INSURANCE COVERAGE FOR SCAMS TARGETING ATTORNEYS

by

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1. Introduction

When an attorney is the victim of a financial scam, he or she may look to the law firm's insurance carrier for reimbursement of lost firm funds, lost client funds and even lost firm billing revenue. Making a prompt claim to the insurance company becomes especially important when the scam involves missing client funds, which if not quickly replaced, may lead to an ethics complaint or a malpractice lawsuit by the client. The attorney may also expect the carrier to step in and defend him if the scam has resulted in a bank's collection action against the attorney to recover funds the bank paid out in the scam beyond what was in the attorney's account.

As you might expect, insurance companies often deny liability in such situations, and some law firms have sued their carriers to enforce scam loss insurance claims. It is difficult to make a general statement about the likelihood of success for such law suits, as each case depends on several factors, including the circumstances of the loss, the terms of the insurance policy and applicable state law. However, the following examples will provide some indications as to how courts have been dealing with cases concerning insurance claims resulting from scams targeting attorneys.

2. Mishandled Funds Coverage

Most of the cases discussed below involve phony clients and counterfeit checks, and some decisions also involve email spoofing, which is the criminal practice of forging a sender's email address so that the message appears to have come from a legitimate sender (such as a referring lawyer) when, in fact, it came from the phony client or his accomplice.

The case of *Martin, Shudt, Wallace, Dilorenzo & Johnson v. Travelers Indemnity Company*, 2014 WL 460045 (N.D.N.Y. February 5, 2014) involved a counterfeit cashier's check received as payment to the law firm for a debt owed to a new client. The firm deposited the check to its trust account and then wired funds to a bank account designated by the "client". When the fraud was discovered, the bank charged back $95,000 on the law firm's trust account. The firm made a claim under a business owner's property insurance policy, which provided coverage for "direct physical loss of or damage to covered property," including money or securities, and which loss was "caused by or resulting from a covered cause of loss." However, the New York court accepted the carrier's position that the claim was barred by an exclusion in the policy for "voluntary parting with any property by you or anyone else to whom you have entrusted the property."

Attorneys' Liability Protection Society, Inc. v. Whittington Law Associates, PLLC, 2013 WL 3289055 (D.N.H. June 28, 2013) is another decision involving collection of a debt for a new client. The attorney accepted a referral from a Virginia firm and subsequently received a check, deposited it to his trust account and then wired most of the funds to a foreign bank account. It turned out that the Virginia law firm's website had been hacked and the check was bogus. As in the New York decision discussed above, the bank seized funds in the attorney's trust account and sued the firm to cover the balance of the loss from the fraudulent check.

The New Hampshire federal court entered judgment for the insurance company, based on a policy exclusion for claims "arising from or in connection with … [a]ny conversion, misappropriation or improper commingling by any person of client or trust funds or property, or funds or property of any other person held or controlled by an insured in any capacity or under any authority, including any loss or reduction in value of such funds or property." A copy of the federal district court's decision is included in our CLE materials.

In a similar scenario, in *Lawyers Mutual Liability Insurance Company of North Carolina v. Mako*, 756 S.E. 2d 809 (N.C. Ct. App. 2014), a new "client" that the lawyer never actually met hired the law firm to collect a large worker's compensation settlement from his former employer. The firm received a cashier's check and distributed most of the funds on the same day, in

violation of their own “ten day” policy. When the wire was unsuccessful, the law firm received a second cashier’s check and this time successfully wired the funds to a bank in Japan. After learning that both checks were bogus, the law firm filed a $175,000 claim with their malpractice carrier, but the North Carolina court ruled that policy language exclude coverage for this claim because the firm disbursed funds while the bank still had the right to return the check and revoke the deposit under state law.

AND NOW SOME GOOD NEWS……

In *Morris James LLP v. Continental Casualty Company,* 928 F.Supp.2d 816 (D, Del. 2013), a law firm was approached by a foreign company for assistance with collecting a debt owed by a Delaware company. Soon, the new “client” informed Morris James that the Delaware company had agreed to a settlement, and would be sending a cashier’s check. The firm deposited the check, deducted its fees and wired most of the funds to a foreign bank account. Of course, the check was later returned to the firm’s bank as "altered/fictitious" and "counterfeit." The law firm made a property loss claim of $176,750 and eventually filed suit in federal court based on the following endorsement:

> We will pay for loss resulting directly from "forgery" or alteration of checks, drafts, promissory notes, or similar written promises, orders or directions to pay a sum certain in money that are made or drawn by one acting as an agent or purported to have been so made or drawn.

After finding some provisions of the insurance policy ambiguous, the Delaware federal court entered summary judgment for the law firm on its claim. A copy of the decision is included in our CLE materials.

3. Malpractice (Professional Services) Coverage

A three judge panel of the Eleventh Circuit has ruled on one of these law firm/Internet scam cases. In *Chong v. Medmarc Casualty Insurance Company,* a putative foreign client hired Chong to establish a U.S. subsidiary with a cashier’s check, which the firm deposited in its trust

account. After following the client's instructions to wire most of the funds to another overseas business, Chong found out that the cashier's check was forged, and the funds that were transferred out of the trust account belonged to other clients. Chong made a claim and then filed suit based on a professional liability insurance policy to Chong that covered, *inter alia*, all claims of negligence arising from an act or omission in the performance of "professional services" rendered by Chong. "Professional services" was defined by the policy to include "[s]ervices as a . . . trustee . . . but only for those services typically and customarily performed by an attorney."

The district court entered judgment for the insurance company because "there have been no negligent acts or negligent omissions resulting from the performance of, or failure to perform, professional services." However, the Eleventh Circuit panel reversed, finding that management of funds held in trust for clients constituted a "professional service" as defined by Medmarc's policy and applicable Florida law. Accordingly, the Court of Appeals remanded the case to the district court for entry of summary judgment for the law firm.

The Eleventh Circuit decision is included in our CLE materials.

An Ohio federal court reached the same conclusion in *Stark & Knoll Co., L.P.A. v. ProAssurance Cas. Co.*, 2013 WL 1411229 (N.D. Ohio 2013). One of the law firm's attorneys received an email purportedly from an attorney located in Idaho asking whether he would accept a collection matter on behalf of a client located in Germany. After corresponding with the new "client", the lawyer received an "Official Check of CitiBank, N.A." in the amount of $295,960.00 and deposited in the firm's IOLTA account. Following the client's instructions, he wired $197,921.00 to a bank in Japan. Later the attorney learned that the check was forged and that the email had not actually come from the attorney in Idaho. The law firm transferred funds from its general account to cover the loss of client funds and made a claim under its malpractice policy.

As in the *Chong* decision above, there was a dispute between the parties in the *Stark & Knoll* case over whether the attorney had been engaged in "professional services". Part of the insurer's argument was that activity concerning the IOLTA account was ministerial rather than

professional. However, the Ohio federal district court ruled in favor of the law firm, citing the Eleventh Circuit's *Chong* decision and finding that the policy covered actions which included those of a "trustee" or "similar fiduciary capacity."

A New York appeals court used similar logic in reversing a trial court's ruling in *Lombardi, Walsh, Wakeman, Harrison Amodeo & Davenport P.C. v. American Guarantee,* 85 A.D.3d 1291, 924 N.Y.S. 2d 201 (2011). The appeals court ordered judgment against the insueance company for failing to defend the law firm against a bank's collection suit for the deficiency of funds wired out from what proved to be a phony check. As with the *Chong* and *Stark & Knoll* courts, the *Lombardi* court placed emphasis on an attorney in possession of a client's funds being a fiduciary governed by the Rulers of Professional Conduct and consequently found that the attorneys were performing professional services covered by the policy when they were victimized by the bogus check scam.

However, there are reported cases that hold for the insurance company on the "professional services" issue. *See, e.g., Bradford & Bradford, P.A. v. Attorneys Liability Protection Society, Inc.,* 2010 WL 4225907 (D.S.C. 2010) (malpractice policies are to protect lawyers from claims for legal services, not for being victims of fraud); *Fidelity Bank v. Stapleton,* CV No. 07A-11482-2 (Ga. 2009) ("[n]o application of legal knowledge unique to the practice of law is implicated by his actions in this case."); *Fleet National Bank v. Wolsky,* CV No. 04-5075 (Mass. 2006) (receiving and depositing a client check does not involve a lawyer's professional knowledge or skill).

4. Computer and Media Fraud Coverage

As of the writing of this material, there was an interesting case pending in state court in Rhode Island concerning not hacked emails or fake checks, but instead "ransomware". *Moses Alfono Ryan Ltd. v. Sentinel Insurance Company*, Limited, PC-2017-1280. Ransomware is a variety of malicious software that is usually delivered in an email and installs covertly on a victim's computer system. This virus is designed to encrypt or otherwise block the victim's access to its computer system and data until a sum of money (the "ransom") is paid.

On or about May 22, 2015, an attorney at the plaintiff law firm received an email from an unknown source that included an attachment encoded with a ransom ware encrypted virus. After he clicked on the attachment, the virus encrypted all of the documents and information on the law firm's computer network, and the efforts of experts hired by Moses Alfonso to retrieve the electronic client files and other information were unsuccessful. It took three months for the firm to negotiate with the perpetrators, obtain a Bitcoin account and pay the demanded ransom twice, totaling over $25,000, to obtain the necessary decryption tools.

Moses Alfonso made a claim on their business owner's policy for losses resulting from business income interruption, comprised of the $25,000 ransom and over $700,000 in lost billings. When Sentinel rejected the claim, the law firm filed suit for breach of contract and insurer bad faith. The complaint also seeks punitive damage and demands a jury trial.

The law firm's complaint and the insurance company's answer are included in our CLE materials.

5. CONCLUSION

There is no clear line of decisions on which a law firm can rely for assurance that its insurance policy will protect the firm if it becomes a victim of a scam. Some firms have had success making a claim on a property loss policy and perhaps more firms have obtained positive results from a professional malpractice policy. However, as stated in the introduction to this discussion, the circumstances of the loss, the terms of the insurance policy and applicable state law are important considerations in each case.

Moreover, a reader may get a sense from some of these decisions that the degree of the attorney's negligence in allowing the scam to occur may be at least a background consideration for some courts. Failing to use common sense or to follow your own safeguards and policies certainly will not engender a judge's sympathy.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

Attorneys Liability Protection Society, Inc.

v.

Civil No. 11-cv-563-JL
Opinion No. 2013 DNH 091

Whittington Law Associates, PLLC, W.E. "Ned" Whittington, and Ledyard National Bank

MEMORANDUM ORDER

This dispute over the scope of a professional liability insurance policy arises from a somewhat unusual set of facts, at least as far as professional liability insurance policies are concerned. Whittington Law Associates, PLLC and W.E. Whittington (collectively, the "Whittington defendants") were evidently the victims of what has become known as a "Nigerian Check Scam." In the typical embodiment of that confidence game, "the victim is asked to accept what appears to be a legitimate check on behalf of a foreign corporation, deposit the funds, then wire some or all of the proceeds to a foreign account before the victim's bank realizes the check is, in fact, counterfeit." Branch Banking & Trust Co. v. Witmeyer, No. 10-cv-55, 2011 WL 3297682, at *1 (E.D. Va. Jan. 6, 2011).

That is precisely what happened here. The Whittington defendants were induced, by a "client" that did not actually

exist, to deposit a sizeable check into their account at Ledyard National Bank and promptly wire the bulk of the funds to a bank account in Japan. By the time Ledyard discovered that the check was invalid, the funds had already been withdrawn from the Japanese account.

Finding itself more than $150,000 short, Ledyard commenced a state-court action against the Whittington defendants to recover that amount. The Whittington defendants, in turn, sought coverage against that action from their professional liability insurer, Attorneys Liability Protection Society, Inc. ("ALPS"), which responded by filing this action seeking a declaratory judgment that it need not provide coverage. The Whittington defendants have counterclaimed, seeking a declaratory judgment to the contrary, and alleging that ALPS breached the insurance contract by declining to provide coverage. This court has jurisdiction of this action under 28 U.S.C. § 1332 (diversity).

