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UNITED STATES DISTRICT COURT

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CENTRAL DISTRICT OF CALIFORNIA

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MAXUM INDEMNITY COMPANY, a
Corporation,

Case No. 2:16-cv-05907

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Plaintiff,

**COMPLAINT FOR
DECLARATORY RELIEF**

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vs.

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LONG BEACH ESCROW
CORPORATION, a Corporation; JOYCE
CLARK, an Individual, inclusive,

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Defendants.

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1 Plaintiff Maxum Indemnity Company (“Maxum”), for its Complaint against
2 Defendants Long Beach Escrow Corporation (“Long Beach Escrow”) and Joyce
3 Clark (“Clark”) (collectively, “Defendants”), alleges as follows:

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5 **NATURE OF ACTION**

6 1. This is an action to determine Maxum’s rights and obligations under its
7 Professional Liability Coverage Form (Non-Medical) policy, No. PFP-6015404-05,
8 which was issued to Long Beach Escrow for the period from April 23, 2015 to April
9 23, 2016 (the “Policy”). Maxum is currently defending the named insured, Long
10 Beach Escrow, and its officer and employee Clark, under the Policy and subject to a
11 reservation of rights, in the pending underlying negligence and breach of fiduciary
12 duty action entitled *Keely Partners, LP. v. Long Beach Escrow Corporation d/b/a*
13 *Long Beach Trading Company, Joyce Clark and Does 1 through 50*, filed in Los
14 Angeles County Superior Court, Case No. NC060577 (“the Keely Partners Action”).
15 Maxum seeks a determination of coverage with respect to any duty to indemnify
16 Long Beach Escrow and Clark if they are found liable for the injuries alleged in the
17 Keely Partners Action.

18 2. Maxum submits that an exclusion applies with respect to both claims
19 alleged against Long Beach Escrow and Clark, precluding coverage under the
20 Policy, and that a second exclusion also applies to the breach of fiduciary duty claim
21 alleged in the Keely Partners Action.

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23 **JURISDICTION AND VENUE**

24 3. **Jurisdiction.** This Court has jurisdiction over this action pursuant to 28
25 U.S.C. Section 1332(a) in that the parties to this action are citizens of different states
26 and the amount in controversy, exclusive of interest and costs, exceeds \$75,000.

27 4. **Venue.** Venue is proper in the Central District of California, pursuant
28 to 28 U.S.C. Section 1391(b)(1), in that Defendant Long Beach Escrow has its

1 principal place of business in Long Beach, California and, upon information and
2 belief, Defendant Clark is a resident of Long Beach, California, and are both located
3 within the Central District.

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5 **PARTIES**

6 5. **Maxum.** Plaintiff Maxum Indemnity Company is, and at all times
7 relevant times was, an insurance company and corporation organized and existing
8 under the laws of Delaware with its principal place of business in Alpharetta,
9 Georgia. Maxum operates as a surplus lines insurance company in the State of
10 California and is listed on the California Department of Insurance's List of
11 Approved Surplus Line Insurers. Accordingly, Maxum is a citizen of Delaware and
12 Georgia within the meaning of 28 U.S.C. § 1332.

13 6. **Long Beach Escrow.** Upon information and belief, Defendant Long
14 Beach Escrow Corporation's principal place of business is in Long Beach,
15 California, and is, therefore, a citizen of California within the meaning of 28 U.S.C.
16 § 1332.

17 7. **Joyce Clark.** Upon information and belief, Defendant Joyce Clark is a
18 citizen of the State of California and a resident of Long Beach, California within the
19 meaning of 28 U.S.C. § 1332.

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21 **FACTUAL BACKGROUND**

22 **The Misappropriation and Conversion of Keely Partners' Funds**

23 8. According to the Complaint in the Keely Partners Action, Keely
24 Partners is a limited partnership which conducts frequent real estate transactions,
25 and George Pappas is the managing partner of ECG, LLC, which is the general
26 partner of Keely Partners. In or about 2010, Keely Partners retained Long Beach
27 Escrow and Clark to serve as "accommodators" for funds involved in its real estate
28 business transactions, in which they would temporarily hold Kelly Partners' funds

1 until those funds could be transferred and applied to the corresponding real estate
2 transaction. The Complaint alleges that the “purpose behind this intermediate step
3 is so the accommodator’s customer may avoid various tax implications related to its
4 taking possession of the funds.”

