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BERKLEY ASSURANCE COMPANY, Plaintiff, v. GRIFIN CAMPBELL DBA CAMPBELL CONSTRUCTION LLC, et al., Defendants.	PHILADELPHIA COUNTY COURT OF COMMON PLEAS AUGUST TERM 2013 NO. 00129

MEMORANDUM OF LAW IN SUPPORT OF THE MOTION OF PLAINTIFF BERKLEY ASSURANCE COMPANY FOR SUMMARY JUDGMENT AS TO COUNT II AND COUNT III OF BERKLEY'S THIRD AMENDED COMPLAINT

DECLARING THE BERKLEY POLICY VOID AND THAT THERE IS NO COVERAGE UNDER THE POLICY DUE TO MATERIAL MISREPRESENTATIONS MADE BY GRIFFIN CAMPBELL IN HIS APPLICATIONS FOR INSURANCE

I. STATEMENT OF MATTER BEFORE THE COURT

Berkley Assurance Company ("Berkley") submits this Memorandum of Law In Support Of The Motion for Summary Judgment As To Count II And Count III Of Berkley's Third Amended Complaint Declaring The Berkley Policy Void And That There Is No Coverage Under The Policy Due To Material Misrepresentations Made By Griffin Campbell In His Applications For Insurance (the "Motion"). As detailed in Berkley's Motion and discussed below, the Berkley Policy issued to Grifin Campbell dba Campbell Construction LLC ("Campbell") does not provide coverage to Campbell or any person or entity for the underlying tort lawsuits ("the Underlying Actions") arising out of the June 5, 2013 building collapse on Market Street ("the

Building Collapse") and is void *ab initio* because Campbell made material misrepresentations in his applications for the Berkley Policy.

Griffin Campbell was the demolition contractor working on Market Street when a building being demolished tragically collapsed in June of 2013. Mr. Campbell is now in prison for his part in the tragedy.

In applying for the Berkley Policy, Campbell submitted several applications, each of which contained material misrepresentations concerning Campbell's business and safety practices (including misrepresenting the size of his payroll, his intent to retain salvage, his use of subcontractors, and his safety policies (or lack thereof)), Campbell's finances (including failing to disclose his two prior bankruptcies) and other matters detailed further below and in Berkley's Motion.

In the policy applications, Campbell and his company presented themselves as established, stable, experienced demolition workers that had in place, among other things, written safety procedures, manuals and a Risk Manager. But, having now deposed Campbell in this case, as well as having the benefit of documents and his testimony from the criminal trial, it is now clear – as even Campbell has admitted – that many of the facts reported on his applications for insurance with Berkley were false.

Moreover, now that discovery is complete, there is no material fact in dispute relevant to this Motion. The statements made by Campbell in applying for the Berkley Policy are reflected in the written application materials provided to Berkley. The falsity of those statements is uncontroverted – proven both by documents in writing that speak for themselves (such as filings from Campbell's bankruptcy cases) and by the sworn deposition testimony of Campbell and his agent, Anthony McGlawn of the McGlawn Agency (plus Campbell's sworn trial testimony from

his criminal trial). All that remains is for this Court to determine whether the false statements made by Campbell in applying for the Berkley Policy are material. As detailed below, they clearly are as a matter of law. Campbell's misrepresentations directly speak to the experience, safety policies and financial stability of his business and the risk to be insured by Berkley. There can be no doubt that such matters were and are material to the risk insured by Berkley.

As such, Berkley is entitled to a declaration that it has no obligation to provide coverage to Campbell (or any other person or entity) under the Berkley Policy for the injuries and damages arising out of the Building Collapse and that Berkley's policy is void *ab initio*.

II. STATEMENT OF QUESTION INVOLVED

Question: Whether, as a result of Campbell's many material misrepresentations in his applications for the Berkley Policy, the Berkley Policy is void *ab initio* and thus does not provide coverage for Campbell or any person or entity?

Suggested Answer: Yes, the Berkley Policy is void *ab initio* because Campbell made numerous material misrepresentations in his insurance applications. As the Policy is void, it is as if the Policy does not exist. Therefore, no coverage is available under the Berkley Policy for the Underlying Actions for Campbell or any person or entity.

III. STATEMENT OF RELEVANT FACTS

A. Griffin Campbell and His Work

Griffin Campbell was an individual who had no formal training in construction but describes himself as a hard working person who has always worked at something since he was nine or ten years old. Ex. 22, Campbell D.T. 29.[1] In or about 1986, Campbell began operating a

[1] All exhibits are appended and described in the Affidavit of Gale White submitted in support of this Motion, which is attached as Exhibit A to Berkley's Motion. The exhibits referred to herein are exhibits to the White Affidavit.

food truck and did this until about 2004. Ex. 22, Campbell D.T. 25-26. While still operating the food truck, Campbell began to buy houses to renovate and rent to others. Campbell explained that a lot of work on the rehabs was done by family members or friends; for example, his cousin did the carpentry, and others did the plumbing. *Id.* at 32-33. While operating the food truck, Campbell performed labor or painting jobs on the side. *See generally* Ex. 22, Campbell D.T. 26-38 (describing past experience). Campbell testified that he had no major construction experience and that he was basically doing smaller renovation jobs, bathrooms, patios, painting and things like that. Ex. 22, Campbell D.T. 37-38.

Campbell had become familiar with the architect, Plato Marinakos, as Marinakos would "pull permits and stuff like that" for people rehabbing houses. *Id.* at 63-64. In late 2012, Marinakos approached Campbell about demolishing buildings on Market Street and Campbell got the job to do the demolition. *Id.* at 65-66. (This eventually, some 6 months later, became the site of the tragic Market Street building collapse.)

Campbell testified that, before the Market Street demolition project, he had never prepared a demolition plan, would not even know how to do a demolition plan, had never done a demolition survey to do demolition and would not even know how to do that. *Id.* at 61, 84-85. Further, he had no experience with, and had never prepared a demolition bid. *Id.* at 62. Nor had Campbell ever been involved in the demolition of a four story structure or a commercial structure. *Id.* at 78. Campbell also admitted that, he had no knowledge of the OSHA demolition standards. *Id.* at 96. Campbell admitted that before he did the Market Street demolition project he had never signed a demolition contract; in fact, he had never even SEEN a demolition contract before Ex. 22, Campbell D.T. 83-84.

Nonetheless, the contract to do the Market Street Demolition was given to Griffin Campbell and a contract was signed in December 2012.

B. Campbell's First Insurance Policy For the Market Street Project Was Not Adequate

Campbell needed insurance and contacted his insurance agent, Anthony McGlawn of the A. McGlawn Insurance Agency, and asked McGlawn to procure insurance on his behalf. Ex. 24, McGlawn D.T. 15-16. McGlawn had been in the insurance agency business since 1985 and was an independent insurance agent placing insurance for more than one insurance company. *Id.* at 10, 52.

McGlawn first obtained an insurance policy for Campbell from Colony Insurance Company. The policy incepted on December 20, 2012. Ex. 2, Declarations page of the Colony policy.

