UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

MAGNA TYRES USA, LLC,

Plaintiff,

v. **Case No. 6:22-cv-2176-CEM-DCI**

COFACE NORTH AMERICA INSURANCE COMPANY,

Defendant.
_____/

ORDER

THIS CAUSE is before the Court on Defendant's Motion for Summary Judgment ("Defendant's Motion," Doc. 75) and Plaintiff's Motion for Partial Summary Judgment as to Scrivener's Errors ("Plaintiff's Motion," Doc. 81). Plaintiff filed a Response to Defendant's Motion, (Doc. 92), to which Defendant filed a Reply (Doc. 93), and Defendant filed a Response to Plaintiff's Motion (Doc. 89), to which Plaintiff filed a Reply, (Doc. 96). As set forth below, Defendant's Motion will be granted, and Plaintiff's Motion will be denied.

I. BACKGROUND

In February 2020, Defendant Coface North America Insurance Company issued a Policy of International Credit Insurance ("Policy") to Plaintiff Magna Tyres USA, LLC. (Policy, Doc. 75-1, at 15–42). The Policy protects Plaintiff "against loss

due to Insolvency of debtors, which Insolvency shall have occurred within the Policy Term." (*Id.* at 37). Plaintiff received coverage for several companies—most important being Tires Direct, Inc. ("TDI"); Narsi, Inc. ("Narsi"); and Tire Super Center of Orlando LLC ("TSCO"). (*Id.* at 29, 30). Plaintiff believed these three companies, among others, were controlled by Sanjeet Singh Veen ("Singh"). (de Ruijter Dep., Doc. 75-3 at 53, 64). Singh was Plaintiff's biggest customer in North America. (Singh Dep., *id.* at 317).

By the end of 2019, Singh's debts to Plaintiff and its related companies ("Magna Entities") exceeded $8.9 million, (de Ruijter Dep., *id.* at 66), and as of May 4, 2020, he owed $12.89 million to Magna Entities. (Quirjins Individual Dep., *id.* at 123). On May 27, 2020, Plaintiff filed insurance claims with Defendant seeking payment for tires allegedly purchased by TDI, Narsi, and TSCO. (Receipt of Claims, Doc. 75-1 at 44–46; Baumgartner Dep., Doc. 81-7 at 7, 10:5–20). Plaintiff sought coverage for three Narsi invoices, four TDI invoices,[1] and one TSCO invoice. (Pl.'s Verified Third Am. Resps. to Def.'s First Set of Interrogs., Doc. 75-3 at 365). At the time, TDI had filed a lawsuit against Plaintiff in California. (*See* Super. Ct. of Cal. Cnty. of L.A. Verified First Am. Compl., Doc. 11-2 at 38–53). Narsi is also engaged in a lawsuit with Plaintiff in Texas. (*See* Narsi Decl., Doc. 75-3 at 351).

[1] Plaintiff withdrew its insurance claims on TDI Invoice No. 2020060168. (Doc. 92 at 5 n.18).

Relying on Condition 6 of the Policy, which concerns the settlement of insurance claims that are the "subject of a Dispute," Defendant notified Plaintiff that it was "hold[ing] the claims in abeyance while continuing to monitor the developments" in the ongoing litigation. (Coface Letter, Doc. 75-1 at 52). Defendant later denied the TSCO insurance claim. (Duane Morris Letter, Doc. 75-1 at 54).

Plaintiff brings two counts—Count I for declaratory judgment and Count II for breach of contract. Defendant moves for summary judgment on both counts. (*See generally* Doc. 75). Plaintiff moves for partial summary judgment on certain affirmative defenses. (*See generally* Doc. 81).

II. LEGAL STANDARD

A. Summary Judgment

"The court shall grant summary judgment if 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 dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A fact is material if it may "affect the outcome of the suit under the governing law." *Id.*

"The moving party bears the initial burden of showing the court, by reference to materials on file, that there are no genuine issues of material fact that should be decided at trial." *Allen v. Bd. of Pub. Educ.,* 495 F.3d 1306, 1313–14 (11th Cir.

