

UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
WACO DIVISION

PERRY & PERRY BUILDERS, INC.	§	
Plaintiff	§	
	§	
v.	§	
	§	CIVIL ACTION NO.6:25-cv-00106-LS
COWBELL CYBER, INC., and	§	
OBSIDIAN SPECIALTY INSURANCE	§	
COMPANY	§	
Defendants.	§	

**DEFENDANTS COWBELL CYBER, INC. AND OBSIDIAN SPECIALTY INSURANCE  
COMPANY’S MOTION FOR SUMMARY JUDGMENT**

Pursuant to Fed. R. Civ. P. 56, Defendants Cowbell Cyber, Inc. (“Cowbell”) and Obsidian Specialty Insurance Company (“Obsidian”) (together with Cowbell, “Defendants”) file this Motion for Summary Judgment (“Motion”) on all causes of action asserted by Plaintiff Perry & Perry Builders, Inc. (“Perry & Perry”) and would respectfully show the Court as follows:

**I. INTRODUCTION**

This insurance coverage action arises from a social engineering attack where a fraudster tricked a Perry & Perry employee into transferring money intended for a vendor to an unintended third party. Obsidian acknowledged that the social engineering attack was a covered **Cyber Crime Incident** and paid Perry & Perry the \$250,000 Cyber Crime Loss sublimit. However, because Perry & Perry wired the funds to the fraudster in two transactions one minute apart, Perry & Perry contends that it is entitled to a second \$250,000 Cyber Crime Loss sublimit. Perry & Perry’s argument lacks merit.

First, the Policy’s Cowbell Breach Fund Separate Limit Endorsement unequivocally limits Obsidian’s obligation to pay to one limit of liability under each insuring agreement. Item 5 of the Declarations sets forth the applicable limits of liability and describes each coverage as having an

“Each **Claim** Limit of Liability.” The Policy’s Breach Fund Separate Limit Endorsement states the “Limits of Liability set forth in Item 5 of the Declarations is the maximum amount the **Insurer** will pay for all **Claims, First Party Loss**...under each Insuring Agreement, regardless of the number of **Claims...Cyber Crime Incidents**...” The Declarations list a \$250,000 limit of liability Cyber Crime Loss. Since Obsidian has paid that limit, that is the maximum it is obligated to pay under that insuring agreement.

Second, even if the Breach Fund Separate Limit Endorsement did not control, Perry & Perry’s loss resulted from a single peril—a Social Engineering Attack—and thus is subject to a single \$250,000 Cyber Crime Loss sublimit.

Accordingly, the Court should grant summary judgment to Obsidian and Cowbell on Plaintiff’s First Cause of Action alleging Breach of Contract.

Since Perry & Perry is not entitled to any benefits under the Policy that it was not provided, Obsidian and Cowbell cannot be liable under Texas law for a violation of the Texas Insurance Code,. Accordingly, the Court should grant summary judgment to Obsidian and Cowbell on the Second Cause of Action alleging a violation of the Texas Insurance Code.

## II. STATEMENT OF FACTS

### A. **THE OBSIDIAN POLICY**

Obsidian issued Prime 250 Cyber Risk Insurance Policy No. OBD-CB-S3DTFHJ5Z002 to Perry & Perry for the policy period from August 12, 2023 to August 12, 2024 (the “Policy”), with a \$1,000,000 aggregate limit for all payments under all Coverages combined. *See* Joint Summary Judgment Stipulations (“Stipulations”), ECF No. 13, ¶¶ 2-3; Stipulations, Exhibit A, Policy, ECF No. 13-1, p. 4.

The Policy affords first-party and third-party coverage.<sup>1</sup> The Policy's **First Party Loss** coverage grant states: "The **Insurer** will reimburse the **Insured**, all **First Party Loss** directly resulting from a **Cyber Event** which is first discovered by the **Insured** during the **Policy Period** or **Extended Reporting Period** (if applicable)." ECF No. 13-1, p. 14.

The Policy defines **First Party Loss** to include **Cyber Crime Loss**. *Id.*, pp. 14-15. **Cyber Crime Loss** means, in part, the "loss of **Money** or **Digital Currency** directly resulting from" a **Social Engineering Attack**. *Id.*, p. 17. A **Cyber Event** includes a **Cyber Crime Incident**, which, in turn includes a **Social Engineering Attack**. *Id.*, pp. 16-17.

