

FILED

2015 DEC 10 P 3:46

CIVIL DISTRICT COURT FOR ORLEANS PARISH

STATE OF LOUISIANA

NO. 15-11711

DIVISION:

J-5

NEW HOTEL MONTELEONE, LLC

VERSUS

CERTAIN UNDERWRITERS AT LLOYD'S OF LONDON, SUBSCRIBING
TO ASCENT CYPERPRO POLICY NO. ASC14C000944, and EUSTIS
INSURANCE, INC.

FILED: _____

DEPUTY CLERK

PETITION FOR DAMAGES

Plaintiff, New Hotel Monteleone, LLC ("Plaintiff" or "Hotel Monteleone") brings the following Petition against Defendants, Certain Underwriters at Lloyd's, London, Subscribing To Ascent CyberPro Policy No. ASC14C000944 ("Ascent") and Eustis Insurance, Inc. ("Eustis") and in support thereof, states as follows:

INTRODUCTION

1. This is a dispute arising out of the refusal to provide full insurance coverage for the most significant damages that Hotel Monteleone suffered, and likely could suffer, as a result of a cyberattack involving credit and debit cards. Ascent has refused to cover the liabilities and losses in full, leaving Hotel Monteleone with significant uninsured losses. Ascent's refusal is unfounded under the language of the insurance policy and the facts at issue, or, at a minimum, the insurance policy language is ambiguous and should be interpreted in favor of covering Hotel Monteleone's liabilities and losses. Ascent's refusal to pay violates Louisiana Revised Statutes §§ 22:1892 and 1973. Alternatively, if the Court were to rule that Ascent's position was correct, then Eustis failed in its obligation to obtain the insurance coverage that Hotel Monteleone requested specifically.

THE PARTIES

2. Hotel Monteleone is a limited liability corporation duly organized under the laws of the State of Louisiana, with its principal place of business located in New Orleans, Louisiana.

3. On information and belief, Ascent consists of a number of Lloyd's, London Subscribing To Ascent CyberPro Policy No. ASC14C000944, including Syndicate AML 2001 at Lloyd's, Syndicate ARK 4020 at Lloyd's, Syndicate PEM 4000 at Lloyd's, Syndicate FDY 435 at Lloyd's, Syndicate ANV 1861 at Lloyd's, and Syndicate NAV 1221 at Lloyd's, and the insurance was underwritten by Ascent Underwriting, a trading division of Safeonline LLP, with its principal place of business located at Centurion House, 37 Jewry Street, London, EC3N 2ER on behalf of Underwriters at Lloyd's, London. On information and belief, Safeonline LLP is authorized and regulated by the United Kingdom's Financial Conduct Authority ("FCA"). Safeonline LLP's FCA Registration Number is 451382.

4. On information and belief, Eustis is a company organized under the laws of the State of Louisiana, with its principal place of business located in Metairie, Louisiana.

JURISDICTION AND VENUE

5. This Court has subject matter jurisdiction pursuant to Louisiana Code Civ. P. arts. 1-11.

6. The insurance policy at issue contains clauses relating to mediation, arbitration, and choice of law. Those provisions are contrary to Louisiana law.

7. Louisiana Revised Statute § 22:868 provides in pertinent part:

§868. Limiting actions; jurisdiction

A. No insurance contract delivered or issued for delivery in this state and covering subjects located, resident, or to be performed in this state, or any group health and accident policy insuring a resident of this state regardless of where made or delivered, shall contain any condition, stipulation, or agreement either:

- (1) Requiring it to be construed according to the laws of any other state or country except as necessary to meet the requirements of the motor vehicle financial responsibility laws of such other state or country.
- (2) Depriving the courts of this state of the jurisdiction of action against the insurer.

8. This Court has personal jurisdiction over Ascent because it agreed, in the insurance policy in dispute in this action, to submit to the jurisdiction of a court of competent jurisdiction within the United States when Ascent failed to pay an amount claimed to be due under the insurance policy in dispute in this action.

9. This Court has personal jurisdiction over Eustis, because Eustis is incorporated under the laws of and located in Louisiana, is licensed and/or authorized to do business in Louisiana, and has done or transacted the business of procuring insurance for policyholders located in Louisiana, including the policy sold to Hotel Monteleone, within the relevant time period.

10. Venue is proper in Orleans Parish pursuant to Louisiana Code Civ. P. arts. 76 and 76.1 because this is an action on an insurance contract where the policyholder is domiciled, the contract was executed, and the loss occurred in Orleans Parish.

THE CYBERPRO INSURANCE POLICY

11. Ascent sold the primary level Ascent CyberPro insurance policy no. ASC14C000944 to Hotel Monteleone for the period February 24, 2014 to November 1, 2014 (the "2014 CyberPro Insurance Policy"). A copy of the 2014 CyberPro Insurance Policy is attached hereto as **Exhibit A**. The 2014 CyberPro Insurance Policy generally provides \$3 million in limits. That full \$3 million in limits is available under the Security and Privacy Liability Insuring Module 1.

12. Prior to purchasing the 2014 CyberPro Insurance Policy, Hotel Monteleone had suffered a separate cyberattack in 2013 that stole payment card numbers. That 2013 cyberattack resulted in liabilities assessed against Hotel Monteleone in the form of operational fraud and operational reimbursement. The liabilities assessed as a result of the 2013 cyberattack against Hotel Monteleone in the form of operational fraud and operational reimbursement were in excess of \$200,000.00.

13. Hotel Monteleone did not have a cyberinsurance policy in place at the time of the 2013 cyberattack.

14. When Hotel Monteleone sought to purchase a cyberinsurance policy, it wanted to make certain that it would have insurance coverage for (among other things) operational fraud and operational reimbursement amounts for fraudulent charges and the costs of replacing payment cards as a result of a cyberattack.

15. It was Hotel Monteleone's reasonable expectation that the 2014 CyberPro Insurance Policy would provide full coverage for liabilities for operational fraud and operational reimbursement amounts for fraudulent charges and the costs of replacing payment cards as a result of a cyberattack.