2007). In ruling on a motion for summary judgment, the Court construes the facts and all reasonable inferences therefrom in the light most favorable to the nonmoving party. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000). But when faced with a "properly supported motion for summary judgment," the nonmoving party "must come forward with specific factual evidence, presenting more than mere allegations." *Gargiulo v. G.M. Sales, Inc.*, 131 F.3d 995, 999 (11th Cir. 1997) (citing *Anderson*, 477 U.S. at 248–49 (1986)); *see also LaRoche v. Denny's, Inc.*, 62 F. Supp. 2d 1366, 1371 (S.D. Fla. 1999) ("The law is clear . . . that suspicion, perception, opinion, and belief cannot be used to defeat a motion for summary judgment.").

"[A]t the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson*, 477 U.S. at 249. "[T]he proper inquiry on summary judgment is 'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" *Stitzel v. N.Y. Life Ins. Co.*, 361 F. App'x 20, 22 (11th Cir. 2009) (quoting *Anderson*, 477 U.S. at 251–52). Put another way, a motion for summary judgment should be denied only "[i]f reasonable minds could differ on the inferences arising from undisputed [material] facts." *Pioch v. IBEX Eng'g Servs.*,

825 F.3d 1264, 1267 (11th Cir. 2016) (quoting *Allen v. Tyson Foods Inc.*, 121 F.3d 642, 646 (11th Cir. 1997).

B. Principles of Insurance Contract Interpretation

It is undisputed that Florida law governs the interpretation of the insurance policy at issue. In Florida, "[s]ummary judgment is appropriate in declaratory judgment actions seeking a declaration of coverage when the insurer's duty, if any, rests solely on the applicability of the insurance policy, the construction and effect of which is a matter of law." *Northland Cas. Co. v. HBE Corp.*, 160 F. Supp. 2d 1348, 1358 (M.D. Fla. 2001); *see also Gas Kwick, Inc. v. United Pac. Ins. Co.*, 58 F.3d 1536, 1538–39 (11th Cir. 1995) ("Under Florida law, interpretation of an insurance contract is a matter of law to be decided by the court."). "[T]he Florida Supreme Court has made clear that the language of the policy is the most important factor." *James River Ins. Co. v. Ground Down Eng'g, Inc.*, 540 F.3d 1270, 1274 (11th Cir. 2008) (quotation omitted). Additionally, "insurance contracts are construed according to their plain meaning." *Id.* (quoting *Taurus Holdings, Inc. v. U.S. Fid. & Guar. Co.*, 913 So. 2d 528, 532 (Fla. 2005)). "[I]f a policy provision is clear and unambiguous, it should be enforced according to its terms whether it is a basic policy provision or an exclusionary provision." *Taurus Holdings*, 913 So. 2d at 532 (quotation omitted).

Where the "relevant policy language is susceptible to more than one reasonable interpretation, one providing coverage and the [other] limiting coverage, the insurance policy is considered ambiguous." *Westport Ins. Corp. v. VN Hotel Grp., LLC*, No. 6:10-cv-222-Orl-28KRS, 2011 WL 4804896, at *2 (M.D. Fla. Oct. 11, 2011) (quoting *Auto-Owners Ins. Co. v. Anderson*, 756 So. 2d 29, 34 (Fla. 2000)). For an insurance contract to be found ambiguous, "[t]here must be a genuine inconsistency, uncertainty, or ambiguity in meaning that remains after resort to the ordinary rules of construction." *Valiant Ins. Co. v. Evonosky*, 864 F. Supp. 1189, 1191 (M.D. Fla. 1994) (quotation omitted). Additionally, the mere fact that policy language requires interpretation does not render the language ambiguous. *Id.* "Ambiguous policy provisions are interpreted liberally in favor of the insured and strictly against the drafter who prepared the policy." *Westport Ins. Corp.*, 2011 WL 4804896, at *2 (quoting *Auto-Owners Ins. Co.*, 756 So. 2d at 34). Moreover, "[e]xclusionary clauses are construed even more strictly against the insurer than coverage clauses," and the insurer has the burden of demonstrating that an exclusion in a policy applies. *Id.* (quotation omitted).

