UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
PALM BEACH DIVISION

CONVERGENCE TECHNOLOGIES, INC., Case No. 9:25-cv-81260-DMM

Plaintiff,

v.

BERKLEY INSURANCE COMPANY,

Defendant.
_____/

DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT

Defendant, BERKLEY INSURANCE COMPANY, by and through the undersigned counsel, files this Motion to Dismiss Plaintiff's Complaint, and in support thereof states as follows:

I. INTRODUCTION

This matter involves an insurance coverage dispute. The insuring agreement at issue covers loss resulting directly from forgeries or alterations on a limited universe of covered documents – *i.e.*, "checks, drafts, promissory notes, or similar written promises, orders or directions to pay a sum certain." Here, the insured, Convergence Technologies, Inc. ("Convergence"), claims it suffered a loss due to forged documents. However, such documents are not checks, drafts, promissory notes, or similar to checks, drafts, or promissory notes. Instead, the documents at issue here are contracts memorializing the sale of Convergence's future accounts receivable executed by someone pretending to be Convergence's CEO.

Sales contracts are simply not checks, drafts, or promissory notes, nor are they anything similar thereto. The sales contracts reflect the sale of an asset with myriad other conditions and undertakings. They are not unconditional promises nor promises to pay a sum certain – the absolute essence of negotiable instruments. Likewise, the documents cannot be "drawn by or drawn upon"

as required. Because there is no forgery on a covered document, coverage is not triggered.

Coverage cannot apply here for another reason. The policy covers only loss resulting *directly* from a forgery on a covered document. In this context, for example, a forged check or other negotiable instrument can be presented for immediate payment. The party relying on the forged document parts with its funds and thereby suffers a loss *immediately and directly*. Here, the forgeries on the sales contracts did not *immediately and directly* result in any money changing hands or any losses to be suffered by Convergence. Instead, several conditions had to be satisfied before the purchasers would be entitled to receive any funds from Convergence, including but not limited to a sale creating a receivable, a payable of such receivable, and efforts by the purchasers to collect on such sales. Due to all the events that had to occur after the forgery, but before Convergence suffered a loss, the loss did not (and could not) result *directly* from the forgery.

II. STATEMENT OF FACTS

Convergence sought coverage for its claimed loss to Berkley Insurance Company ("Berkley") under Commercial Crime Policy No. BCCR-45004183-22 (the "Policy") issued by Berkley to Convergence for the Policy Period of January 5, 2023, to January 5, 2024 (the "Claim"). *See* Exhibit 2, Policy (attached as Ex. A to Plaintiff's Complaint). For the reasons previewed above and discussed in more detail below, Berkley denied coverage, and Convergence has now filed this lawsuit. *See* Exhibit 1, Complaint at Law.

From September 2023 to February 2024, Convergence alleges that a fraudster, Michael Schumacher, executed various contracts with private entities ("Purchasers") by purportedly signing Convergence's CEO's name, William Kruer ("Kruer"), on behalf of Convergence (collectively, the "Sales Contracts"). *Id.* at ¶ 11. The entities with which the Sales Contracts were entered into are as follows:

1) Top Tier Capital ("Top Tier" or "Top Tier Contract"); *See* Exhibit 3
2) RBLX Funding ("RBLX" or "RBLX Contract"); *See* Exhibit 4
3) Unlimited Capital LLC ("Unlimited Capital" or "Unlimited Capital Contract"); *See* Exhibit 5
4) Mottex Capital ("Mottex" or "Mottex Contract"); *See* Exhibit 6
5) AFA Capital ("AFA" or "AFA Contract"); *See* Exhibit 7