16. The premium for the 2014 CyberPro Insurance Policy was \$20,277.40. The total policy limits are \$3 million.

17. As detailed below, the 2014 CyberPro Insurance Policy contains an endorsement, titled, "Payment Card Industry Fines or Penalties Endorsement," that applies to "a monetary fine or penalty" received in writing from Visa, MasterCard, American Express, or JCB. That endorsement limits coverage to \$200,000.00. Hotel Monteleone would not have paid \$20,277.40 for only \$200,000.00 in coverage for operational fraud and operational reimbursement amounts for fraudulent charges and the costs of replacing payment cards as a result of a cyberattack.

18. It was not within Hotel Monteleone's reasonable expectations that the 2014 CyberPro Insurance Policy would provide only \$200,000.00 in coverage for operational fraud and operational reimbursement amounts for fraudulent charges and the costs of replacing payment cards as a result of a cyberattack.

19. The 2014 CyberPro Insurance Policy provides:

INSURING MODULE 1: (SECURITY AND PRIVACY LIABILITY)

We shall pay on **your** behalf **damages** and **claims expenses** that exceed **your deductible** as stated within item 4 of the Declarations, which you become legally obligated to pay as a result of any **claim** first made against **you** and notified by **you** to **us** in writing, in accordance with Section XI of this policy, during the **policy period** or any **extended reporting period**, if applicable, arising from an actual or alleged **security and privacy wrongful act(s)** for which **you** are legally liable provided that such act(s) occurred on or after the **retroactive date**.

2014 CyberPro Insurance Policy, § I. (bold in original). On information and belief, this language was not drafted specifically for Hotel Monteleone. On information and belief, this language is found in insurance policies that Ascent sold to other insureds.

20. A **Claim** includes, “[a] written demand for monetary damages or non-monetary relief, a request for a tolling agreement, the service of a civil suit, or institution of arbitration proceedings received by you seeking monetary damages or including the threat or initiation of a suit and/or proceeding seeking a temporary restraining order or a preliminary or permanent injunction[.]” 2014 CyberPro Insurance Policy, § VII.D. (bold in original). On information and belief, this language was not drafted specifically for Hotel Monteleone. On information and belief, this language is found in insurance policies that Ascent sold to other insureds.

21. The definition of **security and privacy wrongful act** specifically includes wrongful acts related to obligations under a contract with a payment card processor.

22. The 2014 CyberPro Insurance Policy provides:

KK. **Security and privacy wrongful act** means:

1. A **privacy event, security event** or breach of **privacy regulations** committed by you or which occurs on **your computer network**;
2. **Your** failure to disclose a **security event** or **privacy event** in violation of notification laws or regulations;
3. **Your** failure to prevent transmission of **malicious code, a computer virus, or a denial of service** attack from **your computer network**;
4. **Your** failure to prevent loss of **employee** personally identifiable information, as defined in **privacy regulations**; or
5. **Your** failure to maintain the security or confidentiality of personally identifiable information stored on **your computer network** under any contract, including but not limited to a payment card processing agreement with a financial institution or other payment processor.

2014 CyberPro Insurance Policy, § VII. (bold in original). On information and belief, this language was not drafted specifically for Hotel Monteleone. On information and belief, this language is found in insurance policies that Ascent sold to other insureds.

23. The definition of **Damages** does not exclude amounts owed under a contract with a payment processor.

24. The 2014 CyberPro Insurance Policy provides:

- H. **Damages** means a monetary judgment, consumer redress fund, award, settlement, or punitive damages to the extent insurable under the law pursuant to which this policy is construed. **Damages** does not include:
1. **Your** future profits or royalties, restitution, or disgorgement of **your** profits;
 2. The cost to comply with orders granting injunctive or non-monetary relief, including specific performance, or any agreement to provide such relief;
 3. Loss of **your** fees or profits, return or offset of **your** fees or charges, or **your** commissions or royalties provided or contracted to be provided;
 4. Taxes, fines, penalties, or sanctions; however, this does not include civil fines or penalties to the extent insurable by law or to the extent otherwise covered under insuring module 7[;]
 5. Any damages that are a multiple of compensatory damages;
 6. Any amount which **you** are not financially or legally obligated to pay;
 7. Disgorgement or return of any remuneration or financial advantage to which **you** were not legally entitled;
 8. Monetary judgments, awards, or settlements which are uninsurable under the law pursuant to which this policy is construed;
 9. Past, present and/or future license fees of any kind; or
 10. Liquidated damages.

2014 CyberPro Insurance Policy, § VII. (bold in original). On information and belief, this language was not drafted specifically for Hotel Monteleone. On information and belief, this language is found in insurance policies that Ascent sold to other insureds.

25. The 2014 CyberPro Insurance Policy added an endorsement titled, "Payment Card Industry Fines or Penalties Endorsement."

26. That endorsement contains a coverage limitation, called a “sublimit,” of only \$200,000.00 for monetary fines and penalties imposed on Hotel Monteleone by Visa, MasterCard, American Express, or JCB.

27. The 2014 CyberPro Insurance Policy provides:

We shall pay on your behalf Payment Card Industry fines or penalties in excess of your deductible as stated within item 4 of the Declarations, which you become legally obligated to pay as a result of any claim first made against you and notified by you to us in writing, in accordance with Section XI of this policy, during the policy period or any extended reporting period, if applicable, arising solely from a privacy event, or security event.

It is agreed that Section VII. **DEFINITIONS**, is amended to include the following additional definitions:

Payment Card Industry fines or penalties means a written demand received by you by a **credit card association** for a monetary fine or penalty because of your non-compliance with **Payment Card Industry Data Security Standards**.

Credit card association means Visa, MasterCard, American Express, Discover, or JCB.

Payment Card Industry Data Security Standards means published and generally accepted security standards for the Payment Card Industry.

2014 CyberPro Insurance Policy, Endorsement No. 1. (bold in original). On information and belief, this language was not drafted specifically for Hotel Monteleone. On information and belief, this language is found in insurance policies that Ascent sold to other insureds.

28. This endorsement applies to Payment Card Industry “monetary fines or penalties.”

29. This endorsement does not apply to reimbursements, fraud recoveries, or assessments owed to payment card processors, the payment card brand, or the Payment Card Industry.

