To Be Argued By:
Andrew N. Adler
Time Requested: 15 Minutes

New York Supreme Court

APPELLATE DIVISION — SECOND DEPARTMENT

Docket No. 2015-04079

MB FINANCIAL BANK, N.A.,

Plaintiff-Respondent-Appellant,

against

THE SECURITY TITLE GUARANTEE CORPORATION OF BALTIMORE, and GENERAL ABSTRACT SERVICES, LLC,

Defendants-Appellants-Respondents,

and

ERICH PIEPER and STOUGES, MORGAN & PIEPER, LLP,

Defendants.

BRIEF FOR DEFENDANT-APPELLANT-RESPONDENT GENERAL ABSTRACT SERVICES, LLC

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QUESTIONS PRESENTED

1. Does a plaintiff policyholder properly state a cause of action for breach of an insurance policy against the issuing agent of the title insurance company when the agent countersigned a schedule and certain endorsements in the policy but is not otherwise mentioned in that policy, and the policy expressly places all coverage obligations upon the insurer, not its agent?

This question should be answered, "No." (*See* Argument Point II.).

2. Assuming that the insurance policy itself remains ambiguous regarding whether the issuing agent functioned as an insurer, should the court dismiss the breach of contract claim based upon documentary evidence indisputably refuting the allegation that the agent was an insurer, such as the contract between the agent and its principal?

This question should be answered, "Yes." (*See* Argument Point II.).

3. Does the title insurance policy's Exclusion 3(a) bar the insured's cause of action for breach of the policy when the insured's purported loss was caused by the acts of its designated attorney and representative, who allegedly failed to pay off an existing mortgage?

This question should be answered, "Yes." (*See* Argument Point III.).

4. Does the policy's Exclusion 3(e) bar the cause of action for breach of the policy when the insured did not directly fund the loan to its borrower at closing, but instead transmitted the funds to its designated attorney and representative, who allegedly stole the proceeds?

This question should be answered, "Yes." (*See* Argument Point III.).

PRELIMINARY STATEMENT

Defendant-Appellant NY Land Searches Inc. d/b/a General Abstract Services ("General Abstract"), incorrectly sued herein as General Abstract Services, LLC, appeals from that portion of the Decision & Order of the New York Supreme Court, Nassau County (Driscoll, J.) dated March 9, 2015 and entered on March 20, 2015 (the "Order") that denied General Abstract's motion to dismiss the cause of action of Plaintiff-Respondent MB Financial Bank, N.A. ("Plaintiff") claiming breach of contract as against General Abstract.

This litigation arises out of the alleged misappropriation of loan proceeds by Plaintiff's (or its predecessor-in-interest's) designated "settlement agent" and attorneys, defendant Stouges, Morgan & Pieper, LLP ("SMP"), who were retained to transact a residential mortgage refinance. In the transaction, General Abstract served merely as the title agent for

underwriter The Security Title Guarantee Corporation of Baltimore ("Security Title") and also as a "closer," in charge of various ministerial tasks.

In its breach of contract cause of action, Plaintiff avers that Security Title insured Plaintiff and then violated the insurance policy by wrongly declining coverage. Plaintiff submits that General Abstract, a policy issuing agent of Security Title, somehow also held coverage responsibilities to Security Title's insureds. In particular, Plaintiff maintains that General Abstract entered into the insurance contract in its own capacity, and not purely as agent for its disclosed principal, Security Title.

The court below mistakenly declared, without any detailed analysis, that it could not grant General Abstract's motion to dismiss the breach of contract claim because the operative insurance policy remained ambiguous in that regard. In fact, though, the policy's terms and conditions never mention General Abstract. Rather, the company merely countersigned one of the schedules and some of the endorsements. Given numerous express clauses in the policy showing that Security Title functioned as the sole insurer, the counter-signatures (regarded in their context) plainly indicate that General Abstract worked only as an agent. No other reasonable interpretation exists.

