Those Interested Underwriters at Lloyd's, London v AU Trading LLC
2019 NY Slip Op 32803(U)
September 23, 2019
Supreme Court, New York County
Docket Number: 651010/2018
Judge: Saliann Scarpulla
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 39EFM

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THOSE INTERESTED UNDERWRITERS AT LLOYD'S, LONDON WHO SUBSCRIBED TO THE POLICY OF INSURANCE/CERTIFICATE NUMBERED B1098S140100,

Plaintiff,

- v -

AU TRADING LLC,AU TRADING (EUROPE) LIMITED, CC HOLDINGS LLC,CC TRADING (LONDON) LIMITED, CC WEALTH LIMITED

Defendant.

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INDEX NO. 651010/2018

MOTION DATE 03/11/2019, 03/11/2019

MOTION SEQ. NO. 001 002

DECISION + ORDER ON MOTION

HON. SALIANN SCARPULLA:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 78, 79, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115

were read on this motion to/for STAY.

Upon the foregoing documents, it is

In this declaratory judgment action arising out of a dispute over an insurance claim, plaintiff Those Interested Underwriters at Lloyd's London who Subscribed to the Policy of Insurance/Certificate Numbered B1098S140100 ("Underwriters") move for summary judgment on the complaint against the insured defendants AU Trading LLC ("AU Trading"), AU Trading (Europe) Limited ("AU Europe"), CC Holdings LLC ("CC

Holdings"), CC Trading (London) Limited ("CC Trading"), and CC Wealth Limited ("CC Wealth") (collectively, "Defendants").[1]

Background

AU Trading is a Delaware limited liability company, CC Holdings is a Wyoming limited liability company, AU Europe and CC Trading are English private limited companies, and CC Wealth is a British Virgin Islands corporation. Defendants are owned by John Christopher ("JC") and are engaged in the business of trading and storing various precious metals for nonparty customers. Defendants maintain that they were operated by JC, his wife Jennifer Shields ("JS"), and his parents – JC and JS lived and worked in Switzerland, and JC's parents mainly worked in London.

Defendants, through insurance broker H.W. Wood Limited ("Broker"), purchased insurance policy number B1098S140100 from Underwriters ("Policy") to insure the precious metals. Specifically, the Policy insures

> [c]oins, numismatic and the like, including but not limited to rare coins, bullion coins and items of numismatic interest, bullion and/or precious metals of any description and other similar interest being property of [Defendants] or in [Defendants'] care, custody and control for which they are responsible to insure and/or for which they may be held liable whilst in their care, custody and control.

Policy at 2 (the insured stock is hereinafter referred to as "gold"). The Policy insures the gold while it is in Defendants' "care, custody and control at" – *inter alia* – "any bank vault worldwide on an all risks basis including but not limited to . . . Hatton Garden

[1] Underwriters also move to stay discovery pending the resolution of their motion for summary judgment, which I granted for the reasons set forth on the record on February 6, 2019.

Safety Deposit Limited ["HDSD"]" in London, United Kingdom, and at various locations worldwide, including Defendants' "[h]ome office premises" in Switzerland. Policy at 2.

Defendants maintained fourteen safe deposit boxes ("boxes") at HGSD. From April 3, 2015 through 5, 2015, HGSD was burglarized ("the Burglary") and five of Defendants' fourteen boxes were broken into; Defendants maintain that approximately $2.53 million in gold was stolen from these five boxes. On April 10, 2015, JC provided notice of an insurance claim ("Claim") resulting from the Burglary, but because he was in New York with JS for JS's mother's funeral, he did not know what was missing from the boxes until he "ha[d] access to all of [his] files in London."

Thereafter, Underwriters appointed Matthew Thomas ("MT") of Charles Taylor Adjusting as the loss adjuster, who began to investigate the Claim and correspond with JC. On April 13, 2015, MT requested certain information from JC, including the contracts for Defendants' HGSD boxes and records detailing the gold in each box at the time of the Burglary. In his April 15, 2015 response, JC informed MT that he would return to Switzerland from New York the next day and arrive in London shortly thereafter, where he would "finalize the list of items that were in the" burglarized boxes; and that, HGSD was then inaccessible because of the police's Burglary investigation. The following week, JC sent MT updates regarding the Burglary investigation and HGSD's inaccessibility and informed MT that he would not be able to assess the loss and finalize a list of gold lost until he was able to access HGSD.