The Policy defines **Social Engineering Attack** as:

the manipulation or deception, by an unauthorized third party, of a director, officer, board member, trustee, owner, partner, principal, manager, or employee (including full time, part time, temporary, leased, seasonal, independent contractor and volunteer) of the **Insured Organization**, who is authorized to request or make payments on behalf of the **Insured Organization**. The manipulation or deception must be accomplished by the transmission of fraudulent communications by the unauthorized third party, and cause the director, officer, board member, trustee, owner, partner, principal, manager, or employee (including full time, part time, temporary, leased, seasonal, independent contractor and volunteer) to transfer, pay or deliver the **Insured Organization's Money** to an unintended third-party recipient.

*Id.*, p. 23.

Taking these definitions together, **First Party Loss** includes the loss of money directly resulting from a **Social Engineering Attack**.

The Limits of Liability are set forth in Item 5. of the Policy's Declarations. Every insuring agreement in Item 5 is subject to an "each **Claim**<sup>2</sup> Limit of Liability." Section I.B.(5) of Item 5. provides for a \$250,000 "Each **Claim** Limit of Liability" for Cyber Crime Loss. *Id.*, p. 5.

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<sup>1</sup> "[A] first-party claim is stated when 'an insured seeks recovery for the insured's own loss,' whereas a third-party claim is stated when 'an insured seeks coverage for injuries to a third party.'" *Lamar Homes, Inc. v. Mid-Continent Cas. Co.*, 242 S.W.3d 1, 17 (Tex. 2007) (quoting *Universe Life Ins. Co. v. Giles*, 950 S.W.2d 48, 54 n.2 (Tex. 1997)).

<sup>2</sup> Though the Policy defines **Claim**, the definition applies only to third-party loss. The definition of **Claim** is any:

The Policy includes the Cowbell Breach Fund Separate Limit Endorsement, which provides:

Section IV.A. Limit of Insurance and Deductible is deleted and replaced by the following:

A. Limit of Insurance and Deductible

Aggregate Limit of Liability & Limits of Liability for All Amounts Other than the Cowbell Breach Fund

The Aggregate Limit of Liability set forth in Item 3. of the Declarations is the maximum amount the **Insurer** will be liable to pay for all **Claims, First Party Loss, First Party Expense, and Liability Expense**, regardless of the number of **Claims, Privacy Incidents, Network Security Incidents, Cyber Crime Incidents, Media Incidents, or Insureds**.

The Limits of Liability set forth in Item 5. of the Declarations is the maximum amount the **Insurer** will be liable to pay for all **Claims, First Party Loss, First Party Expense, and Liability Expense** under each Insuring Agreement, regardless of the number of **Claims, Privacy Incidents, Network Security Incidents, Cyber Crime Incidents, Media Incidents, or Insureds**. Such Limits of Liability are part of, and not in addition to, the Aggregate Limit of Liability.

*Id.*, p. 47.

Under the foregoing endorsement, Obsidian agreed to pay a single Limit of Liability as set forth in Item 5. of the Declarations, for all **First Party Loss** no matter how many **Claims, Privacy Incidents, Network Security Incidents, Cyber Crime Incidents, Media Incidents, or Insureds** are involved.

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(1) written demand for **Money** or non-monetary relief, written demand for arbitration or written request to toll or waive a statute of limitations received by the **Insured**; (2) civil proceeding in a court of law or equity, including any appeal therefrom, which is commenced by the filing of a complaint, motion for judgment or similar pleading, against the **Insured**; (3) administrative or regulatory investigation, inquiry, suit, proceeding, prosecution or governmental actions against the **Insured** solely with respect to a **Privacy Incident**; (4) an arbitration or other alternative dispute resolution proceeding against the **Insured** for monetary damages or non-monetary or injunctive relief, commenced by the **Insured's** receipt of a request or demand for such proceeding, including any appeal thereof; or (5) written notice received by the **Insured** for **PCI Costs** from a third party, with whom the **Insured Organization** has entered into a **Payment Card Services Agreement**, as a result of actual or alleged non-compliance with the **PCI DSS**. ECF No. 13-1, p. 16.

