

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

NEW ENGLAND SYSTEMS, INC.,

Plaintiff,

v.

CITIZENS INSURANCE COMPANY OF
AMERICA,

Defendant.

Civil Action No. 3:20-cv-01743-JAM

April 1, 2022

**PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION
TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

Respectfully submitted,

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INTRODUCTION

Plaintiff, New England Systems, Inc. (“NSI”), respectfully submits this Memorandum of Law in Opposition to Defendant, Citizens Insurance Company of America’s (“Citizens”) Motion for Summary Judgment (ECF No. 48). Citizens’ Motion must be denied because there are numerous issues of material fact in dispute.

This case arises from a data breach caused by a ransomware attack on NSI’s servers, which began on June 13, 2019 (the “Data Breach”). NSI is a managed services provider that provides information technology (“IT”) support, IT strategy and consulting, and cybersecurity services to its clients, under subscription-based contracts and individual projects.¹ The Data Breach attacked NSI’s systems, and those of its clients, encrypting and preventing access to systems and files. As a result of the Data Breach and the need to perform remedial work, NSI was unable to resume its normal business operations for over 60 days and suffered a loss of business income. But when NSI made a claim to Citizens for its losses resulting from the Data Breach under its cyber insurance policy, Citizens refused to acknowledge that NSI suffered any loss of business as a result of the Data Breach and denied any obligation to pay the claim.

NSI timely filed its Complaint against Citizens on October 16, 2020, alleging breach of contract, violation of CUIPA, and breach of good faith.² On August 24, 2021, the parties participated in an unsuccessful mediation, after which the parties engaged in written discovery and depositions. The Court must deny Defendant’s Motion because the allegations in the Complaint, supported by the facts developed during discovery, demonstrate genuine issues of material fact.

¹ Pltf.’s Complaint, ¶ 5-8. A true and accurate copy of the Complaint is annexed hereto as **Exhibit A**.

² Id.

I. Statement of Facts

A. NSI suffered a Data Breach incident.

On June 13, 2019, NSI discovered its system was attacked by “Sodinokibi” ransomware, which encrypted NSI’s data and its clients’ data, and exposed to the data to a malicious third party.³ The Data Breach resulted in the loss and/or theft of data belonging to NSI and its clients.⁴ On or around June 14, 2019, within 24 hours of discovery, NSI timely notified Citizens of the Data Breach and Citizens consented to NSI self-performing work for its customers to repair and restore its system and data.⁵ NSI performed the necessary work to repair and restore its system, including isolating and eliminating the ransomware. It then spent the next several months restoring and repairing its files, its clients’ files, and their respective digital environments. Some of NSI’s clients still have servers that are inaccessible and information that could not be recovered.

B. NSI purchased insurance coverage for a loss of business income resulting from a Data Breach.

NSI purchased a Businessowner’s Insurance Policy from Citizens, Policy No. OBE D918330-00, effective from May 15, 2019 to May 15, 2020 (“the Policy”).⁶ The Policy contains a Data Breach Coverage Form, No. 391-1140 01/15, with an aggregate limit of \$250,000.

The Data Breach Coverage Form covers “Data Breach Expense Coverages and Additional Expense Coverage” for a ‘data breach’ that is discovered during the policy period and is reported within 30 days of discovery of the ‘data breach.’⁷ The Policy defines Data Breach as, in relevant part, “The failure or violation of the security of your ‘system’ including the impairment or denial

³ See Id. at ¶ 16.

⁴ Id. at ¶ 17.

⁵ Id. at ¶ 19.

⁶ A true and accurate copy of the Policy is annexed hereto as **Exhibit B**.

⁷ Ex. B, Section (A)(b).

of access to your ‘system,’ including a ‘Cyber Attack’ [...] which damages or harms your ‘system’ or the ‘system’ of a third party for whom you provide ‘services’ for a fee.”⁸

The Data Breach Expense Coverage Form also includes “Cyber Business Interruption and Extra Expense,” which covers “actual loss of ‘business income’ and additional ‘extra expense’ incurred by you during the ‘period of restoration’ directly resulting from a ‘data breach’ which is first discovered during the ‘policy period’ and which results in actual impairment or denial of service of ‘business operations’⁹ during the policy period.”¹⁰ The term “actual impairment” is not defined.

The Data Breach Coverage Form defines the “Period of Restoration” as “[t]he period of time that begins... (1) for ‘Extra Expenses’, immediately after the actual or potential impairment or denial of ‘business operations’ occurs; and (2) for the loss of ‘Business Income’, after 24 hours or the number of hours shown as the Cyber Business Interruption Waiting Period Deductible in the Schedule on this Coverage Form, whichever is greater, immediately following the time the actual impairment or denial of ‘business operations’ first occurs.”¹¹

“The ‘Period of Restoration’ ends on the earlier of the following: (1) the date ‘business operations’ are restored, with due diligence and dispatch, to the condition that would have existed had there been no impairment or denial; or (2) Sixty (60) days after the date the actual impairment or denial of ‘business operations’ first occurs.”¹² The Data Breach occurred on June 13, 2019.¹³ Because NSI sustained its losses between June 13, 2019 and August 12, 2019, NSI’s claims occurred within the 60-day Period of Restoration.