The Sales Contracts state that they are for the "Sale of Receipts" and "THIS IS NOT A LOAN." *See* Ex. 3 at 2, Top Tier Contract; Ex. 4 at 2, RBLX Contract; Ex. 5 at 2, Unlimited Capital Contract. The Sales Contracts also state that any payments by Convergence are conditioned upon Convergence's sale of products and payment by Convergence's customers. *Id.* The Sales Contracts also contain conditions under which Convergence would not be required to pay any money at all and provide that there is no guarantee of payment under the Sales Contracts. Ex. 6 at 2, Mottex Capital Contract; Ex. 3 at 1, Top Tier Contract; Ex. 4 at 1, RBLX Contract; Ex. 5 at 1, Unlimited Capital Contract; Ex. 7 at 7, AFA Capital Contract. Finally, the Sales Contracts contain numerous other obligations, conditions, instructions, and undertakings of both parties to the Sales Contracts.[1]

Convergence alleges that after Schumacher entered into the agreements, large amounts of money were deposited into Convergence's account "without its knowledge or consent." Ex. 1 at ¶ 12. Thereafter, the Purchasers began withdrawing funds from Convergence's bank account, purportedly without Convergence noticing the withdrawals. *Id.* at ¶ 14. Convergence submitted proofs of loss to Berkley seeking coverage under Insuring Agreement A.2. – Forgery or Alteration ("Forgery Insuring Agreement") of the Policy. *Id.* at ¶ 15.

[1] To avoid being duplicative and in the interest of brevity, these numerous conditions are identified and discussed below where relevant.

> The Forgery Insuring Agreement provides coverage for:
>
> a. We will pay for loss resulting directly from "forgery" or alteration of checks, drafts, promissory notes, or similar written promises, orders or directions to pay a sum certain in "money" that are:
>
> (1) Made or drawn by or drawn upon you; or
> (2) Made or drawn by one acting as your agent;
>
> or that are purported to have been so made or drawn.
>
> For the purposes of this Insuring Agreement, a substitute check as defined in the Check Clearing for the 21st Century Act shall be treated the same as the original it replaced.

Ex. 2 at 6.

Forgery is defined as:

> the signing of the name of another person or organization with intent to deceive; it does not mean a signature which consists in whole or in part of one's own name signed with or without authority, in any capacity, for any purpose.

Ex. 2 at 17. Thus, the Forgery Insuring Agreement provides coverage for a forgery upon one of the enumerated negotiable instruments – checks, drafts or promissory notes – as well as other similar negotiable instruments, *i.e.*, written promises to pay a sum certain in money. Accordingly, Berkley advised Convergence that the allegedly forged documents do not qualify for coverage under the Forgery Insuring Agreement because they are simply commercial sales contracts rather than the specific type of documents covered thereunder. Ex. 1 at ¶ 15.

III. STANDARD OF REVIEW

Fed. R. Civ. P. Rule 12(b)(6) allows for dismissal when a plaintiff "fail[s] to state a claim upon which relief can be granted." When ruling on a Rule 12(b)(6) motion to dismiss, a court accepts all of the factual allegations in the complaint and construes those facts in the light most favorable to the plaintiff. *Driessen v. Univ. of Miami Sch. of L. Child. & Youth L. Clinic*, No. 19-21224-CIV, 2019 WL 8895221, at *2 (S.D. Fla. Apr. 2, 2019). However, a plaintiff's obligation

requires more than labels and conclusions, and "a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 555 (2007). Thus, a court is not bound to accept a legal conclusion as true where couched as a factual allegation. *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009).

On a motion to dismiss, a court may consider documents that plaintiff failed to attach to the complaint "provided that it is central to the plaintiff's claims and is undisputed in terms of authenticity." *Kuber v. Berkshire Life Ins. Co. of Am.*, 423 F. Supp. 3d 1326, 1331 (S.D. Fla. 2019) (citing *Maxcess, Inc. v. Lucent Techs., Inc.*, 433 F.3d 1337, 1340 n. 3 (11th Cir. 2005); *Horsley v. Feldt*, 304 F.3d 1125, 1135 (11th Cir. 2002)); *Harris v. Ivax Corp.,* 182 F.3d 799, 802 n. 2 (11th Cir.1999) (stating that "a document central to the complaint that the defense appends to its motion to dismiss is also properly considered, provided that its contents are not in dispute."). Stated another way, "a district court may consider extrinsic evidence when ruling on a motion to dismiss 'if [the extrinsic evidence] is (1) central to the plaintiff's claim, and (2) its authenticity is not challenged." *Dapeer v. Neutrogena Corp.*, 95 F. Supp. 3d 1366, 1371 (S.D. Fla. 2015) (citing *SFM Holdings, Ltd. v. Banc of Amer. Sec., LLC,* 600 F.3d 1334, 1337 (11th Cir.2010)).