At the end of April 2015, Defendants' remaining gold was transferred from HGSD to a separate facility owned by the security company Brinks to be itemized and stored. On April 30 and May 1, 2015, JC and his father unloaded the gold that was transferred to Brinks,[2] and JC's father made a handwritten list of the gold while it was being unloaded to establish post-loss inventory. Defendants maintain that the post-loss inventory is a reliable accounting of the gold stored at HGSD that was not stolen.

Defendants maintain that JC calculated Defendants' inventory prior to the Burglary by analyzing their most recent business records, including trading history and storage order files.[3] JC calculated the difference between the pre-loss inventory and post-loss inventory to establish the amount of gold purportedly lost in the Burglary.

On May 14, 2015, MT met with JC and JS in London to discuss the Claim and review documents and records. Thereafter, MT requested additional documents from Defendants. In May and June 2015, Defendants provided documentation to Underwriters and communicated with MT and the Broker regarding the information requested and how to substantiate the Claim.

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[2] MT states that he witnessed and took notes during this process on April 30, 2015, but he did not return with JC and his father to Brinks the following day when they completed unloading and cataloging the remaining gold.

[3] According to Defendants, their boxes at HGSD were all full of gold and that the contents "did not change in a significant way on a regular basis. [Gold was] moved at the request of [Defendants'] customers or in accordance with demand from trading operations." JC Aff. ¶25.

On July 14, 2015, Underwriters' attorney, Owen B. Carragher, Jr. ("Carragher"), wrote to Defendants, informing them that he was retained by Underwriters and requesting additional information. On July 16, 2016, Defendants met with Carragher and the Broker in New York. In a July 17, 2015 email, JC proposed producing Defendants' storage invoices either pursuant to a non-disclosure agreement ("NDA") to protect their clients' privacy or with their clients' information redacted.

Defendants maintain that, by July 2015, Defendants provided MT and Underwriters with a substantial number of documents, including rental receipts and contracts for their HGSD boxes, the receipts for the gold recently moved to Brinks, the handwritten post-loss inventory list of the gold received at Brinks, and hundreds of purchase and sale invoices. However, because Underwriters continued to demand additional documentation and information, on July 29, 2015, Defendants hired an adjustor, Bev Fitzgerald ("Fitzgerald") of Fitzgerald Consulting Ltd., to assist with the Claim and prepare a statement of claim report ("SOCR"). Defendants informed Carragher of this and requested that he communicate with Fitzgerald directly.

Defendants maintain that they worked with Fitzgerald over the next several months, but because there were no contemporaneous inventory spreadsheets, Fitzgerald substantiated the Claim by analyzing pre-loss records consisting of invoices and customer orders, which purportedly reflected Defendants' inventory.

On November 12, 2015, Fitzgerald sent MT the SOCR which included, *inter alia*, redacted copies of storage invoices for March 2015 (Defendants maintain that they did

not have a complete set of April 2015 invoices which predated the Burglary) and outstanding customer orders for the storage of gold at the time of the Burglary. On January 15, 2016, MT emailed his response to the SOCR to Fitzgerald – which included requests for clarification, additional information, and unredacted invoices – and requested a meeting with Fitzgerald. Fitzgerald informed MT that his email was being forwarded to Defendants for further instruction. This same month, Defendants maintain that JC was diagnosed with meningitis, for which he was hospitalized and took time off of work.

On February 12, 2016, JC sent an email to the Broker seeking advice in responding to MT's January 15, 2016 letter and expressed concerns regarding, *inter alia*, MT's requests for the disclosure of client information. Fitzgerald informed MT that JC was awaiting a response from the Broker. On February 20, 2016, Fitzgerald wrote to MT informing him that, because Defendants had not received a response from the Broker regarding the disclosure of client information, Fitzgerald requested postponing meeting with MT while Defendants determine whether their legal obligations. On February 26, 2016, JC sent an email to MT with additional documents, including a list of items returned from police custody, and invited MT to inspect the recovered items.

