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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SW TRADERS, LLC,

Plaintiff(s),

v.

UNITED SPECIALTY INSURANCE
COMPANY, et al.,

Defendant(s).

NO. C09-778MJP

ORDER ON MOTIONS FOR
1. SUMMARY JUDGMENT
2. LEAVE TO AMEND

The above-entitled Court, having received and reviewed

1. Plaintiff's Memorandum and Motion for Summary Judgment (Dkt. No. 10)
2. Defendants' Opposition to Plaintiff's Motion for Summary Judgment (Dkt. No. 21)
3. Plaintiff's Reply in Support of Plaintiff's Motion for Summary Judgment (Dkt. No. 29)
4. Defendants' Motion for Summary Judgment (Dkt. No. 14)
5. Plaintiff's Opposition to Defendants' Motion for Summary Judgment (Dkt. No. 17)
6. Defendants' Reply in Support of Defendants' Motion for Summary Judgment (Dkt. No. 26)
7. Plaintiff's Second Motion for Leave to File Amended Complaint (Dkt. No. 33)
8. Defendants' Response to Plaintiff's Second Motion for Leave to File Amended Complaint (Dkt. No. 39)

1 9. Praeipere Joinder of Optimum Claims Services, Inc. in Defendants' Motion for
2 Summary Judgment (Dkt. No. 38)¹

3 and all attached declarations and exhibits, makes the following ruling:

4 IT IS ORDERED that Plaintiff's motion for summary judgment is GRANTED IN PART and
5 DENIED IN PART; Plaintiff's motion to declare Washington state law the controlling law of the
6 contract is GRANTED and the remainder of the motion is DENIED.

7 IT IS FURTHER ORDERED that Defendants' motion for summary judgment is GRANTED,
8 and that all claims against all defendants are DISMISSED with prejudice.

9 IT IS FURTHER ORDERED that Plaintiff's motion for leave to amend their complaint is
10 STRICKEN as moot.

11 **Background**

12 The factual circumstances surrounding this dispute are tangled and convoluted. The
13 following timeline is drawn from the facts and evidence submitted by both sides to this controversy:

14 **October 2008** Stanley Lambert ("Lambert") bought a boat which he renamed M/V PACIFIC
15 DAWN, intending to use it as a short-run freight hauler in American Samoa.
16 On the Bill of Sale (which is dated October 28, 2008; Moran Decl., Ex. A), the
17 buyer is listed as "SW Traders, LLC."

18 **10/27/08** Lambert contacted Ms. Waldron at the insurance brokerage firm of Venbrook
19 Insurance Services ("Venbrook") seeking coverage for his boat.

20 **10/29/08** A Certificate of Formation was issued by State of Washington for "SW Traders,
21 L.L.C.;" the sole officer is listed as "Reginald Gates."² Moran Decl., Ex. B1.

22 ¹ The Defendants' Motion for Summary Judgment was filed by United Specialty Insurance Company and
23 WFT Inc.. A third defendant, Optimum Claims Services, Inc. ("Optimum"), had not been served at the time of removal
24 but filed this Praeipere Joinder acknowledging receipt of Plaintiff's state court summons and complaint via certified mail
from the Washington Secretary of State on August 18, 2009. Without waiving any defects in service, Optimum joins in
Defendants' motion.

25 ² The document is silent as to who initiated or authorized the company's formation. The only evidence that this
26 company was created at Lambert's behest is the hearsay declaration of attorney Harold Thoreen. See Thoreen Decl., ¶ 4.
ORDER ON MOTIONS - 2

1 **10/31/08** Ms. Waldron contacted Ms. Armfield at Defendant WFT Inc. (“WFT”) and
2 transmitted a “Marine Insurance Application” (“Application;” filled out by Lambert,
3 listing “Stanley Lambert/Pacific Dawn. Ltd.” as the Vessel Owner) and a “Skipper’s
4 Questionnaire” (which listed Lambert as the Owner/Skipper). The Application stated
5 that the vessel would be owner-operated and that the applicant would notify WFT if
6 that changed. Armfield Decl., Ex. B. There is no mention of SW Traders, LLC.

7 **11/14/08** The U.S. Coast Guard issued the “Certificate of Documentation” for M/V PACIFIC
8 DAWN (“Certificate”). The document lists the owner as “SW Traders LLC,
9 comprised of one member.” Moran Decl., Ex. C. The Certificate does not identify
10 the “one member” of SW Traders, LLC.