⁸ Id. at Section (F)(d).

⁹ Id. at Section (A)(b)(1)(b)(5). “Business operations” is defined as “your usual and regular business activities.” Id. at Section (F)(5).

¹⁰ Ex. B, Section (F)(19)(a).

¹¹ Id. at Section (F)(19)(b).

¹² Ex. A, ¶ 16.

C. As a Result of the Data Breach, NSI Suffered an Impairment of Business Operations and Suffered a Loss of Business Income.

During the Period of Restoration, NSI's efforts were focused on remediating issues resulting from the Data Breach instead of its normal business operations. Because it could not spend time performing the work in its service agreements or paid projects, NSI lost business income. Several of NSI's clients stopped doing business with NSI as a direct result of the Data Breach. These include Avon Public Library, Albert Brothers, Community Housing Advocates, Star Struck, LLC, and Wolcott Public Schools. NSI's records show that its employees spent 468 hours restoring those six clients' systems alone.¹³

Avon Public Library (the "Library") terminated its contract because of the Data Breach. Glenn Grube, the Library's representative, testified that they were "extremely disappointed" with the way NSI handled the Data Breach and believed that NSI was "partly responsible" for the Data Breach.¹⁴ The Library was unhappy with the speed with which NSI fixed the issues caused by the ransomware,¹⁵ but they "had a good relationship" with NSI prior to the Breach and "[t]he services they provided were on par with what [they] were paying."¹⁶ The Library terminated its contract in November 2019, and services ceased in December 2019.¹⁷ The executed contract between NSI and the Library contained an automatic renewal provision. When the Library cancelled its contract in November 2019, 26 months remained on the contract, resulting in \$38,571 of lost income for NSI.

¹³ "Clients" Time Sheet, NSI000355 (attached hereto as **Exhibit P**); 156 hours restoring Albert Brothers, 112 restoring Wolcott Public Schools, 72 restoring United Steel, 50 hours restoring Star Struck, 47 hours restoring Community Housing, and 31 hours restoring Avon Public Library. See also McDonald Dep. 72:1 – 74:25 (Ex. N).

¹⁴ Grube Dep. 33:1-15 (attached hereto as **Exhibit Q**).

¹⁵ Id.

¹⁶ Id. at 19:18-23.

¹⁷ Id. at 27:12-13.

Albert Brothers, Inc. (“Albert Brothers”) terminated its contract because of the Data Breach. Albert Brothers’ representative, Timo Makkonen, testified that Albert Brothers would not have canceled their contract with NSI but for the Data Breach,¹⁸ and that Albert Brothers had not pursued other service providers until the Data Breach occurred.¹⁹ Albert Brothers had a 12-month contract with NSI that would have expired on October 1, 2019,²⁰ but Albert Brothers cancelled its contract effective in August 2019. Thus, NSI lost income for two months of the Albert Brothers contract, valued at \$8,100. Additionally, NSI quoted Albert Brothers for an Office 365 e-mail migration on or about May 6, 2019,²¹ but as a result of the Data Breach, Albert Brothers did engage NSI to perform that.²² As a result of the cancelled contract and lost project, NSI lost \$23,800 it would have earned from Albert Brothers.

Community Housing Advocates (“CHA”) did not renew its contract with NSI due to the Data Breach. CHA’s contract with NSI expired on August 21, 2019,²³ and Kathleen Shaw, its representative, testified that she was unaware of any conversations about terminating services with NSI prior to the Data Breach.²⁴ CHA was not happy with NSI’s response to the Data Breach, and following the Breach, CHA retained a new IT vendor in July 2019.²⁵ Ms. Shaw confirmed that the Data Breach was the “major reason” for canceling the contract with NSI.²⁶ CHA’s contract with NSI was due to be renewed in August 2019, and but for the Data Breach, the contract would have

¹⁸ Makkonen Dep. 28:19-29:11, 36:9 – 37:14 (attached hereto as **Exhibit R**).

¹⁹ Id. at 36:9 – 37:14.

²⁰ Id. at 35:25 – 36:8.

²¹ Id. at 38:24 – 39:18.

²² Id. at 40:3-41:9 (“as a result of the breach we did not continue with any of the services or projects with NSI, including this one.”).

²³ Shaw Dep. 53:12-15 (attached hereto as **Exhibit S**).

²⁴ Id. at 54:1-13.