In a March 7, 2016 email, JC informed MT that it was illegal, under Swiss law, for Defendants to disclose their client data. For the next several months, the parties continued to communicate regarding, *inter alia*, the applicability of Swiss law.

By letter dated July 14, 2016, Defendants sent Underwriters a letter demanding payment of their Claim and explaining that they had incurred more than $800,000 in

damages as a result of Underwriters' failure to approve the Claim; the majority of damages purportedly incurred (more than $500,000) resulted from Defendants "delivering to its customers lost insured items subsequently purchased on the spot market directly by [Defendants] and / or delivery in cash of the current price equivalent of the insured property to its customers." In a July 28, 2016 letter, Carragher informed Defendants that Underwriters could not resolve the Claim without the several categories of information, including: information concerning the applicability of Swiss data protection laws; inventory records; and financial records. On August 31, 2016, JC avers that his mother died suddenly, and he spent the next several months trying to settle her estate and stabilize his father, who became ill from the related stress and shock.

In November 2016, JS filed a complaint with the New York State Department of Financial Services regarding Underwriters' non-settlement of the Claim. In March 2017, Underwriters sent Defendants a proposed NDA regarding the disclosure and use of Defendants' client information. Thereafter, Defendants engaged an attorney in Switzerland, Dr. Michael Tschudin ("Tschudin") to advise Defendants on the restrictions imposed by Swiss law, resolve the issue of the disclosure of the client information to Underwriters, and to review the sufficiency proposed NDA.

In April 2017, Defendants and Tschudin informed Underwriters that the proposed NDA did not comply with Swiss law, and proposed changes to address these purported deficiencies. The NDA issues were never resolved.

On July 11, 2017, Carragher sent a letter to Defendants noticing an examination under oath ("EUO") of JC, JS, and Fitzgerald, which were to take place in New York in September 2017, and requesting the production of documents previously requested but not produced by August 18, 2017. On August 11, 2017, Tschudin responded to Carragher's request for documents, maintaining that, because most of the requested documents contain personal data and are stored in Switzerland, any production must comply with Swiss law.

On August 25, 2017, Defendants informed Carragher that, although they were "willing to partake in further examinations," the request that they be videotaped and that the examination take place in New York was unreasonable because the Policy "does not specify a location, format or provide . . . any detailed guidelines regarding [EUOs] . . . ." Defendants objected to the EUOs taking place in New York because Defendants "business and records are located in Europe," the requested documents "are located in Switzerland and are protected by Swiss data protection law," and it would cause Defendants "additional unnecessary expense and interruption to their business."

Defendants proposed that the parties schedule the EUOs to take place in Switzerland and informed Carragher that Fitzgerald was no longer working for Defendants. Carragher responded to Defendants' August 2017 correspondence in a letter dated October 19, 2017, which purported to outline Defendants' failure to cooperate throughout the Investigation. Carragher did not seek to reschedule the time or place of the previously noticed EUOs.

In March 2018, Underwriters commenced this action, asserting the four causes of action seeking the following declarations: (1) the determination of Underwriters' rights and Defendants' obligations to cooperate under the Policy's EUO clause; (2) that Defendants materially breached their obligations to cooperate with the Claim investigation under the EUO clause, thereby voiding coverage under the Policy; (3) that Defendants' actions constitute a repudiation of the Policy; and (4) that Defendants breached the implied covenant of good faith and fair dealing by acting in bad faith throughout the Investigation, thereby voiding coverage under the Policy.

Defendants answered the complaint and asserted counterclaims against Underwriters for: (1) breach of the Policy by failing to pay the Claim; (2) breach of the covenant of good faith and faith dealing by acting in bad faith; and (3) attorneys' fees. The parties have not engaged in discovery.

Underwriters now move for summary judgment on their complaint. In support of the motion, Underwriters deluge the record with years of email correspondence between the parties, which Underwriters maintain document and establish Defendants' material breach of the EUO clause by failing to cooperate in the Investigation. The central examples of Defendants' purported noncooperation are that they failed to produce: (1) computerized inventory spreadsheet of gold stored at HGSD, which was regularly updated to reflect trades, and related metadata ("Inventory Spreadsheets"); (2) unredacted sales invoices to enable Underwriters to identify the owners of the gold; (3) financial statements from 2013 through 2015; and (4) JC, JS, and Fitzgerald for EUO's in New

York. Underwriters also maintain that Defendants' noncooperation is established by, *inter alia*, Defendants' failure to substantiate their assertions for the application of Swiss law to their document production.

