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County of KOOTENAI)ss

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IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE

STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

LAKELAND TRUE VALUE HARDWARE, LLC, *Plaintiffs*, vs. **THE HARTFORD FIRE INSURANCE COMPANY.** *Defendants*.	Case No. **CV 2008 7069** **MEMORANDUM DECISION AND ORDER RE: HARTFORD'S MOTIONS IN LIMINE**

I. INTRODUCTION AND PROCEDURAL BACKGROUND.

Plaintiff Lakeland True Value Hardware LLC (Lakeland) owned a hardware store in Rathdrum, Idaho. Complaint, p. 1, ¶¶ 1, 4. On January 28, 2008, due to snow load, the roof of the hardware store collapsed, causing immediate cessation of the hardware store business. *Id.,* p. 2, ¶ 5. Lakeland was insured by The Hartford (Hartford). Lakeland made a claim under its policy with Hartford for Lakeland's loss. *Id.,* ¶ 6.

On September 4, 2008, Lakeland filed this lawsuit against Hartford, alleging delay in payment of the claim, bad faith and breach of contract. *Id.,* ¶¶ 7, 8. On August 20, 2009, Hartford filed a Motion for Summary Judgment, claiming there was no dispute of material fact that Hartford had paid Lakeland what was owed under the policy, both for the Business Personal Property loss, and under the Business Income portion of the policy, and thus, both Lakeland's breach of contract claim and bad faith claim should be dismissed. Memorandum in Support of Hartford's Motion for Summary Judgment, pp. 2-4. Oral argument on the Hartford's Summary Judgment motion was held on November 4, 2009.

At the conclusion of that hearing, the Court held Lakeland's bad faith (breach of the duty of good faith) claim must be dismissed, and summary judgment was granted in favor of Hartford because Lakeland had failed to prove that the claim was not fairly debatable, primarily due to the fact that Lakeland's demands for amounts due under the policy kept changing. Lakeland's breach of contract claims relating to Hartford's determination of the "period of restoration" survived summary judgment and remained for determination at the jury trial. November 23, 2009, Order Granting Defendant's Motion to Compel and Order Granting Defendant's Summary Judgment in Part and Denying in Part, pp. 1-2.

On December 16, 2009, Lakeland filed a Motion for Reconsideration. The basis of Lakeland's motion to reconsider was that because Hartford's motion for summary judgment was based on the theme that the Hartford had paid all that was owed Lakeland under the policy, such theme wasn't the primary issue; the primary issue was delay in making payments under the policy. Memorandum in Support of Motion for Reconsideration, pp. 1-2. On January 13, 2010, oral argument was held on Lakeland's Motion for Reconsideration. At the conclusion of that hearing, the Court denied Lakeland's Motion for Reconsideration, finding that the Court had considered Lakeland's claims of alleged delay in making payments at the summary judgment hearing and decision, that the dispute in value of the claims was caused by Lakeland in the first instance, due to: 1) inconsistent and different figures at different times, and 2) due to Lakeland's failure to timely provide Hartford with material it had requested. At the conclusion of the Court's decision, counsel for Lakeland claimed "the Court just said…the Court is making a finding of fact that it is Lakeland's fault that Hartford didn't timely make payments…that is a finding of fact." Digital record, 12:33:08-27. The Court pointed out that the Court was finding that Lakeland had not proven that the claim was not fairly debatable due to Lakeland's unsupported,

inconsistent and changing demands upon Hartford.

In spite of that clarification by the Court, on February 4, 2010, Lakeland filed "Plaintiff's Second Motion for Reconsideration." This time Lakeland claims: "The Court made findings of fact which it cannot do as a matter of law." Plaintiff's Memorandum in Support of Second Motion for Summary Judgment, p. 2. Lakeland states: "This appears to be a finding of fact that the delay was Lakeland's fault." *Id.* Lakeland then made the following argument which not only ignores this Court's findings, but shows complete misunderstanding of the law of bad faith in Idaho, the elements of that tort, and which party bears the burden of proof as to those elements:

> The Court said it was not finding that it was Lakeland's fault, which only leaves that the Court found that the issues surrounding the information being provided to Hartford at least made it fairly debatable as to whether the claim was timely paid. Another way to say it is that the Court found that it is at least fairly debatable as to whether or not Hartford was reasonable to withhold payment given that a dispute about whether the information was being provided exists. Under the Court's holding, there could never be a bad faith case if there is a dispute centered on whether the insured provided the necessary information for the insurance company to timely pay the claim.

Id. It is unknown how Lakeland can make the claim that "…Hartford at least made it fairly debatable as to whether the claim was timely paid". In an insurance claim, the ball starts rolling with the insured making a claim upon the insurer, putting the insurer on notice of the claim. Then the insurer must evaluate that claim and act in good faith. But to prove bad faith, the insured must prove that: 1) the insurer denied a claim in which coverage was not fairly debatable, and 2) that the insured had proven coverage to the point that based on the evidence the insurer had before it, the insurer intentionally and unreasonably withheld the insured's benefits. *Robinson v. State Farm Mutual Automobile Insurance Company,* 137 Idaho 173, 178, 45 P.2d 829, 834 (2002). In the present case, this Court has found that when Lakeland started the ball rolling by making its claim, Lakeland made unsupported,

inconsistent and changing claim demands upon Hartford. It is entirely Lakeland's business for Lakeland to characterize that as this Court laying "fault" upon Lakeland, but such exercise is not productive. At summary judgment on Lakeland's bad faith claim, *fault* upon Lakeland is wholly *irrelevant*. However, proving the claim was *not* fairly debatable and proving coverage to the point that based on the evidence before it the insurer then intentionally and unreasonably withheld benefits is not only *relevant*, it is *dispositive*, and, most importantly, it is *Lakeland's burden* to prove at summary judgment. Because Lakeland made unsupported, inconsistent and changing claim demands upon Hartford, at summary judgment Lakeland could not prove its own claim was not fairly debatable, and Lakeland could not prove coverage to the point that based on the evidence Lakeland had given to Hartford that Hartford then intentionally and unreasonably withheld benefits.

This matter came before the Court for oral argument on February 22, 2010. At the conclusion of that hearing, this Court denied "Plaintiff's Second Motion for Reconsideration."

On February 22, 2010, this Court heard oral argument on several other motions. The Court denied Lakeland's Motion to Amend Complaint (which sought to add a claim for punitive damages when all that is left is Lakeland's breach of contract claim against Hartford), granted Hartford's Motion to Strike the Affidavit of Robert E. Underdown, and denied Hartford's Motion for a Protective Order (regarding some upcoming depositions). The Court took under advisement Hartford's Motion in Limine re: Harper and Hartford's Motion in Limine re: Damages. This lawsuit is scheduled for a ten-day jury trial beginning March 22, 2010.

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II. ANALYSIS.

A. HARTFORD'S MOTION IN LIMINE RE: (CONSEQUENTIAL) DAMAGES.

On February 9, 2010, Hartford filed its Motion in Limine Re: Damages, Affidavit of Counsel in Support of Defendant's Motion in Limine Re: Damages, and Memorandum in Support of Motion in Limine Re: Damages. Hartford seeks a ruling from this Court barring at the jury trial Lakeland's claims of: 1) consequential damages for any alleged breach of contract by Hartford, and 2) expenses and damages that are either personal to the owners of Lakeland, Michael and Kathy Fritz, undocumented damages or damages which the Hartford has already paid. Memorandum in Support of Motion in Limine Re: Damages, pp. 1-2. On February 16, 2010, Lakeland filed "Plaintiff's Response to Defendant's Motion in Limine." On February 18, 2010, Hartford filed "Reply in Support of Defendant's Motion in LImine Re: Damages."

1. Consequential Damages.

Hartford seeks a ruling in limine from this Court barring Lakeland's claims of consequential damages for any alleged breach of contract by Hartford. In addition to 1) "Contract damages for lost business income for the balance of the period of restoration, January 28th, per the report of Dan Harper $30,400", (these damages are clearly allowed if the period of restoration is proven to be later than October 31, 2008), Lakeland also claims as damage: 2) "Tort damage for lost business income from January 2009 through September 2009 per the report of Dan Harper -- $136,400; 3) Contract damages for continuing normal operating expenses through the balance of the period of restoration, January 28th, 2009, per the report of Dan Harper -- $24,500; 4) Tort Damages for continuing normal operating expenses through September 2009, per the report of Dan Harper -- $39,000; 5) True Value back charge for lease hold improvements that had to be repaid due to late account status -- $17,219; 6) Miscellaneous charges due to cash flow

problems though May 2009; 7) Colonial Pacific Leasing Group has filed suit and has obtained a default. The amount of this judgment is not yet determined. Kootenai County Case No. CV09-1981; 8) Great American Leasing – Judgment $$51,759.58 + $657.55, plus interest of 18% per anum; 9) Contract damages for Adjusters International -- $16,000; and 10) Punitive damages -- $500,000, or such other sum as a jury deems appropriate." Affidavit of Counsel in Support of Defendant's Motion in Limine Re: Damages, Exhibit A: Plaintiff's Fourth Supplemental Response to Defendant's First Set of Interrogatories and Requests for Production, pp. 4-5. Lakeland's policy with Hartford reads:

> **4. Business Income and Extra Expenses Exclusions.** We will not pay for:
>
> * * *
>
> b. Any other consequential loss.

