IT IS ORDERED as set forth below:

Date: April 3, 2012

Paul W. Bonapfel
U.S. Bankruptcy Court Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:	:	
	:	
INTERNATIONAL MANAGEMENT ASSOCIATES, LLC, et al.	:	Case No. 06-62966 (Substantively Consolidated)
Debtors.	:	
	:	
WILLIAM F. PERKINS, in his capacity as Plan Plan Trustee of International Management Associates, LLC, and its affiliated debtors,	:	
	:	
Plaintiff,	:	
v.	:	Adversary No. 10-06090
	:	
AMERICAN INTERNATIONAL SPECIALTY LINES INSURANCE COMPANY and NASDAQ OMX GROUP, INC.,	:	
Defendants.	:	
	:	

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW PURSUANT TO 28 U.S.C. § 157(c)(1) REGARDING DEFENDANT AISLIC'S MOTIONS (1) FOR SUMMARY JUDGMENT [93, 94]; (2) TO EXCLUDE THE PROPOSED EXPERT TESTIMONY OF CRAIG J. MCCANN [92]; AND (3) TO STRIKE IMPROPER SUPPLEMENTAL DECLARATION [102]

I. Introduction, Summary of Proposed Disposition of AISLIC's Motions, and Considerations With Regard to Proceedings After District Court's De Novo Review

This adversary proceeding involves a dispute over insurance coverage.

The plaintiff is William F. Perkins. He is the Plan Trustee under the confirmed Chapter 11 plan of International Management Associates, LLC ("IMA"), and its affiliated debtors, all of whose cases have been substantively consolidated. The remaining defendant is American International Specialty Lines Insurance Company ("AISLIC"), which issued to IMA an investment management insurance policy, Policy No. 625-53-43 (the "Policy").[1]

The Trustee claims that IMA is entitled to coverage under the Policy for legal liability arising from negligent investment, breaches of contract, and breaches of fiduciary duties. AISLIC denies liability on various grounds. Part III further describes the Trustee's claims and summarizes the defenses that the Court considers here.

AISLIC has filed four motions that the Court addresses herein. Two are motions for summary judgment. One motion contends that the Policy is void and of no effect as a matter of law (the "Policy Invalidity Motion").[2] The other asserts a lack of coverage (the "Coverage

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[1]On August 12, 2010, the Court entered proposed findings of fact and conclusions of law [40], proposing that the Motion to Dismiss filed by NASDAQ OMX Group, Inc. ("NASDAQ"), be granted, subject to reconsideration at any time prior to the entry of a pretrial order or such further time that the Court permits. The purpose of the reservation of the right to reconsideration was that the Trustee could have a claim against NASDAQ if AISLIC prevailed on its defense that the insurance policy was *void ab initio* because of the failure of IMA to submit required information. The District Court approved and adopted the proposed findings and conclusions on October 21, 2010. [54].

[2]Plaintiff's Motion for Summary Judgment Based Upon Invalidity of Policy [93].

Motion").[3]

The other two motions seek to exclude the proposed testimony of the Trustee's expert, Dr. Craig J. McCann (the "Expert Motion"),[4] and to strike his declaration the Trustee filed in opposition to that motion (the "Expert Declaration Motion").[5]

Based on the proposed findings of fact and conclusions of law set forth below, the Court's proposed dispositions of the motions are as follows:

(1) AISLIC is entitled to summary judgment that the insurance policy is void due to IMA's material misrepresentations or omissions, as the Policy Invalidity Motion [93] asserts, for reasons set forth in Part IV(B)(1);

(2) AISLIC is not entitled to summary judgment on the other two defenses that the Policy Invalidity Motion asserts, for reasons set forth in Part IV(B)(2) and (3);

(3) AISLIC is not entitled to summary judgment on any of its defenses that the Coverage Motion [94] asserts, for reasons set forth in Part V(B); and

(4) AISLIC's Expert Motion [92] and its Expert Declaration Motion [102] should be denied for reasons set forth in Part VI.