Inventory Spreadsheets

Underwriters aver that Defendants continuously represented that they maintained Inventory Spreadsheets prior to the Burglary, but that Defendants failed to produce them. According to Underwriters, Defendants confirmed the existence of these Inventory Spreadsheets at May 14 and July 16, 2015 meetings and in numerous communications. Underwriters rely on affirmations by MT, whereby MT avers that, on several occasions including a May 14, 2015 meeting, he was "led to believe" that the Inventory Spreadsheets existed. MT also submits an undated, handwritten document, which he maintains were contemporaneous notes that he took during the May 14, 2015 meeting and establish that Defendants confirmed the existence of the Inventory Spreadsheets.

Defendants dispute the existence of the Inventory Spreadsheets. In his affirmation in opposition, JC describes Defendants' business practices. JC avers that his parents would regularly move the gold to and from HGSD, that he discussed the business with his mother several times per day, and because of her "active involvement," his mother had a "detailed knowledge of the contents of the [] boxes." JC Aff. ¶12. Defendants aver that all of their back-office operations are administered from Switzerland, where Defendants files and business records are also maintained. Defendants' "business records are primarily hard copy and . . . . include copies of trades with clients, copies of purchase receipts from suppliers, shipping records and bank statements." JC Aff. ¶11.

Defendants claim that they did not keep Inventory Spreadsheets, or a "perpetual inventory record," because JC's "mother lacked the I.T. skills to reliably maintain and update a spreadsheet – hence the use of manually written notes and frequent telephone conversations." JC Aff. ¶49.[4]

Client Information

Underwriters also argue that Defendants failed to cooperate by concealing, for three months, that the majority of the gold subject to the claim was owned by Defendants' clients and thereafter refusing to identify those clients to Underwriters, including by refusing to produce unredacted sales invoices and storage contracts to enable Underwriters to identify the owners of the gold allegedly stolen. Defendants purportedly failed to cooperate by refusing to provide client information, in breach of the Policy's: (1) Sanction Limitation and Exclusion Clause JC2010/014[5] which may subject Underwriters to anti-money laundering ("AML") sanctions; and (2) Direct Adjustment

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[4] Although the majority of Defendants' business records were maintained in Switzerland, Defendants maintain that JC's parents kept some records, which were mainly comprised of: recent shipping records, which were allegedly generally be shredded once delivered because archived copies were kept in Switzerland; some notes regarding the recent movement of gold stored at HGSD, which were allegedly generally shredded by JC's mother once the movements were discussed; and handwritten lists from periodic stock checks of the gold stored at HGSD, which were purportedly shredded by JC's mother after discussing the stock check with JC the same or following day.

[5] "No (re)insurer shall be deemed to provide cover and no (re)insurer shall be liable to pay any claim or provide any benefit hereunder to the extent that the provision of such cover, payment of such claim or provision of such benefit would expose that (re)insurer to any sanction, prohibition or restriction under United Nations resolutions or the trade or economic sanctions, laws or regulations of the European Union, United Kingdom or United States of America." Policy at 15.

Clause which hindered Underwriters' ability to directly adjust the Claim with the clients.[6] Defendants argue that they have not refused to produce documents, but that they are required, under Swiss law, to maintain confidentiality of records.

Financial Information

Underwriters next argue that Defendants failed to cooperate by refusing to provide their full financial statements for 2013 through 2015. Defendants maintain that the only financial statements that they prepare are publicly available and that they informed MT of this as early as May 2015; moreover, in the SOCR, Defendants submitted the most recent financial statement for the only entity who suffered a loss of approximately $500,000 from the Burglary (and all other gold lost belonged to Defendants' clients).

EUOs

Finally, Underwriters argue that Defendants materially breached the EUO clause by failing produce Fitzgerald for an EUO and failing to appear for EUOs scheduled in New York in September 2017, and therefore, Policy should be voided.

