

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.	§	

PLAINTIFF’S MOTION FOR SUMMARY JUDGMENT

Plaintiff Perry & Perry Builders, Inc. (“Plaintiff” or “PPB”) files this Motion for Summary Judgment as follows:

Introduction

1. This is an insurance coverage dispute. Based on the undisputed facts, PPB suffered two first party losses covered by the policy in this case. The only dispute is whether PPB is entitled to recover for two claims or only one claim. Under applicable rules of construction for insurance policies, PPB is entitled to recover for both losses, each of which constitutes a separate claim.
2. Obsidian Specialty Insurance Company and Cowbell Cyber, Inc. (collectively “Defendants”) have proposed two interpretations of the policy to avoid language providing for coverage of each claim. The policy language does not support either interpretation. If Defendants intended to limit their liability as proposed, then they “had the duty to make such an intention in its policy clear and unambiguous.” *Gonzalez v. Mission Am. Ins. Co.*, 795 S.W.2d 734, 737 (Tex. 1990). Because the policy does not include language to support Defendants’ interpretations, the policy language unambiguously provides for separate coverage of both claims.

3. Alternatively, should the Court conclude that the policy language is ambiguous and potentially supports both PPB's and Defendants' interpretations, the Court "must resolve the uncertainty by adopting the construction that most favors the insured ... even if the construction urged by the insurer appears to be more reasonable or a more accurate reflection of the parties' intent." *RSUI Indem. Co. v. Lynd Co.*, 466 S.W.3d 113, 118 (Tex. 2015).

4. The parties have agreed to submit this case for determination on cross motions for summary judgment. The facts supporting summary judgment have been agreed and have been submitted pursuant to F.R.C.P. 56(c)(1)(A) as Joint Summary Judgment Stipulations (Dkt. #13), including Exhibits A through H attached thereto.¹

Facts

5. Facts of Loss. PPB is the named insured under Prime 250 Cyber Risk Insurance Policy Number OBD-CB-S3DTFHJ5Z-002 issued by Obsidian (the "Policy") with a policy period from August 12, 2023 through August 12, 2024. (Dkt. 13, p.1). In December of 2023, Alamo Structural Steel LLC ("Alamo Steel") was a third-party vendor who provided steel and metal materials to PPB. (*Id.*) In December of 2023, a person fraudulently misrepresenting themselves as the chief financial officer of Alamo Steel emailed PPB's office manager Kelli Hilton: a) claiming that Alamo Steel would no longer accept paper checks; and b) requesting that PPB pay invoices by electronic ("ACH") payments. (Dkt. 13, p.2; Ex. B, Dkt. 13-2). These fraudulent emails included banking information for an account that did not belong to Alamo Steel. (*Id.*)

6. Hilton called a phone number provided by the fraudulent emails to verify the information and spoke to someone fraudulently misrepresenting themselves to be the Alamo Steel CFO. (Dkt. 13, p.2; Ex. D, p.2, Dkt. 13-4). In reliance on these fraudulent communications, Hilton made two

¹ References to Ex. A – Ex. H herein will be references to the exhibits to the Joint Summary Judgment Stipulations.

separate ACH transfers for two Alamo Steel invoices – one for \$272,997.45 and one for \$601,866.25. (Dkt. 13, p.2; Ex. B, Dkt. 13-3). The funds were never recovered.

7. Policy Coverage. The deception of Hilton resulting in the two payments constitutes a “Social Engineering Attack” under §II(NNN) of the Policy. (Dkt. 13, p.3; Ex. A, p.23, Dkt. 13-1). A “Social Engineering Attack” is one form of a “Cyber Crime Incident” and a “Cyber Crime Loss” under §§II(L) & (M) of the Policy. (Dkt. 13, p.3; Ex. A, p.16-17. Dkt. 13-1). A “Cyber Crime Event” includes a “Cyber Crime Incident” under §II(N) of the Policy. (Dkt. 13, p.3; Ex. A, p.17. Dkt. 13-1). “First Party Loss” includes a “Cyber Crime Loss” under §I.B of the Policy. (Ex. A, p.14. Dkt. 13-1). The Policy provides for reimbursement of the insured for “First Party Loss” directly resulting from a “Cyber Event” under “First Party Loss Coverage” §I.B. (Ex. A, p.14, Dkt. 13-1). Accordingly, because the two payments were the result of a Social Engineering Attack, they both constitute a Cyber Crime Incident and a Cyber Crime Loss and are therefore both covered losses for reimbursement as First Party Losses directly resulting from a Cyber Event under §I.B.