An agent cannot breach a contract by acting on behalf of a disclosed

principal. Hence, as a matter of law, General Abstract cannot be held liable on the insurance contract. (*See* Argument Point II., *infra*).

Also, even if the policy were ambiguous, the trial court compounded its error by failing to address the extrinsic documentary evidence proffered by General Abstract: The agency agreement between the underwriter and its agent, General Abstract's web site, and New York's comprehensive regulatory regime all attest to the unsoundness of Plaintiff's theory of recovery. (*See id.*).

Finally, even if — contrary to the pertinent law, alleged facts, and undisputed documents — General Abstract were somehow denominated an "insurer," the company still would assume no coverage duties to Plaintiff, due to two applicable policy exclusions. For example, the relevant policy excludes claims (such as one based upon SMP's apparent theft while acting as Plaintiff's appointed agent) which were "created [or] suffered by" the policyholder. (*See* Argument Point III., *infra*).

For these reasons, as detailed below, this Court should reverse the Order insofar as it denied General Abstract's motion pursuant to N.Y. C.P.L.R. §§ 3211(a)(1) and (7) to dismiss the Complaint's first cause of action (for breach of contract) in its entirety. The Order should be affirmed in all other respects regarding General Abstract.

STATEMENT OF FACTS[1]

Plaintiff is a bank that merged with Cole Taylor Bank ("Cole Taylor") on August 18, 2014. (R. 32, ¶ 1). Cole Taylor approved a refinance loan and engaged SMP to act as its attorneys and "settlement agent" in connection with closing the transaction. (R. 36, ¶¶ 19, 24).

"Security Title and General Abstract" allegedly "entered into" a lender's title insurance policy, dated December 19, 2013, to insure and protect Plaintiff (hereafter, the "Policy"). (R. 36, ¶ 25; R. 50-61). Plaintiff avers that General Abstract "signed certain endorsements and schedules to the Policy in its own capacity, thereby reflecting an explicit intent to be bound, in addition to Security Title, to the terms of the Policy." (R. 42, ¶ 58).

However, the Policy actually states that, subject to its exclusions and conditions,

> The Security Title Guarantee Corporation of Baltimore, a Maryland corporation (the "Company") insures… against loss or damage… sustained or incurred by the Insured by reason of [various enumerated risks].

[1] General Abstract assumed in the court below, and continues to assume for purposes of this appeal, that the facts alleged in the Complaint are true. Thus, General Abstract predicates this "Statement of Facts" upon the Complaint's allegations and upon undisputed documentary proof submitted to the trial court. This "Statement of Facts" does not constitute an admission of any purported "fact" alleged by Plaintiff.

(R. 50).

The Policy identifies the "Insured" as Cole Taylor and "its successors and/or assigns." (R. 52).

The Policy further declares that,

> The Company [defined as Security Title, solely] will also pay the costs, attorney's fees, and expenses incurred in defense of any matter insured against by this Policy, but only to the extent provided in the Conditions.

(R. 51, final sentence).

Throughout the Policy, many contract terms are agreed upon and entered into by Plaintiff and Security Title (the latter defined as the "Company"), including that, "The Insured acknowledges the Company has underwritten the risks covered by this policy…." (R. 61, § 16).

General Abstract "countersigned" one of the Policy's schedules and three of its four endorsements. (R. 52, 57-59). The Policy does not otherwise mention General Abstract. Only Security Title is identified by name in the signature block on the first page of the Policy (R. 50) and in the remaining (fourth) endorsement. (R. 56).

Over two years before the Policy was issued, Security Title and General Abstract entered into a "Title Policy Issuing Agreement" (the "Agreement"). (R. 194, ¶ 3; R. 196-204). As explained in that Agreement, General Abstract served as the limited policy issuing agent of Security Title. General Abstract was delegated authority:

> solely for the purpose of issuing on Security [Title]'s forms interim title insurance binders, or commitments to insure..., as well as policies of title insurance and other Security [Title] approved insurance contracts, including endorsements....