III. ANALYSIS

A. Justiciability

"Federal courts are courts of limited jurisdiction." *Gardner v. Mutz*, 962 F.3d 1329, 1336 (11th Cir. 2020). This limited jurisdiction extends only to "cases" and

"controversies." *Id.* (citing U.S. Const. art. III, § 2). "This case-or-controversy requirement comprises three familiar 'strands': (1) standing, (2) ripeness, and (3) mootness." *Id.*

Defendant asserts the TDI and Narsi insurance claims are nonjusticiable in federal court because they are currently in abeyance and have not yet been denied.[2] (Doc. 75 at 21). "If a claim is not ripe, the district court lacks jurisdiction to issue a ruling on the merits and therefore must dismiss that claim without prejudice." *Serpentfoot v. Rome City Comm'n*, 322 F. App'x 801, 805 (11th Cir. 2009). However, it is Plaintiff's causes of action—one for declaratory judgment[3] and the other for breach of contract—that must be ripe to present a justiciable controversy for the Court, which is not necessarily the same analysis as whether the insurance claims themselves have been denied.

There is a ripe controversy under the Declaratory Judgment Act when the parties have a "definite and concrete" dispute about the "legal rights and obligations

[2] The TSCO insurance claim, however, is ripe because Defendant has denied coverage, and it "is no longer subject to a Dispute under the terms of [the] Policy . . . ." (Doc. 75-1 at 54).

[3] "[A]lthough Plaintiff's complaint references the Florida Declaratory Judgment Act, 'as a federal court sitting in diversity jurisdiction, we apply the substantive law of the forum state, in this case Florida, alongside federal procedural law.'" *Westchester Gen. Hosp., Inc. v. Evanston Ins. Co.*, No. 19-22831-Civ-WILLIAMS/TORRES, 2020 WL 4501947, at *19 (S.D. Fla. May 4, 2020) (cleaned up) (quoting *Global Quest, LLC v. Horizon Yachts, Inc.*, 849 F.3d 1022, 1027 (11th Cir. 2017)). "Florida's Declaratory Judgment Act . . . is a procedural mechanism that confers subject matter jurisdiction on Florida's circuit and county courts; it does not confer any substantive rights." *Coccaro v. Geico Gen. Ins. Co.*, 648 F. App'x 876, 880–81 (11th Cir. 2016). Therefore, Count I must be construed under the federal Declaratory Judgment Act codified at 28 U.S.C. § 2201. *See id.* at 881.

arising from the contracts of insurance." *Aetna Life Ins. Co. of Hartford, Conn. v. Haworth*, 300 U.S. 227, 242 (1937). Defendants argue that this case is similar to a duty to indemnify case because there is underlying litigation between Plaintiff, TDI, and Narsi about these debts, and generally "an insurer's duty to indemnify is not ripe until the underlying lawsuit is resolved or the insured's liability is established." *Mid-Continent Cas. Co. v. Delacruz Drywall Plastering & Stucco, Inc.*, 766 F. App'x 768, 770 (11th Cir. 2019). However, declaratory judgment actions involving an insurer and an insured party may be ripe even prior to judgment in underlying litigation. *See Allstate Vehicle & Prop. Ins. Co. v. Jawanda*, No. 1:22-cv-04719-SDG, 2024 WL 1396643, at *3–4 (N.D. Ga. Mar. 31, 2024) (citing *Standard Accident Ins. Co.v. Meadows*, 125 F.2d 422 (5th Cir. 1942) and *Cincinnati Ins. Co. v. Holbrook*, 867 F.2d 1330, 1333 (11th Cir. 1989)). There is not a categorical rule. The Court must look at the specific facts of the case.

As this Court has previously explained, the parties here dispute whether Defendant appropriately invoked Condition 6 of the Policy, which allows them to suspend coverage of disputed insurance claims. (*See* Doc. 29 at 6). And Plaintiff argues that suspending coverage in this way and refusing to make a final determination as to coverage equates to a constructive denial of its claims.

