UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

Coffey & McKenzie, LLC, Plaintiff, vs. Twin City Fire Insurance Company, d/b/a The Hartford, Defendant.	C/A NO.: 2:20-cv-01671-BHH **DEFENDANT'S REPLY MEMORANDUM IN SUPPORT OF MOTION FOR JUDGMENT ON THE PLEADINGS UNDER RULE 12(c)**

Defendant Twin City Fire Insurance Company ("Twin City") respectfully submits this reply memorandum in support of its motion (the "Motion"), pursuant to Federal Rule of Civil Procedure 12(c) and District of South Carolina Local Rules 7.04 and 7.05, for Judgment on the Pleadings with respect to the Complaint of the Law Firm Coffey & McKenzie, LLC ("Plaintiff" or the "Law Firm").

I. INTRODUCTION

This is an insurance coverage action in which the Law Firm seeks to recover from its insurer, Twin City, for purported losses caused by the coronavirus. But the policy at issue does not cover loss caused by a virus. *See* Mot. Ex. A. at 124. No one disputes that. *See* Opp. at 2, 6; *see also* Compl. ¶ 7.

Instead, the Law Firm asserts two peripheral arguments that have no application: (1) Twin City's decision to deny coverage was based on its own purportedly impermissible investigation, and (2) the Policy allegedly is an "unconscionable" contract of adhesion. *See* Opp. at 4-9.

The first point is false and, in any event, immaterial. Twin City and the Law Firm agree that the cause of the alleged loss is a virus, and losses from a virus are excluded from coverage. It does not matter whether Twin City relies on its own investigation or on the Law Firm's investigation; everyone agrees that the virus caused the Law Firm's alleged losses.

The second point is contradicted by well-established South Carolina law and commonsense. By definition, a Law Firm is a sophisticated party comprised of lawyers who are trained to read, interpret, and understand contracts. The Law Firm purchased the state-approved insurance policy in an arm's length negotiation and was fully capable of understanding its terms. The mere presence of an exclusion in the policy does not render the policy oppressive or unenforceable. It simply means there were certain risks – such as losses from a virus – Twin City was not willing to insure.

In short, nothing in the Opposition changes the fact that there is no coverage for the Law Firm's virus-related losses. Accordingly, the Law Firm's claims fail and judgment should be entered for Twin City.

Indeed, that is the same conclusion a Michigan trial court reached on July 1, 2020 with respect to other coronavirus business income claims. The Court there concluded that the plaintiff failed to allege that COVID-19 caused direct physical loss or damage to its property, but even if plaintiff did, the policy's unambiguous virus exclusion – similar to the one here – precluded coverage.[1] *See, e.g.*, Ex. C at 22 ("But, there is a virus exclusion that would also apply.").

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[1] *Gavrilides Management Company et al. vs. Michigan Insurance Company*, Case No. 20-258-CB-C30 (Mich. Circuit Court, Ingham County). Oral Argument and Decision on Motion to Dismiss, *Gavrilides Mgmt. Co. vs. Mich. Ins. Co.*, Case No. 20-258-CB-C30 (Mich. Circuit Court, Ingham County, July 1, 2020), *available at* https://www.youtube.com/watch?v=Dsy4pA5NoPw&feature=youtu.be; *see also* Ex. C at 18-24. The court has not yet issued a written order, but the oral argument and decision from the bench were live-streamed and are available at the YouTube link, and the transcript is attached hereto as

II. ARGUMENT

A. Law Firm and Defendant Agree That the Coronavirus Caused the Law Firm's Loss

The Law Firm argues that its claims should not be dismissed because Twin City relied on its own investigation in denying the Law Firm's claim. Opp. at 4. That is both false and irrelevant.