Affidavit of Counsel in Support of Defendant's Motion in Limine Re: Damages, Exhibit B, p. 18. Hartford argues Lakeland is claiming damages beyond the twelve-month period following the January 28, 2008, roof collapse. That twelve-month period ended on January 28, 2009. Hartford argues "These damages were not specifically contemplated as recoverable by the parties at the time of contracting because [the above] provision in the Policy specifically excludes coverage for consequential damages; rather, they were expressly contemplated as damages that were excluded from coverage." Memorandum in Support of Motion in Limine Re: Damages, pp. 5.

Damages recoverable for breach of contract are those that arise naturally from the breach and are reasonably foreseeable. *Silver Creek Computers, Inc. v. Petra, Inc.,* 136 Idaho 879, 884, 42 P.3d 672, 677 (2002); *citing Appel v. LePage,* 135 Idaho 133, 136-37, 15 P.3d 1141, 1144-45 (2000). Damages need not have been precisely and specifically foreseeable at the time of contracting, but only reasonably foreseeable by the parties. *Id.*

However, "Under general contract principles, consequential damages are not recoverable unless specifically contemplated by the parties at the time of contracting. *Id.,* citing *Appel,* 135 Idaho 133, 136-37, 15 P.3d 1141, 144-45; *Brown's Tie & Lumber Co. v. Chicago Title Co. of Idaho,* 115 Idaho 56, 61, 764 P.2d 423, 428 (1988); *Suitts v. First Sec. Bank of Idaho, N.A.,* 110 Idaho 15, 22, 713 P.2d 1374, 1381 (1985). Consequential damages are not recoverable where they are not specifically contemplated by the parties. *Silver Creek Computers, Inc. v. Petra, Inc.,* 136 Idaho 879, 884, 42 P.3d 672, 677, citing *Appel,* 135 Idaho 133, 137, 15 P.3d 1141, 145; *Brown's Tie & Lumber Co. v. Chicago Title Co. of Idaho,* 115 Idaho 56, 61, 764 P.2d 423, 428. Hartford accurately cites these cases (Memorandum in Support of Motion in Limine Re: Damages, pp. 3-6) for the rule of contract law stated in those cases, but these cases do not deal with policy language under an insurance contract. Hartford cites other cases for insurance policy provisions with identical language to Lakeland's policy with Hartford regarding exclusion of consequential damages: *Blis Day Spa, LLC v. The Hartford Ins. Group,* 427 F.Supp.2d 621 (2006) (interpreting North Carolina law); and *Streamline Capital, LLC v. Hartford Casualty Ins. Co.,* 2003 WL 22004888 (U.S. Dist.Ct. S.D. N.Y. 2003) (interpreting New York law). Memorandum in Support of Motion in Limine Re: Damages, pp. 5-10.

Streamline is a breach of contract case involving a Hartford policy, specifically business income loss and the "period of restoration". Streamline provided computer services to other businesses (securities traders, brokers and dealers) in the World Trade Center. Streamline's headquarters and many of the businesses Streamline served were completely destroyed by the September 11, 2001, terrorist attacks. Hartford paid Streamline $200,000 to lease another space, but that space resulted in a conflict with a competitor, and Streamline felt it needed to relocate again. Because Hartford would pay

no more than the $200,000 to Streamline, Streamline lost the ability to rent space at a different location. Streamline sued for not only the additional payments it claimed were due under their version of when the "period of restoration" ended, but also for "consequential damages, which include business opportunities that were lost because of the defendant's alleged failure promptly to meet its payment obligations under the contract." 2003 WL 22004888, p. 4. The analysis of that issue in *Streamline* is set forth below, and begins with a discussion of contract law identical to the Idaho cases of *Brown' Tie & Lumber, Appel* and *Silver Creek Computers:*

> Citing a Second Circuit case that incorporated an earlier New York State Court of Appeals ruling, we stated that " 'to recover damages beyond those flowing naturally from the breach, "such ... damages must have been brought within the contemplation of the parties as the probable result of a breach at the time of or prior to contracting." " ' *Continental,* 2003 U.S. Dist. LEXIS 682, at *15 (quoting *Harris v. Provident Life & Accident Ins. Co.,* 310 F.3d 73, 80 n. 3 (2d Cir.2002) (quoting *Kenford Co. v. County of Erie,* 73 N.Y.2d 312, 319, 540 N.Y.S.2d 1, 4, 537 N.E.2d 176 (1989))). We continued:
>
> > Thus, it is clear that unless a plaintiff alleges that the specific injury was of a type contemplated by the parties at the time of contracting, a claim for consequential damages should be dismissed. *See Brody Truck Rental, Inc. v. Country Wide Ins. Co.,* 277 A.D.2d 125, 126, 717 N.Y.S.2d 43, 44 (1st Dept.2000) (dismissing the action because the insurance contract did not cover consequential damages and the parties did not contemplate recovery of consequential damages at the time of contracting); *Martin v. Metropolitan Prop. & Casualty Ins. Co.,* 238 A.D.2d 389, 390, 656 N.Y.S.2d 318, 319 (2d Dept.1997) (dismissing action where party sought reimbursement for foreclosure allegedly caused by non-payment of premiums as foreclosure was not foreseeable at the time of contracting).
> >
> > Specifically, in order to determine whether such damages were within the contemplation of the parties at the time of contracting, New York courts take into consideration whether there existed a specific provision in the policy itself permitting recovery for the loss. *See e.g. Brody Truck Rental,* 277 A.D.2d 125 at 126, 717 N.Y.S.2d at 44 (dismissing defendant's claim for consequential damages and specifically noting that "the insurance policy ... contains no provision or language indicating that recovery of consequential damages was within the contemplation of the parties."); *High Fashion Hair Cutters v. Commercial Union*

Insurance Co., 145 A.D.2d 465, 467, 535 N.Y.S.2d 425, 427 (2d Dept.1998) (holding that the "plaintiff was not entitled to consequential or indirect damages since the policy did not contain a specific provision permitting recovery for such loss.") *Martin,* 238 A.D.2d 389 at 390, 656 N.Y.S.2d at 319 (dismissing the claim for consequential damages and explaining that "... the contract of insurance does [not] contain any language which permits recovery for consequential damages.").

Continental, 2003 U.S. Dist. LEXIS 682, at *15-*16.

Here, the complaint does not even allege that the parties contemplated at the time of contracting that Streamline would incur additional harm from financing costs and loss of business in the event Hartford failed promptly to meet its obligations under the Policy. Nor is there a provision in the Policy making Hartford liable for such damages.

And significantly, the Policy itself contains a provision specifically disclaiming any liability on Hartford's part for such losses. Specifically, the Exclusions section of the Policy reads:

> 4. Business Income and Extra Expense Exclusions. We will not pay for:
>
> a. Any Extra Expense, or increase of Business Income loss, caused by or resulting from:
>
> (1) Delay in rebuilding, repairing or replacing the property or resuming "operations", due to interference at the location of the rebuilding, repair or replacement by strikers or other persons; or
>
> (2) Suspension, lapse or cancellation of any license, lease or contract. But if the suspension, lapse or cancellation is directly caused by the suspension of "operations", we will cover such loss that affects your Business Income during the "period of restoration".
>
> b. Any other consequential loss.

Policy at 11 (Pl. Cross-Motion Ex. A at STM 61).

The meaning of this provision is unambiguous. *Black's defines "consequential loss" as "[a] loss arising from the results of damage rather than from the damage itself." Black's Law Dictionary (7th ed.1999).* Losses that Streamline incurred only because of Hartford's alleged failure promptly to meet its obligations under the Policy are clearly losses arising from the results of the damage at the World Trade Center rather than from the damage itself. Thus, the language of the contract, a key factor under New York law in determining whether consequential damages for breach of an insurer's policy obligations were within the contemplation of the parties, in this case further demonstrates that the parties did not anticipate the insurer would be liable for such damages. *See Crawford Furniture Mfg. Corp. v. Pa. Lumbermens Mut. Ins. Co.,* 244 A.D.2d 881, 668

N.Y.S.2d 122, 122-23 (4th Dep't 1997) (reversing trial court's denial of motion to dismiss request for consequential damages where "[p]laintiff failed to establish that such damages were reasonably foreseeable or contemplated by the parties" and "the contract at issue contain[ed] a provision excluding from business interruption coverage 'any other consequential loss" ').