In a declaratory judgment action, a finding that the insurer denied the insurance claim is generally enough to establish the action is ripe. *See Am. Ins. Co.*

v. Evercare Co., 430 F. App'x 795, 798–99 (11th Cir. 2011) (finding a controversy and therefore jurisdiction where the insurer denied coverage after the insured demanded it). Courts have also recognized instances where an insurer has constructively denied an insurance claim. *See Café La Trova LLC v. Aspen Specialty Ins. Co.*, 519 F. Supp. 3d 1167, 1176 (S.D. Fla. 2021); *Wilshire Condo. Ass'n v. QBE Ins. Corp.*, Case No. 10-23806-Civ, 2013 WL 12092532, at *5 (S.D. Fla. Apr. 10, 2013) (finding a de facto denial from "prolonged refusal to respond to [the insured's] coverage claim"). Here, Plaintiff alleges that by suspending coverage Defendant has "effectively denied and declined to pay" its insurance claims. (Doc. 1-1 at 7).

In *Café La Trova*, the court held there was a constructive denial where the insurer had not "paid, denied, investigated, or otherwise officially responded to [the insured's] insurance claim" in the ten months after the complaint was filed. 519 F. Supp. 3d at 1176. It was important to the holding that the insurer "made clear throughout the[ ] proceedings its position that Plaintiff's losses [were] not covered by the Policy." *Id.* And that is so here. While Defendant has responded to Plaintiff's insurance claims, Defendant has not paid. And Defendant has made plain from the remainder of its motion its stance that Plaintiff's insurance claims are not covered under the Policy. (*See* Doc. 75 at 18–24). Defendant has thus constructively denied Plaintiff's TDI and Narsi insurance claims, and Plaintiff's declaratory judgment claim is ripe.

As for Count II, under Florida law, a breach of insurance contract claim is ripe when the insurer denies the insurance claim. *See Yacht Club on the Intracoastal Condo. Ass'n. v. Lexington Ins. Co.*, 509 F. App'x 919, 922 (11th Cir. 2013) (citing *Allstate Ins. Co. v. Kaklamanos*, 843 So.2d 885, 892 (Fla. 2003), and *Palma Vista Condo. Ass'n of Hillsborough Cnty., Inc. v. Nationwide Mut. Fire Ins. Co.*, No. 8:09-cv-155-T-27EAJ, 2010 WL 4274747, at *6 (M.D. Fla. Oct. 7, 2010)). Here, as explained above, Defendant has constructively denied Plaintiff's insurance claims. (Coface Letter, Doc. 75-1 at 52).

That means both causes of action—declaratory judgment and breach of contract—are ripe for review. *See Café La Trova*, 519 F. Supp. 3d at 1176; *Yacht Club*, 509 F. App'x at 922. Therefore, there is a justiciable controversy before the Court.

B. Material Misrepresentation

Defendant asserts that none of the insurance claims are covered under the Policy because Plaintiff made a material misrepresentation in the Application, and the terms of the Policy itself allows for denial of coverage due to such misrepresentations.[4] The Policy provides in relevant part:

[4] Plaintiff cites law related to recission of a policy due to misrepresentations, and while such discussions can be informative, they are not directly applicable because the issue here is interpretation of a provision of the Policy, not application of common law to permit recission.

> any misrepresentations, omissions or fraud shall not prevent recovery under this Policy unless they are either:
>
> (1) fraudulent; or
>
> (2) material either to the acceptance of the risk, or to the hazard assumed by us; or
>
> (3) we would in good faith either not have issued this Policy, or would not have issued it in as large an amount, or would not have provided coverage for the hazard resulting in the loss, if the true facts had been made known to us as required by the Application, the Policy or otherwise.

(Doc. 75-1 at 32) (emphasis omitted).

1. Misrepresentation

Defendant alleges Plaintiff made a misrepresentation by "falsely den[ying] knowledge of any information detrimental to the creditworthiness of its customers, including that Singh's accounts were more than 60 days past due." (Doc. 75 at 27–28). Question 11 on the Application "Have you any information detrimental to the credit worthiness of any individual, firm, co-partnership or corporation to which you have made or contemplate making any sale or shipment, under which said policy, if issued, will apply?" is answered "No." (Signed Policy Application, Doc. 81-18 at 2). And part of Question 14, which asks "How much is past due over 60 days?" is left blank. (*Id.* at 3).

