IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

JOHN F. KENNEDY, solely in his capacity as Receiver for the Receivership Estate of Education Corporation of America, Virginia College, LLC, and New England College of Business and Finance, LLC, and MONROE CAPITAL MANAGEMENT ADVISORS, LLC, Plaintiffs, v. NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA., Defendant.	Case No. 5:23-cv-00080-TES The Honorable Tilman E. Self, III

DEFENDANT NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA.'S PARTIAL MOTION TO DISMISS THE AMENDED COMPLAINT

Defendant National Union Fire Insurance Company of Pittsburgh, Pa. ("National Union"), through its undersigned counsel and pursuant to Rule 12(b)(1) and Rule 12(b)(6) of the Federal Rules of Civil Procedure, hereby respectfully requests that the Court dismiss Plaintiffs' Amended Complaint against National Union in part. As grounds for its Motion, and as more fully explained in the accompanying Memorandum of Law in Support of the Partial Motion to Dismiss the Amended Complaint, National Union states that Plaintiffs fail to state a claim upon which relief can be granted in part and that one Plaintiff lacks standing to assert any counts.[1]

[1] Pursuant to the Federal Rules of Civil Procedure, National Union will file its Answer to the remaining portions of the Amended Complaint after the Court rules on the present Motion. *See* Fed. R. Civ. P. 12(a)(4).

Dated: June 13, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 13, 2023, I electronically filed the foregoing DEFENDANT NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA.'S PARTIAL MOTION TO DISMISS THE AMENDED COMPLAINT using the Court's CM/ECF system, which will automatically send notification of such filing to all counsel of record.

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DEFENDANT NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA.'S MEMORANDUM OF LAW IN SUPPORT OF ITS PARTIAL MOTION TO DISMISS THE AMENDED COMPLAINT

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INTRODUCTION

This case concerns an insurance coverage dispute between, on the one hand, Plaintiffs John F. Kennedy, solely as the Receiver for the Receivership Estate of Education Corporation of America ("ECA"), and Monroe Capital Management Advisors, LLC ("Monroe Capital") and, on the other hand, ECA's insurer, Defendant National Union Fire Insurance Company of Pittsburgh, Pa. ("National Union"). Plaintiffs seek insurance coverage from National Union under ECA's "Commercial Crime Insurance" policy (the "Policy") for a string of thefts allegedly committed on ECA's campuses. Plaintiffs assert that National Union breached the Policy (Count I) and denied coverage in bad faith (Count II), and they also seek a declaration of coverage (Count III).

Although Plaintiffs filed the operative Amended Complaint in lieu of opposing National Union's Partial Motion to Dismiss, the Amended Complaint fails to cure the overwhelming majority of the pleading deficiencies in the original Complaint. As with the original Complaint, dismissal under Rule 12(b)(6) of the Federal Rules of Civil Procedure is appropriate here because virtually all of the allegations are implausibly pled. *First*, while Plaintiffs scarcely allege coverage for thefts on *three* of ECA's campuses, they wholly fail to plausibly plead that there is coverage for the remaining *18* campuses. As such, the Court should dismiss Counts I and III to the extent Plaintiffs contend, with respect to those 18 campuses, that National Union breached the Policy or that they are entitled to a declaration of coverage.

Second, Plaintiffs have not cured the defects in their count for bad faith denial of coverage (Count II). Putting aside Plaintiffs' failure to allege facts showing that the underlying claims are in fact covered under the Policy and that an adequate demand was made on National Union, as required for a bad faith count, Plaintiffs' own allegations confirm that National Union did not act in bad faith. Under Georgia law, a bad faith count fails as a matter of law when the insurer has *any* reasonable ground to contest the underlying claim. While Plaintiffs do not expressly allege

National Union's basis for denying coverage, a pleading deficiency in its own right, the only possible construction of their allegations is that Plaintiffs and ECA failed to corroborate the claims for insurance coverage with sufficient documentation, an entirely reasonable basis to deny coverage. Accordingly, this Court should dismiss Count II in its entirety.

Third, under Georgia law and the unambiguous terms of the Policy, Plaintiffs are not entitled to punitive damages, attorney's fees, or indirect or consequential damages. As a result, these requests should all be dismissed.

Finally, Monroe Capital, ECA's alleged senior secured lender and collateral agent, lacks standing to sue under the Policy. The Policy is for ECA's benefit only and provides no rights or benefits to any other party. Accordingly, for this independent reason, all counts asserted by Monroe Capital must be dismissed pursuant to Rule 12(b)(1) and Rule 12(b)(6) of the Federal Rules of Civil Procedure.

BACKGROUND

A. THE ALLEGED THEFTS AT ECA'S CAMPUSES.

ECA owned and operated for-profit colleges and other training institutions across the country. Doc. 14 ("Am. Compl.") ¶¶ 1, 29. On December 5, 2018, due to its "precarious financial status," ECA announced that it would "immediately cease operations and wind down," as well as shutter its 71 campuses. *Id.* ¶¶ 1, 38. This Court appointed Mr. Kennedy as the Receiver of "all the business, business interest[,] and property of [ECA], wherever located, by whomsoever held, without limitation" to be "vested in a Receivership Estate." *Id.* ¶ 37.