8. Claims Process. In a March 26, 2024 letter, Defendants acknowledged that the Social Engineering Attack against Hilton and PPB was a covered First Party Loss under the Policy. (Dkt. 1, p.3-4; Ex. E, Dkt. 13-5). Thereafter Defendants paid \$250,000 to PPB as policy limits for a single claim under the Policy. (Dkt. 1, p.3-4; Ex. E, Dkt. 13-5). On April 3, 2024, PPB wrote to Defendants asserting that there were two losses and therefore PPB was entitled to payment for two claims. (Ex. F, p.3, Dkt. 13-6). In response, Defendants asserted that payment for PPB’s second claim was barred by Policy Definition KK “Interrelated Incident”. (Ex. F, p.1, Dkt 13-6). On May 30, 2024, counsel for PPB responded with an explanation of why the Policy provided a separate limit of \$250,000 for “Each Claim.” (Ex. G, Dkt. 13-7). That letter also explained that nothing in

the Policy provided for a single limit or other coverage limitation for an “Interrelated Incident” and demanded payment of the \$250,000 policy limit for the second claim. (*Id.*)

9. Defendants never responded to PPB’s May 30, 2024 letter, resulting in this lawsuit being filed. On March 21, 2025, in response to this lawsuit, Defendants provided a second coverage denial for PPB’s second claim. (Ex. H, Dkt. 13-8). That letter posited a new Policy interpretation, which is that PPB’s second claim is barred by the “Cowbell Breach Fund Separate Limit Endorsement.” (Ex. H, Dkt. 13-8; Ex. A, p.47, Dkt. 13-1). However, that endorsement does not change the policy limits terms of the Declarations, which provide a separate limit of insurance for “Each Claim.” Accordingly, the endorsement does not bar PPB’s second claim.

10. Policy Limits. The Policy unambiguously provides for a coverage limit for “Each Claim.” Declarations Item 5 is titled “Limits” and includes three charts – one chart for each of three coverage sections: I.A, I.B, and I.C. The coverage at issue in this case is “I.B First Party Loss Coverage” therefore the relevant chart is as follows (Ex. A. p.5, Dkt 13-1):

Section I.B.	Coverage	Included (yes/no)	Each Claim Limit of Liability	Waiting Period	Retroactive Date
(1)	Business Interruption Loss	yes	\$1,000,000.00	The greater of: <u>\$5,000.00</u> or <u>24</u> hours	N/A
(2)	Contingent Business Interruption Loss	yes	\$1,000,000.00	The greater of: <u>\$5,000.00</u> or <u>24</u> hours	N/A
(3)	System Failure Business Interruption Loss	yes	\$1,000,000.00	The greater of: <u>\$5,000.00</u> or <u>24</u> hours	N/A
(4)	System Failure Contingent Business Interruption Loss	yes	\$1,000,000.00	The greater of: <u>\$5,000.00</u> or <u>24</u> hours	N/A
(5)	Cyber Crime Loss	yes	\$250,000.00	\$10,000.00	N/A
(6)	Bricking Costs	yes	\$1,000,000.00	\$5,000.00	N/A
(7)	Criminal Reward Costs	yes	\$100,000.00	N/A	N/A

Column four of this chart clearly provides that there is a limit of \$250,000 for “Each Claim” for a “Cyber Crime Loss.” The Policy contains no further explanation regarding the application of the provisions of this chart.

