EXHIBIT A

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SHORT FORM ORDER

INDEX NO. 3655/2012

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION IAS PART 48 - SUFFOLK COUNTY

PRESENT:
HON. JERRY GARGUILO
SUPREME COURT JUSTICE

ORIG. RETURN DATE: 5/23/18
FINAL SUBMITTED DATE: 6/20/18
MOTION SEQ#015
MOTION: MG

JOHN R. RICONDA,

Plaintiff,

- against -

LIBERTY INSURANCE UNDERWRITERS, INC.,

Defendant.

PLAINTIFF'S ATTORNEY:
WHITE & CASE LLP
1221 AVENUE OF THE AMERICAS
NEW YORK, NEW YORK 10020

DEFENDANT'S ATTORNEY:
D'AMATO & LYNCH LLP
225 LIBERTY STREET
NEW YORK, NEW YORK 10281

Defendant, Liberty Insurance Underwriters, Inc. ("Liberty"), petitions the Court to set aside the Verdict rendered against it on May 4, 2018 and direct judgment in its favor as a matter of law; or for a new trial; or to reduce the Jury Verdict. Plaintiff opposes the application in all respects.

In making its determination, the Court has considered the following submissions:

1. Defendant's Notice of Motion To Set Aside The Verdict and Direct Judgment As A Matter of Law To Liberty; Affirmation of Peter A. Stroili In Support, inclusive of Exhibits 1 through 7 and A through BB and Memorandum of Law In Support;
2. Plaintiff's Memorandum of Law In Opposition; and
3. Defendant's Reply Affirmation of Peter A. Stroili with Exhibits A through G and Memorandum of Law In Reply.

The statutory framework within which Defendant seeks relief is found at Civil Practice Law and Rules § 4404(a). It provides that after a verdict is rendered the court can set it aside and either (1) grant judgment to which a party is entitled to it as a matter of law or (2) order a new trial on the ground that the verdict is "contrary to the weight of evidence".

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As is its habit, the Court has consulted New York Practice, Fifth Edition Practitioner Treatise Series, David D. Siegel, West Publishing. Professor Siegel notes at section 405:

> The judge is authorized to grant judgment as a "matter of law" only when [he/she] believes that on this record reasonable minds could not differ and there is therefore only one way the jury can go. The difficulty is that reasonable minds may differ about whether reasonable minds may differ, and among them may be the reasonable minds that inhabit the appellate court. If the trial court grants judgment for a side under CPLR 4401 without letting a jury pass on the issues, an appellate court that disagrees with the judges's action has no verdict to reinstate and must therefore order a new trial, wasting the earlier one. But if the trial court waits until a verdict is in, saving its action for CPLR 4404 and granting judgment notwithstanding the verdict (should the jury have found the other way), a disagreeing appellate court has a verdict to reinstate. This is no small economy, and it accounts for the widespread practice among judges of letting a fully tried case go to the jury before ruling on a motion for judgment.

This Court allowed the case to be submitted to the jury.

Defendant's application as noted hereinabove seeks one of three remedies: (1)judgment as a matter of law; (2) a new trial; or (3) to reduce the jury verdict.

Preceding trial, this matter was the subject of comprehensive motion practice. On March 6, 2018, this Court issued a Short Form Order which noted:

> This is an action to recover damages for breach of contract, bad faith, and breach of the covenant of good faith and fair dealing based upon the alleged improper denial of insurance coverage to certain non parties by the defendant. It is undisputed that the defendant issued a director's and officer's liability insurance policy to the directors and officers of nonparty QGSI, Inc. in July 2007. In May 2008, QSGI created a special purpose vehicle called QSGI-CCSI, Inc. in order to complete the acquisition of Contemporary Computer Services, Inc. ("CCSI"), located at 200 Knickerbocker Avenue, Bohemia, New York

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> 11716. At that time, the plaintiff was the president and owner of CCSI. The Stock Purchase Agreement between QSGI-CCSI, Inc. and QSGI, as buyers, and the plaintiff, as seller, was executed by all parties in May of 2008.
>
> Pursuant to an insurance renewal application filed by QGSI, Inc., the defendant issued Directors & Officers Policy No. D04N386075004 to QSGI, Inc. of Hightstown, New Jersey, effective July 8, 2008 to July 8, 2009 (the D&O policy)... After the closing of the sale on July 7, 2008, CCSI ceased to exist as a freestanding company and became QSGI-CCSI, Inc., doing business as CCSI. After QGSI, Inc. failed to pay the plaintiff the agreed compensation for the purchase of CCSI, QGSI, Inc. declared bankruptcy... (*emphasis added*)
>
> Thereafter, the plaintiff commenced an action against the directors and officers of QGSI, Inc. for fraud, self-dealing and breach of fiduciary duty entitled *Riconda v Sherman*, Supreme Court, Suffolk County, Index No. 11-6678 (the underlying action). Despite requests by the defendants in said action, their insurer, the defendant herein, disclaimed coverage. The underlying action was settled when, among other things, Edward L. Cummings (Cummings), a former officer of QSGI and a defendant in the underlying action, entered into a confession of judgment in favor of the plaintiff, and assigned his right to proceed against the defendant for the failure to indemnify him as an insured in the underlying action to the plaintiff.
>
> The instant action was commenced by the plaintiff against the defendant, as Cumming's assignee, alleging that the defendant has breached the contract of insurance and the D&O policy by failing to provide coverage to Cummings and to pay the amount due under the confession of judgment, has acted in bad faith, and has breached its duty of good faith and fair dealing.

This Court's findings in the March 6, 2018 Short Form Order referenced hereinabove presents findings of fact tantamount to the law of the case. That history undeniably establishes that Plaintiff, John R. Riconda ("Riconda") stepped into shoes of an insured, Cummings, as his assignee and thereafter prosecuted claims against Defendant, Liberty. In

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essence, Riconda as the assignee of an insured was suing the insurer to defend his assignor against claims brought by Riconda.

The history of this litigation, inclusive of the underlying litigation, reveals that Plaintiff originally commenced an action for breach of contract. That contract involved the sale of his company. It is apparent to the Court, that case (the underlying case) lacked traction. At that point in time, as a matter of strategy, Riconda changed directions. The change in direction led to the negotiation of the assignment by Cummings in return for a covenant not to enforce a confession of judgment duly negotiated and executed between Cummings and Riconda. That change of strategy was prompted by the realization that the only entity with "deep pockets" was Defendant, Liberty.[1]

Throughout the pre-trial and trial, the exclusion relied upon by Defendant concerning coverage was found at section 5.6 of the policy (the insured versus insured exception). Section 5 reads as follows:

> 5. Exclusions: The insurer shall not be liable to make any payment for loss in connection with any claim:
>
> 5.6 brought or maintained by or on behalf of the insured organization to any insured person, in any capacity.

On or about July 8, 2008, Liberty issued a renewal executive advantage policy (Directors & Officers Policy) to QSGI, Inc. ("QSGI") for the policy period commencing July 8, 2008 through and including July 8, 2009. As noted above, the exclusion found at section 5.6 of the Policy also known as the Insured versus Insured Exclusion provided that the "insurer shall not be liable to make any payment for loss in connection with any claim: brought or maintained by… any insured person defined as an officer or director of the insured organization, QSGI or any subsidiary." No party raised "ambiguity" as an issue.

The evidence adduced at trial was that Plaintiff commenced negotiations with QSGI

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1. As an aside, throughout the proceeding concerning the issue of a bad-faith denial by the insurer, the Court inquired as to whether or not Plaintiff offered Liberty the opportunity to resolve the claim within the limits of available coverage. It became apparent to the Court that the traditional protocol, i.e. calling upon the insurer to tender its limits was never followed.

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