The outstanding debts of Singh's companies to Magna Entities exceeded $5.9 million in November 2019. (Quirijns Corporate Representative Dep., Doc. 75-3 at

217). As of December 31, 2019, the outstanding balance exceeded $8.9 million. (de Ruijter Dep., *id.* at 66). By the end of January 2020, the Singh companies owed upwards of $11.6 million. (Quirijns Individual Dep., *id.* at 123). In addition, Plaintiff's former employee, who oversaw accounting, testified that Singh was regularly 90 days past due on his accounts. (Sampson Dep., *id.* at 242, 291).

Plaintiff first argues that it did not make any misrepresentation because Defendant's employee, William Clark, completed and submitted the Application to underwriting before returning it to Plaintiff for a signature. (Clark Email, Doc. 86-14 at 89). Clark wrote that "if there is a section that isn't completed, then that means it doesn't have to be completed." (*Id.*). Clark also advised Plaintiff "please just review [the Application] and if you want to make any changes, feel free….. otherwise if no changes, then please just sign the last page and send me back the signature page is all I need." (*Id.*). The Application was signed by Plaintiff's CEO. (Signed Policy Application, Doc. 81-18 at 9). Plaintiff contends it committed no misrepresentation because Defendant's agent completed and submitted the Application on Plaintiff's behalf. (Doc. 92 at 19–20). Perhaps tellingly, Plaintiff cites no case law in support of this argument.

"[U]nder Florida law, a party to a contract has the 'duty to learn and know the contents of a proposed contract before he signs and delivers it [as he] is presumed to know and understand its contents, terms, and conditions.'" *Dorward v. Macy's Inc.*,

No. 2:10-cv-669-FtM-29DNF, 2011 WL 2893118, at *6 (M.D. Fla. July 20, 2011) (quoting *Sabin v. Lowe's of Fla., Inc.*, 404 So.2d 772, 773 (Fla. 5th DCA 1981)). Neither is an applicant absolved of this duty if an insurance agent fills out the application on his behalf. *See Rodriguez v. Responsive Auto Ins. Co.*, No. 3D22-1384, 2023 WL 5061776, at *4 (Fla. 3d DCA Aug. 9, 2023); *see also Valiente v. StockX, Inc.*, 645 F. Supp. 3d 1441, 1340 (S.D. Fla. 2022) ("In order to create an account, Plaintiff was required to click a box affirming that he agreed to the Terms[ ] and cannot now argue that he never read the Terms and therefore did not have the ability to understand them."). Therefore, under the instant circumstances, Plaintiff had a duty to know the contents of what it was signing and is bound by its statements in the Application.

Plaintiff also argues that when it "signed the Application, it believed that it did not have information detrimental to the creditworthiness of the Buyers." (Doc. 81 at 17). However, "[t]he [Policy] contains no knowledge or intent element; unintentional or unknowing misstatements bar recovery under a policy if they alter the risk or the likelihood of coverage." *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Sahlen*, 999 F.2d 1532, 1536 (11th Cir. 1993). As discussed below, the information if disclosed would have resulted in Defendant refusing to issue coverage for those companies. Thus, Plaintiff's belief when signing has no bearing on this analysis.

Next, Plaintiff argues that Question 11 is ambiguous because it "does not identify a time period applicable to it nor does it define what [Defendant] contends is 'information detrimental to the creditworthiness' of the Buyers." (Doc. 81 at 20). As such, Plaintiff asserts it is not clear that the information Plaintiff failed to provide fell within this provision, and therefore, construing the ambiguity in favor of coverage, the Court must find that there was no misrepresentation. "The lack of a definition of an operative term in a policy does not necessarily render the term ambiguous and in need of interpretation by the courts." *State Farm Fire & Cas. Co. v. CTC Dev. Corp.*, 720 So. 2d 1072, 1076 (Fla. 1998). Indeed, the language of the Policy itself gives context, indicating debts owed that were sixty days or more past due would fall into this category—and that is precisely the type of information Plaintiff failed to disclose. Thus, the provision is not ambiguous here.

Finally, Plaintiff argues that it should not have been required to disclose all of the referenced information because some of the debt was owed to related entities, not Plaintiff itself. But the Policy does not limit the inquiry to debts owed directly to Plaintiff; the inquiry is based on information within Plaintiff's purview. And Plaintiff does not dispute that it had this information at the time. Thus, Defendant has established that Plaintiff made a misrepresentation. Therefore, the Court turns to whether that misrepresentation was material.