Plaintiff relies heavily on *Sabbeth Indus. v. Pa. Lumbermens Mut. Ins. Co.,* 238 A.D.2d 767, 656 N.Y.S.2d 475 (3d Dep't 1997). In that case, the Appellate Division of the New York Supreme Court dealt with a trial court ruling prohibiting plaintiff from amending its complaint to include a claim for consequential damages on the ground that the insurance policy lacked express provisions or other language demonstrating that recovery of consequential damages was contemplated. *Sabbeth Indus.,* 238 A.D.2d at 767-68, 656 N.Y.S.2d at 476-77. The Appellate Division overruled, calling the lack of express policy language dealing with consequential damages "immaterial," and concluding that, in view of the "specific protection [business interruption] coverage provides, ... consequential damages were reasonably foreseeable and within the contemplation of these parties." *Id.* at 477.

We believe *Sabbeth* is inconsistent with the weight of authority of New York cases, which have focused on the specific language of the contract to find that consequential damages were within the contemplation of the parties at the time of contracting. Those cases include cases we cited in *Continental,* such as *Brody Truck Rental,* 277 A.D.2d at 126, 717 N.Y.S.2d at 44 (1st Dep't 2000), *High Fashion Hair Cutters,* 145 A.D.2d at 467, 535 N.Y.S.2d at 427 (2d Dep't 1998), *Martin,* 238 A.D.2d at 390, 656 N.Y.S.2d at 319 (2d Dep't 1997); as well as *Sweazey v. Merchants Mut. Ins. Co.,* 169 A.D.2d 43, 45, 571 N.Y.S.2d 131, 132 (3d Dep't 1991) (reversing trial court's refusal to strike claim for consequential damages and stating that consequential damages "must have been brought within the contemplation of the parties as a probable result of a breach at the time of or prior to contracting" and finding that "[t]he insurance policy in this case contains neither provisions nor language which demonstrates that recovery of consequential damages was within the contemplation of the parties"). *See also Zurich Am. Ins. Co. v. ABM Indus., Inc.,* 01 Civ. 11200(JSR), 2003 U.S. Dist. LEXIS 8973, at *15-*16 (S.D.N.Y. May 29, 2003) (dismissing, in declaratory judgment action, defendant's claim for consequential damages based on 1) court's rejection of some of the claims for breach of contract underlying the consequential damages claim, and 2) court's finding that defendant "utterly failed to specify nature of its alleged consequential damages or adduce competent evidence showing, as required for any such claim, that the consequential damages were foreseeable and within the contemplation of the parties at the time the contract was made") (citations omitted).

Moreover, *Sabbeth* did not include the compelling fact that exists here: that the only contract language specifically dealing with consequential damages precludes them. Thus, we conclude that making the insurer liable for consequential damages stemming from the insurer's

> own alleged breach was not within the contemplation of the parties at the time of contracting, and we grant defendant's motion to dismiss plaintiff's claim for consequential damages.

Streamline, 2003 WL 22004888, pp. 4-7. (bold and italics added). Lakeland argues:

> Reliance on this case [*Streamline*] is frivolous. This is an unpublished federal case interpreting New York law in 2003 and the interpretation is not a correct statement of current New York law on the subject.

Plaintiff's Response to Defendant's Motion in Limine, p. 2. Reliance on *Streamline* is in fact not frivolous. *Streamline* is solidly on point. *Streamline* is in fact not an "unpublished" decision, but is simply a decision not reported in Federal Supplement 2d. *Streamline* concerns the same insurance company, Hartford. *Streamline* concerns identical policy language to that of the present case. *Streamline* interprets New York state case law on contracts which is similar, if not identical, to Idaho case law on contracts.

Lakeland claims *Bi-Economy Market, Inc. v. Harleysville Ins. Co. of New York,* 10 N.Y.3d 187, 194, 886 N.E.2d 127, 856 N.Y.S.2d 505 (N.Y. 2008), involves a policy that "was almost identical to the policy in this case". Plaintiff's Response to Defendant's Motion in Limine, p. 2. Nowhere in the *Bi-Economy* decision is the consequential damage exclusion discussed. The *Bi-Economy* decision makes no mention of an "appraisal provision" in the applicable insurance contract. Thus, without that policy language, it is difficult to understand Lakeland's argument that the policy "was almost identical to the policy in this case." Apparently Lakeland claims *Bi-Economy* is the correct current statement of New York law on the subject. *Id.* What Lakeland ignores is the fact that *Bi-Economy* is a bad faith case, and *Streamline* was not a bad faith case. Lakeland's case is no longer a bad faith case, as summary judgment has been granted against Lakeland in favor of Hartford on Lakeland's bad faith claims. The following quote from *Bi-Economy* shows that it is a bad faith case, and shows how important the fact that it is a bad faith

case is to the majority's decision:

> Thus, the very purpose of business interruption coverage would have made Harleysville aware that if it *breached its obligations under the contract to investigate in good faith* and pay covered claims it would have to respond in damages to Bi-Economy for the loss of its business as a result of the breach (*see Sabbeth Indus. v Pennsylvania Lumbermens Mut. Ins. Co.*, 238 AD2d 767, 769 [3d Dept 1997]).

10 N.Y.3d 187, 195, 886 N.E.2d 127, 132, 856 N.Y.S.2d 505, 510. (italics added). A breach of the covenant to act in good faith is the tort of bad faith. The dissent in *Bi-Economy* shows how intertwined the tort of bad faith was intertwined with the decision to allow a claim for consequential damages:

> The majority achieves this simply by changing labels: Punitive damages are now called "consequential" damages, and a bad faith failure to pay a claim is called a breach of the "covenant of good faith and fair dealing."

10 N.Y.3d 187, 196, 886 N.E.2d 127, 133, 856 N.Y.S.2d 505, 511.

Bi-Economy, in turn, cites several cases for the proposition that an exclusion provision regarding consequential loss does not bar recovery of consequential damages. 10 N.Y.3d 187, 188. One of those cases is, *Hold Brothers, Inc. v. Hartford Casualty Ins. Co.* 357 F.Supp.2d 651 (S.D.N.Y. 2005). Another case is the first version of *Lava Trading, Inc. v. Hartford Fire Ins. Co.,* 326 F.Supp.2d 434 (S.D.N.Y. 2004), These cases must be discussed.

Neither Lakeland nor Hartford discussed *Hold Brothers, Inc. v. Hartford Casualty Ins. Co.* 357 F.Supp.2d 651 (S.D.N.Y. 2005), in their briefing or in oral argument. *Hold Brothers* is *the* case that Lakeland should have been advocating this Court adopt. *Hold Brothers* is factually very similar to *Streamline*. Hold Brothers was in the securities trading and software development business, and had just completed about $1 million in improvements in their offices in the World Trade Center when that office was completely

destroyed in the September 11, 2001, terrorist attacks. 357 F.Supp.2d 651, 653.

Hartford insured Hold Brothers for property damage and loss of business income. 357 F.Supp.2d 651, 652. The reasoning in *Hold Brothers* is as follows:

> Hartford maintains that, at any rate, the Policies expressly exclude recovery of consequential losses. Thus, Hartford argues that notwithstanding Hold Brothers' allegation that "[t]he parties understood and contemplated that a breach by Hartford of its obligation to pay business income and/or extra expense losses under the Policies would likely cause Hold Brothers to suffer further loss of income and/or extra expenses," (footnote omitted) Hold Brothers fails to state a claim for consequential damages. Specifically, Hartford points to two exclusions in the Policies. *First,* the Policies state that Hartford "will not pay for loss or damage caused by or resulting from ... Consequential Losses: Delay, loss of use or loss of market." (footnote omitted) *Second,* under the heading "Business Income and Extra Expense Exclusions," the Policies provide that:
>
> > [Hartford] will not pay for:
> >
> > a. Any Extra Expense, or increase of Business Income loss, caused by or resulting from:
> >
> > (1) Delay in rebuilding, repairing or replacing the property or resuming 'operations,' due to interference at the location of the rebuilding, repair or replacement by strikers or other persons; or
> >
> > (2) Suspension, lapse or cancellation of any license, lease or contract. But if the suspension, lapse or cancellation is directly caused by the suspension of 'operations,' we will cover such loss that affects your Business Income during the 'period of restoration.'
> >
> > b. *Any other consequential loss.*[FN52]
> >
> > FN52.*Id.* § B.4. (emphasis added).
>
> Hartford contends that these provisions excluding coverage for consequential losses preclude Hold Brothers' claim for consequential damages resulting from Hartford's alleged breach of the Policies.[FN53]
>
> > FN53.*See* Hartford Mem. at 13; *J.R. Adirondack,* 739 N.Y.S.2d at 797 (dismissing claim for consequential damages because "[t]he insurance policy at issue here expressly excludes coverage for consequential losses"); *Crawford,* 668 N.Y.S.2d at 122-23 (holding that consequential damages are unavailable because "[p]laintiff failed to establish that such damages were reasonably foreseeable or contemplated by the parties when the contract was formed ... and, indeed, the contract at issue contains a provision excluding

from business interruption coverage 'any other consequential loss" ') (citations omitted).

Hold Brothers responds that the cited provisions are *coverage* exclusions and have no bearing on the availability of consequential damages resulting from breach.[FN54]

FN54.*See* Memorandum of Law in Opposition at 13-15; *see also Lava Trading,* 326 F.Supp.2d at 442 ("The scope of a policy's coverage and the damages that are recoverable if the insurer breaches the policy are, of course, distinct concepts.").