11. Definition of “Claim.” As indicated above, the fourth column of the Section I.B chart provides “Each Claim Limit of Liability” therefore the meaning of the word “Claim” as used in this chart is of importance. There is no Policy definition for the word “Claim” as applied to first party losses therefore the word “Claim” in the limits chart for Section I.B is not defined by the Policy. The only definition of “Claim” is found in §II(F) of the Policy and only applies to third party claims. Therefore, the Policy definition of “Claim” does not apply to first party losses and therefore cannot apply to the Section I.B chart. (Ex. A, p.16, Dkt. 13-1). “Claim” is therefore undefined by the Policy as it applies to Section I.B, the coverage at issue in this case.

Argument and Authorities

12. “Claim” must be given its ordinary and generally accepted meaning. It is undisputed that the Policy definition of “Claim” (§II(F)) only applies to third party claims because the definition is limited to demands for money, civil proceedings, administrative and regulatory proceedings, and other liability claims against an insured. Nothing in the definition of “Claim” addresses a first party claim by an insured for coverage under the Policy. Accordingly, the Policy does not define “Claim” in the context of the first party loss at issue in this lawsuit. “Unless the policy dictates otherwise, we give words and phrases their ordinary and generally accepted meaning.” *RSUI Indem.*, 466 S.W.3d at 118. According to Merriam-Webster, the ordinary meaning of the word “Claim” is “a demand for something due or believed to be due.”² With regard to the first party loss

² <https://www.merriam-webster.com/dictionary/claim>. (Last accessed July 6, 2025).

at issue in this case, the Policy provides no definition or restriction on the meaning of the word “Claim”, therefore this ordinary meaning applies.

13. The Policy provides a separate \$250,000 coverage limit for “Each Claim.” As the result of a Social Engineering Attack, PPB suffered one Cyber Crime Loss for the payment of \$272,997.45 and a second Cyber Crime Loss for a separate payment of \$601,886.25. PPB has made a demand and claim for both of these losses, each of which is a separate “demand for something due or believed to be due.” Accordingly, each of these losses is the basis for a separate Claim under the Policy. In the Section I.B Limits Chart, there is a column labeled “Each Claim Limit of Liability” which unambiguously provides for a separate limit of liability for “Each Claim.” On the “Cyber Crime Loss” row of the I.B Chart, the “Each Claim Limit of Liability” is \$250,000.00. Accordingly, under the unambiguous language of the Policy, there is a separate \$250,000 limit for each of PPB’s claims. The Court should grant summary judgment that PPB is entitled to recover \$250,000 for its second claim.

14. The Policy does not limit recovery for Interrelated Incidents. Defendants’ first denial cites definition KK “Interrelated Incident” as the basis for denying PPB’s second claim. (Ex. A, p.19, Dkt. 13-1; Ex. F, p.1, Dkt. 13-6). Other than this definition, the Policy contains no reference to the term “Interrelated Incident.” There is no provision of the Policy restricting or limiting coverage or limits for “Interrelated Incidents” therefore the cited definition is irrelevant to PPB’s Claims. As demonstrated by *Gonzalez v. Mission Am. Ins. Co.*, 795 S.W.2d 734, 736 (Tex. 1990), an insurer can only enforce the actual policy provisions and is not permitted to enforce language it wished it had included in the policy.

15. In *Gonzalez*, the policy limited claims of bodily injury by an aircraft passenger to \$100,000, with a total limit of \$300,000 because there were only three passenger seats. *Id.* When three

passengers died in an accident, the carrier argued that the damages were limited by the \$100,000 per passenger bodily injury limit. The Texas Supreme Court disagreed because policy language must be “construed strictly against the party who drafted it since the drafter is responsible for the language used.” *Id.* at 737. The court pointed out that the carrier “could have easily drafted the policy to read: The company’s limit of liability for all damages, arising out of bodily injury, sickness or diseases, including death at anytime resulting therefrom, sustained by any one passenger shall not exceed \$100,000. ... If [the insurer] intended to limit its liability for payment to \$100,000 for all damages resulting from any one passenger's bodily injury, including death, then [the insurer] had the duty to make such an intention in its policy clear and unambiguous because the terms, language, and conditions of the insurance policy were selected by [the insurer].” *Id.*