**B. THE SOCIAL ENGINEERING ATTACK**

On December 19, 2023, a fraudster purporting to be third-party steel and metal vendor Alamo Structural Steel, LLC (“Alamo”) emailed Perry & Perry Office Manager Kelli Hilton inquiring about the “anticipated date for the upcoming payment run.” ECF No. 13, ¶¶ 4-6; Stipulations, Exhibit B, Fraudulent Emails, ECF No. 13-2, p. 1-2. Ms. Hilton responded the same day that she would issue a check in the morning and mail it to Alamo. ECF No. 13-2, p. 1. The fraudster responded, “Effective immediately, we will no longer accept paper checks due to the continuous delays and missing mails. and [sic] we ask customers to kindly assist us by transitioning to electronic payments (ACH ).” *Id.* Ms. Hilton replied: “If you give me the ACH information I can do that tomorrow.” *Id.*, p. 3. The fraudster provided with a single set of ACH instructions. *Id.*, pp. 3-4.

The next day, Ms. Hilton transferred Perry & Perry’s funds to the fraudster pursuant to those instructions. ECF No. 13, ¶¶ 8-9. At 10:15:04 a.m. eastern time, she processed an ACH transfer to the fraudster in the amount of \$272,997.45. *Id.*, ¶ 8; Stipulations, Exhibit C, Bank transaction records, ECF No. 13-3, p. 1-2. Approximately a minute later, at 10:16:41 a.m. eastern time, Ms. Hilton processed a second ACH transfer to the fraudster in the amount of \$601,886.25. ECF No. 13, ¶ 9; ECF No. 13-3, p. 3-4. She then emailed the fraudster stating: “I just completed 2 ACH transactions.” ECF No. 13-2, p. 6.

**C. OBSIDIAN PAYS THE CYBER CRIME LOSS LIMIT**

On January 18, 2024, Perry & Perry received a notice of unpaid invoices from Alamo and discovered that Ms. Hilton had not sent the ACH transfers to Alamo and instead directed them to a fraudster. ECF No. 13, ¶ 11. Perry & Perry contacted their bank to recover the funds, but the attempt was unsuccessful. Stipulations, Exhibit E, March 26, 2024 letter from Cowbell to Perry &

Perry, ECF No. 13-5, p. 2. The next day, Perry & Perry reported the claim to Cowbell, Obsidian's third-party claims administrator. ECF No. 13, ¶ 17. With Cowbell assistance, Perry & Perry engaged Wood Smith Henning as breach counsel and Kroll as forensic investigator. *Id.*, ¶ 18.

On March 26, 2024, Cowbell issued a reservation of rights letter to Perry & Perry on behalf of Obsidian. ECF No. 13, ¶ 19; ECF No. 13-5. In the letter, Cowbell wrote, “[T]he Insuring Agreements are satisfied and accordingly, Obsidian will pay all reasonable and necessary **First Party Expense**<sup>3</sup> and reimburse all **First Party Loss** in excess of the applicable Deductible that the **Insured** incurs solely as a result of a **Cyber Event**.” ECF No. 13-5, p. 4. In the letter, Cowbell explained that “the **First Party Loss** coverage section [...] includes coverage for **Cyber Crime Loss** which is subject to a sublimit of liability of \$250,000.00 in excess of a \$10,000.00 Deductible.” *Id.*, p. 2.

On April 3, 2024, Perry & Perry inquired whether each ACH transfer qualified for a separate **Cyber Crime Loss** sublimit under the Policy. ECF No. 13, ¶ 21; Stipulations, Exhibit F, Email correspondence, ECF No. 13-6, pp. 2-4. Cowbell responded that only one \$250,000 **Cyber Crime Loss** sublimit was available for the **Social Engineering Attack** under the Policy. ECF No. 13, ¶ 21; ECF No. 13-6, p. 1.