"Under New York law, the initial interpretation of a contract is a matter of law for the court to decide." (citation footnote omitted). "Part of this threshold interpretation is the question of whether the terms of the insurance contract are ambiguous." (citation footnote omitted). "Where there are alternative, reasonable constructions of a contract, *i.e.,* the contract is ambiguous, the issue should be submitted to the trier of fact." (citation footnote omitted). **For the purposes of this motion, it is only necessary to say that the provisions cited by Hartford do not unambiguously exclude the recovery of consequential damages resulting from breach of the Policies. Neither provision makes any reference to losses or damages resulting from breach; on the contrary, both provisions appear in the context of exclusions of coverage for certain kinds of losses.** Hold Brothers' construction is, therefore, eminently reasonable. [FN58]

FN58.***See Lava Trading,* 326 F.Supp.2d at 442 (holding that an identical provision "speaks only to what constitutes a covered loss under a policy of insurance, and not to what remedies are available for breach of a policy"); *but see Streamline Capital,* 2003 WL 22004888, at *7 (holding that the same provision precludes** consequential damages resulting from breach).

Thus, while the cited policy language may ultimately have a direct bearing on what damages for breach were within the contemplation of the parties at the time of contracting, a question of fact exists as to whether these provisions exclude the recovery of consequential damages.

Having determined that (1) New York law requires that in order to recover consequential damages for breach of an insurance policy, the policyholder must show only that such damages were within the contemplation of the parties as the probable result of a breach at the time of or prior to contracting and (2) the provisions of the Policies excluding consequential losses do not unambiguously exclude the recovery of consequential damages, I conclude that Hold Brothers' claim for consequential damages satisfies the permissive pleading standard of Rule 8. In keeping with this standard, Hold Brothers need not plead specific facts to support its claim; it is more than sufficient at this stage that Hold Brothers has alleged that "[t]he parties understood and contemplated that a breach by Hartford of its obligation to pay business income and/or extra expense losses under the Policies would likely cause Hold Brothers to suffer further loss of income and/or extra expenses." [FN59] Thus, Hold Brothers has adequately pled a claim for consequential damages.

(footnote omitted).

> FN59. Compl. ¶ 17. Hartford argues that Hold Brothers fails to state a claim for consequential damages because the complaint fails to allege that the parties contemplated that Hartford would be *liable* for the specific consequential damages sought. *See* Hartford Mem. at 7. Not only is this argument out of sync with *Swierkiewicz v. Sorema* and the rest of the Supreme Court's and Second Circuit's Rule 8 jurisprudence, but it is also premised on a misreading of *Kenford.* On a motion to dismiss, a court must draw all reasonable inferences in plaintiff's favor. It is reasonable to infer from Hold Brothers' allegations that Hartford assumed liability for losses resulting from a breach of the contract. In any case, as stated earlier, in order to impose liability for consequential damages, the plaintiff must show that such "unusual or extraordinary *damages* ... [were] within the contemplation of the parties as the probable result of a breach." *Kenford,* 73 N.Y.2d at 319, 540 N.Y.S.2d 1, 537 N.E.2d 176 (emphasis added).

357 F.Supp.2d 651, 658-660. (bold added). The bold portion of the *Hold Brothers* decision shows the court in *Hold Brothers* found the exclusion of consequential damages provision to be ambiguous. In making that finding, the *Hold Brothers* decision at footnote 58 cites the first *Lava Trading (Lava Trading Inc. v. Hartford Fire Ins. Co.,* 326 F.Supp.2d 434, 441 (S.D.N.Y.2004)) decision. As shown below, that first *Lava Trading* decision found the exclusion clause unambiguous, but distinguished between "covered loss" under a policy of insurance, versus "what remedies are available for breach of a policy". In the second *Lava Trading* (*Lava Trading Inc., v. Hartford Fire Insurance Company,* 365 F.Supp.2d 434 (S.D.N.Y 2005)) decision, the court tackled the exclusionary clause on consequential damages directly, and held that the language of the exclusionary clause regarding consequential damages, coupled with the arbitration provision, made it clear that "consequential damages that this plaintiff seeks were not contemplated as a foreseeable consequence of a breach of Hartford's duty to pay under the Policy." 365 F.Supp.2d 434, 448.

As shown above in the bold and italicized portion of the analysis in *Streamline,*

the Court in *Streamline* specifically found the exclusionary language unambiguous:

> *The meaning of this provision is unambiguous.* Black's defines "consequential loss" as "[a] loss arising from the results of damage rather than from the damage itself." Black's Law Dictionary (7th ed.1999).

Streamline, 2003 WL 22004888, p. 5. (italics added). *Lava Trading* did not really mention ambiguity, but the decision obviously finds the exclusionary clause on consequential damages to not be ambiguous. *Blis Day Spa* (discussed below) did not mention ambiguity, but the decision obviously finds the clause not ambiguous. Thus, the only case that finds the clause ambiguous is *Hold Brothers*, and the court in *Hold Brothers* makes that conclusion by making the distinction between exclusion of coverage vs. damages, a distinction which no other case makes.

Lava Trading Inc., v. Hartford Fire Insurance Company, 365 F.Supp.2d 434 (S.D.N.Y 2005) also involves Lava Trading's lost business which was destroyed in the September 11, 2001, terrorist attacks on the World Trade Center. As a result of that destruction, Lava Trading had to relocate its business. Lava Trading also sought damages for its costs to secure funding, for damages resulting from loss of clients and from damages resulting from the alleged loss of future business growth. 365 F.Supp.2d 434, 445.

The portion of *Lava Trading* which discusses consequential damages shows how important the "appraisal provision" in the applicable insurance contract was to the Federal District Court judge:

> In *Kenford Co. v. County of Erie,* 73 N.Y.2d 312, 540 N.Y.S.2d 1, 537 N.E.2d 176 (1989) ("*Kenford II*"), the New York Court of Appeals held that "[i]t is well established that in actions for breach of contract, the nonbreaching party may recover ... such unusual or extraordinary damages [as] have been brought within the contemplation of the parties as the probable result of a breach at the time or prior to contracting." *Id.* at 319, 540 N.Y.S.2d 1, 537 N.E.2d 176 (citations omitted). In order to determine what damages are reasonably contemplated by the parties, "the

nature, purpose and particular circumstances of the contract known by the parties should be considered ... as well as 'what *liability* the defendant fairly may be supposed to have assumed consciously, *or to have warranted the plaintiff reasonably to suppose that it assumed,* when the contract was made.' " *Id.* (citations omitted; emphasis added); *see also Trademark Research Corp. v. Maxwell Online, Inc.,* 995 F.2d 326, 332-33 (2d Cir.1993) (finding that plaintiff had "failed to establish its lost future profits with the degree of certainty required by *Kenford* [ ] ... and has failed to establish that *liability* for such damages were contemplated by the parties at the time of contracting."). As the quoted language makes clear, the availability of consequential damages in a given case requires an examination of: (1) the particular contract at issue; (2) whether there has been any conscious assumption of liability by a contracting party; and (3) whether, by words or deeds, one party was reasonably led to believe that the other had assumed such liability. Thus, as indicated in my prior rulings on the subject, the Court in *Kenford II* looked to whether there was a "provision in the contract" *or* "any evidence in the record to demonstrate that the parties, at any relevant time, reasonably contemplated *or would have contemplated* that the [defendant] was undertaking a contractual responsibility" for the consequential damages sought by the plaintiff. *Kenford II,* 73 N.Y.2d at 320, 540 N.Y.S.2d 1, 537 N.E.2d 176 (emphasis added); *see also Trademark Research Corp.,* 995 F.2d at 334 (finding that "[t]he record contains no specific evidence that, at the time of contracting, [defendant] accepted liability for nine years of lost profits. No evidence was offered that the parties ever discussed lost profits liability.").

In order to prevail, Lava is required to " 'establish that liability for [the consequential damages sought] were contemplated by the parties at the time of contracting.' " *Lava Trading Inc. v. Hartford Fire Insurance Co.,* 2004 WL 943565, at *2 (S.D.N.Y. May 3, 2004) (quoting *Trademark Research Corp.,* 995 F.2d at 332-33). Plaintiff must present evidence "of 'what the parties would have concluded had they considered the subject,' or that, in light of the parties' discussions on the subject, one party would have been led to believe that the other was assuming liability for such damages." *Id.*

On its motion for summary judgment, Hartford has pointed to a lack of any such evidence, and has presented evidence that neither it nor plaintiff contemplated that Hartford would be liable for consequential damages in the event of a breach. "In moving for summary judgment against a party who will bear the ultimate burden of proof at trial, the movant's burden will be satisfied if he can point to an absence of evidence to support an essential element of the nonmoving party's claim." *Goenaga v. March of Dimes Birth Defects Fdn.,* 51 F.3d 14, 18 (2d Cir.1995); *see also Gallo v. Prudential Residential Services, L.P.,* 22 F.3d 1219, 1223-24 (2d Cir.1994) ("[T]he moving party may obtain summary judgment by showing that little or no evidence may be found in support of the nonmoving party's case."). "In other words, the moving party does not bear the burden of disproving an essential element of the nonmoving party's claim." *Bussa v. Alitalia Linee Aeree Italiane, S.p.A.,* 2004 WL

1637014, at *3 (S.D.N.Y. Jul.21, 2004). In light of Hartford's initial showing that there is no evidence that the parties contemplated, or that Hartford reasonably warranted, that Hartford would be liable for the consequential damages sought here in the event of a breach of the Policy, the burden shifts to Lava to "set forth specific facts showing that there is a genuine issue for trial," and it cannot rest on "mere allegations or denials" of the facts asserted by the movant. Rule 56(e), Fed.R.Civ.P.