30. Notably, Ascent changed the “Payment Card Industry Fines or Penalties Endorsement” for the insurance policy Ascent sold to Hotel Monteleone for November 1, 2014 through November 1, 2015. The Payment Card Industry Fines or Penalties Endorsement in the 2014-2015 insurance policy specifically includes “*reimbursements, fraud recoveries or assessments*” that Hotel Monteleone would owe under the terms of a Merchant Service

Agreement with a **credit card association.**” (Emphasis added in bold and italics.) The 2014-2015 insurance policy states, like the 2014 CyberPro Insurance Policy, “**Credit card association** means Visa, MasterCard, American Express, Discover, or JCB.”

31. The 2014 CyberPro Insurance Policy, by contrast, included only “a monetary fine or penalty” within the Payment Card Industry Fines or Penalties Endorsement.

32. The plain language of the Payment Card Industry Fines or Penalties Endorsement in the 2014-2015 Ascent insurance policy shows that Ascent meant to encompass reimbursements, fraud recoveries, or assessments.

33. The plain language of the Payment Card Industry Fines or Penalties Endorsement in the 2014 CyberPro Insurance Policy shows that Ascent meant to encompass only “a monetary fine or penalty.”

34. The plain language of the Payment Card Industry Fines or Penalties Endorsement in the 2014 CyberPro Insurance Policy applies only when Hotel Monteleone “received” “a written demand by” “Visa, MasterCard, American Express, Discover, or JCB.”

35. The scope of the Payment Card Industry Fines or Penalties Endorsement is broader in the 2014-2015 Ascent insurance policy than it is in the 2014 CyberPro Insurance Policy.

36. When Hotel Monteleone asked to renew its cyberinsurance coverage at the expiration of the 2014 CyberPro Insurance Policy’s policy period, Eustis failed to tell Hotel Monteleone that Ascent had changed the language of the Payment Card Industry Fines or Penalties Endorsement in the proposed 2014-2015 Ascent insurance policy. Hotel Monteleone had provided notice of the 2014 cyberattack to Ascent and Eustis in October 2014, and the 2014 CyberPro Insurance Policy was due to be renewed on November 1, 2014. Ascent withdrew its quote for coverage, then re-offered a quote. Hotel Monteleone was told that the only change in the quote was to increase the premium and increase the deductible from \$25,000.00 to \$50,000.00. No one informed Hotel Monteleone that the policy wording would change.

THE CYBER ATTACK

37. On or around October 17, 2014, Hotel Monteleone discovered that it may have experienced a cyberattack (the "2014 cyberattack"). The 2014 cyberattack resulted in a security breach. As a result of the security breach, payment card numbers allegedly were compromised and were no longer confidential.

THE LIABILITIES

38. After the 2014 cyberattack, Hotel Monteleone faced liabilities as a result of the cyberattack.

39. Hotel Monteleone's liabilities relate to an alleged failure to maintain security or confidentiality of payment card numbers.

40. The liabilities were imposed by means of a written demand from a payment card processor, BMO Harris Bank N.A.

41. To date, there has not been "a written demand received by [Hotel Monteleone] by" Visa.

42. To date, there has not been "a written demand received by [Hotel Monteleone] by" MasterCard.

43. To date, there has not been "a written demand received by [Hotel Monteleone] by" American Express.

44. To date, there has not been "a written demand received by [Hotel Monteleone] by" JCB. Hotel Monteleone does not accept JCB.

45. To date, there has not been "a written demand received by [Hotel Monteleone] by" Discover.

46. Hotel Monteleone has been held liable for multiple types of losses as a result of the 2014 cyberattack.

47. The first type of loss was for "ADC Fraud Recovery." "ADC" is an abbreviation for "Account Data Compromise." ADC Fraud Recovery is loss from fraudulent charges allegedly resulting from the 2014 cyberattack.

48. The second type of loss was for “ADC Operational Reimbursement.” ADC Operational Reimbursement is loss from replacing payment cards that had to be replaced after the 2014 cyberattack.

49. The third type of loss is a “Case Management Fee.” That amount includes all investigation and other costs incurred by MasterCard in connection with the Account Data Compromise Event.

50. MasterCard’s *Account Data Compromise User Guide*, (June 26, 2014), which may be found here: http://www.mastercard.com/us/merchant/pdf/Account_Data_Compromise_User_Guide.pdf, states that the final step in an Account Data Compromise event is the “financial settlement of losses encountered as a result of an ADC [Account Data Compromise] Event, including operational reimbursement, fraud recovery, and ADC Event case management.” The final step for MasterCard, after it has determined the amounts of operational reimbursement and operational fraud, are to make a “financial settlement.” (MC ADC User Guide at 7-1) MasterCard’s “financial settlement” is imposed via a “Final Responsibility Letter.”

51. The fourth type of loss is for alleged violations of requirements of the Payment Card Industry (“PCI”) Data Security Standards (“DSS”) (collectively, with PCI, “PCI DSS”). Liability that relates solely to PCI DSS non-compliance has been described as a “fine” or “penalty” by an educational website focused on PCI compliance. PCI Compliance Guide explains, in its frequently asked questions:

Q: What are the penalties for noncompliance?

A: The payment brands may, at their discretion, fine an acquiring bank \$5,000 to \$100,000 per month for PCI compliance violations. The banks will most likely pass this fine on downstream till it eventually hits the merchant. . . .

PCI FAQs, PCI Compliance Guide, <https://www.pcicomplianceguide.org/pci-faqs-2/#11> (last visited Nov. 24, 2015); *see also About PCI Compliance Guide*, PCI Compliance Guide, <https://www.pcicomplianceguide.org/about-pci-compliance-guide/> (last visited Nov. 24, 2015) (“The PCI Compliance Guide, powered by ControlScan, is one of the leading *educational* websites available focused exclusively on PCI compliance.”).

ASCENT'S WRONGFUL LIMITATION OF COVERAGE

52. Hotel Monteleone has paid, in full, the premium of the 2014 CyberPro Insurance Policy, and has satisfied all pertinent terms that are conditions precedent to Underwriter's obligations under the 2014 CyberPro Insurance Policy.

