

I.

PARTIES

1. Endurance is a Delaware corporation with its principal place of business in New York.
2. BMB is a Texas corporation with its principal place of business at 1111 North Loop West, Suite 400, Houston, Texas 77008.
3. Winter is a Texas resident who resides at 10015 Olympia Drive, Houston, Texas 77042.

II.

JURISDICTION AND VENUE

4. The Court has subject matter jurisdiction over this case pursuant to 28 U.S.C. § 1332(a)(1), because there is a complete diversity of citizenship between the parties to this action at the time of filing of this action and the amount in controversy exceeds \$75,000, exclusive of interest and costs.
5. Venue is proper under 28 U.S.C. § 1391(a), in that, upon information and belief, BMB operates its primary place of business in the Southern District of Texas and Winter resides in the Southern District of Texas. Also, venue is proper under 28 U.S.C. § 1391(b), in that, upon information and belief, the Southern District is the judicial district where a substantial part of the events and omissions giving rise to the Claims occurred.

III.

FACTUAL BACKGROUND

A. Summary of the Claims

1. The Class Action Lawsuit

6. On July 2, 2009, an action was filed in U.S. District Court for the Northern District of Texas, Dallas Division, against BMB and Winter, as well as three other defendants: Willis of Colorado, Inc., Willis Group Holdings Ltd., and Amy S. Baranoucky (collectively “the Defendants”). Plaintiffs are Samuel Troice, Martha Diaz, Paula Gilly-Flores and Punga Punga Financial, Ltd., individually and on behalf of a class of all others similarly situated. A copy of the Complaint in the Class Action Lawsuit is attached hereto as Exhibit 1.

7. The Plaintiffs in the Class Action Lawsuit assert claims against the Defendants on behalf of a “class of defrauded Mexican investor clients of Houston, Texas-based Stanford Financial Group.” (Complaint, Ex. 1, pp. 1-2). Plaintiffs allege participation by the Defendants in a massive investment fraud scheme perpetrated by the Stanford Financial Group (SFG) and its principals from, by and through Texas that led to the intervention by the SEC in Texas and appointment of a receiver. (*Id.*, p. 2). Plaintiffs are Mexican citizens who allege that they were induced to invest in SFG by, in part, misrepresentations and actions of each of the Defendants. Although the allegations in the complaint are multifarious and lengthy, the following paragraph from the Complaint summarizes the gravamen of Plaintiffs’ allegations against the defendants:

Defendants Willis and BMB [insurance brokers for Stanford] became willing participants in the perpetuation of the Stanford fraud. Apparently at the request of Stanford Financial, Willis and BMB over the years (and apparently every year) provided Stanford Financial in Houston with certain “safety and soundness” letters for SIB with the clear intention that they be used for marketing purposes to retain or obtain actual and prospective clients for SIB. ... In doing so, both Willis and BMB crossed the line from being mere insurance brokers for the Stanford Financial group, to joining the Stanford Financial/SIB sales force, essentially acting as sales agents for the Texas-based investment company. ...

(Complaint, ¶ 39, p. 15).

8. Plaintiffs further allege that the “safety and soundness” letters contain misrepresentations, by touting the Stanford group as “first class business people,” by

“intentionally creating the impression that the insurance policies [issued by Lloyds of London to Stanford] provided coverage for all investments in SIB,” and by stating that SIB had undergone “stringent Risk Management Review[s] conducted by an outside audit firm,” when in fact no such stringent review took place. (*Id.*, ¶ 40-41, pp. 16-17). The Complaint identifies and attaches as exhibits six “safety and soundness” letters issued by BMB and signed by Robert S. Winter, beginning on January 16, 1996 and ending on April 6, 2004, wherein Winter is identified in the letters as a “Financial Specialist” for BMB. The Complaint further alleges that the letters issued by BMB were additionally misleading because they failed to disclose that Winter was also a member of the SIB Board of Directors, which “give the distinct impression that BMB is a wholly unrelated company providing an unbiased outside ‘opinion’ about SIB.” (*Id.*, ¶ 45, p. 18).

9. Plaintiffs in the Class Action assert both “class” and “individual” causes of action. The “class” causes of action include (1) violations of the Texas Securities Act [sales of securities through untruths or omissions; sales of unregistered securities; sales of securities by unregistered dealers]; (2) participation in a fraudulent scheme; and (3) civil conspiracy. The “individual” causes of action include (1) common law fraud; and (2) negligent misrepresentation. The Complaint also makes allegations of (1) joint enterprise; (2) alter ego; (3) agency; and (4) respondeat superior. Plaintiffs seek actual damages “in excess of \$1 billion,” attorneys fees and punitive damages.