(R. 196, Art. 1, § 1).

As specified in its caption and throughout its text, the Agreement delineated how and under what circumstances General Abstract "issued" title insurance as an agent of Security Title. (*See also* R. 196, Art. 1, § 2; R. 196-97, Art. II, §§ 1-6).

A few days after the Policy went into effect, Plaintiff (the refinance lender) advanced funds to SMP. That law firm was then supposed to transmit the money to the prior mortgagee to pay off an earlier loan. (R. 37, ¶¶ 30-31). Allegedly, however, SMP never forwarded the money or took any steps to ensure the payoff. (R. 37, ¶ 32). According to the Complaint, Plaintiff put

General Abstract on notice of this embezzlement in March 2014, after which General Abstract "purported to investigate." (R. 38, ¶ 40).

On or about May 21, 2014, Cole Taylor made a claim under the Policy (the "Claim") to Security Title. (R. 38-39, ¶ 41; R. 62-63). The claim letter mentions that Cole Taylor received a copy of the Policy from General Abstract, and that General Abstract made "efforts to investigate and resolve" the problem of the missing funds. (R. 62). Yet the letter does not otherwise discuss General Abstract. While the claim letter to Security Title was appended to the Complaint, no similar letter to General Abstract is alleged in the Complaint or attached thereto.

By letter dated June 2, 2014, Security Title denied the Claim due to various enumerated exclusions. (R. 64-66). This lawsuit followed.

The Complaint's first cause of action charges breach of contract against Security Title and General Abstract. It posits that these entities violated the insurance Policy by "improperly rejecting the claim made under the Policy, and failing to cure the defect, lien, or encumbrance in the title to the subject property." (R. 42, ¶ 61). As noted above, this count attempts to attribute Security Title's obligations under the Policy to General Abstract, by virtue of General Abstract's signing certain pages of the Policy. (*See id.* ¶ 58).

The second cause of action sounds in negligence. Plaintiff asserts that Security Title and General Abstract owed a "duty of reasonable and/or professional care" in connection with the refinance transaction but disregarded that duty. (R. 43, ¶¶ 64, 67; *see also* R. 37, ¶ 33).

In lieu of answering the Complaint, General Abstract and Security Title moved separately for dismissal of both causes of action. In its Order, the trial court dismissed the negligence claim. (R. 23). Yet, as stated above, the court also decided that the contract claim against General Abstract should withstand the motion because "General Abstract is arguably also bound" as a party to the Policy, and because the moving defendants did not establish that the Policy's coverage exclusions unambiguously apply. (*Id.*). The *nisi prius* court provided no direct scrutiny of General Abstract's arguments but implied that the Policy was ambiguous regarding whether General Abstract signed that document in its own capacity. (*See* R. 18, 19-20, 23).

General Abstract timely appealed. (R. 2-3).

ARGUMENT

I.

STANDARD OF REVIEW

A *de novo* standard of review applies on an appeal from a ruling on a

summary judgment motion. 4 N.Y. Jur. *Appellate Review* § 550 (2011) (citing, *inter alia*, *Duane Reade, Inc. v. Cardtronics, LP*, 54 A.D.3d 137, 140, 863 N.Y.S.2d 14 (1st Dep't 2008)). In considering a motion to dismiss for failure to state a cause of action pursuant to N.Y. C.P.L.R. § 3211(a)(7), the court must accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every reasonable favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. *See, e.g., T.V. v. New York State Dep't of Health*, 88 A.D.3d 290, 306, 929 N.Y.S.2d 139 (2d Dep't 2011). Nevertheless, bare legal conclusions, inherently incredible claims, and factual claims flatly contradicted by the record do not merit any such consideration. *Lutz v. Caracappa*, 35 A.D.3d 673, 674, 828 N.Y.S.2d 426 (2d Dep't 2006); *Gershon v. Goldberg*, 30 A.D.3d 372, 373, 817 N.Y.S.2d 322 (2d Dep't 2006); *Parola, Gross & Marino, P.C. v. Susskind*, 43 A.D.3d 1020, 1021-22, 843 N.Y.S.2d 104 (2d Dep't 2007); *Palazzolo v. Herrick, Feinstein, LLP*, 298 A.D.2d 372, 372, 751 N.Y.S.2d 401 (2d Dep't 2002); *Asgahar v. Tringali Realty, Inc.*, 18 A.D.3d 408, 409, 795 N.Y.S.2d 68 (2d Dep't 2005).