53. Hotel Monteleone is entitled to all of the benefits provided by the 2014 CyberPro Insurance Policy.

54. The 2014 CyberPro Insurance Policy applies to losses resulting from the 2014 cyberattack.

55. The full \$3 million limit applies to losses due to fraud recovery, operational reimbursement, and case management fees. The Payment Card Industry Fines or Penalties Endorsement applies to amounts owed for violations of PCI DSS requirements, if those amounts result from "a written demand received by [Hotel Monteleone] by [Visa, MasterCard, American Express, Discover, or JCB]."

56. When Hotel Monteleone sought coverage from Ascent under the 2014 CyberPro Insurance Policy, Ascent turned over all its investigation and claims handling responsibilities to the law firm of Kissel, Hirsch & Wilmer LLP.

57. Ascent did not explain to Hotel Monteleone why it had outside counsel handle the claim for Hotel Monteleone.

58. Claims handling is part of the ordinary course of Ascent's business obligations.

59. Ascent's outside claims handler, Kissel, Hirsch & Wilmer LLP, determined that the only reasonable interpretation of the 2014 CyberPro Insurance Policy is that the Payment Card Industry Fines or Penalties Endorsement applies not only to amounts owed for violations of PCI DSS requirements, but also applies to fraud recovery, operational reimbursement, and case management fee losses arising out of the 2014 cyberattack.

60. Ascent's outside claims handler, Kissel, Hirsch & Wilmer LLP, first told Hotel Monteleone of this position in writing via a letter dated May 15, 2015. The letter was copied to: Ian Cavalier, Safeonline; Angie Marino, Eustis Insurance; Stuart Brown, RT Specialty; and Richard Kissel, Kissel, Hirsch & Wilmer LLP.

61. The first person copied on the letter, Mr. Cavalier, is the head of Safeonline's (and, therefore, Ascent's) claims team. Safeonline's website states: "Our claims team is headed up by Ian Cavalier, an insurance claims professional with over 20 years experience in the London market." *Claims*, Safeonline, <https://www.safeonline.com/claims/> (last visited Nov. 24, 2015). Safeonline advertises Mr. Cavalier as having "significant experience with data breach/cyber, technology E&O, media liability and intellectual property claims." *Id.*

62. Mr. Cavalier has "ultimate responsibility for all aspects of claims handling for [Safeonline's and Ascent's] core classes including cyber, technology E&O, media liability and intellectual property." *Safeonline Team*, Safeonline, <https://www.safeonline.com/safeonline-team/> (last visited Nov. 24, 2015).

63. After Ascent sent its May 15, 2015 letter, the wholesale insurance broker RT Specialty, which had worked with Eustis, followed up with Ascent regarding coverage for the fraud recovery, operational reimbursement, and case management fees. Mickey Estey, who, on information and belief, is Senior Vice President - E&O Practice Leader for RT Specialty, spoke with Mr. Cavalier about the Hotel Monteleone claim on or about July 28, 2015.

64. Mr. Estey, on information and belief, had a discussion about Hotel Monteleone's claim with Mr. Cavalier. On information and belief, in that conversation, Mr. Cavalier agreed that fraud recovery losses should be covered by the liability section of the 2014 CyberPro Insurance Policy, rather than the Payment Card Industry Fines or Penalties Endorsement and that endorsement's \$200,000.00 sublimit.

65. In a July 28, 2015 voicemail from Mr. Estey left to Ray Posecai, Executive Vice President for Eustis, Mr. Estey explained that he spoke with Mr. Cavalier at Safeonline. Mr. Estey stated:

Hey, Ray, this is Mickey Estey with RT.

I just wanted to give you another update on the New Hotel Monteleone cyber claim. *I spoke with Safeonline, Ian Cavalier. He's the claims manager at our London broker. And we went through the discussion about coverage. And he agrees with us about the position with regard to the fraud recoveries. It should fall under the liability section of the policy, not be sublimited by the PCI fines and penalties section.*

So, he's going to go directly to Ryan and have a conversation with him about it and discuss the position that they're taking. He felt like that was the best first step, is to let him have a conversation with Ryan directly, the claims attorney that we're working with. And he's going to let us know how that proceeds, as far as getting a response on it. And then, then we'll see where that goes.

If he reaches an agreement with them, and they're going to cover it, then great, obviously. And then...but if not, he will reach back to us, and we can have a further conversation about it.

I just wanted to give you an update about it. Ok. I will let Angie know as well. If you want to discuss this, give me a call on my office or cell line. Thanks. Talk to you soon. Bye.

66. Mr. Estey did not explain why Mr. Cavalier, who has "ultimate responsibility for all aspects of claims handling for [Safeonline's and Ascent's] core classes including cyber, technology E&O, media liability and intellectual property," would need to answer to an American law firm tasked with handling the claim for Ascent.

67. The determination of Ascent's outside claims handler, Kissel, Hirsch & Wilmer LLP, results in only \$200,000.00 of insurance coverage available under the 2014 CyberPro Insurance Policy for fraud recovery, operational reimbursement, and case management fees, in addition to amounts owed for violations of PCI DSS requirements.

68. Ascent's interpretation of the 2014 CyberPro Insurance Policy is not reasonable. Alternatively, the language of the Payment Card Industry Fines or Penalties Endorsement is ambiguous and should be construed against Ascent and in favor of coverage.

69. Hotel Monteleone has liabilities that exceed the \$200,000.00 sublimit applicable to the Payment Card Industry Fines or Penalties Endorsement. Ascent's interpretation of the 2014 CyberPro Insurance Policy has left Hotel Monteleone with uncovered losses.

70. Ascent bears the burden of proving that its interpretation of the 2014 CyberPro Insurance Policy language is the only reasonable interpretation of the language. As such, Ascent must demonstrate that this is the only reasonable interpretation of its insurance policy: losses for fraud recovery, operational reimbursement, and case management fees, even if not by "a written demand received by [Hotel Monteleone] by [Visa, MasterCard, American Express, Discover, or JCB]," are excluded from the entire 2014 CyberPro Insurance Policy, except for the terms provided under the Payment Card Industry Fines or Penalties Endorsement.