Many of ECA's campuses closed two days later on December 7, 2018, and "skeleton crews" remained for another week to shutter the campuses. *Id.* ¶ 39. According to the Amended Complaint, those campuses housed expensive equipment, machinery, furniture, and supplies. *Id.* ¶¶ 1, 39. Prior to or soon after the closures, the Amended Complaint alleges that, at 21 of the campuses, "extensive

theft occurred of ECA property . . . resulting in losses of over $5.73 million." *Id.* ¶ 1. The "unforeseen and abrupt" closures of those campuses purportedly prevented the "orderly" liquidation of these assets. *Id.* ¶ 40. While ECA apparently "directed the[] employees to secure the locations," the security measures were "uneven," and allegedly "many ECA employees colluded in the theft of valuable ECA equipment." *Id.* ¶ 41. Monroe Capital, ECA's alleged senior secured lender and collateral agent, was "permitted to take possession of, sell, or otherwise liquidate the Remaining Personalty," which allegedly included the assets at ECA's 71 campuses, "without being in violation of . . . the Receiver Order." *Id.* ¶¶ 2, 5, 164–66.

For three of the 21 purported campus thefts, the Amended Complaint alleges that the theft was committed by an ECA employee. *See id.* ¶¶ 42–44, 49–51, 55–56. First, the Amended Complaint alleges that on December 18, 2018, the last day of school at the Virginia College Culinary School in Birmingham, Alabama two ECA employees, Dennis Sanders and Brandon Fee, witnessed another alleged employee, Jared Danks, loading culinary equipment into a truck (the "Birmingham Culinary Incident"). *Id.* ¶ 42. The Amended Complaint further alleges that when confronted, Mr. Danks responded that "everyone else was taking equipment, so why was it a problem that he did it" and continued with the theft. *Id.* ¶ 43. After Mr. Danks refused to return the equipment over the next few days, Mr. Sanders and another ECA employee, John Carreon, filed a police report. *Id.* ¶ 44.

Second, according to the Amended Complaint, on December 5, 2018 and a few days thereafter at the Brightwood College in Charlotte, North Carolina the landlord observed people removing property and furniture, including computers, audio-visual equipment, and simulators, from the campus (the "Charlotte Incident"). *Id.* ¶ 49. The Amended Complaint further states that police were called and learned that the campus president, an alleged ECA employee, colluded with the unidentified thieves to accomplish the thefts. *Id.* ¶ 50. The employee allegedly stated that she had "told her

unidentified co-conspirators it was okay to remove whatever they wanted." *Id.* ¶ 51. However, the employee apparently did not have authority to authorize the removal of ECA equipment and acted against explicit instructions to preserve such assets. *Id.*

Third, at the Brightwood College in Dayton, Ohio the dean and assistant dean of the school, who allegedly were "charged with care and custody" of the campus property, "allowed, even facilitated, the wholesale looting" of the campus (the "Dayton Incident"). *Id.* ¶ 55. The property taken included furniture and medical equipment, among other items. *Id.* ¶ 56.

In contrast to these factual allegations about thefts committed by actual employees at three ECA campuses, for another 17 ECA campuses, the Amended Complaint alleges only that the ECA employees with responsibility for securing the property ultimately failed to do so and thus purportedly "allowed" the thefts to occur. *See id.* ¶¶ 61–62, 67–68, 73–74, 79–80, 85–86, 91–92, 97–98, 103–04, 109–10, 115–16, 121–22, 127–28, 133–34, 139–40, 145–46, 151–52, 157–58. And for the 21st and last campus, the Call Center in Birmingham, the Amended Complaint does not include a single specific allegation about the alleged thefts. Otherwise, the Amended Complaint alleges just that the losses at all of the campuses "were caused by clear instances of Employee Theft and/or Robbery. *Id.* ¶ 163.

B. NATIONAL UNION'S POLICY.

National Union issued the Policy, policy number 01-772-17-09, to ECA for a policy period of September 3, 2018, through September 3, 2019. *See id.* ¶ 30; *see also* Doc. 3 ("Policy"). ECA seeks coverage for the thefts under only the "Commercial Crime Insurance" or "Crime Coverage Section" of the Policy, and only two provisions of that section—Insuring Agreement 1.A and Insuring Agreement 1.D. *See* Am. Compl. ¶¶ 31, 35, 185.

Insuring Agreement 1.A of the Policy provides:

> The **Insurer** will pay for loss of or damage to **Money**, **Securities** and **Other Property** resulting directly from **Theft** committed by an **Employee**, whether identified or not, acting alone or in collusion with other persons.

Policy § 1.A. The term "**Theft**" is defined as "the unlawful taking of **Money**, **Securities** or **Other Property** to the deprivation of the **Insured**. Solely with respect to Insuring Agreement 1.A., **Theft** shall also mean forgery." *Id.* § 2(v). And "**Employee**" has a multi-faceted definition that expressly includes and excludes certain individuals. *Id.* § 2(e).

Insuring Agreement 1.D of the Policy, in relevant part, provides:

> The **Insurer** will pay for loss of or damage to **Other Property** . . . inside the **Premises** resulting directly from an actual or attempted **Robbery** of a **Custodian**[.]

Id. § 1.D. "**Robbery**" means the "unlawful taking of property from the care and custody of a person by one who has: (i) caused or threatened to cause that person bodily harm; or (ii) committed an obviously unlawful act witnessed by that person." *Id.* § 2(s). The term "**Custodian**" is defined as "the **Insured**, or any of the **Insured's** partners or **Members**, or any **Employee** while having care and custody of property inside the **Premises**, excluding any person while acting as a **Watchperson** or janitor." *Id.* § 2(c).