ALPS has moved for summary judgment on both its claim and the Whittington defendants' counterclaims. Its arguments are twofold. First, pointing out that the Whittington defendants' insurance policy provides coverage only for damages arising from "an act, error or omission in professional services that were or should have been rendered," it argues that the events underlying Ledyard's claim do not meet that definition. Second, it argues

that even if Ledyard's claim falls within the general scope of the policy, that claim is specifically excluded by the policy's exclusion for the "conversion, misappropriation or improper commingling" of funds controlled by the Whittington defendants. The Whittington defendants have cross-moved for summary judgment, unsurprisingly taking a contrary position as to both the scope of the policy and the applicability of the exclusion.

Having carefully considered the parties' submissions and heard oral argument, the court concludes that Ledyard's claim against the Whittington defendants arises from the conversion or misappropriation of funds under the Whittington defendants' control, and is therefore excluded under the unambiguous policy language. The court accordingly grants ALPS's motion for summary judgment, and denies the Whittington defendants' cross-motion.

I. Applicable legal standard

Summary judgment is appropriate where "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." Fed. R. Civ. P. 56(a). A dispute is "genuine" if it could reasonably be resolved in either party's favor at trial. See Estrada v. Rhode Island, 594 F.3d 56, 62 (1st Cir. 2010) (citing Meuser v. Fed. Express Corp., 564 F.3d 507, 515 (1st Cir. 2009)). A fact is

"material" if it could sway the outcome under applicable law. Id. (citing Vineberg v. Bissonnette, 548 F.3d 50, 56 (1st Cir. 2008)). In analyzing a summary judgment motion, the court "views all facts and draws all reasonable inferences in the light most favorable to the non-moving party." Id. On cross-motions for summary judgment, the court applies this standard to each party's motion separately. See, e.g., Am. Home Assurance Co. v. AGM Marine Contractors, Inc., 467 F.3d 810, 812 (1st Cir. 2006).

II. Background

Defendant W.E. Whittington is a New Hampshire attorney who practices law under the name Whittington Law Associates, PLLC. Late on the evening of July 24, 2011, he received an e-mail from a person claiming to be Richard Downey, an attorney with the Law Offices of Richard L. Downey & Associates in Fairfax, Virginia. "Downey" wrote that he would be "sending a client over for a business litigation matter," and asked Whittington to "[a]dvise of [his] availability." Once Whittington had done so, the e-mail continued, "Downey" would "have [his] client contact [Whittington] directly with pertinent information." Whittington did not promptly respond to the e-mail, and late the following night, "Downey" wrote a second, identical e-mail to Whittington, sent from a different e-mail address.

The next morning, Whittington responded to the original e-mail, advising "Downey" that he was "completely available"; the morning after that, he responded to "Downey's" second e-mail, again advising of his availability. Several days later, "Downey" wrote back, informing Whittington that he had "forwarded your contact to my client to establish direct contact and provide pertinent information for your review." Shortly thereafter, Whittington received an e-mail from a person claiming to be Martin Joachim, a representative of Bendtsteel A/S in Frederiksvaerk, Denmark. "Joachim" advised that he had been referred by Richard Downey, and indicated that he would be forwarding additional information about "our legal matter."

In an e-mail to Whittington several days later, "Joachim" outlined the contours of this "legal matter." According to the e-mail, Mill Steel Supply of Manchester, New Hampshire had made only a part payment for "goods" supplied by Bendtsteel, with over $500,000 still outstanding. Bendtsteel wished to maintain its otherwise good relationship with Mill Steel Supply, but believed that the retention of the Whittington defendants "and the introduction of legal pressure may initiate immediate payment." "Joachim" continued:

> Our expectation of your services for now will be within the scenario of a phone call or demand letter to our

> customer. This approach will trigger the much needed response from our customer towards payment.
>
> When all available options have been exhausted, litigation may be introduced as a last resort. We will forward the pertinent document for your review.
>
> You may send your retainer document for the board to review as we intend to commence immediately.

After checking for conflicts of interest and conducting some internet research on Bendtsteel and Mill Steel Supply (both of which seemed, to Whittington, to be legitimate companies), Whittington advised "Joachim" via e-mail that he had no conflict of interest, and forwarded an engagement letter. "Joachim" returned a signed copy of the engagement letter (again via e-mail), and informed Whittington that, after being notified of Bendtsteel's intention "to retain legal services as regards our claim," Mill Steel Supply had promised to make payment. Following additional e-mail correspondence, "Joachim" informed Whittington that Mill Steel Supply had "made a part payment to you/your firm to avoid litigation," and that the payment would be sent directly to Whittington's office.

On August 31, 2011, Whittington received a UPS package containing a check in the amount of $195,790, purportedly issued by Citibank, N.A. on behalf of Mill Steel Supply and payable to Whittington Law. He promptly notified "Joachim" of the receipt, asking whether "Joachim" wanted the funds wired to him and

proposing that the Whittington defendants keep $2,000 as a retainer. "Joachim" responded, agreeing to the $2,000 retainer and requesting that Whittington ask his bank "to transfer by swift to our creditor MS CAR FACTORY COMPANY LTD in CHIBA-KEN, JAPAN the sum of $188,978.000 (USD)." Wire transfer instructions were attached. The Whittington defendants immediately deposited the check into their client trust account at Ledyard National Bank, and requested that the bank wire the funds as directed by "Joachim."

Ledyard completed the transfer on September 6, 2011. Later that same day, Ledyard received notification that Citibank would not honor the check, and attempted--unsuccessfully--to recall the wire transfer. A subsequent investigation determined that the check was fraudulent, and that "Downey" and "Joachim" were fake identities (although Richard Downey and his law firm actually existed, his website had been hacked and the e-mail was not from the real Richard Downey).

Ledyard responded to this revelation by seizing the funds remaining in the Whittington defendants' client trust account to offset its loss. It also filed a state-court lawsuit against the Whittington defendants, seeking to recover the balance of the lost funds. The Whittington defendants duly reported the suit to ALPS, their professional liability insurer, requesting that ALPS

provide them with a defense against Ledyard's action. ALPS denied coverage and filed this declaratory judgment action.

III. Analysis

As is often true of insurance coverage disputes, this case does not involve any real disagreement as to the underlying facts. The outcome turns instead on the interpretation of the Whittington defendants' insurance policy, over which there is much disagreement. As noted at the outset, that disagreement concerns two clauses in particular. The first of these is the policy's coverage clause, which, in pertinent part, provides coverage for claims arising from or in connection with "an act, error or omission in professional services that were or should have been rendered by the Insured." Ins. Pol'y (document no. 18-7) at 2, § 1.1.1 (boldface omitted).[1] The second is one of the policy's multifarious exclusions, for claims arising from or in connection with the "conversion, misappropriation or improper commingling by any person" of client funds or funds "held or

[1]The policy pervasively deploys boldface type, using it for terms that are defined in the body of the policy itself, and also to emphasize certain passages of text. Instead of either copying each occurrence of boldface when quoting the policy or commenting on its omission, this order omits the boldface from any quoted portion of the policy.

controlled by an Insured in any capacity or under any authority." Id. at 8, § 3.1.13.

The parties' memoranda devote considerable attention to the first clause. ALPS, noting that the policy defines "professional services" to be "services or activities performed for others as an attorney in an attorney-client relationship," see id. at 6, § 2.22.1, argues that the policy does not provide any coverage because the Whittington defendants "did not have an attorney-client relationship with any actual client." Memo. in Supp. of ALPS's Mot. for Summ. J. (document no. 18-1) at 15. For their part, the Whittington defendants argue that an "actual client" is not necessary to an "attorney-client relationship," and that the only requirement is an attorney's "good faith belief . . . that he had entered into a legitimate attorney-client relationship." Memo. in Supp. of Defts.' Mot. for Summ. J. (document no. 21-1) at 12-13. Each side cites several cases involving similar facts in support of its favored interpretation.

While the interpretation of the first clause is interesting --particularly in light of the divergent results reached by the cases the parties cite[2]--this court need not resolve that issue.

[2]Compare Nardella Chong, P.A. v. Medmarc Cas. Ins. Co., 642 F.3d 941 (11th Cir. 2011) (losses due to Nigerian Check Scam arose from provision of professional services and were covered by attorney's professional liability insurance policy); Stark &

Assuming without deciding that Ledyard's claim against the Whittington defendants arises from or in connection with "an act, error or omission in professional services that were or should have been rendered by the Insured," such that the policy would ordinarily provide coverage against it under the first clause, that claim is excluded under the second clause.

The interpretation of insurance policy language is a question of law for the court. Concord Gen. Mut. Ins. Co. v. Doe, 161 N.H. 73, 75 (2010). "Insurers are free to contractually limit the extent of their liability through use of a policy exclusion." Progressive N. Ins. Co. v. Concord Gen. Mut. Ins. Co., 151 N.H. 649, 653 (2005). "Such language must be so clear, however, as to create no ambiguity that might affect the

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Knoll Co., L.P.A. v. Proassurance Cas. Co., No. 12-cv-2669, 2013 WL 1411229 (N.D. Ohio Apr. 8, 2013) (same); O'Brien & Wolf, L.L.P. v. Liberty Ins. Underwriters Inc., No. 11-cv-3748, 2012 WL 3156802 (D. Minn. Aug. 3, 2012) (same); and Lombardi, Walsh, Wakeman, Harrison, Amodeo & Davenport, P.C. v. Amer. Guar. & Liab. Ins. Co., 924 N.Y.S.2d 201 (N.Y. App. Div. 2011) (same) with Bradford & Bradford, P.A. v. Attorneys Liab. Prot. Soc'y, Inc., No. 09-cv-2981, 2010 WL 4225907 (D.S.C. Oct. 20, 2010) (losses due to Nigerian Check Scam did not arise from provision of professional services and were not covered by attorney's professional liability insurance policy); Fidelity Bank v. Stapleton, No. 07A-11482-2 (Ga. State Ct. Jan. 14, 2009) (same); and Fleet Nat'l Bank v. Wolsky, No. 04-CV-5075 (Mass. Super. Ct. Dec. 6, 2006) (same). (In light of these cases, the court might need to reconsider its statement that this case "arises from a somewhat unusual set of facts, at least as far as professional liability insurance policies are concerned." Supra at 1.)

insured's reasonable expectations." Id. An ambiguity exists when, considering the exclusion "in its appropriate context, and construe[ing] the words used according to their plain, ordinary, and popular definitions . . . the parties may reasonably differ about the interpretation of the language." Id. The court ultimately "interpret[s] exclusion language to mean what a reasonable person would construe it to mean." Id.

In full, the relevant policy exclusion provides that

> THIS POLICY DOES NOT APPLY TO ANY CLAIM ARISING FROM OR IN CONNECTION WITH . . . [a]ny conversion, misappropriation or improper commingling by any person of client or trust account funds or property, or funds or property of any other person held or controlled by an Insured in any capacity or under any authority, including any loss or reduction in value of such funds or property.

Ins. Pol'y (document no. 18-7) at 8, § 3.1.13. As the Whittington defendants note, "this exclusion has apparently not been reviewed by any court in a reported decision." Memo. of Law in Supp. of Defts.' Mot. for Summ. J. (document no. 21-1) at 22. That is not, however, an obstacle to its application here, as its terms are clear and unambiguous as applied to the facts of this case. Ledyard's claim against the Whittington defendants arises from the scammer's misappropriation of the bank's funds, which the Whittingon defendants controlled, and thus falls squarely within this exclusion.

The Whittington defendants' arguments to the contrary are not persuasive. In their memorandum in support of their motion for summary judgment, they focus solely on whether the misappropriated funds were "client or trust account funds or property," asserting that because Ledyard "is not seeking to recover" such funds and "[t]he $195,790 represented by the fraudulent check was simply never in the firm's [client trust] account . . . the exclusion by its own terms is inapplicable." Id. By its own terms, though, the exclusion does not apply solely to the misappropriation of "client or trust account funds or property." It also applies to the misappropriation of, simply, "funds" that are "held or controlled by an Insured in any capacity or under any authority."

Perhaps recognizing their oversight, in their opposition to ALPS's motion for summary judgment, the Whittington defendants assert that they "never actually held or controlled the money sent to [them] by Citibank" because "[t]he money represented by the $195,790 check that was purported to come from Citibank . . . never existed." Defts.' Memo. in Supp. of Obj. to Pl.'s Mot. for Summ. J. (document no. 23-1) at 10. Ledyard's action does not, however, arise from the scammer's misappropriation of the nonexistent funds "represented by the $195,790 check," so whether the Whittington defendants actually controlled those funds is

irrelevant. What is relevant is whether the Whittington defendants controlled the funds that were misappropriated, and which are the subject of Ledyard's claim against the Whittington defendants--the funds the Whittington defendants instructed Ledyard to wire to the Japanese bank account.