EUSTIS' OBLIGATIONS TO HOTEL MONTELEONE

71. Based on Eustis's professional expertise, including professional expertise in procuring cyber-liability insurance programs, Hotel Monteleone relied on Eustis to, among other things, review and analyze Hotel Monteleone's risks of loss, develop Hotel Monteleone's cyber-liability insurance program, review the terms and conditions of the 2014 CyberPro Insurance Policy, advise Hotel Monteleone about the terms and extent of coverage afforded by the 2014 CyberPro Insurance Policy, and procure a cyber-liability insurance policy that met Hotel Monteleone's coverage needs.

72. Hotel Monteleone had never purchased cyber-liability insurance policies from other insurance carriers. After suffering losses in the form of fraud recovery, operational reimbursement, and case management fees resulting from the cyberattack in 2013, Hotel Monteleone wanted insurance coverage for such losses. Hotel Monteleone wanted a cyberinsurance policy that would cover at least as much as the liabilities assessed as a result of the 2013 cyberattack against Hotel Monteleone in the form of operational fraud and operational reimbursement. Those liabilities were more than \$200,000.00.

73. Hotel Monteleone told Eustis that Hotel Monteleone wanted an insurance policy that would provide full coverage for losses in the form of fraud recovery, operational reimbursement, and case management fees. Hotel Monteleone told Eustis that Hotel Monteleone wanted a cyberinsurance policy that would cover at least as much as the liabilities assessed as a result of the 2013 cyberattack, and that the amount exceeded \$200,000.00.

74. Eustis told Hotel Monteleone that the 2014 CyberPro Insurance Policy would provide full coverage for losses in the form of fraud recovery, operational reimbursement, and case management fees.

75. Eustis did not tell Hotel Monteleone that the 2014 CyberPro Insurance Policy would provide only \$200,000.00 in coverage for losses in the form of fraud recovery, operational reimbursement, and case management fees.

76. Hotel Monteleone would not have agreed to purchase an insurance policy with only \$200,000.00 in coverage for losses in the form of fraud recovery, operational reimbursement, and case management fees.

77. Eustis understood that Hotel Monteleone would rely on Eustis and agreed to provide the services listed above.

78. When Eustis presented Hotel Monteleone with the proposal for the 2014 CyberPro Insurance Policy, Eustis did not note and did not inform Hotel Monteleone that Ascent would interpret the 2014 CyberPro Insurance Policy as limiting coverage for losses in the form of fraud recovery, operational reimbursement, and case management fees to \$200,000.00.

79. Eustis understood that Hotel Monteleone accepted customer credit and debit cards for payment.

80. Eustis understood that Hotel Monteleone had a cyberattack in 2013 that resulted in liabilities for fraud recovery, operational reimbursement, and case management fees and that Hotel Monteleone wanted insurance that would cover those losses in full.

81. Eustis understood that Hotel Monteleone would face liabilities should any theft, loss, or damage to Hotel Monteleone's customers' credit and debit card numbers occur.

82. Eustis understood or should have understood that, as a retailer that accepted and relied upon credit and debit card transactions for its business, Hotel Monteleone would require coverage for these losses for more than the \$200,000.00 of insurance coverage provided by the Payment Card Industry Fines or Penalties Endorsement.

83. Eustis understood that Hotel Monteleone would rely on Eustis to procure insurance coverage adequate for this risk. Eustis further understood that Hotel Monteleone required insurance coverage for losses in the form of fraud recovery, operational reimbursement, and case management fees, and Eustis undertook to secure this coverage for Hotel Monteleone. In other words, Eustis agreed to procure a primary cyber-liability insurance policy that provided \$3 million of coverage for the risk that Ascent now states is limited to just \$200,000.00.

84. Eustis was responsible for submitting and communicating Hotel Monteleone's insurance needs to the insurance marketplace, procuring an insurance policy to meet Hotel Monteleone's needs, and reviewing the terms and conditions of the policy to ensure that the

policy provided both the coverage sought by Hotel Monteleone and the coverage that Eustis represented would be provided by the 2014 CyberPro Insurance Policy.

85. Eustis failed to disclose to Hotel Monteleone that it had obtained a policy for Hotel Monteleone that could allow Ascent to assert that losses related to the theft of credit and debit card numbers would constitute loss insured under the Payment Card Industry Fines or Penalties Endorsement subject to a \$200,000.00 liability limit. It also failed to disclose that Ascent would take the position that the 2014 CyberPro Insurance Policy failed to provide adequate coverage for fraud recovery, operational reimbursement, and case management fees losses.

86. In the event that this Court determines that the fraud recovery, operational reimbursement, and case management fees are subject to the Payment Card Industry Fines or Penalties Endorsement's \$200,000.00 liability limit, Eustis failed to procure the cyber-liability insurance coverage required and requested by Hotel Monteleone. As a result, Hotel Monteleone will have incurred an uncovered loss or a loss that exceeds the liability limits of the 2014 CyberPro Insurance Policy's Payment Card Industry Fines or Penalties Endorsement.

COUNT 1 - BREACH OF CONTRACT

(Against Ascent)

Hotel Monteleone brings Count 1 of its Petition against Ascent for breach of contract and, in support thereof, states as follows:

87. Hotel Monteleone repeats each and every allegation contained in Paragraphs 1 through 70 as if fully set forth herein.

88. The 2014 CyberPro Insurance Policy is a contract that, under the Security and Privacy Liability Insuring Module 1, requires Ascent to pay **damages** and **claims expenses** that Hotel Monteleone becomes legally obligated to pay because of any **claim** arising out of an actual or alleged **security and privacy wrongful act(s)**, as those bolded terms are defined within the 2014 CyberPro Insurance Policy. The liabilities for fraud recovery, operational reimbursement, and case management fees are legal obligations to pay because of a **claim** arising out of an actual or alleged **security and privacy wrongful act**.

89. Hotel Monteleone has paid the premiums under the 2014 CyberPro Insurance Policy and complied with all conditions precedent under the 2014 CyberPro Insurance Policy.

90. The plain language of the 2014 CyberPro Insurance Policy's Security and Privacy Liability Insuring Module 1 obligate Ascent to pay all losses for fraud recovery, operational reimbursement, and case management fees resulting from the 2014 cyberattack.

91. In the alternative, the language of the 2014 CyberPro Insurance Policy is ambiguous, and must be construed against Ascent. According to the wholesale broker, the person with "ultimate responsibility for all aspects of claims handling for [Ascent's] core classes including cyber, technology E&O, media liability and intellectual property" agreed that losses for fraud recovery, operational reimbursement, and case management fees resulting from the 2014 cyberattack are covered under the 2014 CyberPro Insurance Policy's Security and Privacy Liability Insuring Module 1.

