom, the district court correctly entered summary judgment for USAA GIC, as the evidence in this case permits but one conclusion—that the Streeters failed to cooperate with USAA GIC during its investigation, prejudicing the insurer's investigation into the set of fires giving rise to the Streeters' claims. As such, we **AFFIRM** the district court's grant of summary judgment to Defendant-Appellee USAA GIC.

2. We have "long looked with disfavor upon motions to certify that are filed after the moving party has failed to avail itself of a prior opportunity to seek certification." *Hinojos v. Kohl's Corp.*, 718 F.3d 1098, 1108 (9th Cir. 2013) (citing *Thompson v. Paul*, 547 F.3d 1055, 1065 (9th Cir. 2008)). To overcome the presumption against certification in such instances, "particularly compelling reasons must be shown when certification is requested for the first time on appeal by a movant who lost on the issue below." *In re Complaint of McLinn*, 744 F.2d 677, 681 (9th Cir. 1984). The Streeters did not mention the possibility of certification until after the district court

entered judgment against them, and they have not shown "particularly compelling reasons" to overcome the presumption against certification. Accordingly, we decline to certify any question to the Montana Supreme Court.

AFFIRMED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA, MISSOULA DIVISION, FILED JANUARY 25, 2023

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

CV 20-188-M-DLC

DAVID AND KATJA STREETER,

Plaintiffs,

vs.

USAA GENERAL INDEMNITY COMPANY,
AND JOHN DOES 1-10,

Defendants.

January 25, 2023, Decided;
January 25, 2023, Filed

ORDER

Before the Court is United States Magistrate Judge Kathleen L. DeSoto's Findings and Recommendation concerning Defendant USAA General Indemnity Company's ("USAA") Motion for Summary Judgment and Plaintiffs David and Katja Streeter's Cross-Motion for Partial Summary Judgment. (Doc. 146.) The Streeters timely filed specific objections to the Findings and

Recommendation. (Doc. 151.) Consequently, the Streeters are entitled to *de novo* review of those findings and recommendations to which they object. 28 U.S.C. § 636(b)(1)(C); *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003). Absent objection, this Court reviews a magistrate's findings and recommendations for clear error. *McDonnell Douglas Corp. v. Commodore Bus. Mach., Inc.*, 656 F.2d 1309, 1313 (9th Cir. 1981). Clear error exists if the Court is left with a "definite and firm conviction that a mistake has been committed." *United States v. Syrax*, 235 F.3d 422, 427 (9th Cir. 2000).

BACKGROUND

On or about July 11 and July 12, 2019, two fires occurred at the Streeters' home. (Doc. 16 at 2, ¶¶ 4, 6.) At the time of the fires, the Streeters were insured under a homeowners policy issued by USAA (the "Policy"). (*Id.* at 2, ¶¶ 3, 5.) The Policy includes coverage against sudden and accidental loss to the insured's dwelling, other structures, and tangible personal property with some exclusions, such as loss caused by intentional acts by the insured. (Docs. 80 at 7; 66-1 at 20, 31, 35.) The Policy provided "Dwelling" coverage in the amount of $ 395,000, "Other Structure" coverage in the amount of $ 39,500, "Personal Property" coverage in the amount of $ 197,500, and unlimited "Loss of Use" coverage for up to 12 months. (Doc. 66-1 at 4.) The Policy also contains conditions requiring that the insured "cooperate with [USAA] in the investigation of a claim" and "provide [USAA] with records and documents [USAA] request[s]." (*Id.* at 38.)

The Streeters notified USAA of the fires and submitted a claim under the Policy for the total loss of their home. (Docs. 16 at 2, ¶¶ 4, 6; 80 at 5, ¶ 8.) The Streeters participated in an in-person recorded interview with a USAA claims representative on July 15, 2019, and explained that they had been camping at the time of the first fire and in a hotel at the time of the second fire. (Docs. 16 at 2, ¶ 7; 78-3 at 2.) The Streeters also participated in an interview with a cause and origin expert from USAA. (Doc. 78 at 12, ¶ 12.) During an interview and subsequent email exchange with a USAA investigator on July 18, 2019, the Streeters were informed that USAA would be requesting additional information as part of its claim investigation, including mortgage refinance records, proof of income, and certain cell phone data for the period from July 8 to July 15, 2019. (Docs. 78-1 at 2; 78-2 at 1; 178-3 at 4.) The Streeters were informed that the data pulls from their cell phones would be conducted by a third-party contractor, One Source Discovery ("One Source"). (Doc. 78-2 at 1.) The USAA investigator also provided the Streeters with a preservation letter asking for their "cooperation in preserving electronically stored information that may contain information relevant to [their] claim" and citing the Policy's cooperation and document disclosure conditions. (Doc. 61-2 at 3.)

Shortly after this request, the Streeters provided USAA with some of the requested material, including paystubs, mortgage records, and some Verizon records with call and text data from their cell phones for the period of June 14 to July 13, 2019. (Docs. 78-3 at 5; 78-2 at 1; 61-6 at 7-24.) On August 1, 2019, the Streeters met with a One

Source data pull technician. (Doc. 61 at 3.) During that meeting, the Streeters presented the technician with an authorization letter that limited what data USAA could access. (*Id.*) That authorization stated:

> In the phone conversations with USAA it was requested that Katja and I make our phones available for inspection to a third party contracted by USAA. USAA has asked us for text messages, phone logs, GPS locations, search history, and emails from 7-8-19 until 7-15-19. I will grant USAA their request for information for those items. I do not grant USAA, or any third-party contractor for said company, to access or view personal files, pictures, notes, or any other technical data from any of the cell phones owned by David or Katja Streeter or from the iPad that will be inspected. If USAA, or its representatives, access these files or data types I will deem it a violation of said agreements and seek remedy.

(Doc. 61-3.)

USAA was advised of the authorization letter and agreed to allow One Source's data pull to continue without allowing USAA access to the data until an agreement could be reached with the Streeters. (Doc. 78-3 at 7.) USAA ultimately agreed "to only request from OneSource [sic] Discovery the file types which [the Streeters] indicated in the [authorization letter] . . . , with the stipulation that [USAA] may request access to additional files and/or

data at a future time if it deems necessary to do so in furtherance of the investigation." (Doc. 61-4 at 2.)

USAA received the authorized extraction reports from One Source on August 9, 2019. (Doc. 78-4 at 4.) After receiving the cell phone data from One Source, USAA's investigator noted that David Streeter's call log was missing calls from July 10 to July 12, 2019, that appeared in the Verizon records the Streeters had previously provided. (Docs. 61-5 at 1; 61-6 at 11-12.) USAA contacted One Source about the missing call data and One Source informed USAA that expanded scope authorization from the Streeters would be required in order for One Source to "check for other temporal data in the timeframe" or "review if anything is amiss," such as "factory reset, data hiding, etc." (Doc. 61-5 at 1.) One Source could not "even confirm or deny the very existence of other data categories within the 7/10-7/12 time frame" without expanded scope authorization. (*Id.*)

On August 19, 2019, USAA contacted the Streeters regarding the missing cell phone data and informed them that, "[i]n an effort to determine the reason for absence of this data, [USAA was] requesting an expansion to the scope for One Source Discovery to research." (Doc. 61-7 at 2.) USAA specified that they were seeking expanded authorization to:

- Review communication activity including voicemail and third party application

- Voicemail records for both phones from 07/08/19-07/15/19

- Examine for any and all indicators of factory reset, data hiding or similar[.]

(*Id.*) The same day, the Streeters authorized One Source "to look into any communication apps such as Whats App [sic] and Messenger" and "voicemail from the devices that were downloaded," but did not approve expanded scope authorization for examining "any and all indicators of factory reset, data hiding or similar." (Doc. 61-8 at 1.) Then, on August 26, the Streeters informed USAA that they were "suspending the right for One Source Solutions to share any further personal information with USAA." (Doc. 61-9 at 1.) The Streeters went on to request "a statement from USAA of exactly why, to the finest detail, why [sic] USAA believes such information will assist them in their investigation." (*Id.*)

On July 31, 2019, USAA issued an advance payment to the Streeters in the amount of $ 5,000 under "Personal Property" coverage. (Doc. 16 at 3, ¶ 10.) In February 2020, USAA paid the Streeters the $ 395,000 policy limit for "Dwelling" coverage and $ 143,125 under the Policy's "Personal Property" coverage. (*Id.* ¶ 12.) In March 2020, USAA issued additional payments of $ 20,893.63 under the Policy's "Excess Debris Removal, Trees, Shrubs, and Other Plants" coverage, $ 11,677.20 under "Other Structures" coverage, and $ 33,357.85 under "Loss of Use" coverage. (*Id.* ¶¶ 13-15.) In May 2020, USAA paid an additional $ 35,275.04 under "Personal Property" coverage. (*Id.* ¶ 16.) In total, USAA paid the Streeters approximately $ 640,000 for their claim.