As Part II explains, the Court submits these proposed findings of fact and conclusions of law to the District Court for its de novo review pursuant to 28 U.S.C. § 157(c) with regard to any findings or conclusions to which a party has filed a specific written objection pursuant to

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[3]Plaintiff's Motion for Summary Judgment On Policy No. 625-53-43 [94].

[4]Plaintiff's Motion to Exclude the Proposed Expert Testimony of Craig J. McCann and Incorporated Memorandum of Law in Support. [92].

[5]Plaintiff's Motion to Strike the December 16, 2011 Declaration of Craig J. McCann and Incorporated Memorandum of Law in Support [102].

Fed. R. Bankr. P. 9033(d).

The Court notes that, if the District Court approves and adopts the Court's proposed conclusion that AISLIC is entitled to summary judgment because the policy is void due to IMA's misrepresentations or omissions, or if the District Court's de novo review results in the grant of summary judgment in favor of AISLIC on any one of its other defenses, the District Court may decline to consider any of the other issues because judgment in AISLIC's favor moots such issues.[6]

If AISLIC prevails on its defense that the insurance policy was *void ab initio* because of the failure of IMA to submit required information, the dismissal of the other defendant, NASDAQ OMX Group, Inc. ("NASDAQ") is subject to reconsideration pursuant to the District Court's Order entered on October 21, 2010, in Civil Action No. 1:10-CV-2940-TWT (the "Dismissal Order").[7] The Dismissal Order approved and adopted this Court's findings of fact and conclusions of law (the "Dismissal Opinion") [40] proposing that NASDAQ's motion to dismiss be granted, subject to reconsideration because, if AISLIC prevailed on this particular defense, the Trustee would have a claim against NASDAQ. If the District Court in considering this defense in the context of AISLIC's Policy Invalidity Motion now determines that AISLIC is entitled to summary judgment based on this defense, the District Court may wish to defer entry of final judgment until final disposition of the Trustee's claims against NASDAQ. If the District

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[6]The Court has considered all of the issues AISLIC raises in its motions notwithstanding the fact that the Court's proposed conclusion that AISLIC is entitled to summary judgment on one dispositive issue makes consideration of the remaining ones unnecessary. The Court has chosen to proceed in this manner so that the District Court will be in a position to conduct a de novo review of any issues that the parties have raised.

[7]A copy of the District Court's Order is at Docket No. 54 in this adversary proceeding.

Court grants summary judgment to AISLIC on any other ground, the entry of final judgment in favor of both defendants will be appropriate.

If the District Court's de novo review results in denial of both of AISLIC's motions for summary judgment, AISLIC's motions concerning the expert testimony and declaration of Dr. Craig J. McCann will not be moot.

Because the Trustee has demanded a jury trial [25] and the parties have not consented to a jury trial before a bankruptcy judge, any trial in this adversary proceeding should occur before the District Court. If the District Court's de novo review results in the denial of AISLIC's motions for summary judgment, the District Court may wish to consider whether further proceedings prior to trial, including the consideration and submission of a proposed pretrial order, should take place in the District Court[8] or in this Court. If the District Court determines that this Court should preside over the consideration and submission of a proposed pretrial order, the District Court may want to provide guidance to this Court and the parties concerning any modifications it prefers to the form of pretrial order that the Local Rules of the District Court prescribe and any other pretrial matters that the parties and this Court should consider so as to facilitate the trial before the District Court.

Attached is an Appendix that explains the format and abbreviations that the Court uses in its discussion of the issues and citations to the record and that lists defined terms that the Court uses.

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[8]The Court notes that the District Court may at any time, on its own motion, withdraw the reference of an adversary proceeding in whole or in part, for cause shown. 28 U.S.C. § 157(d).

II. Jurisdiction and Procedural Matters

Before addressing the merits of AISLIC's four motions, the Court considers jurisdictional and procedural matters that affect the manner in which the Court does so.