92. Ascent has breached the 2014 CyberPro Insurance Policy and its obligations arising out of the 2014 CyberPro Insurance Policy and applicable law by declining to indemnify Hotel Monteleone for more than \$200,000.00 in losses for fraud recovery, operational reimbursement, and case management fees resulting from the 2014 cyberattack.

93. Hotel Monteleone has sustained damages and will continue to sustain damages as a result of Ascent's breach of its obligations under the 2014 CyberPro Insurance Policy and applicable law. Hotel Monteleone's damages include denial of the 2014 CyberPro Insurance Policy proceeds to which Hotel Monteleone is entitled and consequential damages caused by Ascent's conduct, including, but not limited to, the loss of use of funds Hotel Monteleone has been required to expend that should have been paid by Ascent, the additional unnecessary cost caused by Ascent's breach of its obligations with respect to the adjustment of Hotel Monteleone's insurance claim and/or breach of Ascent's duty of good faith and fair dealing, the attorneys' fees and expenses incurred with prosecuting this claim, and other damages to be proven at the time of trial.

WHEREFORE, in light of above, Hotel Monteleone requests that the Court enter judgment against Ascent for the breach of contract, that the Court award Hotel Monteleone damages in an amount sufficient to compensate it for all damages resulting from the breach of

contract by Ascent, including attorney's fees, interest, and costs, and all other just and proper relief.

COUNT 2 - DECLARATORY JUDGMENT

(Against Ascent)

Hotel Monteleone brings Count 2 of its Petition against Ascent for declaratory judgment and, in support thereof, states as follows:

94. Hotel Monteleone repeats each and every allegation contained in Paragraphs 1 through 70 as if fully set forth herein.

95. Hotel Monteleone anticipates that it may be liable for further fraud recovery, operational reimbursement, and case management fees losses resulting from the 2014 cyberattack.

96. Ascent cannot prove that the only reasonable interpretation of the 2014 CyberPro Insurance Policy is that fraud recovery, operational reimbursement, and case management fees losses resulting from the 2014 cyberattack are covered only under the Payment Card Industry Fines or Penalties Endorsement.

97. Ascent's current coverage position is that fraud recovery, operational reimbursement, and case management fees losses resulting from the 2014 cyberattack are covered only under the Payment Card Industry Fines or Penalties Endorsement.

98. An actual controversy of a justiciable nature presently exists between Hotel Monteleone and Ascent concerning the proper construction of the 2014 CyberPro Insurance Policy and the rights and obligations of the parties thereto with respect to Ascent's obligations under the 2014 CyberPro Insurance Policy related to fraud recovery, operational reimbursement, and case management fees losses resulting from the 2014 cyberattack.

99. Hotel Monteleone therefore is entitled to a declaratory judgment that Ascent has an obligation to indemnify Hotel Monteleone under the Security and Privacy Liability Insuring Module for costs Hotel Monteleone incurs in connection with fraud recovery, operational reimbursement, and case management fees losses resulting from the 2014 cyberattack.

WHEREFORE, in light of the above, Hotel Monteleone requests that the Court declare that costs Hotel Monteleone incurs in connection with fraud recovery, operational

reimbursement, and case management fees losses resulting from the 2014 cyberattack are covered under the Security and Privacy Liability Insuring Module 1 of the 2014 CyberPro Insurance Policy. Hotel Monteleone requests any additional relief that the Court deems just and proper under the circumstances.

COUNT 3 – VIOLATION OF LOUISIANA REVISED STATUTES §§ 22:1892, 22:1973

(Against Ascent)

Hotel Monteleone brings Count 3 of its Petition against Ascent for vexatious refusal to pay and, in support thereof, states as follows:

100. Hotel Monteleone repeats each and every allegation contained in Paragraphs 1 through 70 as if fully set forth herein.

101. Ascent was obligated to pay the amount of any claim due any insured within thirty days after receipt of satisfactory proofs of loss from the insured or any party in interest or within thirty days after written agreement of settlement of the claim from any third party claimant.

102. Failure to make such payment within thirty days, when such failure is found to be arbitrary, capricious, or without probable cause, shall subject Ascent to a penalty, in addition to the amount of the loss, of fifty percent (50%) damages on the amount found to be due from Ascent to Hotel Monteleone, payable to Hotel Monteleone, or in the event a partial payment or tender has been made, fifty percent (50%) of the difference between the amount paid or tendered and the amount found to be due as well as reasonable attorney fees and costs. Such penalties, if awarded, shall not be used by Ascent in computing either past or prospective loss experience for the purpose of setting rates or making rate filings.

103. More than thirty days have passed since Hotel Monteleone asked Ascent to pay the fraud recovery, operational reimbursement, and case management fees losses resulting from the 2014 cyberattack.

104. More than thirty days have passed since Ascent received satisfactory proofs of loss from the insured or any party in interest or written agreement of settlement of the claim.

105. Ascent should be held subject to a penalty of fifty percent (50%) damages between the amount paid or tendered and the amount found to be due, as well as reasonable attorney fees and costs.

106. Ascent owes to Hotel Monteleone a duty of good faith and fair dealing. Ascent has an affirmative duty to adjust claims fairly and promptly and to make a reasonable effort to settle claims with the insured or the claimant, or both. If Ascent breached those duties, Ascent shall be liable for any damages sustained as a result of the breach.

107. Any one of the following acts, if knowingly committed or performed by an insurer, constitutes a breach of the insurer's duties imposed in Subsection A of Louisiana Rev. Stat. §22:1973:

- (1) Misrepresenting pertinent facts or insurance policy provisions relating to any coverages at issue.
- (2) Failing to pay a settlement within thirty days after an agreement is reduced to writing.
- (3) Denying coverage or attempting to settle a claim on the basis of an application which the insurer knows was altered without notice to, or knowledge or consent of, the insured.
- (4) Misleading a claimant as to the applicable prescriptive period.
- (5) Failing to pay the amount of any claim due any person insured by the contract within sixty days after receipt of satisfactory proof of loss from the claimant when such failure is arbitrary, capricious, or without probable cause.
- (6) Failing to pay claims pursuant to R.S. 22:1893 when such failure is arbitrary, capricious, or without probable cause.