Here, Convergence failed to attach the Sales Contracts in which Schumacher sold future receivables to the Purchasers, but this is exactly the type of document "central" to Convergence's complaint and undisputed in validity. Berkley attaches here the exact copies of the Sales Contracts that Convergence provided to Berkley in the sworn proof of loss that it submitted when seeking coverage under the Policy. These are undisputedly the documents at issue and that this Court will need to decide the legal question presented.

"[I]f the allegations of the complaint about a particular exhibit conflict with the contents of the exhibit itself, the exhibit controls." *Hoefling v. City of Miami,* 811 F.3d 1271, 1277 (11th Cir.

2016); *see Degirmenci v. Sapphire-Fort Lauderdale, LLLP*, 693 F. Supp. 2d 1325, 1341 (S.D. Fla. 2010) (same). Here, the Sales Contracts contradict Convergence's legal conclusion that they are promissory notes.

IV. ARGUMENT

A. Insuring Agreement A.2. – Forgery or Alteration Is Not Triggered.

As noted above, the Policy's Forgery or Alteration Insuring Agreement provides coverage for:

> b. We will pay for loss resulting directly from "forgery" or alteration of checks, drafts, promissory notes, or similar written promises, orders or directions to pay a sum certain in "money" that are:
>
> (3) Made or drawn by or drawn upon you; or
> (4) Made or drawn by one acting as your agent;
>
> or that are purported to have been so made or drawn.
>
> For the purposes of this Insuring Agreement, a substitute check as defined in the Check Clearing for the 21st Century Act shall be treated the same as the original it replaced.
>
> Ex. 2 at 6.

Thus, coverage applies only when loss is caused by a forgery on one of the following documents: 1) checks, 2) drafts, 3) promissory notes, or 4) similar written promises, orders or directions to pay a sum certain in "money." Such documents must be "made," "drawn by," or "drawn upon" Convergence or one acting as its agent.

1. The Sales Contracts are not covered documents.

a. The Sales Contracts are not checks, drafts, or promissory notes.

It is indisputable that the Sales Contracts are not checks or drafts. Convergence could hardly argue otherwise. Thus, the only question is whether they meet the definition of promissory notes. The Sales Contracts' express language and Florida law establish that they are not promissory

notes.

In Florida (and elsewhere), "a promissory note is an ***unconditional*** promise to pay a fixed amount of money, and as such, it is a self-authenticating negotiable instrument." *Demakis v. SunTrust Bank*, 312 So. 3d 1015, 1016 (Fla. Dist. Ct. App. 2021) (emphasis added); *see also Palma v. S. Fla. Pulmonary & Critical Care, LLC*, 307 So. 3d 860, 865 (Fla. Dist. Ct. App. 2020) (citing *Perry v. Fairbanks Capital Corp.*, 888 So. 2d 725, 727 (Fla. 5th DCA 2004)(ruling "(a) promissory note is clearly a negotiable instrument within the definition of section 673.1041(1), Florida Statutes.").

Here, the Sales Contracts are simply commercial contracts for the sale of future accounts receivables in exchange for a purchase price, dependent upon the creation of future receivables without any guarantee of payment, and subject to numerous other undertakings, instructions, and conditions. The Sales Contracts, expressly state:

> **1.9 Sale of Receipts (THIS IS NOT A LOAN)**
>
> Ex. 3 at 2, Top Tier Contract; Ex. 4 at 2, RBLX Contract; Ex. 5 at 2, Unlimited Capital Contract; *see also* Ex. 7 at 3, AFA Capital Contract (sale of Purchased Future Receipts, not the borrowing of funds); Ex. 6 at 2, Mottex Capital Contract ("Sale of Future Receipts (THIS IS NOT A LOAN)" and "Buyer assumes risk that the full Purchased Amount may never be remitted because Seller's business went bankrupt").

