

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

Case No. 19-20269-CIV-MARTINEZ/OTAZO-REYES

SUNDERLAND MARINE INSURANCE
COMPANY LTD.,

Plaintiff/Counter-Defendant,

v.

C SERVICES, LLC,

Defendant/Counter-Plaintiff.

**REPORT AND RECOMMENDATION
ON CROSS-MOTIONS FOR SUMMARY JUDGMENT**

THIS CAUSE came before the Court upon Defendant/Counter-Plaintiff C Services, LLC's ("Defendant" or "C Services") Motion for Summary Judgment (hereafter, "Defendant's Motion for Summary Judgment") [D.E. 54] and Plaintiff/Counter-Defendant Sunderland Marine Insurance Company Ltd.'s ("Plaintiff" or "Sunderland") Motion for Summary Judgment and Incorporated Memorandum of Law in Support (hereafter, "Plaintiff's Motion for Summary Judgment") [D.E. 56] (together, "Cross-Motions for Summary Judgment"). The Court held a hearing on these matters on March 20, 2020 (hereafter, "Summary Judgment Hearing") [D.E. 100]. For the reasons stated below, the Court RESPECTFULLY RECOMMENDS that the Cross-Motions for Summary Judgment be GRANTED IN PART AND DENIED IN PART.

PROCEDURAL AND FACTUAL BACKGROUND

Sunderland brings this declaratory action against C Services, in connection with a marine insurance policy for a 2000 61-ft. Garlington vessel named "Mathilda" (hereafter, "Vessel"). See Am. Compl. [D.E. 25]. The insurance policy commenced on January 20, 2012 and was renewed

yearly thereafter. Id. at 3. Sunderland alleges that, after C Services sustained damages to the Vessel in December 2015 (hereafter, “the December 2015 Incident”), it waited until September 18, 2017 to file a claim, to Sunderland’s detriment. Id. at 4-7. Sunderland further alleges that the 2015 renewal of the prior year’s policy, which resulted in the issuance of Policy No. YIP-16837-2015 (hereafter, “2015 Policy”), was based upon misrepresentations and/or failure to disclose material facts related to the replacement of the Vessel’s captain. Id. at 6.

Sunderland asserts various claims based on C Services’ alleged breaches of insurance policy provisions, which purportedly prejudiced Sunderland’s ability to investigate or assess the insurance claim (Counts I-IV). Id. at 6-11. Sunderland also asserts claims for failure to mitigate damages, material misrepresentation and lack of fortuity (Counts V-VII). Id. at 11-16. Based on these allegations, Sunderland seeks a judgment declaring that: the relationship of insurer and insured does not exist between Sunderland and C Services as regards the December 2015 Incident; the 2015 Policy provides no coverage to C Services for the December 2015 Incident; and the 2015 Policy is void as a result of misrepresentations and/or non-disclosure of material facts. Id. at 16.

Plaintiff seeks summary judgment as to Count II, in the form of a declaration that Defendant failed to provide timely notice of the December 2015 Incident, which is a condition precedent to its coverage under the 2015 Policy. See Plaintiff’s Motion for Summary Judgment [D.E. 56 at 1]. Plaintiff also seeks summary judgment as to Count VI, in the form of a declaration that Defendant made material misrepresentations and/or non-disclosures of material facts at the time it applied for the 2015 Policy renewal, which permits Plaintiff to void and/or to rescind the 2015 Policy. Id. at 1-2.¹ In turn, Defendant seeks a judgment as a matter of law that

¹ Plaintiff also argues that Defendant’s misrepresentations or non-disclosures permit it to void or rescind two policy renewals that pre-dated and post-dated the 2015 Policy, respectively. Id.

Plaintiff owes it coverage for damage to the engines and generators of the Vessel resulting from the December 2015 Incident. See Defendant’s Motion for Summary Judgment [D.E. 54 at 1]. Specifically, Defendant contends that its insurance claim falls within Sunderland’s Insuring Agreement and is not barred by the wear and tear exclusion in the Agreement. Id. at 6. Defendant further argues that it timely reported its insurance claim to Sunderland’s “captive” agent and that any prejudice claimed by Sunderland is due to its own failure to investigate the loss. Id. at 9-14. Defendant also relies on Florida Statute § 627.409(2), Florida’s “anti-technical statute,” as precluding Plaintiff from denying coverage based on untimely notice and misrepresentation. Id. at 14-17. Finally, Defendant argues that Plaintiff waived any right to rescind the 2015 Policy or to have it deemed void *ab initio*, regardless of the existence of a material misrepresentation, which, in any event, would be a question of fact for the jury. Id. at 17-20.

SUMMARY JUDGMENT STANDARD

Under Federal Rule of Civil Procedure 56, “[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). When determining whether a genuine issue of material fact exists, courts “view all evidence and draw all reasonable inferences in favor of the non-moving party.” Smith v. Royal Caribbean Cruises, Ltd., 620 F. App’x 727, 729 (11th Cir. 2015). “Yet, the existence of some factual disputes between litigants will not defeat an otherwise properly grounded summary judgment motion; ‘the requirement is that there be no *genuine* issue of *material* fact.’” Weiner v. Carnival Cruise Lines, No. 11-CV-22516, 2012 WL 5199604, at *2 (S.D. Fla. Oct. 22, 2012) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)). Indeed,

[T]he plain language of [Rule 56] mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be no genuine issue as to any material fact, since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial.

Cohen v. Carnival Corp., 945 F. Supp. 2d 1351, 1354 (S.D. Fla. 2013) (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986)). Hence, the mere existence of a scintilla of evidence in support of the non-moving party's position is insufficient; there must be evidence upon which a jury could reasonably find for the non-movant. Anderson, 477 U.S. at 251.

UNDISPUTED FACTS²

1. In 2012, C Services purchased the Vessel.
2. As part of the purchase process of the Vessel in 2012, a survey was conducted. During the 2012 survey, the port engine was observed to have logged 3,023.0 hours and the starboard engine had 3,076.6 hours.
3. After conducting a sea trial, the surveyor determined that the Vessel performed at "Above Average" condition, defined as one that has "above average care and is equipped with extra electrical and electronic gear."
4. The 2012 survey was provided to Sunderland during the underwriting process, and the underwriters stated: "this is the exact type of risk we want . . . based on the above average survey, claims-free experience and a good captain in charge."

² See Defendant's Statement of Material Facts [D.E. 53]; Statement of Material Facts Not in Dispute in Support of Plaintiff's Motion for Summary Judgment [D.E. 55]; Plaintiff's Statement of Material Facts in Opposition to Defendant C Services' Statement of Material Facts [D.E. 67]; Response to Plaintiff's Statement of Material Facts [D.E. 70]; Plaintiff's Reply Statement of Material Facts in Support of Plaintiff's Motion for Summary Judgment [D.E. 79] (collectively, "Parties' Statements of Material Facts"). Any facts that were wholly or partially disputed in the Parties' Statements of Material Facts are not included in this Section and are not considered for purposes of the Cross-Motions for Summary Judgment.

5. Yachtinsure (“Yachtinsure”) was an authorized underwriter on behalf of Sunderland.

6. All communications between Yachtinsure and C Services occurred through C Services’ agents, first Able Maritime Yachtinsure, also known as Marine Underwriters, sometimes referred to as Marine Underwriters/Able Maritime (“MU/AM”); and then later through Lightship Maritime, Inc. (“Lightship”), after Lightship purchased MU/AM in or around August 2016 from Salvus Bain Management (USA), LLC (“Salvus Bain”). Salvus Bain was a wholly owned subsidiary of The North of England Protecting and Indemnity Association Ltd., the parent and holding company of Sunderland. Following its acquisition of MU/AM, Lightship continued to employ the same agents.

7. Elizabeth Holmes (“Ms. Holmes”) worked as an insurance broker with MU/AM from approximately July 1997 until August 2016 (when Lightship purchased MU/AM) and she worked as an insurance broker for Lightship thereafter until approximately December 2018.

8. Ulf Henriksson (“Mr. Henriksson”) is the sole owner of C Services, which is a limited liability company.

9. On January 16, 2012, C Services submitted to Yachtinsure, via C Services’ agent, an application for a policy of marine insurance (hereafter, “2012 Application”). See 2012 Application [D.E. 25-1].

10. Sunderland issued a marine insurance policy covering the Vessel that took effect on January 20, 2012 and was renewed by C Services annually thereafter through the policy period ending on January 20, 2017.

11. Each and every renewal was based in part on the material information set forth in the original application.

12. In the years following its 2012 purchase of the Vessel, C Services performed regular maintenance and repairs on it, including an overhaul of the engines which was completed in late 2013.

13. In June 2014, the Vessel experienced a fuel leak in the engine room caused by the rupture of a high-pressure fuel line. The leak caused all the fuel to be emptied out of the Vessel at a rate of 50 gallons per hour. The fuel line was subsequently repaired after a mechanic inspected it and determined it could be welded back together. The captain of the Vessel at the time was Capt. Bill Dhillon (“Capt. Dhillon”). Following the repair of the fuel line, the Vessel required a very large amount of new fuel to be fed into the fuel tanks, which was then pumped into the engines and generators.

14. Mr. Henriksson never saw the fuel pipe that broke in June 2014, and Capt. Dhillon took no photographs of it. Mr. Henriksson chose not to submit an insurance claim for the June 2014 fuel leak because the cost of repair was less than the deductible.

15. In an email dated October 9, 2014, during the term of Sunderland’s Policy No. SMI-14500-2014 (hereafter, “2014 Policy”), C Services, via its agent, Lourie Devine of MU/AM (“Ms. Devine”), requested that Yachtinsure issue an endorsement to the 2014 Policy replacing Capt. Dhillon with a new named operator, Capt. Andrew Jackson (“Capt. Jackson”). See October 9, 2014 Email [D.E. 25-2].

16. Yachtinsure needed more information before Capt. Jackson could be approved as a named operator.

17. In an email dated October 28, 2014, C Services, via its agent, Monica Hahn of MU/AM (“Ms. Hahn”), sent Yachtinsure a copy of Capt. Jackson’s resume and Merchant Marine license. See October 28, 2014 Email [D.E. 25-3].

18. On January 8, 2015, C Services' agent sent an email requesting that Sunderland renew the 2014 Policy. See January 8, 2015 Email [D.E. 25-5].

19. On January 20, 2015, Sunderland issued to C Services the 2015 Policy, affording Hull & Machinery coverage on the Vessel in the amount of \$960,000.00. See 2015 Policy [D.E. 25-6]. Capt. Jackson was included as a named operator on the 2015 Policy.

20. The 2015 Policy states, in pertinent part:

GENERAL CONDITIONS AND WARRANTIES

6) It is hereby agreed that your brokers or any substituted brokers ("whether surplus lines approved or otherwise or duly licensed to act as your insurance agent, broker or intermediary or not"), shall be deemed to be exclusively the agent(s) of you and not of us in any and all matters relating to, connected with or affecting this insurance . . .

See 2015 Policy [D.E. 25-6 at 11].

YOUR NON-DELEGABLE DUTIES IN THE EVENT OF A LOSS

2) As soon as reasonable and possible give us direct written notification of ANY loss and its circumstances to: Yachtinsure Ltd.

Id. at 15.

POLICY TERMS AND CONDITIONS

2.) MISREPRESENTATION, CONCEALMENT OR FRAUD: The entire policy will be VOID if, in connection with your insurance application, whether before or after a loss, occurrence or event, any named insured or operator has: a) Misrepresented or failed to disclose any material fact or circumstance or made any false statement related to this insurance[] or b) Engaged in fraudulent conduct.

Id. at 3.

21. In late 2015, the Vessel was taking longer than normal to accelerate and exuding more smoke than usual.

22. Shortly after Thanksgiving 2015, Mr. Henriksson instructed Capt. Jackson to have the engines and generators repaired.

23. C Services hired a mechanic, Roger Bennett (“Mr. Bennett”), to inspect the engines and generators in December 2015. In January 2016, Mr. Bennett told Mr. Henriksson that the engines’ cylinders were corroded.

24. On January 20, 2016, C Services, via its agent Ms. Hahn, sent an email requesting Sunderland to renew the 2015 Policy. See January 20, 2016 Email [D.E. 55-5].

25. Leading up to the policy renewal beginning in 2016, no new application was requested of C Services.

26. On January 20, 2016, Sunderland issued to C Services its Marine Insurance Policy No. SMI-19500-2016 (hereafter, “2016 Policy”) affording Hull & Machinery coverage on the Vessel in the amount of \$960,000.00. See 2016 Policy Declarations Page [D.E. 55-6].

27. Capt. Jackson was included as a named operator on the 2016 Policy.

28. The 2016 Policy Declarations Page warrants that there were no known or reported losses as of the date of inception, January 20, 2016.

29. The 2016 Policy was the last policy issued by Sunderland for coverage of the Vessel, and it expired on January 20, 2017.

30. In March 2016, the Vessel was moved to Islamorada, Florida and placed in dry dock at the Coral Bay Marina. The repairs and replacement required the removal of the engines and generators, which were then secured on dry land, and maintained for possible re-sale or rebuild. The Sunderland Policy was in full force and effect at the time and all premiums had been paid.

31. On January 19, 2017, upon request of the underwriters, the insured completed a

renewal application. The application requested that the insured list “Details of any Criminal Convictions, OUI/DUI, Insurance Losses.” The application did not request any information regarding arrests that did not result in a criminal conviction or conviction for OUI/DUI.

32. In July 2017, the engines and generators that had been removed from the Vessel were transferred to a secure and gated area in Summerland Key, Florida to prevent any theft or vandalism. As before, the engines and generators were elevated and covered to maintain their condition.

33. In a July 27, 2017 email to Ms. Holmes, who was then working at Lightship, Mr. Henriksson stated, “[a]fter understanding my insurance terms I will be filing a claim. . . . [P]lease work with my captain Diana [Smith] cc:ed on this email to help her prepare the claim” See July 27, 2017 Email [D.E. 53-6 at 3].

34. On July 28, 2017, Ms. Holmes acknowledged that a claim was being made and stated that “we will need to get a surveyor by to take a look and assess the damage.”

35. On August 15, 2017, C Services’ agent, Ms. Devine (formerly at MU/AM and later at Lightship) sent an email to Yachtinsure notifying it of a claim for damage to the Vessel’s engines and generators. See August 15, 2017 Email [D.E. 55-7].

36. The next day, August 16, 2017, Francesca Ellis (“Ms. Ellis”) of Yachtinsure replied to Ms. Devine, formally acknowledging receipt of the claim, noting a possible issue of late notice and asking C Services to complete and return a Claim Declaration form. Id. Sunderland did not inspect or request an inspection of the engines, generators, or Vessel at that time.

37. On September 10, 2017, Hurricane Irma hit the Florida Keys as a Category 4 hurricane. Hurricane Irma caused additional damage to the engines, which were located at the secure and gated area in Summerland Key, Florida, rendering them unsalvageable.

38. On September 14, 2017, Capt. Smith sent an e-mail attaching the completed Claim Declaration to Ms. Devine of Lightship, which Ms. Devine forwarded to Ms. Ellis of Yachtinsure on September 18, 2017. See September 14, 2017 Email [D.E. 36-1]. In the September 14, 2017 email, Capt. Smith stated, “sorry I haven’t gotten this to you sooner – had it filled out then prep for the hurricane happened.” She further stated, “the captain that was on board the boat is no longer with Ulf Henriksson and probably not a good idea that he be contacted – I left some areas blank because of that.” Id.

39. The Claim Declaration Form states that Capt. Jackson was the “person in control at the time of the loss.”

40. The Claim Declaration includes these details: “leak in fuel line in engine room, after leak fixed, turbos would not engage on both motors (black smoke out of exhaust) . . . generators – had leak through exhaust, back pressure problem.” See Claim Declaration [D.E. 36-1 at 3].

41. The Claim Declaration states that the date of the incident was December 2015. See Claim Declaration [D.E. 36-1 at 3]. The referenced fuel leak in the engine room occurred in June 2014.

42. On October 4, 2017, Sunderland denied coverage and refused to pay for damages to the Vessel related to the engine and generator failure and the subsequent damage to the salvage value caused by Hurricane Irma.

43. Capt. Jackson died on October 16, 2017.

44. On February 18, 2018, Sunderland issued a formal letter advising that the policy provision titled, “YOUR NON-DELEGABLE DUTIES IN THE EVENT OF A LOSS,” requiring that the insured take steps to minimize the loss and protect the insured vessel from further loss, and give the insurer an opportunity to examine the damaged property, precludes coverage.

45. On June 18, 2018, Mr. Bennett provided a report to Mr. Henriksson describing the work he had done on the Vessel in 2013, 2015 and 2016 [D.E. 52-7]. In his June 2018 report, Mr. Bennett does not state that the original loss was caused by contaminated fuel which entered the engines and generators via the fuel pump system. His report does not mention contaminated fuel at all. Mr. Bennett’s report states that the engine damage was caused by saltwater which came in through either the fuel or the oil system, but he does not say how. As for the generators, Mr. Bennett states that those were most likely damaged by saltwater which came in through the water-cooling system.

46. On January 18, 2019, Sunderland commenced the instant declaratory judgment action, asserting, inter alia, that there was no coverage due to delayed notice, failure to provide Sunderland with an opportunity to inspect the vessel, and failure to mitigate damage to the vessel.

47. C Services never refused to allow access to the engines and generators stored at Summerland Key, nor did it ever refuse access to the Vessel. C Services cooperated fully with Sunderland and Yachtinsure’s request to conduct a survey.

48. Sunderland has also denied coverage on the basis that the insured failed to comply with the policy provision that states an insured should “[s]ubmit a claim form and sworn signed

statement if requested, describing the loss, together with two estimates of repair costs and/or records to substantiate the amount of loss.”

49. To date, Sunderland has not returned any of the premiums paid by C Services, despite filing this action to rescind the policy.

50. The policy at issue only covers damage which occurs during the term of the policy itself. The policy states, in relevant part: “HULL AND MACHINERY COVERAGE . . . 1.01 If a sum insured is shown for Hull in the insuring agreement declaration page, we will provide coverage for accidental physical loss of, or damage to the insured vessel, which occurs during the period of this insuring agreement”

51. In or around June 2018, Sunderland was informed that C Services was being represented by David Collins, Esq.

52. Following Mr. Henriksson’s Examination Under Oath on July 25, 2018 [D.E. 55-9], Sunderland issued a letter dated September 18, 2018, stating its Amended Position Regarding Coverage, which included material misrepresentation as a basis for denying the subject claim. This letter was sent via email by Paul Sowerby, Claims Manager of Sunderland, to David Collins, Esq., on September 18, 2018.

53. In an abundance of caution, Sunderland’s counsel forwarded Mr. Sowerby’s email of September 18, 2018, with the letter of the same date attached, to C Services’ counsel on January 8, 2020.

54. On February 4, 2020, Sunderland sent an email to C Services requesting that it withdraw its assertion that material misrepresentation was first raised by Sunderland in litigation in January 2019, in recognition of the fact that Mr. Sowerby’s email and letter had been provided

to C Services on September 18, 2018 and again on January 8, 2020. Sunderland has received no response to its emails dated January 8, 2020 or February 4, 2020.

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

In Count II, Plaintiff seeks a declaratory judgment of non-coverage as a matter of law on the grounds that Defendant's failed to provide it with timely notice of the December 2015 Incident. In Count VI, Plaintiff seeks a declaratory judgment as a matter of law that the 2015 Policy is void or subject to rescission based on material misrepresentations and/or non-disclosures of material facts by Defendant. The undersigned discusses these two grounds in turn.

1. Whether Plaintiff is entitled to summary judgment as to Count II.

The 2015 Policy imposes on Defendant the duty to give direct written notification to Yachtinsure of any loss and its circumstances, as soon as reasonable and possible. See 2015 Policy [D.E. 25-6 15]. The following facts regarding notice are undisputed:

- In a July 27, 2017 email to Ms. Holmes, who was then working at Lightship, Mr. Henriksson stated, “[a]fter understanding my insurance terms I will be filing a claim. . . . [P]lease work with my captain Diana [Smith] cc:ed on this email to help her prepare the claim” See July 27, 2017 Email [D.E. 53-6 at 3].
- On July 28, 2017, Ms. Holmes acknowledged that a claim was being made and stated that, “we will need to get a surveyor by to take a look and assess the damage.”
- On August 15, 2017, C Services' agent, Ms. Devine (formerly at MU/AM and later at Lightship) sent an email to Yachtinsure notifying it of a claim for damage to the Vessel's engines and generators. See August 15, 2017 Email [D.E. 55-7].
- The next day, August 16, 2017, Ms. Ellis of Yachtinsure replied to Ms. Devine, formally acknowledging receipt of the claim, noting a possible issue of late notice and asking C Services to complete and return a Claim Declaration form. Id. Sunderland did not inspect or request an inspection of the engines, generators, or vessel at that time.
- On September 14, 2017, Capt. Smith sent an e-mail attaching the completed Claim Declaration to Ms. Devine of Lightship, which Ms. Devine forwarded to Ms. Ellis of Yachtinsure on September 18, 2017. See September 14, 2017 Email

[D.E. 36-1]. In the September 14, 2017 email, Capt. Smith stated, “sorry I haven’t gotten this to you sooner – had it filled out then prep for the hurricane happened.” She further stated, “the captain that was on board the boat is no longer with Ulf Henriksson and probably not a good idea that he be contacted – I left some areas blank because of that.” Id.

- The Claim Declaration includes these details: “leak in fuel line in engine room, after leak fixed, turbos would not engage on both motors (black smoke out of exhaust) . . . generators – had leak through exhaust, back pressure problem.” See Claim Declaration [D.E. 36-1 at 3].
- The Claim Declaration states that the date of the incident was December 2015. See Claim Declaration [D.E. 36-1 at 3]. The referenced fuel leak in the engine room occurred in June 2014.

See Undisputed Facts, *supra*. Based on the foregoing, the December 2015 Incident, which resulted from the June 2014 fuel leak, was first reported by C Services to its insurance agent on July 27, 2017; and was first reported to Yachinsure, as required by the 2015 Policy, on August 15, 2017 (hereafter, “August 2017 Notice”). Thus, a period of 20 months elapsed from the December 2015 Incident to the August 2017 Notice. The undersigned does not find a 20-month notice delay to be reasonable; and Defendant does not contend that it is.³

Defendant attempts to create an issue of fact regarding timing by contending that it gave notice in March 2016 to Sunderland’s “captive” agent, AM/MU, through Capt. Jackson. However, there is no competent evidence to support this contention, given that Capt. Jackson died on October 16, 2017 and that there is no documentary record of the purported March 2016 notice.

Defendant also argues that, even if it failed to give timely notice of its claim, it may still receive the benefit of coverage if it establishes that Sunderland “was not materially or

³ Alternatively, an even longer and less reasonable 38-month period elapsed from the June 2014 fuel leak referenced in C Services’ Declaration to the August 2017 Notice. Mr. Henriksson chose not to submit an insurance claim for the June 2014 fuel leak because the cost of repair was less than the deductible. See Undisputed Facts, *supra*.

substantially prejudiced by the non-compliance.” See Defendant’s Opposition to Plaintiff’s Motion for Summary Judgment (hereafter, “Defendant’s Opposition”) [D.E. 71 at 14]. Defendant relies for this proposition on Kings Bay Condo. Ass’n, Inc. v. Citizens Prop. Ins. Corp., 102 So. 3d 732 (Fla. 4th DCA 2012), in which the Fourth District Court of Appeal ruled that “[i]f the insured breaches the notice provision, prejudice to the insurer will be presumed, but may be rebutted by a showing that the insurer has not been prejudiced by the lack of notice.” Id. at 733 (quoting Bankers Ins. Co. v. Macias, 475 So. 2d 1216, 1218 (Fla. 1985)). Defendant has not adduced any competent evidence to rebut the presumption of prejudice arising from its late notice. Indeed, the Claim Declaration providing details of the loss was not sent to Yachtinsure until September 18, 2017, which was eight days after Hurricane Irma hit the Florida Keys as a Category 4 hurricane on September 10, 2017 and rendered the Vessel’s engines unsalvageable. See Undisputed Facts, *supra*. Moreover, Mr. Bennet did not render his report describing the work he had done on the Vessel in 2013, 2015 and 2016 until June 18, 2018. Id. Thus, the cases upon which Defendant relies, where the presumption was rebutted despite late notice by the insured’s having provided extensive information about the loss, are inapposite. See Defendant’s Opposition [D.E. 71 at 14-15] (citing Robinson v. Auto Owners Ins. Co., 718 So. 2d 1283 (Fla. 2d DCA 1998); Hartford Acc. & Indem. Co. v. Phelps, 294 So. 2d 362 (Fla. 1st DCA 1974); Palma Vista Condominium Ass’n of Hillsborough County, Inc. v. Nationwide Mut. Fire Ins. Co., Inc., 2010 WL 4274747 (M.D. Fla., October 7, 2010); Zurich American Ins. Co. v. Cutrale Citrus Juices USA, Inc., 2002 WL 1433728 (M.D. Fla., February 11, 2002); Leben v. State Farm Fla. Ins. Co., 93 So. 3d 528, 529 (Fla. 4th DCA 2012); Stark v. State Farm Fla. Ins. Co., 95 So. 3d 285, 288 (Fla. 4th DCA 2012)).

Accordingly, the undersigned concludes that Plaintiff is entitled to summary judgment as

to Count II of the Amended Complaint and to a declaration that Defendant failed to provide timely notice of the December 2015 Incident, which is a condition precedent to coverage under the 2015 Policy.

2. *Whether Plaintiff is entitled to summary judgment as to Count VI.*

Plaintiff also seeks summary judgment as to Count VI of the Amended Complaint, arguing that the 2015 Policy is void or subject to rescission based on Defendant's material misrepresentations and/or non-disclosures of material facts.⁴

"It is well-settled that the marine insurance doctrine of *uberrimae fidei* is the controlling law of [the Eleventh C]ircuit." HIH Marine Servs., Inc. v. Fraser, 211 F.3d 1359, 1362 (11th Cir. 2000). This "federal law will control even in the face of contrary state authority." Northfield Ins. Co. v. Barlow, 983 F. Supp. 1376, 1384 (N.D. Fla. 1997). "*Uberrimae fidei* requires that an insured fully and voluntarily disclose to the insurer all facts material to a calculation of the insurance risk." Id. The "strict burden" to disclose is on the insured. Northfield, 983 F. Supp. at 1380. "The duty to disclose extends to those material facts not directly inquired into by the insurer." HIH, 211 F.3d at 1362. A misrepresentation is material if "it might have a bearing on the risk to be assumed by the insurer." Id. at 1363 (quoting Northfield, 983 F. Supp. at 1380). The Eleventh Circuit has further stated that materiality in the context of a marine insurance contract is defined as "that which could possibly influence the mind of a prudent and intelligent insurer in determining whether he would accept the risk, and . . . concealment of such facts voids the policy, whether the concealment be due to fraud, negligence, accident, or mistake." Kilpatrick Marine Piling v. Fireman's Fund Ins. Co., 795 F.2d 940, 942-43 (11th Cir. 1986).