²⁵ Id. at 61:3 – 62:8.

²⁶ Id. at 64:13-22.

been renewed. Therefore, as a direct result of the Data Breach, NSI lost \$105,840 when CHA failed to renew its contract with NSI.

Star Struck, LLC (“Star Struck”) terminated its contract because of the Data Breach. Keith Sessler, the President of Star Struck, testified that he personally made the decision to terminate the contract with NSI, and that he did so by letter to Tom McDonald on August 1, 2019.²⁷ Star Struck had considered suing NSI for the Breach, and they “felt that [they] needed a company that knew what they were doing, that were protecting [Star Struck] properly and that [they] wouldn’t be hit by ransomware.”²⁸ He stated that “the main reason” for cancellation “was the attack.”²⁹ Mr. McDonald testified that upon cancelation, Star Struck stated that they had paid NSI to protect Star Struck from viruses, not give them viruses.³⁰ Star Struck’s contract with NSI contained an automatic renewal provision,³¹ and Star Struck continued to work with NSI after renewal in April 2019.³² Mr. Sessler testified he cancelled the contract for cause.³³ When Star Struck canceled its contract on August 1, 2019 because of the Data Breach, Mr. Sessler was aware that there were 32 months remaining on the contract term. Therefore, NSI lost \$104,000, the remaining balance of Star Struck’s contract as a direct result of the Data Breach.

Wolcott Public Schools (“Wolcott”) terminated its relationship with NSI because of the Data Breach.³⁴ Its superintendent, Dr. Gasper, testified that while Wolcott was seeking to hire an in-house IT director prior to the Breach, it intended to retain NSI on a smaller scale for approximately \$7,000 per year to coordinate projects with the in-house employee.³⁵ This proposed

²⁷ Sessler Dep. 27:8-19 (attached hereto as **Exhibit T**).

²⁸ Id. at 30:20 – 31:5.

²⁹ Id. at 38:18 – 39:6.

³⁰ McDonald Dep. 212:25 – 213:6 (Ex. N).

³¹ Sessler Dep. 20 (Ex. T).

³² Id. at 22:7-8.

³³ Id. at 36:1 – 37:18.

³⁴ Gasper Dep. 87:10-21 (attached hereto as **Exhibit U**).

³⁵ Id. at 36:1 – 37:22.

arrangement with NSI was presented to the Board of Education in January 2019,³⁶ but the plan was canceled because of the Data Breach.³⁷ Thus, at minimum, NSI lost \$7,000 income but for the Data Breach.

D. Citizens Failed to Investigate and Wrongfully Denied NSI’s Claim for Business Interruption.

On June 14, 2019, the day immediately following the initiation of the Data Breach, NSI reported its claim under the Policy (“Claim”).³⁸ On June 19, 2019, Citizens acknowledged NSI’s claim for first-party losses resulting from the Data Breach,³⁹ but strategically limited its investigation to dodge a business interruption claim. On June 27, 2019, Citizens’ adjuster Christopher Guittar emailed NSI to explain the coverage available under NSI’s Policy.⁴⁰ But Mr. Guittar failed to identify the Policy’s business interruption coverage.⁴¹ He also failed to request information from NSI that would allow him to determine whether NSI sustained a business interruption, and whether coverage would have applied claim.⁴²

When NSI, through its insurance broker, asked about business interruption several weeks later, it was told the coverage did not apply.⁴³ Mr. Guittar told NSI, absent any evidence to support such a finding, that NSI never sustained a business interruption.⁴⁴ Citizens incorrectly stated that the Policy required a “shutdown” of business, even though the Policy requires only an

³⁶ Id. at 38:1-22.

³⁷ Id. at 87:10-21.

³⁸ Id. at ¶ 16.

³⁹ June 19, 2019 Email Guittar to McDonald (attached hereto as **Exhibit C**); see also, June 17, 2019 Email Kellerman to Cormier (attached hereto as **Exhibit D**).

⁴⁰ June 27, 2019 Email Guittar to McDonald (attached hereto as **Exhibit E**).

⁴¹ See id.

⁴² Id.

⁴³ September 3, 2019 email from Barber to McDonald (attached hereto as **Exhibit X**).

⁴⁴ Id.

“impairment” of normal business operations.⁴⁵ Citizens never requested any information to determine whether NSI’s business was “impaired” as a result of the Data Breach.