The Policy also contains a number of relevant exclusions and conditions that bar, limit, or condition coverage under the Policy.[1] The Policy excludes "[l]oss that is an indirect or a consequential result of an **Occurrence** covered by this **Crime Coverage Section** including, but not limited to, loss resulting from . . . payment of damages of any type for which the **Insured** is legally liable; provided, however, the **Insurer** will pay compensatory damages arising directly from a loss covered under this

[1] The exclusions and conditions listed here are those relevant to the present Partial Motion to Dismiss. They are not the only provisions that National Union believes bar, limit, or condition coverage under the Policy, and National Union expressly reserves the right to raise other provisions at the appropriate time.

Crime Coverage Section; or . . . payment of costs, fees or other expenses the **Insured** incurs in establishing either the existence or the amount of loss under this **Crime Coverage Section**." *Id.* at Endorsement # 5; *see also id.* § 3(f).

As for the Policy's conditions, the "**Insured** may not bring any legal action against the **Insurer** involving loss . . . unless the **Insured** has complied with all the terms of this **Crime Coverage Section** and policy." *Id.* § 6(a)(xiii)(1). Under those terms, the "**Insured** must keep records of all property covered under this **Crime Coverage Section** so the **Insurer** can verify the amount of any loss," *id.* § 6(a)(xx), and "must . . . [p]roduce . . . all pertinent records," *id.* § 6(a)(vii)(1)(c). Additionally, the Policy is "for the **Insured's** benefit only" and "provides no rights or benefits to any other person or organization," such that "[a]ny claim for loss . . . must be presented by the **Insured**." *Id.* § 6(a)(xviii).

C. ECA'S CLAIMS AND THE PRESENT ACTION.

On February 5, 2019, ECA's insurance broker submitted notices of claims with respect to the campus thefts to National Union under the Policy. Am. Compl. ¶ 168. National Union agreed to toll the time for ECA to provide its proofs of loss. *Id.* ¶ 169. Thereafter, an agent for Monroe Capital submitted proofs of loss under the Policy, and the Receiver subsequently adopted each of the claims submitted by Monroe Capital. *Id.* ¶¶ 5, 170–71. The Amended Complaint alleges that National Union denied coverage for these claims, *id.* ¶¶ 172, 176, 179, but it nowhere alleges National Union's basis for denying coverage. Instead, at most, the Amended Complaint alleges that "Plaintiffs have worked to gather requested documents on the Claims" but that "many documents requested by National Union were not available." *Id.* ¶¶ 173–74. National Union agreed to toll the statute of limitations, including through February 28, 2023, and Plaintiffs brought the present action upon the expiration of the tolling agreement. *Id.* ¶¶ 175, 180.

Plaintiffs assert three counts against National Union in the present action: breach of contract (Count I), bad faith denial of coverage (Count II), and declaratory judgment (Count III). *Id.* ¶¶ 181–

203. In Count I, Plaintiffs allege that the Policy issued by National Union to ECA was a contract for insurance, that ECA and Plaintiffs performed all obligations under the Policy, and that National Union breached the contract by failing to make payments under the Policy. *See id.* ¶¶ 181–90. The alleged damages for the breach include "the loss of monies owed under the Policy for the Claims, delay in payments to creditors from the Receivership Estate, incidental costs, and legal fees." *Id.* ¶ 189. In Count II, Plaintiffs allege that National Union's denial of the claims was "unjustified," "frivolous[,] and unfounded" and that National Union "did not have reasonable grounds to exclude or deny coverage of the Claims under the Policy," such that National Union "acted in bad faith." *See id.* ¶¶ 191–99. Plaintiffs assert that they made "proper demands pursuant to O.C.G.A. § 33-4-6," Georgia's bad faith statute, and thus seek, in addition to compensatory damages, statutory damages and attorney's fees under that statute. *Id.* ¶¶ 198–99. Finally, in Count III, Plaintiffs seek a declaration that "the Claims are covered by the Crime Coverage Section of the Policy." *See id.* ¶¶ 200–03.

LEGAL STANDARD

A motion to dismiss under Rule 12(b)(1) can "come in two forms: facial or factual." *Kennedy v. Floridian Hotel, Inc.*, 998 F.3d 1221, 1230 (11th Cir. 2021). A facial challenge is based on the allegations of the complaint, whereas a factual challenge can raise extrinsic evidence for consideration. *See id.* Where, as here, a defendant raises a facial challenge, "the allegations in [the] complaint are taken as true for the purposes of the motion." *Id.*

A complaint survives a motion to dismiss under Rule 12(b)(6) only if it alleges sufficient factual matter, accepted as true, that states a claim for relief that is plausible on its face. *See McCullough v. Finley*, 907 F.3d 1324, 1333 (11th Cir. 2018) (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). There is a two-step framework used to decide whether a complaint survives a motion to dismiss. *See id.*

At the first step, a court identifies the allegations that are "no more than conclusions,"

which are "not entitled to the assumption of truth" and thus "disregard[ed]" by the court. *See id.* In other words, a plaintiff must plead "more than [] unadorned, the-defendant-unlawfully-harmed-me accusation[s]" and "more than 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action.'" *Id.* (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). Such conclusory allegations are "discard[ed]" because "their conclusory nature 'disentitles them to the presumption of truth.'" *Id.* At the second step, after disregarding conclusory allegations, the court determines whether any remaining factual allegations "plausibly give rise to an entitlement to relief." *Id.* The allegations must be "enough to raise a right to relief above the speculative level." *Id.* at 1335.