Further, any payments under the Sales Contracts are "conditioned upon [Convergence's] sale of products and services, and the payment therefore by [Convergence's] customers." Ex. 3 at 2, Top Tier Contract; Ex. 4 at 2, RBLX Contract; Ex. 5 at 2, Unlimited Capital Contract. Indeed, the Sales Contracts explicitly state that Convergence is not guaranteeing payment of the Purchased Amount. Ex. 3 at 1, Top Tier Contract; Ex. 4 at 1, RBLX Contract; Ex. 5 at 1, Unlimited Capital Contract. Accordingly, the Sales Contracts expressly make payment under them conditional; they are decidedly *not* an unconditional promise to pay, which they must be to qualify as a promissory note.

The Sales Contracts also cannot be presented and paid upon the faith of the documents themselves. Rather, they reflect a commercial sale between two specific parties, with various undertakings and conditions attached to the sale of receipts. In fact, the Sales Contracts explicitly warn that the Purchasers may *never* collect any money if the receivables are not paid:

> **Buyer assumes the risk that** Future Receipts may be remitted more slowly than Buyer may have anticipated or projected because Seller's business has slowed down, and the risk that **the full Purchased Amount may never be remitted because Seller's business went bankrupt or Seller otherwise ceased operations in the ordinary course of business. Buyer is buying the Purchased amounts knowing the risks that Seller's business may slow down or fail, and Buyer assumes these risks…**

(emphasis added). Ex. 6 at 2, Mottex Contract ; *see, e.g.*, Ex. 3 at 1, Top Tier Contract; Ex. 4 at 1, RBLX Contract; Ex. 5 at 1, Unlimited Capital Contract; Ex. 7 at 3, AFA Contract (payment "not intended to be, nor shall it be construed as a loan…that requires absolute and unconditional payment").

In addition to containing express warnings that the Purchasers may never receive a dime of the receivables they *hope* will be paid in the future, the Sales Contracts also contain numerous conditions. In fact, they all contain entire sections memorializing numerous other conditions, instructions, and undertakings of both Convergence and the Purchasers. These include, but are not limited to:

1) The right of Purchaser to enter the premises of Convergence without prior notice; (Ex. 6 at 4, Mottex, Section 14(c); Ex. 7 at 4, AFA Capital, Section XVII.(p);

2) The right of Purchaser to contact Convergence's employees at any time and demand immediate updates and record such conversations; (Ex. 6 at 4, Mottex, Section 14(d)); Ex. 7 at 5, AFA Capital, Section XVII.(q)

3) Convergence's obligation to allow Purchaser continual access to Convergence's bank account (by providing passwords and authorizations), so Purchaser can withdraw from that account; (Ex. 3 at 2, Top Tier, Section 1.1; Ex. 6 at 2, Mottex, Section 3; Ex. 7 at 6, AFA Capital, Section XX(a));

4) Convergence submitting to obtaining the Purchaser's approval in order for Convergence to sell its business assets, change its places of businesses, and change its business name;
(Ex. 6 at 3, Mottex, Section 13(f); Ex. 7 at 4, AFA Capital, Section XVII.(h)-(i);

These terms and conditions mean the Sales Contracts are far from a promise to pay a set sum on demand, *i.e.*, a straightforward "IOU" that is unconditional. Rather, they are a contract to effectively pawn Convergence's future customer invoices to the Purchasers in exchange for immediate cash while subjecting the Purchasers to the possibility that no money will be paid at all in return. For all of these reasons, the Sales Contracts are simply not promissory notes.

b. The Sales Contracts are not similar written promises to pay a sum certain.

