

**No. 17-2014**

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**UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT**

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AMERICAN TOOLING CENTER, INC.,

*Plaintiff – Appellant,*

vs.

TRAVELERS CASUALTY AND SURETY  
INSURANCE COMPANY,

*Defendant – Appellee.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN

Case No. 5:16-cv-12108

The Honorable John Corbett O'Meara

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**BRIEF OF APPELLANT  
AMERICAN TOOLING CENTER, INC.**

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**DISCLOSURE OF CORPORATE AFFILIATIONS  
AND FINANCIAL INTEREST**

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure,  
American Tooling Center, Inc. makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly-owned corporation?

No.

If the answer is YES, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

2. Is there a publicly-owned corporation, not a party to the appeal, that has a financial interest in the outcome?

No.

If the answer is YES, list the identity of such corporation and the nature of the financial interest:

Date: November 14, 2017

WILSON YOUNG PLC

/s/ Douglas Young  
Douglas Young

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## TABLE OF CONTENTS

STATEMENT IN SUPPORT OF ORAL ARGUMENT.....	v
I. STATEMENT OF JURISDICTION .....	1
II. STATEMENT OF THE ISSUE.....	1
III. STATEMENT OF THE CASE.....	2
IV. STANDARD OF REVIEW .....	4
V. MICHIGAN LAW GOVERNS INTERPRETATION OF TRAVELERS' INSURANCE POLICY .....	4
VI. SUMMARY OF ARGUMENT .....	5
VII. ARGUMENT	
A. ATC Suffered a Direct Loss of its Money .....	7
B. ATC was Victimized by Computer Fraud .....	19
C. The Computer Fraud "Directly Caused" ATC's Loss .....	20
VIII. CONCLUSION .....	21
CERTIFICATE OF COMPLIANCE.....	23
CERTIFICATE OF SERVICE .....	24

## TABLE OF AUTHORITIES

### Cases

<i>Acorn Inv. Co. v. Mich. Basic Prop. Ins. Ass'n</i> , 2009 WL 2952677 (Mich. Ct. App. Sept. 15, 2009) .....	7
<i>Aetna Cas. &amp; Sur. Co. v. Kidder, Peabody &amp; Co.</i> , 246 A.D.2d 202, 209–10, 676 N.Y.S.2d 559 (1998).....	10
<i>Apache Corp. v. Great Am. Ins. Co.</i> , 2015 WL 7709584, *2–3 (S.D. Tex. Aug. 7, 2015).....	14, 15
<i>Apache Corp. v. Great Am. Ins. Co.</i> , 662 Fed. Appx. 252 (5th Cir. October 18, 2016).....	14, 15, 16
<i>Brightpoint, Inc. v. Zurich Am. Ins. Co.</i> , 2006 WL693377 at *7 (S.D. Ind. March 10, 2006) .....	16
<i>DeFrain v. State Farm Mut. Auto. Ins. Co.</i> , 491 Mich. 359, 367, 817 N.W.2d 504 (2012) .....	16
<i>GAIC v. AFS/IBEX Fin. Servs., Inc.</i> , 2008 WL 2795205 (N.D. Tex. July 21, 2008).....	17
<i>Hantz Fin. Services, Inc. v. Am. Intl. Specialty Lines Ins. Co.</i> , 664 Fed. Appx. 452 (6 <sup>th</sup> Cir. 2016).....	11, 12
<i>Henderson v. State Farm Fire &amp; Cas. Co.</i> , 460 Mich. 348, 353, 596 N.W.2d 190 (1999) .....	16
<i>Medidata Solutions, Inc. v. Federal Insurance Co.</i> , 2017 WL 3268529 (S.D. N.Y. July 21, 2017).....	17
<i>Pedicini v. Life Ins. Co. of Alabama</i> , 682 F.3d 522, 526 (6 <sup>th</sup> Cir. 2012) .....	4
<i>Pestmaster Servs. v. Travelers Cas. &amp; Sur. Co. of Am.</i> , 656 Fed. Appx. 332 (9th Cir. 2016).....	12
<i>RBC Mortg. Co. v. Nat'l Union Fire Ins. Co. of Pittsburgh</i> , 349 Ill. App.3d 706, 285 Ill. Dec. 908, 812 N.E.2d 728 (2004) (Ill. law)..	10
<i>Retail Ventures, Inc. v. National Union Fire Ins. Co. of Pittsburgh, Pa.</i> , 691 F.3d 821 (6th Cir. 2012) .....	9, 10