11 **12/1/08** WFT requested the Coast Guard “Certificate of Documentation” from the insurance
12 broker (Armfield Decl., Ex. D); Venbrook e-mailed it as a PDF attachment to WFT
13 that same day. The transmitting e-mail does not mention that the owner listed on the
14 Coast Guard documentation was different than the owner listed on the Application,
15 nor does it contain a request to change or supplement the named insured party. In the
16 e-mail, Waldron referred to M/V PACIFIC DAWN as “Stan’s vessel.” *Id.*, Ex. E.
17 On that same date, the insurance policy issued (with an effective date of October 31,
18 2008) covering Hull and Machinery Protection and Indemnity Risks, and identifying
19 the insured as:

20 Stanley Lambert, Pacific Dawn Ltd.
21 2690 Pao (*sic*) Lane
Wahiawa, HI 96786

22 There were no additional insureds, and no evidence that any objection was made to the
23 designation of “Stanley Lambert, Pacific Dawn Ltd.” as the named insured party.

24 **12/11/08** M/V PACIFIC DAWN left Vancouver, B.C., bound for American Samoa.

25 **12/13/08** The vessel encountered heavy weather and sustained damage to items in Hold #2.

1 12/27/08 WFT was notified of the loss (Waldron's notice referred to Lambert as "our insured;"
2 id., Ex. F).

3 12/29/08 The vessel went into dry-dock in Hawaii for cleanup and painting unrelated to the
4 storm damage; Venbrook hired Mr. Doyle to survey and assess the damage. Lambert
5 met with Doyle and assisted in his valuation of the damaged property.

6 1/10/09 Lambert was injured in a motorcycle accident on Oahu and lapsed into a coma.

7 1/15/09 Doyle issued a report assessing the loss value at \$106,909. Bratz Decl., Ex. B.

8 1/23/09 Lambert died.

9 1/26/09 Waldron/Venbrook e-mailed Armfield/WFT to say that "Venbrook has been
10 instructed" to change the insured on the policy to:

11 Stanley Lambert F/V Pacific Dawn
12 SW Traders LLC
13 2960 Paio (*sic*) Lane
14 Wahiawa, HI 96786

15 There is no indication who had "instructed" Venbrook and no assertion that a mistake
16 had been made previously. Armfield Decl., Ex. I. Armfield forwarded the request to
17 WFT's home office.

18 2/9/09 Waldron/Venbrook sent an e-mail (id., Ex. J) superseding the previous request and
19 indicating that Venbrook had "now been instructed to change the named insured to . . .
20 [Lambert's] lawful widow, Tracy Lambert" (again, there is no mention of who issued
21 the instruction):

22 Estate of Stanley Lambert, S.W. Traders
23 c/o Tracy Lambert
24 111 Shelbourne Blvd.
25 Cambell (*sic*) River, B.C. V9W 6S2
26 Canada

27 This request was also sent on to the home office. WFT issued the amended
28 endorsement as requested with an effective date of January 26, 2009. Id., Ex. K.

1 **4/14/09** Plaintiff filed "Notice of Bad Faith Claim" with Washington State Insurance
2 Commissioner based on Defendants' failure to either deny coverage or issue a
3 reservation letter. Moran Decl., Ex. S1.

4 **4/28/09** In an e-mail to the claims agent for Defendant Optimum Claims, Plaintiff's attorney
5 referred to his discovery that "the underwriters had issued a post-loss endorsement
6 changing the identity of the named insured some 30 days *after the loss*. See *Attached*
7 *Endorsement*.³ As you well know, the named insured and beneficiary under the policy
8 is SW Traders, LLC... [which] did not request or authorize this change..." Plaintiff's
9 counsel went on to demand an explanation and, failing that, to threaten to refer the
10 matter to the Washington State Insurance Commission as "a pretty clear cut case of
11 criminal fraud." Bratz Decl., Ex. E; emphasis in original.

12 **4/29/09** Edmondson/Venbrook sent Armfield/WFT an e-mail indicating that "[i]t appears that
13 the vessel was put in the name of SW Traders LLC, Therefore believe we should
14 amend to this name only

15 SW Traders LLC
16 2960 Palo (*sic*) Lane
17 Wahiawa, Hawaii (per bill of sale) Effective 10/30/08"

18 Id., Ex. L. Armfield forwarded this request along to the home office, which refused to
19 amend the endorsement.

19 **Discussion**

20 Since it is the finding of this Court that the issues raised in Defendants' summary judgment
21 motion are dispositive of this matter, the Court turns first to that pleading.