On December 19, 2019, NSI demanded that Citizens pay for its first-party cyber business interruption losses incurred due to the Data Breach.⁴⁶ On January 28, 2020, after forcing NSI to retain counsel to pursue its claim, and despite failing to inform NSI of the existence of business interruption coverage available, and without requesting information from NSI that would support such a claim, Citizens wrongfully denied coverage for the Claim.⁴⁷ On or around April 20, 2020, NSI provided additional information and documents to support its claim for business interruption losses to Citizens, and again demanded that Citizens make payments pursuant to the Policy.⁴⁸ On June 8, 2020, Citizens denied coverage for the Claim again.⁴⁹ To date, Citizens has grossly disregarded NSI’s interests and has not issued any payment towards NSI’s first-party cyber business interruption claim.⁵⁰

II. Standard of Review

It is well-settled that when deciding a motion for summary judgment, the trial court must “assess the record in the light most favorable to the non-movant and draw all reasonable inferences in its favor.”⁵¹ To prevail on a motion for summary judgment, the moving party must show “that there is no genuine dispute as to any material fact” and that the moving party “is entitled to judgment as a matter of law.”⁵² “[E]ven when [the non-movant] comes forth with nothing, summary judgment must be denied if the facts supporting the motion do not establish the

⁴⁵ Id.

⁴⁶ December 19, 2019 Letter from SDV (attached hereto as **Exhibit G**).

⁴⁷ January 28, 2020 Letter from Conway Stoughton (attached hereto as **Exhibit I**); see also, Ex. E.

⁴⁸ April 20, 2020 Letter from SDV (attached hereto as **Exhibit J**).

⁴⁹ June 8, 2020 Letter from Conway Stoughton (attached hereto as **Exhibit K**).

⁵⁰ Ex. A, ¶ 34.

⁵¹ Mendillo v. Prudential Ins. Co. of Am., 156 F. Supp. 3d 317, 336 (D. Conn. 2016); see also Weinstock v. Columbia Univ., 224 F.3d 33, 41 (2d Cir. 2000).

⁵² FED. R. CIV. P. 56(a).

nonexistence of such an issue.”⁵³ Summary judgment can be granted “only when reasonable minds could not differ as to the import of the evidence.”⁵⁴

If a defendant can sustain its burden, which Citizens cannot in the Motion before this Court, the burden of proof shifts to the nonmoving party, who must raise a genuine issue of material fact.⁵⁵ “[S]ummary judgment is to be denied where there exist genuine issues of fact and inferences of mixed law and fact to be drawn from the evidence before the court.”⁵⁶ Notably, “An issue is genuine ... if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. A material fact is one that would affect the outcome of the suit under the governing law. Only those facts that must be decided in order to resolve a claim or defense will prevent summary judgment from being granted.”⁵⁷

Regarding damages specifically, “[a] defendant may prevail on a motion for summary judgment where the plaintiff fails to provide evidence of damages, especially where damages are an essential element of a cause of action, such as breach of contract.”⁵⁸ However, a defendant can only prevail on a motion for summary judgment as to a damages claim where there is no basis at all for a plaintiff’s damages; simply reiterating the claims in a complaint or providing self-serving

⁵³ United Food & Comm. Workers Local 919 v. Ottaway Newspapers, Inc., 1991 WL 328466, *1, quoting Bloomgarden v. Coyer, 479 F.2d 201, 206 (D.C. Cir. 1973).

⁵⁴ Bryant v. Maffuci, 923 F.2d 979, 982 (2d Cir. 1991), cert. denied, 502 U.S. 849 (1991).

⁵⁵ Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986); United Oil Co. v. Urban Redevelopment Comm’n of City of Stamford, 158 Conn. 364, 379 (1969) (citation omitted).

⁵⁶ Id.

⁵⁷ Mendillo v. Prudential Ins. Co. of Am., 156 F. Supp. 3d 317, 336 (D. Conn. 2016) (internal citations and quotation marks omitted).

⁵⁸ Indep. Ins. Serv. Corp. v. Hartford Life Ins. Co., 472 F. Supp. 2d 183, 192 (D. Conn. 2007), quoting Maier-Schule GMC, Inc. v. General Motors Corp., 154 F.R.D. 47, 56 (W.D.N.Y.1994).

testimony is insufficient to survive a motion for summary judgement.⁵⁹ NSI's clients have rendered extensive deposition testimony showing, at minimum, "some basis" for NSI's damages claim.⁶⁰

III. Argument

A. Citizens promised to cover NSI's loss of business income incurred during the period of restoration resulting from a data breach that resulted in an actual impairment or denial of business operations.