⁴ As noted above, Plaintiff also seeks to void or rescind the prior and subsequent years' policies.

Plaintiff contends that Defendant violated its duty of *uberrimae fidei* by failing to disclose facts concerning the driving record and criminal history of the Capt. Jackson, which were purportedly material to Yachtinsure's underwriter when deciding whether to endorse him as a named operator in the 2014 Policy and to approve two renewals under the same terms, resulting in issuance of the 2015 Policy and the 2016 Policy. See Plaintiff's Motion for Summary Judgment [D.E. 56]. Specifically, Plaintiff maintains that Defendant committed a material misrepresentation by omitting the details of Capt. Jackson's traffic violations and infractions, which information it knew or should have known would have caused Plaintiff to decline to issue the endorsement and renewals. According to Plaintiff, because the 2012 Application asked for Capt. Dhillon's prior violations and suspensions, etc., for the prior five years, Defendant remained on notice that this information was material over two years later, even though Plaintiff did not ask for this same specific information in connection with Capt. Jackson's endorsement. Plaintiff relies on Allendale Mut. Ins. Co. v. Excess Ins. Co. Ltd., 992 F. Supp. 278 (S.D.N.Y. Feb. 3, 1998) for this argument. In Allendale, the disputed clause was written into the first contract and not thereafter, and the Court stated that *uberrimae fidei*:

would count for very little if a reinsurer not only had to inform its reinsured that it considered desired information material, but had to renew this notice every six months. Such a result would effectively impose on reinsurers a duty of inquiry, despite well-settled precedent to the contrary.

992 F. Supp. at 282-83.

In opposition to Plaintiff's argument, Defendant contends that the omitted prior violations of Capt. Jackson were traffic offenses and withheld adjudications that were not required to be disclosed because they were not lawful convictions; and that Sunderland has failed to produce official arrest records regarding them. Defendant also argues that the issue of materiality must be resolved by the trier of fact because Plaintiff has no applicable underwriting guidelines and

merely relies on a conclusory declaration from its underwriter. Moreover, at the Summary Judgment Hearing, Defendant attempted to raise an issue of fact regarding its disclosures of Capt. Jackson's record and, as a result, the undersigned granted it leave to supplement the summary judgment record. However, Defendant acknowledges that receipt of the information it purportedly provided regarding Capt. Jackson cannot be confirmed and could only be inferred from subsequent email exchanges. See Defendant's Supplemental Briefing in Support of its Motion for Summary Judgment [D.E. 102 at 2].

In addition, Defendant opposes Plaintiff's Motion for Summary Judgment as to Count VI on the following legal grounds. Defendant first argues that Plaintiff conceded in its Answer to the Amended Complaint that the 2015 Policy was in full force and effect at the time of loss and that all premiums had been paid in full. See Plaintiff's Amended Answer [D.E. 32 at 7]. Defendant argues, therefore, that Plaintiff is precluded from now changing its position and arguing that the policy was void *ab initio* based on material misrepresentation. Plaintiff relies for this argument on Aligned Bayshore Holdings, LLC v. Westchester Surplus Lines Ins. Co., Case No. 18-21692-Civ-Scola. See Order on Parties' Renewed Cross-Motion for Summary Judgment, No. 18-21692-Civ-Scola [D.E. 153 at 3] (Where the opposing party admitted a specific fact in its Answer, "[b]ecause this is a judicial admission, [the opposing party] is bound by its admission."). Defendant next argues that Plaintiff's failure to return the policy premium precludes it from rescinding the 2015 Policy, relying on, *inter alia*, Laboss Transp. Servs., Inc. v. Glob. Liberty Ins. Co. of New York, 208 F. Supp. 3d 1268 (S.D. Fla. 2016). Plaintiff responds to these legal arguments by contending that its pleadings are not dispositive of these "waiver" issues.

The undersigned finds that the foregoing factual and legal disputes preclude disposition of the misrepresentation claim in the context of summary judgment. Therefore, the undersigned

concludes that Plaintiff is not entitled to summary judgment as to Count VI of the Amended Complaint. For the same reasons, Defendant is not entitled to summary judgment based on its “waiver” argument.