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³ Unfortunately, the exhibit containing the e-mail does not include the "Attached Endorsement" so the Court is unsure which of the two changes (January 26 or February 9, 2009) Plaintiff's counsel is referring to. The Court assumes that it was the February 9 change that named the Estate of Lambert as an additional insured, since the e-mail goes on to state that SW Traders is the named insured (which did not occur until the January 26 amendment).

1 Defendants' Summary Judgment Motion2 Uberrimae fidei

3 Defendants argue (and Plaintiff concedes) that federal admiralty law governs maritime
4 contracts except to the extent that there is no judicially established federal admiralty rule governing
5 the issue presented. Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S. 310 (1955). Washington
6 case law holds that state law "controls the interpretation of a marine insurance policy only in the
7 absence of a federal statute, a judicially fashioned admiralty rule, or a need for uniformity in
8 admiralty practice." Kimta AS v. Royal Ins. Co., 102 Wn.App. 716, 722 (2000). In this case, there is
9 a "judicially fashioned admiralty rule" at the forefront of the Court's analysis.

10 Plaintiff agrees with Defendants that the federal maritime doctrine of *uberrimae fidei* is
11 available as a defense in this matter. Pltf. Response, p. 2. The phrase means "utmost good faith"
12 and requires an applicant for marine insurance "*even if not asked*, to reveal every fact within his/her
13 knowledge that is material to the risk." Cigna Prop. and Cas. Ins. Co. v. Polaris Pictures Corp., 159
14 F.3d 412, 418, n. 1 (9th Cir. 1998)(emphasis in original). An insurer may rely on the rule to rescind
15 an insurance contract "if it can show either intentional misrepresentation of a fact, regardless of
16 materiality, or nondisclosure of a fact material to the risk, regardless of intent." Id. at 420; citing
17 Washington Int'l Ins. Co. v. Mallone, 773 F.Supp.189, 191 (C.D.Cal. 1990).⁴

18 The Court finds that the issue of intentional misrepresentation is not amenable to resolution
19 by summary judgment. Although there is a circumstantial case to be made that Lambert (a Canadian
20 citizen) had a motive to set up a dummy corporation and misrepresent the true nature of the
21 ownership arrangement to his insurance company (it is illegal for non-citizens to own *or* skipper
22 U.S.-registered vessels; 48 U.S.C. §§ 12103(a), 12151(b)(6)), there are simply too many disputed

24 ⁴ Defendants also point out that the policy itself contains a "Misrepresentation" provision which states that "if
25 the Assured has concealed or misrepresented any material fact or circumstance concerning this insurance or the subject
26 matter thereof. . . whether before or after a loss, coverage under this policy will be forfeited which otherwise was
granted." Armfield Decl., Ex. G, p. 25.

1 issues of material fact – and too little evidence regarding the motives of the departed Mr. Lambert –
2 to award summary judgment on that basis.

3 Far more convincing is the argument that the omission of the fact of ownership of M/V
4 PACIFIC DAWN by Gates/SW Traders from the Application and the Skipper’s Questionnaire
5 represents the nondisclosure of a material fact which voids the contract regardless of whether the
6 omission was intentional or not. Case law defines a “material fact” in maritime insurance as one that
7 “may increase the liability to loss, or affect the risk or obligation assumed and which is, in fact or
8 law, within the knowledge of one party and not the other.” Steelmet v. Caribe Towing Corp., 747
9 F.2d 689, 605 (11th Cir. 1984). “A non-disclosed fact is material if it would have affected the
10 insurer’s decision to insure at all or at a particular premium.” Certain Underwriters at Lloyds,
11 London v. Inlet Fisheries, Inc., 518 F.3d 645, 655 (9th Cir. 2008) (quoting N.Y. Mar. & Gen. Ins. Co.
12 v. Tradeline, 266 F.3d 112, 123 (2d Cir. 2001).

13 The Court is persuaded that the ownership of a vessel is a material fact subject to the
14 disclosure requirements of maritime insurance law. It is illegal for non-citizen to own a U.S.-flagged
15 vessel (46 U.S.C. § 12103(a)) and further illegal for a U.S.-documented vessel to be “placed under
16 the command of a person not a citizen of the United States.”⁵ 46 U.S.C. § 12151(b)(6). The penalties
17 include fines, seizure and forfeiture. 46 U.S.C. § 12151(a) and (b). Ms. Armfield, the marine
18 insurance underwriter responsible for the decision to insure M/V PACIFIC DAWN, submitted two
19 declarations wherein she attested to the materiality of the following non-disclosed facts:
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24 ⁵ It appears from the evidence submitted that Lambert never disclosed that he was a Canadian citizen. Although
25 not argued in the briefing, that omission from the Application could also constitute a material nondisclosure. Regardless
26 of whether Lambert was or was not the owner of M/V PACIFIC DAWN, it appears that he was the skipper of the boat on
its voyage to American Samoa, a position forbidden to non-citizens on a U.S.-flagged vessel.

