

Sordoni Constr. Co. v Chartis Ins. Co. of Canada
2021 NY Slip Op 32322(U)
November 15, 2021
Supreme Court, New York County
Docket Number: Index No. 452106/2016
Judge: Richard G. Latin
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PRESENT: HON. RICHARD LATIN **PART** **46V**

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INDEX NO. 452106/2016

MOTION DATE 10/11/2021

MOTION SEQ. NO. 005 006 007

CHARTIS INSURANCE CO. OF CANADA, CANATAL
STEEL USA INC., WESTCHESTER SURPLUS LINES
INSURANCE COMPANY, SAFETY AND QUALITY PLUS,
INC., WESTERN HERITAGE INSURANCE COMPANY,
NORTH AMERICAN IRON WORKS, INC., CANAL STEEL,
INC.

Defendant.

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were read on this motion to/for

were read on this motion to/for

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER

In motion sequence 005, plaintiffs Sordoni Construction Co. (“Sordoni”) and Old Republic General Insurance Corp. (“Old Republic”) move, pursuant to CPLR 3212, for summary judgment on four causes of action in the amended verified complaint (“Complaint”) seeking (1) declaratory judgment against defendant Chartis Insurance Co. of Canada (“Chartis”) and defendant Canatal

Steel USA, Inc. (“Canatal”); (2) breach of contract against Chartis; (3) declaratory judgment against defendant Westchester Surplus Lines Insurance Company (WSLI) and defendant Safety and Quality Plus, Inc. (SQP); and (4) breach of contract against WSLI (Complaint, NYSCEF Doc. No. [NYSCEF] 4; Notice of Motion 005, NYSCEF 219). Chartis cross-moves pursuant to CPLR 3212 for partial summary judgment seeking declaratory relief (Affirmation in Opposition, NYSCEF 315).¹

In motion sequence 006, Chartis moves, pursuant to CPLR 3212, for summary judgment seeking declaratory relief (Notice of Motion 006, NYSCEF 245).

In motion sequence 007, WSLI and SQP move, pursuant to CPLR 3212, for summary judgment dismissing the third and fourth causes of action in the Complaint and seek declaratory relief (Notice of Motion 007, NYSCEF 276).

BACKGROUND

The instant action arises out of an insurance coverage dispute involving the injury of a construction work at the construction project site located at 360 Gateway Drive, Brooklyn, New York (the Project) (Complaint, NYSCEF 4, ¶ 26).

Sordoni was retained by J.C. Penney Corporation, Inc. (“JCP”) as general contractor for the Project (Complaint, NYSCEF 4, ¶ 12). In connection with the Project, Sordoni was required to obtain general liability insurance for the benefit of JCP as an additional insured (Complaint, NYSCEF 4, ¶ 13). Old Republic issued Commercial General Liability Policy No. A3CG05481300 to Sordoni for the policy period of March 1, 2013 to March 1, 2014 with JCP as an additional insured (the Old Republic Policy) (Complaint, NYSCEF 4, ¶¶ 11, 15). In addition, Sordoni was

¹ Chartis refers to itself as AIG Canada in its motion papers. Chartis did not file a notice of cross motion prior to filing its Affirmation in Opposition to Old Republic’s Motion for Summary Judgment and Cross Motion for Partial Summary Judgment (NYSCEF 315).

obligated to obtain coverage for JCP and Sordoni as additional insureds on each of the subcontractors engaged to work on the Project (Complaint, NYSCEF 4, ¶ 14).

Sordoni subsequently executed subcontractor agreements with SQP (SQP Subcontract), and Canatal (Canatal Subcontract), which provided that each subcontractor would obtain general liability insurance naming Sordoni as an additional insured (Complaint, NYSCEF 4, ¶¶ 16, 17, 19, 22; Canatal Subcontract, NYSCEF 223; SQP Subcontract, NYSCEF 224). Furthermore, Canatal was required to obtain umbrella liability insurance in excess of the comprehensive general liability insurance for the benefit of Sordoni as an additional insured (Complaint, NYSCEF 4, ¶ 20).