ARGUMENT

I. PLAINTIFFS FAIL TO PLAUSIBLY ALLEGE THAT NATIONAL UNION BREACHED THE POLICY OR THAT THEY ARE ENTITLED TO A DECLARATION OF COVERAGE WITH RESPECT TO THE VAST MAJORITY OF THE UNDERLYING CLAIMS.

Under Georgia law, insurance policies are "subject to the ordinary rules of contract construction." *Anderson v. Wilco Life Ins. Co.*, 17 F.4th 1339, 1345 (11th Cir. 2021). The "cardinal" rule is to "determine and carry out the intent of the parties." *Id.* If a policy provision's language is "clear and unambiguous," a court must enforce the policy "according to its plain terms." *Id.* And, even if a policy provision "present[s] a question of construction," the provision is "not ambiguous . . . unless and until an application of the pertinent rules of construction leaves it uncertain as to which of two or more possible meanings represents the true intention of the parties." *Ace Am. Ins. Co. v. Wattles Co.*, 930 F.3d 1240, 1252 (11th Cir. 2019). Although an ultimately ambiguous term must be "construed . . . in favor of the insured," the "rule of liberal construction of an insurance policy cannot be used to create an ambiguity where none, in fact, exists." *Id.* at 1252–53. Stated another way, "courts have no more right or power, by construction, to extend the coverage of a policy or to make it more

beneficial to the insured than they do to rewrite the contract and increase the coverage." *Id.* at 1253.

Here, as noted above, Plaintiffs seek coverage under two provisions in the Policy: Insuring Agreement 1.A and Insuring Agreement 1.D. *See* Am. Compl. ¶¶ 31, 35, 185. National Union addresses these two provisions in turn, keeping in mind that Plaintiffs have "the burden of proving that a claim falls within the coverage of the policy." *Travelers Home & Marine Ins. Co. v. Castellanos*, 773 S.E.2d 184, 186 (Ga. 2015).

A. For all but three claims, Plaintiffs do not adequately allege there were Thefts committed by an Employee, a requirement for coverage under Insuring Agreement 1.A.

National Union does not contest that, solely at this stage of the case, Plaintiffs have plausibly alleged that there may be coverage under Insuring Agreement 1.A for the Birmingham Culinary Incident, the Charlotte Incident, and the Dayton Incident, as the Amended Complaint alleges that those Incidents involved thefts committed by ECA employees. *See* Am. Compl. ¶¶ 42, 50, 55. While National Union believes Plaintiffs will ultimately be unable to prove that there is coverage under Insuring Agreement 1.A—for instance, what specific property was stolen and the value of that property, as required to establish a claim—National Union does not seek dismissal with respect to those three underlying claims under Insuring Agreement 1.A.

However, Plaintiffs' allegations with respect to the remaining 18 campuses are sorely deficient, as Plaintiffs fail to plausibly allege any requisite "**Theft** committed by an **Employee**." *See* Policy § 1.A. Instead, for these campuses, Plaintiffs repeatedly, and in boilerplate conclusory fashion, allege only that the ECA employees in place to secure the property ultimately failed to do so and thus purportedly "allowed" the thefts to occur. *See* Am. Compl. ¶¶ 61–62, 67–68, 73–74, 79–80, 85–86, 91–92, 97–98, 103–04, 109–10, 115–16, 121–22, 127–28, 133–34, 139–40, 145–46, 151–52, 157–58.

To begin, one glaring pleading deficiency is that, unlike the Birmingham Culinary Incident, the Charlotte Incident, and the Dayton Incident, Plaintiffs have not provided *any* information about the

"employees" that allegedly "allowed" the thefts. As such, Plaintiffs have not plausibly alleged—nor is it possible for this Court to decide—whether the thefts were "committed by an **Employee**" as required for coverage under Insuring Agreement 1.A. *See* Policy §§ 1.A, 2(e); *see also Success Healthcare, LLC v. Zurich Am. Ins. Co.*, No. 9:14-cv-81423, 2015 U.S. Dist. LEXIS 185341, at *8–12, *18–19 (S.D. Fla. Mar. 20, 2015), *adopted*, 2015 U.S. Dist. LEXIS 185345 (S.D. Fla. Apr. 8, 2015) (granting motion to dismiss in part when the plaintiff "failed to allege sufficient facts to show that [an individual] was an 'employee'" under part of crime insurance policy's definition of "employee"). Crucially, the multi-faceted definition of "**Employee**" includes only certain individuals and excludes, for example, certain temporary employees and independent contractors. *See* Policy §§ 2(e), 2(e)(ii). Plaintiffs' conclusory allegations do not provide sufficient information to plead that any purported theft was committed by an "**Employee**."

More problematically, the Amended Complaint's allegations that the ECA employees "allowed" third-party bad actors to commit the thefts by failing to properly secure the property does not amount to "**Theft** committed by an **Employee**" as a matter of law. Even if the employees' failure to secure the property allegedly "allowed" *others* to commit thefts, that does not amount to an "unlawful taking" of property *by the ECA employees*, as required to show "**Theft** committed by an **Employee**." *See id.* §§ 1.A, 2(v); *see also, e.g.*, *Ellenberg v. Certain Underwriters at Lloyd's*, 187 B.R. 785, 806 (Bankr. N.D. Ga. 1995) (holding, under Georgia law, that a CEO did not engage in employee theft when the insured's trustee "did not show that [the CEO] was aware" of a third party's conduct, even though the CEO's actions may have caused the insured's losses); *Hartford Fire Ins. Co. v. Mitchell Co.*, No. 1:08-cv-00623, 2010 U.S. Dist. LEXIS 132887, at *15–20 (S.D. Ala. Dec. 15, 2010) (holding that an employee's "failure to" take certain actions did not constitute employee theft, regardless of whether that conduct "result[ed] in loss to the employer"); *Pine Belt Auto., Inc. v. Royal*

Indem. Co., No. 3:06-cv-5995, 2008 U.S. Dist. LEXIS 84393, at *15–17 (D.N.J. Oct. 21, 2008) (holding that there was "not a 'taking' and therefore not a theft under the terms of the policy," such that there was no coverage for "the losses resulting from [the employee's] acts").

In fact, Plaintiffs' other allegations confirm that these thefts were ultimately committed by third parties, not by any ECA employees. For example, for the Dayton Incident, Plaintiffs specifically allege that the ECA employees "facilitated" the thefts, but they include no such allegations with respect to the remaining campuses. *See* Am. Compl. ¶ 55. Moreover, for other campus thefts, Plaintiffs allege that the "minority owner of the building" and the "landlord of the premises"—*not* ECA employees—were the individuals "identified as taking ECA's property." *Id.* ¶¶ 140–41, 159–60.

Otherwise, the Amended Complaint just alleges that the losses "were caused by clear instances of *Employee Theft* and/or Robbery." *Id.* ¶ 163 (emphasis added). But, under binding Eleventh Circuit precedent, this Court "*must* identify [those] conclusory allegations and then discard them," as their "conclusory nature disentitles them to the presumption of truth." *Champion v. Mannington Mills, Inc.*, 538 F. Supp. 3d 1344, 1347 (M.D. Ga. 2021) (quoting *McCullough*, 907 F.3d at 1333) (emphasis added and quotation marks omitted); *see also M&M Sisters, LLC v. Scottsdale Ins. Co.*, No. 22-11290, 2022 U.S. App. LEXIS 25752, at *8–9 (11th Cir. Sept. 14, 2022) (affirming dismissal due to insured's "conclusory allegation" of coverage because "[c]onclusory allegations . . . masquerading as facts will not prevent dismissal").

In sum, Plaintiffs have failed to plausibly allege that they are entitled to coverage under Insuring Agreement 1.A for the overwhelming majority of the underlying claims. Accordingly, except for the underlying claims for the Birmingham Culinary Incident, the Charlotte Incident, and the Dayton Incident, the Court should dismiss Counts I and III to the extent Plaintiffs seek coverage under Insuring Agreement 1.A of the Policy.

B. For all but one claim, there is no coverage under Insuring Agreement 1.D because the Amended Complaint does not allege a Robbery of a Custodian.

For this stage of the case only, National Union does not contest that Plaintiffs have plausibly alleged that there may be coverage under Insuring Agreement 1.D for the Birmingham Culinary Incident, as the Amended Complaint alleges that the Incident involved theft that was witnessed by an ECA employee who purportedly had care and custody of the property. *See* Am. Compl. ¶¶ 42–44. Again, National Union believes Plaintiffs will ultimately not prevail on this claim, but National Union does not seek dismissal of this single claim under Insuring Agreement 1.D here.

However, based on the clear and unambiguous terms in Insuring Agreement 1.D, there are *no* allegations that any of the remaining underlying claims are covered because Plaintiffs have not pled that they involved a "**Robbery** of a **Custodian**." Significantly, for two of the three underlying claims for which National Union is not seeking dismissal under Insuring Agreement 1.A, coverage is not plausibly pled under *Insuring Agreement 1.D*. For instance, as for the Charlotte Incident, Plaintiffs allege only that "the landlord observed people removing property and furniture . . . from the campus." *Id.* ¶ 49. Plaintiffs do not and cannot allege that, as required to show "**Robbery** of a **Custodian**," the landlord was the "**Insured**, or any of the **Insured's** partners or **Members**, or any **Employee** while having care and custody of property inside the **Premises**," let alone that the landlord had the required "care and custody" of the property. *See* Policy §§ 1.D, 2(c), 2(s); *see also Cleveland Ave. Liquor Store, Inc. v. Home Ins. Co.*, 156 S.E.2d 202, 204–05 (Ga. Ct. App. 1967) (holding that there was no insurance coverage for property theft when individual did not have "*care and custody* of the insured property" as required by the insurance policy).

Similarly, with regard to the other campuses, Plaintiffs fail to allege that the bad actors "caused or threatened to cause . . . bodily harm" to an individual with the required "care and custody" of the property or "committed an obviously unlawful act witnessed" by an individual with the required "care

and custody" of the property, and, as a result, there can be no coverage for a "**Robbery** of a **Custodian**" under Insuring Agreement 1.D. *See* Policy §§ 1.D, 2(c), 2(s); *see also* Am. Compl. ¶¶ 55–56, 61–62, 67–68, 73–74, 79–80, 85–86, 91–92, 97–98, 103–04, 109–10, 115–16, 121–22, 127–28, 133–34, 139–40, 145–46, 151–52, 157–58. At best, the Amended Complaint alleges that the losses "were caused by clear instances of Employee Theft and/or *Robbery*." Am. Compl. ¶ 163 (emphasis added). Yet that is another conclusory allegation that must be disregarded by the Court. *See McCullough*, 907 F.3d at 1333; *M&M Sisters*, 2022 U.S. App. LEXIS 25752, at *8–9.

Accordingly, separate and apart from the underlying claims for which National Union seeks dismissal of Counts I and III under Insuring Agreement 1.A (all claims save for Birmingham Culinary Incident, the Charlotte Incident, and the Dayton Incident), the Court should also dismiss Counts I and III with respect to all claims save for the Birmingham Culinary Incident, to the extent Plaintiffs seek coverage under Insuring Agreement 1.D of the Policy. There are simply no allegations in the Amended Complaint to support coverage of those claims under this provision.

II. PLAINTIFFS FAIL TO PLAUSIBLY ALLEGE ANY BAD FAITH DENIAL OF COVERAGE.

Despite taking the opportunity to replead, the Amended Complaint's conclusory allegations of bad faith are still insufficient to plausibly establish that Plaintiffs are entitled to relief. In Count II of the Amended Complaint, Plaintiffs allege that National Union's denial of the claims was "unjustified," "frivolous[,] and unfounded" and that National Union "did not have reasonable grounds to exclude or deny coverage of the Claims under the Policy," such that National Union "acted in bad faith." *See* Am. Compl. ¶¶ 191–99. Plaintiffs assert they made "proper demands pursuant to O.C.G.A. § 33-4-6," and seek, in addition to compensatory damages, statutory damages and attorney's fees under that statute. *Id.* ¶¶ 198–99.

O.C.G.A. § 33-4-6, Georgia's bad faith statute, is "the exclusive remedy for an insured's claim

of bad faith failure to pay policy proceeds." *Am. Safety Indem. Co. v. Sto Corp.*, 802 S.E.2d 448, 456 (Ga. Ct. App. 2017). "[T]he insured bears the burden of proving that the refusal to pay the claim was made in bad faith." *Taylor v. State Farm Fire & Cas. Co.*, 819 S.E.2d 482, 486 (Ga. Ct. App. 2018). To prevail on this count, a plaintiff must prove "(1) the claims are covered; (2) a demand for payment was made against [the insurer] within 60 days prior to filing suit; and (3) [the insurer's] failure to pay was motivated by bad faith." *Sto*, 802 S.E.2d at 456. Because O.C.G.A. § 33-4-6 imposes a penalty, these three requirements are "strictly construed." *Id.* Count II falters on all three requirements.

First, as discussed, Plaintiffs fail to plausibly allege that the vast majority of the claims for which they seek coverage—18 of the 21 ECA campuses where the thefts allegedly occurred under Insuring Agreement 1.A, and 20 of the 21 ECA campuses under Insuring Agreement 1.D—are in fact covered under the Policy. While Plaintiffs include sufficient allegations for three campuses, *see* Am. Compl. ¶¶ 42–44, 49–51, 55–56, for the remaining campuses, their allegations are implausibly pled, and thus Plaintiffs cannot show coverage for those 18 campuses. *See Rest. Grp. Mgmt., LLC v. Zurich Am. Ins. Co.*, No. 1:20-cv-04782-TWT, 2021 U.S. Dist. LEXIS 94597, at *22 (N.D. Ga. Mar. 16, 2021) (granting motion to dismiss count under O.C.G.A. § 33-4-6 due to "Plaintiffs' failure to plead sufficient facts regarding coverage of their claimed losses" because, "without sufficiently pleaded covered losses," the count under O.C.G.A. § 33-4-6 "fail[ed]").

Second, Plaintiffs still do not adequately allege that they complied with the demand requirement. They allege that they "made proper demands pursuant to O.C.G.A. § 33-4-6," Am. Compl. ¶ 198, but that legal conclusion must be disregarded, *see McCullough*, 907 F.3d at 1333. Indeed, Plaintiffs do not even specifically allege that the demand was made "within 60 days prior to filing suit." *Sto*, 802 S.E.2d at 456. In addition, in order to satisfy O.C.G.A. § 33-4-6, the demand "must be sufficient to alert the insurer that it is facing a bad faith claim for a specific refusal

to pay so that it may decide whether to pay the claim." *Thompson v. Homesite Ins. Co. of Ga.*, 812 S.E.2d 541, 545 (Ga. Ct. App. 2018). Plaintiffs nowhere allege the exact nature of the demand and thus cannot show (nor can this Court determine) that the demand was sufficient to alert National Union that it was facing a bad faith count.

Finally, there are deficient allegations that National Union's "failure to pay was motivated by bad faith." *Sto*, 802 S.E.2d at 456. For one thing, Plaintiffs do not even provide the Court with National Union's basis for denying coverage, so the Court cannot assess those proffered reasons. Plaintiffs allege only that National Union's denial of the claims was "unjustified," "frivolous[,] and unfounded" and that National Union "did not have reasonable grounds to exclude or deny coverage of the Claims under the Policy," such that National Union "acted in bad faith." *See* Am. Compl. ¶¶ 191–99. But those allegations, too, must be disregarded because they are nothing but "labels and conclusions." *See McCullough*, 907 F.3d at 1333.

In any event, Plaintiffs' own allegations make clear that National Union did not act in bad faith. "Under OCGA § 33-4-6, an award of attorney fees and a bad faith penalty is not authorized if the insurer had any 'reasonable ground to contest the claim.'" *Auto Owners Ins. Co. v. Gay Constr. Co.*, 774 S.E.2d 798, 802 (Ga. Ct. App. 2015). Reading between the lines of the Amended Complaint, Plaintiffs indicate that National Union denied coverage because Plaintiffs and ECA failed to corroborate the claims for insurance coverage with sufficient documentation. *See* Am. Compl. ¶¶ 173–74 (alleging that "Plaintiffs have worked to gather requested documents on the Claims" but that "many documents requested by National Union were not available"). And that is of course a reasonable ground to deny coverage. *See Allstate Ins. Co. v. Sinton*, No. 1:09-cv-03530-CAP, 2013 U.S. Dist. LEXIS 191505, at *12–14 (N.D. Ga. Aug. 29, 2013) (granting motion to dismiss count under O.C.G.A. § 33-4-6 when there was a "dispute over whether the [insureds] misrepresented the

values of any items claimed in their proof of loss forms" and thus there was a "reasonable defense"). Indeed, under the Policy, the "**Insured** must keep records of all property covered under this **Crime Coverage Section** so the **Insurer** can verify the amount of any loss," Policy § 6(a)(xx), and "must . . . [p]roduce . . . all pertinent records," *id.* § 6(a)(vii)(1)(c). Without such documentation, Plaintiffs will *never* be able to show that they are entitled to coverage.

III. BASED ON APPLICABLE LAW AND THE POLICY, PLAINTIFFS ARE NOT ENTITLED TO PUNITIVE DAMAGES, ATTORNEY'S FEES, OR INDIRECT OR CONSEQUENTIAL DAMAGES.

A. Plaintiffs are not entitled to punitive damages.

In the Amended Complaint, Plaintiffs ask the Court to "[a]ward punitive damages against Defendant and in favor of Plaintiffs." Am. Compl. at Prayer for Relief ¶ E. However, under Georgia law, "[p]unitive damages are not recoverable in actions for breach of contract[.]" *Walia v. Walia*, 847 S.E.2d 8, 12 (Ga. Ct. App. 2020); *see also Blackburn v. BAC Home Loans Servicing, LP*, 914 F. Supp. 2d 1316, 1330 (M.D. Ga. 2012) ("It is clear that a plaintiff cannot recover punitive damages . . . for a breach of contract under Georgia law."). As such, Plaintiffs cannot obtain punitive damages based on National Union's alleged breach of the Policy.

Beyond that, if the Court allows Plaintiffs' bad faith count under O.C.G.A. § 33-4-6 to proceed (which, respectfully, it should not), that count also cannot serve as the basis for punitive damages under Georgia law. *See, e.g.*, *Great Sw. Express Co. v. Great Am. Ins. Co.*, 665 S.E.2d 878, 881 (Ga. Ct. App. 2008) (affirming summary judgment to insurer on insured's counterclaims for punitive damages because "the penalties contained in OCGA § 33-4-6 are the exclusive remedies for an insurer's bad faith refusal to pay insurance proceeds"); *Butler v. Nationwide Mut. Fire Ins. Co.*, No. 1:21-cv-02138-MLB, 2022 U.S. Dist. LEXIS 41026, at *23 (N.D. Ga. Mar. 8, 2022) (granting insurer's motion to dismiss request for punitive damages because "O.C.G.A. § 33-4-6 displaces claims for punitive damages based on an insurer's bad faith failure to pay a claim"); *West v. Const. Life Ins. Co.*, No. 5:18-

cv-00318-TES, 2019 U.S. Dist. LEXIS 15320, at *4 (M.D. Ga. Jan. 31, 2019) ("[T]he Georgia statute that governs cases concerning an insurer's refusal to pay insurance proceeds limits damages for bad faith to 50 percent of the amount of actual damages, and plaintiffs are not entitled to punitive damages under the statute."). The Court should therefore dismiss Plaintiffs' request for punitive damages.

B. Plaintiffs are not entitled to attorney's fees.

Plaintiffs also seek to recover "the costs and disbursements of the action, including reasonable attorneys' fees, accountants' and experts' fees, costs, and expenses pursuant to O.C.G.A. § 33-4-6 and O.C.G.A. § 13-6-11." Am. Compl. at Prayer for Relief ¶ D. As an initial matter, the request for attorney's fees under O.C.G.A. § 33-4-6 should be dismissed for the same reasons, discussed above, that the count under that statute should be dismissed. As for O.C.G.A. § 13-6-11, which allows for the "expenses of litigation" when "the defendant has acted in bad faith, has been stubbornly litigious, or has caused the plaintiff unnecessary trouble and expense," that request also fails as a matter of law.