The Whittington defendants plainly controlled those funds, as their attorney conceded at oral argument. To "control" something, in the sense that term is used in the policy, means "to exercise restraining or directing influence over" or "to have power over." Webster's Third New International Dictionary 496 (2002). The Whittington defendants' "directing influence" or "power over" the funds in question is evident from the fact that the bank wired those funds at their direction.[3] Further, the clause refers to funds controlled by the Whittington defendants

[3]As ALPS notes, several courts have concluded that one exercises control over funds by directing that they be wired. See, e.g., Gould v. Georgia, 614 S.E.2d 252, 255 (Ga. Ct. App. 2005) ("[A]n individual can exercise control over funds by directing a wire transfer."); Bailey v. Texas, 885 S.W.2d 193, 199 (Tex. Ct. App. 1994) (defendant "exercised control over" bank funds by "orchestrat[ing] a wire transfer" from one account to another). The Whittington defendants assert that these cases are inapposite because they "have absolutely nothing at all to do with insurance" and "involve the theft of 'real' money," not "a counterfeit check or the wiring of funds that did not exist." Defts.' Reply (document no. 25) at 6. This argument--which rather flippantly ignores the fact that this case also involves "the theft of 'real' money" from the bank and its depositors--does not diminish these cases' instructive value as to the plain and ordinary meaning of the term "control."

"in any capacity or under any authority," a clause broad enough to encompass the Whittington defendants' status as account holders at Ledyard. Indeed, the Whittington defendants' authority, as account holders, to direct the bank how to disperse the funds at issue was the linchpin on which the scam itself turned; if the Whittington defendants had no such authority, the scam could not have been accomplished.

The Whittington defendants also argue that the exclusion is ambiguous because ALPS could have included additional language in the policy to exclude claims "arising out of, in connection with, or in consequence of . . . the dishonoring of any financial instrument." Defts.' Memo. in Supp. of Obj. to Pl.'s Mot. for Summ. J. (document no. 23-1) at 11 (quoting Chicago Title Ins. Co. v. Northland Ins. Co., 31 So. 3d 214, 215 n.1 (Fla. Dist. Ct. App. 2010)) (emphasis omitted); see also Defts.' Reply (document no. 25) at 7. Determining whether a policy exclusion is ambiguous, though, does not turn on whether the insurer might have included another, more precise exclusion. As already discussed, ambiguity turns instead on whether "the parties may reasonably differ about the interpretation of the language" of the exclusion that was actually included in the policy. Concord Gen. Mut. Ins., 151 N.H. at 653. And, for the reasons already

discussed, the parties can not "reasonably differ" as to whether Ledyard's claim falls within the scope of § 3.1.13's exclusion.[4]

As a last resort, in their reply brief, the Whittington defendants argue that the language of § 3.1.13 quoted above does not apply at all, and that a version of the exclusion that ALPS promulgated in August 2011 applies instead. This position directly contradicts the position the Whittington defendants take in their memorandum in support of their motion for summary judgment, in which they rely upon the same version of § 3.1.13 quoted above. See Memo. in Supp. of Defts.' Mot. for Summ. J. (document no. 21-1) at 21-22. This court ordinarily does not consider arguments made for the first time in reply, see Doe v. Friendfinder Network, Inc., 540 F. Supp. 2d 288, 303 n.16 (D.N.H. 2008), a practice that is even more sensible when a party's tardily-contrived arguments are in conflict with its own earlier arguments, see Beane v. Beane, 856 F. Supp. 2d 280, 298 (D.N.H. 2012). The court also does not, for that matter, consider inadmissible evidence on summary judgment, see, e.g., Elmo v.

[4]At oral argument, the Whittington defendants argued that the exclusion was ambiguous as actually written, contending that the parties could reasonably differ as to whether the term "any person" referred only to persons employed by or acting on behalf of an Insured. This argument was not presented in any of the Whittington defendants' memoranda and is untimely. See Johnson v. Gen. Dynamics Info. Tech, Inc., 675 F. Supp. 2d 236, 241 n.3 (D.N.H. 2009). It is also unpersuasive.

Callahan, 2012 DNH 144 at 18, and the "new" version of § 3.1.13 upon which the Whittington defendants rely is unauthenticated and hence inadmissible, see Fed. R. Evid. 901(a).

The new version of the exclusion does not help the Whittington defendants in any event. That version excludes claims arising out of or in connection with "[a]ny conversion, misappropriation, improper commingling or negligent supervision of client or trust account funds or property, or funds or property of any other person held or controlled by an Insured in any capacity or under any authority, ..." Revised Ins. Pol'y (document no. 25-1) at 8, § 3.1.13. The removal of the phrase "by any person," the Whittington defendants argue, makes it "clear that the bad or negligent act must be done by the insured." Defts.' Reply (document no. 25) at 7 (emphasis in original). Reading the exclusion "in its appropriate context," Concord Gen. Mut. Ins., 151 N.H. at 653, though, it is apparent that the revision worked no such change.

When the policy excludes coverage for claims arising from the insured's acts, it includes a specific limitation to that effect. By way of example, the policy contains exclusions for claims arising from or in connection with:

> An Insured's activities as an elected public official or as an employee of a governmental body, subdivision, or agency thereof; . . .

> An Insured's activities or capacity as a fiduciary under the Employee Retirement Income Security Act of 1974, as amended, or any regulation or order issued pursuant thereto; . . .
>
> Alleged discrimination by an Insured, including discrimination based on race, color, creed, age, sex, nationality, marital status or sexual orientation;
>
> Alleged sexual harassment or misconduct by an Insured;
>
> An Insured's rendering of investment advice to any person, including but not limited to advice concerning securities, real property, commodities or franchises; [and]
>
> An Insured's services or capacity as a broker, dealer, investment advisor, business manager, accountant, real estate broker or real estate agent[.]

Revised Ins. Pol'y (document no. 25-1) at 7-8 (section numbers omitted; emphasis added); see also Ins. Pol'y (document no. 18-7) at 6-8 (using the same or similar language). So the very fact that the exclusion set forth in § 3.1.13 is not limited to "an Insured's conversion, misappropriation, improper commingling or negligent supervision" or "conversion, misappropriation, improper commingling or negligent supervision by an Insured" is enough to set it apart from its confederates, and to make clear to any reasonable person that the "bad or negligent act" need not be done by the insured. The phrase "by any person" was surplusage,

and its deletion made no change to the substance of the exclusion.[5]

The Whittington defendants finally protest that "no law firm purchasing professional liability insurance would expect that permitting its client trust account to be pilfered would not be covered."[6] Defts.' Reply (document no. 25) at 9 (quoting O'Brien & Wolf, 2012 WL 3156802 at *8). It suffices to say in response that if the plain and unambiguous language of the insurance policy excludes coverage for those acts, the insured law firm should expect just that. That is the case here, and ALPS is entitled to summary judgment in its favor.

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[5]The Whittington defendants also argue that the addition of "negligent supervision" to § 3.1.13 (which, they say, does not bind them) "highlights the ambiguity in the original exclusion" by demonstrating that the earlier version did not exclude claims arising from negligence of the type alleged in Ledyard's suit against them. Defts.' Reply (document no. 25) at 8. But, as already discussed, in reviewing policy language for ambiguity, this court reviews the language of the policy as it was actually written and does not speculate about how it might have been written.

[6]This protestation, it bears noting, is in tension with the Whittington defendants' argument--discussed above--that the "pilfered" funds were not in their client trust account.

IV. Conclusion

For the foregoing reasons, ALPS's motion for summary judgment[7] is GRANTED, and the Whittington defendants' motion for summary judgment[8] is DENIED. The clerk shall enter judgment accordingly and close the case.[9]

SO ORDERED.

Joseph N. Laplante
United States District Judge

Dated: June 28, 2013

cc: William L. Boesch, Esq.
Gordon A. Rehnborg, Jr., Esq.
R. Matthew Cairns, Esq.

[7]Document no. 18.

[8]Document no. 21.

[9]As a member of the bar of this court, ALPS's counsel is expected to be familiar with and observe the local rules of this court. Counsel is reminded that pursuant to Local Rule 5.1(a), "[f]ootnotes shall be used sparingly." In spite of this rule, every citation to the record or to authority in ALPS's legal memoranda is contained in a footnote, begetting around 150 footnotes total. Counsel would do well to temper his use of footnotes in the future.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

MORRIS JAMES LLP,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civ. No. 11-19-SLR
	)	
CONTINENTAL CASUALTY COMPANY,	)	
	)	
	)	
Defendant.	)	

Edward M. McNally, Esquire, Mary B. Matterer, Esquire, and Corinne Elise Amato, Esquire of Morris James LLP, Wilmington, Delaware. Counsel for Plaintiff.

Paul Cottrell, Esquire, and Melissa L. Rhoads, Esquire of Tighe & Cottrell, Wilmington, Delaware. Counsel for Defendant. Of Counsel: Edward M. Napierkowski, Esquire of Colliau Elenius Murphy Carluccio Keener & Morrow.

MEMORANDUM OPINION

Dated: March 18, 2013
Wilmington, Delaware

ROBINSON, District Judge

I. INTRODUCTION

This case features a law firm as the unfortunate victim of a scam in which it lost $176,750. The law firm, Morris James LLP ("plaintiff"), now seeks to recover the money under the provisions of an insurance policy ("the Policy") issued to it by Continental Casualty Company ("defendant"). Plaintiff originally filed its complaint against defendant on November 30, 2010 in the Superior Court of the State of Delaware in and for Kent County. (D.I. 21, ex. A) On January 6, 2011, defendant filed a notice of removal pursuant to 28 U.S.C. §§ 1441 and 1446, bringing the case before this court. (D.I. 1) Defendant filed its answer on January 11, 2011. (D.I. 5) On April 11, 2012, following an initial status conference, the court stayed discovery and set a briefing schedule for summary judgment. (D.I. 17) Currently before the court are the parties' cross-motions for summary judgment. (D.I. 20, 22) The court has jurisdiction over this matter pursuant to 28 U.S.C. § 1332(a)(1).

II. BACKGROUND

A. The Parties

Plaintiff is a limited partnership organized in Delaware with a principal place of business in Delaware. (D.I. 1 at ¶ 6) Defendant is a corporation organized in Illinois, with a principal place of business in Illinois. (*Id.* at ¶ 5) The amount in controversy is $176,750, which the plaintiff lost in the scam. (*Id.* at ¶ 3)

B. The Scam

In June 2010, plaintiff was approached by a foreign company calling itself Esa Corporation Group Oyj ("Esa") for assistance with collecting a debt allegedly owed by a

Delaware entity, B&B Industries ("B&B"), under a sales agreement. (D.I. 21, ex. A at ¶ 4; D.I. 24, ex. 2 at CCC149) Plaintiff believed both entities to be involved in the steel industry. (D.I. 24, ex. 2 at CCC149) Esa signed an engagement letter with plaintiff and also provided plaintiff with a copy of the purported sales agreement regarding the products sold and the outstanding debt. (D.I. 21, ex. A at ¶ 5; D.I. 24, ex. 2 at CCC149)

On July 7, 2010, Esa informed plaintiff that B&B had agreed to a settlement of the debt in order to avoid litigation. (D.I. 21, ex. A at ¶ 6; D.I. 24, ex. 2 at CCC149) On July 13, 2010, Esa notified plaintiff that B&B had made a partial payment toward the settlement. (D.I. 24, ex. 2 at CCC149) Plaintiff then received what appeared to be a cashier's check drawn on Citibank in the amount of $195,495 ("the purported check"). (D.I. 21, ex. A at ¶ 6) The purported check included all of the identifying marks of a valid Citibank cashier's check, including an "Official Check" notation and branch and teller numbers. (D.I. 24, ex. 2 at CCC149 & ex. 3) On July 20, 2010, plaintiff deposited the purported check to its account. (D.I. 21, ex. A at ¶ 7) Of the $195,495, Esa instructed plaintiff to keep certain funds as compensation for legal services and to transfer $176,750 to an account in Japan to pay a Japanese company for products sold to Esa. (*Id.*, ex. A at ¶ 6; D.I. 24, ex. 2 at CCC149) On July 20, 2010, finding no issues with the purported check, plaintiff followed Esa's instructions and authorized a wire transfer of $176,750 to the Japanese account. (D.I. 21, ex. A at ¶ 8) The money was released to the holder of the Japanese account on July 21, 2010. (*Id.*, ex. C) On July 22, 2010, the purported check was returned by Citibank to plaintiff's bank as "altered/fictitious" and "counterfeit." (D.I. 24, ex. 4; D.I. 27, ex. K) Plaintiff received the voided purported check by mail on July 26, 2010. (D.I. 24, ex. 2 at CCC149) Although

plaintiff has attempted to recover its lost funds through various means, those attempts have thus far proven fruitless. (D.I. 21, ex. A at ¶ 11; D.I. 24, ex. 2 at CCC149-50)