Defendants maintain that Fitzgerald stopped working for Defendants in early 2016, after a fee dispute. Defendants argue that they did not have an obligation to produce Fitzgerald for an EUO because Fitzgerald was no longer working for Defendants when Underwriters noticed his EUO on July 17, 2017. As to the EUOs of JC and JS,

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[6] "In case of loss of property of others (insured hereunder) held by the Insured, for loss of which claim is made upon Insurers, the right to adjust such loss with the owner or owners of the property is reserved to Insurers and the receipt of such owner or owners in satisfaction thereof shall be in full satisfaction of any claim of the Insured for the loss of said property for which such payment has been made . . . ." Policy at 13.

Defendants maintain that the Policy does not specify the location of the EUOs, and because Underwriters were seeking the disclosure of customer information, the EUOs were required to take place in Switzerland.

Discussion

As an initial matter, the parties disagree as to whether the Policy is governed by New York or Swiss law. The Policy provides that it "shall be governed by and construed in accordance with the laws of New York and each party to submit to the exclusive jurisdiction of the courts of the United States of America." Policy at 2. The Policy contains additional conditions, entitled "SPECIFIC CONDITIONS – in respect of the Swiss locations only," which, *inter alia*, complies with and provides for the application of Swiss law. Policy at 9-12. Defendants argue that this section applies to any information located in Switzerland, i.e., Defendants' books and records.

The Policy itself show that the Swiss portion which Defendants' rely is inapplicable because it only pertains to a loss incurred at a Swiss location; here the loss occurred in the United Kingdom and Defendants' books and records are not insured under the Policy.[7]

The first cause of action, which seeks a determination of Underwriters' rights and Defendants' obligations to cooperate under the Policy's EUO clause, is "unnecessary and duplicative" of the second cause of action, which seeks a declaration that Defendants

[7] Although I find that the Swiss choice of law provision does not apply to the production of Defendants' records located in Switzerland, the relevant Swiss privacy laws governing the disclosure of client information may nevertheless be applicable.

materially breached their obligations under the Policy to cooperate with the Investigation. *Feldman v Herrmann*, 2015 WL 6688289 (Sup Ct, New York County 2015) ("As the resolution of plaintiffs' claim for breach of contract requires a determination of the parties' rights and obligations under the contract, their request for an order declaring the same is unnecessary and duplicative." (citation omitted)); *see also Ithilien Realty Corp. v 180 Ludlow Dev. LLC*, 140 AD3d 621, 622 (1st Dept 2016). For this reason, I grant summary judgment to Defendants dismissing the first cause of action. *See* CPLR 3212(b).

In the second cause of action, Underwriters seek a declaration that Defendants materially breached their obligations under the Policy to cooperate with Underwriter's investigation of the claim, thereby voiding coverage under the Policy. "In order to establish breach of a cooperation clause, the insurer must show that the insured engaged in an unreasonable and willful pattern of refusing to answer material and relevant questions or to supply material and relevant documents." *New York Cent. Mut. Fire Ins. Co. v Rafailov*, 41 AD3d 603, 604 (2d Dept 2007) (citations and quotation marks omitted); *accord Yerushalmi v Hartford Acc. & Indem. Co.*, 158 AD2d 407 (1st Dept 1990). The insurer must make this showing "by a preponderance of the evidence." *Yerushalmi*, 158 AD2d at 407 (citing *Ausch v St. Paul Fire & Mar. Ins. Co.*, 125 AD2d 43, 45-46 (2d Dept 1987)).

The "duty of an insured to cooperate with the insurer is satisfied by substantial compliance," *DePicciotto Corp. v Wallis*, 177 AD2d 327, 328 (1st Dept 1991) (citations

omitted), "and where a delay in compliance is neither lengthy nor willful, and is accompanied by a satisfactory explanation, preclusion of a claim is inappropriate." *Ravailov*, 41 AD3d at 604-05 (citations omitted).