In opposition to Hartford's motion, Lava points only to internal Hartford documents demonstrating that Hartford was aware of the reasons why people buy business interruption coverage, and the importance of resolving such claims promptly to minimize actual lost income. Thus, Lava quotes from certain training materials that acknowledge that when a business is experiencing downtime, its net earnings may be affected, and that swift action on the part of the insurer may be beneficial to the policy holder. Lava also relies on certain advertising materials in which, it asserts, Hartford touts the type of policy at issue as security against "unexpected loss [ ] wip[ing] out your bottom line" (Bauer Exh. I at HCAS 02545) and claims that "you simply can't afford to be caught short on insurance protection" (Bauer Exh. K at HCAS 02539). Lava also relies on certain statements from Hartford claim adjuster Peter Pollicino, who acknowledged, not surprisingly, that a lack of insurance coverage could "be deadly to a business" and/or "wipe out" a business financially. Bauer Cert. Exh. L at 471.

None of this "evidence," however, creates a genuine issue of material fact as to whether Hartford was assuming liability for consequential damages in the event of a breach. The evidence adduced by Lava simply illustrates the rather unremarkable proposition that business interruption insurance is meant to insure against loss of business income and other expenses, and that if a company does not have such insurance, they stand the risk of financial consequences if they are not otherwise prepared. It is a significant leap of reasoning to conclude from this that Hartford understood that it would be liable for the consequential damages sought here, or was warranting to Lava that it would be so liable. No reasonable jury could conclude otherwise.

Of course, New York law also requires that the Court consider "the nature, purpose and particular circumstances of the contract known by the parties" in determining whether consequential damages are available. *Kenford II,* 73 N.Y.2d at 319, 540 N.Y.S.2d 1, 537 N.E.2d 176. The Appellate Division, Third Department, has held that "[t]he very purpose of business interruption coverage would make defendant aware that if it breached the policy it would be liable to plaintiffs for damages for the loss of their business as a consequence of its breach or made it possible for plaintiffs reasonably to suppose that defendant assume such damages when the contract was made." *Sabbeth Industries Ltd. v. Pennsylvania Lumbermens Mutual Insurance Co.,* 238 A.D.2d 767, 769, 656 N.Y.S.2d 475 (3d Dep't 1997). But in *Sabbeth,* the insurer disclaimed *any* coverage under the policy, and plaintiff sought the "lost value of its business" and other damages. It is not clear from the Court's opinion which of these

losses would have been due under the policy had the insurer met its obligations. Certainly, if an insurer breaches its policy, it should expect to be liable for covered losses under the policy. But most importantly, *Sabbeth* was decided in the context of a motion to dismiss. As in *Sabbeth,* I denied Hartford's motion to dismiss and have given Lava the opportunity to prove its allegations. This plaintiff's "consequential damage" claim fails because there is no evidence to support it.

Nothing in the Policy before me would lead either the insured or the insurer to understand that the insurer, in the event of breach, would be liable for costs to secure funding that should have been provided by Hartford, the loss of clients or the loss of future business growth. Lava relies on language in the Policy itself that provides, for example, that there is no dollar limit for business interruption coverage, which is limited only by a maximum of twelve months plus thirty days. Policy at LAV 0028 & 0029. From this provision, and the fact that the Policy was designed to pay Lava for certain expenses and lost income during the period it could not operate (up to a maximum of 13 months), Lava extrapolates that "[b]oth parties understood ... that Lava's lost income would be greater if (1) business interruption coverage were denied or delayed; or (2) of the Period of Restoration were miscalculated or abbreviated by Hartford's own wrongdoing; and (3) that Hartford would be responsible for paying the costs of its delay or wrongdoing." Lava Br. at 18. Lava's conclusion, however, does not follow from the cited Policy provisions. Indeed, it is undermined by the fact that the Policy contemplates substantial delay in payment, during which time both the insured and the insurer presumably are assessing the losses, the insured is submitting its claim, and any differences between the insured and insurer are resolved. See Policy at LAV 0035-0038 (providing, inter alia, that the insurer will pay for a covered loss within 30 days of receiving the signed statement of loss only if (1) the insured has complied with all of the terms of the Policy and (2) the insured and the insurer have agreed upon the amount of the loss or an appraisal award has been made). Thus, the Policy contemplates that a period of at least 90 days may pass before Hartford indicates its intentions with respect to a claim, and contemplates payment within 90 days (or less) of a covered loss only if the insured has complied with all the terms of the Policy and the insured and insurer have reached an agreement as to the amount of the loss or "an appraisal award has been made." Id. The Policy sets forth an explicit dispute resolution mechanism, to be conducted by an appraiser, that either party may invoke in the event of any disagreement as to the amount of loss. *Id.* at LAV 0036. (There is no evidence in the record before me on this motion that Lava ever sought, or obtained, an appraisal award, or indeed made any claim other than that made in January 2002. *See* Pls. 56.1 Response ¶ 21.) In short, contrary to Lava's position that the Policy language would lead Hartford to understand that any delay in payment or disagreement with respect to the claim would render it liable for the consequential damages sought, the Policy explicitly recognizes that delay (including potential delay of more than three months) is foreseeable.

> Although the Policy language may have a direct bearing on whether damages sought were within the contemplation of the parties, it is not necessarily controlling on the issue. *Lava Trading Inc. v. Hartford Fire Insurance Co.,* 326 F.Supp.2d 434, 442 (S.D.N.Y.2004). I have considered the Policy exclusions and payment provisions cited by Lava in support of its contention that liability for consequential damages are contemplated by the Policy, as well as the entirety of the Policy, and conclude they, either alone or in conjunction with other evidence, do not raise a genuine issue of material fact as to whether the parties contemplated consequential damages of the kind and character sought.
>
> The loss of business income that arises from a covered loss such as the destruction of the World Trade Center was, indeed, contemplated by the parties. That was the purpose of the contract of insurance. But, with the benefit of the full summary judgment record before me, I conclude that the consequential damages that this plaintiff seeks were not contemplated as a foreseeable consequence of a breach of Hartford's duty to pay under the Policy. The parties knew that Hartford would be liable for the sums paid and they knew that if those sums were not paid, Hartford would be liable for simple interest at 9% per annum from the date of the breach. *See* N.Y. C.P.L.R. §§ 5001 & 5004 (McKinney's 1992 & 2005 Supp.); Feb. 16, 2005 Tr. at 18. In response to Hartford's motion, Lava has failed to raise a triable issue of fact as to whether anything further was contemplated.

365 F.Supp.2d 434, 445-448. (italics added) This appraisal dispute resolution provision was important to the court in this second Lava Trading decision. Counsel for Hartford in the present case noted *Lava Trading* involved a dispute resolution mechanism, to be conducted by an appraiser, which either the insured or the insurer could invoke in the event of any disagreement as to the amount of loss. Reply in Support of Defendant's Motion in Limine Re: Damages, p. 9. *Hold Brothers* also seems to have involved an appraisal provision (357 F.Supp.2d 651, 655, footnote 23), but that fact does not enter into the court's decision in *Hold Brothers* in finding the consequential damage exclusion to be ambiguous.

As mentioned above, *Hold Brothers* cites the first *Lava Trading* decision: *Lava Trading Inc. v. Hartford Fire Ins. Co.,* 326 F.Supp.2d 434, 441 (S.D.N.Y.2004). The analysis in that case of the consequential damages exclusion is as follows:

Consequential Damages Claim

Although the New York Court of Appeals has not addressed the specific issue of the availability of consequential damages in a case alleging a breach of an insurance policy, the leading New York case on the availability of consequential damages generally in a breach of contract action is *Kenford Co. v. County of Erie,* 73 N.Y.2d 312, 540 N.Y.S.2d 1, 537 N.E.2d 176 (1989). In *Kenford,* the Court of Appeals held that "[i]t is well established that in actions for breach of contract, the nonbreaching party may recover ... such unusual or extraordinary damages [as] have been brought within the contemplation of the parties as the probable result of a breach at the time or prior to contracting." *Kenford,* 73 N.Y.2d at 319, 540 N.Y.S.2d 1, 537 N.E.2d 176. In order to determine what damages are reasonably contemplated by the parties, "the nature, purpose and particular circumstances of the contract known by the parties should be considered ... as well as 'what liability the defendant fairly may be supposed to have assumed consciously, or to have warranted the plaintiff reasonably to suppose that it assumed, when the contract was made.' " *Id.* (citations omitted). In the absence of an express contractual provision with respect to the consequential damages sought, *"the commonsense rule to apply is to consider what the parties would have concluded had they considered the subject." Id.* at 320, 540 N.Y.S.2d 1, 537 N.E.2d 176 (citation omitted; emphasis in the original).