The following month, counsel for Perry & Perry sent a letter to Cowbell asserting that Perry & Perry was entitled to payment of an additional \$250,000 **Cyber Crime Loss** sublimit because the loss occurred via two transfers. ECF No. 13, ¶ 22; Stipulations, Exhibit G, May 30, 2024 Letter from Perry & Perry to Cowbell, ECF No. 13-7. Counsel alleged that despite the fact that the transfers were instituted pursuant to a single set of fraudulent ACH instructions sent by a single fraudster and were sent approximately one minute apart, each constituted a separate **Cyber Crime**

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<sup>3</sup> The **First Party Expense** coverage grant is not at issue here, but provides coverage for forensics and data restoration costs directly resulting from a **Cyber Event** discovered during the policy period.

**Loss** under the Policy. ECF No. 13-7, pp. 2-3. Perry & Perry recognized that the Policy’s definition of **Claim** was a defined term in the Policy, but that defined term was only applicable to liability coverage for third-party claims. So, Perry & Perry instead attempted to rely on the dictionary definition of “claim”—“a demand for something due or believed to be due.” *Id.*, pp. 3-4. Perry & Perry’s counsel did not address the Cowbell Breach Fund Separate Limit Endorsement. *See generally id.* Obsidian has denied that Perry & Perry is entitled to two **Cyber Crime Loss** sublimits. ECF No. 13, ¶ 23.

#### **D. PERRY & PERRY SUES COWBELL AND OBSIDIAN**

On February 18, 2025, Perry & Perry sued Cowbell and Obsidian. *See* Complaint, ECF No. 1-1, pp. 7-13. On June 27, 2025, Perry & Perry filed a first amended complaint (“FAC”). *See* FAC, ECF No. 14. Though Perry & Perry acknowledges that Cowbell and Obsidian paid the \$250,000 **Cyber Crime Loss** sublimit, it alleged that Cowbell and Obsidian “wrongfully refused to pay the policy limit for the second loss.” *Id.*, ¶¶ 11-12. Like its May 30, 2024 letter, Perry & Perry’s FAC ignores the Breach Fund Separate Limit Endorsement. Perry & Perry also asserts causes of action for violation of the Texas Insurance Code. *Id.*, ¶¶ 15-16.

By letter dated March 21, 2025, White and Williams LLP (“W&W”), as counsel for Obsidian, requested that Perry & Perry discontinue this action. ECF No. 13, ¶ 24; Stipulations, Exhibit H, March 21, 2024 Letter from W&W to Perry & Perry, ECF No. 13-8. W&W explained that even if Perry & Perry was correct that two wire transfers made one minute apart arising from the same social engineering attack could somehow entitle them to two **Cyber Crime Loss** sublimits (it does not), the Breach Fund Separate Limit Endorsement Breach Fund Limit explicitly prevented Perry & Perry from recovering more than one **Cyber Crime Loss** sublimit. ECF No. 13-8.

Perry & Perry has not responded to this position.

### **III. ARGUMENT AND AUTHORITY**

#### **A. APPLICABLE STANDARDS**

##### **1. Summary Judgment Standard**

Summary judgment is appropriate when “the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). “A genuine dispute of fact exists when evidence is sufficient for a reasonable jury to return a verdict for the non-moving party, and a fact is material if it ‘might affect the outcome of the suit.’” *Willis v. Cleco Corp.*, 749 F.3d 314, 317 (5th Cir. 2014) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

“[A] party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact.” *Davis v. Fort Bend Cty.*, 765 F.3d 480, 484 (5th Cir. 2014) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986), cert. denied, 135 S. Ct. 2804 (2015)). Where, as here, the non-movant will bear the burden of proof at trial, the moving party may satisfy this burden by “point[ing] out the absence of evidence supporting the nonmoving party’s case.” *Stagliano v. Cincinnati Ins. Co.*, 633 Fed. Appx. 217 (5th Cir. 2015) (quoting *Latimer v. Smithkline & French Lab.*, 919 F.2d 301, 303 (5th Cir. 1990). “The burden then shifts to the nonmoving party to go beyond the pleadings and by her own affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial.” *Id.* (quoting *Davis*, 765 F.3d at 484).

“However, the nonmoving party ‘cannot defeat summary judgment with conclusory allegations, unsubstantiated assertions, or only a scintilla of evidence.’” *Burns v. Nielsen*, 456 F. Supp. 3d 807, 818 (W.D. Tex. 2020) (quoting *Davis*, 765 F.3d at 497 n. 20).