Because the Sales Contracts are so plainly not actual checks, drafts, or promissory notes, Convergence has only one argument left: that the Sales Contracts are *similar* written promises to pay a sum certain like checks, drafts, and promissory notes. And in fact, Convergence seems to concede that the Sales Contracts are not similar to checks or drafts and asserts only the legal conclusion that the forged documents at issue were akin to a promissory note. Ex. 1 at ¶ 13. But this question is as straightforward as whether the Sales Contracts are *literally* promissory notes.

Checks, drafts and promissory notes are all negotiable instruments under Florida law as cited above.

Florida law defines a negotiable instrument as, in relevant part:

> an unconditional promise or order to pay a fixed amount of money, with or without interest or other charges described in the promise or order, if it:
>
> (a) Is payable to bearer or to order at the time it is issued or first comes into possession of a holder;
>
> (b) Is payable on demand or at a definite time;
>
> ***

Fla. Stat. Ann. § 673.1041.

Given this, numerous courts across the country have ruled the only documents that can qualify as "similar" to the expressly enumerated instruments covered by this insuring agreement are other types of negotiable instruments. That is, interpreting a list of specific items such as checks, drafts, and promissory notes, general words following those specific items must resemble those specific items. *Midlothian Enterprises, Inc. v. Owners Ins. Co.*, 439 F. Supp. 3d 737, 743 (E.D. Va. 2020) (ruling an email directing the payment of a sum certain does not qualify as a covered document). Non-negotiable instruments are not similar to checks, drafts, or promissory notes. *Ryeco, LLC v. Selective Ins. Co.*, 539 F. Supp. 3d 399, 408 (E.D. Pa. 2021) (ruling a wire transfer authorization form does not qualify as a covered document).

As the court ruled in *Vons Companies, Inc. v. Fed. Ins. Co.*, 57 F. Supp. 2d 933, 945 (C.D. Cal. 1998), *aff'd*, 212 F.3d 489 (9th Cir. 2000), a forgery or alteration insuring agreement covers certain types of negotiable instruments. Documents that are not interchangeable with a negotiable instrument or its equivalent are outside the scope of such an insuring agreement. *Id.* The *Vons* court explained that forgery is a covered loss due to the need for businesses to rely on negotiable instruments, in part, because they are rarely presented by the maker. *Id.* Therefore, the documents covered by the forgery insuring agreements in commercial crime policies are documents with legal effect, *i.e.*, documents that can be deposited. *Id.* Consequently, falsified invoices, purchase orders, and wire information sheets are not covered documents. *Id.* Many other courts have agreed. *See, e.g.*, *Veneman v. Travelers Cas. Ins. Co. of Am.*, No. 2022-CA-0021-MR, 2023 WL 3261555, at *7 (Ky. Ct. App. May 5, 2023) (the phrase "checks, drafts, [or] promissory notes" refers to "negotiable instruments"); *KMS Dev. Partners LP v. Fed. Ins. Co.*, 763 F. Supp. 3d 691, 699 (E.D. Pa. 2025), *appeal dismissed*, No. 25-1241, 2025 WL 2306944 (3d Cir. May 23, 2025)(same);

Discovery Land Co. LLC v. Berkley Ins. Co., 2023 WL 2503634, at *12 (D. Ariz. Mar. 14, 2023) (ruling documents without the same effect as negotiable instruments are not "similar"); (*CustomMade Ventures Corp. v. Sentinel Ins. Co.*, No. 11-10365, 2012 WL 4321060 (D. Mass. Sept. 17, 2012).

Negotiable instruments, generally, are designed to function almost like cash in that you can present them to a bank and receive a "sum certain" or "fixed amount" of funds based on the faith of the document, *i.e.*, "payable on demand" and "payable to bearer." *See* Fla. Stat. Ann. § 673.1041. In addition, negotiable instruments may not contain any undertaking or instruction other than those expressly identified in the definition of negotiable instrument. *See* Fla. Stat. Ann. § 673.1041(c).