Twin City denied coverage based on the Law Firm's own assertions that its losses were caused by the coronavirus. The Law Firm has never argued otherwise—not in its Complaint, not in its Opposition, and not in any other communications with Twin City. After the Law Firm reported its business interruption claim to Twin City over the phone, Twin City sent the Law Firm the Claim Denial Letter, which summarized the Law Firm's own characterization of its claim: "This letter responds to your claim for business income loss due to the ongoing coronavirus pandemic and State of Emergency." Mot. Ex. B at 1. The Law Firm never contested this summary of its own claim. Moreover, the Complaint and the Opposition confirm the Law Firm's position that the virus caused its losses. *See* Compl. ¶¶ 7, 8 (alleging that its business was interrupted when South Carolina court operations were "suspend[ed] . . . because of the Cov[]id-19 virus"); Opp. at 2. ("the [Law Firm] filed its claim for damages under the Policy ***as a result of the Covid-19 pandemic*** and the subsequent substantial interruption of its business").

The only case Plaintiff cites in support of this argument, *Varnadore v. Nationwide Mut. Ins. Co.*, 345 S.E.2d 711 (S.C. 1986), has no application. In *Varnadore*, the insured's car was destroyed by a fire, and the parties disagreed about what caused the loss—the insurer claimed the

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Exhibit C. For ease of reference, exhibits cited in the moving papers and this reply are lettered consecutively.

fire was caused by arson and the insured asserted the fire was caused by problems with the car. *Id*. at 713. The Court held that the insurer was not entitled to a directed verdict on the bad faith claim because the insurer had relied solely upon its own investigation in denying the claim while ignoring evidence, including a highway patrol interview of the policyholder at the scene of the fire, supporting the policyholder's claim. *Id*. at 711, 713. Here, the Law Firm and Twin City agree that Plaintiff's losses were caused by the coronavirus. *E.g.*, Compl. ¶ 7. No evidence has been ignored and there is no dispute about the cause of loss. Accordingly, *Varnadore* is inapposite.

B. The Policy is Not Unconscionable

South Carolina courts rarely invalidate contracts based on unconscionability, even contracts of adhesion. *See Gladden v. Boykin*, 739 S.E.2d 882, 884-85 (2013) ("Courts should not refuse to enforce a contract on grounds of unconscionability, even when the substance of the terms appear grossly unreasonable, unless . . . the party against whom enforcement is sought cannot be said to have consented to the contract."). There is no basis to do so here.

The parties agree that, under South Carolina law, unconscionability is defined as the (1) absence of meaningful choice on the part of one party due to one-sided contract provisions, together with (2) terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them. *Gladden,* 739 S.E.2d at 884; (quoting *Simpson v. MSA of Myrtle Beach, Inc.*, 644 S.E.2d 663, 668 (S.C. 2007)); *see* Opp. at 6, 7 (citing standard). Neither prong is met. The Law Firm had a meaningful choice in buying the Policy, and the Policy does not have oppressive terms.

1. The Law Firm Had A Meaningful Choice to Buy Insurance From Twin City.

The Law Firm cannot plausibly claim it lacked a meaningful choice, which "generally speaks to the fundamental fairness of the bargaining process in the contract at issue." *Simpson*, 644 S.E.2d at 669. There is no dispute (*see* Opp. at 6) that, to make this "meaningful choice" determination, courts consider the "nature of the injuries suffered by the plaintiff; whether the plaintiff is a substantial business concern; the relative disparity in the parties' bargaining power; the parties' relative sophistication; whether there is an element of surprise in the inclusion of the challenged clause; and the conspicuousness of the clause." *Lucey v. Meyer*, 736 S.E.2d 274, 284-85 (S.C. Ct. App. 2012).