## **2. Policy Interpretation**

“The interpretation of an insurance policy, like other contracts, begins with the text and requires that undefined words be given their plain, ordinary, and generally accepted meanings absent some indication of a different intent.” *United States Metals, Inc. v. Liberty Mut. Group, Inc.*, 490 S.W.3d 20, 23 (Tex. 2015) (internal citations omitted). A policy interpretation that gives meaning to each word is preferable to one that renders one or more words surplusage. *Id.* at 23-24. Finally, “a policy provision is ambiguous only if it is subject to more than one reasonable interpretation and not merely because the parties or other courts differ over its interpretation.” *Id.* at 24 (internal citations omitted). When construing policies, courts do not simply stop at the definitions of each word, but instead consider the context. If the policy itself demonstrates that the party intended that a particular word have a “different” or more “technical” meaning, courts will construe the word according to that intention. *Anadarko Petroleum Corp. v. Houston Cas. Co.*, 573 S.W.3d 187 (Tex. 2019).

Under Texas law, “a party seeking indemnity under an insurance policy bears the burden of proving coverage if the insurer contests coverage for the claim. When resolving claims for indemnity, the court must look at the actual facts and evidence--not what was alleged or could have been alleged.” *Medmarc Cas. Ins. Co. v. Craytor*, No. 5:06CV95, 2007 U.S. Dist. LEXIS 42279 \*7-8 (E.D. Tex. April 30, 2007) (internal citations omitted). Perry & Perry cannot meet its burden here.

**B. PERRY & PERRY IS LIMITED TO ONE CYBER CRIME LOSS SUBLIMIT**

**1. The Plain Language of the Cowbell Breach Fund Separate Limit Endorsement Establishes that Perry & Perry is Limited to One Cyber Crime Loss Limit Regardless of the Number of Claims or Cyber Crime Incidents**

The Court need look no further than the plain language of the Cowbell Breach Fund Separate Limit Endorsement to determine that Obsidian and Cowbell are entitled to summary judgment on Perry & Perry's First Cause of Action. The endorsement unambiguously provides that the \$250,000 **Cyber Crime Loss** sublimit is the most that the insurer will pay under that insuring agreement, no matter the number of **Claims** or **Cyber Crime Incidents**. It states:

The Limits of Liability set forth in Item 5. of the Declarations is the maximum amount the **Insurer** will be liable to pay for all **Claims, First Party Loss, First Party Expense, and Liability Expense** under each Insuring Agreement, regardless of the number of **Claims, Privacy Incidents, Network Security Incidents, Cyber Crime Incidents, Media Incidents, or Insureds**. Such Limits of Liability are part of, and not in addition to, the Aggregate Limit of Liability.

ECF No. 13-1, p. 47.

The Policy language is clear. Whether the transfers constitute one **Claim** or two, one **Cyber Incident** or two, one **First Party Loss** or two, the Limit of Liability set forth in Item 5 is the "maximum amount the insurer will be liable to pay for all **Claims** [and] **First Party Loss** [...]" under each Insuring Agreement." *Id.* Since the Limit of Liability set forth in Item 5 for Cyber Crime Loss is \$250,000 and Obsidian has already paid Perry & Perry that limit, the Court should grant summary judgment to Cowbell and Obsidian on Perry & Perry's First Cause of Action alleging Breach of Contract.

**2. The Social Engineering Attack Caused a Single Cyber Crime Loss**

Even if the plain language of the Cowbell Breach Fund Separate Limit Endorsement did not dispose of Perry & Perry's breach of contract claim (it does), Perry & Perry would still only be entitled to one \$250,000 **Cyber Crime Loss** sublimit because the two transfers resulted directly

from a single **Social Engineering Attack**. This single peril is one loss under the Policy, subject to one sublimit.