Under Georgia law, if an insured's counts are "predicated on the insurer's failure to pay a claim, OCGA § 33-4-6 is the exclusive vehicle through which the insured may make a claim for attorney fees against the insurer." *Thompson*, 812 S.E.2d at 546. This rule governs "[e]ven where the insured alleges other theories of recovery distinct from a bad faith claim." *Id.* Applying this rule, the court in *Thompson* reversed the trial court's decision allowing the insured's request for attorney's fees under O.C.G.A. § 13-6-11 to proceed. *See id.*; *see also, e.g.*, *Powers v. Unum Corp.*, 181 F. App'x 939, 944 n.8 (11th Cir. 2006) ("The district court also properly concluded that [the insured's] claim for attorneys fees and litigation expenses under O.C.G.A. § 13-6-11 was barred by O.C.G.A. § 33-4-6, which provides insureds the exclusive procedure to recover attorneys fees."); *Tiber Capital Grp., LLC v. Travelers Cas. & Sur. Co. of Am.*, No. 2:22-cv-00095-RWS, 2022 U.S. Dist. LEXIS 238964, at *11 (N.D. Ga. Dec. 1, 2022) ("Georgia law has long made clear that a claim for attorneys' fees and litigation expenses under O.C.G.A. § 13-6-11 is barred by O.C.G.A. § 33-4-6[.]") (quotation mark omitted). As

such, the Court should dismiss Plaintiffs' request for attorney's fees.

C. Plaintiffs are not entitled to indirect or consequential damages.

In Count I of the Amended Complaint, Plaintiffs allege that they have suffered damages that include "the loss of monies owed under the Policy for the Claims," *as well as* "delay in payments to creditors from the Receivership Estate, incidental costs, and legal fees." Am. Compl. ¶ 189. However, the Policy unambiguously excludes "[l]oss that is an indirect or a consequential result of an **Occurrence** covered by this **Crime Coverage Section** including, but not limited to, loss resulting from . . . payment of damages of any type for which the **Insured** is legally liable; provided, however, the **Insurer** will pay compensatory damages arising directly from a loss covered under this **Crime Coverage Section**; or . . . payment of costs, fees or other expenses the **Insured** incurs in establishing either the existence or the amount of loss under this **Crime Coverage Section**." Policy at Endorsement # 5; *see also id.* § 3(f). The latter category of damages sought by Plaintiffs—"delay in payments to creditors from the Receivership Estate, incidental costs, and legal fees," Am. Compl. ¶ 189—is clearly excluded as a matter of law by Endorsement # 5. *See, e.g., Lubin v. Cincinnati Ins. Co.*, No. 1:09-cv-02985-RWS, 2010 U.S. Dist. LEXIS 133794, at *5, *15–16 (N.D. Ga. Dec. 17, 2010) (enforcing similar exclusion for "indirect or consequential loss" based on the "plain and unambiguous terms" under Georgia law).

IV. MONROE CAPITAL LACKS STANDING TO PURSUE THIS ACTION.

Finally, as explained in National Union's first Motion to Dismiss and unaddressed in the Amended Complaint, this case should not proceed with the involvement of Monroe Capital, ECA's alleged senior secured lender and collateral agent. *See* Am. Compl. ¶ 5. The Policy unambiguously states that it is "for the **Insured's** benefit only" and "provides no rights or benefits to any other person or organization," such that "[a]ny claim for loss . . . must be presented by the **Insured**." Policy § 6(a)(xviii). Such a provision is enforceable under Georgia law. *See Fournier v. Hartford Fire Ins.*

Co., 862 F. Supp. 357, 360, 362–63 (N.D. Ga. 1994) (enforcing same provision and stating that "the express provisions of the policy preclude suit by anyone other than the insured").

One recent persuasive decision, *Western Alliance Bank v. National Union Fire Insurance Co. of Pittsburgh, Pa.*, makes clear that Monroe Capital lacks standing under this provision to pursue any counts in this action. *See* No. 3:15-cv-03429, 2016 U.S. Dist. LEXIS 19936 (N.D. Cal. Feb. 18, 2016). In that case, after the insured went out of business, the employees were asked to "leave company property where it was," but the president later found that "almost all of that property was missing." *Id.* at *1–2. Western Alliance Bank, which "purport[ed] to hold a security interest in the missing property," then sought to "collect on the [commercial crime] insurance policy" issued by National Union to the insured. *Id.* at *2. Based on the exact same provision at issue here, and noting that "the mortgagee of an insured property has no interest in a policy obtained by [a] mortgagor in the mortgagor's name and for his or her own benefit," the court held that Western Alliance Bank lacked "standing to bring a claim." *Id.* at *3–4, *9–12 (quoting Couch on Insurance § 65:82). As such, the Court granted National Union's motion to dismiss. *Id.* at *16. *Western Alliance Bank* commands the same result here with respect to Monroe Capital.

CONCLUSION

Accordingly, for the foregoing reasons, National Union respectfully requests that the Court (i) dismiss Counts I and III to the extent Plaintiffs seek coverage under Insuring Agreement 1.A (except for the Birmingham Culinary Incident, the Charlotte Incident, and the Dayton Incident) and Insuring Agreement 1.D (except for the Birmingham Culinary Incident); (ii) dismiss Count II in its entirety; (iii) dismiss Plaintiffs' requests for punitive damages, attorney's fees, and indirect or consequential damages; and (iv) dismiss Monroe Capital's counts in their entirety. National Union respectfully requests that the dismissals be with prejudice given that Plaintiffs have now had the opportunity to cure these pleading deficiencies but have failed to do so.

Dated: June 13, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 13, 2023, I electronically filed the foregoing DEFENDANT NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA.'S MEMORANDUM OF LAW IN SUPPORT OF ITS PARTIAL MOTION TO DISMISS THE AMENDED COMPLAINT using the Court's CM/ECF system, which will automatically send notification of such filing to all counsel of record.

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