<i>Taylor &amp; Lieberman v. Fed. Ins. Co.</i> , No. CV 14-3608 RSWL SHX, 2015 WL 3824130 (C.D. Cal. June 18, 2015) .....	11, 12
<i>Tooling Mfg. &amp; Techs Ass'n v. Hartford Fire Ins. Co.</i> , 693 F.3d 665, 677 (6th Cir. 2012) .....	8, 11
<i>Vons Cos. v. Fed. Ins. Co.</i> , 212 F.3d 489, 492–93 (9th Cir.2000) .....	10
<i>Wuliger v. Manufacturers Life Ins. Co.</i> , 567 F.3d 787, 792-93 (6th Cir. 2009).....	4
<b>Court Rules</b>	
Fed. Rule App. P. 4(a)(1)(A) .....	1
Fifth Circuit Rule 47.5.4 .....	14
<b>Statutes</b>	
28 U.S.C. §1291 .....	1
28 U.S.C. §1332(a)(1) .....	1
<b>Miscellaneous</b>	
<i>Black's Law Dictionary</i> .....	9
<i>Webster's Third New Int'l Dictionary</i> 641 (1981) .....	9

## **STATEMENT IN SUPPORT OF ORAL ARGUMENT**

Pursuant to Federal Rules of Appellate Procedure 23(a)(1) and Sixth Circuit Rule 34(a), Appellant American Tooling Center, Inc. respectfully requests that the Court permit oral argument. Oral argument will allow the attorneys for the parties to address any outstanding factual or legal issues that the Court deems relevant and will assist the court in its decision. Oral argument is further requested because this case presents complex legal issues and the decisional process is likely to be aided by oral argument.

## **I. STATEMENT OF JURISDICTION**

The U.S. District Court for the Eastern District of Michigan had jurisdiction over this action pursuant to 28 U.S.C. §1332(a)(1) as the parties are citizens of different states and the amount in controversy exceeds \$75,000.00. This Court has appellate jurisdiction pursuant to 28 U.S.C. §1291.

The District Court entered its final Judgment on August 1, 2017, in favor of Defendant/Appellee and against Plaintiff/Appellant. On August 28, 2017, Appellant filed a Notice of Appeal. Because the Notice of Appeal was filed within 30 days of the entry of the Judgment, it was timely under Fed. Rule App. P. 4(a)(1)(A).

## **II. STATEMENT OF THE ISSUE**

Whether Plaintiff/Appellant American Tooling Center, Inc., suffered a direct loss under the terms of Defendant/Appellee Travelers Casualty and Surety Company of America's Crime insurance coverage.

### **III. STATEMENT OF THE CASE**

This appeal arises out of an insurance coverage dispute between Plaintiff/Appellant American Tooling Center, Inc. (hereinafter “ATC”), and its insurer Defendant/Appellee Travelers Casualty and Surety Company of America (hereinafter “Travelers”). This dispute involves the crime coverage contained within the Travelers “Wrap+” business insurance policy, No. 105493837, issued to Superior Cam, Inc.<sup>1</sup>, for the policy period of October 1, 2014 to October 1, 2015 (the “Policy”). (Policy; RE 21-2, Page ID# 200-283).

During the policy period, between March 23, 2015 to May 20, 2015, ATC received a series of fraudulent email communications which caused it to issue three wire transfer payments<sup>2</sup> totaling \$834,107.76 to one or more cybercriminals instead of its legitimate Chinese vendor. On May 22, 2015, ATC provided Travelers with a Notice of Loss under the Policy. (Notice of loss; RE 21-4, Page ID# 451). On July 8, 2015, Travelers wrote to ATC and noted that it had not yet submitted its Proof of Loss but that coverage was denied for this loss. (Travelers’ denial letter; RE 21-5, Page ID# 459-461). In that denial letter, Travelers asserted that “the loss was not directly caused

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<sup>1</sup> Superior Cam, Inc, is an affiliated company of ATC and ATC is a Named Insured under this same Travelers insurance policy.