Pursuant to the SQP Subcontract, SQP obtained Commercial General Liability Policy No. G24310498 002 effective February 27, 2014 from WSLI (WSLI Policy) (WSLI Policy, NYSCEF 234).

Pursuant to the Canatal Subcontract, Canatal obtained Commercial General Liability Policy No. 66458093 for the policy period of June 23, 2013 to June 23, 2014 from Chartis (Chartis Policy) (Chartis Policy, NYSCEF 229). Canatal also obtained an excess Umbrella Liability Insurance Policy No. 66458093 for the policy period of June 23, 2013 to June 23, 2014 (Chartis Excess Policy) (Chartis Excess Policy, NYSCEF 230).

Sordoni was named as an additional insured in the WSLI Policy, Chartis Policy, and Chartis Excess Policy.

Canatal subsequently engaged defendant North American Iron Works, Inc. (“NAIW”) d/b/a Canal Steel Inc. (“Canal”) for work on the Project (Complaint, NYSCEF 4, ¶ 17).

THE UNDERLYING ACTION

On February 27, 2014, John Cross (“Cross”) was injured during his course of employment as a construction worker for Canal on the Project when a set of bar joists fell and struck him during unloading (Complaint, NYSCEF 4, ¶ 28).

On November 4, 2014, Cross commenced a lawsuit against, inter alia, Sordoni, Canal, NAIW, and JCP, entitled *John Cross v The Related Companies, et. al.* in the Supreme Court of New York, Kings County Index #510352/2014 (Cross Action) (Complaint, NYSCEF 4, ¶ 27). Thereafter, Cross filed an amended complaint asserting claims against Canatal as well (*id.*).

In his amended complaint, Cross alleged that the set of bar joists were improperly, inadequately and/or unsafely secured negligently or in violation of applicable statutes, regulations, codes and/or ordinances by Sordoni, Canal, NAIW, and Canatal, and that JCP failed to properly supervise and direct the Project (Complaint, NYSCEF 4, ¶¶ 28, 29).

Sordoni asserted cross claims again Canal, SQP, Canatal, and NAIW in the Cross Action seeking apportionment, common law indemnification, contractual indemnification, and breach of contract (Complaint, NYSCEF 4, ¶ 30). Sordoni subsequently filed a third-party complaint in the Cross Action against SQP and non-parties Bay Crane Northeast, LLC and Bay Crane Service, Inc. (Third Third-Party Complaint, NYSCEF 318). In addition, Chartis filed a third-party complaint against New Millennium Building Systems (Second Third-Party Complaint, NYSCEF 317).

Thereafter, on May 15, 2020, JCP filed for bankruptcy, thus staying the Cross Action (Notice of Bankruptcy, NYSCEF 319).

THE DECLARATORY JUDGMENT ACTION

The Complaint seeks declaratory relief and breach of contract against Chartis, WSLI, and Western Heritage Insurance Company (“Western”) and their respective insureds across seven

causes of action (Complaint, NYSCEF 4). Sordoni alleges in its Complaint, that it has been unable to compel Canatal, SQP, Canal, and their respective insurers, Chartis, WSLI, and Western to defend Sordoni in the Cross Action. Instead, Old Republic has been compelled to undertake the defense of Sordoni and JCP in the Cross Action (Complaint, NYSCEF 4, ¶¶ 32, 33).

WSLI and SQP answered and asserted cross claims against Chartis, Canatal, Western, NAIW, and Canal (WSLI Answer, NYSCEF 11; SQP Answer NYSCEF 12). Western answered and asserted cross claims against Chartis, Canatal, WSLI, and SQP (Western Answer, NYSCEF 9). Chartis answered but did not assert any cross claims (Chartis Answer, NYSCEF 36).

On May 29, 2020, the court granted summary judgment in favor of Western, thereby dismissing the fifth, sixth, and seventh causes of action and the related cross claims against WSLI, NAIW, and Canal (Western Order) (Western Order, NYSCEF 305).

Plaintiffs now seek summary judgment on their remaining causes of action for (1) declaratory judgment against Chartis and Canatal; (2) breach of contract against Chartis; (3) declaratory judgment against WSLI and SQP; and (4) breach of contract against WSLI.