Under C.P.L.R. § 3211(a)(1), dismissal is appropriate when "the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen v. Mutual Life*

Ins. Co. of N.Y., 98 N.Y.2d 314, 326, 746 N.Y.S.2d 858 (2002).

II.

GENERAL ABSTRACT COULD NOT HAVE BREACHED THE INSURANCE POLICY SINCE IT DID NOT HAVE COVERAGE OBLIGATIONS

In its cause of action for breach of contract, Plaintiff unconvincingly tries to lump General Abstract together with Security Title and pretend that the former entity holds duties to indemnify Security Title's policyholders or to cure title defects. This theory fails because General Abstract merely functioned as Security Title's limited agent for the purpose of issuing policies, which role is reflected in the language of the relevant insurance policy itself, the agency agreement between these defendants, and in New York's comprehensive regulatory regime.

> There is no legal theory of vicarious liability for breach of contract... by a contracting party, if he was clearly acting only as an agent of a disclosed principal. Indeed, it is well settled that when an agent acts on behalf of a disclosed principal on a contract, the agent will not be personally bound unless there is clear and explicit evidence of the agent's intention to be so bound.

Sargoy v. Wamboldt, 183 A.D.2d 763, 765, 583 N.Y.S.2d 488 (2d Dep't 1992); *accord Lido Beach Towers v. Denis A. Miller Ins. Agency, Inc.*, 128 A.D.3d 1025,

1026, 11 N.Y.S.3d 192 (2d Dep't 2015).

In the case at bar, Plaintiff claims that General Abstract "signed certain endorsements and schedules to the Policy in its own capacity, thereby reflecting an explicit intent to be bound, in addition to Security Title, to the terms of the Policy." (R. 42, ¶ 58). But, the Policy itself evinces otherwise, and the parties unambiguously manifest that the Policy did not bind the agent, General Abstract.

All of the insurance obligations in the Policy expressly fall upon Security Title. That entity is defined therein as "the Company" that "insures" the policyholders (Cole Taylor and Plaintiff) "against loss or damage…." (R. 50). "The Company" (and no other entity) pays costs, assumes the duty to defend and indemnify, receives notices of claim, and exclusively takes on all burdens of underwriter, as particularized in the contract. (R. 50-51). In the Policy, Plaintiff "acknowledges the Company [i.e., Security Title] has underwritten the risks covered by this policy…." (R. 61, § 16).

No language in the endorsements countersigned by General Abstract modifies such definitions and obligations. For example, the "Environmental Protection Lien Endorsement" begins with the phrase, "The Company insures the Insured against loss or damage…," unmistakably demonstrating

that Security Title ("The Company") functions as the sole insurer. (R. 58). So, too, in the Residential Mortgage Endorsement, "...the Company insures...." (R. 59).

There is nothing remotely ambiguous about such language. Not one word of the Policy hints that General Abstract assumed the contractual indemnification or other duties of an insurance carrier or guarantor. Rather, the only reasonable interpretation of General Abstract's signatures on certain pages of the Policy, in the framework of the whole contract, is that General Abstract acted purely as the underwriter's agent to issue those portions of the Policy.