Appendix B

The Streeters filed their Complaint (Doc. 1) in December 2020 and an Amended Complaint (Doc. 33) in August 2021. The Streeters allege breach of contract and violations of Montana's Unfair Trade Practices Act ("UTPA"). (*Id.* at 11-14, ¶¶ 49-61.) USAA's Answer to the Amended Complaint raised several affirmative and other defenses, including that the Streeters' "claims may be barred by their failure to comply with one or more conditions precedent to recovery of the benefits or remedies they seek in connection with the subject matter of their claim, including the duty to cooperate under the policy." (Doc. 34 at 13, ¶ 6.)

USAA did not gain access to the additional cell phone data requested from the Streeters until after litigation began. (*See* Doc. 61 at 4, ¶ 14.) USAA then learned that data had been deleted from the Streeters' cell phones and, based on their investigation into this deleted data, determined that the loss was intentionally caused by the Streeters. (*See* Docs. 60 at 5, 13-14; 51 at 5-12.) USAA subsequently filed an Amended Answer asserting additional defenses based on this new evidence, including breach of the Policy's concealment-and-misrepresentation and fraud provisions and the intentional-loss exclusion. (Doc. 105.)

In their Motion for Summary Judgment (Doc. 59), USAA argues that summary judgment is appropriate for all of the Streeters' claims for several reasons. First, USAA argues that the Streeters failed to comply with the Policy's cooperation and record-disclosure provisions. (*Id.* at 1.) Second, USAA argues that the Streeters' "inability-

to-rebuild" claim fails as a matter of law under the Policy's terms "because the timing of [USAA's] payment did not prevent [the Streeters] from rebuilding." (*Id.* at 2.) Finally, USAA argues that the Streeters' "claims for alleged UTPA violations . . . and for declaratory judgment fail as a matter of law under the UTPA." (*Id.*) The Streeters have cross-moved for summary judgment on their breach of contract claim under Montana law. (Doc. 64 at 2.)

Judge DeSoto recommends that this Court grant USAA's motion and deny the Streeters' cross-motion. (Doc. 146 at 1.) Judge DeSoto determined that the Streeters had violated the Policy's cooperation provision "by limiting and then entirely revoking [USAA's] authorization to access electronic records during the claim investigation," (*id.* at 17), which actually prejudiced USAA's "ability to investigate the claim in real time," (*id.* at 26). Thus, "the Streeters' failure to cooperate with [USAA's] claim investigation precludes coverage under the Policy and is fatal to their breach of contract claim." (*Id.* (citing *Seymour v. Safeco Ins. Co. of Ill.*, CV 13-49-BU-DLC-RWA, 2014 U.S. Dist. LEXIS 190110, 2014 WL 12591708, at *2 (D. Mont. July 24, 2014)).) Judge DeSoto also found that, "[a]bsent coverage, the Streeters' claims for punitive damages, attorney fees, and declaratory judgment also fail." (*Id.* at 27.)

The Streeters timely filed objections to the Findings and Recommendation, which can be grouped into four categories. First, the Streeters argue that Judge DeSoto erred in concluding that the Streeters had failed to substantially cooperate with USAA's investigation. (Doc.

151 at 8-16, 18-25.) Second, that Judge DeSoto erred in concluding that any noncooperation resulted in actual prejudice. (*Id.* at 17, 27-29.) Third, the Streeters attack the "noncooperation" standard utilized by Judge DeSoto and further argue that any alleged noncooperation on their part does not obviate coverage absent notice from USAA and a chance to remedy. (*Id.* at 6-7, 25-27.) Fourth, that Judge DeSoto erred in determining that a breach of the cooperation provision was fatal to all of the Streeters' claims. (*Id.* at 29-30.) The Streeters also "object to the recommendation that [their] cross-motion for partial summary judgment and all other pending motions be denied as moot," (*id.* at 30); however, this argument is premised on this Court rejecting the Findings and Recommendation for the aforementioned reasons.

The Court will address each of the Streeters' specific objections and review the relevant findings and recommendations *de novo*. First, the Court will address the appropriate standard for determining "noncooperation" under a policy such as the one at issue here. Second, the Court will determine whether the Streeters' conduct constituted "noncooperation" under that standard, thereby obviating coverage in this case. Third, the Court will address whether there was any requirement for USAA to provide notice or a chance to remedy. Finally, the Court will address whether breach of the cooperation provision is fatal to all of the Streeters' claims.

Appendix B

DISCUSSION

This Court can resolve an issue summarily if "there is no genuine dispute as to any material fact" and the prevailing party is "entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). Material facts are those which may affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). A factual dispute is genuine when there is sufficient evidence for a reasonable factfinder to return a verdict for the other party. *Id.* If the moving party meets its initial responsibility, the burden then shifts to the opposing party to establish that a genuine issue of fact exists. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986).

I. Noncooperation Standard

This case is before the Court under diversity jurisdiction; accordingly, the Court applies the substantive law of Montana, the forum state. *See Med. Lab'y Mgmt. Consultants v. Am. Broadcasting Cos., Inc.*, 306 F.3d 806, 812 (9th Cir. 2002). The Montana Supreme Court has not addressed whether, and under what circumstances, an insured's failure to cooperate with a claim investigation will preclude coverage where the applicable policy contains a cooperation provision. Therefore, this Court "must predict how the state's highest court would decide the question." *Orkin v. Taylor*, 487 F.3d 734, 741 (9th Cir. 2007).

First, the Court looks to the Montana Supreme Court's decision in *Steadele v. Colony Insurance Company*. 2011 MT 208, 361 Mont. 459, 260 P.3d 145 (Mont. 2011). In that case, the court held that an insured's failure to comply with their policy's notice provision constituted a failure to meet a condition precedent and barred recovery. *Id.* at 150. The court reasoned that such failures interfere with an insurer's "opportunity to defend its interests and to prevent or mitigate adverse judgments." *Id.* This Court has applied *Steadele*'s holding and reasoning to subsequent diversity actions involving failure to provide timely notice of a claim. *See, e.g., Contractors Bonding and Ins. Co. v. Sandrock*, 321 F. Supp. 3d 1205, 1211-12 (D. Mont. 2018).

Next, the Court looks to another of its decisions in an insurance diversity action, *Seymour v. Safeco Insurance Company of Illinois*, in which an insured "failed to cooperate with [the insurer]" by not "providing [the insurer] with a written estimate to support their request for additional payment." 2014 U.S. Dist. LEXIS 190110, 2014 WL 12591708, at *8. The Court held that this noncooperation "preclude[d] any additional recovery under the [p]olicy," and therefore, the plaintiff's breach of contract claim failed. *Id.* The Court again reasoned that "[a]n insured's failure to provide documents requested by the insurer . . . impairs an insurer's ability to conduct a legitimate claim investigation to determine whether coverage exists." *Id.* (citation omitted).

These cases provide support for the conclusion that, under Montana law, noncooperation with the terms of

an insured's policy can preclude coverage. However, the Court must look to decisions from other jurisdictions to determine the appropriate standard for whether noncooperation has occurred. USAA cites to several decisions that provide guidance. From these cases, the Court concludes that the applicable standard for determining noncooperation is: (1) the insured failed to cooperate in a material and substantial respect, (2) with an insurer's reasonable and material request, (3) thereby causing actual prejudice to the insurer's ability to evaluate and investigate a claim. *See Hall v. Allstate Fire & Cas. Ins. Co.*, 20 F.4th 1319, 1323 (10th Cir. 2021) ("For an insurer to assert the affirmative defense of failure to cooperate, it must show: (1) the insured fails to cooperate with the insurer in some material and substantial respect; and (2) this failure to cooperate materially and substantially disadvantaged the insurer."); *Tran v. State Farm Fire & Cas. Co.*, 136 Wn.2d 214, 961 P.2d 358, 363 (Wash. 1998) ("The only limitation on the requirement that insureds cooperate with the insurer's investigation is that the insurer's requests for information must be material to the circumstances giving rise to liability on its part."); *see also Habecker v. Peerless Ins. Co.*, No. 1:07-CV-0196, 2008 U.S. Dist. LEXIS 92894, 2008 WL 4922529, at *4 (M.D. Penn. Nov. 14, 2008) ("An insured's failure to cooperate excuses an insurer's coverage obligations if the breach is material and prejudicial to the insurer's interest."). The insurer has the burden of proving noncooperation. *See Tran*, 961 P.2d at 365.