When a person writes a check or draft, the check or draft states a specific sum of money to be paid upon presentment of the check. Likewise, a promissory note states a specific sum to be paid upon presentment to the promisor. If the document at issue does not contain a sum certain that is to be paid, then it is not similar to the enumerated documents in a forgery or alteration insuring agreement. *See, e.g., Children's Place, Inc. v. Great Am. Ins. Co.*, 2019 WL 1857118, at *4 (D.N.J. Apr. 25, 2019) (ruling a document that contained payment instructions including bank account information was not covered because it contained no specific amount to be paid). For example, where a line of credit's amount was dependent upon external contingencies, such as fluctuations based on draws and repayments, such note did not promise payment of a fixed sum certain under Florida law. *Third Fed. Sav. & Loan Ass'n of Cleveland v. Koulouvaris*, 247 So. 3d 652, 655 (Fla. Dist. Ct. App. 2018); *see also Chuchian v. Situs Investments, LLC*, 219 So. 3d 992, 993 (Fla. Dist. Ct. App. 2017) . Other "similar" items might include bearer bonds that are payable to whoever physically holds the bond certificate, a certificate of deposit that is payable to the holder

by the issuing bank, or a money order that guarantees a "sum certain" to the payee.

The Sales Contracts do not contain any promise to pay a sum certain. To the contrary, the amount of funds payable under the Sales Contracts or even whether *any* funds are ever due depends fully on the existence and amount of Convergence's future accounts receivables. They expressly provide conditions and circumstances under which any amounts paid can change or not be paid at all. The Mottex Contract, for example, states that the periodic amount to be paid is "an estimate of the Specified Percentage of your average sales revenue." Ex. 6 at 2. It also provides that such amount can be adjusted under specified conditions. *Id.* The RBLX Contract also states that the amount due under the Sales Contract can be *changed upon receiving notice that such change is necessary*. Ex. 4 at 2.

A promise to pay a *sum certain* does not contain this type of equivocating language over what amounts the promisee *may* actually receive in the end. In a standard promissory note, person A makes a binding legal commitment to pay person B a specific sum of money, not an adjustable, changeable amount that might ultimately be paid *if* "the Seller's business [does not] slow down or fail." Ex. 6 at 2, Mottex Contract. The mealy-mouthed "maybes" of the Sales Contracts do not entitle the Purchasers to any specific sum of money. They gave the Purchasers an opportunity to collect on outstanding debts if they exist—nothing more.

The Sales Contracts do not trigger coverage because they are simply commercial sales transactions that bear no similarities to negotiable instruments, *i.e.*, an unconditional promise to pay a sum certain. Instead, they merely gave the Purchasers the *hope* that they will be able to collect on the future receivables. They specifically warn the Purchasers of the risk that the receivables will never be collectible. The Sales Contracts could hardly be more distinct from a *promise* to pay a *sum certain*. The Sales Contracts are more akin to the purchase of artwork, where

the buyer hopes he can sell the piece down the road for money but has no guarantee that anyone will value the painting as he does, than they are to a promissory note that has a specific face value everyone can agree on and which can be exchanged directly for money.

c. The Sales Contracts were not, and cannot be, "made by or drawn upon" anyone.

Further underscoring that the Sales Contracts are not "similar written promises, orders or directions to pay a sum certain in 'money,'" the Policy goes on to require that those documents must be "(1) Made or drawn by or drawn upon you; or (2) Made or drawn by one acting as your agent; or that are purported to have been so made or drawn." The terms "maker" and "drawer" have specific meanings in the commercial paper context and as defined under the Uniform Commercial Code's provisions governing negotiable instruments. See *Vons Companies, Inc. v. Fed. Ins. Co.*, 57 F. Supp. 2d 933, 945 (C.D. Cal. 1998), *aff'd*, 212 F.3d 489 (9th Cir. 2000) (falsified invoices, purchase orders, wire information sheets could not be made or drawn upon by one acting as the insured's agent and thus are not covered documents); *see also Travelers Cas. & Sur. Co. of Am. v. Baptist Health Sys.*, 313 F.3d 295, 299 (5th Cir. 2002) (holding the phrases 'drawn by' and 'drawn upon' have a definite legal meaning in commercial paper context) (citing Texas' U.C.C.); *Benoit Ford LLC v. Lexington Ins. Co.*, No. 2:22-CV-06024, 2023 WL 6209342, at *6 (W.D. La. Sept. 22, 2023) (the terms "made," "drawn by," or "drawn upon" are defined in the Louisiana Commercial Code); *Parkans Int'l LLC v. Zurich Ins. Co.*, 299 F.3d 514, 517 (5th Cir. 2002) (applying Texas law) (the phrases "drawn by" and "drawn upon" have a definite legal meaning).