Here, the Policy's EUO clause provides:

> The Insured shall, in case of loss or damage, give to the Underwriters or their duly authorised agents, all information they require for an evaluation of the loss. The Insured, any loss payee or other individual or organisation claiming an interest under the contract of insurance, shall submit, and so far as is within their power, shall cause all other individuals interested in the property and other members of the household and employees and agents, to examinations under oath by any persons authorised by Underwriters relative to any and all matters concerning the claim and subscribe to the same and shall produce for examination all books of account, bills, invoices and other vouchers or certified copies thereof if the originals be lost, at such reasonable time and place as may be designated by the Underwriters or their representatives and shall permit extracts and copies to be made thereof.

Policy at 14.

Although the EUO clause obligates Defendants to provide Underwriters with "all information they require for an evaluation of the loss," Underwriters have failed to establish as a matter of law that much of the specific information they sought is material and relevant and required to evaluate the loss, or that Defendants have unreasonably refused to produce such information. For example, although Inventory Spreadsheets would be relevant to the Investigation, a review of the record and the parties' conflicting affidavits show that questions of fact and credibility issues remain as to the existence of Inventory Spreadsheets.

As to the financial records, Underwriters "failed to show that certain documents and information regarding the financial conditions of the [Defendants] at the time of the loss which were not produced were material and relevant to the investigation." *V.M.V. Mgt. Co., Inc. v Peerless Ins.*, 15 AD3d 647, 648 (2d Dept 2005) (citations omitted). Underwriters failed to submit any admissible evidence suggesting that the" Burglary occurred "under suspicious circumstances and that [Defendants] had a possible motive in arranging" the Burglary, *McLaughlin v State Farm Fire and Cas. Co.*, 255 AD2d 298, 298 (2d Dept 1998),[8] and the Policy did not expressly require the production of information concerning the financial condition of Defendants. *Cf. Sec. Mut. Life Ins. Co. of New York v DiPasquale*, 302 AD2d 267, 267 (1st Dept 2003) (policy contained express provision "mandat[ing] the submission . . . of unredacted federal tax returns"). Likewise, Underwriters failed to establish that Defendants acted unreasonably and willfully by failing to produce all financial records requested. *See Blinco v Preferred Mut. Ins. Co.*, 11 AD3d 924, 924 (4th Dept 2004) (no willful pattern of noncooperation where insured reasonably "object[ed] to the broad scope of documentation" requested, which included "tax returns for the last three years").

[8] *Compare Evans v Intl. Ins. Co.*, 168 AD2d 374, 375 (1st Dept 1990) (tax records relevant where "circumstances of the claim may reasonably appear suspicious"); *DePicciotto Corp.*, 177 AD2d at 327 (After investigation led insurer "to conclude[] that the burglary had to be an 'inside job,'" insurer entitled to tax returns "to determine whether [insured's] principals had a financial motive to arrange the burglary."); *Maurice v Allstate Ins. Co.*, 173 AD2d 793, 794 (2d Dept 1991) ("where there were suspicious circumstances surrounding the burglary of the plaintiffs' home, the plaintiffs' possible motive in arranging the burglary renders their financial situation material and relevant").

Underwriters have failed to establish as a matter of law that the identity of Defendants' clients is material and relevant to the Investigation. The Policy's Limitation and Exclusion Clause absolves a (re)insurer of the obligation to pay claims that would subject that (re)insurer to sanctions – Underwriters have failed to establish how this clause pertains to themselves, as the insurer. Even if this clause were applicable, Underwriters have not established that they would be subject to sanctions or incur liability as a matter of law.[9] As to Underwriters' argument that Defendants were required to provide client information so that Underwriters could directly adjust the Claim with the individual clients, Defendants maintain that the gold was stored in an allocated pool, *i.e.*, by type of gold, rather than by individual client;[10] questions of fact remain regarding whether it would be possible for Defendants to identify which clients' gold was stolen and is subject to the Claim.

Moreover, Underwriters failed to establish as a matter of law that Defendants engaged in an unreasonable and willful pattern of refusing to cooperate by not disclosing their clients' identities. Underwriters' assertions that they had no knowledge that the

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[9] For example, Underwriters failed to establish their general AML practices and compliance with relevant AML statutes, and Underwriters have not established how Defendants' proposed method of disclosing customer information (in compliance with Swiss law) would run afoul of AML statutes and subject Underwriters to sanctions.