<sup>2</sup> These payments were also issued during the policy period on April 8, 2015, April 9, 2015 and May 8, 2015.



by the use of a computer.” *Id.* at Page ID# 460. Further, “the loss was not caused directly by the use of a computer to fraudulently cause a transfer of Money from inside the Premises or Banking Premises.” *Id.* On September 16, 2015, ATC submitted a detailed, sworn Proof of Loss to Travelers (Proof of Loss; RE 21-4, Page ID# 330-457) and counsel for ATC asked Travelers to reconsider its denial of this claim. (ATC counsel letter; RE 21-6, Page ID# 463-467). On October 23, 2015, Travelers reiterated its denial of this claim. (Travelers reiterated denial letter; RE 21-7, Page ID# 469-471).

Thereafter, on June 9, 2016, ATC filed its Complaint against Travelers asserting three counts for breach of contract, declaratory judgment and statutory bad faith (Complaint, RE 1, Page ID# 1-16). On April 7, 2017, ATC and Travelers filed cross motions for summary judgment. (ATC’s Motion for Summary Judgment, RE 21, Page ID# 170-196; Travelers’ Motion for Summary Judgment, RE 22, Page ID# 591-693). On August 1, 2017, prior to the scheduled oral argument on these motions set for August 3, 2017, the district court granted Travelers’ Motion for Summary Judgment and denied ATC’s Motion for Summary Judgment. (Dist. Ct. Opinion and Order, RE 33, Page ID# 963-970). The district court also issued a Judgment in favor of Travelers on this same date. (Judgment, RE 34, Page ID# 971). On August

28, 2017, ATC then timely appealed the district court's order and judgment. (Notice of Appeal, RE 35, Page ID# 972).

ATC appeals the district court's grant of Travelers' motion for summary judgment and the denial of its motion for summary judgment and respectfully requests that this Court reverse the district court's order.

#### **IV. STANDARD OF REVIEW**

This appellate review is governed by the *de novo* standard of review. A grant or denial of summary judgment is reviewed de novo. *See Wuliger v. Manufacturers Life Ins. Co.*, 567 F.3d 787, 792-93 (6th Cir. 2009).

Matters presenting pure questions of law, such as interpretation of an insurance policy, are subject to the appellate court's independent review as is determination of the meaning of the relevant contract language. *See Pedicini v. Life Ins. Co. of Alabama*, 682 F.3d 522, 526 (6<sup>th</sup> Cir. 2012) ("We review a grant of summary judgment on a breach of contract claim de novo").

#### **V. MICHIGAN LAW GOVERNS INTERPRETATION OF THE TRAVELERS INSURANCE POLICY**

The parties agree that Michigan law applies to the Travelers' Policy as it was issued to Superior Cam, Inc.,<sup>3</sup> a business domiciled in Michigan. The

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<sup>3</sup> See footnote 1.

district court applied Michigan law to this dispute. (Dist. Ct. Opinion and Order, RE 33, Page ID# 966).

## **VI. SUMMARY OF ARGUMENT**

This dispute involves the issue of whether ATC suffered a direct loss within Travelers' crime protection policy insuring ATC against "Computer Fraud" and whether a fraudulent email from a disguised fraudulent email address directly caused the transfer of ATC's own funds from its bank account to the account of the cybercriminals.

The Travelers Policy at issue includes insurance coverage for Employment Practices Liability, Fiduciary Liability and Crime. The Crime coverage insures ATC against a variety of risks, including employee theft, forgery or funds transfer fraud and computer crime. Computer Crime has two subsets of coverage: Computer Fraud, and; Computer Program and Data Restoration Expense. This appeal involves the Computer Fraud coverage of the Policy.

Under the Computer Fraud coverage, the Policy provides \$1 million limit of liability after a \$5,000 single loss retention. (ATC's Motion for Summary Judgment, Exhibit A; RE 21-2, Page ID# 201).

Section I. F.1. (*Id.* at Page ID# 227) of the Policy states:

## F. COMPUTER CRIME

### 1. Computer Fraud

The Company will pay the **Insured** for the **Insured's** direct loss of, or direct loss from damage to, **Money, Securities** and **Other Property** directly caused by **Computer Fraud**.