Plaintiff's bald legal conclusion that such countersignatures show that General Abstract intended to sign "in its own capacity" remains inherently incredible, since not one word in the entire contract — or anywhere else — exhibits such an aim. Certainly, no "clear and explicit evidence" exists of General Abstract's intent to be bound. *See Sargoy*, 183 A.D.2d at 765; *Lido Beach Towers*, 128 A.D.3d at 1026.

Since General Abstract signaled an intent to serve only as agent, it cannot properly be sued for breach of the Policy's terms, even though the agent allegedly made substantive choices about the contents of the Policy.

As a matter of law, only Security Title can be liable on a contract that it executed as disclosed principal. *See id*.

Plaintiff does not aver that General Abstract had anything to do with Security Title's decision to disclaim insurance coverage.[2] Whatever steps Security Title took to deny coverage to Plaintiff cannot be attributed to General Abstract.

Given that the Policy is unequivocal on its face, this Court need not and should not resort to extrinsic evidence before resolving this appeal in General Abstract's favor. *See, e.g., Florida Infusion Servs., Inc. v. Alden Surgical Co.*, 23 A.D.3d 614, 615, 805 N.Y.S.2d 111 (2d Dep't 2005); *ABM Mgmt. Corp. v. Harleysville Worchester Ins. Co.*, 112 A.D.3d 763, 764, 977 N.Y.S.2d 330 (2d Dep't 2013) (the Court decides as a question of law whether an insurance policy provision is ambiguous)). This Court should not entertain the possibility that some entirely unspecified "pre-Policy communication may elucidate" the supposed ambiguity (R. 18), for no ambiguity exists in the first instance, and therefore no such alleged evidence is admissible on the issue.

[2] Tellingly, Plaintiff made no attempt to tender its claim to General Abstract. (*See* R. 60, "Conditions," § 2, requiring notice of claim to "the Company," i.e., Security Title).

But, if this Court harbors any doubt concerning the Policy's meaning, indisputable documentary evidence beyond the Policy itself corroborates General Abstract's position. Firstly, Security Title and General Abstract entered into a Title Policy Issuing Agreement (the "Agreement") that carefully sets out what tasks General Abstract could and could not perform regarding Security Title's insurance policies. (R. 194, ¶ 3; R. 196-204). The Court may properly invoke the Agreement to dismiss the contract cause of action. *See Countrywide Home Loans, Inc. v. LaFonte*, 2003 N.Y. slip op. 50571(U), *7 (Sup. Ct. Nassau County Feb. 13, 2003) (in granting pre-answer motion to dismiss, the court considered the authority granted in an agreement between title insurance company and its title agent); *Chase Home Fin. LLC v. Islam*, 37 Misc. 3d 1206(A), 2012 N.Y. slip op. 51916(U), *4 (Sup. Ct. Queens County 2012) (same).

In the Agreement between General Abstract and Security Title, the latter delegates authority to the former "solely" for certain enumerated purposes. (R. 196, Art. I, § 1; *see also* R. 196, Art. I, § 2 ("The appointment of Agent herein is strictly limited to the purpose stated in Section 1 above."); R. 196-97, Art. II, §§ 1-6). Repeatedly throughout that Agreement, the parties clearly intend that General Abstract act as a limited policy issuing agent but

that such company has no role or authority to operate in its own capacity. (*See generally* R. 196-97, Art. I-II). General Abstract holds no power to "issue any commitment or policy" except under the detailed conditions fixed by its principal. (R. 197, Art. II, § 6). The Agreement recognizes that General Abstract would "countersign[]" interim "commitments" and final policies that it "issued." (R. 197, Art. II, § 4).

If General Abstract really had been permitted to function, and in fact functioned, as an insurer in its own right, such crucial information surely would have been included in this comprehensive contract. Instead, the Agreement merely sets forth a customary division of labor between the risk-taking underwriter and its agent. The contract asks General Abstract to countersign but does not permit that corporation to execute any commitments or policies in its own name.