Appendix B

A. Substantial Cooperation

The Streeters failed to substantially cooperate with USAA's investigation. The Policy required that the Streeters provide USAA with the records and documents USAA requests, as often as USAA reasonably requires. (Doc. 61-1 at 38.) As discussed above, the Streeters did initially comply with USAA's request for information by providing mortgage refinance records, proof of income, and certain cell phone data. (*See* Docs. 78-3 at 5; 78-2 at 1; 61-6 at 7-24.) However, when USAA requested additional data from the Streeters' cell phones after discovering a discrepancy between the One Source data pull and the Verizon cell phone records, the Streeters declined to provide USAA with access to "any and all indications of factory resets, data hiding or similar." (Docs. 61-7 at 2; 61-8 at 1.) The Streeters then entirely revoked USAA's access to their electronic records held by One Source. (Doc. 61-9 at 1.) Furthermore, the evidence indicates that the Streeters deleted data from their cell phones after filing their claim, as evidenced by the missing call records, despite the preservation letter provided by USAA. (Doc. 61-2 at 3.)

In their objections, the Streeters argue that their initial cooperation raises a genuine issue of material fact as to whether they substantially cooperated. (Doc. 151 at 11.) In support of this argument, the Streeters point to their early cooperation with USAA, including participation in a recorded interview and provision of requested documents. (*Id.* at 9.) The Streeters also point to the fact that USAA agreed to the parameters of their authorization letter,

with the stipulation that USAA could request access to additional files or data. (*Id.*) Finally, the Streeters argue that they never revoked USAA's access to the data held by One Source, but only "suspended" access until David Streeter could "speak with the adjuster's supervisor" and until USAA provided a statement "as to why it believe[d] the additional information requested [would] assist in its investigation." (*Id.* at 10.)

As support for their argument, the Streeters offer new evidence in the form of correspondence sent from their previous attorney, Mathew Hutchison, to USAA in September, October, and December 2019. (Docs. 150-1; 150-2; 150-3; 150-4.) In these letters, Mr. Hutchinson requested that USAA comply with requests for information and documents, (Doc. 150-1 at 1-2), "provide all pertinent facts, documents and/or insurance policy provisions upon which USAA . . . believes supports in any way . . . its basis to contest the Streeters' claim," (Doc. 150-2 at 2), provide "information that justifies its refusal to indemnify its insured," (Doc. 150-3 at 1), and "provide [the Streeters] with all coverage benefits provided under their insurance policy," (Doc. 150-4 at 1). These letters, which were not previously provided to the Court, are now offered as evidence that the Streeters never actually revoked USAA's access to their electronic records, but that USAA "failed to communicate regarding the information requested." (Doc. 151 at 11.)

As an initial matter, this Court need not consider "evidence presented for the first time in a party's objection to a magistrate judge's recommendation." *United States*

v. Howell, 231 F.3d 615, 621-22 (9th Cir. 2000). USAA urges this Court not to consider this new evidence, (Doc. 153 at 13-15), but ultimately the Court finds that the new evidence has no effect on its analysis.

Initial compliance with USAA's requests does not extinguish the Policy's cooperation requirement. *See, e.g., Habecker*, 2008 U.S. Dist. LEXIS 92894, 2008 WL 4922529 at *5 (stating "despite the plaintiffs' initial assistance, no reasonable jury could have concluded that the plaintiffs had discharged their duty to cooperate"). The question is whether the insured fails to cooperate in *some material and substantial respect*. This standard could be met by one or many refusals to provide requested information. Here, the failure to provide USAA access to the requested cell phone data after a discrepancy was identified by USAA's investigator is both material and substantial, as was the deletion of the data.

Despite the Streeters' claims to the contrary, the record supports the conclusion that USAA's authorization to access the requested data from One Source was *revoked*. (*See* Hr'g Tr. 67:20-68:2, Doc. 149 at 67-68.) This revocation occurred before USAA had received the expanded extraction reports it needed to continue its investigation. Moreover, the Policy's cooperation provision does not demand that the insurer comply with conditions imposed by the insured before gaining access to requested information, such as the requests for information made by Mr. Hutchinson in the newly offered letters. The Streeters' arguments to this effect essentially turn the cooperation provision on its head, imposing the

obligation on the insurer to cooperate with requests of the insured. The cooperation provision does not operate in this fashion. Rather, an insured who feels that an insurer is not complying with their obligations under the Policy has other remedies available, such as a bad faith claim.

In conclusion, the Streeters failed to substantially cooperate with USAA's request for information and no reasonable juror could conclude otherwise.

B. Reasonable and Material Request

USAA's request was reasonable and material to their investigation. Information is material if it "concerns a subject relevant and germane to the insurer's investigation . . . at the time the inquiry was made." *Tran*, 961 P.2d at 363 (internal quotation omitted).

Here, the information requested directly pertained to USAA's investigation into the cause of the fires that damaged the Streeters' property. As explained above, USAA requested an expanded data pull after identifying discrepancies between the initial cell phone data provided by the Streeters and the data provided by One Source. This missing data corresponded with the days of the fires. Furthermore, the Streeters had been made aware of their obligation to provide requested information, per the terms of the Policy, and had agreed that USAA may request access to additional files and/or data at a future time if it deemed it necessary to do so in furtherance of the investigation. (*See* Docs. 61-2 at 3; 61-4 at 2.)

The Streeters do not directly object to Judge DeSoto's conclusion that the information sought by USAA was reasonable and material. Accordingly, the Court is satisfied that there is no clear error in the Findings and Recommendation regarding the reasonableness and materiality of USAA's request.

C. Actual Prejudice

The Streeters' failure to cooperate actually prejudiced USAA's investigation. Actual prejudice requires "affirmative proof of an advantage lost or disadvantage suffered as a result of [the failure to cooperate], which has an identifiable detrimental effect on the insurer's ability to evaluate or present its defenses to coverage or liability." *Tran*, 961 P.2d at 365; *see also Seymour*, 2014 WL 12545877, at *8 (explaining that an insurer is prejudiced where "the insured's intransigence prevents the insurer from completing a legitimate investigation to determined whether it should provide coverage"); *Habecker*, 2008 U.S. Dist. LEXIS 92894, 2008 WL 4922529, at *6 (finding that an insured's refusal to authorize access to relevant files held by a third-party "deprived [the insurer] of relevant information . . . thereby prejudicing it [sic] assessment of covered claims"). Undue delay may also constitute prejudice. *See McCoy v. Travelers Indem. Co. of Am.*, No. 4:CV-00-2246, 2002 U.S. Dist. LEXIS 27431, at *16 (M.D. Pa. Feb. 8, 2002) ("An insurer is entitled to receive information relevant to a loss promptly and while the information is still fresh.").

The Streeters' refusal to provide USAA access to the records needed to fully investigate the discrepancy in the cell phone data impeded USAA's investigation and prejudiced its ability to evaluate coverage. Moreover, by revoking all authorization for One Source to provide USAA with any further electronic data, the Streeters prevented USAA from investigating the claim until after the Streeters were paid under the Policy. *See Tran*, 961 P.2d at 366 (discussing the potential for prejudice where an insurer pays a claim, but the insured impeded the insurer's ability to complete its investigation and determine whether the claim was fraudulent).

In their objections, the Streeters contend that there is a genuine issue of material fact as to whether USAA was prejudiced or inhibited in fully investigating the claim and argue that such determinations should be left for the jury. (Doc. 151 at 27 (citing *Field v. State Farm Mut. Auto. Ins. Co.*, No. C13-5267-BHS, 2014 U.S. Dist. LEXIS 83790, 2014 WL 2765224, at *2 (W.D. Wash. June 18, 2014) ("Prejudice is an issue of fact that will seldom be established as a matter of law.")).) The Streeters point to USAA's "failure to follow-up on the Streeters' request for communication regarding the scope of the supplemental request for electronic information" as evidence that the investigation was not inhibited by the Streeters' actions. (*Id.* at 17.) The Streeters also argue that a determination of actual prejudice cannot be made without first determining their culpability for the fires. (*Id.* at 28-29.)

The Streeters' objections have no merit. Prejudice is not determined by the actual content of the records

sought—i.e., proof of culpability—but whether the insurer's ability to investigate was impaired. *See Seymour*, 2014 WL 12545877, at *8 (explaining that the prejudice suffered is the inability to complete a legitimate investigate into a claim); *Habecker*, 2008 U.S. Dist. LEXIS 92894, 2008 WL 4922529, at *6 (explaining that an insurer suffers prejudice when put "into the untenable position of either denying coverage or paying the claim without the means to investigate its validity"). Here, USAA's ability to investigate the claim was inhibited by the Streeters' noncooperation and therefore USAA suffered actual prejudice. Although the question of prejudice may be left to the jury, the Court finds that no reasonable juror could conclude that USAA was not prejudiced by the Streeters' failure to cooperate.

Although the Streeters claim a factual dispute remains as to why the initial extraction reports obtained by USAA are not in the claim file, (Doc. 151 at 15-16), this "dispute" is irrelevant to the material facts. *Anderson*, 477 U.S. at 247-48 (explaining that "the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact."). For the foregoing reasons, USAA met its burden of proving noncooperation under the terms of the Policy.