Where, as here, a loss is caused by a single peril, it is subject to one limit of liability. *See Moore v. State Farm Lloyd's*, No. A-02-CA-591-SS, 2003 U.S. Dist. LEXIS 27232 (W.D. Tex. April 1, 2003) (insured homeowner only entitled to one limit, despite damages to home from several, separate leaks discovered at different times); *Coats v. Farmers Ins. Exch.*, 230 S.W.3d 215 (Tex. App. 2006) (insured homeowner only entitled to one limit, despite damages to home from multiple leaks emanating from different sources); *Saint Paul-Mercury Indem. Co. v. Rutland*, 225 F.2d 689 (5th Cir. 1955) (applying a single “per accident” limit of liability where truck collided with a freight train, damaging sixteen cars); *Howard, Weil, Labouisse, Friedrichs, Inc. v. Ins. Co. of N. Am.*, 557 F.2d 1055 (5th Cir. 2003) (finding that an employee broker’s four-day speculative spree in soybean futures and issuance of two bad checks, resulting in a \$150,000 loss “was a single loss albeit the product of more than one act” such that one per-loss deductible applied under the policy at issue); *see also Heartland Co-Op. v. Nationwide Agribusiness Ins. Co.*, 2025 Iowa Sup. LEXIS 35 (Iowa 2025) (holding that “any one loss” limit meant the insured’s aggregate losses arising from a single peril entitle it to one limit).

Here, there was one **Social Engineering Attack** that caused Perry & Perry to institute the transfers to the unintended third party. The fraudster initiated an email conversation with Ms. Hilton, and sent a single set of fraudulent ACH instructions. ECF No. 13-2, pp. 1-4. The fraudster did not demand more than one payment. *Id.* The transfers were sent to a single bank account approximately one minute apart. ECF No. 13-3. This single **Social Engineering Attack** resulted in one **Cyber Crime Loss** subject to a single Cyber Crime Loss sublimit.

Perry & Perry’s attempt to stack sublimits for a single loss is antithetical to the “very concept of a sublimit,” which is to “cap a carrier’s exposure at an amount below the policy limit if a particular type of covered peril caused the loss.” See *Phila. Indem. Ins. Co. v. Baby Fold, Inc.*, 2018 U.S. Dist. LEXIS 165071, \*22 (N.D. Ill. Sept. 16, 2018); *Nat’l Union Fire Ins. Co. v. Gulf Island Fabrication, Inc.*, 2011 U.S. Dist. LEXIS 38618 (E.D. La. Apr. 8, 2011) (“The plain language of the 2008-2009 National Union policy establishes specific endorsements and sublimits of coverage for various categories of loss, and these provisions serve a particular purpose—to set exclusive limits of coverage for specific losses within the overall insurance policy.”)

Thus, in *United Specialty Ins. Co. v. Porto Castelo, Inc.*, 2016 U.S. Dist. LEXIS 59715 (S.D. Tex. May 5, 2016), the court rejected a similarly improper attempt to stack sublimits. There, the policy included a \$500,000 protection and indemnity limit, with a \$100,000 crew sublimit. When an explosion occurred on-board the insured boat, four crewmen were injured. They sued the insured to recover for their injuries, demanding \$100,000 for each crew member. The insurer agreed that there was coverage under the Protection and Indemnity portion of the Policy up to the crew sublimit of \$100,000. Much like Perry & Perry, the insured was discontent with one sublimit and so it argued that each crew member was entitled to receive a separate \$100,000 “crew sublimit.” The court disagreed. Turning to the ordinary meaning of “crew,” the court determined that it did not refer to a single person, but to more than one person. Then, the court reasoned that adopting the insured’s interpretation “would be contrary to the purpose of a sublimit. If they would be entitled to up to \$500,000 for crew claims, there would be no purpose in including the sublimit in the Policy.” *Id.* at \*18. This would render the sublimit meaningless in violation of Texas law on contract interpretation. *Ibid.*

Perry & Perry’s interpretation of “**Claim**” in the Each **Claim** Limit of Liability to mean each wire transfer to the fraudster is more tortured than the insured’s interpretation of “crew” in *Porto*. The only reasonable interpretation of the “Each **Claim** Limit of Liability”—which is used for every insuring agreement in the Policy, first and third-party alike—is the claim made by the insured under the Policy for damages it suffered from the peril insured against. Thus, if Perry & Perry sought coverage under the Policy because a single peril triggered multiple insuring grants, Perry & Perry could potentially access different Each **Claim** Limits of Liability, subject to the aggregate limit of liability. Or, if Perry & Perry sought coverage under the Policy more than once because different perils triggered different Each **Claim** Limits of Liability, Perry & Perry could potentially access several Each **Claim** Limits of Liability, subject again to aggregate limit of liability. But that is not this case.

