UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SUMMERWIND WEST CONDOMINIUM OWNERS ASSOCIATION, INC.,

Plaintiff,

1:22-cv-03165-JPC

-against-

MT. HAWLEY INSURANCE COMPANY and SYNDICATE 1458 AT LLOYD'S OF LONDON

Defendants.

DEFENDANTS' MEMORANDUM OF LAW SUPPORTING MOTION FOR SUMMARY JUDGMENT

Respectfully submitted,

GREG K. WINSLETT, admitted *pro hac vice*
Texas State Bar No. 21781900
RICHARD L. SMITH, III, admitted *pro hac vice*
Texas State Bar No. 24098446
QUILLING, SELANDER, LOWNDS, WINSLETT & MOSER, P.C.
2001 Bryan Street, Suite 1800
Dallas, Texas 75201
(214) 871-2100
(214) 871-2111 (Fax)
gwinslett@qslwm.com
rlsmith@qslwm.com

MATTHEW KRAUS, ESQ. (MK0621)
CHARTWELL LAW
One Battery Park Plaza, Suite 710
New York, New York 10004
(212) 785-0757
mkraus@chartwell.com

ATTORNEYS FOR DEFENDANTS

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INTRODUCTION

Defendants Mt. Hawley Insurance Company ("Mt. Hawley") and Syndicate 1458 at Lloyd's of London ("Syndicate 1458") (collectively "Mt. Hawley") submit this Memorandum of Law in Support of the motion pursuant to Fed. R. Civ. P. 56 seeking an order dismissing all claims asserted herein due to Plaintiff's fraud and concealment.

PRELIMINARY STATEMENT

This is a first-party insurance coverage dispute regarding Plaintiff's claim for damage to its condominium building in Navarre, Florida (the "Property") purportedly caused by Hurricane Sally in September 2020. The Property was insured under a policy of commercial property insurance issued by Mt. Hawley (the "Policy"). The Policy contains a mandatory New York forum-selection clause, pursuant to which the case was transferred to this Court. The Policy also contains a New York choice-of-law provision which clearly states that all claims and defenses in this case are governed by New York law.

The Court recently granted Mt. Hawley's motion for leave to amend its answer to add an additional affirmative defense under the Concealment, Misrepresentation and Fraud provision of the Mt. Hawley Policy (ECF Doc. 48). That provision operates to void coverage entirely if an insured intentionally conceals or misrepresents any material fact related to the Property, the Policy, or the underlying insurance claim. The record herein conclusively demonstrates that Plaintiff violated this Policy condition. Plaintiff and its representatives have continuously misrepresented and concealed material facts regarding major components of this insurance claim and the condition of Plaintiff's Property prior to the reported storm.

Plaintiff represented during Mt. Hawley's claim investigation that its elevators and roofs were damaged by the storm beyond repair when, in fact, Plaintiff was already in the process of replacing them because they were deteriorated and beyond their useful lives. Unbeknownst to Mt.

Hawley, Plaintiff's property manager, Anne Malone, specifically instructed the owner of the elevator company, Matthew Cavinder, to fraudulently doctor his already existing, pre-storm elevator replacement bid to trick Mt. Hawley into believing it was generated post-storm as a result of the hurricane. In Malone's own words, this deception was geared to take the already planned elevator replacement and "push it under the insurance claim."

Furthering that deception, in her deposition in this case, Malone swore that the elevators had not experienced any major problems prior to the hurricane. Months later, however, Mt. Hawley obtained pre-hurricane emails from Malone (through a subpoena to Cavinder) in which Malone specifically advised Cavinder that the elevators were "declining considerably," were "past their life expectancy," and "took a significant hit when Hurricane Ivan hit in 2004." Those incriminating pre-storm emails were conveniently omitted from Plaintiff's production in this case and it took the entire discovery period to fully expose this subterfuge, once Mt. Hawley finally secured critical documents from Cavinder and completed his deposition.

This evidence demonstrates that Plaintiff intentionally concealed and misrepresented material facts regarding major components of its claim that were material to Mt. Hawley's investigation of this loss. Malone's explicit instructions for Cavinder to doctor the date of his elevator bid to "push it under the insurance claim," combined with her false testimony regarding the pre-storm condition of the elevators, is clear and convincing evidence of Plaintiff's intent to defraud Mt. Hawley. Against this background, Plaintiff's claim for breach of the Policy fails as a matter of law.

Plaintiff's Florida-based claim for attorney's fees also fails because (1) Plaintiff is not entitled to coverage under the Policy as a matter of law, and (2) this case is governed by New York law, not Florida.

Finally, it is undisputed that Plaintiff has never repaired or replaced any of the exterior EIFS cladding, windows, or window seals that Plaintiff contends were damaged by the hurricane. Against that background, even if the Court does not grant summary judgment and dismiss Plaintiff's claims as a whole, the Mt. Hawley insurance policy contractually precludes any recovery for replacement costs or costs purportedly necessary to comply with applicable building codes.

BACKGROUND

The relevant background facts largely mirror those set forth in Mt. Hawley's Notice of Motion and Memorandum in Support of Motion for Leave to File an Amended Answer to add the subject fraud defense (ECF Doc. No. 44, 45).