II. Notice Requirement

The Streeters contend that USAA was under an obligation to notify them of their noncompliance with the

Policy and provide them an opportunity to cure. (Doc. 151 at 25.) As support for this argument, the Streeters point to cases cited in the Findings and Recommendation, such as *Seymour*, *Tran*, and *Habecker*,[1] where the insured was warned about their failure to comply. (*Id.* at 22-25.) The Streeters further argue that USAA has "waived and [is] estopped from asserting any coverage defense not communicated to [the Streeters] in a timely denial letter" before payment of the claim. (*Id.* at 26 (citing *Time Oil Co. v. Cigna Prop. & Cas. Ins. Co.*, 734 F. Supp. 1400, 1418 (W.D. Wash. May 23, 1990); *Portal Pipe Line Co. v. Stonewall Ins. Co.*, 256 Mont. 211, 845 P.2d 746, 750 (Mont. 1993)).)

The Streeters' argument is an attempt to shift the Policy's cooperation requirement onto USAA; however, the Streeters lack support for this proposition. The elements of noncooperation, as discussed above, do not include a requirement that an insurer provide notice of noncompliance with the terms of the Policy in order to actually enforce it. Although some degree of warning or notice may have occurred in the cases cited by the Streeters, there is no indication that those courts considered notice

1. In *Seymour*, the insurer "advised [the insured] that it needed a written estimate supporting her request for additional payment before it would consider paying anything further." 2014 WL 12545877, at *7. In *Tran*, the insurer attempted to contact the insured multiple times and warned the insured's attorney that the claim could be denied if he failed to provide the requested information. 961 P.2d at 361. In *Habecker*, the insureds were "repeatedly reminded" by their insurer of the importance of the requested information. 2008 U.S. Dist. LEXIS 92894, 2008 WL 4922529, at *6.

to be a necessary element to a noncooperation defense. Moreover, the Streeters were put on notice of the Policy's cooperation provision at the outset of the claims process.

Additionally, payment on a claim does not waive the noncooperation defense. USAA raised the defense of noncooperation in its first Answer, (Doc. 12 at 15, ¶ 5), and therefore did not waive the defense. As discussed in *Tran*, noncooperation forces an insurer into the difficult position of having to pay a claim, which may be fraudulent, or face potential claims of bad faith or violation of the Consumer Protection Act. 961 P.2d at 366. Therefore, it is against reason to conclude that an insurer is estopped from asserting noncooperation as a defense after payment has been made on the claim.

For the reasons above, the Streeters' arguments regarding a notice requirement and estoppel are unsuccessful.

III. Effect of Noncooperation

The Streeters argue that violation of the Policy's cooperation provision "is not fatal to [their] breach of contract or other claims" because failure to cooperate only constitutes a breach of a condition of forfeiture, not a breach of a condition precedent. (Doc. 151 at 29.) According to the Streeters, "dismissal of a claim for failure to meet a condition precedent is proper when there has not yet been a decision to accept the claim as a valid and covered claim." (*Id.*) But, where the insurer has paid a claim, "to defeat coverage there must be a determination that the

insured 'has nullified the coverage' with some action." (*Id.* at 30.) The Streeters allege that the nullifying action here is arson, "which has not, and cannot, be established." (*Id.*) The Streeters also point to the fact that "any 'missing' electronic information has been produced" so "retroactive dismissal of the entire claim on this basis would be in error." (*Id.*)

As already discussed above, the Streeters' premise is flawed. The noncooperation defense is available even where a claim has been paid. The rationale behind the defense is that an insurer is prevented from properly investigating a claim where an insured has failed to cooperate with the collection and sharing of information. It is not the content of the information that determines whether noncooperation has caused prejudice, but whether the insurer's ability to investigate was impaired.

Providing the requested information after-the-fact—after payments have been made and litigation has been initiated—is not sufficient to cure the effects of noncooperation. As already discussed, the Policy's cooperation provision places a condition on the insured, not the insurer, to cooperate in the collection of information. Failure to comply with the cooperation provision is sufficient grounds for repudiation of a claim, per the terms of the Policy. Accordingly, summary judgment should be granted in favor of USAA on all of the Streeters' claims.

Reviewing the remainder of Judge DeSoto's Findings and Recommendation for clear error, the Court finds none.

Accordingly, IT IS ORDERED that Judge DeSoto's Findings and Recommendation (Doc. 146) is ADOPTED in full.

IT IS FURTHER ORDERED that USAA's Motion for Summary Judgment (Doc. 59) is GRANTED.

IT IS FURTHER ORDERED that the Streeters' Cross-Motion for Partial Summary Judgment (Doc. 64) and all other pending motions (Docs. 55, 68, 73, 82, 84, 87, 89, 91, 93, 95, 97, 119, 121, 123, 134, 146) are DENIED as moot.

DATED this 25th day of January, 2023.

/s/ Dana L. Christensen
Dana L. Christensen
United States District Judge

APPENDIX C — FINDINGS AND RECOMMENDATION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA, MISSOULA DIVISION, FILED SEPTEMBER 27, 2022

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

CV 20-188-M-DLC-KLD

DAVID AND KATJA STREETER,

Plaintiffs,

vs.

USAA GENERAL INDEMNITY COMPANY,
AND JOHN DOES 1-10,

Defendants.

FINDINGS & RECOMMENDATION

This breach of contract and insurance bad faith case comes before the Court on Defendant USAA General Indemnity Company's ("USAA GIC") Motion for Summary Judgment (Doc. 59) and Plaintiffs David and Katja Streeter's cross-Motion for Partial Summary Judgment (Doc. 64). For the reasons discussed below, USAA GIC's motion should be granted, and the Streeters' cross-motion for partial summary judgment should be denied.

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I. Background

Plaintiffs David and Katja Streeter's home and personal property suffered significant damage in two fires that took place on July 11, 2019 and the early morning hours of July 12, 2019. (Doc. 16, at ¶¶ 4, 6; Doc. 80, at ¶ 8). At the time of the loss, the Streeters were insured under a homeowners insurance policy issued by USAA GIC ("the Policy"). (Doc. 16, at ¶ 3). The Policy provided dwelling coverage in the amount of $395,000, other structure coverage in the amount of $39,500, personal property coverage in the amount of $197,500, and loss of use coverage in an unlimited amount for up to 12 months. (Doc. 66-1, at 4).

On or about July 11, 2019, the Streeters submitted a claim under the Policy for the total loss of their home and personal property, and USAA GIC undertook a claim investigation. (Doc. 80, at ¶ 8). On July 12, 2019, USAA GIC confirmed with the successor mortgagee on the Streeters' property, LoanCare, LLC, that the remaining balance of the mortgage on the property was $467,519.92. (Doc. 66-2, at 2). On July 15, 2019, USAA GIC claims representative Lisa Heisey gathered factual information about the claimed fire loss during an in-person recorded interview with the Streeters. (Doc. 16, at ¶ 7; Doc. 78-3, at 2). The Streeters explained that they had been away on a camping trip at the time of the first fire, and were staying at hotel when the house caught fire again in the early morning hours of July 12, 2019. (Doc. 78-3, at 2). Also on July 15, 2019, the Streeters participated in an in-person interview with USAA GIC's cause and origin expert, Norm Loftin. (Doc. 78, at 12 ¶12, citing Doc. 78-3, at 1)

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On July 18, 2019, USAA GIC investigator Angela Ritchie took a recorded statement from the Streeters during which they verified that they been away on a camping trip at the time of the first fire, and were staying at a hotel when the second fire took place. (Doc. 78-1, at 1). Ritchie advised the Streeters that USAA GIC would be requesting additional information as part of its claim investigation, including mortgage refinance records, proof of income, and cellphone records for the period from July 8, 2019 to July 15, 2019. (Doc. 78-1, at 2; Doc. 78-3, at 4). Ritchie explained that USAA GIC would also be requesting data pulls from both of the Streeters' cellphones, which would be carried out by third-party contractor OneSource Discovery ("OneSource"). (Doc. 78-1, at 2).

In a follow-up email later that day, Ritchie confirmed USAA GIC's request for the Streeters to provide all mortgage refinance records, proof of income, and cellphone text and call detail logs from July 8, 2019 to July 15, 2019. (Doc. 78-2, at 1). Ritchie also confirmed that USAA GIC was requesting a data pull from their cellphones, and explained that One Source would be contacting them to make arrangements for the data pulls. (Doc. 78-2, at 1). Ritchie attached a preservation letter to her email that asked for the Streeters' "cooperation in preserving electronically stored information that may contain information relevant to your claim." (Doc. 61-2, at 3). The preservation letter cited the Policy's cooperation and document disclosure provisions, and requested that the Streeters "secure, maintain, and preserve any information on all smart devices," including cell phones. (Doc. 61-2, at 3). Shortly thereafter, the Streeters provided Ritchie with the requested refinance documents, proof of income, and

Verizon phone records from June 14, 2019 through July 13, 2019. (Doc. 78-3, at 5; Doc. 78-2, at 1).