During the relevant time period, a company named Sterling & Sterling ("Sterling") provided insurance consultation and advice to STB Investments Corp. ("STB"), the owners of the buildings being demolished. Ex. 23, Simmonds D.T. 1810-13. McGlawn provided a certificate of insurance concerning the Colony Policy to Sterling on behalf of STB. McGlawn also sent a copy of the Colony policy to Victor Chan at Sterling for his review. Ex. 24, McGlawn D.T. 73. Chan reviewed the Colony policy and determined that it excluded the demolition work that Campbell was contracted to do for STB. Ex. 4, 2/8/13 email string. On February 8, 2013, Chan wrote to McGlawn stating "We've reviewed the Griffin policy you just provided and it excludes the demolition work that Griffin was contracted to provide my client. This is not acceptable…" Ex. 4, 2/8/13 email string. Chan directed McGlawn to either have the exclusions removed or to obtain new insurance for Campbell emphasizing "[t]ime is of the essence." *Id.*

Thomas Simmonds, who handled insurance matters for the owner, STB (Ex. 23, Simmonds D.T. 1800-01), wrote to Marinakos and stated: "Griffin MUST stop working until his coverage is correct. Please advise/confirm." Ex. 5, 2/8/13 email string (emphasis in original).

On February 15, 2012, McGlawn reported to Sterling that Colony was unable to remove the relevant exclusions from its policy and that he (McGlawn) would get another policy for Campbell. Ex. 6, 2/15/13 email string; Ex. 7, 2/15/13 email string; Ex.24, McGlawn D.T. 75-76.

C. The Urgent Rush to Obtain Replacement Insurance For Campbell

McGlawn explained that he was now dealing with Marinakos and Sterling (Victor Chan) regarding Griffin Campbell's insurance and that Victor Chan was the person giving McGlawn instructions as to the policy that was needed. Ex. 24, McGlawn D.T. 75-77, 81. Campbell told McGlawn that Plato Marinakos would pay for the new policy. Ex. 24, McGlawn D.T. 116. Campbell gave McGlawn permission to allow Marinakos to determine what insurance he needed and they, Marinakos and McGlawn, picked out the insurance for Campbell. Ex. 22, Campbell D.T. 534-35.

McGlawn was instructed by Marinakos to work exclusively on obtaining replacement insurance for Campbell. Ex. 24, McGlawn D.T. 158-59. McGlawn dropped everything and worked on the Campbell insurance. *Id.* at 160. Campbell needed insurance in place to continue his work demolishing the Market Street buildings and they "Wouldn't take no for an answer." Ex. 24, McGlawn D.T. 36-37.

McGlawn began to look for a new insurer that would issue an insurance policy for Griffin Campbell to cover the demolition risk. McGlawn prepared insurance applications for Griffin Campbell. McGlawn testified that he obtained all of the information to fill out the applications from Griffin Campbell. Ex. 24, McGlawn D.T. 84-95, 100-10, 129-32.

McGlawn went to several other carriers including Scottsdale but none would underwrite the risk. McGlawn also sought insurance through a retail agent, Atlantic Specialty Lines, Inc. ("Atlantic Specialty"). Ex. 24, McGlawn D.T. 95-96, 134-35.

McGlawn sent copies of the insurance applications he had prepared to Emily Gault at Atlantic Specialty. Ex. 10, 2/25/13 email string; Ex. 24, McGlawn D.T. 125-26. McGlawn also sent copies of the applications to Victor Chan and Plato Marinakos for their review. Ex. 12, 2/26/13 email string; Ex. 24, McGlawn D.T. 133-34. Emily Gault forwarded these applications to Berkley. Ex. 11, 2/26/13 email string attaching applications.

On March 4, 2013 McGlawn sent the applications to Marinakos and stated to Marinakos "Please have Griffin sign the enclosed applications and bring the down payment, $9,500 and we can bind today." Ex. 13, 3/4/13 email string. On the same day, Marinakos reported to Victor Chan (Sterling) that "Griffin is signing the final forms to bind the policy right now. Are you ok with the policy?" Ex. 14, 3/4/13 email string.

D. <u>The Two Signed Applications Submitted to Berkley</u>

McGlawn provided two additional applications to Berkley.

The first of these applications is Exhibit 17 to the White Aff., and bears Bates numbers BERK0241-BERK0247. This application is dated March 6, 2013 and is signed by Griffin Campbell. Campbell has admitted that he signed this application. Ex. 22, Campbell D.T. 1242.

This application states in part, that:

> This application does not bind the applicant nor the company to complete the insurance, but it is agreed that the information contained herein shall be the basis of the contract should a policy be issued. Ex. 17, at BERK0246.

This application form also contains a fraud warning stating:

> FRAUD WARNING: Any person who knowingly and with intent to defraud any insurance company or other person files an application for insurance or statement of claim containing any materially false information or conceals for the purpose of misleading, information concerning any fact material thereto commits a fraudulent insurance act, which is a crime and subjects such person to criminal and civil penalties. … Ex. 17, at BERK0246.

Additionally, immediately before the space for the applicant's name, title and signature (and that of the producer), the application states:

> We [Applicant, here Campbell and Producer, here McGlawn] hereby declare that the above statements and particulars are true and I/We agree that this application shall be the basis of the contract with the insurance company. Ex. 17, at BERK0247.

A second application for insurance was submitted to Berkley dated March 4, 2013. This application is attached to the White Aff. as Exhibit 15, bearing Bates numbers BERK0233 - BERK0240.

> The March 4, 2013 application states in part:
>
> THE UNDERSIGNED IS AN AUTHORIZED REPRESENTATIVE OF THE APPLICANT AND REPRESENTS THAT REASONABLE INQUIRY HAS BEEN MADE TO OBTAIN THE ANSWERS TO QUESTIONS ON THIS APPLICATION. HE/SHE REPRESENTS THAT THE ANSWERS ARE TRUE, CORRECT AND COMPLETE TO THE BEST OF HIS/HER KNOWLEDGE. Ex. 15, at BERK0240.

This application is signed by Anthony McGlawn as Campbell's agent and also bears a signature of "*Griffin Campbell*". Campbell denies that the signature on this application is his. Ex. 22, Campbell D.T. 1248. However, Campbell may have authorized someone to sign the application on his behalf. Campbell testified that he did not recall one way or the other. Ex. 22, Campbell D.T. 1249. Anthony McGlawn confirmed that he signed this application and that by

signing he understood that he was affirming the truth of the statements in the application. Ex. 24, McGlawn D.T. 150-54.

E. Campbell Misrepresented The Scope, Experience And Abilities Of Griffin Campbell And Campbell Construction Relating To The Demolition Business

The applications paint a picture of a stable, longstanding large demolition company, with significant experience in contracting for and conducting demolition activities but, in reality, Campbell and Campbell Construction had only a few men working for him and had virtually no experience or expertise in commercial demolition work.

Campbell stated on the applications that his "primary operation" was "WRECKING BUILDINGS". Ex. 15, at BERK0234. But this was far from true and Griffin Campbell admitted so.

As Mr. Campbell explained at his deposition, he had only done two previous demolition jobs both in about 2011. Ex. 22, Campbell D.T. 38-53. Those jobs each involved the demolition of a three story burnt out row house. *Id.* at 58; 70-71. Before that, he had never demolished a building. *Id.* at 45. Further, when he did demolish the two row houses, he did not have a company, he did not own any demolition equipment, he did not have any permanent employees and did not have an office, or a corporate bank account. *Id.* at 52-53.

Campbell also testified about the work he and his business did and, in fact, his primary operation was not wrecking buildings as he had stated in his application. That was only a very small part of what he had done. As summarized in Section III. A. above, Campbell's primary work relating to construction had been rehabbing houses in North Philadelphia since about 2004 and, before that, he had owned and operated a food truck from about 1986 to 2004, during which time he did some labor or painting jobs on the side. *See generally* Ex. 22, Campbell D.T. 26-38 (describing past experience). Campbell had no major construction experience, but rather was

basically doing smaller renovation jobs, bathrooms, patios, painting and things like that. Ex. 22, Campbell D.T. 37-38.