- 1 • Lambert's non-citizen status (vis-a-vis his purported ownership and his skipping of
- 2 the vessel);
- 3 • The creation of a business entity in which the applicant (Lambert) had no stake to hold
- 4 title to the vessel; and
- 5 • The unknown experience, reputation or character of the sole member of that entity
- 6 (Gates).

7 Armfield states that all of these factors would have affected her assessment of the risk inherent in
8 insuring the boat; she also testified that, if she knew at the time of insuring M/V PACIFIC DAWN
9 what she knows now, she would not have made the same decision on the same terms with respect to
10 the policy issued on the vessel. First and Second Armfield Decl's.

11 Defendants attempt to discredit Armfield's testimony with a declaration from an insurance
12 broker for Venbrook (Ms. Edmondson) who claims that she has worked with Armfield for 20 years
13 and never heard an indication from her that it was important to know the names of individuals in a
14 company holding documented title to a vessel. Second Edmondson Decl., ¶¶ 3-8. The Court does
15 not find Edmondson's observations sufficient to create a genuinely disputed issue of material fact.
16 Armfield's testimony makes it clear that, while she does not always ask for the identity of every
17 member of every owner corporation, she would have considered it material for issuing a policy for
18 M/V PACIFIC DAWN at the price quoted⁶ to know the identity of the sole member of an owner-
19 corporation and the fact that it was not the man who identified himself as the owner in the initial
20 application (with whom the company had previously done business). Second Armfield Decl., ¶ 6.
21 She goes on to assert:

22
23 _____
24 ⁶ The doctrine of *uberrimae fidei* is not only concerned with whether the policy would have been issued had the
25 material fact or facts been disclosed, but also whether the policy would have been issued at the rates quoted. If the non-
disclosed information would have affected that aspect of insurance analysis and valuation (as Armfield testified above), it
would likewise be considered "material." "A non-disclosed fact is material if it would have affected the insurer's decision
to insure at all or at a particular premium." Certain Underwriters, 518 F.3d at 655. (emphasis supplied)

1 I would consider it material to assessing the risk being underwritten to know what vessel
2 owning and operating experience this unidentified documented owner corporation **and** its sole
3 member Mr. Gates had, whether it/he planned to operate the vessel, for what purpose, how
4 well the LLC was capitalized, what stake Mr. Gates had in the vessel, and what stake Mr.
Lambert, identified as the sole owner (equitable or otherwise) and the operator, had in SW
Traders.

4 Id. (emphasis in original)

5 Furthermore, the leading Ninth Circuit case on *uberrimae fidei*, Cigna Properties, turns on the
6 issue of the materiality of the true identity of the owner:

7 The facts [Defendants] Polaris and Inbanco failed to disclose were material to Cigna's risk.
8 Polaris failed to disclose DeGeorge's ownership interest in the [vessel]. (*citation omitted*)....
9 Polaris also failed to disclose the relationships among DeGeorge, Polaris, Inbanco and Tridon.

9 Cigna, 159 F.3d at 420.

10 Plaintiff attempts to make much of the fact that, prior to the issuance of the written policy,
11 Defendant WFT was provided with a document containing the information that SW Traders was the
12 owner of the vessel.⁷ This argument fails:

13 1: There is nothing in the e-mail that alerts the insurance company that the attachment
14 contains material information different from what had previously been provided. In
15 fact, the effect of the communication is just the opposite – "... per your request, please
16 find the new documentation on *Stan's vessel*." Armfield Decl., Ex. E (emphasis
17 supplied). The implication was unmistakable that the original representation that
18 Lambert owned the boat is still the case. The Court is mindful that Lambert had
19 previously represented (on the Application) that the vessel would be "owner operated"
20 and that he would "submit if changed." Armfield Decl., Ex. B, p. 2. Neither Lambert,
21 Venbrook or SW Traders took a proactive part in "submitting" a change in the owner-

23
24 ⁷ The Court notes at the outset Plaintiff's repeated attempts throughout its briefing and supporting declarations
25 to imply that this information was voluntarily supplied by either Venbrook or SW Traders, thus fortifying its argument
26 that no material nondisclosure occurred. The evidence indicates otherwise. A review of the correspondence surrounding
the e-mailing of the Certificate of Documentation makes it clear that the information was not supplied to Defendant WFT
until one of WFT's employees requested it by e-mail on December 1, 2008. Armfield Decl., Ex. D.