[Underlining added; Bold are defined terms in Policy]

“Computer Fraud” is defined at Section III. Definitions, E. (*Id.* at Page ID# 231):

#### E. Computer Fraud means:

The use of any computer to fraudulently cause a transfer of **Money, Securities** or **Other Property** from inside the **Premises** or **Financial Institution Premises**:

1. to a person (other than a **Messenger**) outside the **Premises** or **Financial Institution Premises**; or
2. to a place outside the **Premises** or **Financial Institution Premises**.

[Underlining added; Bold are defined terms in Policy]

“Financial Institution Premises” is defined at Section III. Definitions, X. (*Id.* at Page ID# 234) as:

- #### X. **Financial Institution Premises** means the interior of that portion of any building occupied by a **Financial Institution** (including any night depository chute and any safe maintained by such **Financial Institution**), transfer agent or registrar or similarly recognized place of safe deposit.

[Underlining added; Bold are defined terms in Policy]

“Money” is defined at Section III. Definitions, II. (*Id.* at Page ID# 236) as:

- II. **Money** means a medium of exchange in current use and authorized or adopted by a domestic or foreign government, including currency, coins, bank notes, bullion, travelers’ checks, registered checks and money orders held for sale to the public.

[Underlining added; Bold are defined terms in Policy]

“Premises” is defined at Section III. Definitions, MM., (*Id.* at Page ID# 236) in the Policy as:

- MM. **Premises** means the interior of that portion of any building the Insured occupies in conducting the Insured's business.

[Underlining added; Bold are defined terms in Policy]

## VII. **ARGUMENT**

### A. **ATC Suffered a Direct Loss of Its Money**

The Travelers’ Policy issued to ATC provides commercial crime insurance coverage to ATC for “direct loss” of its money caused by Computer Fraud. The district court erred in finding that ATC somehow suffered an “indirect loss” of its money. Quite to the contrary, ATC suffered an immediate loss of its money which was proximately caused by the fraudulent emails.

The Policy requires that ATC suffer a “direct loss” of money caused by Computer Fraud. In *Acorn Inv. Co. v. Mich. Basic Prop. Ins. Ass’n*, 2009 WL

2952677 (Mich. Ct. App. Sept. 15, 2009) (in an unpublished opinion) , the Michigan Court of Appeals held that the word “direct” means “immediate” or “proximate” cause, “as distinct from remote or incidental causes.” (ATC’s Motion for Summary Judgment, Exhibit M; RE 21-14, Page ID# 551-555).

Other courts addressing similar direct loss requirements have interpreted them as limiting the insurance coverage to losses incurred directly by the insured (“direct means direct”) rather than by a third party to whom the insured is liable. See *Tooling Mfg. & Techs Ass’n v. Hartford Fire Ins. Co.*, 693 F.3d 665, 677 (6th Cir. 2012). (ATC’s Motion for Summary Judgment, Exhibit N; RE 21-15, Page ID# 557-570). In *Tooling, Mfg & Techs. Ass’n*, the Court stated:

In Michigan, “reviewing courts must interpret the terms of the contract in accordance with their commonly used meanings, ... [and] [w]hen considering a word or phrase that has not been given prior legal meaning, resort to a lay dictionary such as Webster’s is appropriate,” *Citizens Ins.*, [477 Mich. 74, 730 N.W.2d 682, 686 (2007)] (internal quotation marks and citations omitted), so we turn to the dictionary. *Webster’s* defines “directly” as:

1a: without any intervening space or time: next in order. . .

2a: straight on along a definite course of action without deflection or slackening . . .[;] d: simultaneously and exactly or equally

3: in close relational proximity . . .[;]

4a: without any intervening agency or instrumentality or determining influence: without any intermediate step . . . .

*See Webster's Third New Int'l Dictionary* 641 (1981) available at <http://unabridged.merriam-webster.com/cgi-bin/unabridged>

*Black's Law Dictionary* defines “directly” as:

In a direct way without anything intervening; not by secondary, but by direct, means.

*Black's* further defines “direct” as:

Immediate; by the shortest course; without circuitry; operating by an immediate connection or relation, Instead of operating through a medium; the opposite of indirect.