Plaintiff's Property was insured under a commercial property insurance policy, No. MWC0600445, issued by Mt. Hawley with a policy period from August 23, 2020 to August 23, 2021 (the "Policy").[1] The Property is one of three adjacent condominium buildings collectively referred to as the "Summerwind Resort." Plaintiff's building is "Summerwind West."[2] All three buildings are managed by the same property management company, Virtuous Management, and the Virtuous manager at the time of the storm was Anne Malone.[3] Ms. Malone was specifically identified as Plaintiff's representative on the declarations page of the Mt. Hawley Policy, she was Plaintiff's contact on the Property Loss Notice reporting the claim to Mt. Hawley on September 16, 2020, and she was the representative directed by Plaintiff's condominium board to handle the underlying insurance claim on Plaintiff's behalf.[4] Malone testified that she communicated and coordinated with Altieri Insurance Consultants ("Altieri"), the public adjuster hired by Plaintiff,

[1] Statement of Facts ¶ 1.
[2] *Id.* ¶ 2.
[3] *Id.* ¶ 3.
[4] *Id.* ¶ 4.

regarding the insurance claim, and submitted records related to post-storm repairs to Altieri for submission to Mt. Hawley.[5]

The Policy contains a "General Condition" which states as follows:[6]

> **C. Concealment, Misrepresentation, or Fraud**
>
> This policy is void in any case of fraud by [the insured] as it related to this Coverage at any time. It is also void if you or any other insured, at any time, intentionally conceals or misrepresents a material fact concerning this policy, the Covered Property, your interest in the Covered Property, or a claim under this policy.

The Policy contains also contains the following provision:[7]

> **LEGAL ACTION CONDITIONS ENDORSEMENT**
>
> This endorsement adds the following to LEGAL ACTION AGAINST US elsewhere in the policy:
>
> > All matters arising hereunder including questions relating to the validity, interpretation, performance and enforcement of this Policy shall be determined in accordance with the law and practice of the State of New York (notwithstanding New York's conflicts of law rules).
> >
> > …

During the Claim adjustment, on December 11, 2020, Mt. Hawley wrote Plaintiff's public adjuster denying coverage because Mt. Hawley's engineer determined that the wind damage to the Property did not exceed the Policy deductible.[8]

On January 11, 2021, Plaintiff's public adjuster wrote Mt. Hawley disagreeing with Mt. Hawley's coverage decision, stating that extensive storm-created damage was documented to the roofs, and stating that Plaintiff had incurred over $500,000 in "emergency" elevator repairs from Cavinder Elevator Company as a result of damage created by the storm.[9] Attached to that letter

[5] *Id.*
[6] *Id.* ¶ 5.
[7] Statement of Facts ¶ 6.
[8] *Id.* ¶ 7.
[9] *Id.* ¶ 8.

was an estimate to repair alleged storm damage and a photo report.[10] That estimate included $514,959.00 to replace the elevators based on the proposal and invoice from Cavinder Elevator Company.[11]

On March 24, 2021, Mt. Hawley wrote Plaintiff again after reinspecting the Property.[12] Mt. Hawley's letter specifically included a request for information regarding the history of the Property and condition of the Property prior to the storm, including any estimates, bids, appraisals, or invoices from any consultant or contractor related to maintenance or repairs to the Property prior to the storm.[13] For reasons that are now apparent, Plaintiff never provided Mt. Hawley the pre-storm bids it had in its possession and still has not to this day.[14] Plaintiff only produced what it claimed to be post-storm bids and invoices to replace the roofs for $593,676.12 and the elevators for $549,034, which were incorporated into the public adjuster's estimate Plaintiff submitted as its damages model in this case.[15]

Over the course of discovery, significant evidence has surfaced that graphically exposes Plaintiff's fraudulent scheme. From meeting minutes of Plaintiff's condominium board, Mt. Hawley learned that, two months before the storm, Plaintiff instructed its property manager, Anne Malone, to solicit bids to replace both the elevators and roofs.[16] As noted above, Mt. Hawley now knows that Anne Malone emailed Matthew Cavinder of Cavinder Elevator Company back in July 2020 (months before the storm) stating: "I manage three high rise condominiums in Navarre, FL, and all elevator units are declining considerably and are past their life expectancy. They were

[10] *Id*.
[11] *Id*.
[12] Statement of Facts ¶ 9.
[13] *Id.*
[14] *See id.* ¶ 10.
[15] *Id.* ¶ 11.
[16] *Id.* ¶ 12.

installed in . . . 2000 and took a significant hit when Hurricane Ivan hit back in 2004. The rust, door operators, control boards are all struggling from time to time, thus creating the need for me to begin to get proposals for modernizations, etc."[17] This stands in stark contrast to the sworn deposition testimony Anne Malone gave in this case:[18]

> Q: Is there any damage or problems with the elevators before Hurricane Sally?
>
> A: Not that I remember. Anything major.
>
> Q: What do you remember minor?
>
> A: Just minor maintenance, call button out. Light out.
>
> . . .
>
> Q: So were the elevators – replacing the elevators at Summerwind West, was that part of the association's insurance claim to Mt. Hawley?
>
> A: I believe it was.
>
> Q: Were you aware of any problems with the elevators that predated the hurricane?
>
> A: Not really. I mean, they ran, they had some maintenance issues as we discussed earlier.
>
> . . .
>
> Q: Did you think there was a need to modernize the elevators before Hurricane Sally?
>
> A: Not before Hurricane Sally.