On August 1, 2019, the Streeters met with a data technician from OneSource for the data pull and presented the following authorization, which was addressed to USAA GIC:

> In the phone conversations with USAA it was requested that Katja and I make our phones available for inspection to a third party contracted by USAA. USAA has asked us for text messages, phone logs, GPS locations, search history, and emails from 7-8-19 until 7-15-19. I will grant USAA their request for information for those items.
>
> I do not grant USAA, or any third-party contractor for said company, to access or view personal files, pictures, notes, or any other technical data from any of the cell phones owned by David or Katja Streeter or from the iPad that will be inspected. If USAA, or its representatives, access these files or data types I will deem it a violation of said agreements and seek remedy.

(Doc. 61-3; 78-3, at 7). The OneSource data technician called Ritchie and advised her that the Streeters would "allow the data pull to continue," but they were asking "for the data to be stored with One Source Discovery until an agreement can be reached with them and USAA as to

what information is accessed." (Doc. 78-3, at 7). Ritchie confirmed with the data technician that the data could be pulled and stored by OneSource until USAA GIC and the Streeters could "come to an agreement on what data is consented to be released." (Doc. 78-3, at 7).

On August 7, 2019, Ritchie emailed the Streeters to confirm that USAA GIC had received their August 1, 2019 authorization document and remind them that it had "requested your cooperation with obtaining electronically stored information from your electronic devices." (Doc. 61-4, at 2). USAA GIC agreed "to only request from OneSource Discovery the file types which you indicated in the attached document that you will grant USAA access, with the stipulation that USAA GIC may request access to additional files and/or data at a future time if it deems necessary to do so in furtherance of the investigation." (Doc. 61-4, at 2).

On August 9, 2019, Ritchie emailed OneSource data technician Ryan Ferreira to confirm the scope of the information USAA GIC was seeking pursuant to the Streeters' authorization, and asked that the extraction take place. (Doc. 78-4, at 4). Ferreira emailed the extraction reports to Ritchie later that day. (Doc. 78-4, at 4: Doc. 78-9). Ferreira's email contained links to download three zip files containing the reports, and advised "for security purposes, this link will expire in 7 days." (Doc. 78-4, at 4).

On August 15, 2019, Ritchie accessed the zip files using the links provided in Ferreira's email, and created claim

notes based on her review of the extraction reports. (Doc. 78-3, at 8-9). Ritchie compared the extraction reports with the Verizon records previously provided by the Streeters, and noted that several calls listed in the Verizon records were not documented in the extraction report for David Streeter's cell phone. Ritchie emailed Ferreira: "I noted in David Streeter's Call Log that only 07/13/19 to 07/15/19 were provided. Are there other calls pulled; specifically from 07/10/19 to 07/12/19? I have a copy of the phone bill details and see several calls back and forth from David and Katja's phones to each other that are not showing in your report for David Streeter. (Doc. 61-5, at 1; 61-6, at 11-12; Doc. 61-7, at 2).

Ferreira responded on August 16, 2019 and verified that there were no calls between July 10, 2019 and July 12, 2019 in the data downloaded from David Streeter's cellphone. (Doc. 61-5, at 1). Ferreira confirmed "that all standard text messages (SMS and MMS), Instant Messages (from the iMessage platform), and call from 7/8/19-7/15/19 were included in the downloads. (Doc. 61-5, at 1). He explained that OneSource could "check for other temporal data in the time frame," but "would need expanded scope authorization from the Streeters," and without that, it could not "even confirm or deny the very existence of other data categories within the 7/10 - 7/12 time frame." (Doc. 61-5, at 1). Ferreira advised Ritchie that "to review if anything is amiss to include factory reset, data hiding, etc." OneSource would need "expanded scope authorization." (Doc. 61-5, at 1).

Ritchie emailed the Streeters again on August 19, 2019. (Doc. 61-7, at 2). She explained:

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> During the review of the data provided by One Source Discovery, it was noted that records of call activity showing on your phone bill from 07/10-19 to 07/12/19 was not provided to USAA. In an effort to determine the reasons for absence of this data we are requesting an expansion to the scope for One Source Discovery to research. The expanded scope being requested is as follows:
>
> - Review communication activity including voicemail and third party application
>
> - Voicemail records for both phones from 7/8/19 -7/15/19
>
> - Examine for any and all indications of factory resets, data hiding or similar

(Doc. 61-7, at 2). The Streeters responded a few hours later. They authorized OneSource "to look into any communication apps such as Whats App and Messenger to confirm communication attempts during the week of 7-8-19 to 7-15-19" and to "also look into voicemail from the devices that were downloaded." (Doc. 61-8, at 1). The Streeters' response did not, however, include authorization for USAA GIC to examine for indications of factory resets, data hiding, or similar. (Doc. 61-8, at 1). On August 26, 2019, before USAA GIC received the expanded extraction reports, the Streeters informed USAA GIC that they were "suspending the right for OneSource Solutions to share any further personal information" from the data pulls with USAA GIC. (Doc. 61-9, at 1). The Streeters did not

authorize USAA GIC to obtain their electronic data until after this litigation had begun and protective order was entered in the case.

On February 18, 2020 USAA GIC paid the $395,000 policy limits for dwelling coverage, and issued a payment to the Streeters in the amount of $143,125 under the Policy's personal property coverage provisions. (Doc. 16, at ¶ 12). In March and May 2020, USAA GIC issued additional payments under the Policy's personal property, other structure, and loss of use coverage provisions. (Doc. 16, at ¶¶ 13-16). All told, between July 2019 and May 2020, USAA GIC issued payments under the Policy totaling more than $600,000. (Doc. 16, at 3).

The Streeters commenced this action against USAA GIC in December 2020 (Doc. 1), and filed an Amended Complaint on the August 30, 2021 extended deadline for amending the pleadings. (Doc. 33). The Amended Complaint asserts claims against USAA GIC for breach of contract, violation of Montana's Unfair Trade Practices Act, punitive damages, attorney fees, and declaratory judgment. (Doc. 33). USAA GIC answered and asserted several affirmative and other defenses, including an unclean hands defense. (Doc 34). USAA GIC also asserted as a defense that the Streeters' "claims may be barred by their failure to comply with one or more conditions precedent to recovery of the benefits or remedies they seek in connection with the subject matter of their claim, including the duty to cooperate under the policy." (Doc. 34, at 13 ¶ 6).

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On June 14, 2022, approximately two weeks before discovery was set to close, USAA GIC moved for leave to file an Amended Answer to assert additional defenses based on new evidence obtained during discovery that it claims shows the Streeters intentionally caused the two fires that destroyed their property. (Doc. 50). The Court granted the motion (Doc. 104), and USAA GIC filed its Amended Answer on August 19, 2022. (Doc. 105). The Amended Answer asserts additional defenses that the Streeters breached the Policy's concealment-and-misrepresentation and fraud clauses, and an additional defense based on the Policy's intentional-loss exclusion. The Amended Answer also provides additional details in support of the failure-to-cooperate and unclean hands defenses USAA GIC had previously plead. (Doc. 105, at 14-17).

USAA GIC moves for summary judgment as to all claims asserted in the Amended Complaint on the ground that the Streeters failed to comply with the Policy's cooperation and record-disclosure provisions. USAA GIC also moves for summary judgment on several of the Streeters' claims for additional and independent reasons. First, USAA GIC maintains the Streeters' breach of contract claim that the timing of its dwelling payment prevented them from timely rebuilding their home fails as a matter of law under the terms of the Policy. Second, USAA GIC argues it is entitled to summary judgment on the Streeters' claims for alleged UTPA violations not arising from Mont. Code Ann. § 33-18-242 and declaratory judgment because those claims are precluded under the UTPA.

The Streeters, in turn, have cross-moved for partial summary judgment on their breach of contract claim alleging violations of Montana's stated value statute, Mont. Code Ann. § 33-24-102.

II. Legal Standards

A. Summary Judgment Standard

Under Federal Rule of Civil Procedure 56(a), a party is entitled to summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." The party seeking summary judgment bears the initial burden of informing the Court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of any genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). A movant may satisfy this burden where the documentary evidence produced by the parties permits only one conclusion. *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 251, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

Once the moving party has satisfied its initial burden with a properly supported motion, summary judgment is appropriate unless the non-moving party designates by affidavits, depositions, answers to interrogatories or admissions on file "specific facts showing that there is a genuine issue for trial." *Celotex*, 477 U.S. 317, 324, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). The party opposing a

motion for summary judgment "may not rest upon the mere allegations or denials" of the pleadings. *Anderson*, 477 U.S. at 248.

In considering a motion for summary judgment, the court "may not make credibility determinations or weigh the evidence." *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 130, 150 (2000); *Anderson*, 477 U.S. at 249-50. The Court must view the evidence in the light most favorable to the non-moving party and draw all justifiable inferences in the non-moving party's favor. *Anderson*, 477 U.S. at 255; *Betz v. Trainer Wortham & Co., Inc.*, 504 F.3d 1017, 1020-21 (9th Cir. 2007).