DISCUSSION

“The primary purpose of a declaratory judgment is to stabilize an uncertain or disputed jural relationship with respect to present or prospective obligation” (*Chanos v MADAC, LLC*, 74 AD3d 1007, 1008 [2d Dept 2010]). Although fact issues may be resolved within the context of determining entitlement to declaratory relief, the purpose of a declaratory judgment is to declare the legal rights of the parties based on the given set of facts and not render findings of fact (*Thome v Alexander & Louisa Calder Found.*, 70 AD3d 88, 99 [1st Dept 2009]).

Courts look first to the language of the relevant insurance policies to settle disputes between insurers, giving unambiguous provisions of the policy their plain and ordinary meaning

(*Stout v I E. 66th St. Corp.*, 90 AD3d 898, 903-04 [2d Dept 2011]). A court cannot rewrite the terms of an insurance policy if the language is determinative (*id. at* 904). Similarly, an insurance contract should not be interpreted in a manner that would render its provisions meaningless (*id. at* 904).

Plaintiffs argue in their first cause of action against Chartis and Canatal that they are entitled to a declaration as to the rights, duties, and obligations of the parties under the terms of the Chartis Policy. In their second cause of action against Chartis, plaintiffs argue that Chartis has breached the Chartis Policy by failing to defend Sordoni in the Cross Action.

Chartis does not dispute that Sordoni is an additional insured under the Chartis Policy and Chartis Excess Policy. Rather, the dispute between Chartis and Sordoni involves Sordoni's representation by defense counsel that was not appointed by Chartis. Chartis contends that, as the insurer, it has the right to control the defense of Sordoni, including the selection of counsel for Sordoni's defense.

SORDONI IS ENTITLED TO ITS CHOICE OF COUNSEL

On April 4, 2016, Chartis informed Sordoni by letter that: (1) Sordoni is an additional insured under the Chartis Policy, (2) Chartis was reserving its rights to deny coverage in the event that "Sordoni's liability did not arise out of work performed by Canatal or on Canatal's behalf"; (3) that any coverage by Chartis is "excess over any primary insurance available to [Sordoni] covering liability for damages arising out of the premises or operations for which you have been added as an additional insured by attachment of an endorsement", and (4) that the "[Chartis] Policy requires the exhaustion of the applicable [self-insured retention (SIR)] to be exhausted before any defense and/or indemnity obligation exists" (Chartis April 2016 Letter, NYSCEF 232, p. 3).

Subsequently, on January 9, 2020, Chartis informed Sordoni by letter that: (1) it acknowledges that the SIR was exhausted, (2) that the coverage under the Chartis Policy is “primary to and will not contribute with the Old Republic Policy” subject to a reservation of rights to “seek contribution from any other primary insurance available to Sordoni for which Sordoni has been added as an additional insured by attachment of an endorsement” and “pursue Sordoni and/or Old Republic for any defense expenses that Sordoni and/or Old Republic may recover in the related declaratory judgment action commenced by Sordoni and Old Republic” (Chartis January 2020 Letter, NYSCEF 233, p. 3).

Thereafter on August 12, 2020, Chartis informed Sordoni by letter that “by letter dated January 9, 2020, [Chartis] accepted Sordoni’s defense and indemnification under the [Chartis Policy] without reservation...” and indicated that Chartis would be appointing counsel to defend Sordoni (Chartis Aug 12 2020 Letter, NYSCEF 322, p. 4).

Here, there is the potential for a conflict of interest in light of the pending claims for summary judgment between Sordoni and Chartis’s insured, Canatal, in the Cross Action and Chartis’s claims for summary judgment against Sordoni in the instant action.

“The insurer's right to control the defense of the underlying litigation against the insured corresponds to the recognized right of the insurer to protect its own financial interest” (*M & M Elec., Inc. v Commercial Union Ins. Co.*, 241 AD2d 58, 61-62 [2d Dept 1998]). However, “where there is a conflict of interests between an insurance company and its insured, the insured has the right to independent counsel and implicitly that such counsel may be of the insured's choosing, with reasonable fees paid by the insurer” (*69th St. and 2nd Ave. Garage Assoc. v Ticor Tit. Guar. Co.*, 207 AD2d 225, 227 [1st Dept 1995] [internal citations omitted]). “Indeed, the law is clear that where a conflict of interest is probable, selection of attorneys to represent the insured should be

made by the insured rather than by the insurance company, which should remain liable for reasonable fees...” (*id.* [finding a crucial conflict of interest that entitled plaintiff to counsel of its own choosing])).