This adversary proceeding is pending before this Court as a civil proceeding over which the District Court has jurisdiction under 28 U.S.C. § 1334(b) and that has been referred to this Court pursuant to 28 U.S.C. § 157(a) and L.R. 83.7, N.D. Ga. Because it is not a core proceeding within the definition of 28 U.S.C. § 157(b)(2) and the parties have not consented to this Court's entry of orders and judgments, this Court has the authority to hear, but not determine, this proceeding under 28 U.S.C. § 157(c)(1).

Ordinarily, this would mean that the Court would conduct a trial and, at its conclusion, submit proposed findings of fact and conclusions of law to the District Court for its de novo review. 28 U.S.C. § 157(c)(1); Fed. R. Bankr. P. 9033(a). In this proceeding, however, the Trustee has made a demand for trial by jury. [25]. Because the parties have not consented to a jury trial before this Court, Fed. R. Bankr. P. 9015(b), and because considerations of judicial economy may make it impractical for this Court to conduct a jury trial in any event, the District Court will conduct the trial on the merits when the proceeding is ready for trial if a dispositive motion is not granted.

In these circumstances, the Court thinks that the District Court should conduct a de novo review, in accordance with Bankruptcy Rule 9033, of this Court's proposed disposition of AISLIC's summary judgment motions before this Court hears any further matters.

The Federal Rules of Bankruptcy Procedure, however, do not expressly contemplate such a procedure with regard to disposition of a motion for summary judgment in a non-core

proceeding. Fed. R. Civ. P. 56(a), applicable in adversary proceedings under FED. R. BANKR. P. 7056, requires that the court state the reasons for granting or denying a summary judgment motion, but it does not require findings of fact or conclusions of law. Similarly, Fed. R. Civ. P. 52(a)(3), applicable under Fed. R. Bankr. P. 7052, does not require the court to state findings of fact or conclusions of law when ruling on a summary judgment motion under Rule 56.

If this Court considers the motions for summary judgment but does not make proposed findings of fact and conclusions of law, uncertainties may exist as to the proper procedure for the District Court to conduct a de novo review of the Court's work. This is because, under 28 U.S.C. § 157(c)(1) and Bankruptcy Rule 9033, District Court involvement in a non-core proceeding does not occur until the bankruptcy judge has made and submitted findings of fact and conclusions of law, unless the District Court withdraws the reference under 28 U.S.C. § 157(d).

To avoid such possible uncertainty, the Court concludes that it is appropriate to submit proposed findings of fact and conclusions of law to the District Court with regard to the motions for summary judgment. In this regard, the Court notes that, although Rules 52 and 56 do not require a court to make findings of fact and conclusions of law in connection with a motion for summary judgment, they do not prohibit it.

The Court will, therefore, consider AISLIC's motions for summary judgment by making proposed findings of fact and conclusions of law that deal with the issues they raise. The Court proposes the findings of fact set forth herein as the Court's proposed findings of fact that are both undisputed and material, determined in accordance with the standard for ruling on a motion for summary judgment, *i.e.,* with all inferences drawn in favor of the Trustee, as the party opposing

the motion.

The same considerations apply to AISLIC's motions with regard to testimony and the declaration of the Trustee's expert. An evidentiary ruling in the course of a non-core proceeding could have a dispositive effect on its outcome, and the District Court's jurisdiction to conduct a de novo review of a bankruptcy judge's proposed findings of fact necessarily implies its jurisdiction to review any evidentiary ruling that the bankruptcy judge makes. Accordingly, the Court will likewise make proposed findings of fact and conclusions of law in connection with its consideration of these motions.