The Data Breach caused a covered impairment or denial of NSI's business operations which resulted in loss of business income to NSI. The nature of business interruption claims requires a fact-intensive analysis. The Second Circuit has held that "factual disputes surround the issues" related to business interruption claims, such that summary judgment is not proper.⁶¹ In Zurich v. ABM Indus. Inc., 397 F.3d 158 (2d Cir. 2005), the court reversed a granting of summary judgment by the Southern District of New York against an insured seeking business interruption coverage because too many factual issues remained.⁶² Zurich had sought declaratory judgment as to its obligation to cover the business interruption losses incurred by a business located at the World Trade Center during the September 11, 2001 terrorist attacks.⁶³ Zurich had covered some of the business interruption claim which resulted from the WTC building's destruction, but argued that coverage was limited to only those losses at the site.⁶⁴ The insured had claimed losses outside the site, including expenses incurred through increased union negotiations, unemployment claims, and suspended operations at the insured's 34 other Manhattan locations due civil orders.⁶⁵ The

⁵⁹ See Indep. Ins., 472 F. Supp. 2d at 192-93 (citing granting of summary judgment where "the plaintiff had 'produced absolutely no evidence in its opposition to defendant's motion for summary judgment to support its claim for damages' other than the allegations in its complaint.").

⁶⁰ Id. at 193 (denying motion for summary judgment finding that expert reports alone "provide[d] **some basis** for the 50 million solicitation volume assumption such that it cannot say that [plaintiff]'s damages claim is purely speculative.") (Emphasis added).

⁶¹ See Zurich Am. Ins. Co. v. ABM Indus., Inc., 397 F.3d 158, 164 (2d Cir. 2005).

⁶² Id. at 171, 173.

⁶³ Id. at 161.

⁶⁴ Id. at 163.

⁶⁵ Id.

insured sought coverage for these claims under the Extra Expense and Civil Authority coverage available under its Business Interruption insurance.⁶⁶ The Court granted Zurich's motion for summary judgment, finding no business interruption coverage beyond the lost income "resulting from the destruction of the World Trade Center space that [the insured] itself occupied or caused by the destruction of [insured's] own supplies and equipment located in the World Trade Center."⁶⁷

On appeal, the Second Circuit vacated and remanded, reasoning that the insured might be entitled to Extra Expense coverage, but it was "not clear at this point, however, that summary judgment in [the insured's] favor is appropriate on the Extra Expense issue because there [was] no finding as to the causation requirement."⁶⁸ Here too, NSI has alleged that the Data Breach caused NSI's claimed losses, a fact that Citizens has disputed thus far, including in its motion for summary judgment; until this material fact is determined, summary judgment is not appropriate.

The Southern District of New York Court likewise remanded the question of civil authority coverage because factual issues remained.⁶⁹ As noted above, the insured had 34 Manhattan locations which it could not operate due to New York City civil orders after the attacks.⁷⁰ The Court found that there was no civil authority coverage because "the insured's loss of business income was caused by the destruction of the WTC, and thus would have occurred even if no orders of civil authorities prohibited access to the WTC."⁷¹ The Second Circuit disagreed, finding that the destruction alone would not have impacted the 34 locations aside from the WTC, and therefore the suspension at those locations would not have occurred but for the civil orders.⁷² The court's final determination, though, was that a factual dispute remained as to whether the civil orders or

⁶⁶ Id.

⁶⁷ Id.

⁶⁸ Id. at 170.

⁶⁹ Id. at 171.

⁷⁰ Id. at 163.

⁷¹ Id. at 171.

⁷² Id.

the insured's own policies after the attacks impaired those additional locations' operations.⁷³ Here too, factual disputes permeate the question of whether the Data Breach caused NSI's impairment of its business operations. With this material fact still in dispute, summary judgment is not appropriate.

i. Whether NSI suffered loss of business income is a material issue of fact.

NSI suffered a loss of business income as a result of the Data Breach. According to the Policy, "business income" means the "Net Income (Net Profit or Loss before income taxes) that would have been earned or incurred had there been no impairment or denial of 'business operations' due to a covered 'data breach' and continuing normal operating expenses incurred, including payroll."⁷⁴

In response to Citizens' discovery requests, NSI produced its tax returns⁷⁵ and profit and loss statements for the years 2017, 2018, 2019, and 2020. These documents demonstrate changes in income for NSI over the course of a four-year period. Citizens disputes the fact that these statements show income lost as a result of the Data Breach, stating that NSI made a profit in 2019. However, in his deposition, Tom McDonald, CEO of NSI, testified that an analysis of NSI's finances showed a clear decline in its net income from 2018 to 2019 as a result of the Data Breach.⁷⁶ These financial statements and testimony clearly show a genuine dispute in the case that is critical to adjudication of NSI's claim for loss of business income.

⁷³ Id.

⁷⁴ Ex. B, Section (F)(4).

⁷⁵ NSI Tax Returns from 2018 and 2019 (attached hereto as **Exhibit L & M**).

⁷⁶ McDonald Dep. 158:3-19 (attached hereto as **Exhibit N**).

ii. Whether NSI's loss of business income was the result of the Data Breach is an issue of fact.