[10] JC provides the following example to explain how the gold was stored in an allocated pool: "[I]f 500 Gold Sovereigns owed to fifty different clients, 500 Gold Sovereigns were stored at HGSD. However, the individual coins were not marked as to which coin belonged to each client, as all of the Gold Sovereigns were the same. If a client had requested delivery of one of the Gold Sovereigns at any time, a coin would have been removed from the allocation and dispatched to the client." JC Aff. ¶27.

gold belonged to third parties is belied by the language of the Policy, which insures gold "owned by **and/or** in the care, custody and control of [Defendants] for which they are responsible to insure and for which they may be held responsible for whilst in their care, custody and control at any bank vault worldwide . . . ." Policy at 2 (emphasis added). Contrary to Underwriters' depiction of the events, Defendants did not refuse to produce the identities of their clients; rather, Defendants sought to produce this information in accordance with Swiss privacy laws.

Similarly, although Defendants were obligated under the Policy to submit to an EUO, Underwriters have failed to establish that Defendants conduct constituted an "unreasonable and willful pattern" where the EUOs were only scheduled once and prior to the scheduled date, Defendants indicated that they were willing to submit to EUOs but at a different location. *See generally Marmorato v Allstate Ins. Co.*, 226 AD2d 156 (1st Dept 1996) (*citing Yerushalmi,* 158 A.D.2d 407).

Review of the record submitted, including the substantial and extensive correspondence between parties, shows that questions of fact exist as to whether Defendants' conduct constitutes an "unreasonable and willful pattern" of noncooperation. The record reflects numerous communications and meetings between the parties and that Defendants produced numerous records; Defendants also maintain that they intended to cooperate and provide all information that was reasonably required for the Investigation and that they hired Fitzgerald and Tscheudlin in an attempt to cooperate with Underwriters and comply with their demands. *See Wells Fargo Bank, N.A. v IPA Asset*

Mgt. III, LLC, 2014 N.Y. Slip Op. 30971[U] (Sup Ct, Suffolk County 2014) (insurer failed to demonstrate insured "engaged in a pattern of willful and unreasonable conduct and refused to produce documents" where "the parties communicated with each other numerous times" and insurer "failed to show that the documents and information which were not produced were material and relevant to the investigation").[11] In any event, the record suggests that Underwriters and MT are also at least partially responsible for delaying the Investigation.[12]

Therefore, Underwriters' motion for summary judgment on its second cause of action for breach of the duty to cooperate is denied. Underwriters' motion for summary judgment on the third and fourth causes of action are also denied, as the alleged conduct underlying those remaining causes of action are related to the conduct at issue in the second cause of action.[13]

In accordance with the foregoing, it is hereby

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[11] And, although Defendants were obligated under the Policy to submit to an EUO, Underwriters have failed to establish that Defendants conduct constituted an "unreasonable and willful pattern" where the EUOs were only scheduled once and prior to the scheduled date, Defendants indicated that they were willing to submit to EUOs but at a different location. *See generally Marmorato v Allstate Ins. Co.*, 226 AD2d 156 (1st Dept 1996) (*citing Yerushalmi,* 158 A.D.2d 407).

[12] For example, MT took more than two months to respond to the SOCR; Underwriters noticed the EUOs more than two years after being provided with notice of the Claim; and correspondence between the parties and the Broker show that, at various times throughout the Investigation, both parties requested and refused meetings with the other.

[13] have reviewed all of the parties' arguments, even if not specifically addressed in this decision and order and find that they would not change my determination.

ORDERED that plaintiff's motion for summary judgment on the complaint is denied in its entirety; and it is further

ORDERED that, upon a search of the record, I dismiss the complaint's first cause of action; and it is further

ORDERED that plaintiff's motion for a stay of discovery pending the determination of the motion for summary judgment was granted for the reasons stated on the record on February 6, 2019 but is now moot; and it is further

ORDERED that the parties appear for a status conference at 60 Centre Street, Room 208, on October 30, 2019 at 2:15 p.m.

This constitutes the decision and order of the Court.

9/23/19
DATE

SALIANN SCARPULLA, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	X DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE