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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

TAYLOR AND LIEBERMAN, an	)	CV 14-3608 RSWL (SHx)
Accountancy Corporation.,	)	
	)	<b>ORDER Re: Cross Motions</b>
Plaintiff,	)	<b>for Summary Judgment on</b>
	)	<b>all Claims and Partial</b>
v.	)	<b>Summary Judgment on Some</b>
	)	<b>Claims</b>
FEDERAL INSURANCE COMPANY,	)	
a corporation,	)	
	)	
Defendant.	)	
_____	)	

The instant cross-motions for summary judgment arise from Plaintiff Taylor and Lieberman's ("Plaintiff" or "T&L") Motion for Partial Summary Judgment [22] and Defendant Federal Insurance Company's ("Defendant" or "FIC") Motion for Summary Judgment [23]. The Court, having reviewed all papers submitted pertaining to this Motion and having considered all arguments presented to the Court, **NOW FINDS AND RULES AS FOLLOWS:**

The Court **GRANTS** Defendant's Motion for Summary Judgment [23] in its entirety. The Court **DENIES** [22]

1 Plaintiff's Motion for Summary Judgment in its  
2 entirety.

3 **I. UNCONTROVERTED FACTS**

4 This action stems from Plaintiff's claim against  
5 Defendant for breach of an insurance coverage contract.  
6 Both Plaintiff and Defendant agree that this case is  
7 appropriate for summary judgment, and that because this  
8 is a case of contract interpretation it must therefore  
9 be decided as a matter of law. The uncontroverted  
10 facts in this cross motion for summary judgment are as  
11 follows. Plaintiff Taylor & Lieberman is an accounting  
12 firm that performs services such as business  
13 management, account oversight, and tax planning and  
14 preparation various clients, including the client that  
15 was the victim of the fraudulent activity that led to  
16 this litigation {"Client"}. Parties' Joint Stipulation  
17 of Uncontroverted Facts, 2:1-3. Part of Plaintiff's  
18 business management responsibilities included managing  
19 Client's financial accounts by issuing payments,  
20 transferring funds, having Power of Attorney (held by  
21 Edward Lieberman as the Principal) over funds, writing  
22 checks and wiring transfers. Id. at 2:4-8. Plaintiff  
23 purchased a Forefront Portfolio Policy ("the Policy")  
24 from Defendant Federal Insurance Company prior to the  
25 incident at issue. Id. at 2:9-11. The Policy was in  
26 effect from June 29, 2011 to June 29, 2012 no lapse in  
27 payments. Id.

28 The dispute arises from a perpetrator fraudulently

1 taking hold of Client's email account and sending wire  
2 payment instructions via that email address to the  
3 email account of Plaintiff's employee, Ms. Miller, on  
4 or about June 4, 2012. Id. at 2:14-22. The requested  
5 wire transfer was to an account at Maybank in Malaysia  
6 in the amount of \$94,280.00. Id. The email sent to  
7 Ms. Miller's email account was signed with Client's  
8 name typed at the end of the email. Id. Ms. Miller  
9 believed the instructions to be from Client, so she  
10 requested the transfer and sent a confirmation email to  
11 Client. Id.

12 Ms. Miller subsequently received another email from  
13 the same Client's email address on June 5, 2012,  
14 requesting that additional funds in the amount of  
15 \$98,485.90 be wired to the United Overseas Bank in  
16 Singapore. Id. at 2:25-3:3. This email was also  
17 signed with Client's name typed at the bottom. Id.  
18 The wire transfer was once again completed, and a  
19 confirmation was sent to Client's email address. Id.

20 Ms. Miller received a third email request for the  
21 wiring of \$128,101.00, purportedly from Client, but  
22 from a different email address. Id. at 3:6-10. The  
23 email instructed Ms. Miller to wire the funds to Hong  
24 Leong Bank in Malaysia. Id. Ms. Miller was tipped off  
25 by the different email address, and placed a call to  
26 Client to confirm. Id. It was at this time that the  
27 fraudulent scheme was discovered, and the third  
28 transfer was not completed. Id.

1 Plaintiff immediately tried to recover the first  
2 two transfers, and was able to get \$93,331.98 back from  
3 the first transfer. Id. at 3:12-16. Plaintiff was  
4 unable to recover anything from the second transfer.  
5 Id. Thus, Plaintiff's add up to \$99,433.92 after  
6 Client withdrew its funds (\$948.02 that were  
7 unrecoverable from the first transfer, plus \$98,485.90  
8 from the second transfer). Id.

9 On June 11, 2012, Plaintiff tendered this loss  
10 under the crime coverage of the Policy. Id. at 3:17-  
11 19. On June 13, 2012, Defendant determined that  
12 coverage was not afforded for this loss and denied the  
13 claim. Id.

## 14 II. DISCUSSION

### 15 A. Legal Standard

16 Summary judgment is appropriate when there is no  
17 genuine issue of material fact and the moving party is  
18 entitled to judgment as a matter of law. Fed. R. Civ.  
19 P. 56(a). A genuine issue of material fact is one in  
20 which the evidence is such that a reasonable fact-  
21 finder could return a verdict for the non-moving party.  
22 Anderson v. Liberty Lobby, 477 U.S. 242, 248 (1986).  
23 The evidence, and any inferences based on underlying  
24 facts, must be viewed in a light most favorable to the  
25 opposing party. Diaz v. American Tel. & Tel., 752 F.2d  
26 1356, 1358 n.1 (9th Cir. 1985).

27 Where the moving party does not have the burden of  
28 proof at trial on a dispositive issue, the moving party

1 may meet its burden for summary judgment by showing an  
2 "absence of evidence" to support the non-moving party's  
3 case. Celotex v. Catrett, 477 U.S. 317, 325 (1986).

4 The non-moving party, on the other hand, is  
5 required by Federal Rule of Civil Procedure 56(e) to go  
6 beyond the pleadings and designate specific facts  
7 showing that there is a genuine issue for trial. Id.  
8 at 324. Conclusory allegations unsupported by factual  
9 allegations, however, are insufficient to create a  
10 triable issue of fact so as to preclude summary  
11 judgment. Hansen v. United States, 7 F.3d 137, 138  
12 (9th Cir. 1993) (citing Marks v. Dep't of Justice, 578  
13 F.2d 261, 263 (9th Cir. 1978)). A non-moving party who  
14 has the burden of proof at trial must present enough  
15 evidence that a "fair-minded jury could return a  
16 verdict for the [opposing party] on the evidence  
17 presented." Anderson, 477 U.S. at 255. In ruling on a  
18 motion for summary judgment, the Court's function is  
19 not to weigh the evidence, but only to determine if a  
20 genuine issue of material fact exists. Id.

## 21 **B. Analysis**

22 Plaintiff, as the insured, has the burden of  
23 proving coverage under the Policy. FDIC v. New  
24 Hampshire Ins. Co., 953 F.2d 478, 483-485 (9th Cir.  
25 1992). Plaintiff argues that Defendant breached their  
26 contract because the Policy should have been honored  
27 under each of three different sections. Pl.'s Mot.  
28 1:15-17. These sections are as follows: Forgery

1 Coverage (Coverage D), because the email constitutes a  
2 forged signature (Mot. 1:23-27); Computer Fraud  
3 Coverage (Coverage E), because the email sent to  
4 Plaintiff constitutes a computer violation (Mot. 1:28-  
5 2:2); and Funds Transfer Coverage (Coverage F), because  
6 Plaintiff is a financial institution per a policy  
7 covering "fraudulent written electronic instructions  
8 issued to a financial institution" (Mot. 2:7-8).

9 The relevant coverage provisions, stated in full,  
10 are as follows:

11 • Forgery Coverage: "The Company shall pay the  
12 **Parent Corporation** for direct loss sustained by an  
13 **Insured** resulting from **Forgery** or alteration of a  
14 **Financial Instrument** committed by a **Third Party**."

15 Parties Stipulation of Facts Ex. B at 37 (emphasis  
16 in original).

17 • Computer Fraud Coverage: "The **Company** shall pay  
18 the **Parent Corporation** for direct loss sustained by  
19 an **Insured** resulting from **Computer Fraud** committed  
20 by a **Third Party**." Parties Stipulation of Facts  
21 Ex. B at 37 (emphasis in original).

22 • Funds Transfer Fraud Coverage: The **Company** shall  
23 pay the **Parent Corporation** for direct loss  
24 sustained by an **Insured** resulting from **Funds**  
25 **Transfer Fraud** committed by a **Third Party**. Parties  
26 Stipulation of Facts Ex. B at 37. (emphasis in  
27 original).

28 Each of the bold terms is further defined in the

1 Policy. Accordingly, each potential basis for coverage  
2 requires extensive analysis to determine whether or not  
3 it applies to the unique facts presented by the  
4 fraudulent activity. While the Court is skeptical  
5 about Plaintiff's right to coverage under each of the  
6 above provisions, it is unnecessary for the Court to  
7 perform this full analysis. Each of the three  
8 provisions above applies only to "direct loss sustained  
9 by an Insured." For the reasons discussed below,  
10 Plaintiff's losses do not, as a matter of law,  
11 constitute direct loss.

12 To summarize, Defendant argues that Plaintiff does  
13 not show that it suffered a direct loss because the e-  
14 mails did not immediately and without intervening cause  
15 result in a loss. Def.'s Mot. 2:24-28. In fact,  
16 argues Defendant, Plaintiff's loss only occurred after  
17 the bank was unable to recover all of the lost funds  
18 and the Client demanded payment from Plaintiff. Id.  
19 In essence, Plaintiff is attempting to recover for a  
20 third-party loss.

21 A common use interpretation of direct loss provides  
22 that a loss is not direct unless it follows immediately  
23 and without intervening space, time, agency, or  
24 instrumentality. Tooling, Mfg. & Techs. Ass'n v.  
25 Hartford Fire Ins. Co., 693 F.3d 665, 674 (6th Cir.  
26 2012) (hereinafter "TMA"). This principle has resulted  
27 in differing approaches among the circuit courts, but  
28 most courts, including those in this Circuit, have

1 indicated that *liability policies* may require an  
2 insurer to discharge an obligation of the insured to a  
3 third party for some act of the insured or its  
4 employee, while *indemnity policies* may not.<sup>1</sup> See *id.*;  
5 see also Vons Companies, Inc. v. Fed. Ins. Co., 57 F.  
6 Supp. 2d 933, 943 (C.D. Cal. 1998) *aff'd*, 212 F.3d 489  
7 (9th Cir. 2000); Simon Mktg. v. Gulf Ins., 149  
8 Cal.App.4th 616, 623 (2007); Valley Cmty. Bank v.  
9 Progressive Cas. Ins. Co., 854 F.Supp.2d 697, 709  
10 (N.D.Cal.2012); Citizens Bank & Trust Co. v. St. Paul  
11 Mercury Ins. Co., No. CV305-167, 2007 WL 4973847, at  
12 \*3-5 (S.D. Ga. Sept. 14, 2007); Fireman's Fund Ins. Co.  
13 v. Special Olympics Int'l, Inc., 249 F. Supp. 2d 19, 27  
14 (D. Mass.) *aff'd on other grounds*, 346 F.3d 259 (1st  
15 Cir. 2003); Lynch Props., Inc. v. Potomac Ins. Co. of  
16 Ill., 140 F.3d 622, 629 (5th Cir. 1998); Direct Mort.  
17 Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA,  
18 625 F. Supp. 2d 1171, 1176 (D. Utah 2008); Tri City  
19 Nat. Bank v. Fed. Ins. Co., 2004 WI App 12, at \*801-02  
20 (2003).

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22 <sup>1</sup>Many of these cases differentiate between "employee  
23 fidelity" policies, which constitute indemnity provisions that  
24 exclude third party liability, and liability policies which  
25 include third party liability. See Armbrust Int'l, Ltd. v.  
26 Travelers Cas. & Sur. Co. of Am., No. C.A. 04-212 ML, 2006 WL  
27 1207659, at \*8 (D.R.I. May 1, 2006) ("The policies cover injury  
28 to the insured, not a third party, a fact which significantly  
differentiates them from liability policies, which, as a rule,  
indemnify an insured against losses to a third party."). While  
the provisions at issue here are not employee fidelity policies,  
they are, for reasons discussed above, sufficiently similar that  
the case law is persuasive.