In the usual or natural course or line; immediately upwards or downwards; as distinguished from that which is out of the line, or on the side of it; the opposite of collateral. In the usual or regular course or order, as distinguished from that which diverts, interrupts, or opposes; the opposite of cross, contrary, collateral or remote.

Without any intervening medium, agency or influence; unconditional.

Finally, *Black's* defines “direct loss” to mean:

One resulting immediately and proximately from the occurrence and not remotely from some of the consequences or effects thereof.

*See Black's Law Dictionary*

In *Retail Ventures, Inc. v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 691 F.3d 821 (6th Cir. 2012), this Court, in applying Ohio law, looked at an insurance policy requiring loss “resulting directly from” computer fraud.

This Court considered credit card hacker's theft was required to be the "sole" and "immediate" cause of the insured's loss. See also, *RBC Mortg. Co. v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 349 Ill. App.3d 706, 285 Ill. Dec. 908, 812 N.E.2d 728 (2004) (Ill. law). Under this approach, loss "resulting directly from" employee misconduct refers only to the insured's own loss from employee misconduct and not the insured's vicarious liability to third parties. See *Vons Cos. v. Fed. Ins. Co.*, 212 F.3d 489, 492–93 (9th Cir.2000) (direct means no vicarious liability); *Aetna Cas. & Sur. Co. v. Kidder, Peabody & Co.*, 246 A.D.2d 202, 209–10, 676 N.Y.S.2d 559 (1998) (finding no coverage for third-party claims arising out of misconduct of employee who disclosed confidential information to others that resulted in massive insider trading losses).

Courts that have adopted the "direct means direct" approach have done so in the context of fidelity bonds. *Retail Ventures, Inc.*, *supra* at 829. The use of the word "directly" is defined as "immediate" or "without anything intervening" cause. ATC's loss falls within the above definitions of a "direct" loss. In ATC's case, the cybercriminal directly stole ATC's money by trick or artifice. The wire transfer initiated by ATC to the cybercriminal's account came directly from ATC's bank account. It was only initiated because of the fraudulent spoofed emails sent via computer to ATC.



*Tooling, Mfg & Techs. Ass'n, supra.* is distinguishable in that this Court found that a theft by an employee of the named insured from an affiliated company did not constitute a direct loss to the named insured. This loss was not direct in that it was not a direct loss to the named insured, it was a loss to an affiliated (third party) company. As *Tooling* involved a theft of a third party's money, it was not the insured direct loss. There is no dispute that the money stolen from ATC was its money and not that of any third party.

In *Hantz Fin Services, Inc. v Natl. Union Fire Ins. Co. of Pittsburgh, PA*, 130 F. Supp.3d 1089, 1093–94 (E.D. Mich. 2015), *aff'd on other grounds sub nom., Hantz Fin. Services, Inc. v. Am. Intl. Specialty Lines Ins. Co.*, 664 Fed. Appx. 452 (6<sup>th</sup> Cir. 2016), this Court dealt with a similar 'indirect loss' issue. In *Hantz*, an employee of Hantz created a similar company name and misdirected Hantz's customers' payments to his fraudulent company's account. This Court found this loss was not a direct loss to Hantz as it was the Hantz customers' money that was stolen and Hantz's loss arose from its settlement of its customers claims against it.

A similar result occurred in *Taylor & Lieberman v. Fed. Ins. Co.*, No. CV 14-3608 RSWL SHX, 2015 WL 3824130 (C.D. Cal. June 18, 2015). Like *Hantz*, in *Taylor & Lieberman*, an accounting firm was tricked by an email into wiring a client's money to a cybercriminal. There was no loss of the

insured accounting firm's money. The accounting firm claimed a loss resulting from its repayment to its client. Both *Hantz* and *Taylor & Lieberman* make clear that the insured must directly suffer the loss of its money and not the money of any third party.