Email exchanges between Anne Malone and Cavinder after the hurricane expose, unmistakably, a fraudulent scheme to doctor Cavinder's pre-hurricane elevator bid to create the

[17] *Id.* ¶ 13. Of course, Plaintiff never produced this critical email despite its obvious relevance and responsiveness to multiple document requests propounded by Mt. Hawley. *Id.* ¶ 13, n.1. Even Matthew Cavinder, who was designated as a non-retained expert by Plaintiff and was served a comprehensive document subpoena for all documents and communications related to the Property, did not produce this email (or any others) until after his deposition was rescheduled because he had conveniently neglected to produce his file.

[18] *Id.* ¶ 15.

illusion it was necessitated by Hurricane Sally. Anne Malone emailed Cavinder on October 21, 2020 telling Cavinder to change the date of its pre-storm, July 2020 bid to make it appear that they created it after the storm.[19] Cavinder replied that same day, stating that he had followed Malone's instructions and attached the pre-storm bids for all three Summerwind buildings with the post hurricane dates Ms. Malone requested.[20] Then on November 17, 2020, Anne Malone forwarded the doctored elevator replacement bid to the public adjuster to include in the claim estimate submitted to Mt. Hawley.[21]

As if the reason for this deception was not already clear enough, Anne Malone explicitly explained in her email to Cavinder that he needed to "change the date" of his pre-storm bid so she could "push it under the insurance claim."[22] When confronted with this obvious fraud in their depositions, they disingenuously claimed that the purpose of this doctored bid was purportedly to reflect "updated pricing." This is despite the fact that there was no reference whatsoever to any "pricing changes" in their email exchange and that the only instruction to Cavinder was to alter the date of the earlier bid "to push it under the insurance claim."[23] Put simply, the overwhelming evidence in this case now establishes that Plaintiff purposely submitted this doctored bid as part of its insurance claim, which was actually created prior to the storm, in order to defraud Mt. Hawley.

The final piece of this dishonest plan is the mysterious disappearance of Cavinder's pre-storm bid. Neither Virtuous nor Cavinder has produced it in discovery, despite multiple requests and subpoenas for that critical document and everyone's acknowledgment that it exists.[24] Mt.

[19] *See* Statement of Facts ¶ 16.
[20] *Id.*
[21] *Id.*
[22] *See id.*
[23] *See id.*
[24] *Id.* ¶ 17.

Hawley rescheduled Cavinder's deposition multiple times based upon representations that his entire file would be provided so that he could be thoroughly questioned regarding this matter.[25] That complete production never occurred, however, and when he was asked in his January 2023 deposition why he did not produce his pre-storm elevator bid in response to Mt. Hawley's subpoena, Cavinder ultimately claimed that it had somehow been "destroyed" and/or deleted and was not retrievable:[26]

> Q: And this brings me to a topic that's been the subject of a lot of discussion in this lawsuit. I have never seen and we have never been provided a copy of the modernization proposal that you did for the west building that predated Hurricane Sally. Where is that?
>
> A: Well, probably because I typically use the same proposal and I just change the date and price. I don't save every single document. I just doctor the existing that was submitted. That's probably why the dates don't show that.
>
> Q: So you're telling me that, at one time, there was a proposal to completely modernize the Summerwind West elevators that predated Hurricane Sally, but that document doesn't exist anymore.
>
> A: Correct.

(**Exhibit 10**, Excerpts from Cavinder Depo. at 23:23-24:14).

Mt. Hawley repeatedly requested this document from all parties (including via subpoena) right up to the discovery cut-off in this case—to no avail. Cavinder's "explanation" really only exposes the obvious lie. If the pre-storm bid was "doctored", as Cavinder himself puts it, the earlier electronic version of the document would exist as an email attachment when the pre-storm bid was submitted to Anne Malone. In a final attempt to get to the bottom of this, Mt. Hawley followed up directly with Cavinder's personal counsel, but he refused to respond.[27] Of course, at the end of the day, it is now obvious why this incriminating pre-storm bid has conveniently

[25] *Id.* ¶ 18.
[26] Statement of Facts ¶ 19.
[27] *Id.* ¶ 21.

disappeared and why it has consistently been withheld from production by everyone on Plaintiff's side of this case.[28]

It should also be noted that there are similar issues with concealment and misrepresentation concerning the roof. Despite issuing document subpoenas to the roofers who actually replaced the roofs following the storm, the documents produced did not contain pre-storm bids or communications with Plaintiff. Likewise, Plaintiff's management company's production did not include any pre-storm replacement bids. Moreover, during their depositions, Anne Malone and the president of Plaintiff's condominium board denied any knowledge of a bid to replace the roof solicited before the storm.[29] Of course, once again, this is despite the fact that the condominium meeting minutes Mt. Hawley has obtained clearly state that, before the storm, the condominium board instructed Anne Malone to solicit bids to replace the roof just as they instructed her to solicit a bid to replace the elevators.[30]

Finally, although Plaintiff claims that Hurricane Sally damaged the exterior EIFS cladding and windows of the Property, such that all of the EIFS and windows require replacement, Plaintiff admits that, more than three-and-a-half years after the storm, they have not done any of this work.[31]

The Policy contains the following provisions that limit Plaintiff's recovery of replacement costs and the increased costs of construction due to the enforcement of any law or ordinance governing the construction, use, or repair of the Property:[32]

H. Valuation

[28] In the event summary judgment is not granted in this case, Mt. Hawley intends to seek spoliation sanctions and spoliation instructions to the jury.
[29] *Id.* ¶ 22.
[30] *Id.* ¶ 12.
[31] *Id.* ¶ 23.
[32] *Id.* ¶ 24.