The parties dispute whether NSI's loss of business income was caused by the Data Breach. NSI's claim for lost income from specific canceled contracts is soundly supported by the record. Representatives from five of NSI's former clients testified that their respective businesses canceled their contracts with NSI because of the Data Breach. These clients stated the Data Breach caused them to lose faith in NSI's abilities and they did not believe NSI handled the Data Breach well. Citizens disputes the fact that these customers canceled their contracts with NSI because of the Data Breach, which is in direct contravention of the testimony. Dispute exists regarding this crucial issue of material fact that is indispensable to NSI's claim for coverage.⁷⁷

Additionally, written discovery in this case supports NSI's claims for damages. Notably, Citizens' own document production, which includes Citizens' claims file, confirms that NSI diligently communicated its losses from the Data Breach to Citizens. Citizens' call logs and email communications with NSI include discussions of damages, such that Citizens was clearly aware that the Data Breach had an impact on NSI's systems. Nevertheless, Citizens turned a blind eye to the fact that the Data Breach could negatively affect NSI's business. It never sought details from NSI, it never informed NSI of what documentation Citizens would need to support a claim for business income losses, and when NSI made such a claim, Citizens denied same.

Between the third-party document production and testimony confirming IT problems, delays, and restoration work that NSI performed after the Data Breach, Mr. McDonald's deposition testimony, and NSI's own document production, a genuine dispute exists as to material facts at the

⁷⁷ See Sikorsky Int'l Operations, Inc. v. Babcock Mission Critical Services, 2021 WL 6118730, *3 (D. Conn. 2021) (finding that Sikorsky offered sufficient evidence during discovery to demonstrate existence of a genuine dispute as to material fact).

core of NSI's claims for losses due to the Data Breach, such that summary judgment is inappropriate.

iii. Whether NSI suffered an actual impairment or denial of service of its business operations for over 60 days as a result of the Data Breach is an issue of fact.

During the 60-day period of restoration following the Data Breach, NSI was unable to perform its usual and regular business activities as it would have done had there been no impairment or disruption by the Data Breach; specifically, NSI was unable to perform contracted services and projects for its clients.⁷⁸ In lieu of same, NSI worked tirelessly to recover both its own systems and those of several of its clients after the Data Breach.⁷⁹ As a result, NSI could not perform the work quoted in its Master Services Agreements with numerous clients, such as e-mail migrations, installation/upgrade to virus protection, or desktop upgrades, because NSI's employees were engulfed by repair and restoration efforts for its clients. The Data Breach most notably impacted the systems at the following entities which, at the time of the Data Breach, were clients of NSI: Avon Public Library, Albert Brothers, Community Housing Advocates, Star Struck, LLC, United Steel, and Wolcott Public Schools.⁸⁰

After 60 days, NSI still had not resumed its usual and regular business activities.⁸¹ NSI was unable to restore all of its clients' files and servers, and some of NSI's clients had to pay a ransom in order to have their data released.⁸² As NSI's CEO testified as NSI's designated witness pursuant to Fed. R. Civ. P. 30(b)(6), following the Data Breach, NSI diverted all its resources and time to restoring its customers' systems, despite the fact that its own systems had also been encrypted.⁸³

⁷⁸ Ex. A, ¶ 23.

⁷⁹ McDonald Dep. 93:5 – 94:6 (Ex. N).

⁸⁰ Ex. A, ¶ 26.

⁸¹ See McDonald Dep. 81:7-24 (Ex. N).

⁸² Id. at 81:7-24.

⁸³ Id. at 93:5 – 94:6.

It is estimated that 38-42 of NSI's clients were impacted by the Data Breach,⁸⁴ and not all clients were restored at the same time, as clients were impacted in different ways and to different extents. NSI had to tailor its restoration efforts to suit the damage done to each client.⁸⁵ For example, Jeff Godin of United Steel testified, “[W]hatever it was that they were working on that wasn't directly related to restoring our service and getting us back up and running, I'm sure that I told them to stop and focus completely on getting us up and running again. [...] If I caught them working on something else, I wouldn't have taken it well.”⁸⁶

As discussed more fully above, several of NSI's clients stopped doing business with NSI altogether as a direct result of the Data Breach, including Avon Public Library, Albert Brothers, Community Housing Advocates, Star Struck, LLC, Wolcott Public Schools. NSI's records show that its employees spent 468 hours alone restoring those six clients' systems.⁸⁷ When these clients cancelled their service relationships with NSI, NSI suffered a significant loss of income, which impacted its business long after the Data Breach.

After the Data Breach, NSI was only able to provide limited services for its clients – beyond restoration work due to the virus – for “over six months.”⁸⁸ Contrary to what Citizens posits, there is no specific date when the effects of the Data Breach were eradicated. In fact, Mr. McDonald testified that it was “over a year before NSI got back to some semblance of normalcy” and that NSI is still dealing with the effects of the Data Breach today.⁸⁹ For some clients, remediation “took

⁸⁴ Id. at 79:16-21.