Furthermore, a change in counsel at this juncture of litigation in the Cross Action would be prejudicial to Sordoni, as Sordoni has been represented by its own counsel for over six years. Therefore, Sordoni is entitled to counsel of its own choosing (*see Major Builders Corp. v Commercial Union Ins. Co.*, 155 AD2d 267 [1st Dept 1989] [court found it would be appropriate for plaintiff to choose its own counsel after three years of litigation and the potential for conflicts of interest])). Chartis has conceded that Sordoni is entitled to coverage and thus, Chartis should contribute to the reasonable cost of Sordoni’s defense by counsel of its own choosing.

CHARTIS’S CROSS-MOTION IS DENIED

In light of the above, Chartis’ cross motion seeking a declaration that Sordoni breached the cooperation clause contained in the Chartis Policy and Chartis Excess Policy by refusing to accept a change in counsel is denied.

WSLI HAD A DUTY TO DEFEND SORDONI

Plaintiffs are entitled to summary judgment on their third and fourth causes of action in the Complaint. WSLI and SQP’s motion for summary judgment seeking dismissal of the plaintiffs’ third and fourth causes of action is denied.

In their third cause of action against WSLI and Safety, plaintiffs seek a declaration as to the rights, duties, and obligations of the relevant parties under the terms of the WSLI Policy. In their fourth cause of action against WSLI, plaintiffs argue that WSLI has breached the WSLI Policy by failing to defend Sordoni in the Cross Action.

It is undisputed that Cross did not assert allegations against SPQ directly in the Cross Action, however, Sordoni interposed a second third-party complaint seeking common-law indemnification, contractual indemnification, contribution, and breach of contract alleging that Cross's injury was a result of SQP's negligence (Second Third-Party Complaint, NYSCEF ¶¶ 8-78).

Despite WSLI and SQP's arguments to the contrary, the allegations in Sordoni's Second Third-Party Complaint were sufficient to raise the possibility of coverage within the scope of the WSLI Policy and trigger Sordoni's entitlement to a defense as an additional insured under the WSLI Policy (*Mt. Hawley Ins. Co. v American States Ins. Co.*, 168 AD3d 558, 559 [1st Dept 2019] [finding a duty to defend based on allegations in a third-party complaint by an additional insured against a named insured]).

WSLI argues that that Sordoni and JCP are not additional insureds under the WSLI policy because the injury did not arise out of SQP's act or omission or an act or omission of those acting on SQP's behalf based on a decision by the court in the Cross Action dismissing Sordoni's claims for common-law indemnification and contribution, which found that SQP was not the "proximate cause" of Cross's injury (SQP Decision) (SQP Decision, NYSCEF 306).

WSLI argues that Sordoni and JCP are not additional insureds pursuant to the language of the WSLI Policy, which provides that:

"Such person or organization is an additional insured only with respect to liability for 'bodily injury', 'property damage' or 'personal and advertising injury' caused in whole or in part, by:

1. Your acts or omissions;
2. The acts or omissions of those acting on your behalf;

in the performance of your ongoing operations for the additional insured."

(NYSCEF 291, p. 29).

WSLI contends that the language of the policy restricting liability “caused in whole or in part” to the “acts or omissions” of the named insured, SQP in this instance, limits coverage to injury proximately caused by the named insured (*Hanover Ins. Co. v Philadelphia Indem. Ins. Co.*, 159 AD3d 587 [1st Dept 2018] [internal quotation marks and citations omitted]).

The court in the Cross Action held that SQP “met its burden and established that it was not negligent and exercised no actual supervision with respect to operation of the crane. It is undisputed that [SQP] did not control or operate the claim”. The court further held that “Sordoni failed to provide proof that [SQP] exercised actual supervision of the unloading of the joists to entitle them to common law indemnification and failed to raise a triable issue of fact concerning the degree of fault attributable to the parties” (NYSCEF 306, p. 10).

