UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
PALM BEACH DIVISION

CASE No. 9:25-cv-81260-DMM

CONVERGENCE TECHNOLOGIES, INC.

Plaintiff,

BERKLEY INSURANCE COMPANY

Defendant.
_____/

PLAINTIFF'S RESPONSE TO MOTION TO DISMISS

The Plaintiff, CONVERGENCE TECHNOLOGIES, INC., by and through its undersigned counsel, hereby files and serves its Response to the Motion to Dismiss filed by the Defendant, BERKLEY INSURANCE COMPANY, and further states as follows:

FACTUAL BACKGROUND AND PERTINENT PROCEDURAL HISTORY

The Plaintiff, CONVERGENCE TECHNOLOGIES, INC. (hereinafter referred to as the Plaintiff or CONVERGENCE) is a technology company that provides administrative services and consulting in various digital and technological fields including credit card processing, financial services and the provision of internet access. (Complaint ¶ 7). In the course of its business, CONVERGENCE contracted with BERKLEY INSURANCE COMPANY to purchase insurance through a COMMERCIAL CRIMES POLICY. (Complaint ¶ 8). That policy provided up to $1,000,000.00 per occurrence for forgery or alteration.[1] (See Declarations Page attached as "Exhibit 2" to the Motion to Dismiss).

[1] This policy limit is subject to a $50,000 deductible per occurrence.

Under the terms of the COMMERCIAL CRIMES POLICY, the Defendant will pay losses resulting directly from forgery or alteration of checks, drafts, promissory notes, or other similar written promises, orders or direction to pay a sum certain in "money" that are: (a) made or drawn upon you; or (b) made or drawn by one acting as your agent; or that are purported to have been so made or drawn. (See Berkley Policy at pg. 004 of "Exhibit 2" to Motion to Dismiss).

During the time that the COMMERCIAL CRIME POLICY was in effect, the Plaintiff was the victim of a crime in which a third-party (Michael Schumacher) assumed the identity of its CEO in order to execute various contracts which were titled "Merchant Agreements" and which provided for an advance of cash in exchange for the repayment, from company assets or receivables, up to a sum certain. (Complaint ¶ 12).

For example, on January 30, 2024, Mr. Schumacher used Docusign to forge the CEO's signature on a Merchant Agreement with TOP TIER CAPITAL in which Top Tier advanced the sum of $2,250,000.00 in exchange for repayment in the sum certain of $3,350,000.00 at a rate of either: (a) $84,375.00 per business day; or (b) thirty percent (30%) of each deposit into the business's operating account.[2] Under the terms of the "Merchant Agreement" - the Plaintiff was required to continue making these payments, at the same rate, until such time as the full sum-certain of $3,350,000.00 was paid in full. Although there is no definitive timeline for the repayment of this advance, there is likewise no ability to reduce the amount owed or 30% benchmark percentage based upon company performance. Instead, the "Merchant Agreement" permits TOP TIER to debit the full amount called for in the contract, each business day, regardless of the company's receipts and continuing each business day – at that same rate – until the full amount is paid in full.

[2] The Merchant Agreement permits a recalculation of the daily payment (not the total amount due) each two weeks with the daily remittance based upon 30% of the receivables during the prior two (2) calendar weeks.

The "Merchant Agreement" with TOP TIER CAPITAL also contains both a Security Agreement and a Limited Guaranty of Performance. The Security Agreement afforded TOP TIER a "security interest in and lien upon" all accounts, chattel paper, documents, equipment, general intangibles, instruments and inventory owned at the time, or acquired thereafter, by both the Plaintiff and the guarantor. The Security Agreement also provided a security interest in, and lien upon, all funds in the account regardless of the source of the funds (i.e. including funds which were not receivables). The guarantee provides that Mr. William Kruer (the CEO) of the Plaintiff is jointly and severally liable for the obligations owed to TOP TIER under the terms of the "Merchant Agreement."[3]

Subsequent to the execution of these forged Merchant Agreements, the various merchants began taking payments directly from the Plaintiff's bank accounts resulting in financial damages. (Complaint ¶ 14).