C. Plaintiff's Insurance Claim

The Policy was in effect at the time of plaintiff's loss. (D.I. 24, ex. 1 at CCC5) On August 16, 2010, plaintiff submitted a property loss notice to defendant, describing the loss as a "fraudulent check scheme" and attaching a letter describing the facts surrounding the loss.[1] (D.I. 21, exs. B & C) On September 29, 2010, defendant notified plaintiff of its position that the Policy did not provide coverage for the loss. (D.I. 24, ex. 5) Plaintiff then filed this suit against defendant on November 30, 2010. (D.I. 21, ex. A)

D. The Policy

The main portion of the Policy ("the main Policy") is titled "Businessowners Special Property Coverage Form." (D.I. 24, ex. 1 at CCC13) Section A of the main Policy provides the scope of coverage, which reads in relevant part:

> A. **COVERAGE**
> We will pay for direct physical loss of or damage to Covered Property at the premises described in the Declarations caused by or resulting from a Covered Cause of Loss.
>
> 1. **Covered Property**
> Covered Property includes . . . Business Personal Property as described under b. below . . . .
>
> . . . .
>
> b. **Business Personal Property** located in or on the buildings at the described premises or in the open (or in a vehicle) within 1,000 feet of the described premises, including:
>
> . . . .
>
> (6) Your "money and securities"
>
> . . . .

[1]The parties do not dispute the contents of the Policy or that plaintiff paid the premiums. (D.I. 23 at 5)

> 5. **Additional Coverages**
> Additional coverages may be attached to this Policy (designation would appear in the attached form(s)). Unless otherwise stated, payments made under these Additional Coverages are in addition to the applicable Limits of Insurance.

(*Id.*, ex. 1 at CCC13-15) Pursuant to paragraph A.5, the Policy includes additional coverages in the form of attached endorsements. (*See id.*, ex. 1 at CCC35-51) One such endorsement is entitled "FORGERY AND ALTERATION" (the "Forgery and Alteration Endorsement"). (*Id.*, ex. 1 at CCC43) This endorsement is listed in the Forms and Endorsements Schedule as being part of the Policy. (*Id.*, ex. 1 at CCC1) It provides, in relevant part:

> 1. We will pay for loss resulting directly from "forgery" or alteration of checks, drafts, promissory notes, or similar written promises, orders or directions to pay a sum certain in money that are made or drawn by one acting as an agent or purported to have been so made or drawn.

(*Id.*, ex. 1 at CCC43) The Forgery and Alteration Endorsement has a limit of $250,000 in addition to the applicable limits of coverage provided elsewhere by the Policy. (*Id.*, ex. 1 at CCC6)

The Policy also states, in paragraph A.3, that the covered causes of loss are "risks of direct physical loss" unless a loss is, inter alia, "excluded in section B. EXCLUSIONS." Relevant to the instance case is an exclusion under section B for losses caused by false pretenses ("the False Pretense Exclusion"), which provides:

> 2. We will not pay for loss or damage caused by or resulting from any of the following:
>
> . . . .
>
> j. **False Pretense**
> Voluntary parting with any property by you or anyone else to whom you have entrusted the property if induced to do so by any fraudulent scheme, trick, device or false pretense.

(*Id.*, ex. 1 at CCC18-19)

III. STANDARD OF REVIEW

"The court shall grant 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." Fed. R. Civ. P. 56(a). The moving party bears the burden of demonstrating the absence of a genuine issue of material fact. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 415 U.S. 574, 586 n.10 (1986). A party asserting that a fact cannot be – or, alternatively, is – genuinely disputed must demonstrate such, either by citing to "particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for the purposes of the motions only), admissions, interrogatory answers, or other materials," or by "showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1)(A) & (B). If the moving party has carried its burden, the nonmovant must then "come forward with specific facts showing that there is a genuine issue for trial." *Matsushita*, 415 U.S. at 587 (internal quotation marks omitted). The court will "draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000).

To defeat a motion for summary judgment, the non-moving party must "do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita*, 475 U.S. at 586-87; *see also Podohnik v. U.S. Postal Serv.*, 409 F.3d 584,

594 (3d Cir. 2005) (stating party opposing summary judgment "must present more than just bare assertions, conclusory allegations or suspicions to show the existence of a genuine issue") (internal quotation marks omitted). Although the "mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment," a factual dispute is genuine where "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 411 U.S. 242, 247-48 (1986). "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Id.* at 249-50 (internal citations omitted); *see also Celotex Corp. v. Catrett*, 411 U.S. 317, 322 (1986) (stating entry of summary judgment is mandated "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial").

IV. DISCUSSION

The material facts surrounding plaintiff's loss are undisputed, and the parties agree that Delaware law applies. (D.I. 23 at 8; D.I. 29 at 2-3) Delaware law treats the construction of an insurance contract as a question of law. *Travelers Indem. Co. v. Lake*, 594 A.2d 38, 40 (Del. 1991). "Because an insurance policy is an adhesion contract and is not generally the result of arms-length negotiation, courts have developed rules of construction which differ from those applied to most other contracts." *Hallowell v. State Farm Mut. Auto. Ins. Co.*, 443 A.2d 925, 926 (Del. 1982). The court must read the insurance contract as a whole, give effect to all provisions therein, and interpret the terms in a common sense manner. *See JFE Steel Corp. v. ICI Americas,*

Inc., 797 F. Supp. 2d 452, 469 (D. Del. 2011); *Penn Mut. Life Ins. Co. v. Oglesby*, 695 A.2d 1146, 1149, 1151 (Del. 1997). When the language of an insurance contract is ambiguous, the court should construe the contract in favor of the insured because the "insurer or the issuer, as the case may be, is the entity in control of the process of articulating the terms." *Oglesby*, 695 A.2d at 1149-50; *see also Axis Reinsurance Co. v. HLTH Corp.*, 993 A.2d 1057, 1062 (Del. 2010); *Hallowell*, 443 A.2d at 926. "An insurance contract is ambiguous when the provisions in controversy are reasonably or fairly susceptible to two different interpretations or may have two or more different meanings." *O'Brien v. Progressive N. Ins. Co.*, 784 A.2d 281, 288 (Del. 2001). However, when the language is clear and unequivocal, the parties are bound by its plain meaning. *Hallowell*, 443 A.2d at 926 ("[I]f the language is clear and unambiguous a Delaware court will not destroy or twist the words under the guise of construing them."); *Laird v. Emp'rs Liab. Assur. Corp.*, 18 A.2d 861, 862 (Del. Super. 1941) ("[T]he courts cannot change or ignore the language of a contract merely to avoid hardships or to meet special circumstances against which the parties have not protected themselves.").

The insured carries the burden of proving that a claim is covered by its insurance policy. If the insured can show that its claim is covered, the burden then shifts to the insurer to prove that the claim is not covered by the policy. *State Farm Fire & Cas. Co. v. Hackendorn*, 605 A.3d 3, 7 (Del. Super. 1991) (citations omitted). Here, the resolution of the cross-motions for summary judgment requires the court to construe, as a matter of law, the language of the Policy's Forgery and Alteration Endorsement and

the False Pretense Exclusion ("the provisions"). The court finds that, while the terms of each provision are clear and unambiguous, the Policy is ambiguous when the provisions are read together.

A. Forgery and Alteration Endorsement

The Forgery and Alteration Endorsement covers (1) losses resulting directly from (2) the forgery or alteration of (3) "checks, drafts, promissory notes, or similar written promises, orders or directions" ("covered instruments") (4) to pay a sum certain (5) that are "made or drawn by one acting as an agent or purported to have been so made or drawn." (D.I. 24, ex. 1 at CCC43) Plaintiff contends that its loss of $176,750 satisfies all of these criteria.[2] (D.I. 23 at 10-11) Defendant does not dispute that the loss was a direct result of the scam. Nor does defendant dispute that the purported check was for a sum certain and made or drawn by a scammer purporting to be an agent of Citibank. However, defendant offers two arguments for why the Forgery and Alteration Endorsement should not cover the loss. First, defendant contends that plaintiff "does not know and thus cannot represent whether the signature on the counterfeit of the check was forged." (D.I. 27 at 3) Second, defendant contends that the purported check was not a covered instrument because it was a **counterfeit** check, not a forgery or alteration of a valid check. (*Id.* at 2-3) There is no genuine dispute regarding the facts underlying these arguments – plaintiff does not know the identify of the individual who signed the purported check, and the purported check was a counterfeit. As such, defendant's arguments regarding the nature of the purported check relate to

[2]Plaintiff is not claiming as part of its loss any amount retained for its services or any expenses incurred before the scam was discovered. (D.I. 23 at 11 n.4)

interpreting the contract to determine whether the terms of the Forgery and Alteration Endorsement apply to plaintiff's loss.

The term "forgery" is defined in the Policy as "the signing of the name of **another** person or organization with intent to deceive." (D.I. 24, ex. 1 at CCC30) (emphasis added) This definition precludes coverage for an otherwise covered instrument that an individual signs in his or her own name. (*Id.*) Central to the scam in the instant case was the purported check's ability to deceive the victim and the banks involved long enough for the victim to believe that the check had cleared and, under that impression, to transfer money to the perpetrator. Because the identity of the scammer is not known, it is unclear whether the signature was a reproduction of the actual signature of an agent authorized by Citibank to make bank checks or whether it was the signature of a fictional individual. In any case, the court agrees with plaintiff that it is a virtual certainty that whoever signed the purported check did not sign his or her own name.[3] Thus, the term "forgery" in the Forgery and Alteration Endorsement encompasses the signature on the purported check.[4]

Contrary to defendant's assertion, the purported check is a covered instrument

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[3]The scammer would have every reason to avoid signing his or her real name on the purported check. This is especially true in light of the sophisticated nature of the scam. (*See, e.g.*, D.I. 21, ex. C) (noting that "[t]he FBI indicated that this appeared to be a really ingenious scam, unlike any others in the area").

[4]There is also no ambiguity in the term "alteration." In context, an alteration is an unauthorized change or addition to a valid or incomplete instrument that purports to modify in any respect the obligation of a party. *See* U.C.C. § 3-407. However, the facts are insufficient for the court to determine whether the purported check was also an "alteration" of a covered instrument. There is no indication of whether the purported check was modified from an underlying valid or incomplete instrument.

under the terms of the Forgery and Alteration Endorsement. The language of the provision covers, among other instruments, a forged check or written promise. The general rule of negotiable instruments is that the validity of a check is dependent on the genuineness of its signature, not the paper it is written on; therefore, a counterfeit check – as defendant labels it – is equivalent to a forged check. *See, e.g.*, *Dorchester Fin. Sec. v. Banco BRJ, S.A.*, No. 02 Civ. 7504, 2009 WL 5033954, at *3 (S.D.N.Y. Dec. 23, 2009) ("A counterfeit check is the equivalent of a forged check, i.e. a forgery of the signature of the purported drawer." (citing RICHARD HAGEDORN & HENRY BAILEY, BRADY ON BANK CHECKS: THE LAW OF BANK CHECKS ¶ 28.03 (rev. ed. 2012))); *MBTA Emps. Credit Union v. Emp'rs Mut. Liab. Ins. Co. of Wisconsin*, 374 F. Supp. 1299, 1302 (D. Mass. 1974) ("'Counterfeit' has no meaning in this context other than forged.").