We will determine the value of Covered Property in the event of loss or damage as follows:

. . . .

2. If Replacement Cost (without deduction for depreciation) is designated in conjunction with a specific coverage on the Declarations Page, we will pay the cost of building repairs or replacement for that designated coverage

. . . .

Replacement cost valuation does not apply until the damaged or destroyed property is repaired or replaced. You may make a claim for actual cost value before repair or replacement takes place, and within 180 days after the loss for the replacement cost. Repair or replacement must take place within 180 days after the loss in order for replacement cost valuation to apply.

ORDINANCE OR LAW COVERAGE

. . . .

F. Loss Payment

. . . .

4. Under Coverage **C - Increased Cost Of Construction Coverage**:

a. We will not pay:

(1) Until the property is actually repaired or replaced, at the same or another premises; and

(2) Unless the repair or replacement is made as soon as reasonably possible after the loss or damage, not to exceed two years. We may extend this period in writing during the two years.

No extension was ever sought or granted.

APPLICABLE LAW

1. Summary Judgment Standard

Under Rule 56(a) of the Federal Rules of Civil Procedure, summary judgment is required when "there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." FRCP 56(a). To avoid summary judgment, the non-moving party may not simply rest upon conclusory allegations or denials; rather, it bears the burden of providing

evidence of each essential element of its claim to show that a reasonable jury could find in its favor. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Disputes regarding a fact issue that is irrelevant or unnecessary are insufficient, as is a mere scintilla of evidence that is colorable or not significantly probative. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986). "Summary judgment is particularly appropriate in resolving insurance coverage disputes, because the interpretation of an insurance policy presents a question of law." *Folksamerica Reinsurance Co. v. Republic Ins. Co.*, No. 03 CIV. 6608 (VM), 2004 WL 1043086, at *2 (S.D.N.Y. May 6, 2004) (quoting *Constitution Reins. Corp.* v. *Stonewall Ins. Co.*, 980 F.Supp. 124, 127 (S.D.N.Y. 1997), aff'd without opinion, 182 F.3d 899 (2d Cir. 1999) (citation omitted).

2. The substantive law of New York law governs all parties claims and defenses.

As referenced above, the Policy contains a "Legal Action Conditions Endorsement" which states as follows:

> All matters arising hereunder including questions relating to the validity, interpretation, performance and enforcement of this Policy shall be determined in accordance with the law and practice of the State of New York (notwithstanding New York's conflicts of law rules).

(**Exhibit 1** at MTH_**001500**).

It appears to Mt. Hawley, from the Court's Order granting Mt. Hawley's Motion for Leave to add the concealment or fraud defense, that the Court has already determined that New York law governs the Parties' claims and defenses in this lawsuit. (ECF Doc. 48). Moreover, Plaintiff has itself acknowledged that New York law applies, and in its Response in Opposition to Mt. Hawley's Motion for Leave, Plaintiff relied on New York law to evaluate the sufficiency of Mt. Hawley's concealment fraud defense and interpret the Policy. (ECF Doc. 46). Accordingly, Plaintiff has essentially acknowledged the validity of the Policy's choice-of-law provision.

To the extent any choice-of-law discourse is necessary, it is well settled that federal courts sitting in diversity must apply the choice-of-law rules of the state in which the courts sit. *Public Co. Ltd. v. Lehman Bros. Special Financing, Inc.*, 414 F.3d 325, 333 (2d Cir.2005). New York choice-of-law rules are clear: courts should not engage in any conflict-of-law analysis, and must simply apply New York substantive law, where parties include a New York choice-of-law clause in their contract. As a preliminary matter, it is important to note that Mt. Hawley has already prevailed on this New York choice-of-law issue arising from this policy form on multiple occasions in the Southern District of New York. *See, e.g.*, *Ram Krishana, Inc. v. Mt. Hawley Ins. Co.*, No. 1:22-cv-03803, Doc. 87 (S.D.N.Y. April 17, 2024) (enforcing the exact same New York choice-of-law provision in another Mt. Hawley commercial property policy); *CBKZZ Inv. LLC v. Mt. Hawley Ins. Co. & Renaissance Re Syndicate 1458 Lloyds*, No. 22-CV-10672 (AS), 2024 WL 728890, at *1 (S.D.N.Y. Feb. 22, 2024) (same); *see also La. Revitalization Fund LLC v. Starr Surplus Lines Ins. Co.*, No. 23CV1006VSBVF, 2024 WL 1337617, at *1 (S.D.N.Y. Mar. 27, 2024) (magistrate opinion) (holding that a similar New York choice-of-law provision in the subject insurance policy should be enforced pursuant to N.Y. Gen. Oblig. Law § 5-1401, which requires the application of New York law without a conflict-of-law analysis in cases involving commercial contracts of $250,000 or more).

The New York Court of Appeals has recently affirmed this long-standing choice-of-law rule in a response to a certified question from the Second Circuit:

> We reaffirm the principle of *IRB–Brasil* and *Ministers* that when the parties have chosen New York Law, a court may not contravene that choice through a common-law conflicts analysis. In addition, where a statutory provision 'is merely a codification of a long-standing common-law conflict-of-laws principle,' the same principle applies (*Ministers*, 26 N.Y.3d at 472, 25 N.Y.S.3d 21, 45 N.E.3d 917).