THE MOTION TO DISMISS

After removing this matter to federal court pursuant to its diversity jurisdiction, the Defendant has filed a Motion to Dismiss on the grounds that: (a) the Merchant Agreements are not covered documents under the COMMERCIAL CRIME POLICY; and (b) the claim that the Plaintiff's loss did not result directly from the forgery of the Merchant Agreements.

For purposes of the Motion to Dismiss filed under rule 12(b)(6), the Court should presume that all well-pled allegations are true and shall view them in the light most favorable to the Plaintiff. Skurowitz v. Bank of America, N.A., 2023 WL 1810304 (S.D. FLA 2023). This is because the role of a motion to dismiss is to determine if the Complaint is sufficiently pled (i.e. a short and plain

[3] Although the Merchant Agreement with Top Tier Capital was used as an exemplar for purposes of this response, its terms are substantially similar to the agreements that Mr. Schumacher fraudulently entered into with the remaining vendors.

statement of facts showing that the Plaintiff is entitled to relief) and not a determination on the merits of the claim prior to the initiation of the litigation process. "*The purpose of a motion to dismiss filed pursuant to Federal Rule of Civil Procedure 12(b)(6) is to test the facial sufficiency of a complaint. See Fed. R. Civ. P. 12(b)(6). The rule permits dismissal of a complaint that fails to state a claim upon which relief can be granted. Id. It should be read alongside Federal Rule of Civil Procedure 8(a)(2), which requires a "short and plain statement of the claim showing that the pleader is entitled to relief*." Id

In other words, the Complaint must simply set forth the basic facts necessary to establish the claim that is asserted – and do so by alleging facts rather than the bare of elements of the cause of action. "*Although a complaint challenged by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff is still obligated to provide the "grounds" for his entitlement to relief, and a "formulaic recitation of the elements of a cause of action will not do*." Id.

THE PLAINTIFF'S CLAIMS ARE PROPERLY PLED

As an initial matter, the Plaintiff has pled five (5) separate claims for breach of contract arising from the denial of each of the claims submitted to Berkley Insurance under the terms of the COMMERCIAL CRIMES POLICY. The elements for a claim of breach of contract in the State of Florida are the existence of a contract, breach of that contract and damages. "*Under Florida law, a breach of contract claim has three elements: (1) a valid contract, (2) a material breach, and (3) damages*." JPJ Companies, LLC v. National Fire & Marine Insurance Company, 2019 WL 5260286 (S.D. FLA 2019).

In this case, the Complaint alleges: (a) the existence of a contract between the Plaintiff and the Defendant (¶ 8, 9, 10, 16, 17, 26, 27, 36, 37, 46, 47, 56, 57); (b) breach of the contract by failing to pay the claims for forgery arising from Mr. Schumacher's conduct (¶ 15, 19, 20, 22, 29,

30, 32, 39, 40, 42, 49, 50, 52, 59, 60, 62); and damages arising from the breach (¶ 23, 33, 43, 53, 63). In each of these paragraphs, as well as in the Complaint taken as a whole, the Plaintiff has properly pled a short and plain statement of the facts which, taken as true, entitle it to relief under a claim of breach of contract against the Defendant.

THE MERCHANT AGREEMENTS ARE A PROMISSORY NOTE WITHIN THE PLAIN MEANING

The Defendant spends a great deal of time in its Motion to Dismiss arguing that the forged Merchant Agreements are not covered documents under the terms of the COMMERCIAL CRIME POLICY because they do not fit into the definition of "drafts, promissory notes, or similar written promises, orders or directions to pay a sum certain in money." In particular, the Defendant begins its argument by declaring that the Merchant Agreements are not checks or drafts and therefore the "*only question is whether they meet the definition of promissory notes.*" (Motion to Dismiss p. 6).