Thus, in *Kenford,* which did not involve an alleged breach of an insurance policy, the Court looked to whether there was a "provision in the contract" *or* "any evidence in the record to demonstrate that the parties, at any relevant time, reasonably contemplated or would have contemplated that the [defendant] was undertaking a contractual responsibility" for the consequential damages sought by the plaintiff in that case (i.e., compensation for the lack of appreciation in the value of plaintiff's land in the event a stadium was not built). *Kenford,* 73 N.Y.2d at 320, 540 N.Y.S.2d 1, 537 N.E.2d 176. The Court of Appeals found that consequential damages were unavailable in that case because "the [defendant] never contemplated at the time of the contract's execution that it assumed legal responsibility for these damages upon a breach of the contract." *Id.*

Other courts have recognized that consequential damages may be available for breach of an insurance contract, *see, e.g., Landoil Resources Corp. v. Alexander & Alexander Services, Inc.,* 1991 WL 33412, at *3-4 (S.D.N.Y.1991), but, as with any breach of contract, " 'to recover damages beyond those flowing naturally from the breach, "such ... damages must have been brought within the contemplation of the parties as the probable result of a breach at the time of or prior to contracting." ' " *Streamline Capital, L.L.C. v. Hartford Casualty Insurance Co.,* 2003 WL 22004888, at *4 (S.D.N.Y. Aug.25, 2003) (quoting *Continental Information Systems Corp. v. Federal Insurance Co.,* 2003 WL 145561, at *4 (S.D.N.Y. Jan.17, 2003); (other citations omitted)). "[U]nless a plaintiff alleges that the specific injury was of a type contemplated by the parties at the time of contracting, a claim for consequential damages should be dismissed."

Streamline, 2003 WL 22004888, at *5 (citing *Brody Truck Rental, Inc. v. Country Wide Insurance Co.,* 277 A.D.2d 125, 126, 717 N.Y.S.2d 43, 44 (1st Dep't 2000), *appeal dismissed,* 96 N.Y.2d 854, 729 N.Y.S.2d 669, 754 N.E.2d 772 (2001), and *Martin v. Metropolitan Property & Casualty Insurance Co.,* 238 A.D.2d 389, 390, 656 N.Y.S.2d 318, 319 (2d Dep't 1997)).

Plaintiff relies on *Sabbeth Industries Ltd. v. Pennsylvania Lumbermens Mutual Insurance Co.,* 238 A.D.2d 767, 656 N.Y.S.2d 475 (3d Dep't 1997) in support of its claim for consequential damages for defendant's breach of the Business Insurance Policy at issue in this case. In *Sabbeth,* the Appellate Division, Third Department, reversed that part of the trial court's ruling that denied the plaintiff leave to amend its complaint to include a claim for consequential damages, concluding that in light of the "specific protection [business interruption] coverage provides ... consequential damages were reasonably foreseeable and within the contemplation of the parties." 238 A.D.2d at 769, 656 N.Y.S.2d at 477. I need not decide on this motion whether the Third Department's view that the very nature of a business interruption policy can support a claim for consequential damages would be adopted by the New York Court of Appeals. Here, in contrast to the allegations in the *Streamline* case, plaintiff has alleged that consequential damages were in fact within the contemplation of the parties (Complaint ¶ 18), which allegation I accept for the purposes of this motion. Thus, this case is very different from *Streamline* in this respect.

It is true that Lava's Policy does not contain a specific provision or language permitting the recovery of consequential damages. I do not read the Appellate Division cases cited in defendant's papers, which appear to apply the rule as set forth in *Kenford,* as setting forth any such requirement. *See, e.g., Brody Truck Rental,* 277 A.D.2d at 126, 717 N.Y.S.2d 43 (granting insurer's summary judgment motion where liability policy at issue "contains no provision or language indicating that recovery of consequential damages was within the contemplation of the parties ... *and* no factual issue has been otherwise raised as to whether the parties intended that [the insured] would be able to recover damages due to lost business and/or profits") (citations omitted; emphasis added); *Martin,* 238 A.D.2d at 390, 656 N.Y.S.2d 318 (granting motion to dismiss claim for consequential damages arising out of breach of "loss of use" provision of property insurance policy where "it was neither foreseeable nor within the contemplation of the parties at the time of the contract that failure to pay loss of use benefits would result in foreclosure and the consequential damages flowing therefrom. *Nor* does the contract of insurance contain any language which permits recovery for consequential damages.") (emphasis added). *Sabbeth* is a later Third Department decision than *Sweazey v. Merchants Mutual Insurance Co.,* 169 A.D.2d 43, 45, 571 N.Y.S.2d 131, 132 (3d Dep't 1991), and I must assume that *Sabbeth* better reflects how the Third Department would rule on the issue. Similarly, *Martin* is a later Second Department decision than *High Fashion Hair Cutters v. Commercial Union Insurance Co.,* 145 A.D.2d 465, 535

N.Y.S.2d 425 (2d Dep't 1988), and is presumably an accurate statement of that Court's view. Without further guidance from the New York Court of Appeals or the Appellate Divisions, I would apply *Kenford* to contracts of insurance such as that at issue in this case.

The Policy at issue in this case does expressly exclude "any other consequential loss" from its Business Income and Extra Expense coverage. *See* Policy at LAV 00034. Not surprisingly, the parties have differing views as to the significance of this provision. Lava argues that the policy excludes only "certain consequential losses". However, the unambiguous language excludes *"any* other consequential loss" (emphasis added). Lava also argues that the term "consequential loss" is not coextensive with "consequential damages", or at the very least, is ambiguous. To suggest that the terms, themselves, have different meanings is to stretch the meaning of "loss" and "damages" beyond their natural meaning. Indeed, courts routinely make no distinction between the two. *See Mu Chapter of the Sigma Pi Fraternity of the United States, Inc. v. Northeast Construction Services Inc.,* 273 A.D.2d 579, 581, 709 N.Y.S.2d 677, 679 (3rd Dep't 2000) (finding "consequential damages ... precluded under the terms of the contract" where construction contract provided that "[o]wner waives all rights of action against the [c]ontractor for loss of use of the [o]wner's property, including consequential losses due to fire ... however caused.") (alterations in original), *appeal denied sub nom., CNA Insurance Companies v. Northeast Construction Services,* 95 N.Y.2d 768, 744 N.E.2d 141, 721 N.Y.S.2d 605 (2000) (Table); *Aetna Casualty & Surety Co. v. General Time Corp.,* 704 F.2d 80 (2d Cir.1983) (where policy provided for recovery of "all direct and consequential loss" from property damage, insured could recover loss profits resulting from physical injury to property); *ECDC Environmental, L.C. v. New York Marine and General Insurance Co.,* 1999 WL 777883 (S.D.N.Y. Sept.29, 1999) (policy covering "any consequential loss or damage" from accidents covers consequential damages including loss profits).

However, a policy exclusion speaks only to what constitutes a covered loss under a policy of insurance, and not to what remedies are available for breach of a policy. The scope of a policy's coverage and the damages that are recoverable if the insurer breaches the policy are, of course, distinct concepts. Payment to an insured for a covered and non-excluded loss is performance under the contract of insurance. Breach of the contract of insurance is an entirely different matter governed by the present day successors to *Hadley v. Baxendale,* 9 Exch. 341, 156 E.R. 145 (1854) such as the *Kenford* case discussed above. *See Pape v. Home Insurance Co.,* 139 F.2d 231 (2d Cir.1943); *Acquista v. New York Life Insurance Co.,* 285 A.D.2d 73, 81, 730 N.Y.S.2d 272, 278 (1st Dep't 2001) (" 'Although the policy limits define the amount for which the insurer may be held responsible in performing the contract, they do not define the amount for which it may be liable upon a breach.' ") (quoting and adopting the reasoning of *Beck v. Farmers Insurance Exchange,* 701 P.2d 795, 801 (Utah 1985)); *accord Lawton v. Great Southwest Fire Insurance Co.,* 118 N.H. 607, 611, 392 A.2d 576 (1978) (collecting cases for the proposition

that “[t]he policy limits restrict the amount the insurer may have to pay in the performance of the contract, not the damages that are recoverable for its breach”). The policy language may have a direct bearing, but will not always be controlling, on the damages that were within the contemplation of the parties at the time of a contract.