Petróleos de Venezuela S.A. v. MUFG Union Bank, N.A., No. 6, 2024 WL 674251, at *5–6, --- N.E.3d --- (N.Y. Feb. 20, 2024). Additionally, In *Consolidated Restaurant Operations, Inc. v.*

Westport Insurance Corporation, --- N.E.3d ---, 2024 WL 628047, 2024 N.Y. Slip Op. 00795 (N.Y. Feb 15, 2024), the New York Court of Appeals recently enforced a forum selection clause and a New York choice of law provision in a commercial property policy issued by Westport Insurance Corporation similar to the "LEGAL ACTION CONDITIONS ENDORSEMENT" provision in the Mt. Hawley policy at issue here. In *Consolidated*, the Westport policy at issue provided a choice of law provision stating in part: "1. The laws of the State of New York, without regard to its conflict of laws rules, that would cause the application of the laws of any other jurisdiction, shall govern the construction and interpretation of this POLICY." Consolidated operated restaurants in twelve states and internationally. The *Consolidated* court had no difficulty first finding that the Westport "policy is governed by New York law under its express terms." *Id.* at * 1. The *Consolidated* court then joined other states in declaring that commercial property policies do not provide coverage for COVID-19 business interruption losses. *See Id.* at * 6.

For the reasons stated above, the substantive law of New York governs the parties' claims and defenses in this lawsuit, including Plaintiff's claim for breach of contract and attorney's fees under Florida law. See, e.g., *CBKZZ*, 2024 WL 728890, at *1, *3 (attorney-fees request fell within insurance policy's choice-of-law clause encompassing "all matters arising hereunder including questions related to the validity, interpretation, performance and enforcement of this Policy").

3. New York law governing insurance policy interpretation.

As the Court previously determined, "[u]nder New York law, a written contract is to be interpreted so as to give effect to the intention of the parties as expressed in the unequivocal language they have employed." (Opinion and Order granting Defendants' Motion for Leave to Amend Answer, Doc. 48, at 12, n.4 (quoting *Terwilliger v. Terwilliger*, 206 F.3d 240, 245 (2d Cir. 2000)).

4. Enforcing "concealment, misrepresentation, and fraud" provisions under New York law

The policy provision at issue provides that the Policy "is void if you or any other insured, at any time, intentionally conceals or misrepresents a material fact concerning this policy, the Covered Property, your interest in the Covered Property, or a claim under this policy."

As the Court determined in its Order granting Mt. Hawley's motion for leave to amend (ECF Doc. 48), neither the Policy nor New York law requires that Plaintiff made a false statement under oath for this provision to be enforced, and there is no distinction between false statements made in proof of loss statements or false statements made under oath. *Id.* at 12, n.4 (quoting *Fine v. Bellefonte Underwriters Ins. Co.*, 758 F.2d 50, 52 (2d Cir. 1985). For example, in *St. Irene Chrisovalantou Greek Orthodox Monastery, Inc. v. Cigna Ins. Co.*, 226 A.D.2d 624, 641 N.Y.S.2d 352, 353 (1996), the issue was whether a minute book submitted by the insured as proof of the value of stolen jewelry was created with a willful intent to defraud the insurer. Likewise, in *Cimato v. State Farm Fire & Cas. Co*., No. 16-CV-94A(SR), 2020 WL 5260295, at *4 (W.D.N.Y. June 29, 2020), the court granted summary judgment in favor of the insurer on its fraud defense because the insured submitted an inflated estimate to replace damaged personal property during the claim investigation and then falsely testified in his deposition during the subsequent coverage lawsuit that he had actually replaced the property by paying that inflated amount. The court in *Cimato* held no reasonable jury could find that Plaintiff's false statement that he paid $10,000 more than he actually paid to replace his damaged sofa was not willfully made with the intent to defraud the insurer. *Id.*

New York law is clear that "the materiality requirement is satisfied if the false statement concerns a subject relevant and germane to the insurer's investigation as it was then proceeding." *Cimato*, 2020 WL 5260295, at *5 (quoting *Fine v. Bellefonte Underwriters Ins. Co.*, 725 F.2d 179,

183 (2d Cir. 1984)). In other words, there is no requirement that the insurer must actually be duped by the fraud, concealment, or misrepresentation for the provision to be triggered. The Second Circuit explained this in *Fine*, which dealt with false statements during an examination under oath:

> It thus appears that materiality of false statements is not determined by whether or not the false answers deal with a subject later determined to be unimportant because the fire and loss were caused by factors other than those with which the statements dealt. False sworn answers are material if they might have affected the attitude and action of the insurer. They are equally material if they may be said to have been calculated either to discourage, mislead or deflect the company's investigation in any area that might seem to the company, at that time, a relevant or productive area to investigate.

725 F.2d at 184. As such, courts applying New York law routinely enforce identical (or nearly identical) fraud provisions in cases where the insurer denies coverage outright prior to the lawsuit. *See, e.g.*, *Cimato*, 2020 WL 5260295, at *4 (granting summary judgment in favor of the insurer on its fraud defense even though coverage was denied); *Scott v. AIG Prop. Cas. Co.*, 417 F. Supp. 3d 329, 347 (S.D.N.Y. 2019) (granting summary judgment in favor of insurers because the insured breached the policy's fraud provision after the insurers had denied coverage).