However, the Court does agree that WSLI’s duty to defend was terminated upon the finding that SQP was not the proximate cause of the injury. No duty to defend exists if the allegations of underlying complaint cannot be interpreted to fit within the scope of the policy provisions (*see Seneca Ins. Co., Inc. v Cimran Co., Inc.*, 106 AD3d 166, 170 [1st Dept 2013] [internal citations omitted]).

Thus, WSLI owed a duty to defend Sordoni under the WSLI Policy and is liable for the costs of defending Sordoni from the point it tendered coverage until the issuance of the SQP Decision on December 24, 2019.

Moreover, JCP is not an additional insured under the WSLI Policy, which clearly provides that an additional insured is “any person or organization for whom you are performing operations when you and such person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional Insured on your policy” (WSLI Policy,

NYSCEF 234, CG 20 33 04 13). It is undisputed that JCP was not a party to the SQP Subcontract, which is required to have JCP included as an additional insured under the WSLI Policy (*see Gilbane Bldg. Co./TDX Const. Corp. v St. Paul Fire & Mar. Ins. Co.*, 143 AD3d 146, 154 [1st Dept 2016], *affd* 31 NY3d 131 [2018] [“for an organization to be added as an additional insured, there must be a written agreement between the named insured and the organization seeking coverage”] [internal citations omitted]).

CHARTIS’S MOTION FOR PARTIAL SUMMARY JUDGMENT IS GRANTED

In motion sequence 006, Chartis moves for summary judgment seeking various declarations with respect to the parties’ obligations under: (1) the WSLI Policy, (2) the Old Republic with respect to JCP, and (3) the Chartis Excess Policy.

Chartis correctly argues that the Chartis Policy and WSLI Policy both provide primary coverage to Sordoni as both policies are written as primary insurance.

The WSLI provides that “[t]his insurance is primary except when Paragraph b. below applies. If this insurance is primary, our obligations are not affected unless insured amounts under all that other any of the other insurance is also primary. Then, we will share with all that other insurance in Paragraph c. below” (WSLI Policy 267, § IV, 4 [a]). The WSLI further provides that it is excess over “[a]ny other primary insurance available to you covering liability for damages arising out of the premises or operations, or the products and completed operations, for which you have been added as an additional insured” (*id.* at 4 [b])

The Chartis Policy provides “[t]his insurance is primary except when b. Excess Insurance, below, applies. If this insurance is primary, our obligations are not affected unless any of the other insurance is also primary. Then, we will share with all that other insurance by the method described in c. Method of Sharing, below” (Chartis Policy, 268, § VI, 4 [a]). The Chartis Policy further

provides that the policy is excess over “[a]ny other primary insurance available to you covering liability for damages arising out of the premises or operations for which you have been added as an additional insured by attachment of an endorsement” (*id.* at 4 [b]).

Neither the Chartis Policy nor the WSLI Policy is excess to the other as Sordoni is not the named insured on either policy. Thus, by their own terms, both policies are primary and must contribute equally, as stated in each policy (*id.* at 4 [c]; WSLI Policy 267, § IV, 4 [c]).

The portion of Chartis’s motion for partial summary judgment seeking declaratory relief and contribution with respect to JCP’s defense in the Cross Action is denied, as Chartis did not assert any counterclaims seeking such relief in any pleading (*see Hennessy v G.S. Mink Steamer and T. Claxton Hose Co. No. 2, Auxiliary Inc.*, 182 AD3d 830, 831 [3d Dept 2020]). In *Hennssey*, the Third Department upheld the lower court’s determination that “the volunteer companies were not entitled to additional declaratory relief because their consolidated answer contained no counterclaims, thereby rendering their request for declaratory relief improperly interposed” (*id.* at 834).

Furthermore, Old Republic is prejudiced as it was deprived of an opportunity to conduct discovery on those claims and this court cannot determine if Chartis is seeking reimbursement on the basis of contribution and unjust enrichment or, as Old Republic argues in opposition, if the claim is based in subrogation and potentially subject to waiver (CPLR 3017 [b]).

However, Chartis is entitled to declaratory relief with respect to the Chartis Excess Policy as that relief is based purely on the relevant policies at issue.