⁸⁵ Id. at 78:16-21.

⁸⁶ Godin Dep. 55:22 – 56:1 (attached hereto as **Exhibit O**).

⁸⁷ “Clients” Time Sheet, NSI000355 (attached hereto as **Exhibit P**); 156 hours restoring Albert Brothers, 112 restoring Wolcott Public Schools, 72 restoring United Steel, 50 hours restoring Star Struck, 47 hours restoring Community Housing, and 31 hours restoring Avon Public Library. See also McDonald Dep. 72:1 – 74:25 (Ex. N).

⁸⁸ McDonald Dep. 79:16 – 80:12 (Ex. N).

⁸⁹ Id. at 80:6-12.

well over a year.”⁹⁰ Mr. McDonald described the labor, patience, and persistence required to restore clients after the Data Breach:

If a client chose to pay a ransom, if a client chose to work around the impact of the virus for a period of time and then later on determine that wasn't the right thing or they needed some information or something like that and then it would come back and you would also have situations where it wasn't like you could walk around an office and there be a red light and a green light on computers to tell you where the virus was and wasn't. So over a period of time, you think you would get everything and then someone was on maternity leave and came back, and then you had to do some remediation, or they needed something that they didn't think anyone needed and you had to go find it, and it was corrupt, or it was encrypted and had to be restored.⁹¹

Mr. McDonald consistently testified that the remediation work was not simple, and that one cannot definitively identify and “end date.”

In light of the foregoing, Citizens’ position that NSI did not suffer an “actual impairment or denial” of its business, simply because NSI worked tirelessly to recover its clients’ systems, neglects the Policy language and ignores the facts developed to date. Inherent in the Cyber Business Interruption and Extra Expense coverage, which affords coverage for losses sustained during a “period of restoration,” is the fact that during that time, the insured was unable to conduct its business the way it otherwise would do absent the disruption of the subject “data breach.”⁹² While diverting all its resources and personnel to restoration and recovery efforts during the period of restoration, NSI was unable to perform its contracted obligations for its clients (its “business operations”) in the way it would have done had the Data Breach not occurred.⁹³ The record plainly

⁹⁰ Id. at 80:20-21.

⁹¹ Id. at 81:7-24.

⁹² See, Ex. A, Section F(19)(b)(1).

⁹³ See McDonald Dep. 81:7-24 (ex. N); see also Godin Dep. 55:22 – 56:1 (Ex. O).

indicates that the Data Breach caused an actual impairment to NSI's system and its business that lasted at least 60-days.

B. Genuine issues of material fact exist as to NSI's claim against Citizens for bad faith.

Genuine issues of material fact exist regarding NSI's claims against Citizens for acting in bad faith in its investigation and adjustment of NSI's Claim. "Whether a party has acted in bad faith is a question of fact,"⁹⁴ and, therefore, summary judgment is only appropriate if there is no issue of material fact in dispute. Further, summary judgment is not appropriate on a bad faith claim against an insurer where, as here, the parties dispute the steps the insurer took, or failed to take, to investigate the claim.⁹⁵ Here, NSI alleges (1) Citizens misrepresented the terms of the Policy and that (2) Citizens failed to conduct a reasonable investigation; specifically, it failed to request documentation from NSI pursuant to its claims adjustment policies. Citizens disagrees. These factual questions, among others, lie at the heart of NSI's bad faith claim; without a resolution of these disputed issues of fact, the Court cannot grant summary judgment.

i. Whether Citizens misrepresented the terms of the Policy is an issue of fact.

Citizens failed to inform NSI that the Policy contained business interruption coverage for an impairment of business operations as a result of the Data Breach, thereby misrepresenting NSI's available coverage. Mr. Guittar, the claims adjuster, sent an email to Mr. McDonald on June 19, 2019 regarding NSI's first party claim that listed the categories of coverage available; this email

⁹⁴ See Roberts v. Liberty Mut. Fire Ins. Co., 264 F. Supp. 3d 394, 414 (D. Conn. 2017), quoting Renaissance Mgmt. Co. v. Conn. Hous. Fin. Auth., 281 Conn. 227, 240 (2007).

⁹⁵ See Royal Ins. Co. of America v. Zygo Corp., 349 F. Supp. 2d 295, 314 (D. Conn. 2004). See also Sikorsky, 2021 WL 6118730 at *3.

does not include business interruption coverage, which Mr. Cormier confirmed during his deposition.⁹⁶

As the adjustment process continued, NSI tried to pursue coverage for the losses it incurred because of the Data Breach. Citizens refused to investigate a business interruption claim despite NSI's insurance broker, Ted Barber, requesting same.⁹⁷ On October 9, 2019, Mr. Barber wrote to Citizens, stating that Mr. McDonald sought "clarification on the definition of 'period of restoration' in regards to the first party coverage. [Mr. McDonald] feels that his business operations have not been back to normal since the loss/breach occurred."⁹⁸ Citizens responded to this request by issuing a \$35,000 check and providing no clarification, as requested, of the meaning of the Policy's terms.⁹⁹

The evidence in the record shows that Citizens disregarded NSI's rights as a policyholder and failed to inform NSI of the full extent of coverages available to it. There is dispute as to the steps which Citizens took or did not take to investigate the claim, and thus, summary judgment cannot be granted.¹⁰⁰

ii. Whether Citizens conducted a reasonable investigation is an issue of fact.