108. In addition to any general or special damages to which a claimant is entitled for breach of the imposed duty, the claimant may be awarded penalties assessed against the insurer in an amount not to exceed two times the damages sustained or five thousand dollars, whichever is greater. Such penalties, if awarded, shall not be used by the insurer in computing either past or prospective loss experience for the purpose of setting rates or making rate filings.

109. Ascent breached the duty of good faith and fair dealing. Ascent did not adjust claims fairly or promptly and failed to make a reasonable effort to settle claims with the insured or the claimant, or both. Ascent should be held liable for the damages sustained as a result of the breach.

110. Among other things, Ascent:

- Misrepresented pertinent facts or insurance policy provisions relating to any coverages at issue by stating that resolution of the amounts related to MasterCard do not constitute a “settlement,” by rejecting the admission of the head of claims that fraud recovery losses fall under the liability section of the policy and not the Payment Card Industry Fines or Penalties Endorsement, and by stating that only the Payment Card Industry Fines or Penalties Endorsement provides coverage for the fraud recovery, operational reimbursement, and case management fees losses resulting from the 2014 cyberattack;
- Failed to pay a settlement within thirty days after an agreement was reduced to writing by refusing to pay the full amount of the fraud recovery, operational reimbursement, and case management fees losses resulting from the 2014 cyberattack;
- Failed to pay the amount of any claim due any person insured by the contract within sixty days after receipt of satisfactory proof of loss from Hotel Monteleone when such failure was arbitrary, capricious, or without probable cause by refusing to pay more than \$200,000.00 for the fraud recovery, operational reimbursement, and case management fees losses resulting from the 2014 cyberattack, stating that resolution of the amounts related to MasterCard do not constitute a “settlement,” rejecting the admission of the head of claims that fraud recovery losses fall under the liability section of the policy and not the Payment Card

Industry Fines or Penalties Endorsement, and stating that only the Payment Card Industry Fines or Penalties Endorsement provides coverage for the fraud recovery, operational reimbursement, and case management fees losses resulting from the 2014 cyberattack; and

- Failed to pay claims pursuant to R.S. 22:1893 and such failure is arbitrary, capricious, or without probable cause by refusing to pay more than \$200,000 for the fraud recovery, operational reimbursement, and case management fees losses resulting from the 2014 cyberattack, stating that resolution of the amounts related to MasterCard do not constitute a “settlement,” rejecting the admission of the head of claims that fraud recovery losses fall under the liability section of the policy and not the Payment Card Industry Fines or Penalties Endorsement, and stating that only the Payment Card Industry Fines or Penalties Endorsement provides coverage for the fraud recovery, operational reimbursement, and case management fees losses resulting from the 2014 cyberattack.

111. Hotel Monteleone has paid the premiums under the 2014 CyberPro Insurance Policy and complied with all conditions precedent under the 2014 CyberPro Insurance Policy.

112. The plain language of the 2014 CyberPro Insurance Policy’s Security and Privacy Liability Insuring Module obligate Ascent to pay fraud recovery, operational reimbursement, and case management fees losses resulting from the 2014 cyberattack in full, without a \$200,000.00 sublimit. In the alternative, the language of the 2014 CyberPro Insurance Policy is ambiguous, and must be construed against Ascent.

113. Hotel Monteleone has been damaged as a direct result of Ascent’s refusal to pay, and, in addition to its general damages, Hotel Monteleone is entitled to statutory damages as set forth in Louisiana Revised Statutes §§ 22:1892, 22:1973, as well as its attorneys’ fees.

WHEREFORE, in light of the above, Hotel Monteleone requests that the Court enter judgment in favor of Hotel Monteleone to compensate for its damages arising from Ascent’s bad

faith and award Hotel Monteleone statutory damages as set forth in Louisiana Revised Statutes §§ 22:1892, 22:1973, as well as its attorneys' fees, interest, and costs. Hotel Monteleone requests any additional relief that the Court deems just and proper under the circumstances.

COUNT 4 - NEGLIGENT FAILURE TO PROCURE INSURANCE COVERAGE

(Against Eustis)

Hotel Monteleone brings Count 4 of its Petition against Eustis for negligent failure to procure insurance coverage and, in support thereof, states as follows:

114. Hotel Monteleone repeats each and every allegation contained in Paragraphs 1 through 86 as if fully set forth herein.

115. Eustis acted as an insurance agent for Hotel Monteleone in Hotel Monteleone's effort to obtain cyberinsurance that would provide coverage for losses resulting from a cyberattack.

116. Based on Eustis's professional expertise, including professional expertise in procuring cyberinsurance policies, Hotel Monteleone relied on Eustis to, among other things, review and analyze Hotel Monteleone's risks of loss, develop Hotel Monteleone's cyberinsurance program, review the terms and conditions of the 2014 CyberPro Insurance Policy, advise Hotel Monteleone about the terms and extent of coverage afforded by the 2014 CyberPro Insurance Policy, and procure a cyberinsurance policy that met Hotel Monteleone's coverage needs.

117. An insurance agent who undertakes to procure insurance for another owes an obligation to his client to use reasonable diligence in attempting to place the insurance requested and to notify the client promptly if he has failed to obtain the requested insurance.

118. Eustis had undertaken and agreed to procure insurance for Hotel Monteleone.

119. Eustis owed an obligation to Hotel Monteleone to use reasonable diligence in attempting to place the insurance requested.

120. Hotel Monteleone requested that Eustis place a cyberinsurance policy that would provide coverage for fraud recovery, operational reimbursement, and case management fees losses resulting from a cyberattack, without sublimits applicable to those amounts.

121. If Ascent's interpretation of the 2014 CyberPro Insurance Policy is correct, then Eustis did not use reasonable diligence to place the insurance requested, as the insurance is limited to only \$200,000.00 in coverage for fraud recovery, operational reimbursement, and case management fees losses resulting from a cyberattack, whereas the full policy limit is \$3 million.