In addition, this Court has held that the same fraud provision at issue here is clear and unambiguous in that the Policy is not severable in the event of fraud. Instead, the entire policy is void in case of any fraud committed by the insured. *Id.* at *5. *See Mon Chong Loong Trading Corp*., 2013 WL 3326662, at *5 (holding that the exact same fraud provision was clear and unambiguous in that the policy was not severable in the event of fraud). In *Mon Chong Loong*, while the court ultimately determined a fact issue existed regarding the insured's fraudulent intent, it is important to note that the insurer based its fraud and concealment defense, in part, on the insured's false statement that certain property damages were caused by a hurricane when, in fact, they had pre-existed the storm. *Mon Chong Loong Trading Corp. v. Travelers Excess & Surplus Lines Co.*, No. 12 CIV. 6509 CM, 2014 WL 406542, at *2 (S.D.N.Y. Jan. 30, 2014). This is

exactly the type of misrepresentation that Plaintiff made in this case regarding the cause of damage to the elevators and roofs at the Property.

Finally, a fraud provision applies even where the insured's public adjuster or another representative is the party that made the fraudulent statements. Under New York law, a principal, even if innocent, is liable for acts of fraud that are within the scope of an agent's actual or apparent authority. This general principle is the same in the insurance context so that a principal who has expressly or impliedly appointed another person to make proof of loss under an insurance policy is barred from recovery, even though the insured is ignorant of the misrepresentation and innocent of any intent to deceive or defraud. See *Chubb & Son v. Consoli*, 283 A.D.2d 297 [1st Dept 2001].

ARGUMENT

1. Plaintiff's claim for breach of the Policy should be dismissed because the Policy is void for fraud and concealment as a matter of law.

The undisputed factual record shows that Plaintiff intentionally concealed and misrepresented material facts concerning both the underlying insurance claim and its Property. Moreover, the record contains clear and convincing evidence of Plaintiff's intent to defraud Mt. Hawley in the form of emails instructing a contractor to doctor a pre-storm bid to "push it under the insurance claim," concealment of pre-storm emails demonstrating the elevators needed to be replaced before the hurricane, and false testimony during the lawsuit concerning the pre-storm condition of the Property. Accordingly, there is no genuine dispute of material fact regarding any element of Mt. Hawley's affirmative defense concerning the Policy's "General Condition" for "Concealment, Misrepresentation, or Fraud," the Policy is void as a matter of law, and Plaintiff's claim for breach of the Policy should be dismissed with prejudice.

First, at the risk of repetition, the undisputed evidence clearly demonstrates that Plaintiff falsely concealed and misrepresented the pre-storm elevator bid and the pre-storm condition of the

elevators both before and during this litigation. Anne Malone, who is listed in the Policy by name as a representative of the Named Insured, directed Matthew Cavinder in writing to doctor the date on a pre-storm bid in order to deceive Mt. Hawley into thinking that the bid was created after the storm to document covered storm damage. Cavinder complied, and the doctored bid was submitted to Mt. Hawley as a specific line item in Plaintiff's estimate and damage model. Under New York law, such submissions, if falsified, constitute evidence of fraud. *See St. Irene*, 641 N.Y.S.2d at 353 (holding that a fact issue existed as to whether a minute book submitted by plaintiff as proof of the value of stolen jewelry was created with a willful intent to defraud).

Anne Malone testified untruthfully in her deposition and swore that the elevators had no major problems prior to Hurricane Sally and that she was merely soliciting replacement bids for budgetary purposes. This is directly contradicted by the withheld emails Mt. Hawley subsequently uncovered. This scenario is very similar to what occurred in *Cimato*, 2020 WL 5260295 at *4, where the court granted summary judgment in favor of the insurer on its fraud defense because the insured submitted an inflated estimate to replace damaged personal property during the claim investigation and then falsely testified in his deposition regarding the amount paid to replace it.

Second, Mt. Hawley has presented clear and convincing evidence that Plaintiff concocted this fraudulent scheme for the express purpose of fooling Mt. Hawley into believing that the elevator replacement bid was necessitated by Hurricane Sally and created after the storm to specifically document storm damage. The court in *Cimato* granted summary judgment in favor of the insurer because no reasonable jury could find that Plaintiff's false statement that he paid $10,000 more than he actually paid to replace his damaged sofa was not willfully made with the intent to defraud the insurer. Likewise, no reasonable jury could possibly conclude that Anne Malone's explicit instruction for Cavinder to "change the date" of his pre-storm bid so that she

could "push it under the insurance claim" was not made with the intent to conceal the actual date of the bid and dupe Mt. Hawley into thinking it was created after the storm to quantify storm damage. This is especially true when paired with Malone's false deposition testimony that the elevators were not experiencing any significant problems prior to the storm, Plaintiff's concealment of the pre-storm replacement bids, and Plaintiff's concealment of the pre-storm emails to Cavinder asking him to prepare a pre-storm replacement bid because the elevators were "declining considerably" and "past their prime,"

Finally, Plaintiff's misrepresentation and concealment was obviously material to Plaintiff's claim. As stated above, "the materiality requirement is satisfied if the false statement concerns a subject relevant and germane to the insurer's investigation as it was then proceeding." *Cimato*, 2020 WL 5260295, at *5. The elevators and roofs have always been major components of Plaintiff's claim for storm damage purportedly caused by Hurricane Sally and are part of Plaintiff's current damages model in this lawsuit. The replacement bids were submitted to Mt. Hawley during the claim investigation as line-items in the public adjuster's estimate and represented to Mt. Hawley as damages caused by the storm. Contrary to the position Plaintiff has previously expressed to the Court, Mt. Hawley does not have to show it was tricked by Plaintiff into actually paying money in order to establish materiality in this context.