Secondly, even if, as Plaintiff suggests, the Court also looked to General Abstract's website (R. 207, ¶ 8; R. 243), such an investigation would prove General Abstract's point. The website declares that, "General Abstract Services is an independent agency authorized to issue title insurance policies underwritten by nationally known and respected title insurance companies." (R. 245, ¶ 4; R. 247). In other words, General Abstract assists as a mere proxy

to help issue policies "underwritten by" actual insurance companies.

Thirdly, the division of responsibilities between the underwriter and its issuing agent in this case reflects a mandatory convention throughout the industry. Any insinuation to the contrary would prove inherently incredible and flatly contradicted by legal authority and unassailable documents and practices.

Were an appellate court to decree that countersignatures on policy endorsements, without more, foist cure and indemnification obligations upon the agent, it is no exaggeration to predict that the entire industry would fall into chaos. Nobody anticipates such a catastrophic ruling, least of all the insurance regulators. New York State established statutes and regulations founded upon the express assumption that underwriters must follow numerous, stringent rules as "insurance companies," but that "title agents" may "issue" policies "on behalf of a title insurance company" without adhering to such rules.

A "title insurance corporation" must operate pursuant to various statutes. S*ee generally* N.Y. Ins. L. Art. 64. But, until recently,[3] title insurance

[3] New York has adopted licensure and many other regulations of title insurance agents with effective dates of September 2014 and thereafter. *See* N.Y. Ins. L. § 2139 (L. 2014, ch.

agents remained explicitly exempt from licensure and other comprehensive regulation of "insurance agents" and "insurance companies." *See* N.Y. Ins. L. § 2101(a)(4); N.Y. Ins. General Counsel Op. No. 06-05-08, 2006 N.Y. Ins. GC Opinions LEXIS 107 (May 16, 2006). An abstract company becomes an insurer for purposes of this regime only if it independently guarantees the correctness of its searches. N.Y. Ins. General Counsel Op. No. 02-10-21, 2002 N.Y. Ins. GC Opinions LEXIS 304 (2002); N.Y. Ins. General Counsel Op. No. 00-10-08, 2000 N.Y. Ins. GC Opinions LEXIS 18 (Oct. 27, 2000); *see also* N.Y. Ins. General Counsel Op. No. 05-04-23, 2005 N.Y. Ins. GC Opinions LEXIS 102 (2005).

The cited New York Insurance General Counsel opinions, and the statutes to which they refer, pre-date the transaction at issue herein. Such opinions distinguish between title insurers and others (including agents and abstractors) and proclaim that these other entities may become insurers only by independently guaranteeing something, not by merely "selling" title insurance. Plaintiff does not allege (nor could it) that General Abstract guaranteed anything in its own capacity. It follows that countersigning a few

57, § 14, effective Sep. 27, 2014); 11 N.Y.C.R.R. § 30.3, etc. Such provisions were not in effect during the transactions and occurrences alleged in the instant suit.

pages of a policy does not transform an issuing agent into an insurer.

New York's new statute regulating title insurance agents contemplates that the agent does not function as an insurer if, as in the case *sub judice*, the agent simply:

> (ii) prepares, amends, marks up or delivers a title insurance commitment or certificate of title for the purpose of the issuance of a title insurance policy *by* a title insurance corporation; [or] (iii) prepares, amends or delivers a title insurance policy *on behalf of* a title insurance corporation....

N.Y. Ins. L. § 2101(y)(1)(C)(ii)-(iii) (emphasis added; effective Sep. 27, 2014). Again, both before and after the new regulations, the codified distinction between title insurer and title agent does not reasonably permit the inference that a standard title policy creates coverage imperatives for the agent.