The Defendant then sets forth a myriad of reasons why the Merchant Agreements would not fit into the technical definition of "promissory note" – a term which is not defined within the policy. First, the Defendant cites Demakis v. SunTrust Bank, 312 So.3d 1015 (Fla. 2nd DCA 2021) for the proposition that a "*promissory note is an unconditional promise to pay a fixed amount of money.*" However, Demakis arises from the foreclosure of a HELOC and the question was whether the instrument was self-authenticating (for evidentiary purposes) in the same way that traditional promissory note would be. The quotation utilized by the Defendant in this case came from the Court's distinction between a promissory note secured by a mortgage (which would have been self-authenticating in that case) and a HELOC which, by its terms, is not for a particular amount as it can be drawn upon at will by the homeowner. That decision therefore turned on the term "*fixed amount*" and not the term "*unconditional.*"

Furthermore, Demakis gets this definition from the case of Third Federal Savings & Loan Association v. Koulouvaris, 247 So.3d 652, 655 (Fla. 2nd DCA 2018) which actually says that an

unconditional promise or order to pay a fixed amount of money is the definition of a "*negotiable instrument*" and not the more general definition of a "*promissory note.*" Id at 655. Therefore, while the definition of a promissory note that is also a negotiable instrument under the UCC may be an unconditional promise to pay a fixed sum – it does not follow that all promissory notes are, in fact, negotiable instruments.

Stated otherwise, all negotiable instruments are promissory notes – but not all promissory notes are negotiable instruments. In fact, this point is driven home by Koulouvaris which distinguishes a non-negotiable instrument as a "credit agreement" which does not constitute a negotiable instrument because it is not for a fixed amount. "*The HELOC note failed to require the payment of a fixed amount of money, making it a nonnegotiable instrument*." Id at 655. The Defendant cannot reasonably argue that a signed HELOC (which is not a nonnegotiable instrument) is not a promissory note. Therefore, it stands to reason that the two terms are not interchangeable.[4]

The term "promissory note" is not defined within the Berkley CRIME POLICY, and therefore it should be interpreted in accordance with its plain meaning. "*When the language of a contract is clear and unambiguous, courts must give effect to the contract as written and cannot engage in interpretation or construction as the plain language is the best evidence of the parties' intent*." Seritage SRC Finance, LLC v. Town Center at Boca Raton Trust, 397 So.3d 44 (Fla. 4th DCA 2024). Here, although the Defendant insists on conflating the definition of "negotiable instrument" with that of "promissory note", the terms are not identical. The plain language of the latter is nothing more than "*a written promise to pay at a fixed or determinable future time a sum*

[4] The Court should also take judicial notice of the fact that Florida law does recognize non-recourse promissory notes – including, but not limited to, reverse mortgages for further evidence that an agreement to pay does not need to be unconditional in order to fall within the meaning of a promissory note.

of money to a specific individual or bearer." See Merriam-Webster Dictionary.[5] That is precisely what is contained within the Merchant Agreement which requires the payment of a sum-certain in consideration of the amount advanced at the outset.

Furthermore, the interpretation of contractual terms is a task that is performed within the context of the intention of the parties. "*All contracts must be given a reasonable interpretation according to the intention of the parties at the time of executing them*." Seritage Finance at 46. Importantly, to the extent the undefined term "promissory note" is ambiguous (that is subject to more than one reasonable interpretation), the contractual language should be construed in favor of affording coverage to the Plaintiff. "*Moreover, since Excelsior, this Court has held many times, including in Anderson and thereafter, that where the provisions of an insurance policy are at issue, any ambiguity which remains after reading each policy as a whole and endeavoring to give every provision its full meaning and operative effect must be liberally construed in favor of coverage and strictly against the insurer*." Washington National Insurance Corp. v. Ruderman, 117 So.3d 943, 949 (Fla. 2013).

The Defendant could have used the term "negotiable instrument" in the policy provision defining the scope of coverage in the event of a forgery – it did not. Likewise, the Defendant could have defined the term "promissory note" in the policy language – it did not do this either. Instead, it attempts to impute a legalistic meaning that is narrower than the dictionary definition and contrary to the understanding and intention of the Plaintiff in order to avoid coverage for a loss arising from the undisputed forgery of a document which entitled a third-party to the payment of a fixed sum from the Plaintiff's accounts. Using well-established rules of construction and

[5] Online edition.

contractual interpretation, this defense should be rejected, and the Court should deny the motion to dismiss on this basis alone.

COVERAGE DOES NOT DEPEND SOLELY ON DEFINITION OF PROMISSORY NOTE

Even assuming that the Merchant Agreements are not promissory notes for purposes of the construction of this contract, the Plaintiff remains entitled to coverage based upon the remaining language in the forgery clause. In particular, the scope of the coverage for forgery under the policy includes "*similar written promises, orders or directions to pay a sum certain in money*".

The Complaint alleges that the Merchant Agreements fall within the scope of similar written promises, orders or directions to pay a sum certain in money. (Complaint ¶ 13). The Merchant Agreements provided that the Plaintiff would receive a sum-certain **and** that it would repay a sum certain. The timing of the repayment is governed by a specific formula in which the Plaintiff's receipts were to be multiplied by the purchase percentage (30%) and divided by the number of business days within the previous two (2) calendar weeks. Although not unconditional – because they were non-recourse in nature – the amounts due would remain due and owing so long as the Plaintiff remains in business. These written Merchant Agreements, while perhaps not negotiable instruments or "loans" within the context of the state's usuary laws – are at least similar in nature (and actually fit within both the colloquial, common place and dictionary-defined understanding of a promissory note).

Anticipating this argument from the face of the Complaint, the Defendant has cited the Court's attention to several cases which purport to exclude these agreements from meaning of the term "similar". However, each of these cases is highly distinguishable. For example, the Defendant cites the case of Midlothian Enterprises, Inc., v. Owners Insurance Company, 439 F. Supp. 3d 737 (E.D. Virginia 2020), for the proposition that only documents that can qualify as similar to the enumerated list of documents in the policy can qualify as affording coverage. The Plaintiff agrees

with this general proposition – but the Defendant's conclusion that coverage is not available based upon the reasoning of Midlothian simply does not follow.

In Midlothian, an employee received a scam email that purported to be from the company's President. It directed her to wire money to an outside account. Once she did so, she learned that the email had come from a hacker and the company filed a claim under its theft and forgery policy. The Court first noted that the policy specifically excluded losses "*resulting from your, or anyone acting on your express or implied authority, being induced by any dishonest act to voluntarily part with title to or possession of any property*." Id at 40.

The Court then reviewed language under the forgery provision of the policy – which was remarkable similar to the language found in the Berkley policy here. In doing so, the Court held that an email from an outside source is not similar to a check, draft or promissory note and that the interpretation of the term similar should not be interpreted to include the "widest scope". This finding is in line with the Plaintiff's claim here. The Plaintiff does not ask the Court to include an email, wire authorization or other tangentially related document into the scope of the Berkely policy provision. On the contrary, it asks the Court to recognize that, unlike the email in Midlothian, a written agreement that provides for the receipt of an advance followed by the repayment of a sum-certain is, in fact, similar to the consequence of a promissory note.

Likewise, the Defendant cites Vons Companies, Inc. v. Federal Insurance Company, 57 F. Supp. 2d 933, 945 (C.D. Cal. 1998) for the proposition that forgery insurance policies only covers negotiable instruments. Putting aside the fact that the policy language in Vons is different than that contained in the Berkely policy, the case is inapposite to the claim brought by the Plaintiff here. In Vons, the Plaintiff/insured was sued by a third-party for a Ponzi scheme alleged to have been perpetrated by its employee or agent. In other words, the Vons company was not the victim of the

original scheme – but rather was sued by the victim and charged with joint and several liability. It ultimately settled that lawsuit for $10,000,000 and then sought indemnity or reimbursement from its insurer under the forgery provision of its policy. The Court noted that what actually occurred was a fraud, not a forgery and further noted that the invoices and purchase orders that the perpetrator used to commit the fraud against a third-party were not covered within the phrase "similar written promise".

However, while the opinion does refer to negotiable instruments and their equivalent – the decision does not limit the phrase "similar written promises" to negotiable instruments. Doing so in that case (or in this one) would render the term "similar written promises" unnecessary because if the policy was limited to negotiable instruments, it could have simply used that term instead of providing a list of potentially applicable documents that would be covered by the forgery clause.

The Defendant also cites the Court to Discovery Land Company LLC v. Berkley Insurance Company, 2023 WL 2503634 (D. Arizona 2023), in which it was ironically also a Defendant. This case involved a forgery provision that is identical to the COMMERCIAL CRIME POLICY. However, in that case while the Court does make reference to negotiable instruments – the actual forged document was a loan application. The Court held that a loan application (not the closing document but the application) was not similar to a written promise to pay because the application itself did not create any legal obligations or financial liabilities. "*The loan application was just that: an application, upon which no legal or financial obligations issued*." Id at 12.

The Plaintiff does not contest that a loan application is not sufficiently similar to a promissory note to trigger coverage – but once again it simply does not follow that a written Merchant Agreement to advance of money, which must then be repaid on a set schedule subject

only to the termination of the Plaintiff's business operations, is akin to the mere application for a loan that was considered in Discovery Land.

The Defendant's argument attempts to limit the phrase "similar written promises, orders or directions to pay a sum certain" to negotiable instruments but this restriction appears nowhere in the language of the policy (though it could have been easily inserted to avoid an ambiguity) and the cases cited for that proposition are distinguishable, at best. On the contrary, the plain language of the term "similar written promises", clearly includes the Merchant Agreements which required repayment of a sum-certain with periodic payments based upon a defined, formula and conditioned only on the continuation, in any form, of the Plaintiffs business operations. **Again**, to the extent this language is not clear - there is at the very least an ambiguity in the policy which should be construed in favor of affording coverage. See Washington National Insurance Corp. at 949.[6]

THE CONTRACTS PERMITTED THE VENDOR TO DRAW UPON ACCOUNTS

The Defendant next claims that the forgery provision is inapplicable because the policy language requires that forged documents are made or drawn by or drawn upon by the insured, or that are purported to be so made or drawn. The policy does not provide any language to define or contextualize these terms – but the Defendant seeks to impute the meaning ascribed by the UCC (which is not referenced by the clause). However, utilizing the definitions cited by the Defendant (maker being on who is identified as person undertaking to pay and drawer being on identified as

[6] The Defendant also attempts to use the holding in Metro Brokers, Inc. v. Transp, Ins. Co., 603 Fed. Appx. 833 (11th Cir. 2015) to argue that because the payments in this case were made via ACH transactions – they are not considered negotiable instruments, or their equivalent. First, the Court should note that the record does not reveal on its face that there were ACH transfers and therefore that factor is not subject to review on a motion to dismiss. More importantly, in Metro Brokers there was no forged written agreement as there is in this case. On the contrary, the Metro Brokers case involves thieves that logged directly into the Plaintiff's online banking system using an employee's access ID and password and authorized payment to various bank accounts. There was no agreement and there was no evidence that there was signature that was forged. In other words, this opinion which confronted an electronic theft by a hacker is a distinguishable from the Plaintiff's claim in which contracts requiring repayment were forged by Mr. Schumacher.

person ordering payment), it is clear that these terms apply to the forged Merchant Agreements. These agreements: (a) authorizes the merchant to automatically take daily payments from company accounts without further authorization; (b) appoints the merchant as its Power of Attorney with the authority to take any action or settle any obligation due to the company from the processor/bank. "*Merchant hereby authorizes Company and/or its agent(s) to withdraw from the Account via ACH debit the amounts owed to Company for the receipts as specified herein and to pay such amounts to Company*." (See Exhibit 3 pg. 002.)

LOSS RESULTED DIRECTLY FROM FORGERY

The Defendant's final argument is that the forgery of the Merchant Agreements did not directly result in a loss to the Plaintiff. The Defendant cites to Interactive Communications International, Inc. v. Great American Insurance Company, 731 Ded. Appx. 929 (11th Circuit 2018), which defines the term resulting directly to mean "*follows straightway, immediately, and without any intervention or interruption*". It at 933.

Once again, this question relies upon a factual determination that is not apparent from the face of the pleadings (including the Merchant Agreements) attached by the Defendant as exhibits to its motion. Therefore, it is not appropriate for a motion to dismiss, and cannot be adequately considered as there is no factual basis for determining the precise timeline of loss. That said, this case is materially distinguishable from Interactive where the Court (reviewing a summary judgment) found that there were four (4) distinct steps between the perpetration of a computer fraud – it was a computer fraud policy) and the losses sustained by the plaintiff.

In the Interactive case, the Plaintiff was a processor of pre-loaded debit cards that were sold by vendors (such as CVS, Walgreens, etc) to consumers. The consumer would purchase "chits" from Interactive through the vendor – and would then call to redeem the "chit", which would be loaded as cash on to the debit card and become available to the consumer. Based upon

the agreement between Interactive and the various banks that issued the card – it would then have 15 days to transfer the funds to the bank. At some point, a fraud developed in which consumers would purchase cards/chits from a vendor and then simultaneously call Interactive multiple times to exchange the chits for available cash. Because of a glitch in the system, the simultaneous transfers were not recognized and ultimately – when the cards were used in the marketplace, the funds would be lost.

In determining whether Interactive's losses resulted directly from the computer fraud, the Court noted that there were four (4) steps between the perpetration of the fraud and the actual monetary loss: (1) the perpetrator manipulates the system to enable duplicate chit redemption; (2) Interactive transfers the money to the bank that issued the card; (3) a consumer that has the card makes a purchase – a step that can happen at any time, including days, weeks or years later; and (4) the funds are disbursed from the bank that issued the card to the merchant that accepted the debit card as payment. Until the last step, the Court found that Interactive had at least some control and could step in to prevent its loss. Therefore, the Court held that the loss did not result directly from the computer fraud.

By contrast, in this case the evidence will show (and the Complaint alleged) that upon submission of the forged document to the Merchants, the funds were advanced into the Plaintiff's accounts without its knowledge at which point those same merchants operated under a purported contract to automatically remove funds (including repayment and fees) from the Plaintiff's accounts causing "chaos, business losses and significant monetary damages to the Plaintiff". (Complaint ¶ 14). In other words, unlike Interactive where the computer fraud was the first step in a multi-step process leading to loss on the part of the insured – here the monetary losses and other

damages sustained by the Plaintiff followed *"straightway, immediately, and without any intervention or interruption.*" Id.

CONCLUSION

For the foregoing reasons, the Plaintiff requests that this Court enter an Order denying the Defendant's Motion to Dismiss in all respects.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 24th, 2025, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing is being served this day on all counsel of record or pro se parties identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically notices of Electronic Filing.

SERVICE LIST

Convergence Technologies, Inc. vs. Berkley Insurance Company,

United States District Court of the Southern District of Florida

CASE NO. 9:25-cv-81260-DMM

Attorney for Plaintiff, Convergence Technologies, Inc.
Joshua D. Ferraro, Esquire
E-mail: jferraro@lesserlawfirm.com
ldurandetto@lesserlawfirm.com
Lesser, Landy Smith & Siegel, PLLC
420 Columbia Drive, Suite 110
West Palm Beach, FL 33409
Phone: (561) 655-2028
Facsimile: (561) 655-2033

Attorney for Defendant, Berkley Insurance Company
Jesse D. Drawas, Esquire
E-mail: jdrawas@kaufmandolowich.com
tbell@kdvlaw.com

Kaufman Dolowich, LLP
100 S.E. 3rd Ave., Suite 1500
Fort Lauderdale, FL 33394
Phone: (954) 706-7422