Moreover, the purported check is a "written promise[] . . . to pay a sum certain" under the plain meaning of that phrase. It was signed by the scammer and, thus, despite being unauthorized, there was an order to pay money signed by the person giving the instruction. *See* U.C.C. § 3-403 ("Unless otherwise provided in this Article or Article 4, an unauthorized signature is ineffective except as the signature of the unauthorized signer in favor of a person who in good faith pays the instrument or takes it for value."); *see also Firstar Bank, N.A. v. Wells Fargo Bank, N.A.*, No. 02-C-186, 2004 WL 1323942, at *6 (N.D. Ill. June 14, 2004) ("The court sees no reason to draw a distinction on grounds that the purported drawer was fictitious. The Check itself was a written instruction to pay money."). Therefore, plaintiff's loss was the result of a forged instrument within the clear and unambiguous meaning of the Forgery and Alteration

Endorsement.

B. False Pretense Exclusion

Defendant points to the False Pretense Exclusion to argue that coverage of the loss is excluded. The language of the False Pretense Exclusion is clear and unambiguous. The plain meaning requires a "[v]oluntary parting" of property, induced by "any fraudulent scheme, trick, device, or false pretense" ("fraud"). Plaintiff argues that defendant attempts to read the False Pretense Exclusion in a vacuum or, in any case, fails to establish that the exclusion applies to preclude coverage under the Forgery and Alteration Endorsement. (D.I. 26 at 8-13) However, plaintiff does not contest the meaning of the language in the False Pretense Exclusion itself. Therefore, there is no serious dispute that, in addition to resulting from a forged instrument, the scam was a fraud which induced plaintiff to voluntarily part with $176,750, within the language of the False Pretense Exclusion.

C. The Effect of the Forgery and Alteration Endorsement on the Main Policy

Because plaintiff's loss was the result of both a forged instrument and a voluntary parting induced by fraud – two contributory causes – it falls within the plain meaning of both the Forgery and Alteration Endorsement and the False Pretense Exclusion. Thus, whether the loss is covered or excluded by the Policy hinges on which provision is interpreted to prevail, or "trump," the other when the Policy is interpreted as a whole. In attempting to give effect to both provisions, the parties submit different constructions of the contract. Plaintiff avers that the proper interpretation of the provisions together is to give effect to the False Pretense Exclusion, but not in the case

of forged or altered instruments. (D.I. 23 at 13-14) In other words, plaintiff views the Forgery and Alteration Endorsement as trumping the False Pretense Exclusion to the extent they conflict: a loss attributable to a forged or altered instrument would be covered, even if it would otherwise be excluded by the False Pretense Exclusion. Defendant submits the opposite, such that a loss under the Forgery and Alteration Endorsement is covered, but not when it is also due to a voluntary parting of money induced by fraud. (D.I. 27 at 8) Put another way, defendant views the False Pretense Exclusion as trumping the Forgery and Alteration Endorsement to the extent they conflict: a loss due to a forged or altered instrument would not be covered if it also falls under the False Pretense Exclusion.[5] In sum, the provisions themselves are clear and unambiguous, as discussed *supra*, but the parties disagree as to how they should be read in tandem.

"An insurance contract is not ambiguous simply because the parties do not agree on its proper construction. Rather, a contract is ambiguous only when the provisions in controversy are reasonably or fairly susceptible to different reasonable interpretations." *Axis Reinsurance*, 993 A.2d at 1062 (footnote omitted). For the reasons below, the provisions are ambiguous, or susceptible to different reasonable interpretations, when read in tandem. In light of the purposes of the provisions, the language in the rest of the contract, and the terms of other endorsements attached to the Policy, it is possible that reasonable persons could differ as to the effect of the Forgery and Alteration

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[5]Defendant's motion for summary judgment only addresses the False Pretense Exclusion and ignores the import of the Forgery and Alteration Endorsement. (D.I. 21) Defendant offers its interpretation of the provisions together in its answering brief to plaintiff's motion for summary judgment. (D.I. 27)

Endorsement on the main Policy.[6]

The Delaware Supreme Court has found that, where an endorsement provision and an exclusion provision "each have a distinct and independent purpose and function," the provisions are not ambiguous when read together. *Axis Reinsurance*, 993 A.2d at 1062. Here, however, the Forgery and Alteration Endorsement and the False Pretense Exclusion function to define the scope of coverage and, thus, serve the same purpose and function. Section B, delineating the Policy's exclusions, splits the exclusions into two groups. There are twelve exclusions under the first group, introduced by paragraph B.1:

> We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss.

(D.I. 24, ex. 1 at CCC16) Meanwhile, the second group, consisting of seventeen exclusions, is introduced by different language in paragraph B.2:

> We will not pay for loss or damage caused by or resulting from any of the following.

(*Id.*, ex. 1 at CCC18) The False Pretense Exclusion is listed in the second group, under paragraph B.2. On one hand, the difference in the language of paragraphs B.1 and B.2 may indicate a difference in the scope of the exclusions such that (1) the exclusions in the first group (under paragraph B.1) are excluded regardless of any other contributory

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[6]Contrary to plaintiff's contention, giving effect to the False Pretense Exclusion would not render the Forgery and Alteration Endorsement to be "surplusage." (*See* D.I. 23 at 13) The False Pretense Exclusion would still preclude coverage for the voluntary parting of property induced by fraud, where it was not also caused by a forged or altered instrument (or other relevant additional coverage).

cause or event to a loss, while (2) the exclusions in the second group (under paragraph B.2), including the False Pretense Exclusion, are subject to other contributory causes or events that might provide coverage. On the other hand, one could just as easily conclude, reasonably, that paragraph B.2 uses even broader language to exclude losses "caused by or resulting from" the listed exclusions or that losses due to the second group of exclusions are typically not found in conjunction with any other contributory causes. Thus, the language of paragraphs B.1 and B.2 does not provide clear guidance for resolving the apparent conflict between the provisions.

The other endorsements attached to the Policy also contribute to the ambiguity regarding the Forgery and Alteration Endorsement and the False Pretense Exclusion. Some endorsements attached to the Policy explicitly set forth whether they are subject to, or trumped by, certain exclusions in section B. For example, the endorsement entitled "FINE ARTS" ("the Fine Arts Endorsement") provides that the exclusions in paragraphs B.1.b, B.1.c, B.1.d, B.1.f, B.1.g, B.1.h., and B.2.g apply to the endorsement but that "[n]o other exclusions in Paragraph B. Exclusions apply to this Additional Coverage." (*Id.*, ex. 1 at CCC40) Similarly, the endorsement entitled "ORDINANCE OR LAW" ("the Ordinance or Law Endorsement") explicitly states that "Paragraph B.1.a does not apply to this Additional Coverage."[7] (*Id.*, ex. 1 at CCC45) In contrast, the Forgery and Alteration Endorsement is silent regarding the effect of any of the Paragraph B exclusions. This silence does not unambiguously indicate whether the

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[7]Like the Forgery and Alteration Endorsement, the Fine Arts and Ordinance or Law Endorsements both add coverage "under Paragraph A.5. Additional Coverage." (D.I. 24, ex. 1 at CCC40, CCC45)

Forgery and Alteration Endorsement is subject to the False Pretense Exclusion or vice versa.

Where the language of an insurance policy is ambiguous, as it is in the context of the Forgery and Alteration Endorsement and the False Pretense Exclusion being read in tandem, the contract should be interpreted in favor of the insured because the insurer is in control of the process of articulating the terms. *See Oglesby*, 695 A.2d at 1149-50; *Axis Reinsurance*, 993 A.2d at 1062. Defendant was in a better position to foresee that plaintiff might fall victim to scams such as the one at hand[8] and could have used more explicit language to clearly and unequivocally express its intent. As such, it should not be able to evade responsibility because of the ambiguity.

The Third Circuit, applying "general principles of insurance law as developed by courts throughout the nation," has held that, where the language of an insurance policy is ambiguous and the effect of an endorsement unclear, the endorsement "must be given effect over the . . . body of the policy to the extent that the body is in conflict with the endorsement."[9] *Buntin v. Cont'l Ins. Co.*, 593 F.2d 1201, 1204 n.3, 1205-07) This

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[8]Defendant has apparently processed claims similar to plaintiff's in the past. Tim Hendel, a property claim manager for defendant, wrote in an email in August 2010 that "[w]e've had many of these type [sic] of claims before with Atty's offices that receive checks, take out their fees and pays [sic] someone else, only later to find out that the check was 'fraudulent,' 'fictitious' or otherwise." (D.I. 23, ex. B) Such schemes were also known about prior to 2010. (*See* D.I. 21, exs. G, H & I) For example, *The Journal of the Delaware State Bar Association* published an article in November 2008, titled "Are You Really Too Smart to be Scammed?: Internet Scams and Attorney Trust Accounts," which described known instances of the type of scam perpetrated on plaintiff. (*Id.*, ex. G)

[9]It is unclear whether Delaware has explicitly adopted this principle for revolving conflicts between an endorsement and the body of a main policy. Regardless, the rule that ambiguity should be resolved in favor of the insured is sufficient to render plaintiff's

principle is especially true when it is more favorable to coverage. Accordingly, the rules for construing ambiguous policy language favor coverage of plaintiff's loss.

V. CONCLUSION

For the foregoing reasons, the court denies defendant's motion for summary judgment and grants plaintiff's motion for summary judgment. An appropriate order shall issue.

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loss covered.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

MORRIS JAMES LLP,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civ. No. 11-19-SLR
	)	
CONTINENTAL CASUALTY COMPANY,	)	
	)	
	)	
Defendant.	)	

ORDER

At Wilmington this 18th day of March, 2013, consistent with the memorandum opinion issued the same day;

IT IS ORDERED that:

1. Defendant's motion for summary judgment (D.I. 20) is denied.

2. Plaintiff's motion for summary judgment (D.I. 22) is granted.

3. The Clerk of the Court is hereby directed to enter final judgment against defendant and in favor of plaintiff. Defendant shall provide coverage for the asserted loss in the amount of $176,750, together with pre-judgment and post-judgment interest.

United States District Judge

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
MAY 27, 2011
JOHN LEY
CLERK

No. 10-12237

D.C. Docket No. 8:08-cv-01239-VMC-EAJ

NARDELLA CHONG, P.A.,

Plaintiff-Appellant,

versus

MEDMARC CASUALTY INSURANCE COMPANY,

Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Florida

(May 27, 2011)

Before TJOFLAT, CARNES and HILL, Circuit Judges.

PER CURIAM:

Nardella Chong, P.A. ("Chong") filed this declaratory judgment action against its insurer, Medmarc Casualty Insurance Co. ("Medmarc"), to determine whether its professional liability policy issued to Chong provides coverage for Chong's erroneous disbursement of client funds from its trust account. The district court granted Medmarc's motion for summary judgment denying coverage and this appeal followed. For the following reasons, we reverse the summary judgment.

I.

Medmarc issued a professional liability insurance policy to Chong that covered, *inter alia*, all claims of negligence arising from an act or omission in the performance of "professional services" rendered by Chong. Professional services is defined by the policy to include "[s]ervices as a . . . trustee . . . but only for those services typically and customarily performed by an attorney."

The act for which Chong now claims coverage under the policy involved the distribution of its trust account funds in response to a fraud perpetrated upon it by a putative client. The client, Northlink Industrial, Ltd. ("Northlink"), purported to hire Chong to establish a subsidiary in the United States and gave Chong a cashier's check in payment, which Chong deposited into its firm's trust account.

Northlink then directed Chong to wire-transfer most of the proceeds of the cashier's check to alleged overseas business partners, which Chong did. Of course, the cashier's check later turned out to be forged, and the funds that were transferred out of the trust account belonged to other clients. Upon learning of this fraud, Chong notified Medmarc, but Medmarc denied coverage for the missing funds.

The district court found no coverage under the policy because "there have been no negligent acts or negligent omissions resulting from the performance of, or failure to perform, professional services." The district court also found that Chong's other clients' potential claims against it would be in the nature of restitution rather than the damages covered under the policy.

We disagree. The deposit of clients' funds into a trust account creates a fiduciary relationship between those clients and the law firm. *Kenet v. Bailey*, 679 So. 2d 348, 350 (Fla. 3d DCA 1996). In *Kenet*, the Florida court held that:

> When an attorney receives money from his client to place into the attorneys trust account for the client's purpose, a fiduciary relationship is established and a failure to return the money on demand (or to use it as instructed) carries with it substantial potential consequences. Misuse of a client's funds (for they are that even though deposited in a bank account physically controlled by the attorney) is one of the most serious offenses a lawyer can commit.