16. This case is the same. Defendants could have easily drafted the Policy to say: “Notwithstanding anything to the contrary set forth in Item 5 of the Declarations, a single coverage limit will apply to all Interrelated Incidents regardless of the number of Claims or Losses resulting therefrom.” This language, if included in the Policy, would have tied the definition of an “Interrelated Incident” to an unambiguous statement restricting the coverage limit for multiple claims or losses. In the absence of such language, the definition of “Interrelated Incident” cannot provide the basis for a restriction on coverage because “[i]n particular, exceptions or limitations on liability are strictly construed against the insurer and in favor of the insured.” *Nat'l Union Fire Ins. Co. v. Hudson Energy Co.*, 811 S.W.2d 552, 555 (Tex. 1991). Because there is no provision tying the definition of “Interrelated Incident” to a limitation on coverage, the Defendants’ first proposed interpretation fails, and the Court should award PPB \$250,000 for its second claim.

17. The Breach Fund Separate Limit Endorsement does not change the “Each Claim Limit of Liability” provision. In their second denial, after this lawsuit was filed, Defendants asserted that paragraph 2 of the Breach Fund Separate Limit Endorsement prevents PPB from recovering on its second claim. That endorsement replaces Section IV.A of the Policy. (Ex. A, p.47-48, Dkt. 13-1; Ex. H, Dkt. 13-8). The paragraph referred to by Defendants’ denial letter 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.” However, this language does not state that, regardless of the number of Claims, a single coverage limit of \$250,000 will apply to all Cyber Crime Loss under Policy Section I.B. This language refers to the “Limits of Liability set forth in Item 5” which is a vague reference to 15 different liability limits under three separate charts. The first chart contains five separate limits of \$1 million each. The second chart contains five \$1,000,000 limits, one \$250,000 limit, and one \$100,000 limit. The third chart includes three \$1,000,000 limits. (Ex. A, p.5-6, Dkt. 13-1). The literal meaning of the endorsement provision refers to \$18,250,000 in Limits of Liability.

18. Defendants’ second denial appears to contend that this endorsement changes the provisions of Item 5 of the Declarations to eliminate the “Each Claim Limit of Liability” language from column 4 of each of the charts. However, in order to achieve that outcome, the endorsement would have to expressly modify the language in the Item 5 charts, which it does not attempt to do. “When construing the policy’s language, we must give effect to all contractual provisions so that none will be rendered meaningless.” *Am. Mfrs. Mut. Ins. Co. v. Schaefer*, 124 S.W.3d 154, 157 (Tex. 2003). Nothing in the endorsement language modifies the Declarations Item 5 policy limits charts.

The “Each Claim Limit of Liability” language cannot be rendered meaningless and must be given effect. This provision unambiguously states there is a separate \$250,000 limit for each claim for Cyber Crime Loss, therefore PPB is entitled to recover \$250,000 for its second Cyber Crime Loss Claim.

19. Just as in *Gonzalez*, if Defendants had wanted to modify the policy limits provisions of Item 5 of the Declarations, they could have easily, and unambiguously, done so. For example, they could have used a chart that replaced “Maximum Coverage Limit” for “Each Claim Liability Limit” as follows:

Section I.B	Coverage	Included (yes/no)	Maximum Coverage Limit	Waiting Period	Retroactive Date
(1)	Business Interruption Loss	yes	\$1,000,000.00	The greater of \$5,000.00 or 24 hours	N/A
(2)	Contingent Business Interruption Loss	yes	\$1,000,000.00	The greater of \$5,000.00 or 24 hours	N/A
(3)	System Failure Business Interruption Loss	yes	\$1,000,000.00	The greater of \$5,000.00 or 24 hours	N/A
(4)	System Failure Contingent Business Interruption Loss	yes	\$1,000,000.00	The greater of \$5,000.00 or 24 hours	N/A
(5)	Cyber Crime Loss	yes	\$250,000.00	\$10,000.00	N/A
(6)	Bricking Costs	yes	\$1,000,000.00	\$5,000.00	N/A
(7)	Criminal Reward Costs	yes	\$100,000.00	N/A	N/A

This Chart would need to be followed by a Policy provision stating: “The Maximum Coverage Limit set forth in Column 4 of each chart in Declarations Item 5 is the maximum amount that will be paid regardless of the number of Claims or Losses incurred in a policy period.”