The district court in this case also erroneously relied on *Pestmaster Servs. v. Travelers Cas. & Sur. Co. of Am.*, 656 Fed. Appx. 332 (9th Cir. 2016), an unpublished, memorandum decision. (ATC's Motion for Summary Judgment, Exhibit I; RE 21-10, Page ID# 526-527). The *Pestmaster* case is also readily distinguishable on its facts. In *Pestmaster*, the perpetrator of the fraud was a payroll management services vendor of Pestmaster. Pestmaster authorized this payroll management services vendor to withdraw funds from Pestmaster's bank account and make its payroll tax payments. The payroll management services vendor stole Pestmaster's funds after they withdrew them from Pestmaster's account pursuant to Pestmaster's authorization. The California district court found that the loss was caused by the payroll management services vendor's breach of its contractual obligations and its misuse of Pestmaster's funds -- not by an unauthorized transfer. The words "direct" and "directly" are not found in the Ninth Circuit's *Pestmaster* decision, which did not say that the use of a computer must "directly" cause the fraudulent transfer. This district court found there was no coverage simply

because the insured had authorized the thief to withdraw money from its account.

All of the aforementioned situations are distinctly different from the facts of the ATC loss. ATC directly suffered a loss of its funds and no third party's money was stolen. The cybercriminal used fraudulent computer emails to cause ATC to wire its funds to the cybercriminal's account. Travelers even tacitly acknowledged the direct loss requirement was met when it argued that ATC did not suffer a direct loss because it received the contracted dies from its legitimate vendor YiFeng. Travelers attempted to make this direct loss the loss of YiFeng but disregarded the fact ATC remains responsible to pay YiFeng for the work performed on the dies. ATC does not get to eliminate or reduce its debt to YiFeng because it was defrauded by the cybercriminal. As such, ATC has suffered an immediate and direct loss of its money within the terms of the Policy.

In this case, the cybercriminal stole ATC's money by deception. The money that was wire transferred by ATC to the cybercriminal's account came from ATC's bank account. ATC reasonably believed it was transferring the money to YiFeng to pay for work on dies that ATC had purchased from YiFeng. YiFeng never received ATC's payments for the dies because the cybercriminal deceived ATC into sending the payments to him. ATC has paid

YiFeng fifty percent (50%) of the outstanding invoices. (ATC's Motion for Summary Judgment, Exhibit B; Dep. Trans. G. Gizinski; RE 21-3, Page ID# 316 at p. 126). YiFeng has not agreed to accept this partial payment in full satisfaction of the debt. *Id.* Thus, ATC remains liable to pay YiFeng for that die work. That debt to YiFeng for the die work arose before the theft of ATC's money. When ATC wired its funds to the cybercriminal, it suffered a direct loss as that payment did not discharge its debt to its legitimate vendor, YiFeng.

The district court also erroneously relied on *Apache Corp. v. Great Am. Ins. Co.*, 662 Fed. Appx. 252 (5th Cir. October 18, 2016), a *per curiam*, unpublished Fifth Circuit decision where the court also found for the insurance company. (ATC's Motion for Summary Judgment, Exhibit K; RE 21-12, Page ID# 538-544). Under Fifth Circuit Rule 47.5.4, *Apache* has no precedential value. Moreover, because the decision is based on Texas law, which is materially different than Michigan law, it is poorly reasoned and offers little assistance in this matter.

In *Apache*, the insured was duped into sending payments intended for its vendor to a criminal who used fraudulent telephone calls, fraudulent emails, and a fraudulent letter to perpetrate the fraud. *Apache Corp. v. Great Am. Ins. Co.*, 2015 WL 7709584, \*2-3 (S.D. Tex. Aug. 7, 2015). . (ATC's Motion for Summary Judgment, Exhibit L; RE 21-13, Page ID# 545-549). The insured

sought coverage under a commercial crime policy that covered losses “resulting directly from the use of any computer to fraudulently cause a transfer ....” *Id.* at \*2. Noting that under Texas law the terms of an insurance policy are construed by giving them their plain meaning, (like Michigan) the Texas district court granted summary judgment to the insured, finding that the fraudulent emails set the chain of events into motion that led to the loss, and the loss was thus covered under the Policy’s definition of “Computer Fraud.” *Id.* at \*6–7.