122. If Ascent's interpretation of the 2014 CyberPro Insurance Policy is correct, then Eustis did not notify Hotel Monteleone promptly that Eustis had failed to obtain the requested insurance.

123. A client may recover from an insurance agent the loss the client sustains as a result of the agent's failure to procure the desired coverage if the actions of the agent warranted an assumption by the client that the client was properly insured in the amount of the desired coverage.

124. If Ascent's interpretation of the 2014 CyberPro Insurance Policy is correct, then Hotel Monteleone will suffer losses above the \$200,000.00 in coverage, and Hotel Monteleone should be able to recover from Eustis for the amounts over \$200,000.00 for fraud recovery, operational reimbursement, and case management fees losses resulting from the 2014 cyberattack. Eustis represented that it obtained a cyberinsurance policy that would provide \$3 million in coverage for fraud recovery, operational reimbursement, and case management fees losses resulting from a cyberattack. If Ascent's interpretation of the 2014 CyberPro Insurance Policy is correct, Hotel Monteleone did not understand that only \$200,000.00 of insurance would be available for fraud recovery, operational reimbursement, and case management fees losses resulting from a cyberattack, and the face of the policy suggested that the desired coverage had been obtained. Those actions warranted an assumption by Hotel Monteleone that Hotel Monteleone was properly insured in the amount of the desired coverage for fraud recovery, operational reimbursement, and case management fees losses resulting from a cyberattack.

125. An insurance broker is charged with knowledge of the types of insurance policies available, their terms, and their coverage parameters. Where the broker does not understand the policy, reasonable diligence requires the broker to discover what the insurance company intended to include and exclude under the policy's language.

126. Eustis should be charged with knowledge of the types of insurance policies available, their terms, and their coverage parameters in the context of insurance for losses resulting from a cyberattack.

127. If Eustis did not understand Ascent's 2014 CyberPro Insurance Policy, reasonable diligence required Eustis to discover what Ascent intended to include and exclude under the insurance policy's language.

128. If Ascent's interpretation of the 2014 CyberPro Insurance Policy is correct, then Eustis failed to understand and exercise reasonable diligence to understand what coverage would be provided under the 2014 CyberPro Insurance Policy.

129. Hotel Monteleone did not discover, and could not have discovered, Eustis' failure(s) until Ascent asserted on or about May 15, 2015, at the earliest, that there could be only \$200,000.00 in coverage for fraud recovery, operational reimbursement, and case management fees losses resulting from the 2014 cyberattack.

130. As a result, if Ascent's interpretation of the 2014 CyberPro Insurance Policy is correct, Hotel Monteleone has suffered and could suffer further damages as uncovered loss above the \$200,000.00 available under the 2014 CyberPro Insurance Policy's Payment Card Industry Fines or Penalties Endorsement.

WHEREFORE, in light of the above, Hotel Monteleone requests that the Court enter judgment in favor of Hotel Monteleone in an amount to be determined at trial to compensate for its damages arising from Eustis' negligent failure to provide insurance coverage. Hotel Monteleone requests any additional relief that the Court deems just and proper under the circumstances.

COUNT 5 – BREACH OF ORAL CONTRACT

(Against Eustis)

Hotel Monteleone brings Count 5 of its Petition against Eustis for negligent failure to procure insurance coverage and, in support thereof, states as follows:

131. Hotel Monteleone repeats each and every allegation contained in Paragraphs 1 through 86 as if fully set forth herein.

132. Eustis had an oral contract with Hotel Monteleone to act as an insurance broker to obtain cyberinsurance that would provide Hotel Monteleone desired coverage for fraud recovery, operational reimbursement, and case management fees losses resulting from a cyberattack.

133. Eustis undertook an obligation to perform as an insurance broker to obtain cyberinsurance that would provide Hotel Monteleone desired coverage for fraud recovery, operational reimbursement, and case management fees losses resulting from a cyberattack.

134. If Ascent's interpretation of the 2014 CyberPro Insurance Policy is correct, then Eustis breached the oral contract because it failed to perform by failing to place the insurance requested, as the insurance is limited to only \$200,000.00 in coverage for fraud recovery, operational reimbursement, and case management fees losses resulting from a cyberattack, whereas the full policy limit is \$3 million.

135. If Ascent's interpretation of the 2014 CyberPro Insurance Policy is correct, then Hotel Monteleone will suffer losses above the \$200,000.00 in coverage, and Hotel Monteleone should be able to recover from Eustis for the amounts over \$200,000.00 for fraud recovery, operational reimbursement, and case management fees losses resulting from the 2014 cyberattack.

136. Hotel Monteleone did not discover, and could not have discovered, Eustis' failure(s) until Ascent asserted on or about May 15, 2015, at the earliest, that there could be only \$200,000.00 in coverage for fraud recovery, operational reimbursement, and case management fees losses resulting from the 2014 cyberattack.

137. As a result, if Ascent's interpretation of the 2014 CyberPro Insurance Policy is correct, Hotel Monteleone has suffered and could suffer further damages as uncovered loss above the \$200,000.00 available under the 2014 CyberPro Insurance Policy's Payment Card Industry Fines or Penalties Endorsement.

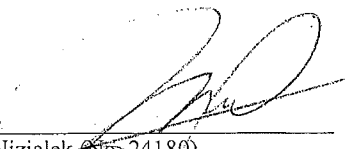
WHEREFORE, in light of the above, Hotel Monteleone requests that the Court enter judgment in favor of Hotel Monteleone in an amount to be determined at trial to compensate for its damages arising from Eustis' breach of oral contract to provide insurance coverage. Hotel Monteleone requests any additional relief that the Court deems just and proper under the circumstances.

WHEREFORE, on all claims, Hotel Monteleone requests that the Court enter judgment such other and further relief as the Court may deem just and proper.

JURY DEMAND

Hotel Monteleone respectfully prays for a trial by jury of all claims and issues so triable.

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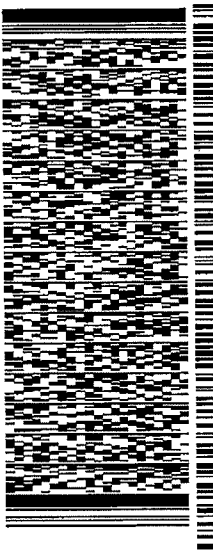
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