Florida's UCC equivalent is no different. A "maker" is "a person who signs or is identified in a note as a person undertaking to pay." Fla. Stat. Ann. § 673.1031(1)(e). A "drawer" is a "person who signs or is identified in a draft as a person ordering payment." *Id.* at (1)(b). These definitions

are found in Article 3 – Negotiable Instruments. Fla. Stat. Ann. Ch. 673, Art. 3. Accordingly, the Forgery or Alteration Insuring Agreement covers the specific negotiable instruments of checks, drafts, or promissory notes, or *similar* negotiable instruments that that can be presented, for example, to a financial institution for payment immediately, *i.e.*, drawn upon.

Here, the Sales Contracts are not a note or draft that orders payment immediately to the bearer. They have no intrinsic value and cannot be presented to a financial institution to be "drawn upon" Convergence. Indeed, the Sales Contracts are not any type of financial instrument at all. They merely consummate a sales transaction and memorialize the various conditions and terms attached to such transaction, along with the rights and obligations of the parties to that transaction. Certainly, one could not present the Sales Contracts to a bank to obtain payment in exchange.

d. The Eleventh Circuit has distinguished electronic funds transfers from negotiable instruments for purposes of a forgery insuring agreement.

The withdrawals Convergence alleges caused its loss were executed via Automated Clearing House ("ACH") transactions. See Ex. 3 at 6, Top Tier; Ex. 4 at 6, RBLX; Ex. 5 at 6, Unlimited Capital; Ex. 6 at 9, Mottex; Ex. 7 at 13, AFA Capital. ACH transactions are a form of electronic funds transfers governed by The National Automated Clearing House Association ("NACHA"). NACHA, *The ABCs of ACH*, NACHA.ORG, https://www.nacha.org/content/abcs-ach (last visited November 10, 2025). The Electronic Funds Transfer Act ("EFTA") defines an electronic funds transfer as "any transfer of funds, other than a transaction originated by check, draft, or similar paper instrument…." *See* 15 U.S.C. § 1693a(7). Accordingly, the manner in which funds were ultimately transferred further demonstrates how dissimilar the Sales Contracts are to the covered documents, *i.e.*, negotiable instruments.

The Eleventh Circuit addressed this distinction between electronic funds transfers and negotiable paper instruments in *Metro Brokers, Inc. v. Transp. Ins. Co.*, 603 Fed. Appx. 833 (11th

Cir. 2015). In *Metro Brokers*, the insured alleged a loss involving electronic funds transfers and sought coverage under a forgery or alteration insuring agreement. *Id.* at 835. The Eleventh Circuit noted that such transfers did not involve a check, draft, or promissory note. Under both federal and Georgia law, electronic funds transfers are "distinguished from – and treated differently from – fund transfers made by check, draft, or bill of exchange." *Id.* (citing 15 U.S.C. § 1693a(7) and Georgia's Uniform Commercial Code stating it does not apply to electronic fund transfers governed by the EFTA). Accordingly, such transfers cannot be characterized as involving a "written promise, order or direction to pay" that was "'similar' to the three enumerated instruments." *Id.*

As with *Metro Brokers*, the funds transfers from Convergence's bank account were electronic ACH transactions. Florida's Uniform Commercial Code also does not apply to electronic fund transfers governed by the EFTA. *See* Fla. Stat. Ann. § 670.108(1). The Sales Contracts themselves were not presented for payment. Rather, they only contained the information necessary to execute an electronic funds transfer. For all of these reasons, the Sales Contracts do not qualify as a covered instrument under the Forgery or Alteration Insuring Agreement and Plaintiff's Complaint must be dismissed.