The Demand Letter

10. On July 8, 2009, a demand letter was sent to the Insured by a law firm purporting to represent “a number of depositors” of SIB who allege that they collectively invested over \$63

million in certificates of deposit and other investments with SIB.¹ A copy of the Demand Letter is attached hereto as Exhibit 2. The allegations in the Demand Letter largely mirror the allegations in the Class Action Lawsuit. In particular, the Demand Letter states that the “safety and soundness” letters issued by BMB and Willis (called “Safety & Security” letters in the demand letter) were misleading in the sense that they falsely represented that the depositors’ investments were fully insured, and that the Stanford Group had undergone “stringent” risk management evaluations by an outside auditor. Like the Class Action Lawsuit, the Demand Letter asserts claims under the Texas Securities Act. The Demand Letter also asserts potential claims under Mexican and other foreign law.

B. The Policy

11. The applicable Policy is Endurance American Specialty Insurance Company Professional Liability Insurance Policy No. PPL 10001201900, with a Policy Period from January 1, 2009 to January 1, 2010. A copy of the Policy is attached hereto as Exhibit 3. The Named Insured is Bowen, Miclette & Britt, Inc. The Limits of Liability for each Claim is \$15,000,000, with a \$15,000,000 total Policy Period Aggregate. The Self-Insured Retention is \$100,000 per Claim and \$300,000 Aggregate.

12. The Policy is a “Claims Made” Policy, and covers only Claims first made against the Insured during the Policy Period. The Policy generally covers for “**Wrongful Acts,**” which is defined in the Policy as “any actual or alleged act, error or omission committed or attempted solely in the performance of or failure to perform ‘**Professional Services**’ by an **Insured.**” “**Professional Services**” are defined in the Policy as:

¹ The same law firm sent a prior demand letter, dated March 19, 2009, on behalf of one of the depositors named in the July 8 Demand Letter, Moises Guakil. For purposes of this Complaint, that prior demand letter is subsumed within the request for relief relating to the July 8 Demand Letter.

- (1) services as an insurance agent, insurance broker, managing general agent, surplus lines broker, wholesale insurance broker, underwriting manager, managing general underwriter, program administrator, insurance consultant or notary public, including claims adjusting, claims administration, risk management, loss control consulting and arranging premium financing;
- (2) services as a Registered Representative, but only with respect to the sale of mutual funds, annuities, variable annuities or variable life products.²

C. Coverage Dispute

13. On July 21, 2009, counsel for Endurance issued a letter to representatives of BMB and Winter, denying coverage for the Claims under the Policy. A copy of that denial letter is attached hereto as Exhibit 4. Coverage was denied on two grounds: first, that the Claims were not covered pursuant to the “securities” exclusion of the Policy; and, second, the Claims do not arise from the rendition of “Professional Services” as defined by the Policy. The denial letter also denied coverage for the Claims to the extent that Winter was not an “Insured Person” under the Policy. The applicable Policy provisions are as follows:

1. “Securities” Exclusion

14. As stated in the denial letter, there is no coverage for any of the Claims pursuant to Exclusion (I) of the Policy, which states as follows:

III. EXCLUSIONS

This Policy shall not apply:

...

- I. to any **Claim** based upon or arising out of any violation or alleged violation of the Securities Act of 1933, as amended, or the Securities Exchange Act of 1934, as amended, or any state Blue Sky or securities law or similar state or federal statute and any regulation or order issued pursuant to any of the foregoing statutes, unless endorsed hereon. ...;

² By endorsement, the definition of “Professional Services” was expanded to include services provided by the Insured in connection with Professional Employer Services Marketing Agreements, which are neither applicable nor relevant here.

15. As noted above, both the Complaint in the Class Action Lawsuit as well as the Demand Letter allege that BMB and Winter violated various provisions of the Texas Securities Act. To the extent that other “independent” causes of action are also asserted, they are also excluded by this Exclusion because they arise from the same conduct that gives rise to the allegations of violations of the Texas Securities Act. Accordingly, this Exclusion is applicable, and operates to preclude coverage for the Claims. *See, e.g., Hiscox Dedicated Corporate Member Ltd. v. Partners Commercial Realty, L.P.*, CA H-08-3411, 2009 U.S. Dist. LEXIS 53686 (S.D. Tex. Jun. 23, 2009) (holding a virtually identical “securities” exclusion in a professional liability policy precluded coverage for a suit by a group of investors against a real estate brokerage firm arising from a failed real estate development project).

2. Claims Do Not Arise From “Professional Services”

16. Further, and in the alternative, no coverage is afforded under the Policy for the Claims because such Claims do not arise out of the Insured’s performance of “**Professional Services.**” As noted above, the Policy only provides coverage for “**Wrongful Acts,**” which is defined in the Policy as “any actual or alleged act, error or omission committed or attempted solely in the performance of or failure to perform ‘**Professional Services**’ by an **Insured.**”

“**Professional Services**” are defined in the Policy as including:

- (1) services as an insurance agent, insurance broker, managing general agent, surplus lines broker, wholesale insurance broker, underwriting manager, managing general underwriter, program administrator, insurance consultant or notary public, including claims adjusting, claims administration, risk management, loss control consulting and arranging premium financing;
- (2) services as a Registered Representative, but only with respect to the sale of mutual funds, annuities, variable annuities or variable life products.