As Campbell explained, before the Market Street demolition project, he had no real demolition experience, he had never prepared a demolition plan, he would not even know how to do a demolition plan, he had never done a demolition survey to do demolition and would not even know how to do that, and he had no experience with and had never prepared a demolition bid. *Id.* at 61-62, 84-85. Plus, Campbell had never been involved in the demolition of a four story structure or a commercial structure and had no knowledge of the OSHA demolition standards. *Id.* at 78, 96.

Finally, Campbell confirmed that at the time he got the Market Street demolition job (which was in or around December 2012[2]—only three months before he stated on his insurance application that he had been in the demolition business for 10 years), he did not even have a demolition company. Ex. 22, Campbell D.T. 533.

In the applications, Griffin Campbell answered "yes" to the question. "Does the applicant have a standard written contract that is used? Ex. 17, at BERK0241. But this too was false. Campbell admitted that, at the time he was about to do work at the Market Street demolition (in or about December 2012), he had never seen or signed a demolition contract. Ex. 22, Campbell D.T. 83-84. Campbell had no standard contract.

Campbell originally had his cousin draft a contract for the Market Street project. Ex. 22, Campbell D.T. 80, 81. That draft was not signed and was not used for the project. Instead, the contract used was an American Institute of Architects agreement. That contract was prepared by

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[2] Campbell signed the contract for the Market Street demolition project on December 28, 2012. *See* Ex. 22, Campbell D.T. 580 (where the contract is marked as an exhibit and Campbell confirmed that the contract is dated December 28, 2012 and confirmed that he signed it).

Plato Marinakos, not Griffin Campbell. Ex. 19, Criminal Transcript Vol. 3 at 113-114 (excerpt of Marinakos testimony); Ex. 22, Campbell D.T. 89-91. Campbell never read the contract and testified that he did not pay any attention to it and did not understand the contract. Ex. 22, Campbell D.T. 588, 590, 596. Campbell confirmed that he had never been involved in a contract like this before. *Id.* at 90-91.

Campbell's statement on the application that he had a standard written contract that he used is clearly false. He had no contract, had never before prepared or used a contract and did not prepare, read, pay attention to or understand the one and only contract he had ever signed.

Campbell misrepresented the size of his payroll, giving the appearance of a much larger company. On his application, Campbell stated that his annual payroll "from demolition operations (excluding office and clerical)" was $125,000. Ex. 17, at BERK0242. However, Campbell testified that, at the time he applied for the insurance, his payroll was in fact less than $50,000 explaining that it was a "small business." Exhibit 22, Campbell D.T. 1203.

Campbell also stated on his application that he did not retain salvage from his demolition projects. Ex. 17, at BERK0243. This was another misrepresentation. Griffin Campbell freely admitted both during his testimony at his criminal trial and at his deposition in the civil cases that he planned to and in fact did retain and sell all of the salvage from the demolition that he could. Campbell testified that he wanted to salvage "every little piece you can salvage." Ex. 19, Criminal Transcript Vol. 10 p. 282-83. Campbell testified that he could sell the façade and he would make something from that, the joists could be sold, there was potential salvage in the copper pipes in the building, and that he used the salvage money to pay his workers. Ex. 19, Criminal Transcript Vol. 10 p. 257-259.

Campbell answered on his applications that he did not use subcontractors. Ex. 17, BERK0244. However, in his testimony Campbell was quite clear, repeating several times, that he in fact did use subcontractors and that he hired Sean Benschop[3] as a subcontractor on the Market Street demolition project and other projects.

Q: Did you consider Mr. Benschop your employee or a subcontractor?

A: I considered Mr. Benschop as a subcontractor.

Q: And that's how you considered him on other jobs too, correct?

A: Correct.

Ex. 22, Campbell D.T. 797; *see also* Ex. 22, Campbell D.T. 473 (repeating Benschop was a subcontractor). Campbell also provided a statement to the police after the building collapse admitting that Benschop was a subcontractor. Ex. 18, police interview at 000025; *see also* Ex. 22, Campbell D.T. 325-326. It is very clear that the statement on the application that Campbell used no subcontractor was false.

F. Campbell Misrepresented The Safety Personnel And Procedures He Had In Place

In his applications for the Berkley Policy, Campbell represented to Berkley that he and his business had written safety practices and policies and safety and risk management personnel on his staff—when in fact these things were not true.

On his applications, Campbell stated that he had a formal loss control or safety program (Ex. 11, at BERK0138 and Ex. 17, at BERK0244), that he had a risk manager and/or safety director who is responsible for safety activities (Ex. 11, at BERK0138 and Ex. 17, at BERK0244), and that that he had a formal safety manual (Ex. 15, at BERK0235).

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[3] Sean Benschop is now in jail due to his role in causing and/or contributing to the collapse for which coverage is sought.

None of these things were even close to the truth. In fact, when asked, Griffin Campbell admitted that he had no formal safety procedures or policies in place, had no written safety manual and did not provide employees with any written safety procedures. Ex. 22, Campbell D.T. 1201. As for formal safety personnel, Campbell testified that he did not have a safety director and did not even know what a risk manager was and of course did not have a risk manager. Ex. 22, Campbell D.T. 1200.

Campbell also misrepresented his pre-demolition safety practices. On the applications, Campbell represented that the conditions of nearby structures were documented before demolition begins (Ex. 11 at BERK0137 and Ex. 17, at BERK0243) and that prior to demolition the buildings and structures were checked for lead, mold or other hazardous materials. (Ex. 11 at BERK0138 and Ex. 17, at BERK0244). Again, these representations were false. Campbell admitted that while he did a walkthrough of the buildings to be demolished on Market Street before demolition began, he did not take notes or anyway assess the conditions of the neighboring buildings. Ex. 22, Campbell D.T. 1195-96. He also admitted that he did nothing to assess whether there was lead in the building and as far as mold "I [Campbell] didn't pay attention to that." Ex. 22, Campbell D.T. 1197-98.

G. Campbell Failed To Reveal His Bankruptcies, Liens And Criminal Record

The applications also asked about any bankruptcies, liens and criminal record. For insurance, the application asks: "Has applicant had a foreclosure, repossession, bankruptcy or filed for bankruptcy during the last five (5) years?" Ex. 15, BERK0235. In response to this question, Griffin Campbell answered "N" for no. *Id.*

However, this too is clearly false. Campbell testified that he was in bankruptcy at the time he signed the Market Street demolition contract in December 20, 2012. Ex. 22, Campbell

D.T. 94. Further, attached to White Aff. as Exhibits 1 and 16 are former bankruptcy filings of Griffin Campbell demonstrating that he had twice filed for bankruptcy. Exhibit 1 is the docket of the January 4, 2010 bankruptcy petition of Griffin Campbell. Exhibit 16 is the docket, and related documents of the March 5, 2013 bankruptcy petition of Griffin Campbell.

The application also asked if the applicant has had a judgment or lien during the past five years and again Campbell answered no. Ex. 15, at BERK0235. Yet, the bankruptcy filings at Ex. 16, at BERK1029 reveal a list of liens demonstrating that the answer on the application was false.

As to criminal record, the application asks whether in the past five years the applicant has been indicted for or convicted of any degree of the crime of fraud, bribery etc. Ex. 15, at BERK0235. Campbell disclosed none. *Id.* However, at his criminal trial, Griffin Campbell freely admitted his criminal record testifying:

> Q: Mr. Campbell, do you have a felony conviction?
>
> A: Yes.

Ex. 19, Criminal Transcript Vol. 11 p. 91. Campbell went on to explain that he was involved in an insurance fraud scheme in 2009, in which he would put in as having been in car accidents but there had actually been no accident. *Id.* at 91-92. Campbell was sentenced to probation and was still on probation at the time he purchased his contractor's license in late 2012/early 2013. *Id.* at 92; *see also* Campbell's deposition testimony in which he admits to having a felony conviction for insurance fraud and explaining the scam. Ex. 22, Campbell D.T. 1132-34.

H. Campbell's Many, Many Misrepresentations Were Material And The Basis Of The Bargain Of The Insurance Policy—Had The Underwriter And Berkley Known The Truth, The Policy Would Not Have Been Issued To Campbell

As demonstrated above, in applying for insurance with Berkley, Campbell completely misrepresented his background, his experience, his size, safety procedures, and his workforce (both size and type of personnel) making it appear that he and his company, Campbell Construction, were in the demolition business, had a significant payroll, had written safety procedures with a Risk Manager or Safety Director in place, and had a good financial and criminal record.

This was clearly not true. Campbell was only starting in the demolition business, having done only two small residential demolition jobs previously, had never had a demolition contract, had never prepared a demolition plan and would not even know how to do a demolition plan. He had never done a demolition survey to do demolition and would not even know how to do that. Further, he had no experience with and had never prepared a demolition bid. *See* Section III.A. above.

Significantly, Campbell also hid from Berkley (and in fact misrepresented) his background including two bankruptcies, many liens and his criminal record of insurance fraud.

These statements are acknowledged in the applications by Griffin Campbell to be basis of the Policy. Ex. 17, at BERK0246; Exhibit 15, at BERK0240 (THE UNDERSIGNED IS AN AUTHORIZED REPRESENTATIVE OF THE APPLICANT AND REPRESENTS THAT REASONABLE INQUIRY HAS BEEN MADE TO OBTAIN THE ANSWERS TO QUESTIONS ON THIS APPLICATION. HE/SHE REPRESENTS THAT THE ANSWERS ARE TRUE, CORRECT AND COMPLETE TO THE BEST OF HIS/HER KNOWLEDGE).

Further the underwriter of this Policy, Mr. D. Stephen Gillespie ("Gillespie"), testified that in underwriting the Policy he relied upon the information provided by the insured on the applications and he further relied on the truthfulness of the applications. Ex. 21, Gillespie D.T. 259-260, 278-279.

Gillespie was the underwriter acting on behalf of Berkley Insurance Company in underwriting the Berkley Policy General Liability Policy No. VUMC0029300, effective March 6, 2013 issued to Grifin Campbell dba Campbell Construction and was the person who made the decision to issue the Policy. Affidavit of D. Stephen Gillespie, herein "Gillespie Aff."

Before issuing the Policy, Gillespie reviewed information provided to Berkley in applications for insurance from Griffin Campbell.

Gillespie has now had an opportunity to review certain documents and portions of the testimony given by Griffin Campbell and others, including portions of deposition and portions of testimony given at Campbell's criminal trial. Gillespie Aff. ¶7. Based on Gillespie's review of such documents and testimony, Gillespie understands that information on the applications provided to Berkley has been contradicted by Mr. Campbell's sworn testimony at this deposition and/or his criminal trial and is not true. Gillespie Aff. ¶8. The information reviewed by Gillespie in the applications was material to Gillespie's assessment of the risk and decision to underwrite and issue the Policy. Gillespie Aff. ¶10. Had Gillespie known at the time of his evaluation of the risk and underwriting, the truth as revealed in the documents and as testified to under oath by Mr. Campbell, Gillespie would not have agreed to issue the Berkley Policy to Griffin Campbell and/or Campbell Construction. Gillespie Aff. ¶11, 12.

Indeed, certain information, if it had been disclosed to Gillespie as requested on the applications, alone would have precluded Gillespie from issuing the Policy to Griffin Campbell

and/or Campbell Construction. Had Gillespie known of Campbell's prior involvement in insurance fraud and prior bankruptcies he would not have issued the Policy. Gillespie Aff. ¶¶ 11-12. Had Gillespie known of Campbell's lack of safety policies, procedures and personnel, Gillespie would not have issued the Policy. Gillespie Aff. ¶12.

Taken has a whole, it is abundantly clear that had Gillespie known the truth, Gillespie and Berkley would not have issued the Berkley Policy. Gillespie Aff. ¶13.

IV. ARGUMENT

A. Berkley Is Entitled To Summary Judgment Because There Are No Genuine Issues Of Material Fact

1. Summary judgment is appropriate where, as here, there are no genuine issues of material fact

Summary judgment is appropriate where the record demonstrates that no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law. Pa. R. Civ. P. 1035.2. A dispute over a material fact is "genuine" only where the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Albright v. Abington Mme. Hosp.*, 696 A.2d 1159, 1167 (Pa. 1997). The purpose of the summary judgment rule is to avoid burdening the parties and the Court by requiring them to undergo the time and expense of an unnecessary trial. *See Salerno v. Philadelphia Newspapers, Inc.*, 377 Pa. Super. 83, 88, 546 A.2d 1168, 1170 (1988) (noting that "the very purpose the rule was intended to serve [is] that judicial economy and efficiency be maintained").

Further, in opposing a motion for summary judgment the non-moving party cannot rely on mere denials, unsupported assertions, or conclusory allegations, but rather "must set forth specific facts by way of affidavit, or in some other way as provided by the rule, demonstrating

that a genuine issue exists." *Salerno*, 377 Pa. Super. at 89, 546 A.2d at 1171 (quoting *Ressler v. Jones Motor Co., Inc.*, 337 Pa.Super. 602, 609, 487 A.2d 424, 429 (1985)).

Here, there are no material facts in dispute. The issues before this Court for purposes of this Motion concern (a) what statements did Campbell make in applying for the Berkley Policy, (b) were the statements false (*i.e.*, misrepresentations), (c) were the misrepresentations known to be false or made in bad faith, and (d) were any misrepresentations material. There are no material facts in dispute concerning any of these issues.

Campbell's statements are contained in his insurance applications, which are written documents produced in discovery. There is no dispute about what those applications say – or what Campbell represented therein.

Whether Campbell's statements are false turns upon a simple comparison of the statements he made to the truth, the real facts. Those facts, however, also are not dispute. They are reflected in incontrovertible documentary proof (such as the bankruptcy documents proving that Campbell did file for bankruptcy notwithstanding his denial) and in the sworn testimony of both Campbell and his insurance broker, Anthony McGlawn, admitting to facts demonstrating that many of the representations on the applications were false. There is thus no dispute that Campbell made misrepresentations in his application.

Similarly, in light of Campbell's sworn testimony and bankruptcy filings, there is no dispute that Campbell knew that his applications contain false statements. And, at a minimum, to the extent that Campbell failed to read any of his applications (a point addressed further below), Pennsylvania law makes clear that an insured submitting an application without reading is does so in bad faith, as a matter of law. *See* Section C.3.(a) below (citing cases). As such, there is no disputed, material issue concerning Campbell's knowledge and bad faith.

Finally, there is, and can be, no material factual dispute that Campbell's misrepresentations were material to the issuance of the Berkley Policy. There is no dispute that Campbell provided false information in response to questions asked of him by the applications, that Campbell did so with knowledge and in bad faith, that those applications were relied upon by Berkley in issuing the Policy and/or pertain to the risk being insured, and thus that Campbell's misrepresentations are material, as a matter of law.

As there are no genuine issues of material fact that Campbell's applications contained misrepresentations, the applications were submitted to Berkley and Berkley relied on the applications to issue the Policy, summary judgment is now appropriate.

2. <u>Pennsylvania courts have entered judgment as a matter of law in favor of insurers in cases such as this – where there is no dispute that the insured made material misrepresentations in the policy application</u>

Pennsylvania courts have granted summary judgment in favor of an insurer where, as here, it is undisputed that material misrepresentations were made in an application. For instance, in *Kearns v. Phil. Life Ins. Co.*, 1990 WL 902421, 20 Phila. Co. Rptr. 583 (Pa. Com. Pl. May 23, 1990), *aff'd sub nom. Kearns v. Philadelphia Life Ins. Co.*, 401 Pa. Super. 292, 585 A.2d 53 (1991), the Philadelphia Court of Common Pleas (in an opinion of Judges Goldman, Goodheart and Hill) granted judgment as a matter of law (in that case, judgement *nov*) in favor of the insurer where documentary evidence established that the policy was issued in reliance on false and fraudulent statements made by or on behalf of the insured. *Id.*, 20 Phila. Co. Rptr. at 590-99. Following Pennsylvania Supreme Court precedent, the *Kearns* court recognized that:

> "Where it affirmatively appears, from sufficient documentary evidence, that the policy was issued in reliance on false and fraudulent statements, made by or on behalf of the insured, as where false answers are shown to have been given by the insured under such circumstances that [s]he must have been aware of their

> falsity, the court may direct a verdict or enter judgment for the insurer.'" (emphasis in the original). Also stated in *Evans*, *supra*, 558-559: '... where the uncontradicted testimony of a party's own witness[es] establishes facts essential to his opponent's case ... facts thereby established are to be taken as true, and, if sufficient to avoid the policy, they may warrant the entry of judgment for the insurer.'"

Id., 20 Phila. Co. Rptr. at 590. Although Kearns involved a judgment *nov*, the reasoning equally applies here. Where the facts evidencing the insured's misrepresentations in applying for a policy are undisputed, judgment can and should be entered as a matter of law.

More recently, in *Parasco v. Pac. Indem. Co.*, 920 F. Supp. 647 (E.D. Pa. 1996), the court awarded summary judgment in favor of the insurer in a case in which the policy contained a provision providing that the carrier did not provide coverage if the insured intentionally concealed or misrepresented any fact relating to the policy before or after a loss. After discussing the federal summary judgment standard (which is similar to the standard to be applied by this Court), the *Parasco* court emphasized that "[w]e therefore ***must award summary judgment*** to [the insurer] if it can demonstrate that no genuine issue of fact exists as to whether [the insured] either misrepresented or concealed a material fact relating to the insurance contract." *Parasco*, 920 F. Supp. at 652-53 (citing *New York Life Ins. Co. v. Johnson*, 923 F.2d 279, 281 (3d Cir.1991) (under Pennsylvania law, in the fraud in the application context, policy is void if insurer can show that (1) representation was false; (2) representation was made in bad faith; and (3) representation was material)) (emphasis added).

The *Parasco* court went on to conclude that "the record establishes beyond reasonable dispute that [the insured] made misrepresentations" were there was uncontroverted evidence (like there is here) that the insured's statements were false. *Id.* at 653. As to materiality, the *Parasco* court reasoned that "[t]he question of materiality is generally considered one of fact and

law, but if the facts misrepresented are so obviously important that 'reasonable minds cannot differ on the question of materiality,' then the question becomes one of law that the court can decide at the summary judgment stage." *Id.* at 654 (quoting *Gould v. American-Hawaiian S.S. Co.*, 535 F.2d 761, 771 (3d Cir. 1976)); *see also Fine v. Bellefonte Underwriters Ins. Co.*, 725 F.2d 179, 183 (2d Cir.) (where statements are indisputably made and indisputably false, "the question seems purely one of law"), *cert. denied*, 469 U.S. 874 (1984).

Thus, in cases such as this, where the misrepresentations made by an insured on his application for insurance are undisputed (being proven both by indisputable documents and the insured's own sworn testimony) and are so obviously important that there can be no dispute that they are material, the Court may, and should, resolve the case at the summary judgment stage. *See Parasco*, 920 F.Supp. at 653-54. Where, as here, statements are indisputably made and indisputably false, the question for the Court is purely one of law. *Id.*

Here, as detailed below, it is undisputable that Campbell made false statements on his applications for insurance and that such misrepresentations are material. For instance, Campbell undertook the demolition of several buildings, including the four-story building which collapsed, while having no safety procedures or policies, no written safety manual and no safety director or risk manager. Ex. 22, Campbell D.T. 1200-01. Yet, Campbell's applications submitted to Berkley falsely stated that Campbell had safety procedures, a safety manual and a risk manager. Ex. 17 at BERK0244; Ex. 15, at BERK0235. Not only is it unconscionable that a contractor was demolishing a four story structure without any safety procedures or personnel, but also more importantly for purposes of this Motion, there can be no dispute that it was material for Berkley, as the insurer, to know these facts. In fact, the undisputed affidavit of Berkley's underwriting witness, Gillespie, confirms that if Gillespie had known about Campbell's lack of safety policies,

procedures and personnel Gillespie would not have issued the Policy. Ex. B, Gillespie Aff. ¶13. Campbell also mispresented numerous other facts, including his purported lack of a bankruptcy, which are detailed in Berkley's Motion papers and which indisputably impact the risks being insured. As such, this Court can and should grant summary judgment in favor of Berkley and prevent the parties and the Court (plus the jury) from having to incur the time and expense of trial. There is no dispute that Campbell's misrepresentations were material and, thus, this Court can resolve the matter at the summary judgment stage and declare that the Berkley Policy void *ab initio*.

C. The Berkley Policy Is Void Due To Campbell's Undisputed Material Misrepresentations On His Applications For Insurance

When a policyholder such as Campbell applies for insurance, he has an obligation to tell the truth on the insurance applications. Pennsylvania law makes this clear in 18 Pa.C.S.A. § 4117(2), which emphasizes that a policyholder commits insurance fraud if he knowingly and with the intent to defraud any insurer, presents or causes to be presented to any insurer any statement forming a part of, or in support of, a claim that contains any false, incomplete or misleading information concerning any fact or thing material to the claim. 18 Pa.C.S.A. § 4117(2).[4]

Pennsylvania law similarly recognizes the importance of an insured providing correct, truthful information on its policy application – and affords an insurer a remedy, voiding a policy,

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[4] "A person violates Pennsylvania's insurance fraud statute by: '(1) presenting false, incomplete or misleading statements to [the insurer]; 2) that were material to the claim;' and 3) which were knowingly made with an intent to defraud. … Fraudulent intent may be inferred where 'false answers [are] given under such circumstances that [the actor] must have been aware of their falsity.' … 'It is sufficient to show that [the misrepresentations] were false in fact and that insured knew they were false when he made them, since an answer known by insured to be false, when made is presumptively fraudulent.' … ." *Wezorek v. Allstate Ins. Co.*, 2007 WL 2264096, at *14-15 (E.D. Pa. Aug. 7, 2007) (internal citations omitted).

when the insured makes material misrepresentations in the application. When a policyholder does not tell the truth in the applications, an insurer has the right to seek a declaration from the courts that the policy is void. *United Nat'l Ins. Co. v. J.H. France Refractories Co.*, 36 Pa. D. & C.4th 400, 410 (Com. Pl. 1996). Pennsylvania thus recognizes a common law right of insurers to rescind an insurance policy that was procured through fraud. *See Jung v. Nationwide Mut. Fire Ins. Co.*, 949 F.Supp. 353, 359-60 (E.D.Pa. 1997) (citing *Metropolitan Prop. & Liab. Ins. Co. v. Insurance Commissioner*, 525 Pa. 306, 580 A.2d 300 (1990)); *New York Life Ins. Co. v. Brandwene*, 316 Pa. 218, 172 A. 669, 670 (1934) (it has long been established that "[w]here the execution of a contract of insurance has been induced by fraudulent misrepresentations of the insured, the insurer may secure its cancellation").

Pennsylvania courts have set forth three elements that an insurer must establish to void a policy in the case of a misrepresentation. An insurance policy may be rescinded if: (1) the application contained a misrepresentation, (2) the misrepresentation was material to the risk being insured, and (3) the insured knew that the representation was false when made, or the insured made the representation in bad faith. *United Nat'l Ins. Co. v. J.H. France Refractories Co.*, 36 Pa. D. & C.4th at 410.

Berkley's Motion and the undisputed evidence submitted in support hereof demonstrates each of these elements as a matter of law and undisputed fact. As demonstrated above in Sections III.E. through III.G., Campbell made many, many false statements in his applications – including, among other things, misrepresentations concerning his experience, size of his company, safety procedures, bankruptcy status, his lien status, and his criminal history. Campbell's misrepresentations were material to the risk insured by Berkley. And, as discussed below, Campbell not only knew that his statements were false, but also made them in bad faith to

the extent that he signed, but did not read, one of his applications and caused others to be submitted on his behalf. As such, Berkley is entitled to judgment as a matter of law voiding the Berkley Policy.

1. Campbell made many misrepresentations on his applications for insurance

As this Court held in *Kearns,* when there is documentary evidence of the misrepresentations, the misrepresentations are so obvious as to bear little comment. *Kearns*, 1990 WL 902421. Here, the undisputed documents and Campbell's own sworn testimony establish – as a matter of law – that Campbell made many misrepresentations on his policy applications. As detailed in the above Statement Of Relevant Facts, in the insurance applications provided to Berkley, Campbell and his company presented themselves as established, stable, experienced, financially sound demolition workers that had in place, among other things, written safety procedures, manuals and a Risk Manager. But that is and was simply not true. In reality, Campbell and Campbell Construction had only a few men working for him and had virtually no experience or expertise in commercial demolition work – and many of the factual statements in the applications were false.

Among the misrepresentations made by Campbell in his applications are the following:

- Representing that his business's "primary operation" was "WRECKING BUILDINGS" (Ex. 11, at BERK0162 and Ex. 15, at BERK0234), when that was far from true as Campbell later admitted. As Campbell conceded at his deposition, he had only done two previous demolition jobs (both in about 2011) each of which merely involved the demolition of a three story burnt out row house. Ex. 22, Campbell D.T. 38-53, 58, 70-71. Before then, Campbell had never demolished a building. *Id.* at 45. Plus, when he did demolish the two row houses, he did not have a company, he did not own any demolition equipment, he did not have any permanent employees and did not have an office, or a corporate bank account. *Id.* at 52-53. Wrecking buildings clearly was not Campbell's primary business when he applied for the Berkley Policy. Rather, his primary work was he had been rehabbing houses in North Philadelphia since about 2004 and, before that, he had owned and operated a food truck from about 1986 to

2004, which performing some labor or painting jobs on the side. *See* Ex. 22, Campbell D.T. 26-38 (describing Campbell's past experience).

- Representing to have (a) a formal loss control or safety program, (b) a risk manager and/or safety director who is responsible for safety activities, and (c) a formal safety manual; however, Campbell has since admitted that he had none of these three. *Compare* Ex. 11, BERK0138, Ex. 17, BERK0244 and Ex. 15, BERK0235 *with* Ex. 22, Campbell D.T. 1201.

- Denying that he had filed for bankruptcy or had any liens during the last five years, but there is incontrovertible proof (both documentary and testimonial) that Campbell misrepresented his bankruptcy status (*compare* Ex. 15, BERK0235 *with* Ex. 22, Campbell D.T. 94; Exs. 1 and 16 (attaching bankruptcy filings and docket) and the status of judgment liens against him (*compare* Ex. 15, BERK0235 *with* Ex. 1; Ex. 16).

- Denying that he had been indicted for or convicted of any crime of fraud or bribery, but then testifying at his criminal trial and in this case that he has a felony conviction and that he had participated in an insurance fraud scheme in 2009. *Compare* Ex. 15, BERK0235 *with* Ex. 20, Criminal Testimony Vol. 11 at 91-92; Ex. 22, Campbell D.T. 1132-1134.

- Denying in his application that he used subcontractors, but later conceding in his testimony that he (Campbell) used a subcontractor on the project (Sean Benschop), who is now in jail due to his role in causing and/or contributing to the collapse for which coverage is sought. *Compare* Ex. 11, BERK0138, Ex. 17, BERK0244 *with* Ex. 22, Campbell D.T. 797.

- Claiming to have a supposed "standard written contract", but later admitting he had none. *Compare* Ex. 11, BERK0135 and Ex. 17, BERK0241 *with* Ex. 22, Campbell D.T. 83-84. In fact, Campbell not only admitted that, before he did the Market Street demolition project, he had never signed a demolition contract but also that, before this project, he had never even SEEN a demolition contract before. Ex. 22, Campbell D.T. 83-84.

- Misstating the size of his business by claiming to have a payroll of $125,000, when the truth was that Campbell's payroll was much, much small – amounting to less than $50,000. *Compare* Ex. 11, BERK0136 and Ex. 17, BERK0242 *with* Exhibit 22, Campbell D.T. 1203.

- Denying in the application that he retained salvage, although Campbell has since admitted that he not only did retain salvage, but intended to do so when he priced/bid for this demolition project. *Compare* Ex. 11, BERK0137 and Ex. 17, BERK0243 *with* Ex. 20, Criminal Transcript Vol. 10 p. 282-283.

Each of the above is an example of the numerous misrepresentations made in Campbell's policy applications, and each has been proven as a matter of undisputed fact – by indisputable documents and/or by Campbell's own sworn testimony.

2. Campbell's misrepresentations were material the risk insured by Berkley

Pennsylvania courts have recognized that "[i]nformation is ... material if knowledge or ignorance of it would naturally influence the judgment of the insurer in issuing the policy, in estimating the degree and character of the risk, or in fixing the premium rate." *A.G. Allebach, Inc. v. Hurley*, 373 Pa.Super. 41, 540 A.2d 289, 295 (1988). Here, there can be no dispute that Campbell's misrepresentations were material, as a matter of law and undisputed fact. As demonstrated above, in applying for the Berkley Policy, Campbell repeatedly misrepresented the scope, experience and abilities of both himself and his company relating to the demolition business – the very business and risk being insured. He misrepresented the nature of his business in many ways – ranging from the number of years he was in business, and how large the business was, to how he performed business (including whether he used subcontractors, whether he had a standard contract and whether he retained salvage), to what safety features (risk manager, safety manual etc.) the business supposedly had (but actually did not). He also mispresented his prior financial status – failing to disclose his bankruptcies and liens, among other things. In each instance, and certainly in totality, Campbell's misrepresentations were material as a matter of law.

(a) Campbell admitted that his (mis)representations were material as a matter of law

Campbell admitted, when submitting the applications, that his answers and representations in the application were material to the risk being insured by Berkley. For

example, in the March 6th application signed by Campbell, Campbell admitted that "the information contained herein shall be the basis of the contract should a policy be issued." Ex. 17 at BERK0246. This application also contained a fraud warning advising that "Any person who knowingly and with intent to defraud any insurance company or other person files an application for insurance containing any materially false information or conceals, for the purpose of misleading, information concerning any fact material thereto commits a fraudulent insurance act, which is a crime and subjects that person to criminal and civil penalties …" Ex. 17, at BERK0246. Campbell, and his broker, the McGlawn Agency, also acknowledged in that application that "We [Applicant, here Campbell and Producer, here McGlawn] hereby declare that the above statements and particulars are true and I/We agree that this application shall be the basis of the contract with the insurance company. Ex. 17 at BERK0247. This statement appears immediately before Campbell's signature, which Campbell has admitted is his. Ex. 22, Campbell D.T. 1242.

Similarly, in the March 4 application submitted on Campbell's behalf, Campbell agreed that "THE UNDERSIGNED IS AN AUTHORIZED REPRESENTATIVE OF THE APPLICANT AND REPRESENTS THAT REASONABLE INQUIRY HAS BEEN MADE TO OBTAIN THE ANSWERS TO QUESTIONS ON THIS APPLICATION. HE/SHE REPRESENTS THAT THE ANSWERS ARE TRUE, CORRECT AND COMPLETE TO THE BEST OF HIS/HER KNOWLEDGE." Ex. 15, at BERK0240.

Campbell thus knew and agreed not only that his statements were true, but that there were to be the basis of his Policy – and thus, by definition and agreement, were material to the risk.

(b) Even if Campbell had not so admitted, his misrepresentations clearly were material as a matter of law

Under the law, even had Campbell not so agreed (which he did), his misrepresentations still were material. An insured's misrepresentations are material as a matter of law when there is incontrovertible documentary evidence that, at the time of the application, the insured answered questions on his application in bad faith or knew that an answer was false. *See Northwestern Mut. Life Ins. Co. v. Babayan*, 430 F.3d 121, 133 (3d Cir. 2005). That is precisely the situation here.

In this case, Campbell submitted applications which represent that Campbell had a formal loss control or safety program, a risk manager and/or a safety director who is responsible for safety activities. Ex. 11, BERK0138 and Ex. 17, at BERK0244. However, Campbell has now admitted that not only did he not have a formal loss control or safety program or a safety director or risk manager, he did not even know what a risk manager was! Ex. 22, Campbell D.T. 1200. Likewise in *Northwestern* there was uncontroverted evidence that the insured's answer on the application was false, as the insured was treated by several physicians for neck, back, hip, leg and knee pain. *Id.* Given the uncontroverted evidence, the Court in *Northwestern* found that the only reasonable inference a fact finder could draw is that the insured answered "no" in bad faith or knowing that her answer was false. *Id.* at 136. As Campbell has admitted that the answers on the applications were false, the only reasonable inference that this Court can make is the answers were given in bad faith or with knowledge that the answers were false. As such, the misrepresentations regarding safety at the demolition site are material as a matter of law and the Policy should be declared void.

(c) The misrepresentations were material as they influenced Berkley's decision to issue the policy

Campbell's misrepresentations also were material because they influenced the Berkley underwriter's decision to issue the Berkley Policy. Courts recognize that every fact in an insurance application is material which increases the risk undertaken by the insurer. *New York Life Ins. Co. v. Johnson*, 923 F.2d 279, 279 (3d Cir. 1991). Anything which increases the risk cannot be immaterial. Undoubtedly demolishing buildings without any safety policies, procedures or personnel in place increases the risk undertaken by Berkley. When knowledge or ignorance of certain information would influence the decision of an insurer in the issuance of a policy, or assessing the nature of the risk, that information is deemed material to the risk assumed by the insurer. *Rohm & Haas Co. v. Cont'l Cas. Co.*, 566 Pa. 464, 476, 781 A.2d 1172, 1179 (2001); *American Franklin Life Ins. Co. v. Galati*, 776 F.Supp. 1054, 1060 (E.D.Pa. 1991).

Moreover, a misrepresentation can be material to the risk assumed by the insurer even if it is not related to the loss actually incurred. *Jung v. Nationwide Mut. Fire Ins. Co.*, 949 F. Supp. 353, 357 (E.D.Pa. 1997). As such, it is not necessary that Campbell's misrepresentations be related to the Building Collapse, though unquestionably Campbell's lack of safety policies, procedures and personnel were contributing factors in the Building Collapse.

Gillespie, the underwriter acting on behalf Berkley who reviewed the applications and made the decision to issue the Policy, has affirmed that he reviewed information in the applications, and the information was material to Gillespie's assessment of the risk and decision to underwrite and issue the Policy. Ex. B, Gillespie Aff. at ¶11. In fact, Gillespie has affirmed that this information was so material to Gillespie's decision to issue the Policy that he (Gillespie) would not have issued the Policy had he known the truth. Ex. B, Gillespie Aff. at ¶13. Indeed, if Gillespie had known of Campbell's bankruptcies or liens, or if he had known of Campbell's prior

involvement in insurance fraud, or the lack of safety policies, procedures and personnel, Gillespie would not have underwritten the Policy. Ex. B, Gillespie Aff. at ¶12.

Moreover, in issuing the Berkley Policy, Gillespie was entitled to rely on the answers in the applications as being truthful. As noted above, the applications state in part that "We [Applicant, here Campbell and Producer, here McGlawn] hereby declare that the above statements and particulars are true and I/We agree that this application shall be the basis of the contract with the insurance company" (Ex. 17, at BERK0247) and the application states "that reasonable inquiry has been made to obtain the answers to questions on this application. He/she represents that the answers are true, correct and complete to the best of his/her knowledge" (Ex. 15, at BERK0240). Gillespie was clearly entitled to rely on the fact that answers in the applications were truthful when issuing the Policy.

3. Campbell knew that his applications contained misrepresentations and/or made the misrepresentations in bad faith

The final element of a claim to void a policy is that the insured knew that the representation was false when made, or the insured made the representation in bad faith. *United Nat'l Ins. Co.*, 36 Pa. D&C 474 at 510. Under Pennsylvania law, however, an insurer need not prove the insured's actual knowledge of falsity.

"It is sufficient to show that [the misrepresentations] were false in fact and that insured knew they were false when he made them, since an answer known by insured to be false, when made is presumptively fraudulent." *Baldwin v. Prudential Ins. Co.*, 215 Pa. Super. 434, 258 A.2d 660, 662 (1969) (internal citations omitted) (quoting *Evans v. Penn Mutual Life Ins. Co.*, 322 Pa. 547, 553, 186 A. 133, 138 (1936)). Plus, fraudulent intent may be inferred where "false answers [are] given under such circumstances that [the actor] must have been aware of their

falsity." *Hepps v. Gen. Am. Life Ins.*, 1998 WL 564497 at *4 (E.D.Pa. Sept.2, 1998) (quoting *Derr v. Mutual Life Ins. Co.*, 351 Pa. 554, 41 A.2d 542, 544 (1945)).

Under the applicable standards, it is undisputed – as a matter of law – both that Campbell knew his misrepresentations to be false and also that Campbell made his misrepresentations in bad faith.

(a) By virtue of signing the application, Campbell is charged with the knowledge of what is in the application for insurance

Campbell is charged with knowing the contents of an application for insurance which he signs. In Pennsylvania, "one who is about to sign a contract has a duty to read the contract first." *Hinkal v. Pardoe*, 2016 Pa. Super. 11 (Jan. 22, 2016). It is well established that, the failure to read a contract before signing the contract does not release the party from the obligations of the contract. *See id.* (citing *Standard Venetian Blind Co. v. Am. Empire Ins. Co.*, 503 Pa. 300, 305, 469 A.2d 563, 566 (1983)).