Id.

The management of these funds held in trust for clients constitutes a "professional service" as defined by Medmarc's policy. The policy states that professional services includes those rendered by the law firm as a "trustee . . . or . . . in any similar fiduciary capacity" as long as "those services [are] typically and customarily performed by an attorney." That the management of trust accounts is a professional service customarily performed by attorneys is indicated by the Florida Bar's devotion of an entire chapter of its rules of attorney conduct to the topic. Furthermore, Medmarc's own corporate representative testified in her deposition that Chong's management of its trust account constituted the performance of legal services to those clients with funds in the account.[1]

Under the terms of the policy, claims alleging negligent acts or omissions in the performance of Chong's professional services are covered. Since we conclude that Chong's management of its trust account constituted a professional service, the policy covers claims alleging negligence in this management, including those

[1]In fact, Medmarc has taken the position in previous litigation that the performance of trust account duties constitutes the performance of professional services, which the failure to properly perform may result in a professional liability claim. *Medmarc Cas. Ins. Co. v. Reagan Law Group, P.C.*, 525 F. Supp. 2d 1334, 1336 (N.D. Ga. 2007). Medmarc's arguments in this case that the transfer of trust funds is a ministerial rather than professional duty or that the actual transfer by someone other than an attorney is material are without merit.

that could have been asserted here.[2]

Nor do we find any merit in the district court's conclusion that Chong's act is not covered by the policy because its clients' claims against it would be in the nature of restitution and not for damages. In *Green v. Bartel*, 365 So. 2d 785 (Fla. 3d DCA 1978), the Florida court held that when an attorney distributes trust funds to a third party without his client's authorization he may be sued for malpractice damages, resulting in a loss to the attorney (for which he would have a claim under his errors and omissions policy). The district court's attempts to distinguish *Green* from the facts of this case are unavailing. In both cases, the attorneys erroneously distributed the client's trust funds to a third party, thus giving rise to an action for malpractice damages – not restitution. We can find no principled difference in the cases, and thus conclude that *Green* does not support the district court's conclusion to the contrary.

III.

We conclude that Chong's erroneous transfer of its clients' trust funds to a third party was an act or omission in the conduct of its professional fiduciary duties to its clients that would give rise to a claim of negligence against it by those

[2]Medmarc gave Chong permission to replace the trust funds without prejudicing its rights to recover under its policy in order to avoid such litigation.

clients and for which it would have been liable in damages. Such a claim for a negligent act or omission is covered by the plain terms of the policy issued by Medmarc to Chong. Accordingly, the entry of summary judgment for Medmarc is reversed and the case is remanded for the entry of summary judgment for Chong. The district court's award of costs against Chong is also reversed.

REVERSED AND REMANDED.

STATE OF RHODE ISLAND **SUPERIOR COURT**
PROVIDENCE, SC.

MOSES AFONSO RYAN LTD. :
Plaintiff, :
:
v. : **PC-2017-** 1280
:
SENTINEL INSURANCE :
COMPANY, LIMITED :
Defendant. :

COMPLAINT

Moses Afonso Ryan Ltd. ("MAR"), by and through its undersigned attorneys, as and for its Complaint against Sentinel Insurance Company, Limited ("Sentinel"), alleges as follows:

THE PARTIES

1. Plaintiff MAR is a Rhode Island professional corporation with its principal place of business in Providence, Rhode Island.

2. Upon information and belief, Defendant Sentinel is an insurance company organized under the laws of the State of Connecticut with its principal place of business in Hartford, Connecticut.

3. Upon information and belief, Sentinel is authorized to sell or write insurance in Rhode Island and, at all material times, has conducted and continues to conduct substantial insurance business in the State of Rhode Island, including engaging in the business of selling insurance, investigating claims, and/or issuing policies that cover policyholders or activities located in Rhode Island.

PRELIMINARY STATEMENT

4. This action is to recover damages for breach of contract and insurer bad faith, and for declaratory relief arising out of Sentinel's unjustified refusal to provide coverage under an insurance policy it sold to MAR.

5. MAR is a law firm consisting of ten attorneys practicing law in Rhode Island and Massachusetts who are assisted by three support staff.

6. MAR is the named insured under The Hartford Spectrum Business Owner's Policy No. 02 SBA ZU7345 issued by Sentinel (the "Policy"), which specifically provides coverage for losses resulting from business income interruptions.

7. MAR was the victim of a ransomware attack on its computer system in which an unidentified third party took over and encrypted all of the documents and information contained on MAR's computer network.

8. The perpetrators of the ransomware attack demanded payment from MAR to release the encrypted documents and information, and after an initial payment, demanded additional payment.

9. Ultimately, after extorting over $25,000 in payments from MAR, the perpetrators of the ransomware attack provided MAR the decryption tools or keys needed to recover the firm's documents and information.

10. Unfortunately for MAR, it took over three months to (1) identify the perpetrators of the ransomware attack, (2) contact the perpetrators of the ransomware attack, (3) negotiate a ransom for the documents and information, (4) obtain payment in the form of Bitcoins for payment of the ransom, (5) obtain the initial decryption tools or keys to recover the documents and information, (6) attempt to use the initial decryption tools or keys to recover the documents and information, (7) discover that the initial decryption tools or keys would not recover the documents and information, (8) re-establish contact with the perpetrators of the ransomware attack, (9) re-negotiate an additional ransom for the documents and information, (10) obtain additional payment in the form of Bitcoins for payment of the additional ransom, (11) obtain the second set of decryption tools or keys to recover the documents and information attempt to use the initial decryption tools or keys to recover the documents and information, (12) recover the documents and information encrypted by the perpetrators of the ransomware attack, and (13) recover or recreate documents that were not saved during the three months of business interruption.

11. During the three months that the documents and information of MAR was held captive by the perpetrators of the ransomware attack, the attorneys of the firm were unproductive and unable to work at a reasonable efficiency.

12. Year to year billing comparisons reveal a reduction of over $700,000 of billings for the three months of interruption.

13. MAR purchased the Policy, and the Policy is designed to protect MAR against precisely the type of loss it has now incurred as a result of the ransomware attack and interruption of its business.

14. Despite the fact that MAR paid its premiums, gave prompt notice of the ransomware attack and interruption of its business to Sentinel, and cooperated fully and completely with Sentinel's inquiry into the ransomware attack and interruption of its business, Sentinel has failed and refused to pay MAR's claim for coverage under the Policy (the "Claim").

15. The refusal by Sentinel to pay the Claim constitutes a breach of Sentinel's contractual obligations.

16. MAR seeks a declaration that there is coverage for the Claim under the Policy and damages for breach of contract and bad faith due to Sentinel's unreasonable failure to honor its obligation under the Policy to pay the Claim.

JURISDICTION AND VENUE

17. This Court has jurisdiction over the subject matter of this action pursuant to Rhode Island General Laws §§ 9-30-1 *et seq.*, and 8-2-13.

18. Venue in this Court is proper because all of the acts or omissions took place in Providence county.

FACTUAL ALLEGATIONS

A. The Sentinel Policy

19. In consideration of significant premiums paid to cover exactly the type of loss at issue here, Sentinel sold the Policy to MAR for the policy period October 13, 2015 to October 13, 2016.

20. The Policy provides coverage for a wide variety of losses, including those related to "**Business Income**".

21. The Policy provides "Limits of Liability" related to "**Business Income**" of 12 MONTHS ACTUAL LOSS SUSTAINED (Form SS 00 02 12 06).

22. The Policy provides that if two or more of this policy's coverages apply to the same loss or damage, Sentinel will not pay more than the actual amount of the loss or damage. (Form SS 00 05 10 08).

23. All emphasized terms in this Complaint appear in boldface in the Policy.

24. Despite the language contained in paragraph 22 above, and despite paying for MAR's losses under two different coverages, Sentinel claims that the limits of liability contained in coverages for **COMPUTERS AND MEDIA** and **COMPUTERS FRAUD** limit its liability to an aggregate of $20,000 ($10,000 per coverage).

B. MAR has suffered a covered Business Interruption

25. MAR is an extremely active and productive law firm.

26. On or about May 22, 2015, an attorney at MAR received an email from an unknown source that included an attachment.

27. The email invited the recipient to open the attachment.

28. The recipient opened the attachment.

29. The recipient was unaware that the attachment was encoded with a ransomware encrypted virus.

30. The ransomware encrypted virus in the attachment infected the computer network of MAR.

31. Over a short period of time, all of the documents and information stored on the MAR computer network was disabled, and MAR lost control of its information, was locked out of its documents, lost access, lost use, the computer network lost all functionality, was taken over and rendered inoperable,

32. As a result of the intrusion into the computer network of MAR by the perpetrators of the ransomware attack, the attorneys and staff at MAR were rendered essentially unproductive.

33. The business income of MAR suffered due to the ransomware attack on the computer network of MAR.

34. MAR hired experts in computer cyber-attack responses in order to remedy its computer network and return the firm to efficient productivity.

35. Unfortunately, the experts hired by MAR could not free the computer network from the ransomware virus.

36. MAR began to search for the identity of the perpetrators of the ransomware attack.

37. MAR made initial contact with the perpetrators of the ransomware attack in June of 2016.

38. In June of 2016, MAR started to negotiate a ransom for the documents and information with the perpetrators of the ransomware attack.

39. In June of 2016 MAR and the perpetrators of the ransomware attack reached an agreed ransom that had to be paid in the form of 13 Bitcoins.

40. Because MAR did not have an existing Bitcoin account, it had to open a Bitcoin account, and begin the process of accumulating Bitcoins.

41. Unknown to MAR at the time, Bitcoin will only allow the purchase of two (2) Bitcoins per day by a new account holder.

42. Once an adequate amount of Bitcoins was purchased, MAR's agents had to contact the perpetrators of the ransomware attack to obtain instructions on how to transfer the Bitcoins to them.

43. Eventually, the perpetrators of the ransomware attack provided MAR's agents instructions on how to transfer the Bitcoins to them.

44. In June 2016, MAR's agents transferred the Bitcoins to the perpetrators of the ransomware attack.

45. In June 2016, the perpetrators of the ransomware attack provided MAR's computer experts with the initial decryption tools or keys to recover the documents and information

46. For several days, MAR's computer experts attempted to use the initial decryption tools or keys to recover the encrypted documents and information.

47. In July 2016 MAR's computer experts discovered that the initial decryption tools or keys would not recover the encrypted documents and information.

48. In July 2016, MAR's agents re-established contact with the perpetrators of the ransomware attack.

49. In July 2016, MAR re-negotiated a ransom for the documents and information.

50. In July 2016, MAR's agents obtained additional payment in the form of Bitcoins for payment of the additional ransom.

51. In July 2016, MAR's computer experts obtained the second set of decryption tools or keys to recover the documents and information, and began to use the second set of decryption tools or keys to recover the documents and information.

52. In July 2016, MAR's computer experts finished recovering the majority of the documents and information encrypted by the perpetrators of the ransomware attack.

53. In July 2016, MAR discovered that it could not recover or recreate documents that were saved on a temporary server during the three months of business interruption.

54. In August 2016, MAR attempted to recover or recreate documents that were not saved on the temporary server during the three months of business interruption.

C. Sentinel's Denial of Coverage

55. The Policy provided to MAR by Sentinel included SPECIAL PROPERTY COVERAGE FORM SS 00 07 07 05 that contains coverage for loss of **"Business Income."** This coverage provides that Sentinel "will pay for the actual loss of Business Income you sustain due to the necessary suspension, of your "operations" during the "period of restoration". The suspension must be caused by direct physical loss of or physical damage to property at the "scheduled" premises" including personal property in the open (or in a vehicle) within 1,000 feet of the "scheduled premises", caused by or resulting from a Covered Cause of Loss."

56. MAR promptly notified Sentinel of ransomware attack and the business interruption and made the Claim for coverage under the Policy.

57. MAR reasonably expected that the Business Income provision of the Policy provided it with coverage for the losses resulting from the ransomware attack on its computer network.

58. Sentinel acknowledged receipt of the Claim.

59. Coverage exists under the **Business Income** and **Extra Expense** provisions of the Policy.

60. On or about March 10, 2017, Sentinel denied coverage for the Claim, stating that coverage was not available under the **Business Income** and **Extra Expense** coverage.