The Chartis Excess Policy provides that “[i]f other valid and collectible insurance applies to damages that are also covered by this policy, this policy will apply excess of the ‘other

insurance'. However, this provision will not apply if the other insurance is specifically written to be excess of this policy" (Chartis Excess Policy, NYCSEF 272, Page 27 of 31, § VI, K).

The Old Republic Policy provides that "[t]his insurance is primary except when Paragraph b. below applies. If this insurance is primary, our obligations are not affected unless any of the other insurance is also primary. Then, we will share with all that other insurance by the method described in Paragraph c. below" (Old Republic Policy, NYSCEF 270, § IV, 4 [a]).

Although the Old Republic Policy provides that it will be excess under certain conditions, the coverage purchased was primary coverage, however, the Chartis Excess Policy was purchased only for excess coverage under its plain terms (*Cheektowaga Cent. School Dist. v Burlington Ins. Co.*, 32 AD3d 1265, 1268 [4th Dept 2006]). Similarly, policy GL 681-94-88 issued by Granite State Insurance Company to JCP (the Granite State Policy) contains similar language providing that it will be excess under certain conditions, but otherwise provides primary coverage is primary to the Chartis Excess Policy (Granite State Policy, NYSCEF 271, § 7, [F]).

Furthermore, the Old Republic Policy contains a pro rata "other insurance" clause, the Chartis Excess Policy clearly contains an excess "other insurance" clause, which means that coverage under the Chartis Excess Policy is not triggered until the Old Republic Policy and other primary insurance is exhausted (*see Sport Rock Intern., Inc. v American Cas. Co. of Reading, PA*, 65 AD3d 12, 18-19 [1st Dept 2009] ["It is well established under New York law that, where one of two concurrently applicable insurance policies contains an excess 'other insurance' clause and the other contains a pro rata 'other insurance' clause, the excess clause is given effect, meaning that the coverage under the policy containing the excess clause does not come into play, and the carrier's duty to defend is not triggered, until the coverage under the policy containing the pro rata

clause has been exhausted”]). Thus, the Chartis Excess Policy is excess to the Old Republic Policy as the Old Republic Policy was purchased for primary coverage.

Accordingly it is,

ORDERED that plaintiffs motion for summary judgment is granted, and its further

ORDERED that Chartis’s cross motion is denied; and its further

ORDERED that Chartis’s motion for partial summary judgment is granted to the extent it seeks declarations with respect to the Chartis Excess Policy and the WSLI Policy and is otherwise denied; and it is further

ORDERED that WSLI motion for summary judgment is denied, and it is further

ORDERED AND DECLARED that Sordoni is entitled to primary coverage under the Chartis Policy and that Sordoni is entitled to representation by counsel of its own choosing, the reasonable cost of which Chartis shall contribute to, and it is further

ORDERED AND DECLARED that WSLI had a duty to defend Sordoni under terms of the WSLI Policy and is obligated to contribute to the costs of defending Sordoni in the Cross Action through the date of December 24, 2019, and it is further

ORDERED AND DECLARED that coverage under the Old Republic Policy and the WSLI Policy must be exhausted before coverage is due under the Chartis Excess Policy with respect to Sordoni and that coverage under the Old Republic Policy, Granite State Policy, and the WSLI Policy must be exhausted before coverage is due under the Chartis Excess Policy with respect to JCP, and it is further

ORDERED AND DECLARED that Chartis is not entitled to the declarations it seeks with respect to Old Republic’s obligations to JCP, and it is further

ORDERED AND DECLARED that WSLI is not entitled to the declarations it seeks.

This constitutes the decision and order of the Court.

Index # 452106/16

11/15/2021
DATE



RICHARD LATIN, J.S.C.

CHECK ONE:

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CASE DISPOSED

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GRANTED

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DENIED

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NON-FINAL DISPOSITION

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GRANTED IN PART

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OTHER

APPLICATION:

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SETTLE ORDER

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SUBMIT ORDER

CHECK IF APPROPRIATE:

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INCLUDES TRANSFER/REASSIGN

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FIDUCIARY APPOINTMENT

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REFERENCE