2. Plaintiff's claim for attorney's fees under Florida law fails as a matter of law.

The choice of law provision in the Policy plainly covers all matters arising under the Policy, and is, therefore, sufficiently broad to encompass Plaintiff's extracontractual claim for attorney's fees under Florida law. "In determining the scope of the choice of law provision, this Court must follow New York law." *Commerce & Indus. Ins. Co. v. U.S. Bank Natl Ass'n*, No. 07–cv–5731 (JGK), 2008 WL 4178474, at *4 (S.D.N.Y. Sept. 3, 2008) (citing *Finance One Public Co. Ltd. v. Lehman Bros. Special Financing, Inc*., 414 F.3d 325, 333 (2d Cir.2005) ("The district court ...

sitting in diversity, was bound to apply New York law to determine the scope of the contractual choice-of-law clause. New York courts decide the scope of such clauses under New York law, not under the law selected by the clause, which here also happens to be New York law.")); *see also Ram Krishana, Inc. v. Mt. Hawley Insurance Company*, No. 1:22-cv-03803, Doc. 87 (S.D.N.Y. April 17, 2024); *CBKZZ Inv. LLC v. Renaissance Re Syndicate 1458 Lloyds*, No. 22-CV-10672 (AS), 2024 WL 728890, at *1 (S.D.N.Y. Feb. 22, 2024);.

Under New York law, a choice of law clause that extends to include all matters arising out of the contract, like the clause at issue here, mandates that New York law apply not only to causes of action sounding in contract, but also to non-contractual claims. *See Turtur v. Rothschild Registry Int'l*, 26 F.3d 304, 309–310 (2nd Cir.1994); *Ramiro Aviles v. S&P Glob., Inc*., 380 F. Supp. 3d 221, 271 (S.D.N.Y. 2019); *H.S.W. Enters., Inc. v. Woo Lae Oak, Inc*., 171 F. Supp. 2d 135, 141 n.5 (S.D.N.Y. 2001). "[P]rovisions applying to disputes 'arising out of' or 'relating to' a contract are capacious enough to reach related tort claims, while provisions stating that a contract will be 'governed by' or 'construed in accordance with' the law of a state are not." *Ramiro*, 380 F. Supp. 3d at 271 (citing *Chigirinskiy v. Panchenkova*, No. 14 Civ. 4410, 2015 WL 1454646, at *6 (S.D.N.Y. Mar. 31, 2015) (quoting *Refco Grp. Ltd., LLC v. Cantor Fitzgerald, L.P*., No. 13 Civ. 1654, 2014 WL 2610608, at *40 (S.D.N.Y. June 10, 2014)).

This Court has specifically held that Mt. Hawley's choice-of-law provision encompasses extracontractual claims, such as claims for attorney's fees. *See Ram Krishana*, No. 1:22-cv-03803, Doc. 87, at 10-11; *CBKZZ*, 2024 WL 728890, at *1, *3. Here, Plaintiff's claim for attorney's fees under Sections 626.9373, 627.428, 57.104, and/or 57.041 of the Florida Statutes are not cognizable under New York law and should be dismissed with prejudice.

3. Plaintiff is not entitled to replacement costs or increased costs of construction due to the enforcement of any law or ordinance

Lastly, even if the Court does not dismiss Plaintiff's claims as a whole, Mt. Hawley is independently entitled to summary judgment on the basis that the Policy requires that Plaintiff actually repair or replace damaged property in order to be entitled to recover replacement costs and ordinance or law costs, as follows:

H. Valuation

We will determine the value of Covered Property in the event of loss or damage as follows:

. . . .

2. If Replacement Cost (without deduction for depreciation) is designated in conjunction with a specific coverage on the Declarations Page, we will pay the cost of building repairs or replacement for that designated coverage

. . . .

Replacement cost valuation does not apply until the damaged or destroyed property is repaired or replaced. You may make a claim for actual cost value before repair or replacement takes place, and within 180 days after the loss for the replacement cost. Repair or replacement must take place within 180 days after the loss in order for replacement cost valuation to apply.

ORDINANCE OR LAW COVERAGE

. . . .

F. Loss Payment

. . . .

4. Under Coverage **C - Increased Cost Of Construction Coverage**:

a. We will not pay:

(1) Until the property is actually repaired or replaced, at the same or another premises; and

(2) Unless the repair or replacement is made as soon as reasonably possible after the loss or damage, not to exceed two years. We may extend this period in writing during the two years.