2. Materiality

As noted, the Policy stated, as relevant here, that a misrepresentation would prevent coverage thereunder if it is "material either to the acceptance of the risk, or to the hazard assumed" or if Defendant "would in good faith . . . not have issued this Policy" if it had known the information. (Doc. 75-1 at 32). This language mirrors the provision of the Florida Insurance Code addressing representations in applications. Fla. Stat. § 627.409(1)(a)–(b). Thus, cases interpreting the language in the Florida Insurance Code are relevant here.

"A misrepresentation is material if it affects the risk undertaken by the insurer." *Mims v. Old Line Life Ins. Co. of Am.*, 46 F. Supp. 2d 1251, 1255–56 (M.D. Fla. 1999) (citing Fla. Stat. § 627.409(1)). "The [*Mims*] court acknowledged that an insurer may establish the materiality of misrepresentations through the affidavit of an underwriter, but warned, 'Generally, however, such "Monday morning quarterbacking" is disfavored and the materiality of misrepresentations will be a factual issue to be decided by the trier of fact, which naturally precludes summary judgment.'" *Darwin Nat'l Assurance Co. v. Brinson & Brinson, Att'ys at Law, P.A.*, No. 6:11-cv-1388-Orl-36DAB, 2013 U.S. Dist. LEXIS 77635, at *28–29 (M.D. Fla. June 3, 2013) (quoting *Mims*, 46 F. Supp. 2d at 1260–61); *see also Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Sahlen*, 999 F.2d 1532, 1536 (11th Cir. 1993) (finding

sufficient to establish materiality underwriter's deposition testimony insurer would not have issued the policy without insured providing false documentation).

Defendant has provided the affidavit of its Chief Underwriter Alexandre Lacreu as evidence that Plaintiff's misrepresentations were material. (Lacreu Decl., Doc. 75-2 at 4–5). Plaintiff attacks Lacreu's declaration as "conclusory" and "in contrast with his deposition testimony." (Objection to Lacreu Decl., Doc. 91, at 2, 3). However, the cited portions of the deposition do not refute the affidavit. Plaintiff also states that Lacreu was only designated as the corporate representative on certain topics, and Plaintiff asserts that his declaration is beyond the scope of his designation. (*Id.* at 6–7). As relevant here, Lacreu's corporate representative deposition was limited to the credit risk underwriting procedures involving Plaintiff's buyers. (Lacreu Dep., 86-4 at 21–22). However, his declaration also addresses the same subject matter—the credit risk underwriting procedures as would have applied to TDI, Narsi, and TSC had Plaintiff provided more information. Thus, the Court will consider Lacreu's declaration.

Lacreu states that Plaintiff "did not disclose (i) any information detrimental to the credit worthiness of its customers; or (ii) any information regarding the extent to which such customers' accounts were more than 60-days past due." (Lacreu Decl., Doc. 75-2 at 4). Furthermore, Plaintiff did not disclose that one person was responsible for TDI, Narsi, and TSCO orders among other companies, and that as of

February 1, 2020, the accounts had millions of dollars of debt over 60-days past due. (*Id.* at 4–5). Nor did Plaintiff disclose it had stopped delivering tires to those companies. (*Id.* at 5). "Had [Plaintiff] disclosed any of the foregoing information to [Defendant] concerning its customers' debts," Lacreu asserts that "[Defendant] would not have insured the debts of these companies under the Policy." (*Id.*).

In *Mims*, because the plaintiff "offered no contradictory evidence to rebut the underwriter's statement" that the insurer would not have issued the policy, the court held that the misrepresentations were "material as a matter of law." 46 F. Supp. 2d at 1261. Here, Plaintiff only claims it considered the creditworthiness of its customers and that debts of $12 million were "not so exceptional." (Quirijns Individual Dep., Doc. 75-3 at 158, 264:22–265:11). However, that noncommittal protestation is directly contradicted by contemporaneous email communications where Plaintiff's employees expressed there was "no tolerance anymore" for "delays of payment" by Singh and his companies. (de Ruijter Dep., *id.* at 68). And Plaintiff offers no evidence to support an assertion that Singh's companies having multiple debts that were over 90 days past due was not material.