20. If, as Defendants’ second denial contends, the goal of the endorsement was to set a maximum coverage limit for each specific coverage definition, then it could have been easily accomplished with the foregoing chart and policy language. It is Defendants’ “duty to make such

an intention in its policy clear and unambiguous.” *Gonzalez*, 795 S.W.2d at 737. However, that is not what the endorsement language achieves because it does not modify or eliminate the “Each Claim Limit of Liability” provision in column 4 of the Declarations Item 5 chart. “[I]f a policy provision is vague or ambiguous, the fault lies with the insurer as the policy’s drafter.” *Tex. Ass’n Gov’t Risk Mgmt. Pool v. Matagorda Cty.*, 52 S.W.3d 128, 135-36 (Tex. 2000). Because the Policy unambiguously provides for a separate \$250,000 limit for each Cyber Crime Loss Claim, the Court should award PPB \$250,000 for its second claim.

21. Alternatively, if there is an ambiguity, it must be construed in favor of the insured. The Policy unambiguously provides for a separate \$250,000 limit for each Claim. However, in the event that the Court concludes there is some ambiguity in the policy language regarding PPB’s second claim and the applicable limits, then that ambiguity must be construed in favor of coverage. “[W]e must resolve the uncertainty by adopting the construction that most favors the insured, and because we are construing a limitation on coverage, we must do so even if the construction urged by the insurer appears to be more reasonable or a more accurate reflection of the parties’ intent.” *RSUI Indem.*, 466 S.W.3d at 118. Defendants have offered two different interpretations of provisions that do not state what Defendants claim. If either of these interpretations creates any ambiguity, then the Court must adopt the interpretation that favors coverage and award judgment to PPB in the amount of \$250,000 for its second Cyber Crime Loss Claim.

22. PPB is entitled to 18% interest as damages. Texas Insurance Code §§ 542.058 & 542.060 provides that PPB is entitled to 18% interest awarded as damages for Defendants’ failure to timely pay the second claim. The 18% is calculated as simple interest and accrues sixty days after the claim is presented, which was April 3, 2024. (Ex. F, p.3, Dkt. 13-6). *Tex. Farmers Ins. Co. v. Cameron*, 24 S.W.3d 386, 400 (Tex. App.—Dallas 2000, pet. denied). Sixty days after presentment

of the claim was June 2, 2024. Four hundred days elapsed between June 2, 2024 and July 7, 2025. Simple interest at 18% on \$250,000 for 400 days is \$49,315.07 for interest through July 7. Daily interest on \$250,000 at 18% is \$123.29. In addition to the \$250,000 policy limit, the Court should award PPB \$49,315.07 for interest through July 7, 2025 and daily interest through the date of judgment at \$123.29 per day.

23. Attorney's Fees. PPB is entitled to recover reasonable and necessary attorney's fees under Texas Civ. Prac. & Rem. Code Chapter 38 for breach of contract as well as under Insurance Code §542.060. Pursuant to Local Rule CV-7(j), PPB will submit an application for fee award after judgment.

Prayer

WHEREFORE PREMISES CONSIDERED, Plaintiff PPB respectfully requests that this Court grant its Motion for Summary Judgment and grant such other relief, both at law and in equity, to which it may be justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been filed through the CM/ECF system on July 7, 2025. I understand the CM/ECF system will send a Notice of Electronic Filing to the following counsel of record:

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A handwritten signature in black ink, appearing to read 'C.R.', is positioned above a horizontal line.

CLARK RICHARDS