Here, the peril insured against is a **Social Engineering Attack** that directly resulted in a **Cyber Crime Loss**, triggering a single Cyber Crime Loss limit. Since Obsidian has paid the Cyber Crime Loss limit, it has fulfilled its obligations under the Policy. Accordingly, the Court should grant summary judgment to Obsidian and Cowbell dismissing the First Cause of Action for Breach of Contract.

**C. THE COURT SHOULD GRANT SUMMARY JUDGMENT TO OBSIDIAN AND COWBELL ON THE SECOND AND THIRD CAUSES OF ACTION BECAUSE OBSIDIAN CORRECTLY DECLINED TO PAY A SECOND CYBER CRIME LOSS SUBLIMIT**

While “[i]nsurance coverage claims and bad faith claims are by their nature independent,”<sup>4</sup> the general rule is that “an insured may not prevail on a bad faith claim without first showing that insurer breached the [policy].” *Liberty Nat. Fire Ins. Co. v. Akin*, 927 S.W.2d 627, 629 (Tex. 1996) (citing *Republic Ins. Co. v. Stoker*, 903 S.W.2d 338, 341 (Tex. 1995)); see also *Martin Res. Mgmt.*

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<sup>4</sup> *Viles v. Security Nat’l Ins. Co.*, 788 S.2.2d 566, 567 (Tex. 1990).

*Corp. v. Fed. Ins. Co.*, No. 20-40571, 2021 U.S. App. LEXIS 28469 (5th Cir. Sept. 20, 2021) (“The general rule is that an insured cannot recover policy benefits as actual damages for an insurer’s statutory violation if the insured has no right to those benefits under the policy. Because [Plaintiff] is not entitled to policy benefits, it fails to plausibly allege a claim for violations of the Texas Insurance Code.”)<sup>5</sup> Because Perry & Perry received all the benefits to which it was entitled under the Policy, and is not entitled to any additional benefits, its bad faith claims under the Texas Insurance Code fail.

#### **IV. CONCLUSION**

In sum, no genuine issue of material fact exists as to any of the causes of action asserted in Perry & Perry’s complaint. Based on the plain language of the Policy’s Cowbell Breach Fund Separate Limit Endorsement, Obsidian has no duty to pay more than one \$250,000 Cyber Crime Loss sublimit of liability, regardless of the number of **Claims** or **Cyber Crime Incidents**. Accordingly, Defendants request that the Court grant summary judgment in their favor on the First Cause of Action against them. Additionally, because Obsidian has provided its insured with all of the benefits due under the Policy, and Perry & Perry cannot show any breach, Defendants request that the Court grant summary judgment in their favor on the Second and Third Causes of Action against them.

A proposed Order granting the relief requested accompanies this Motion.

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<sup>5</sup> While Texas courts have “left open the possibility that an insurer’s denial of a claim it was not obliged to pay might nevertheless be in bad faith if its conduct was extreme and produced damages unrelated to and independent of the policy claim, [ . . . ] such ‘independent-injury claim[s]’ are rare and Texas courts have yet to encounter one. *5 Star Tech I, LP v. Am. Guar. & Liab. Ins. Co.*, No. EP-18-CV-00037-DCG, 2020 U.S. Dist. LEXIS 117327 \*32 (W.D. Tex. April 28, 2020). Perry & Perry has failed to provide a scintilla of evidence that Cowbell and/or Obsidian engaged in extreme conduct or in conduct that produced damages unrelated to and independent of the policy claim. In fact, Perry & Perry does not allege that it suffered any damages apart from its allegation that it is entitled to payment of a second \$250,000 **Cyber Crime Loss** limit.

Respectfully submitted,

/s/ Wm. Lance Lewis

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**ATTORNEYS FOR DEFENDANTS  
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OBSIDIAN SPECIALTY INSURANCE  
COMPANY**

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing document was served concurrently with filing upon counsel of record for all parties through the Court's electronic noticing system.

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