When presented with cross-motions for summary judgment on the same matters, the court must "evaluate each motion separately, giving the non-moving party the benefit of all reasonable inferences." *American Civil Liberties Union of Nevada v. City of Las Vegas*, 333 F.3d 1092, 1097 (9th Cir. 2003).

B. Application of Montana Law

Because this is a diversity action, the Court applies the substantive law of Montana, the forum state. *See Medical Laboratory Mgmt. Consultants v. American Broadcasting Companies, Inc.*, 306 F.3d 806, 812 (9th Cir. 2002). "If the state's highest appellate court has not decided the question presented, then [the federal district court] must predict how the state's highest court would decide the question" *Orkin v. Taylor*, 487 F.3d 734, 741 (9th Cir. 2007).

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II. USAA GIC's Motion for Summary Judgment

A. Noncooperation Defense

USAA GIC moves for summary judgment on its affirmative defense that all claims asserted in the Amended Complaint are barred because the Streeters failed to comply with the Policy's cooperation clause. The Policy identifies several coverage conditions, including certain duties with which insured must comply after a loss. (Doc 61-1). Relevant here, the Policy provides:

> **SECTION I — CONDITIONS**
>
> ...
>
> 2. "Your Duties After Loss. In case of a loss to which this insurance may apply you must see that the following duties are done: ...
>
> ...
>
> e. Cooperate with us in the investigation of a claim.
>
> ...
>
> g. As often as we reasonably require:
>
> ...
>
> (2) Provide us with records and documents we request and permit us to make copies.

(Doc. 61-1, at 38). USAA GIC argues the undisputed evidence demonstrates that the Streeters failed to comply with these cooperation and disclosure provisions, thereby vitiating coverage under the Policy. As USAA GIC recognizes, the Montana Supreme Court has not specifically addressed whether, and under what circumstances, an insured's failure to cooperate with a claim investigation in violation of an insurance policy cooperation clause will preclude the insured from recovering under the policy. Absent any Montana authority directly on point, USAA GIC analogizes to *Steadele v. Colony Ins. Co.*, 2011 MT 208, 361 Mont. 459, 260 P.3d 145, 150-51 (Mont. 2011), in which the Montana Supreme Court held that the insured's failure to provide its insurer with notice of a claim, as required under the policy's notice condition, relieved the insurer of its duty to indemnify its insured because the insurer was prejudiced in its ability to investigate the claim and participate in the litigation. In a subsequent diversity case out of this district, *Contractors Bonding and Insurance Company v. Sandrock*, 321 F.Supp.3d 1205, 1211-12 (D. Mont. 2018), the court applied *Steadele* and held that the insured's failure to provide timely notice of its claim as required by the policy materially prejudiced the insurer because the insurer was deprived of any opportunity to investigate the facts" surrounding the claim. While these cases are distinguishable in that they involved application of Montana's notice-prejudice rule, their rationale is relevant because it was based on the principle that where an insured's breach of a coverage condition materially prejudices the insurer's claim investigation, recovery under the policy is precluded.

Even more to the point, USAA GIC relies on another diversity case out of this district, *Seymour v. Safeco Ins. Co. of Illinois*, in which the court held the insureds' failure to cooperate with the insurer in the handling of their claim for a larger hail-damage payment precluded recovery under their policy. 2014 U.S. Dist. LEXIS 190110, 2014 WL 12545877, at *8 (D. Mont. July 24, 2014), report and recommendation adopted, 2015 U.S. Dist. LEXIS 181837, 2015 WL 12591708 (D. Mont. May 13, 2015). The policy in *Seymour* required the insureds to cooperate with insurer in the investigation of any claim and to submit a proof of loss when required by the insurer. *Seymour*, 2015 U.S. Dist. LEXIS 181837, 2014 WL 12591708, at *2. The undisputed evidence demonstrated that the insureds "failed to cooperate with [the insurer] in handling the claim by providing [the insurer] with a written estimate to support their request for additional payment. *Seymour*, 2015 U.S. Dist. LEXIS 181837, 2014 WL 12591708, at *2. The court agreed with the insurer's argument that "[a]n insured's failure to provide documents requested by the insurer... impairs an insurer's ability to conduct a legitimate claim investigation to determine whether coverage exists." *Seymour*, 2014 U.S. Dist. LEXIS 190110, 2014 WL 1254877, at 8 (citing *Herman v. Safeco Ins. Co. of Am.*, 104 Wn. App. 783, 17 P.3d 631, 635 (Wash. Ct. App. 2001). The court concluded that the insureds' "failure to comply with [the insurer's] request for a written estimate in support of their claim for additional loss preclude[d] any additional recovery under the Policy" and was fatal to the insureds' breach of contract claim. *Seymour*, 2015 U.S. Dist. LEXIS 181837, 2014 WL 12591708, at *2.

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USAA GIC also cites to several cases from other jurisdictions, which provide a helpful framework for analyzing whether USAA GIC is entitled to summary judgment on its noncooperation defense. These cases generally hold that for an insurer to prevail on "the affirmative defense of failure to cooperate, it must show: (1) ' the insured fail[ed] to cooperate with the insurer in some material and substantial respect'; and (2) 'this failure to cooperate materially and substantially disadvantaged the insurer.'" *Hall v. Allstate Fire and Casualty Ins. Co.*, 20 F.4th 1319, 1323 (10th Cir. 2021) (quoting *Soicher v. State Farm Mut. Auto. Ins. Co.*, 2015 COA 46, 351 P.3d 559, 564 (Colo. App. 2015)). See also *Tran v. State Farm Fire and Cas. Co.*, 136 Wn.2d 214, 961 P.2d 358, 363-365 (Wash. 1998) (applying a two-step analysis that first asks whether the insured substantially cooperated in the investigation or settlement of the claim, and then asks whether the insurer was prejudiced by the failure to cooperate).

The insurer has the burden of proving noncooperation. See e.g. *Wilson v. Geico Indem. Co.*, 2018 U.S. Dist. LEXIS 138231, 2018 WL 3869436, at *4 (W.D. Wash. Aug. 15, 2018); *Seymour*, 2014 U.S. Dist. LEXIS 190110, 2014 WL 12545877, at *1 (referring to failure to cooperate as an affirmative defense). Whether an insured has failed to cooperate under the provisions of an insurance policy is typically a question of fact. *Hall*, 20 F.4th at 1323. But "if 'the record can produce no other result' than a finding of a failure to cooperate, the insurer is entitled to summary judgment." *Hall*, 20 F.4th at 1323 (citing *Soicher*, 351 P.3d at 564).

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USAA GIC argues the undisputed evidence demonstrates that (1) the Streeters materially breached the terms of the insurance contract by refusing to cooperate with USAA GIC's request for electronic records during the claim investigation; and (2) USAA GIC was prejudiced as a result because the Streeters' conduct impaired its ability to investigate the validity of the claim in real time, and before issuing payment under the Policy. USAA GIC maintains that the Streeters' failure to comply with the Policy's cooperation and disclosure provisions precludes coverage, and, absent coverage, the Streeters' remaining claims fail as a matter of law.

In response, the Streeters take the position that there are genuine issues of material fact as to whether they substantially cooperated with USAA GIC's claim investigation. Even if USAA GIC could demonstrate that they failed to cooperate, the Streeters further argue that USAA GIC has not demonstrated that its claim investigation was materially prejudiced a result.

1. Substantial Cooperation

"Cooperation is essential to the insurance relationship because that relationship involves a continuous exchange of information between the insurer and the insured interspersed with activities that affect the rights of both, and the relationship can function only if both sides cooperate." 14 *Couch on Insurance* § 199:1 n.2 (3d ed. 2009) (citing *Staples v. Allstate Ins. Co.*, 176 Wash.2d 404, 295 P.3d 201 (2013)). Thus, insureds who fail to comply with a cooperation clause may forfeit the "right to recover under

an insurance policy." *Tran*, 961 P.2d at 363. One "limitation on the requirement that insureds cooperate with the insurer's investigation is that the insurer's requests for information must be material to the circumstances giving rise to liability on its part." *Tran*, 961 P.2d at 363 (citing *Pilgrim v. State Farm Fire Cas. Co. Inc. Co.*, 950 P.2d 479, 383 (Wash. Ct. App. 1997). "Information is material when it 'concerns a subject relevant and germane to the insurer's investigation as it was then proceeding' at the time the inquiry was made." *Tran*, 961 P.2d at 363 (quoting *Fine v. Bellefonte Underwriters Ins. Co.*, 725 F.2d 179, 183 (2d Cir. 1984).