17. A reading of the allegations in the Class Action Lawsuit, as well as in the Demand Letter, reveals that the Claims do not arise from the Insured's rendition of "**Professional Services**," as defined in the Policy. On the contrary, the allegations arise from the Insured's alleged participation in a scheme to promote the sale of fraudulent securities, which is not encompassed in the above definition of "**Professional Services**." Some of the allegations that highlight the nature of the claims asserted against the Insured include the following:

- "In [issuing the "safety and soundness" letters], both Willis and BMB *crossed the line from being mere insurance brokers* for the Stanford Financial group, to joining the Stanford Financial/SIB sales force, essentially acting as sales agents for the Texas-based investment company." (Complaint, ¶ 39, p.15) (bold emphasis added)
- "These letters ... contain untruths and omissions of material facts directed at Plaintiffs with the purpose of promoting and selling SIB and its CD products to Plaintiffs." (Id., ¶ 42, p.16)
- "BMB and Willis, in distributing these letters ... engaged in severely reckless and misleading conduct designed with one goal in mind --- to advance the business goals of their client Stanford Financial." (Id., ¶ 46, p.18)
- "[I]ndeed, the very purpose of the letters was to influence the investors' decision-making process in terms of SIB." (Id., ¶ 101, p.42)
- "By agreeing to assist Stanford Financial and SIB to sell and promote investment products, *Defendants actively joined the Stanford sales force* and ... were acting as links in the chain of *selling unregistered securities* to Plaintiffs ..." (Id., ¶ 103, p.43) (bold emphasis added)
- "Defendants intentionally and actively aided and abetted Stanford Financial to operate as an illegal hedge or mutual fund in Texas and sell securities from, by, and through Texas, by means of the conduct described herein." (Id., ¶107, p.44)

18. Similar, if not identical, allegations appear in the Demand Letter. Because the allegations arise from the Insured's alleged participation in a scheme to promote the sale of fraudulent securities, which cannot be reasonably be characterized as arising from the performance of "**Professional Services**" as defined by the Policy, there is no coverage afforded for the Claims on that basis as well. *See, e.g., Venture Encoding Serv., Inc. v. Atlantic Mut. Ins.*

Co., 107 S.W.3d 729, 736 (Tex. App—Ft. Worth 2003, pet. denied) (an errors-and-omissions policy is not comprehensive insurance; it is designed to insure members of a particular professional group only from the liability arising out of a special risk such as negligence, omissions, mistake, and errors inherent in the practice of the profession).

3. Winter is Not “Insured Person”

19. Winter is only afforded coverage under the Policy if he meets the definition of “**Insured Person**” under the Policy, which is defined as follows:

[A]ny natural person who was, is or becomes a principal, partner, managing member, officer, director, employee or Volunteer of the Named Insured or Subsidiary, but only while in the performance of Professional Services on behalf of the Named Insured or Subsidiary.

20. Although the Complaint in the Class Action Lawsuit, as well as the Demand Letter, attach correspondence allegedly authored by Winter on BMB letterhead, as discussed above, the allegations appear to be directed at Winter in his capacity as an alleged SIB Director. (Complaint, ¶ 45, p. 18). Further, as discussed above, the allegations do not appear to arise from Winter’s performance of “**Professional Services**,” as defined by the Policy. The Demand Letter makes similar allegations. Thus, since it does not appear that Winter is being sued in his capacity as an “**Insured Person**” under the Policy, no coverage would be afforded under the Policy for any claims against either Winter or BMB in those matters on that basis as well.

IV.

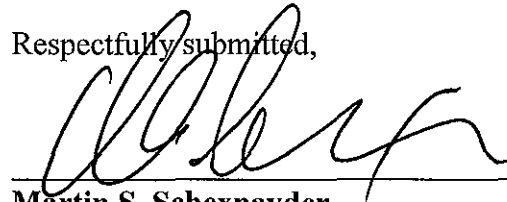
REQUEST FOR DECLARATORY RELIEF

21. Pursuant to the foregoing, Endurance seeks a declaration from the Court that it does not owe a duty to defend or indemnify BMB or Winter under the Policy in connection with Claims, pursuant to the above Policy terms, definitions and Exclusions. In particular, Plaintiff seeks a declaratory judgment that:

- a. No coverage is afforded under the subject Policy for the Claims pursuant to Exclusion III (I) to the Policy;
- b. No coverage is afforded under the Policy for the Claims because such Claims do not arise from the performance of “**Professional Services**” as defined by the Policy; and
- c. No coverage is afforded under the Policy for the Claims because Winter is not an “**Insured Person**” under the Policy with respect to such Claims.

WHEREFORE, Plaintiff requests that this Court issue a Declaratory Judgment as requested above, and grant such other and further relief as Plaintiff may show itself entitled.

Respectfully submitted,



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