First, the Law Firm is not an unsophisticated party and there is no meaningful disparity in "bargaining powers" between the parties. The Law Firm does not and cannot allege that it lacked the education or skills to comprehend the contract or to protect its own interests. South Carolina courts have repeatedly upheld this very principle. *See id. at* 284-85 (holding that an attorney had a meaningful choice in part because, as a lawyer and former assistant solicitor, she was a sophisticated party); *see also Maybank v. BB&T Corp.*, 787 S.E.2d 498, 516 (2016) ("[C]ourts may consider whether the party asserting unconscionability spoke English, had the ability to consult an attorney, or faced other circumstances that made signing the contract in a particular instance grossly inequitable.") (internal citation omitted and emphasis added); *Simpson*, 644 S.E.2d at 670 (taking into account plaintiff's inexperience in business and lack of an attorney to counsel her on the contract's terms). Even if Plaintiff were not a group of lawyers, the contract itself is plainly written and does not require specialized knowledge to understand.

Moreover, the Law Firm could have purchased a different policy from a different insurer if it wanted different coverage. The Law Firm, a sophisticated party and a self-described

"substantial business concern" (Opp. at 8), entered into a contract of insurance with one of presumably several available insurers. *Eaton Corp. v. Trane Carolina Plains*, 350 F. Supp. 2d 699, 699 (D.S.C. 2004) (contract provision not unconscionable in part because "buyer was substantial business concern that negotiated at arm's length with seller"); *Laidlaw Envtl. Servs., (TOC), Inc. v. Honeywell, Inc.*, 966 F. Supp. 1401, 1414 (D.S.C. 1996), *aff'd,* 113 F.3d 1232 (4th Cir. 1997) (same).

The Law Firm's arguments regarding its lack of meaningful choice appear to be (1) the Limited Coverage for Fungi, Wet Rot, Dry Rot, Bacteria and Virus "gives the illusion of coverage but the reality of no coverage" and (2) that it was surprised to learn about the Virus Exclusion in its policy. *See* Opp. at 7-8; *id.* at 9 (coverage is "illusionary"). Neither has merit.

The Limited Coverage (*see* Mot. Ex. A-1) is not illusory. The Law Firm argues that a virus cannot result from fire or lightning; therefore, the coverage is illusory. *See* Opp. at 7-8. That argument ignores entirely the second exception to the exclusion: coverage provided in the Additional Coverage – Limited Coverage for Fungi, Wet Rot, Dry Rot, Bacteria and Virus "*with respect to loss or damage by a cause of loss other than fire or lightning.*" The Additional Coverage applies when the "virus is the result of one or more of the following causes . . . (1) A 'specified cause of loss' other than fire or lighting; (2) Equipment Breakdown Accident . . . ." *See* Mot. Ex. A-1 at 2. Specified causes of loss include, among other things, windstorm or hail. *See* Mot. Ex. A at 55. At least one court has previously addressed losses associated with a windstorm (a specified cause of loss) and a "pseudorabies virus." *See Curtis O. Griees & Sons, Inc. v. Farm Bureau Ins. Co. of Nebraska*, 528 N.W.2d 329, 331 (Neb. 1995). Moreover, virus is

only one of the risks addressed in the endorsement, all of which the Law Firm ignores.[2] Thus, there are many circumstances where virus, bacteria, mold or rot coverage could be provided; they just are not present here.

The Law Firm's second argument – that it was "surprised[] to learn" of the Virus Exclusion – is of no moment. *See* Opp. at 9. Contrary to the Law Firm's assertions, a contract provision does not need to "stand out" to be conspicuous. *Id.* Rather, the standard for conspicuousness is "whether an important clause was particularly inconspicuous, as if the drafter intended to obscure the term." *Gladden*, 739 S.E.2d at 885.

There is nothing about the Virus Exclusion that indicates any intent to obscure it. To the contrary, the text is the same size as all of the other text in the policy and it appears under a heading that is capitalized, bolded, and several sizes larger than other text. *See* Mot. Ex. A at 124; *see Gladden*, 739 S.E.2d at 885 ("[T]he heading of the limitation clause was in all capital letters and in bold, and the clause and its heading were in the same print as the contract's other terms."). Moreover, the Policy declaration page (Mot. Ex. A at 16) includes a special section of "property optional coverages applicable [] to this location" that explicitly and separately lists the Limited Fungi, Bacteria or Virus Coverage and the limits of such coverage. *See, e.g.*, *Morgan v. Advance Am.*, No. 4:07-3235-TLW-TER, 2008 WL 4191754, at *16 (D.S.C. Sept. 5, 2008) (no lack of meaningful choice in part because the arbitration provisions were "conspicuous and explanatory").