Citizens acted in contravention of its own internal claim adjustment policies in investigating NSI's first party claim. Mr. Cormier's deposition testimony confirms that Citizens

⁹⁶ June 19, 2019 email from Gittar to McDonald (attached hereto as **Exhibit V**); Cormier Dep. 41:10-13; 41:25 – 42:1-3; 47:12-14 (attached hereto as **Exhibit H**).

⁹⁷ See October 4, 2019 emails between Barber and McDonald (attached hereto as **Exhibit W**). See also September 3, 2019 email from Barber to McDonald (attached hereto as **Exhibit X**).

⁹⁸ Email from Barber to Marc DeLuca of Citizens (attached hereto as **Exhibit F**).

⁹⁹ Id. Citizens "paid NSI \$35,000 directly and in good faith with the stated understanding that said payment would fully and finally compensate NSI for its efforts in addressing the subject event." Cormier Dep. 67:17-21 (Ex. H).

¹⁰⁰ See Royal Ins., 349 F. Supp. 2d at 314. See also Sikorsky, 2021 WL 6118730 at *3.

had a practice of requesting documentation in response to business interruption claims under the Data Breach Coverage Form. Mr. Cormier, Property Claim Director at Citizens,¹⁰¹ testified:

[I]f a policyholder reports to us that they have an impairment or denial of access to their systems which resulted in, you know, downtime, cessation, you know, halt of the operations, we would request documentation from them to support that and show the loss of revenue during the period of restoration.¹⁰²

Nevertheless, Cormier repeatedly testified that Citizens did not request information or documentation from NSI related to its first-party claim for coverage.¹⁰³ Cormier confirmed that Mr. Guittar never asked for additional information or documents that would have been necessary to evaluate a claim for business interruption and extra expense coverage.¹⁰⁴ For instance, when asked about an email written by Mr. Guittar to NSI regarding the claim,¹⁰⁵ Mr. Cormier testified:

A. This appears to be a correspondence to the insured outlining relevant coverages within the data breach coverage form and other coverages within the business owner's coverage form.

* * *

Q. Can you please tell me if there's anywhere in this correspondence from Mr. Guittar to the policyholder asking for information or documents related to the cyber business interruption and extra expense coverage with the data breach expense coverage form? [...]

A. I don't see reference in this correspondence for documentation relative to income.¹⁰⁶

Instead, Citizens relied merely on NSI's conversations with the adjuster to make a coverage determination. Mr. Cormier testified that Citizens "[r]elied upon conversation from the policyholder" to form its coverage decision regarding business interruption, and never requested

¹⁰¹ Cormier Dep. 19:4-5 (Ex. H).

¹⁰² Id. at 11-17.

¹⁰³ Id. at 38:2-3; 38:22 – 39:1-2; 69:12-17.

¹⁰⁴ Id. at 44:5-13.

¹⁰⁵ June 27, 2019 Email Guittar to McDonald (Ex. E).

¹⁰⁶ Cormier Dep. 48:21 – 49:1-22 (Ex. H).

documentation.¹⁰⁷ Mr. Cormier also testified Citizens' determination regarding whether NSI's client contracts were lost due to the Data Breach was made "[o]nly through discussion between the handling adjuster and the main point of contact on the claim."¹⁰⁸ Citizens failed to perform a good faith and reasonable investigation regarding coverage available to NSI, and the record shows genuine dispute as to whether Citizens requested documentation in support of NSI's first party claim under the Policy. Given this dispute, summary judgment cannot be granted.

IV. Conclusion

WHEREFORE, in light of the foregoing, NSI respectfully requests this Court deny Citizens' Motion for Summary Judgment and grant NSI's Objection thereto.

Dated: April 1, 2022
Trumbull, Connecticut

Respectfully submitted,

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¹⁰⁷ Id. at 54:7-19

¹⁰⁸ Id. at 82:12 – 83:4.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of Plaintiff's Objection to Defendant's Motion for Summary Judgment, Local Rule 56(a)2 Statement of Facts in Opposition to Summary Judgment, and the Exhibits thereto have been electronically mailed to the following attorneys of record, pursuant to Federal Rule of Civil Procedure 5(b), on this 1st day of April, 2022:

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