The Fifth Circuit reversed noting that the Texas Supreme Court had expressed a preference for “uniformity when identical insurance provisions will necessarily be interpreted in various jurisdictions.” *Apache*, 662 Fed. Appx. at 255. Therefore, it undertook to determine whether there was a majority rule from cases that had addressed claims for coverage under similar computer fraud clauses. It found that other courts had ruled against the insureds and was looking a majority rule. *Id.* at 256–257. Finding that *Owens* was the only court that had ruled in the insured’s favor, it concluded that “there is cross-jurisdictional uniformity in declining to extend coverage.” *Id.* at 258. It attempted to harmonize the holdings of the other cases that had ruled for the insurer (involving materially different facts), and concluded that they stand for the proposition that there is no coverage for computer fraud “when the

fraudulent transfer was the result of other events and not directly by the computer use.” *Id.*

This Court should not follow the Fifth Circuit in *Apache* for several reasons. First, Michigan law holds that the interpretation of insurance policy’s terms should follow Michigan’s established principles of contract construction. *Henderson v. State Farm Fire & Cas. Co.*, 460 Mich. 348, 353, 596 N.W.2d 190 (1999). An insurance contract must be enforced in accordance with its terms. *Id.* The terms of a contract must be enforced as written where there is no ambiguity. *Id.* at 354. Further, the court must give terms “their ordinary and plain meaning if such would be apparent to a reader of the instrument.” *DeFrain v. State Farm Mut. Auto. Ins. Co.*, 491 Mich. 359, 367, 817 N.W.2d 504 (2012).

Additionally, the Fifth Circuit’s conclusion that the “majority” of courts have construed the definition of Computer Fraud to require that the use of the Computer “directly” cause the transfer is not accurate. In *Brightpoint, Inc. v. Zurich Am. Ins. Co.*, 2006 WL693377 at \*7 (S.D. Ind. March 10, 2006), the Indiana district court found that the use of a computer to send facsimile copies of a check and guarantee did not fraudulently cause the loss because the insured did not rely on them.) . (ATC’s Motion for Summary Judgment, Exhibit O; RE 21-16, Page ID# 571-577). In the third case relied on by the Fifth Circuit,

*GAIC v. AFS/IBEX Fin. Servs., Inc.*, 2008 WL 2795205 (N.D. Tex. July 21, 2008) (ATC's Motion for Summary Judgment, Exhibit P; RE 21-17, Page ID# 579-590), the fraud at issue was committed by submitting false applications for financing of insurance premiums, and the decision does not explain what role a computer played in that scheme. The insured abandoned its claim that its loss fell under the policy's computer fraud coverage, arguing instead that it was covered by other insuring agreements. *Id.* at 14.

Thus, these unpublished decisions do not support the Fifth Circuit's erroneous conclusion that a majority of courts have held that coverage for computer fraud only extends to transfers directly caused by the use of a computer. This would offer the insurance coverage only in situations where the insured's computer was hacked and the cybercriminal 'directly' removes the insured's money from its bank. However, that language is nowhere to be found in Travelers' definition of Computer Fraud which only requires that the use of a computer "fraudulently cause" a transfer of the insured's money.

Finally, the district court was in error when it disregarded the U.S. District Court for the Southern District of New York's opinion in *Medidata Solutions, Inc. v. Federal Insurance Co.*, 2017 WL 3268529 (S.D. N.Y. July 21, 2017). (ATC's Notice of Supplemental Authority, Exhibit A; RE 32-1, Page ID# 947-962). The district court rejected this supplemental authority as

distinguishable because “the insurance policy does not include the language at issue here which requires the “direct loss” to be “directly caused by computer fraud.” See Opinion footnote at p. 6. In fact, the Federal insurance policy at issue’s “Computer Fraud Coverage” insured the “direct loss of Money, Securities or Property sustained by an Organization resulting from Computer Fraud committed by a Third Party.” [Emphasis added]. *Id.* at \*2. This opinion involved a similar email spoofing crime and required a direct loss of the insured’s money. This district court in finding coverage under similar circumstances stated:

#### **A. Computer Fraud Coverage**

Medidata argues that the Policy’s Computer Fraud clause covers the company’s loss in 2014, because a thief fraudulently entered and changed data in Medidata’s computer system. [Record citation omitted]. Specifically, Medidata asserts that the address in the “From” field of the spoofed emails constituted data which was entered by the thief posing as Medidata’s president. [Record citation omitted]. Also, a thief entered a computer code which caused Gmail to “change” the hacker’s email address to the Medidata president’s email address. [Record citation omitted].