5 9. The Complaint then alleges that “[s]ometime in early 2016, the email
6 service/address for Mr. Pappas was hacked into and taken control of by unidentified
7 individuals or entities,” and Keely Partners understands that the hackers sent an
8 email to Long Beach Escrow and Clark requesting three withdrawals from Keely
9 Partners’ account totaling over \$250,000 and providing information for a new bank
10 account into which the funds would be transferred. The Complaint also alleges that
11 the emails indicated that “Mr. Pappas was unavailable to confirm the transaction by
12 phone for several weeks.” The Complaint then alleges that Long Beach Escrow and
13 Clark “did not take any action or steps to verify the validity of the instructions
14 received in clear violation of industry standards.”

15 10. Keely Partners’ Complaint further alleges that, in response to the
16 hackers’ email, Long Beach Escrow and Clark “wired over \$250,000 to the hackers’
17 account without communicating directly with Plaintiff or any of its agents,
18 specifically Mr. Pappas, by telephone or by facsimile,” and that it “is standard
19 industry practice to use two different communication forums (e.g., email and
20 telephone) when confirming transaction requests.” Keely Partners further alleges
21 that in “wiring the funds to the hackers’ account without first authenticating and
22 verifying the transaction or the new account information, and without first
23 personally speaking to an agent for” Keely Partners, Long Beach Escrow and Clark
24 “failed to follow their own established protocol for wire transfers as well as the
25 custom and practice in industry before wiring the money.” The Complaint alleges
26 that Keely Partners “has not recovered any of the funds stolen from its account.”
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The Filing of the Keely Partners Action and
Maxum’s Defense of Long Beach Escrow and Clark

11. On April 11, 2016, Keely Partners filed the Complaint in the Keely Partners Action, seeking damages against Long Beach Escrow and Clark for the theft of the escrow funds in an amount in excess of \$250,000. Keely Partners has alleged claims of negligence and breach of fiduciary duty against both Long Beach Escrow and Clark.

12. The first cause of action for negligence alleges that Long Beach Escrow and Clark breached their duty to Keely Partners “by failing to follow its own protocol as well as industry standards for wire transfers, specifically by transferring [Keely Partners’] funds to a new bank account without first verifying the request or the new account information, and without requiring a verbal conversation with a representative for [Keely Partners] (as opposed to simply email).” Keely Partners then alleges that such breach caused it “to lose funds from its account via theft because the required safeguards were not in place.” Under that negligence cause of action, Keely Partners claims the following damages: the over \$250,000 in funds stolen, potential penalties for failure to perform on specific previously agreed-to contractual transactions, potential contract damages related to failure to perform, and significant capital gains liability because a tax-free exchange was no longer possible once the funds were stolen.

13. The second cause of action for breach of fiduciary duty realleges the prior allegations from the negligence and additionally alleges that a “fiduciary relationship existed” between Keely Partners and Long Beach Escrow/Clark because they “offered services as an accommodator” and Keely Partners “accepted and paid for the same.” The damages claimed under this cause of action include the amount of the funds stolen, penalties caused by the breach of fiduciary duty and associated opportunity costs.

1 3. Any damages arising out of the commingling, conversion,
2 misappropriation or defalcation of funds or other property (the “Funds
3 Exclusion”).

4 18. Second, in the basic policy form, the following exclusion is set forth:
5 This insurance does not apply to:

6 Q. Any “claim” arising out of or resulting from any “insured’s”
7 fiduciary duty, responsibility or obligation (the “Fiduciary Duty
8 Exclusion”).