DEFENDANT’S MOTION FOR SUMMARY JUDGMENT

Defendant first argues that it is entitled to Summary Judgment as to Count VII of Plaintiff’s Amended Complaint, which seeks a declaration that the 2015 Policy provides no coverage for the December 2015 Incident due to lack of fortuity. At the Summary Judgment Hearing, Plaintiff acknowledged that it wholly relied on the testimony of its expert, Mr. Michael Grant (“Mr. Grant”), as support for this Count. However, by Order dated May 22, 2020 [D.E. 121], the undersigned granted Defendant’s *Daubert* Motion to Strike Mr. Grant as Defendant’s expert witness [D.E. 52]. On this basis, Defendant is entitled to summary judgment as to Count VII of Plaintiff’s Amended Complaint.

Defendant also argues that Plaintiff is precluded from denying coverage by Florida Statute § 627.409(2), which provides, in pertinent part:

A breach or violation by the insured of a warranty, condition, or provision of a wet marine or transportation insurance policy, contract of insurance, endorsement, or application does not void the policy or contract, or constitute a defense to a loss thereon, unless such breach or violation increased the hazard by any means within the control of the insured.

Fla. Stat. §627.409(2). “[This] statute is designed to prevent the insurer from avoiding coverage on a technical omission playing no part in the loss.” Windward Traders, Ltd. v. Fred S. James & Co. of New York, 855 F.2d 814, 818 (11th Cir. 1988) (quoting Pickett v. Woods, 404 So. 2d 1152, 1153 (Fla. App. 1981)). Florida Statute § 627.409 “focuses [] on the actual or immediate cause of the loss—the hazard that occurred—and the question whether that hazard was brought about or increased by the insured’s ‘breach’ of a ‘warranty, condition, or provision’ of the

contract documents,” and thus is not “a condition applicable to pre-contract misrepresentations germane to acceptance of the risk and made at a time when it is impossible to determine whether a ‘loss’ has occurred due to a ‘hazard’ that was ‘increased’ by a ‘breach’ of the policy on the part of the insured.” Gamez v. Ace Am. Ins. Co., 638 F. App’x 850, 854-55 (11th Cir. 2016) (affirming summary judgment in favor of insurer where there was an issue of fraud in the application that was material to the acceptance of risk).

Based on Gamez, Fla. Stat. §627.409(2) has no applicability to Plaintiff’s material misrepresentation or omission claim. Therefore, Defendant is not entitled to summary judgment of coverage pursuant to Florida’s “anti-technical” statute.

Defendant also contends that Plaintiff has the burden of pleading and proving a causal connection between a breach of the notice provision and the claimed loss, but it has not done so. See Plaintiff’s Reply in Further Support of Motion for Summary Judgment [D.E. 73 at 6-7]. As discussed above, however, Defendant has not adduced any competent evidence to rebut the presumption of prejudice arising from its late notice, as clearly required under Florida law to avoid Defendant’s denial of coverage, Kings Bay, 102 So. 3d at 733, and has not provided any legal authority for collaterally circumventing this clear requirement by invoking Fla. Stat. §627.409(2). , Defendant is not entitled to summary judgment on the issue of notice based on Florida’s “anti-technical” statute.

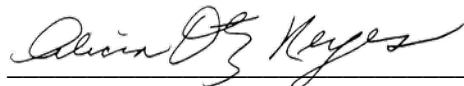
The remainder of Defendant’s Motion for Summary Judgment sought to counter Plaintiff’s arguments in support of its Motion for Summary Judgment, and those issues have already been discussed in that context.

RECOMMENDATION

Based on the foregoing considerations, the undersigned RESPECTFULLY RECOMMENDS that Plaintiff's Motion for Summary Judgment be GRANTED IN PART as to Count II of the Amended Complaint and DENIED IN PART as to Count VI of the Amended Complaint. The undersigned further RESPECTFULLY RECOMMENDS that Defendant's Motion for Summary Judgment be GRANTED IN PART as to Count VII of the Amended Complaint and be otherwise DENIED.

Pursuant to Local Magistrate Judge Rule 4(b), the parties have **fourteen days** from the date of this Report and Recommendation to file written objections, if any, with the Honorable Jose E. Martinez, United States District Judge. Failure to file timely objections may bar the parties from attacking the factual findings contained herein on appeal. See Resolution Tr. Corp. v. Hallmark Builders, Inc., 996 F.2d 1144, 1149 (11th Cir. 1993). Further, "failure to object in accordance with the provisions of [28 U.S.C.] § 636(b)(1) waives the right to challenge on appeal the district court's order based on unobjected-to factual and legal conclusions." See 11th Cir. R. 3-1 (I.O.P. - 3).

RESPECTFULLY SUBMITTED in Chambers at Miami, Florida this 10th day of June, 2020.



ALICIA M. OTAZO-REYES
UNITED STATES MAGISTRATE JUDGE

cc: United States District Judge Jose E. Martinez
Counsel of Record