Thus, like in *Mims*, "[Plaintiff] fails to submit any evidence, i.e.[,] depositions or affidavits of other underwriters, to contradict the affidavit." *Simmons v. Conseco Life Ins. Co.*, 170 F. Supp. 2d 1215, 1224 (M.D. Fla. 2001). Plaintiff "provide[s] only 'mere allegations or denials' which do not overcome the showing made by [ ]

[D]efendant." *Id.* (quoting *Gasaway v. Nw. Mut. Life Ins. Co.*, 26 F.3d 957, 960 (9th Cir.1994)).

Instead, Plaintiff attempts to shift the burden for obtaining this information to Defendant. Plaintiff argues that Defendant, as an insurer "who ma[de] an independent inquiry and is in a position to ascertain facts by a reasonably diligent and complete search, is bound by what a reasonable diligent and complete search would show." (Doc. 81 at 19 (quoting *Sec. Life & Tr. Co. v. Jones*, 202 So. 2d 906 (Fla. 2d DCA 1967))). However, undertaking such an investigation does not "mean[ ] that the insurer can no longer rely on the truthfulness of the application." *Vega v. Indep. Fire Ins. Co.*, 651 So. 2d 743, 745 (5th DCA 1995). "[A]utomatic investigation into one matter [does not] make other matters on the application immaterial." *Wharran v. United of Omaha Life Ins. Co.*, 645 F. Supp. 3d 1299, 1305 (M.D. Fla. 2022).

Here, while Defendant may have been able to access to more information beyond the Dun and Bradstreet Reports when assessing the Singh companies' creditworthiness, it was not expected, (Doc. 86-4 at 70–71, 74), and Defendant could still rely on the truthfulness of the Application, *see Vega*, 651 So. 2d at 745. In addition, at the time of the application, Plaintiff was best positioned to provide up to date information about the Singh companies' credit issues. And like *Wharran*, the

language on the Policy's face indicated that material misrepresentations would prevent recovery. *See id.* This argument, too, does not entitle Plaintiff to prevail.

The very fact Singh's debts were over 90 days past due was information detrimental to the creditworthiness of a customer. Taken together with the almost $12 million in debt at the time the Application was filed, Plaintiff committed a material misrepresentation in failing to correct the answer to Question 11 that it had no information detrimental on the creditworthiness of the Singh companies. *Mims*, 46 F. Supp. 2d at 1256 ("The materiality of a misrepresentation may be shown as a matter of law because some misrepresentations are so gross that any one would know they are material." (internal quotation marks omitted)).

IV. CONCLUSION

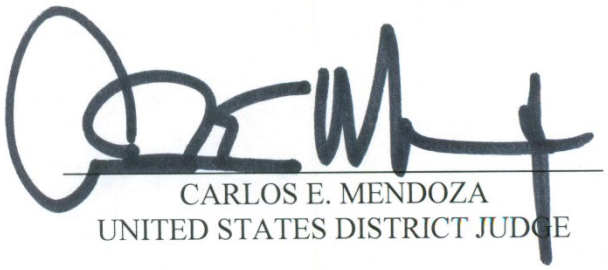
Because Defendant has established that Plaintiff made a material misrepresentation in its Application, the terms of the Policy preclude recovery on all of the claims at issue here. Therefore, Defendant is entitled to summary judgment on both counts.

Accordingly, it is **ORDERED** and **ADJUDGED** as follows:

1. Defendant's Motion for Summary Judgment (Doc. 75) is **GRANTED**.
2. Defendant's Request for Oral Argument (Doc. 76) is **DENIED as moot**.

3. Plaintiff's Amended Motion for Partial Summary Judgment (Doc. 81) is **DENIED**.
4. Plaintiff's Request for Oral Argument (Doc. 79) is **DENIED as moot**.
5. The Clerk is directed to enter judgment in its favor of Defendant and against Plaintiff, providing that Plaintiff shall take nothing on its claims. Thereafter, the Clerk is directed to close this case.

DONE and **ORDERED** in Orlando, Florida on August 26, 2024.



CARLOS E. MENDOZA
UNITED STATES DISTRICT JUDGE

Copies furnished to:

Counsel of Record