Here, the Policy required as a condition of coverage that the Streeters cooperate with USAA GIC in the investigation of their fire loss claim, and, as often as reasonably required, provide records and documents requested by USAA GIC. USAA GIC argues, and the Court agrees, that the undisputed evidence demonstrates the Streeters breached these cooperation provisions by limiting and then entirely revoking USAA GIC's authorization to access electronic records during the claim investigation.

As part of its initial investigation into the cause of the fires, USAA GIC asked the Streeters to provide mortgage refinance records, proof of income, and cellphone from July 8, 2019 to July 15, 2019. (Doc. 78-1, at 2; 78-2, at 1). The Streeters complied with this request, and provided USAA GIC with their mortgage refinance documents, proof of income, and Verizon phone records from June 14, 2019 through July 13, 2019. (Doc. 78-3, at 5; Doc. 78-2, at 1;

Doc. 78-8). USAA GIC also requested data pulls from both of the Streeters' cell phones. (Doc. 78-2, at 1-2). When the Streeters met with the OneSource technician on August 1, 2019, they presented an authorization limiting USAA GIC's access to the data on their cell phones. Specifically, the Streeters agreed that USAA GIC could access text messages, phone logs, GPS locations, search history, and emails from July 8, 2019 until July 15, 2019, but did not authorize USAA GIC "to access or view personal files, pictures, notes, or any other technical data" on their cell phones. (Doc. 61-3; 78-3, at 7). USAA GIC agreed to only request the file types authorized by the Streeters, but with the express "stipulation that USAA GIC may request access to additional files and/or data at a future time if it deems necessary to do so in furtherance of the investigation." (Doc. 61-4, at 2).

When USAA GIC reviewed the extraction reports, it noticed there were no calls in the data downloaded from David Streeter's cell phone for the period from July 10, 2019 to July 12, 2019 -- the days of the fires. (Doc. 61-5, at 1). USAA GIC noted this was inconsistent with the Verizon records previously provided by the Streeters, which listed "several calls back and forth from David and Katja's phone to each other" during this two-day time period. (61-5, at 1; 61-6, at 11-12). OneSource later confirmed that there were no calls between July 10, 2019 and July 12, 2019 in the data downloaded from David Streeter's cell phone, and advised USAA GIC that to check for other data during that time frame, and to determine whether "anything is amiss to include factory reset, data hiding, etc," it would need an "expanded scope authorization" from the Streeters. (Doc. 61-5, at 1).

Consequently, on August 19, 2019, USAA GIC asked the Streeters to authorize an expanded data pull to encompass communication activities on third party applications; voicemail records from July 8, 2019 to July 15, 2019; and an examination for indications of factory resets or data hiding. (Doc. 61-7, at 2). The Streeters authorized USAA GIC to review communications on third party applications for the week of July 8, 2019 to July 15, 2019 and voicemail, but importantly, they did not authorize USAA GIC to access to examine their cellphones for factory resets or data hiding. (Doc. 61-8, at 1). On August 26, 2019, before USAA GIC received the expanded extraction reports, the Streeters revoked all authorization for OneSource to share any further information from the data pulls with USAA GIC. (Doc. 61-9, at 1).

No reasonable juror could find based on the evidence outlined above that the Streeters substantially cooperated with USAA GIC's request for electronic records as required under the terms of the Policy. USAA GIC's request for the Streeters' cell phone data was material and relevant to its investigation into the cause of the fires and whether the Streeters were somehow involved. See e.g. *Farmer v. Allstate*, 396 F.Supp.2d 1379, 1381 (N.D. Ga. 2005) (recognizing that where "questions exist as to the cause of a fire for which a claim is made, the insurer has the right to investigate before reaching a decision as to whether to pay the claim"). When USAA GIC initially informed the Streeters that it was seeking their cooperation to obtain electronically stored information as part of the claim investigation, the Streeters presented an authorization that limited USAA GIC's access to the data on their cell phones. And when USAA GIC reasonably

asked the Streeters to authorize an expanded data pull after identifying discrepancies between the limited cell phone data to which it had access and the Streeters' Verizon records, the Streeters did not permit USAA GIC to examine their cellphones for factory resets or data hiding. Just one week later, the Streeters revoked all authorization for OneSource to share any further information from the data pulls with USAA GIC. The Streeters did not authorize USAA GIC to access their electronic records again until litigation was underway and USAA GIC had issued payments under the Policy totaling more than $600,000.

In an attempt to demonstrate that there are genuine issues of material fact as to whether they substantially cooperated with USAA GIC, the Streeters point to evidence that they initially cooperated with various aspects of the claim investigation. For example, the Streeters note that they participated in interviews with law enforcement and USAA GIC representatives in the immediate aftermath of the fires, and provided the mortgage refinance document, proof of income, and Verizon phone records requested by Ritchie. The Streeters also claim that when they met with the OneSource data technician for the data pull on August 1, 2019, the authorization they presented simply summarized USAA GIC's requests and the parameters that USAA GIC itself had suggested. (Doc. 77, at 12, 16). But the record reflects that the Streeters drafted the authorization (Doc. 103-2, at 2-3; Doc. 103-3, at 3-8), and USAA GIC agreed to the parameters outlined in the authorization with the express "stipulation that USAA GIC may request access to additional files and/or data at

a future time if it deems necessary to do so in furtherance of the investigation." (Doc. 61-4, at 2). The Streeters further claim that they agreed to the expanded data pull requested by USAA GIC on August 26, 2019. (Doc. 77, at 16). But again, the record shows otherwise. As discussed above, the Streeters authorized USAA GIC to access some additional information, but critically did not permit USAA GIC examine their cellphones for factory resets or data hiding. (Doc. 61-8, at 1).

To the extent the Streeters point to some evidence that they cooperated with certain aspects of the initial claim investigation, that evidence is not sufficient to raise a genuine issue of material fact as to whether they substantially cooperated with USAA GIC's claim investigation. In an analogous case, *Habecker v. Peerless Ins. Co.*, 2008 U.S. Dist. LEXIS 92894, 2008 WL 4922529 (M.D. Pa. Nov. 14, 2008), the operators of a restaurant that was damaged in a fire initially cooperated with their insurance company's claim investigation by submitting to a lie detector test, providing financial and business information, and submitting to an interview with a special investigator. *Habecker*, 2008 U.S. Dist. LEXIS 92894, 2008 WL 4922529, at *1-2. But the insureds refused the insurer's repeated requests for an inventory list and for authorization to review their tax records. *Habecker*, 2008 U.S. Dist. LEXIS 92894, 2008 WL 4922529, at *1-3. The court noted the insureds' "abrupt halt in cooperation," and found that "[b]y refusing to execute an authorization, [the insureds] deprived [the insurer] of relevant information about the company's financial loss," such that the insurer "could not evaluate all pertinent facets of the [] insurance

claim." *Habecker*, 2008 U.S. Dist. LEXIS 92894, 2008 WL 4922529, at *6, 6 n. 10. The court granted summary judgment in favor of the insurer based on the insureds' failure to cooperate in the loss investigation. *Habecker*, 2008 U.S. Dist. LEXIS 92894, 2008 WL 4922529, at *1-3.

In doing so, *Habacker* relied on another analogous case in which the plaintiffs initially cooperated with the insurer's fire loss claim investigation by signing financial release authorizations and submitting to examinations under oath. *Habecker*, 2008 U.S. Dist. LEXIS 92894, 2008 WL 4922529, at *5 (citing *McCoy v. Travelers Indemnity Company of America*, 2002 U.S. Dist. LEXIS 27431, 2002 WL 31186978, at *5-6, 10 (M.D. Pa. Feb. 8, 2002)). The insureds later ceased cooperating, however, "by revoking the releases, denying access to their books, and withholding information about the source of the fire." *Habacker*, 2008 U.S. Dist. LEXIS 92894, 2008 WL 4922529, at *5 (citing *McCoy*, 2002 U.S. Dist. LEXIS 27431, 2002 WL 31186978, at *5-6, 9-12). *McCoy* "held that, despite the plaintiffs' initial assistance, no reasonable jury could have concluded that the plaintiffs had discharged their duty to cooperate," and the *Habacker* court followed suit. *Habecker*, 2008 U.S. Dist. LEXIS 92894, 2008 WL 4922529, at *5 (citing *McCoy*, 2002 U.S. Dist. LEXIS 27431, 2002 WL 31186978, at *12).

Here, despite evidence that the Streeters initially cooperated with certain aspects of the claim investigation, the undisputed evidence demonstrates that they limited and then entirely revoked USAA GIC's authorization to access electronic records during the claim investigation.

As in *Habacker* and *McCoy*, the Court finds no reasonable juror could conclude based on the evidence of record that the Streeters substantially cooperated with USAA GIC's claim investigation. See also *Tran*, 961 P.2d, at 363-364 (finding no reasonable juror could conclude that the insured substantially cooperated in the claim investigation, where the insured provided some records regarding the items that were stolen but did not release any of the personal and business financial records requested by his insurer); See also *Farmer v. Allstate Ins. Co.*, 396 F.Supp.2d 137, 1380-82 (N.D. Ga. 2005) (finding insurer entitled to summary judgment where the insureds submitted to an examination under oath but refused to provide any of the documentation and information requested by the insurer, including tax returns, business and personal financial records, and cell phone records).