[2] The present dispute is about coverage for virus-related losses. But the Law Firm ignores that the Additional Coverage addresses wet rot, dry rot, bacteria and fungus too, all of which all could result from a specified cause of loss or Equipment Breakdown. The coverage is not illusory for this additional reason.

Simply put, contractual terms are not inconspicuous, much less unconscionable, because a party failed read them and was therefore "surprise[d] to learn" about them.

2. The Policy's Terms Are Not Oppressive.

The Law Firm has also failed to show that any terms in the Policy were "so oppressive that no reasonable person would make them and no fair and honest person would accept them." *One Belle Hall Prop. Owners Ass'n, Inc. v. Trammell Crow Residential Co.*, 791 S.E.2d 286, 291 (S.C. Ct. App. 2016). Exclusions like this one are not oppressive terms; they are standard in insurance contracts and are routinely enforced. *See, e.g.*, *Ross Dev. Corp. v. Fireman's Fund Ins. Co.*, 910 F. Supp. 2d 828, 832-33 (D.S.C. 2012), *aff'd sub nom. Ross Dev. Corp. v. PCS Nitrogen Inc.*, 526 F. App'x 299 (4th Cir. 2013) (pollution exclusion barred coverage based on "plain language of the exclusion"); *S.C. Farm Bureau Mut. Ins. Co. v. Kelly*, 547 S.E.2d 871, 876 (S.C. Ct. App. 2001) (deciding exclusion barring "loss caused directly or indirectly. . . out of any act committed by any insured with the intent to cause a loss" was "clear and unambiguous" and the court would "not look outside the policy to determine its meaning"); *see also* Motion at 8-9. The Law Firm has given no plausible basis to conclude that the Virus Exclusion here is more oppressive than the other kinds of exclusions that courts have enforced before. In fact, that would be a surprising conclusion given that the policy form – including the Virus Exclusion – was approved by South Carolina regulators for use and sale in the state.[3] The regulators undoubtedly would not have allowed unconscionable policies to be sold to South Carolina citizens.

[3] *See* South Carolina Department of Insurance – Property & Casualty Forms, *available at* https://www.doi.sc.gov/432/Property-Casualty#forms ("The Property and Casualty Unit reviews and analyzes rates, rules, and forms for property and casualty insurance products such as automobile, workers' compensation, and homeowners insurance.").

Moreover, it is well-established that exclusions in insurance policies do not render them unconscionable or unenforceable. *See Allstate Prop. & Cas. Ins. Co. v. English*, No. CV 4:16-3404-RBH-KDW, 2017 WL 11297114, at *10 (D.S.C. Nov. 20, 2017) (rejecting insured's argument that unambiguous exclusion in an insurance policy was unconscionable); *see also Empire Fire & Marine Ins. v. Lang*, 655 F. Supp. 2d 150, 160–61 (D. Conn. 2009) (exclusion in insurance policy not unconscionable); *Vierkant by Johnson v. AMCO Ins. Co.*, 543 N.W.2d 117, 120 (Minn. Ct. App. 1996) (same); *Stutzman v. Safeco Ins. Co. of Am.*, 284 Mont. 372, 380-81 (1997) (same). Insurers are permitted to cover certain risks and not others. There is nothing unconscionable about it.

III. CONCLUSION

For all of the foregoing reasons and others appearing on the record, this Court should grant Twin City's Motion for Judgment on the Pleadings and direct the Clerk to enter final judgment in Twin City's favor.

Signature Page Attached

Respectfully submitted,

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