Federal argues that Medidata’s loss in 2014 is not covered by the Computer Fraud clause, because the emails did not require access to Medidata’s computer system, a manipulation of those computers, or input of fraudulent information. [Record citation omitted]. The Court has reviewed the Policy and concludes that, as a matter of law, the unambiguous language of the Computer Fraud clause provides coverage for the theft from Medidata.

\* \* \* \*

*Id.* at \*4.



## **B. ATC was Victimized by Computer Fraud**

The Travelers' Policy defines the term "Computer Fraud" to mean *the use of any computer to fraudulently cause a transfer of money* from inside a bank to a person outside the bank. ATC's money was in its account at Comerica. ATC's money was transferred from its bank account to the cybercriminal's bank account. This issue then becomes whether a "Computer Fraud" occurred and whether the cybercriminal used "any computer" to "fraudulently cause" those transfers.

The Policy requires Travelers to indemnify ATC for its direct loss of its money directly caused by the use of any computer to fraudulently cause a transfer of ATC's money from its bank to a person outside of its bank. The "use of any computer" element in the Policy's definition of Computer Fraud is plainly met. Mr. Gizinski, the ATC Chief Financial Officer, has testified that he sent email messages to the real Jessie Chen at YiFeng only to receive replies from the cybercriminal disguised as Ms. Chen. (ATC's Motion for Summary Judgment, Exhibit B; Dep. Trans. G. Gizinski; RE 21-3, Page ID# 323 at p. 154-155). These communications were only through the use of a computer. There were no telephone calls or facsimile transmissions.

The cybercriminal used a computer to hack into ATC and/or YiFeng's computer servers, to intercept legitimate emails between ATC and YiFeng, to

create fake email domains, and to send spoof emails to ATC and YiFeng that were intentionally designed to look like legitimate emails, to create fraudulent invoices designed to appear like legitimate YiFeng invoices. The use of a computer was an integral and indispensable part of the fraud committed on ATC.

This fraud on ATC could not have been committed without the use of a computer. (ATC's Motion for Summary Judgment, Exhibit B; Dep. Trans. G. Gizinski; RE 21-3, Page ID# 327 at p. 170-172). Under the Travelers' Policy language, a "Computer Fraud" occurs when "any" computer is used to deceive the insured into transferring its money from its bank to a person or place outside of its bank. The cybercriminal's use of spoof emails to trick ATC into wiring its money to them falls within the definition of "Computer Fraud."

**C. The Computer Fraud "Directly Caused" ATC's Loss.**

The Travelers' Policy also requires that insured's loss be "directly caused" by Computer Fraud. Since a Computer Fraud (by definition) involves the transfer of money from the insured's bank to a third person, the "directly caused" language in the Computer Crime insuring agreement is plainly satisfied by such a transfer. The insured (ATC) lost its money the instant it left its bank account Comerica Bank and is transferred to the cybercriminal's

bank account. There are no intervening steps between the wire transfer of the insured's money and the loss.

The normal method of communication between ATC and YiFeng was by email. (ATC's Motion for Summary Judgment, Exhibit B; Dep. Trans. G. Gizinski; RE 21-3, Page ID# 327 at p. 171). Emails are accomplished through the use of a computer. This fraudulent scheme could not have been successful but for the use of a computer. *Id.* at pp. 170-171. As such, a "Computer Fraud" directly caused ATC's loss.

#### **VIII. CONCLUSION**

ATC's loss is covered by the Policy. The cybercriminals caused ATC to suffer a direct loss of its money. Further, ATC was victimized by a series of computer frauds which directly caused ATC's Loss.

ATC respectfully requests that this Court reverse the district court and grant its motion for summary judgment or alternatively remand this case for further proceedings and any other relief to which this Court finds equitable or just.

Respectfully submitted,

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Dated: November 14, 2017

## CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because: this brief contains 5,507 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedures 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of the Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally-spaced 14-point Times New Roman font.

Dated: November 14, 2017

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/s/ Douglas Young  
Douglas Young

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### **CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit using the appellate CM/ECF system on November 14, 2017.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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