Furthermore, state-wide industry practice enshrines this distinction. In New York, title insurers and agents conform their usage to the Title Insurance Rate Manual of the Title Insurance Rate Service Association, Inc. ("TISRA Manual," tirsa.org/manual.htm). The TISRA Manual points out that policies and coverage may issue only with the insurance regulator's approval. (TISRA Manual § 4). It further specifies the exact endorsements that two

carriers must employ whenever they wish to "coinsure" (i.e., "where each coinsurer assumes a designated portion of the liability of the total risk from the first dollar and is liable for only such portion of any loss") or to assume joint and several liability (i.e., "coinsurance in which the liability for a designated amount of loss or damages from the first dollar is assumed jointly and severally among the coinsurers"). (*Id.* § 3; *cf. id.* at 108 (Joint & Several Liability Endorsement); *id.* at 2 (Manual is ratified by insurance regulator and is binding upon Security Title and its agents)).

Plaintiff cannot dispute that the Policy contained no such endorsements. This constitutes yet another clear sign that General Abstract was not and could not have been an underwriter.

Finally, judicial opinions from other states that have deliberated upon the issue at bar rule, as a matter of law, that title agents are not coinsurers with the title insurance companies they represent and assist:

> The difference between a title insurer and its agent… is that the title insurer enters into the contract with the insured to indemnify for certain losses, while the agent enters into a separate contract with the insurer to sell, solicit, or negotiate insurance on behalf of the insurer. An agent… is not licensed to issue an insurance policy on its own behalf…. [The title insurer] remained solely liable to the [insureds] for any covered loss. Consequently,… as a matter of law

> [the agent] was not a coinsurer with [the insurer] on the [plaintiffs'] title insurance policy.

Kloster v. Roberts, No. 30546-5-III, 2014 Wash. App. LEXIS 334, *38-39 (Wash. App. Feb. 6, 2014), *review denied*, 335 P.3d 941 (Wash. 2014); *see also Title Ins. Co. of Minn. v. State Bd. of Equalization*, 842 P.2d 121, 126-27 (Cal. 1993); Elliot L. Hurwitz, 1-14 NEW APPLEMAN N.Y. INSURANCE LAW § 14.03[2][c][ii] & n.29 ("coinsurance" denotes a title insurance practice wherein "each of two or more title insurance companies assumes a proportionate share of the risk from the first dollar of loss exposure").

For all of these reasons, General Abstract did not evidence an intent to be bound to the terms of the relevant Policy, and the breach of contract claim against it should be dismissed.

III.

EVEN IF GENERAL ABSTRACT WERE AN UNDERWRITER, IT WOULD HAVE NO COVERAGE OBLIGATIONS TO PLAINTIFF DUE TO POLICY EXCLUSIONS

Even if, *arguendo*, Plaintiff correctly alleged General Abstract to have underwritten the Policy herein, or otherwise to be bound by the duties the Policy places upon the carrier, Exclusions 3(a) and 3(e) in the Policy (R. 60) would permit General Abstract (and Security Title) to decline coverage as a

matter of law. For this independent reason, General Abstract did not breach the insurance contract.

For this argument, General Abstract relies upon, adopts, and incorporates herein by reference the opening brief of defendant-appellant Security Title. To the extent that Security Title's brief persuades this Court, the analysis applies equally to General Abstract. That is, if Exclusions 3(a) and 3(e) operate to relieve Security Title of a coverage commitment to plaintiff, then *a fortiori* the same exclusions relieve General Abstract (as, at most, an alleged coinsurer) of any such obligation as well.

CONCLUSION

General Abstract respectfully requests that this Court reverse that portion of the Order below that denied General Abstract's motion to dismiss with prejudice the cause of action for breach of contract, pursuant to C.P.L.R. §§ 3211(a)(1) and (7), and award costs and such other and further relief as the Court deems just and proper.

Dated: Hawthorne, New York
August 28, 2015

Respectfully submitted,

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Certificate of Compliance
Pursuant to 22 N.Y.C.R.R. § 670.10.3(f)

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