61. By denying coverage when the Claim was covered under the Policy and all prerequisites to coverage were met, Sentinel breached its contractual obligation to MAR.

FIRST CAUSE OF ACTION
(Breach of Contract)

62. Plaintiff repeats and realleges the allegations set forth in paragraphs 1 through 61 of this Complaint as if fully set forth herein.

63. The Policy constitutes a valid and enforceable contract between Sentinel and MAR because MAR was the named insured under the Policy.

64. MAR has paid all premiums, provided prompt notice of the claim, and otherwise performed all obligations required of it under the Policy.

65. Under the terms of the Policy, Sentinel must pay up to 12 months of loss of business income that comes within the Policy definitions of **Business Income** and **Extra Expense** coverage.

66. As detailed above, the facts of the Claim come within those Policy provisions.

67. Sentinel has not paid any amounts to MAR in connection with the Claim for loses under **Business Income** and **Extra Expense** coverage.

68. By failing to provide coverage for the Claim, Sentinel has breached the terms of the Policy.

69. As a direct and proximate result of Sentinel's breach of the Policy, MAR has suffered damages in an amount to be determined at trial, plus consequential damages, attorneys' fees, and pre- and post-judgment interest to the extent permitted by law.

SECOND CAUSE OF ACTION
(Declaratory Relief)

70. Plaintiff repeats and realleges the allegations set forth in paragraphs 1 through 69 of this Complaint as if fully set forth herein.

71. Sentinel disputes its legal obligation to pay the Claim.

72. Pursuant to R.I. Gen. Laws § 9-30-1 *et seq.*, MAR is entitled to a declaration by this Court of Sentinel's obligations under the Policy.

73. An actionable and justiciable controversy exists between MAR and Sentinel concerning the proper construction of the Policy, and the rights and obligations of the parties thereto, with respect to the Claim for business income insurance coverage.

74. MAR is entitled to a declaration declaring that there is coverage available for the business interruption under the Policy, and, pursuant to R.I. Gen. Laws § 9-30-1 *et seq.*, any other relief this Court deems proper.

THIRD CAUSE OF ACTION
(Insurer Bad Faith)

75. Plaintiff repeats and realleges the allegations set forth in paragraphs 1 through 74 of this Complaint as if fully set forth herein.

76. Sentinel's denial of coverage was wrongful.

77. Sentinel denied coverage without a reasonable basis in law or in fact.

78. Sentinel denied coverage based on a reckless failure to properly investigate the claim, and thereafter failed to subject the denial of said claim to cognitive evaluation, as required by law.

79. Before, during and after denial of the Claim, Sentinel refused to negotiate, mediate or arbitrate the Claim, even though MAR offered to do so.

80. The circumstances surrounding MAR's contractual claim against the Sentinel, and Sentinel's conduct in the denial of the Claim, give rise to a claim for bad faith pursuant to R.I. Gen. Laws § 9-1-33.

FOURTH CAUSE OF ACTION
(Breach of Covenant of Good Faith and Fair Dealing)

81. Plaintiff repeats and realleges the allegations set forth in paragraphs 1 through 80 of this Complaint as if fully set forth herein.

82. There is a covenant of good faith and fair dealing implied in every contract. This implied covenant requires each contracting party to refrain from doing anything to injure the right of the other to receive the benefits of the agreement.

83. Sentinel breached the implied covenant of good faith and fair dealing in the Policy.

84. Sentinel, at all relevant times, owed MAR an implied duty of good faith and fair dealing.

85. Sentinel's actions were in breach of its duty of good faith and fair dealing.

86. Sentinel's conduct in breach of its duty of good faith and fair dealing consists of, but is not limited to: failing to fully, fairly and promptly investigate Plaintiff's Claim; unreasonably denying and/or withholding benefits under the Policy; denying the Claim without a reasonable basis in fact or law; misconstruing Policy language against MAR; wrongfully denying benefits due and payable under the Policy; and, creating unreasonable burdens for payment and benefits.

87. MAR has sustained actual damages as a result of Sentinel's bad faith conduct.

88. Sentinel's actions further entitle MAR to an award of general and consequential damages for Sentinel's bad faith conduct.

89. Sentinel's actions were undertaken with ill intent and/or in conscious disregard for the harm to be caused to MAR.

90. Sentinel's actions, for the reasons stated above, entitle MAR to an award of punitive damages.

91. MAR is also entitled to its reasonable attorneys' fees pursuant to R.I. Gen. Laws § 9-1-45.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for relief as follows:

(a) On the First Cause of Action, Plaintiff requests that the Court enter judgment against Sentinel, awarding Plaintiff damages in an amount to be determined at trial, plus consequential damages, attorneys' fees, and pre- and post-judgment interest to the extent permitted by law;

(b) On the Second Cause of Action, Plaintiff requests that this Court enter a

declaratory judgment in favor of MAR against Sentinel, declaring that Sentinel is obligated to pay MAR, up to the applicable limits of the Policy, for the Claim;

(c) On the Third Cause of Action, Plaintiff requests that the Court enter judgment against Sentinel, awarding Plaintiff damages in an amount to be determined at trial, plus consequential damages, attorneys' fees, and pre- and post-judgment interest to the extent permitted by law, litigation expenses, expert fees and expenses, for punitive damages pursuant to R.I. Gen. Laws § 9-1-33, for attorneys' fees pursuant to R.I. Gen. Laws § 9-1-33, and for interest on all damages for which interest may be awarded;

(d) On the Fourth Cause of Action, Plaintiff requests that the Court enter judgment against Sentinel, awarding Plaintiff general and consequential damages in an amount to be determined at trial, exemplary or punitive damages, its reasonable attorneys' fees pursuant to R.I. Gen. Laws § 9-1-45, and pre- and post-judgment interest to the extent permitted by law; and

(e) Additionally, Plaintiff requests such other and forth or relief as the Court deems just and proper.

JURY DEMAND

Plaintiff hereby demands a trial by jury on all issues so triable.

Plaintiff,

MOSES AFONSO RYAN LTD.,

By its attorneys,

/s/Stephen A. Izzi
Stephen A. Izzi (#2928)
Moses Afonso Ryan Ltd.
160 Westminster Street, Suite 400
Providence, Rhode Island 02903
Tel: (401) 453-3600
sizzi@marlawri.com

See this notice in Cambodian, Spanish, and Portuguese on the attached pages. **Español:** Véase esta notificación en camboyano, español y portugués en las páginas adjuntas. **Português:** Leia esta notificação em cambojano, espanhol e português nas páginas em anexo.

NOTICE

You have a case in the Rhode Island state court system.

You have the right to an interpreter at no cost to you.

Rhode Island Supreme Court Executive Order 2012-05 states that when a Limited-English Proficient (LEP) person appears in court, the Rhode Island Judiciary will provide a free authorized interpreter for the defendant, plaintiff, witness, victim, parent of a juvenile, or someone with a significant interest in the court proceeding. This interpreting service is provided at no cost to the parties and in all types of cases, both civil and criminal. Court interpreters work in all the courthouses of the Rhode Island state court system.

To schedule an interpreter for your day in court, you have the following options:

1. **Call the Office of Court Interpreters at (401) 222-8710, or**
2. **Send an email message to interpreterfeedback@courts.ri.gov, or**
3. **Visit the interpreters' office to schedule an interpreter:**

The Office of Court Interpreters
Licht Judicial Complex
Fourth Floor, Room 401
250 Benefit Street
Providence, RI 02903

When requesting an interpreter, please provide the following information:

The name and number of your case
The language you are requesting
The date and time of your hearing
The location of your hearing
Your name and a telephone number where we can reach you or your lawyer

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For more information in Portuguese, Russian, and Spanish, including a listing of court forms that are available in Spanish, please visit our website on the Internet:

https://www.courts.ri.gov/Interpreters/englishversion/Pages/default.aspx.

To request a translation of this notice into any other language, please call the Office of Court Interpreters at (401) 222-8710. It would be helpful to have an English speaker with you when you call.

The Rhode Island Judiciary is committed to making the courts accessible to all.

The Office of Court Interpreters
Licht Judicial Complex Fourth
Floor Room 401
250 Benefit Street
Providence, RI 02903

9/15

UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

MOSES AFONSO RYAN LTD.	:	
	:	
Plaintiff,	:	
	:	DOCKET NO. 1:17-CV-00157-S-PAS
v.	:	
	:	
SENTINEL INSURANCE COMPANY, LTD,	:	
	:	
Defendant.	:	

ANSWER AND AFFIRMATIVE DEFENSES OF
DEFENDANT SENTINEL INSURANCE COMPANY, LTD.

Defendant Sentinel Insurance Company, Ltd. hereby responds to Plaintiff's Complaint as follows:

THE PARTIES

1. Admitted.

2. Admitted.

3. Admitted.

PRELIMINARY STATEMENT

4. Paragraph 4 sets forth statements of the claimed purpose of this action and legal conclusions, to which no answer is necessary. To the extent that an answer is required to any allegations contained in Paragraph 4, Sentinel denies any allegations relating to a claimed unjustified refusal to provide coverage under a policy issued to Plaintiff, and is without sufficient knowledge and information to admit or deny the remaining allegations, and therefore leaves the plaintiff to its proof.

5. Sentinel is without sufficient knowledge and information to admit or deny the allegations set forth in paragraph 5 as phrased and therefore leaves the plaintiff to its proof.

6. Sentinel admits that it insured MAR under a Spectrum Business Owner's policy, policy number 02 SBA ZU 7345 ("the policy"). As to the remaining allegations, Sentinel responds that the policy form cited speaks for itself and thus no response is necessary.

7. Sentinel admits that MAR was a victim of a ransomware attack. As to the remainder of the allegations in the paragraph, Sentinel is without sufficient knowledge and information to admit or deny the allegations and therefore leaves the plaintiff to its proof.

8. Sentinel is without sufficient knowledge and information to admit or deny the allegations set forth in paragraph 8 as phrased and therefore leaves the plaintiff to its proof.

9. Sentinel is without sufficient knowledge and information to admit or deny the allegations set forth in paragraph 9 as phrased and therefore leaves the plaintiff to its proof.

10. Sentinel is without sufficient knowledge and information to admit or deny the allegations set forth in paragraph 10 as phrased and therefore leaves the plaintiff to its proof.

11. Sentinel is without sufficient knowledge and information to admit or deny the allegations set forth in paragraph 11 as phrased and therefore leaves the plaintiff to its proof.

12. Sentinel is without sufficient knowledge and information to admit or deny the allegations set forth in paragraph 12 as phrased and therefore leaves the plaintiff to its proof.

13. Sentinel admits that MAR purchased the policy and further admits that the policy provides some coverage for the type of loss MAR suffered, which policy benefits have been paid by Sentinel to MAR. To the extent that MAR alleges that the policy provided coverage for all of the losses MAR has claimed resulted from the ransomware attack it suffered, the allegation is denied.

14. Sentinel admits that MAR paid the premium for the policy and gave notice of the loss on or about June 2, 2016. Sentinel denies that it has failed and refused to pay MAR's claim

for coverage under the policy as it has paid benefits to MAR under the policy. Sentinel admits that it has not paid for all of the losses MAR has claimed resulted from the ransomware attack it suffered, as certain of the losses claimed are not covered by the policy. Sentinel is without sufficient knowledge and information to admit or deny the remaining allegations set forth in paragraph 14 and therefore leaves the plaintiff to its proof.

15. Denied.

16. Paragraph 16 sets forth statements of the claimed purpose of this action and legal conclusions, to which no answer is necessary.

JURISDICTION AND VENUE

17. As the case has been removed to federal court, the allegation is now moot.

18. As the case has been removed to federal court, the allegation is now moot.

FACTUAL ALLEGATIONS

19. Sentinel admits that, in consideration for the premiums paid, it insured MAR under a the policy for the policy period October 13, 2015 to October 13, 2016, subject to the terms, limitations, conditions and exclusions set forth in the policy. The remainder of the allegations are denied.

20. Sentinel responds that the policy form cited speaks for itself and thus no response is necessary. To the extent that a response is necessary, Sentinel admits that the language quoted appears in the policy form cited, but states that the quote is incomplete as the policy form contains other language that is relevant and material to this matter.

21. Sentinel responds that the policy form cited speaks for itself and thus no response is necessary. To the extent that a response is necessary, Sentinel admits that the language quoted

appears in the policy form cited, but states that the quote is incomplete as the policy form contains other language that is relevant and material to this matter.