9 19. Based on the allegations of the Complaint in the Keely Partners Action,
10 and its investigation of the facts of the underlying claim, Maxum believes that no
11 coverage exists under the Policy since the claim alleged against Long Beach Escrow
12 and Clark in the Keely Partners Action arises out of the conversion or
13 misappropriation of funds and thus the Funds Exclusion applies to preclude
14 coverage for such claim. In addition, with respect the second cause of action for
15 breach of fiduciary duty, this claim is precluded by the express Fiduciary Duty
16 Exclusion, which excludes coverage for any claim arising out of or resulting from
17 Long Beach Escrow and Clark’s fiduciary duty, responsibility or obligation.

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19 **FIRST CLAIM FOR DECLARATORY RELIEF**

20 **(The Funds Exclusion Applies to Preclude Coverage**

21 **for the Keely Partners Action)**

22 **(Against All Defendants)**

23 20. Maxum hereby incorporates by reference, as though fully set forth
24 herein, the allegations in paragraphs 1 through 19, inclusive.

25 21. An actual controversy has arisen and now exists between Maxum and
26 Defendants concerning their respective rights and duties under the Policy as
27 described herein. This Court is authorized and empowered to declare and adjudicate
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1 the rights and legal relationships of the parties to this action with reference to the
2 issues raised by this Complaint.

3 22. Maxum contends that the Funds Exclusion applies to preclude coverage
4 under the Policy for both claims alleged against Long Beach Escrow and Clark in
5 the Keely Partners Action because both claims arise out of the conversion or
6 misappropriation of funds.

7 23. Maxum is informed and believes and based thereon alleges that Long
8 Beach Escrow and Clark dispute Maxum's contention.

9 24. Maxum requests a judicial determination of the rights and obligations
10 of each of the parties to this action with respect to the terms of the Maxum Policy.

11 25. A judicial determination is necessary, appropriate, and desirable at this
12 time so that each of the parties may ascertain their respective rights and duties as to
13 one another and may conduct themselves accordingly now and in the future.

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15 **SECOND CLAIM FOR DECLARATORY RELIEF**

16 **(The Fiduciary Duty Exclusion Applies to Preclude Coverage**
17 **for the Breach of Fiduciary Duty Claim in the Keely Partners Action)**
18 **(Against All Defendants)**

19 26. Maxum hereby incorporates by reference, as though fully set forth
20 herein, the allegations in paragraphs 1 through 19, inclusive.

21 27. An actual controversy has arisen and now exists between Maxum and
22 Defendants concerning their respective rights and duties under the Policy as
23 described herein. This Court is authorized and empowered to declare and adjudicate
24 the rights and legal relationships of the parties to this action with reference to the
25 issues raised by this Complaint.

26 28. Maxum contends that the Fiduciary Duty Exclusion, which excludes
27 coverage for any claim arising out of or resulting from Long Beach Escrow and
28 Clark's fiduciary duty, responsibility or obligation, precludes coverage under the

1 Policy with respect to the second cause of action for breach of fiduciary duty in the
2 Keely Partners Action.

3 29. Maxum is informed and believes and based thereon alleges that Long
4 Beach Escrow and Clark dispute Maxum’s contention.

5 30. Maxum requests a judicial determination of the rights and obligations
6 of each of the parties to this action with respect to the terms of the Maxum Policy.

7 31. A judicial determination is necessary, appropriate, and desirable at this
8 time in order that each of the parties may ascertain their respective rights and duties
9 under the Policy as to one another and may conduct themselves accordingly now
10 and in the future.

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12 **PRAYER FOR RELIEF**

13 WHEREFORE, Maxum prays for judgment as follows:

14 1. For a declaratory judgment of this Court with respect to the Maxum
15 Policy, decreeing the rights, duties and obligations of the parties consistent with
16 Maxum’s contentions as set forth above;

17 2. That, if Maxum is found not to have any coverage obligations to Long
18 Beach Escrow and Clark, it may withdraw from their defense in the Keely Partners
19 Action;

20 3. That Maxum be awarded its costs of suit herein;

21 4. For such other and further relief as the Court may deem proper and just.

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23 DATED: August 8, 2016

HINSHAW & CULBERTSON LLP

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25 By: /s/ Larry M. Golub
26 LARRY M. GOLUB
27 PAUL RODRIGUEZ
28 Attorneys for Plaintiff
Maxum Indemnity Company