1           The Court concludes that the policies at issue in  
2 the instant case should be analyzed similarly to  
3 indemnity policies that do not provide third-party  
4 coverage instead of liability policies that do provide  
5 third party coverage, and that as such, Plaintiff has  
6 not suffered a "direct loss." A reading of the Policy  
7 indicates that the parties contracted to have liability  
8 coverage for certain events and indemnity-type coverage  
9 for other events. The liability coverage sections of  
10 the Policy are expressly delineated as such and are  
11 separated in an entirely different document than the  
12 provisions of the Policy that Plaintiff claims cover  
13 its losses in this case. See Parties' Stipulation of  
14 Facts Ex. B at 13-26, 35-49. Further, the section that  
15 contains the relevant provisions of the Policy, when  
16 read in combination with the other provisions in that  
17 section, more likely contemplates fraudulent violations  
18 against Plaintiff that result in a "direct loss" of  
19 Plaintiff's own money-not fraudulent violations upon  
20 which Plaintiff relies that result in a loss of a  
21 client's money, which Plaintiff wants Defendant to  
22 reimburse. For example, the section of the Policy in  
23 question also contains coverage for employee theft,  
24 which is similar in nature to the "employee fidelity"  
25 policies that have been comprehensively examined in the  
26 long list of cases cited above. In response to this  
27 line of argument, Plaintiff contends that its power of  
28 attorney over Client's funds was tantamount to a bailee

1 or trustee power over the funds, and cites Vons, 57 F.  
2 Supp. 2d at 941, for the proposition that such a power  
3 means that a direct loss occurs when the funds are the  
4 subject of fraud. Pl.'s Opp'n at 21:16-28. Defendant  
5 refutes this argument, contending that Plaintiff was  
6 not a bailee or trustee of the funds because they were  
7 held not with Plaintiff but in a separate City National  
8 bank account, and because the Power of Attorney was not  
9 granted to Plaintiff but instead to an individual  
10 representative of Plaintiff. Def.'s Reply at 18:24-  
11 19:7 (citing Alberts v. Am. Cas. Co., 88 Cal. App. 2d  
12 891, 898-899 (1948) and Aetna Cas. Sur. Co. v. Kidder,  
13 Peabody & Co., 246 A.D.2d 202 (N.Y. App. Div. 1998)).  
14 The Court finds Defendant's reasoning more persuasive.  
15 If the funds had been held in an account owned or  
16 attributed to Plaintiff, such as an escrow account (see  
17 Fidelity Nat'l. v. Nat'l Union, 2014 WL 4909103, at \*10  
18 (S.D. Cal. Sept. 30, 2014)) and a hacker had entered  
19 into Plaintiff's computer system and been able to  
20 withdraw funds such that Plaintiff's accounts were  
21 immediately depleted, then Plaintiff would be correct  
22 in asserting coverage from the Policy. Here, however,  
23 a series of far more remote circumstances occurred:  
24 Client gave Plaintiff power of attorney over Client's  
25 money held in Client's own account; a perpetrator of  
26 fraud motivated Plaintiff's agent to use the power of  
27 attorney to transfer funds out of Client's account;  
28 Plaintiff discovered this fraud and attempted to

1 recover the funds; Client requested repayment of the  
2 lost funds and Plaintiff obliged; Plaintiff now  
3 requests Defendant indemnify it for the losses that  
4 were transferred from Client to Plaintiff. These are  
5 not the circumstances that dictated the results in Vons  
6 or Fidelity, and they are not the circumstances appear  
7 to be within the contemplation of the Policy. See  
8 Pestmaster Servs., Inc. v. Travelers Cas. & Sur. Co. of  
9 Am., No. CV 13-5039-JFW MRWX, 2014 WL 3844627, at \*8-10  
10 (C.D. Cal. July 17, 2014) (no direct loss where a third  
11 party obtained insured's approval to initiate  
12 electronic funds transfers from insured's account and  
13 then misused the transferred funds). Accordingly,  
14 Plaintiff has failed to meet its burden to show it is  
15 entitled to coverage under the Policy.

16 **III. CONCLUSION**

17 For the foregoing reasons, Defendant's Motion for  
18 Summary Judgment shall be granted in its entirety, and  
19 Plaintiff's Motion for Summary Judgment shall be denied  
20 in its entirety.

21 **IT IS SO ORDERED.**

22 DATED: June 18, 2015

RONALD S.W. LEW  
HONORABLE RONALD S.W. LEW  
Senior U.S. District Judge

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