22. Sentinel responds that the policy form cited speaks for itself and thus no response is necessary. To the extent that a response is necessary, Sentinel admits that the language quoted appears in the policy form cited, but states that the quote is incomplete as the policy form contains other language that is relevant and material to this matter.

23. Sentinel is without sufficient knowledge and information to admit or deny the allegations set forth in paragraph 23 as phrased and therefore leaves the plaintiff to its proof.

24. Sentinel admits that its position is that the limits of liability contained in the Computers and Media Endorsement and Stretch Endorsement limits its liability to a total of $20,000, which has been paid to MAR. The remainder of paragraph 24 is denied.

25. Sentinel is without sufficient knowledge and information to admit or deny the allegations set forth in paragraph 25 as phrased and therefore leaves the plaintiff to its proof.

26. Sentinel is without sufficient knowledge and information to admit or deny the allegations set forth in paragraph 26 as phrased and therefore leaves the plaintiff to its proof.

27. Sentinel is without sufficient knowledge and information to admit or deny the allegations set forth in paragraph 27 as phrased and therefore leaves the plaintiff to its proof.

28. Sentinel is without sufficient knowledge and information to admit or deny the allegations set forth in paragraph 28 as phrased and therefore leaves the plaintiff to its proof.

29. Sentinel is without sufficient knowledge and information to admit or deny the allegations set forth in paragraph 29 as phrased and therefore leaves the plaintiff to its proof.

30. Sentinel is without sufficient knowledge and information to admit or deny the allegations set forth in paragraph 30 as phrased and therefore leaves the plaintiff to its proof.

31. Sentinel is without sufficient knowledge and information to admit or deny the allegations set forth in paragraph 31 as phrased and therefore leaves the plaintiff to its proof.

32. Sentinel is without sufficient knowledge and information to admit or deny the allegations set forth in paragraph 32 as phrased and therefore leaves the plaintiff to its proof.

33. Sentinel is without sufficient knowledge and information to admit or deny the allegations set forth in paragraph 33 as phrased and therefore leaves the plaintiff to its proof.

34. Sentinel admits that MAR hired experts to remedy the computer network of MAR.

35. Sentinel is without sufficient knowledge and information to admit or deny the allegations set forth in paragraph 35 as phrased and therefore leaves the plaintiff to its proof.

36. Sentinel is without sufficient knowledge and information to admit or deny the allegations set forth in paragraph 36 as phrased and therefore leaves the plaintiff to its proof.

37. Sentinel is without sufficient knowledge and information to admit or deny the allegations set forth in paragraph 37 as phrased and therefore leaves the plaintiff to its proof.

38. Sentinel is without sufficient knowledge and information to admit or deny the allegations set forth in paragraph 38 as phrased and therefore leaves the plaintiff to its proof.

39. Sentinel is without sufficient knowledge and information to admit or deny the allegations set forth in paragraph 39 as phrased and therefore leaves the plaintiff to its proof.

40. Sentinel is without sufficient knowledge and information to admit or deny the allegations set forth in paragraph 40 as phrased and therefore leaves the plaintiff to its proof.

41. Sentinel is without sufficient knowledge and information to admit or deny the allegations set forth in paragraph 41 as phrased and therefore leaves the plaintiff to its proof.

42. Sentinel is without sufficient knowledge and information to admit or deny the allegations set forth in paragraph 42 as phrased and therefore leaves the plaintiff to its proof.

43. Sentinel is without sufficient knowledge and information to admit or deny the allegations set forth in paragraph 43 as phrased and therefore leaves the plaintiff to its proof.

44. Sentinel is without sufficient knowledge and information to admit or deny the allegations set forth in paragraph 44 as phrased and therefore leaves the plaintiff to its proof.

45. Sentinel is without sufficient knowledge and information to admit or deny the allegations set forth in paragraph 45 as phrased and therefore leaves the plaintiff to its proof.

46. Sentinel is without sufficient knowledge and information to admit or deny the allegations set forth in paragraph 46 as phrased and therefore leaves the plaintiff to its proof.

47. Sentinel is without sufficient knowledge and information to admit or deny the allegations set forth in paragraph 47 as phrased and therefore leaves the plaintiff to its proof.

48. Sentinel is without sufficient knowledge and information to admit or deny the allegations set forth in paragraph 48 as phrased and therefore leaves the plaintiff to its proof.

49. Sentinel is without sufficient knowledge and information to admit or deny the allegations set forth in paragraph 49 as phrased and therefore leaves the plaintiff to its proof.

50. Sentinel is without sufficient knowledge and information to admit or deny the allegations set forth in paragraph 50 as phrased and therefore leaves the plaintiff to its proof.

51. Sentinel is without sufficient knowledge and information to admit or deny the allegations set forth in paragraph 51 as phrased and therefore leaves the plaintiff to its proof.

52. Sentinel is without sufficient knowledge and information to admit or deny the allegations set forth in paragraph 52 as phrased and therefore leaves the plaintiff to its proof.

53. Sentinel is without sufficient knowledge and information to admit or deny the allegations set forth in paragraph 53 as phrased and therefore leaves the plaintiff to its proof.

54. Sentinel is without sufficient knowledge and information to admit or deny the allegations set forth in paragraph 54 as phrased and therefore leaves the plaintiff to its proof.

55. Sentinel responds that the policy form cited speaks for itself and thus no response is necessary. To the extent that a response is necessary, Sentinel admits that the language quoted appears in the policy form cited, but states that the quote is incomplete as the policy form contains other language that is relevant and material to this matter.

56. Admitted.

57. Sentinel is without sufficient knowledge and information to admit or deny the allegations set forth in paragraph 57 as phrased and therefore leaves the plaintiff to its proof.

58. Admitted.

59. Sentinel denies that coverage exists under the Business Income and Extra Expense provisions of the policy for the claim submitted by MAR for alleged Business Income losses.

60. Denied as phrased. Further answering, Sentinel states that it provided MAR with its position on the claim by letter dated December 8, 2016, which letter speaks for itself.

61. Denied.

FIRST CAUSE OF ACTION (Breach of Contract)

62. Sentinel's responses to paragraphs 1 through 61 above are hereby incorporated by reference as if fully set forth herein.

63. Admitted.

64. Admitted.

65. Denied.

66. Denied.

67. Admitted.

68. Denied.

69. Denied.

SECOND CAUSE OF ACTION (Declaratory Relief)

70. Sentinel's responses to paragraphs 1 through 69 above are hereby incorporated by reference as if fully set forth herein.

71. Sentinel admits that it disputes certain aspects of the claim submitted by MAR and denies that it has any "legal obligation" to pay MAR for those portions of the claim submitted.

72. Paragraph 72 sets forth a legal conclusions, to which no answer is necessary. To the extent that an answer is required to any allegations contained in Paragraph 72, Sentinel is without sufficient knowledge and information to admit or deny the allegations, and therefore leaves the plaintiff to its proof.

73. Paragraph 73 sets forth a legal conclusions, to which no answer is necessary. To the extent that an answer is required to any allegations contained in Paragraph 73, Sentinel is without sufficient knowledge and information to admit or deny the allegations, and therefore leaves the plaintiff to its proof.

74. Paragraph 74 sets forth a legal conclusions, to which no answer is necessary. To the extent that an answer is required to any allegations contained in Paragraph 74, Sentinel is without sufficient knowledge and information to admit or deny the allegations, and therefore leaves the plaintiff to its proof.

THIRD CAUSE OF ACTION (Insurer Bad Faith)

75. Sentinel's responses to paragraphs 1 through 74 above are hereby incorporated by reference as if fully set forth herein.

76. Denied.

77. Denied.

78. Denied.

79. Denied.

80. Denied.

FOURTH CAUSE OF ACTION (Breach of Covenant of Good Faith)

81. Sentinel's responses to paragraphs 1 through 80 above are hereby incorporated by reference as if fully set forth herein.

82. Sentinel admits to a covenant of good faith and fair dealing in every contract. The remainder of the paragraph sets forth a legal conclusion, to which no answer is necessary.

83. Denied.

84. Admitted.

85. Denied.

86. Denied.

87. Denied.

88. Denied.

89. Denied.

90. Denied.

91. Denied.

FIRST AFFIRMATIVE DEFENSE

1. The only coverage under the policy for loss or damage caused by a computer virus is under the Computers and Media Endorsement, which changes the policy to provide additional coverage for certain computer-related losses.

2. The maximum amount available for Computers and Media coverage under the policy is $20,000.

3. Sentinel has issued payments to Plaintiff totaling $20,000.00.

4. By virtue of these payments, Sentinel has satisfied all of its obligations under the policy to compensate Plaintiff for all covered losses associated with its claim.

SECOND AFFIRMATIVE DEFENSE

1. The only coverage under the policy for loss or damage caused by a computer virus is under the Computers and Media Endorsement, which changes the policy to provide additional coverage for certain computer-related losses.

2. The Computers and Media Endorsement provides additional coverage for losses arising from direct physical loss of or physical damage to "computer equipment" and the cost to research, replace or restore physical loss or damaged "data" and "software" subject to the Limit of Insurance shown in the Declarations for Computers and Media.

3. Under the Computers and Media Endorsement, the definition of the phrase direct physical loss or physical damage to "computer equipment," "data" or "software" is extended to include damage caused by a "computer virus," defined under the policy to mean a program which is intentionally created to cause damage or disruption in the computer operations of a party using or coming in contact in any way with the program.

4. The Computers and Media Endorsement also provides for Business Income and Extra Expense coverage to apply to direct physical loss or damage to "computer equipment" or "data," but the policy expressly specifies that such coverage is included in the Limit of Insurance for Computers and Media shown in the Declarations if the direct physical loss or damage is the result of a "computer virus."

5. The Limit of Insurance shown in the Declarations for Computers and Media is $10,000.

6. The Stretch endorsement to the policy provides an additional limit of $10,000 for such losses.

7. Sentinel has paid Plaintiff $20,000.00, the maximum amount available for Computers and Media coverage under the policy.

8. Inasmuch as Sentinel has paid Plaintiff the maximum amount available for Computers and Media coverage under the policy, no further coverage is available for its Business Income and Extra Expense Claim arising from the introduction of the computer virus to its computer system.

THIRD AFFIRMATIVE DEFENSE

1. The policy specifies that Sentinel will pay for direct physical loss or physical damage to Covered Property at the premises described in the Declarations.

2. The policy further specifies that Covered Property does not include "data" and "software" which exists on electronic media including the cost to research, replace and restore them, except as may be provided in any Additional Coverage or Options Coverages.

3. Additional Coverage for loss to "data" and "software" caused by a computer virus was provided under the Computers and Media Endorsement and Stretch Endorsement.

4. Sentinel has paid its policy limits for the additional coverage available under the Computers and Media Endorsement and the additional coverage under the Stretch Endorsement for Computers and Media coverage.

5. To the extent that Plaintiff seeks recovery for its claim beyond the amounts already paid under these additional coverages, it is seeking recovery for loss of data and software or the cost to research, replace or restore such data or software, which is not covered under the terms of the policy.

FOURTH AFFIRMATIVE DEFENSE

1. The Special Property Coverage form of the policy provides coverage for actual loss of "Business Income" sustained due to the necessary suspension of an insured's "operations" during the "period of restoration" as those terms are defined under the policy.

2. The Special Property Coverage Form further provides that the suspension must be caused by direct physical loss of or physical damage to property at the "scheduled premises."

3. There is no coverage for Plaintiff's claimed losses under the Special Property Coverage Form because there was no direct physical loss or physical damage to property at the scheduled premises and no necessary suspension of plaintiff's operations.

4. The policy's Computers and Media Endorsement provides specific coverage for loss or damage to computer equipment and data caused by a computer virus, including loss of Business Income, subject to the applicable $20,000 limit.

FIFTH AFFIRMATIVE DEFENSE

Plaintiff's claims are subject to the policy limits and sub-limits set forth in the policy.

SIXTH AFFIRMATIVE DEFENSE

Plaintiff's claims are subject to the policy provisions regarding deductible.

Respectfully submitted,
SENTINEL INSURANCE
COMPANY, LTD.

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Dated: April 28, 2017

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by transmission of Notices of Electronic Filing generated by CM/ECF and by electronic mail on April 28, 2017 on all counsel or parties of record on the Service List below.

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