1 operator status nor, when they were finally prompted to provide the requisite
2 Certificate, did they make any attempt (beyond submitting an attachment in an e-mail)
3 to alert the insurer to the fact that the “operator” of M/V PACIFIC DAWN was no
4 longer the person originally represented to be the “owner.”

5 2: There is no evidence before the Court regarding whether anyone at WFT opened the
6 attachment to the e-mail and noticed that the owner of M/V PACIFIC DAWN was not
7 the same entity represented on the Application. The Court does not find this
8 significant. The Certificate merely lists the owner as “SW TRADERS
9 LLC/COMPRISED OF ONE MEMBER,” with the same address as Lambert had
10 previously supplied in the Application. The “one member” is not identified by name
11 in the document. Even if the underwriter had opened the attachment and noticed that
12 the documented title holder was a company different than that listed in the
13 Application, there is nothing in the Certificate (or the accompanying e-mail) that
14 would have alerted them that Lambert (the man with whom they had had prior
15 dealings and who had represented that he owned the boat) was not the “one member”
16 listed on the certificate. On the contrary, the e-mail reference to “Stan’s vessel” would
17 have understandably lead them to believe that the owner (and their named insured)
18 was still the same man who had submitted the Application.

19 Finally, Plaintiff argues that “*uberrimae fidei* is a two way street,” and that the responsibility
20 is equally on the insurance company’s shoulders to ferret out information material to its risk analysis.
21 Pltf. Response, p. 4. This is not the state of the law. As the Ninth Circuit stated in Certain
22 Underwriters, “... *uberrimae fidei* rests on disclosure, not solicitation.” 518 F.3d at 655. And the
23 court in Cigna Properties spelled out that “[t]he doctrine of *uberrimae fidei* requires a marine
24 insurance applicant *even if not asked*, to reveal every fact within his/her knowledge that is material to
25 the risk.” 159 F.3d at 418, n. 1 (internal quotations omitted; emphasis in original). Tellingly,

1 Plaintiff cites no legal authority for its argument that the insurance company cannot complain about
2 nondisclosure if it did not ask for the information or request further clarification.

3 This application of federal maritime insurance law is, technically, the end of the inquiry into
4 the issues of this case: where the doctrine of *uberrimae fidei* is found applicable on the basis of a
5 material nondisclosure, the policy is voided. HIH Marine Services, Inc. v. Fraser, 211 F.3d 1359,
6 1362 (11th Cir. 2000). In the interests of a thorough review of the issues, however, the Court will
7 continue on to an analysis of the state law insurance issues presented by this controversy.

8 *Standing: Plaintiff's status as an "insured party"*

9 The one issue raised by Plaintiff's motion for summary judgment on which it prevails
10 concerns the choice of law in the dispute between these parties in diversity. "When a court sits in
11 diversity, it must look to the forum state's choice of law rules to determine the controlling substantive
12 law." Patton v. Cox, 276 F.3d 493, 495 (9th Cir. 2002). To the extent that this Court must look to
13 state substantive law to determine the issues here, Washington state law dictates that it must be the
14 law of the state where the marine insurance policy was "executed, issued and delivered." Williams v.
15 Steamship Mutual Underwriting Assoc., 45 Wn.2d 209, 229 (1954).

16 Defendants' argument that Hawaii is the forum with the most significant contacts is not
17 supported by the facts. Seattle is the location where the contract was executed and from which it was
18 delivered. At two places in the policy, the law of the State of Washington is invoked: in the General
19 Average and Salvage section ("General Average and Salvage shall be payable. . . in accordance with
20 . . . the Laws and Usage of the Port of Seattle") and the Litigation provision (" . . . if by the laws of
21 the state within which this Policy is issued [a 12-month statute of limitations] is invalid. . .").
22 Armfield Decl., Ex. G, pp. 8 and 18.

23 Hawaii was simply the place where Lambert lived and coincidentally the place where the
24 vessel ended up. Furthermore, the policy specifically states: "This Insurance Contract is issued by an
25 insurer which is not licensed by the State of Hawaii and is not subject to its regulation or