Defendants are entitled to summary judgment as to Plaintiff's claims herein for replacement costs and code compliance costs because, under either New York or Florida law (which does not apply here), an insured is not entitled to these costs unless the insured actually incurs them in making repairs or replacement of the lost or damaged property at issue. *See Sirob Imports, Inc. v. Peerless Ins. Co*., 958 F. Supp. 2d 384, 389 (E.D.N.Y. 2013) ("[T]he Court finds that the Plaintiff was required to complete repairs or reconstruction within two years of the date of the incident before the Defendant must provide replacement cost coverage."); *Todd v. Wayne Co-op. Ins. Co*., 31 A.D.3d 1026, 1027 (N.Y. 3d App. Div. 2006) ("Under the terms [of the policy], replacement cost value cannot be awarded without plaintiff first actually repairing or replacing the property.", citing *D.R. Watson Holdings v. Caliber One Indem. Co*., 15 A.D.3d 969,969, 789 N.Y.S.2d 787 (2005), *Stasack v. Capital Dist. Physicians' Health Plan*, 736 N.Y.S.2d 764, and *Matter of New York Cent. Mut. Fire Ins. Co*., 231 A.D.2d 829, 830, 647 N.Y.S.2d 66 (1996)); *D.R. Watson Holdings v. Caliber One Indem. Co*., 15 A.D.3d 969, 969, 789 N.Y.S.2d 787 [2005] ("Pursuant to the commercial property insurance policy issued by defendant, plaintiffs are not entitled to recover the replacement cost of the heating system 'until the lost or damaged property is actually repaired or replaced….' Because plaintiffs have not repaired or replaced the heating system, the measure of their damage is actual cash value, not replacement cost."); *see also Florida Ins. Guar. Ass'n v. Somerset Homeowners Ass'n, Inc*., 83 So. 3d 850, 852-53 (Fla. 4th DCA 2011)("Under the terms of the policy, an insured must actually repair or replacement the damage as a condition precedent to payment of replacement costs. Somerset failed to do so in this case."); *see also Metal Products Co., LLC v. Ohio Security Ins. Co*., 2022 WL 104618, at *2 (11th Cir. Jan. 11, 2022) ("Because Metal Products made no repairs, Ohio Security was not obligated to pay the replacement cost value of the buildings."), citing *Ceballo v. Citizens Prop. Ins. Corp*., 967 So. 2d

811, 815 (Fla. 2007) ("Courts have almost uniformly held that an insurance company's liability for replacement cost does not arise until the repair or replacement has been completed.").

In this case, it is undisputed that Plaintiff has not replaced any of the exterior EIFS cladding or the windows that Plaintiff contends were damaged by the September 16, 2020, storm. (Defendants' Material Facts, at ¶ 23). Accordingly, Defendants are entitled to summary judgment that Plaintiff is not entitled to recover replacement costs or code compliance costs as damages in this case for the exterior cladding, windows, or any other unrepaired damage.

4. Alternatively, Plaintiff's claims should be dismissed for fraud on the Court.

While summary judgment is warranted under the Policy's Concealment, Misrepresentation and Fraud provision, because of Plaintiff's actual litigation conduct in this matter, including but not limited to demonstrably false sworn deposition testimony and the intentional concealment of critical documents in discovery, the case should be dismissed as a sanction because Plaintiff's conduct constitutes fraud on the Court. *See, e.g.*, *Shangold v. Walt Disney Co.*, No. 03 CIV. 9522 (WHP), 2006 WL 71672, at *5 (S.D.N.Y. Jan. 12, 2006) (dismissing the case as a sanction where Plaintiffs fabricated evidence and lied under oath), *aff'd*, 275 Fed. Appx. 72 (2d Cir. 2008) *and aff'd*, 275 Fed. Appx. 72 (2d Cir. 2008); *McMunn v. Mem'l Sloan-Kettering Cancer Ctr.*, 191 F. Supp. 2d 440, 448, 462 (S.D.N.Y. 2002) (awarding sanction of dismissal where the plaintiff repeatedly lied at her deposition, resulting in the destruction of critical evidence); *DAG Jewish Directories, Inc. v. Y & R Media, LLC*, No. 09 CIV. 7802 RJH, 2010 WL 3219292, at *1-4 (S.D.N.Y. Aug. 12, 2010) (dismissing the case as a sanction where the plaintiff submitted a forged document as evidence).

Here, as is also discussed above, Plaintiff throughout this litigation has engaged in among other things, willful omissions of key facts and documents, and provided false testimony under oath, as follows:

- Withheld production of a pre-storm email from Anne Malone to Matthew Cavinder stating that the elevators are "past their prime" and "declining considerably" and listing various pre-existing damage. (Statement of Facts, ¶ 13).
- In direct contradiction to her pre-storm email to Cavinder (which was conveniently not produced prior to her deposition), Anne Malone testified that the elevators were not experiencing any significant issues prior to Hurricane Sally and did not need to be replaced. (Statement of Facts, ¶ 15).
- Never produced Cavinder's pre-storm elevator replacement bid, which both he and Anne Malone admitted to have existed. (Statement of Facts, ¶ 10).

CONCLUSION

For the foregoing reasons, Defendants Mt. Hawley Insurance Company and Syndicate 1458 at Lloyd's of London respectfully request that the Court grant this Motion for Summary Judgment and dismiss Plaintiff's claims with prejudice.

Respectfully submitted,

/s/ Greg K. Winslett
GREG K. WINSLETT, admitted *pro hac vice*
Texas State Bar No. 21781900
RICHARD L. SMITH, III, admitted *pro hac vice*
Texas State Bar No. 24098446
QUILLING, SELANDER, LOWNDS, WINSLETT & MOSER, P.C.
2001 Bryan Street, Suite 1800
Dallas, Texas 75201
(214) 871-2100
(214) 871-2111 (Fax)
gwinslett@qslwm.com
rlsmith@qslwm.com

MATTHEW KRAUS, ESQ. (MK0621)
CHARTWELL LAW
One Battery Park Plaza, Suite 710
New York, New York 10004
(212) 785-0757
mkraus@chartwell.com

ATTORNEYS FOR DEFENDANTS

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing instrument is being served on all counsel of record in accordance with the Federal Rules of Civil Procedure, on this 1st day of May, 2024.

/s/ Greg K. Winslett
Greg K. Winslett