One who signs an application for insurance without reading it will be held to have read it. *Old Colonial Hotel, Inc. v. Assicurazioni Generali S.P.A.,* 1994 WL 34193, at *3 (E.D.Pa. Feb. 7, 1994). The applicant must be treated by the Court as someone who knows what he would have learned if he had read the application for insurance. *Id.* In Pennsylvania, if an applicant for insurance signs a blank application or fails to review an application for insurance before signing it may not avoid the responsibility imposed by the application. *Id.*

Campbell has admitted that he signed the March 6, 2013 application. Ex. 22, Campbell D.T. 1242. Therefore, Campbell must be held to have read it. As Campbell is held to have read his March 6, 2013 application, Campbell also is charged with the knowledge that his March 6, 2013 application contained the following misrepresentations, among others, that he: (1) had a standard written contract (Ex 11, at BERK0135 and Ex. 17, at BERK241), (2) had an annual

payroll from demolition operations of $125,000 (Ex. 11, at BERK0135 and Ex. 17, at BERK0242), (3) did not retain salvage from the demolition projects (Ex. 11, at BERK0135 and Ex. 17, at BERK0243), (4) did not use subcontractors (Ex. 11, at BERK0138, and Ex. 17, at BERK0244), (5) had a formal loss control or safety program, a risk manager and/or safety director who is responsible for safety activities (Ex. 11 at BERK0138 and Ex. 17, at BERK0244), (6) that prior to demolition, the buildings and structures were checked for lead, mold or other hazardous materials (Ex. 11 at BERK0138 and Ex. 17, at BERK0244), and (7) and that conditions of nearby structures were documented before demolition began (Ex. 11, at BERK0137 and Ex. 17, at BERK0243). The Court must, therefore, treat Campbell as someone who knows what he would have learned if he had read the application for insurance, and therefore void the Policy due to the material misrepresentations contained in the application.

(b) Campbell is liable for any misrepresentations made by his agent in the application for insurance.

Campbell is also liable for any misrepresentations made by McGlawn, his agent, because as principal Campbell is bound by any misrepresentations made by his agent.

"[T]he general rule of Pennsylvania law is that when an insured enlists an insurance broker to procure insurance without specifying an insurer, the broker is an agent of the insured, not the insurer." *Am. Home Assur. Co. v. Church of Bible Understanding*, 2006 WL 2583594, at *6 (E.D. Pa. Sept. 6, 2006).

Here, McGlawn was Campbell's agent, and Campbell retained McGlawn to procure insurance for Campbell for the Market Street project. Ex. 22, Campbell D.T. 1180-83. Campbell testified that during the process of obtaining insurance, Campbell gave the STB Parties the contact information for McGlawn and allowed McGlawn and the STB Parties to pick out the correct insurance for Campbell. Ex. 22, Campbell D.T. 534. McGlawn submitted the

applications for insurance on Campbell's behalf to at least three insurance carriers admitted in Pennsylvania. Ex. 24, McGlawn D.T. 134-135. After the carriers admitted in Pennsylvania refused to provide coverage to Campbell, McGlawn submitted the applications to a non-admitted insurance company through Atlantic Specialty, a retail agent. Ex. 24, McGlawn D.T. 95-96. As such, both through Campbell's admissions, McGlawn statements, and the actions that McGlawn took, it is clear that McGlawn was Campbell's agent.

Misstatements made in an insurance application by an insurance broker, and not the insured, do not relieve the insured from responsibility for the misstatements. *Luber v. Underwriters at Lloyd's*, 1992 WL 346467, at *5 (E.D. Pa. Nov. 16, 1992). If the insured does not review the application, but instead relies on the broker to provide appropriate answers, then the signing of the application containing the misrepresentations constitutes bad faith. *Id.* It is well established under Pennsylvania law that a principal is liable for the misrepresentations made by its agent acting within its authority. *Aiello v. Ed Saxe Real Estate, Inc.*, 508 Pa. 553, 499 A.2d 282, 287 (1985). "This holds true even where the principal did not participate or know of the misrepresentation." *Id.* As such, Campbell is liable for any misrepresentations made by McGlawn on the applications for insurance because McGlawn was acting with Campbell's authority and as his agent when procuring the Policy. "To hold otherwise is to violate public policy and permit the person who held out his agent as worthy of trust and confidence, to escape liability for his agent's deceits and frauds, while at the same time reaping the fruits of his agent's fraud." *Id.* This rule applies equally in the insured-broker context. *Id.* "An insured is bound by his broker's acts, even though fraudulent, and is charged with such broker's knowledge. A misrepresentation by such broker is, in law, the act of the insured, and he is chargeable with the consequences thereof." 16 Appleman, Insurance Law and Practice § 8728. As such, Campbell

is charged with whatever knowledge that McGlawn possessed, and Campbell is bound by the acts of his agent, McGlawn. If the misrepresentations on the insurance applications came from McGlawn, Campbell, as the principal is still liable for these misrepresentations, and thus Berkley may seek a declaration that the Policy is void.

D. The Berkley Policy Is Void As To All Individuals And Entities

In discovery, STB Investments Corp., 2100 W. Market Street, 2132 Market Street Realty, Corp., 303 W. 42nd Street Realty Corp., Thomas Simmonds, Frank Cresci, Richard Basciano, Lois Basicano (hereinafter together the "STB") asserted that they are additional insureds under the Policy and were "innocent insureds" and, as such, even if Campbell made misrepresentations on his applications, the Berkley Policy should not be void as to STB. However, even if STB were a purported "innocent insured" without knowledge of the misrepresentations, the Policy still does not provide coverage to STB.

Campbell's misrepresentations voided the Policy; in other words as set out above, the Policy was void *ab initio*. When a contract is void *ab initio*, it is void from the beginning and it is as if the contract never existed. As such, Campbell's misrepresentations have caused Berkley's Policy to be as if it never existed. When, as here, a contract is determined to be "void," the contract has no effect whatsoever. *Yannuzzi v. Com., State Horse Racing Comm'n*, 37 Pa. Cmwlth. 288, 291, 390 A.2d 331, 332 (1978). A declaration that the contract is void nullifies all aspects of the contract. *FDA Packaging Inc. v. Advance Pers. Staffing, Inc.*, 73 Pa. D. & C.4th 420, 430 (Com. Pl. 2005).

The Supreme Court of Pennsylvania has explained that rescission "amounts to the unmaking of a contract, not merely a termination…" *Klopp v Keystone Ins. Co.* 528 Pa. 1 595, n. 6. (1991). Every part of the Berkley Policy has been nullified by Campbell's

misrepresentations. As the Restatement (Second) of Contracts §7 emphasizes a "void contract is not a contract at all." Accordingly, the Berkley Policy, being void, due to the misrepresentations in procuring the policy, lacks any legal existence whatsoever, from inception. *FDA Packaging Inc.*, 73 Pa. D. & C.4th at 430.

The issue of the effect of rescission of an insurance policy on an additional insured (which had not made misrepresentations in the application-like the STB Parties herein) was squarely addressed in *Toll Bros. v Essex Ins. Co.*, 2015 U.S. Dist. LEXIS 55855; 2015; WL 1933699. (USDC, EDPa 2015) There, the Court explained that if a policy is voided by a misrepresentation in the application, the policy is void, retroactively, *ab initio*, and voids "all rights and responsibilities" that the insurer has to the policy holder, and also voids from the beginning, all rights and responsibilities that the insurer has to any additional insured under the policy. *Id.* at *14-15.

Accordingly, here, the Berkley Policy being void, as if it never existed, provides no coverage for Campbell and provides not coverage for any other individual or entity.

V. RELIEF REQUESTED

For the reasons discussed above, and in the accompanying Motion, Berkley respectfully requests entry of an Order granting summary judgment in its favor, and against Defendants, as to

Count II and Count III of the Third Amended Complaint, and declaring that the Berkley Policy is void *ab initio* and Berkley has no obligations under the Policy to Campbell and/or to any other person or entity.

Respectfully submitted,

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