B. <u>Convergence's loss did not result directly from any forgery on the Sales Contracts.</u>

Convergence's loss did not result directly from the Sales Contracts because they did not cause funds to be withdrawn from Convergence's bank account. The Forgery Insuring Agreement provides coverage for a loss "resulting directly" from a forgery. Ex. 2 at 6. The Eleventh Circuit has explained that "one thing results 'directly' from another if it follows straightaway, immediately, and without intervention. *Interactive Comm'ns. Int., Inc. v. Great Am. Ins. Co.*, 731 F. App'x 929, 934 (11th Cir. 2018).

In *Interactive*, fraudsters manipulated the insured's computers to allow duplicate chit redemptions that ultimately caused the insured's loss of funds. *Id.* at 944. Although the insured argued that "resulting directly" requires only proximate cause, the Eleventh Circuit ruled otherwise. *Id.* at 933-34. Rather, looking to various dictionary definitions, the Eleventh Circuit noted that "direct" means "immediate; marked by the absence of an intervening agency or influence…" and "…without deviation or interruption." *Id.* at 934. Thus, while the fraudsters' manipulation "set into motion the chain of events that ultimately led to the [insured's] loss," it did not immediately cause the loss. *Id.* at 934. The Eleventh Circuit pointed to the several intervening steps, explaining that the manipulation itself did not cause the insured's funds to be transferred. *Id.* Accordingly, the insured's loss did not result directly from the covered peril. *Id.* at 935.

Here, Convergence's loss did not result directly from any forgery upon the Sales Contracts. Upon Schumacher executing the Sales Contracts while purporting to be Convergence's CEO, no money was withdrawn from Convergence's account. Rather, the Sales Contracts merely memorialized the sales transaction and conditions thereto – no funds were transferred upon their execution, and they were not presented for payment to anyone. The ACH Authorization Forms included as appendices to the Sales Contracts only provided the banking account information for Convergence – the forms did not cause any funds to be transferred. *See* Ex. 3 at 6, Top Tier; Ex. 4 at 6, RBLX; Ex. 5 at 6, Unlimited Capital; Ex. 6 at 9, Mottex; Ex. 7 at 13, AFA Capital. Instead, the Purchasers had to take Convergence's banking information and, via the Purchasers' financial institutions, initiate ACH transactions. Upon the Purchasers' financial institutions executing the ACH transfers, Convergence's bank account was debited.

Accordingly, not only did the allegedly forged Sales Contracts not cause any transfer of money, numerous steps were necessary to ultimately effectuate any transfer from Convergence's

bank account. As with *Interactive*, even if Convergence could demonstrate that the alleged forgeries "set into motion the chain of events" that led to its loss, Convergence's allegations and the Sales Contracts demonstrate as a matter of law that its loss did not result directly from the alleged forgeries. Consequently, Convergence's Complaint must be dismissed for this additional reason.

CONCLUSION

For the foregoing reasons, Berkley's Motion to Dismiss Plaintiff's Complaint should be granted with prejudice.

Dated: November 10, 2025.

KAUFMAN DOLOWICH, LLP

/s/ Jesse D. Drawas
Jesse Drawas, Esq.
Fla. Bar #: 68654
100 SE Third Avenue, Suite 1500
Fort Lauderdale, FL 33394
T: (954) 706-7422
jdrawas@kaufmandolowich.com
Attorney for Defendant Berkley Insurance Group

/s/ Stefan R. Dandelles
Kaufman Dolowich LLP
30 N. LaSalle Street, Suite 1700
Chicago, IL 60602
T: (312) 759-1400
sdandelles@kaufmandolowich.com
Attorney for Defendant Berkley Insurance Group

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 10, 2025, I submitted this document using CM/ECF system. I further certify that I am not aware of any non-CM/ECF participants.

/s/ Jesse Drawas
Jesse Drawas, Esq,