Thus, even if a policy exclusion such as that excluding “any other consequential losses” in this case does not speak to what damages may be recovered, the existence of such a provision in the Policy in this case may be relevant to the inquiry of whether consequential damages are available. As noted, whether consequential damages are available in a given case depends, in part, on the intent of the parties, that is, whether such damages were reasonably foreseeable and in the contemplation of the parties at the time of contracting. Defendant argues that even if this exclusion does not in itself preclude recovery of consequential damages, it reflects the parties' intention that consequential damages were not contemplated. The Fourth Department of the Appellate Division appears to agree with this position. *See J.R. Adirondack Enterprises, Inc. v. Hartford Casualty Insurance Co.,* 292 A.D.2d 771, 739 N.Y.S.2d 795 (4th Dept' 2002) (exclusion for “any other consequential loss” in insurance policy precludes claim for consequential damages for breach of that policy); *Crawford Furniture Mfg. Corp. v. Pennsylvania Lumbermens Mutual Insurance Co.,* 244 A.D.2d 881, 688 N.Y.S.2d 122 (4th Dep't 1997) (same). Of course, the opposite conclusion can also be drawn: that by specifically addressing consequential losses and then expressly excluding them from policy coverage, consequential damages were a type of injury that the parties recognized might arise. Or, it may be that the policy provision does not speak at all to what damages might arise by virtue of the insurer's breach of the Policy.

Assume a hypothetical policy allowed recovery for consequential losses up to $50,000. Would that mean that the parties contemplated that, in the event of a breach, there could be consequential damage but that they would be unlikely to exceed $50,000, or would that indicate precisely the opposite, i.e., that consequential damages exceeding $50,000 would be likely but that, in agreeing upon a premium in exchange for policy coverage, the parties were excluding them from policy coverage? Or would some other interpretation be the most plausible? Just as the policy language would be inconclusive in the foregoing example, so, too, do I conclude, in the context of this motion to dismiss, that the consequential loss exclusion at issue in this case is inconclusive.

The ultimate question remains: what damages were in the reasonable contemplation of the parties in the event of breach by the insurer at the time they entered into the contract of insurance? In this case, Lava has alleged that “[t]he parties understood ... that a breach by Hartford of its obligation to pay business income and/or extra expense losses under the Business Insurance Policy would likely cause Lava to suffer further loss of income and/or extra expense.” Complaint ¶ 18. While it remains to be proven whether this is indeed true, and whether the parties contemplated that the type of consequential damages alleged to

> be available here would be the likely result of a breach by Hartford, as well as whether Lava even suffered any losses attributable to Hartford's alleged breach, for the purposes of this motion pursuant to Rule 12(b)(6), I must take plaintiff's allegations as true and draw all reasonable inferences in plaintiff's favor. In the absence of Policy language (which is incorporated into the Complaint) that negates, as a matter of law, that consequential damages were contemplated, the allegation suffices for purposes of this motion to dismiss. Therefore, I decline to dismiss plaintiff's claim for consequential damages at this stage of the litigation.

326 F.Supp.2d 434, 439-443. In the later (2005) *Lava Trading* decision, it is written:

> In a March 18, 2004 Memorandum and Order, 326 F.Supp.2d 434 (S.D.N.Y.2004), I granted in part and denied in part Hartford's motion to dismiss pursuant to Rule 12(b)(6), Fed.R.Civ.P., holding that Lava had adequately pled a claim for consequential damages. As I made clear, "it remains to be proven ... whether the parties contemplated that the type of consequential damages alleged to be available here would be the likely result of a breach by Hartford, as well as whether Lava even suffered any losses attributable to Hartford's alleged breach...." 326 F.Supp.2d at 443.
>
> Hartford now moves for partial summary judgment dismissing Lava's claim for consequential damages. It also seeks a ruling, pursuant to Rule 56(d), Fed.R.Civ.P., that the "period of restoration" provided for in the Policy ended on April 30, 2002 and that certain business income losses are not covered because they are excluded as consequential losses or are speculative. For the reasons set forth herein, Hartford's motion for summary judgment dismissing Lava's claim for consequential damages is granted.

365 F.Supp.2d 434, 436.

The other cases cited in *Bi-Economy* (10 N.Y.3d 187, 188) are not on point. *Sabbeth Industries Limited v. Pennsylvania Lumberman's Mutual Insurance Company,* 238 A.D.2d 767, 656 N.Y.S.2d 475, (N.Y.A.D. 1997), would at first glance seem to allow consequential damages when only breach of the insurance contract is alleged (ie., no bad faith claim is alleged). However, a close reading of that case shows that there was no exclusion clause against consequential damages such as is present in the instant case. *Kenford Co., Inc. v. County of Erie,* 73 N.Y.2d 312, 540 N.Y.2d 1 (N.Y. 1989), did not concern an insurance contract and did not concern an exclusionary clause on

consequential damages. *Carney v. Memorial Hosp. and Nursing Home of Greene County,* 101 A.D.2d 990, 477 N.Y.S.2d 735 (N.Y.A.D.,1984), adds nothing as it did not concern an insurance policy, but merely stands for the proposition that punitive damages will not be allowed under New York case law in a breach of contract case.

In the present case, Hartford also cites to *Blis Day Spa, LLC v. The Hartford Ins. Group,* 427 F.Supp.2d 621 (W.D.N.C. 2006). *Blis Day Spa,* similar to *Streamline,* concerns the same insurance company as the present case, Hartford. *Blis Day Spa* concerns identical policy language to that of the present case. The exclusion of consequential damage clause is identical to that of the present case. *Blis Day Spa* also concerned an appraisal provision, similar to that found in the present case, and that appraisal provision was important in the Federal District Court's reasoning as shown below. *Blis Day Spa* interprets North Carolina state case law on contracts which is similar, if not identical, to Idaho case law on contracts. In *Blis Day Spa,* the trial court, similar to the present case, found the insured's bad faith claim to be without merit, holding: "…the Court finds Plaintiffs have fail to demonstrate that Hartford's refusal to pay the claim was not because of a legitimate, "honest disagreement" as to the validity of the claim or innocent mistake." 427 F.Supp.2d 621, 633. The Federal District Judge in *Blis Day Spa* held:

> In its motion for summary judgment Defendant asserts that not only is there no provision in the Business Policy making Hartford liable for consequential damages, but the policy specifically excludes from business interruption coverage "any other consequential loss."[FN7]
>
> (FN7)
>
> . 4. Business Income and Extra Expense Exclusions. We will not pay for:
>
> a. Any Extra Expense, or increase of Business Income loss, caused by or resulting from:
>
> (1) Delay in rebuilding, repairing or replacing the property or resuming "operations," due to interference at the location of the rebuilding, repair or replacement by strikers or other persons; or
>
> (2) Suspension, lapse or cancellation of any license, lease or contract. But if the suspension, lapse or cancellation is directly

> caused by the suspension of “operations”, we will cover such loss that affects your Business Income during the “period of restoration”.
>
> b. Any other consequential loss.

Hartford also contends that Heil's estimates of consequential damages are too speculative. In light of Defendant's initial showing, the burden shifts to Plaintiffs to “set forth specific facts showing that there is a genuine issue for trial.” Fed.R.Civ.P. Rule 56(e). Having examined the record, the Court finds that the Plaintiffs have failed to offer sufficient evidence, in the contract or otherwise, that at the time of contracting that the parties contemplated, or that Hartford reasonably warranted, Defendant would be liable for the consequential damages of the kind and character sought here in the event of a breach of the Business Policy.

The Court first notes that Plaintiffs offer no evidence, or even allege, that the parties contemplated at the time of contracting recovery of consequential damages of the type sought in the instant case.

Second, the Court does not find any specific provision or language in the Business Policy itself that would lead either the insured or the insurer to understand that in the event that the parties had a reasonable dispute over business expenses Hartford would be liable for loss of future business growth. Plaintiffs do not contend that the Business policy provisions specifically excluding from business interruption coverage consequential losses have no bearing on the availability of consequential damages from an alleged breach. Rather, it appears Plaintiffs tacitly accept that the lost profits that they incurred because of Hartford's failure to pay all dispute amounts under the Business Policy are unambiguously consequential losses within the meaning of the policy. Thus, the Court finds nothing in the Business Policy language would lead Hartford to understand that any delay in payment or disagreement with respect to the claim would render it liable for the consequential damages sought in the instant case.

Third, the Court also finds no evidence from which the parties could presume special. Plaintiffs do not even allege that the parties contemplated at the time of contracting that Plaintiffs would incur additional harm from loss of business in the event Hartford failed to pay disputed sums under the Business Policy. Furthermore, any argument that such consequential damages that result from delay in disputed payments are foreseeable is further forestalled by the appraisal provision,[FN8]

> (FN8.)
>
> The Appraisal of Property Loss provision provides: “If we or you disagree on the value of the property or the amount of loss, either may make a written demand for an appraisal of the loss ... A decision agreed to by any two [of the appraisers and/or umpire] will be binding.”

the purpose of which is to avoid precisely the sort of damage caused by a lengthy delay in payment as exists in the instant case.