Finally, to the extent the Streeters argue USAA GIC has not met its initial burden of production on summary judgment because it has not produced the extraction reports that USAA GIC received on August 9, 2019, the Court disagrees. As USAA GIC points out, the reason the extraction reports are not part of the claim file is that the original link from OneSource expired, and the Streeters revoked USAA GIC's authorization to review their electronic data.[1] (Doc. 103, at 4). As discussed above,

1. Approximately three weeks after USAA GIC filed its summary judgment reply and two days before oral argument, the Streeters filed a motion for leave to supplement their Statement of Disputed and Additional Facts in opposition to USAA GIC's summary judgment motion. (Doc. 134). The proposed supplemental facts relate to the Streeters' argument that USAA GIC spoliated

even without the extraction reports, USAA GIC has presented uncontroverted evidence that the Streeters failed to substantially cooperate in the claim investigation.

In sum, because the Streeters did not authorize USAA GIC to examine their cellphones for factory resets or data hiding during, and later revoked all authorization to review electronic data, no reasonable juror could conclude that Streeters substantially cooperated with USAA GIC's claim investigation.

2. Prejudice

To prevail on its noncooperation defense, USAA GIC must also demonstrate that it was actually prejudiced by Streeters' the failure to cooperate in the claim investigation. *Tran*, 961 P.2d at 365. "Interference with the insurer's ability to evaluate and investigate a claim may cause actual prejudice." *Tran*, 961 P.2d at 365. "Claims of actual prejudice require 'affirmative proof of an advantage lost or disadvantage suffered as a result of [the failure to cooperate], which has an identifiable detrimental effect on the insurer's ability to evaluate or present its defenses to coverage or liability." *Tran*, 961 P.2d at 365.

In *Seymour*, the district court reasoned that if an insurer is inhibited in its "effort to process claims due to the uncooperativeness of the insured," the insurer "suffer[s]

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evidence because Ritchie did not save the extraction reports provided by OneSource to the claim file when she first reviewed them. Even considering the Streeters' untimely submission, the Court's analysis does not change.

prejudice because the insured's intransigence prevents the insurer from completing a legitimate investigation to determine whether it should provide coverage." *Seymour*, 2014 U.S. Dist. LEXIS 190110, 2014 WL 12545877, at *8. Likewise, in *Habecker*, the court found that by refusing to execute an authorization, the insureds prevented the insurer from evaluating all pertinent facts of the insurance claim, thereby prejudicing the insurer's assessment of covered claims. *Habecker*, 2008 U.S. Dist. LEXIS 92894, 2008 WL 4922529, at *6. See also *Hall*, 20 F.4th at 1325 (finding that the insured's failure to cooperate in the insurer's claim investigation put the insurer "in the untenable position of either denying coverage or paying the claim without the means to investigate its validity").

As *Seymour, Habacker*, and the other cases discussed above reflect, the appropriate inquiry for purposes of assessing prejudice is not what, in hindsight, the electronic records requested by USAA GIC actually contained, but rather whether USAA GIC's request was reasonable and material under the circumstances of its investigation at the time, and whether the Streeters' failure to cooperate materially impaired USAA GIC's ability to investigate the claim and evaluate coverage. See *Seymour*, 2014 U.S. Dist. LEXIS 190110, 2014 WL 12545877, at * 8; *Habacker*, 2008 U.S. Dist. LEXIS 92894, 2008 WL 4922529, at *4-5.

As explained above, USAA GIC reasonably requested an expanded data pull after identifying discrepancies between the initial extraction reports and the Streeters' Verizon records on the days of the fires. The Streeters did not permit USAA GIC to investigate those discrepancies

by examining their cell phones for factory resets or data hiding, thereby impeding USAA GIC's investigation and prejudicing its ability to evaluate coverage. The Streeters further inhibited USAA GIC's investigation by later revoking all authorization for OneSource to provide USAA GIC with any further electronic data. USAA GIC suffered actual prejudice because the Streeters' failure to cooperate impeded USAA GIC's ability to investigate the claim in real time, and before making more than $600,000 in payments under the Policy. See *Tran*, 961 P.2d at 366 (recognizing the potential for prejudice when an insurer pays a claim despite the fact that the insured has impeded the insurer's ability to complete its claim investigation).

Because it resulted in actual prejudice to USAA GIC, the Streeters' failure to cooperate with USAA GIC's claim investigation precludes coverage under the Policy and is fatal to their breach of contract claim. *Seymour*, 2015 U.S. Dist. LEXIS 181837, 2014 WL 12591708, at *2.

3. Remaining Claims

Absent coverage, USAA GIC maintains, the Streeters' remaining claims for relief also fail as a matter of law. In addition to their claim for breach of contract, which fails as a matter of law for the reasons set forth above, the Streeters assert claims for violations of Montana's Unfair Trade Practices Act ("UTPA"), punitive damages, attorney fees, and declaratory judgment. (Doc. 33).

Under Montana law, "where there is no coverage, there is no bad faith." *EOTT Energy Operating Ltd.*

Partnership v. Certain Underwriters at Lloyd's of London, 59 F.Supp.2d 1072, 1076 (D. Mont. 1999) (citing *Truck Ins. Exchange v. Waller*, 252 Mont. 328, 828 P.2d 1384, 1388 (Mont 1992). See also *Seymour v Safeco Ins. Co. of Illinois*, 2015 U.S. Dist. LEXIS 181837, 2015 WL 12591708, at * 2-3 (D. Mont. May 13, 2015) (adopting findings and recommendation and granting summary judgment on the plaintiffs' UTPA claim, reasoning that the plaintiffs had "violated the cooperation clause" and "were unable to establish that they were entitled to additional payments," so they could not "prove damages resulting from [the insurer's] handling of the insurance claim"). Because there is no coverage under the Policy, USAA GIC is entitled to summary judgment on the Streeters' UTPA claims.

Absent coverage, the Streeters' claims for punitive damages, attorney fees, and declaratory judgment also fail. "It is axiomatic that one cannot recover punitive damages in a cause of action unless she first recovers compensatory damages." *Feller v. First Interstate Bancsystem, Inc.*, 2013 MT 90, 369 Mont. 444, 299 P.3d 338, 344 (Mont. 2013). The Streeters' claims for attorney fees and costs are premised on the recovery of contractual benefits, by way of litigation, pursuant to Montana's insurance exception to the American Rule. Absent recovery on the contract, attorney fees are unavailable. See *Mlekush v. Farmers Ins. Exch.*, 2017 MT 256, 389 Mont. 99, 404 P.3d 704, 706-08 (Mont. 2017). The Streeters' declaratory judgment claim is similarly premised on "coverage issues associated with the [Streeters'] policy of insurance. (Doc. 33, at ¶ 76). The Streeters do not dispute that, absent coverage under

the Policy, their remaining claims for relief also fail as a matter of law. Accordingly, and because the Court has determined that the Streeters' materially breached the Policy's cooperation clause, thereby vitiating coverage, USAA GIC is entitled to summary judgment on the Streeters' remaining claims.

IV. Conclusion

For the reasons discussed above,

IT IS RECOMMENDED that USAA GIC's motion for summary judgment be GRANTED.

IT IS FURTHER RECOMMENDED that Streeters' cross-motion for partial summary judgment and all other pending motions be DENIED as moot.

NOW, THEREFORE, IT IS ORDERED that the Clerk shall serve a copy of the Findings and Recommendation of the United States Magistrate Judge upon the parties. The parties are advised that pursuant to 28 U.S.C. § 636, any objections to the findings and recommendations must be filed with the Clerk of Court and copies served on opposing counsel within fourteen (14) days after entry hereof, or objection is waived.

DATED this 27th day of September, 2022

/s/ Kathleen L. DeSoto
Kathleen L. DeSoto
United States Magistrate Judge

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED JANUARY 16, 2024

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 23-35086

D.C. No. 9:20-cv-00188-DLC

DAVID STREETER; KATJA STREETER,

Plaintiffs-Appellants,

v.

USAA GENERAL INDEMNITY COMPANY,

Defendant-Appellee.

Filed January 16, 2024

ORDER

Before: McKEOWN and GOULD, Circuit Judges, and BENNETT,* District Judge.

The panel has voted to deny the petition for rehearing. Judge Gould has voted to deny the petition for rehearing en banc, and Judges McKeown and Bennett have so recommended.

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* The Honorable Richard D. Bennett, United States Senior District Judge for the District of Maryland, sitting by designation.

Appendix D

The full court has been advised of the petition for rehearing en banc, and no judge has requested to vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

Appellants' petition for rehearing and petition for rehearing en banc, filed December 19, 2023, is DENIED.