Finally, because courts are instructed to examine “the nature of the contract itself,” the absence of a provision in the contract providing for

such damages is not necessarily controlling on the issue of whether damages sought were within the contemplation of the parties. To this end, Plaintiffs contend that "the purpose of the policy is to put the parties in the position they would have been in had no fire occurred. Had the defendant honored its contractual obligations the plaintiffs would have had the cash necessary to continue moving forward with its business operations." The Court finds the Plaintiffs' lone argument is unpersuasive as it rests not on the basis of anything Hartford may be presumed to have known at the time of contracting, but rather merely on the type of insurance that Plaintiffs purchased. As noted in *Lava Trading Inc. v. Hartford Fire Ins. Co.*,

> [t]he evidence ... simply illustrates the rather unremarkable proposition that business interruption insurance is meant to insure against loss of business income and other expenses, and that if a company does not have such insurance, they stand the risk of financial consequences if they are not otherwise prepared. It is a significant leap of reasoning to conclude from this that Hartford understood that it would be liable for the consequential damages sought here, or was warranting ... that it would be so liable.

Id. 365 F.Supp.2d 434, 446 (S.D.N.Y.2005).

Having considered the entirety of the Business Policy, the Court concludes that the parties knew that Hartford disclaimed business interruption coverage for consequential losses, and that in the event of a disagreement, either party could seek appraisal. Because the consequential damages that plaintiffs seek were not contemplated as a foreseeable consequence of a breach of Hartford's duty to pay under the Business Policy, the Court need not consider whether Heil's estimates are as a matter of law too speculative.

427 F.Supp.2d 621, 638-640. This Court finds this reasoning to be sound. Similar to the court's finding in *Blis Day Spa:* "Plaintiffs offer no evidence, or even allege, that the parties contemplated at the time of contracting recovery of consequential damages of the type sought in the instant case" (427 F.Supp.2d 621, 639), this Court has examined the Complaint and the Amended Complaint in the present case, and Lakeland has not alleged that Lakeland and Hartford contemplated consequential damages at the time their insurance contract was entered into. Just as in *Blis Day Spa:* "…the Court does not find any specific provision or language in the Business Policy itself that would lead either the insured or the insurer to understand that in the event that the parties had a

reasonable dispute over business expenses Hartford would be liable for loss of future business growth." *Id.* In the present case, loss of profits beyond the "period of restoration" would be the claimed non-covered loss, instead of lost future business growth.

This Court is persuaded by *Blis Day Spa, Streamline*, and *Lava Trading*, and finds, due to the unambiguous language of the exclusionary clause regarding consequential damages, and due to the arbitration provision, consequential damages in the present case must be excluded. Hartford's Motion in Limine Re: (Consequential) Damages is granted.

B. HARTFORD'S MOTION IN LIMINE RE: DAN HARPER.

On February 8, 2010, Hartford filed Defendant's Motion in Limine Re: Expert Dan Harper and Memorandum in Support. In that twenty-eight page memorandum, Hartford claims Lakeland's expert, Dan Harper, should be limited in his testimony in several areas. Lakeland filed a five-page response brief on February 16, 2010.

First, Hartford claims regarding the issue of "reasonableness of the adjuster's actions", that such issue is a) no longer relevant and b) Harper agreed in his deposition that he cannot testify as to reasonableness. Defendant's Motion in Limine Re: Expert Dan Harper and Memorandum in Support, pp. 1-5, 8-11. This Court agrees on both grounds. The "reasonableness of the adjuster's actions" is largely irrelevant, given that there is no bad faith cause of action, given the fact that there will be no punitive damage claim, and given that all that remains is whether Hartford breached its contract with Lakeland (which in turn revolves around the determination of the applicable period of restoration). If there is any relevance, Harper himself has admitted he cannot testify as to reasonableness. Affidavit of Counsel in Support of Defendant's Motion in Limine Re: Expert Dan Harper and Memorandum in Support, Exhibit A, p. 18, L. 5 – p. 19, L. 7; p. 136, Ll. 13-23. Harper is

not a claims adjuster and is not an insurance professional. Harper has agreed to limit his opinions to three of his reports. Affidavit of Counsel in Support of Defendant's Motion in Limine Re: Expert Dan Harper and Memorandum in Support, Exhibit A, p. 75, Ll. 15-18. Lakeland does not contest Harper's inability to testify about reasonableness of Hartford's actions. Plaintiff's Response to Defendant's Motion in Limine Concerning Dan Harper, pp. 1-2. Instead, Lakeland focuses on the relevance of "reasonableness", claiming "it was not reasonable or necessary to withhold payment under the schedules to properly determine the final amount of the claim." *Id.,* p. 2. While the "final amount of the claim" is what is at dispute, "reasonableness" of Hartford's actions is no longer relevant. Hartford's Motion in Limine as to Harper's testimony on the "reasonableness of the adjuster's actions" is granted.

Second, Hartford claims that any opinions of Harper as to any claim valuation beyond January 28, 2009, is irrelevant as such would be beyond the one year limitation (from the date of the roof collapse) on the policy. Defendant's Motion in Limine Re: Expert Dan Harper and Memorandum in Support, pp. 11-13. Lakeland simply responds with a "foreseeability" argument. Plaintiff's Response to Defendant's Motion in Limine Concerning Dan Harper, p. 2. Foreseeability is discussed above regarding consequential damages, and the contractual exclusion of consequential damages, and thus, is not a valid argument. Due to the Court's decision above regarding consequential damages, Hartford's Motion in Limine as to Harper's testimony as to any claim valuation beyond January, 28, 2009, is granted, as such opinion testimony is not relevant.

Third, Harford claims Harper cannot testify about "unreimbursed inventory losses", because Harper has not explained his opinion and because he simply reiterates Frtiz' testimony. Defendant's Motion in Limine Re: Expert Dan Harper and Memorandum in

Support, pp. 13-14. Those are not sufficient grounds to grant Hartford's Motion in Limine. Admissibility of this testimony will depend on what foundation can be laid at trial. Hartford's Motion in Limine to keep Harper from testifying about "unreimbursed inventory losses" is denied.

Fourth, Hartford claims Harper cannot testify about the amount of damages if the "period of restoration" had been later than October 31, 2008, because he has not given an opinion on that matter. Defendant's Motion in Limine Re: Expert Dan Harper and Memorandum in Support, pp. 15-16. Indeed, Harper admits he has not been asked to calculate those damages. Affidavit of Counsel in Support of Defendant's Motion in Limine Re: Expert Dan Harper and Memorandum in Support, Exhibit A, p. 84, L. 7 – p. 85, L. 8. Because Lakeland has not disclosed such opinion by Harper as to the amount of damages if the "period of restoration" had been later than October 31, 2008, Hartford's Motion in Limine precluding Harper from testifying about such is granted.

Fifth, Hartford claims Harper's first and second reports fail to satisfy the requirements of I.R.E. 702 and *Daubert*. Defendant's Motion in Limine Re: Expert Dan Harper and Memorandum in Support, pp. 17-28. Hartford claims Harper cannot rendered an opinion about the ability of Lakeland to reopen as Harper has not formed any opinion as to what would be required to open the store. *Id.,* pp. 17-18. Harford also claims Harper's opinion ignores the actual facts of this case. *Id.,* pp. 18-19. Even if Hartford's claims are true, Lakeland must be given the opportunity to develop Harper's foundation at trial. Hartford claims Harper will testify about "continuing normal operating expenses incurred, including payroll", even though such is precluded under the policy. *Id.,* pp. 19-20. Specifically, Hartford objects to rental fees paid and attorney fees paid. *Id.* However, Hartford failed to set forth which portions of the policy prohibit such. Hartford claims Harper

is errant in suggesting the Fritzes were making no draws from insurance proceeds. *Id.,* p. 21. This Court finds Harper should be allowed to explain such. Hartford claims other math errors and foundation problems for Harper's opinions. *Id.,* pp. 22-28. Hartford will certainly be allowed to inquire about these matters at trial, but this Court cannot at this time prohibit Harper's testimony on these matters. Hartford's Motion in Limine under I.R.E. 702 and *Daubert* must be denied at this point.

III. ORDER.

IT IS HERBY ORDERED Hartford's Motion in Limine Re: (Consequential) Damages is **GRANTED**.

IT IS FURTHER ORDERED Hartford's Motion in Limine as to Harper's testimony on the "reasonableness of the adjuster's actions" is **GRANTED**.

IT IS FURTHER ORDERED due to the Court's decision above regarding consequential damages, Hartford's Motion in Limine as to Harper's testimony as to any claim valuation beyond January, 28, 2009, is **GRANTED**, as such opinion testimony is not relevant.

IT IS FURTHER ORDERED Motion in Limine to keep Harper from testifying about "unreimbursed inventory losses" is **DENIED**.

IT IS FURTHER ORDERED that because Lakeland has not disclosed such opinion by Harper as to the amount of damages if the "period of restoration" had been later than October 31, 2008, Hartford's Motion in Limine precluding Harper from testifying about such is **GRANTED**.

IT IS FURTHER ORDERED Hartford's Motion in Limine under I.R.E. 702 and *Daubert* must be at this point be **DENIED**.

Entered this 8th day of March, 2010.

_____
John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of March, 2010, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

Lawyer	**Fax #**	**Lawyer**	**Fax #**
Arthur Bistline	676-8680	Keely E. Duke	208-395-8585

_____
Jeanne Clausen, Deputy Clerk