III. Background and Positions of Parties on the Merits

AISLIC issued a binder for investment management insurance coverage to IMA on January 5, 2006 and a policy on January 26. On February 17, 2006, investors in IMA, Steven Atwater and affiliated parties, filed a lawsuit in the Superior Court of Fulton County against IMA and some of its officers. Six days later, on February 23, 2006, investor David Laird and others filed a substantially similar lawsuit. Also on February 23, AISLIC advised IMA that the policy was *void ab initio* because IMA had not complied with conditions for coverage that the binder specified.

IMA and the officer defendants notified AISLIC of the lawsuits and requested coverage, which AISLIC denied.

The Superior Court of Fulton County, on February 17, 2006, and the District Court, on February 27, 2006, in an action brought by the Securities and Exchange Commission, appointed

Mr. Perkins as Receiver for IMA and its affiliates.[9] On March 16, 2006, he filed Chapter 11 cases on their behalf, and became the Chapter 11 Trustee in the cases on April 28, 2006.[10] The cases were substantively consolidated,[11] and the Court confirmed a Chapter 11 plan on August 27, 2008. (PX-1 [99-4]).

The parties here agree that the appointment of Mr. Perkins as Receiver began the process of revealing that the founder of IMA, Kirk Wright, had used IMA and its affiliates to run a "Ponzi" scheme. Mr. Wright was indicted and convicted in District Court for a number of federal offenses. After his conviction, he died of an apparent suicide prior to sentencing while in federal custody.

The automatic stay of 11 U.S.C. § 362(a) stayed the prosecution of the lawsuits in the Superior Court. The filing of the Chapter 11 cases required that the plaintiffs in those actions, as well as others similarly situated, pursue their remedies in the bankruptcy cases and file proofs of claim.

After substantively consolidating the Chapter 11 cases,[12] the Court confirmed the Trustee's Chapter 11 plan. (PX-1 [99-4]). Under the terms of the plan, the plaintiffs in the lawsuits just described and others like them, together with the victims of the Ponzi scheme,

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[9]See Affidavit of William Perkins, Bankruptcy Case No. 06-62966, Docket No. 9, ¶¶ 8-14.

[10]Order Approving Selection of Trustee (April 28, 2006), Bankruptcy Case No. 06-62966, Docket No. 56.

[11]Order Granting Trustee's Motion for Substantive Consolidation of the Debtors' Estates (April 17, 2008), Case No. 06-62966, Docket No. 607.

[12]Order Granting Trustee's Motion for Substantive Consolidation of the Debtors' Estates (April 17, 2008), Case No. 06-62966, Docket No. 607.

became "Investor Tort Claimants."[13] The Plan defines "Investor Tort Claims" as "Claims of Persons who purchased Interests in one or more of the Debtors for damages arising from the purchase of such Interests."[14] Mr. Perkins became the "Plan Trustee" under the plan, responsible for liquidating assets of the consolidated estates and distributing the proceeds to Investor Tort Claimants.

A. Summary of Trustee's Position

The Trustee in this action seeks coverage under the Policy for losses for which IMA is liable based on allegedly wrongful investment of investors' money in two funds, known as Platinum II and Emerald II. Some of the investors' money was used in the Ponzi scheme and effectively stolen, but some of it was deposited into an investment account with Lehman Brothers.

Trustee's Exhibits 46 and 47 (PX-46 [99-52], PX-47 [99-53]) show the investors who filed a proof of claim and purchased shares of either Emerald II or Platinum II. The Trustee observes that the claims of the plaintiffs in the two lawsuits far exceed the $5 million Policy limit. (P-SAF-2 [100-1] ¶¶ 7, 30).

According to the Trustee (P-SAF-2 [100-1] ¶¶ 22-23), investors gave IMA $11,055,956.35 to invest in the Emerald II Fund, of which $5,175,395.07 was invested in the Lehman Brothers account, and $9,313,164.98 to invest in the Platinum II Fund, of which $6,792,280.36 was invested in the Lehman Brothers account.

Of the total investments in these two funds of $20,369,121.33, then, $11,967,675.43 was

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[13]P-SAF-2 [100-1] ¶ 6; PX-38 at 9 [100-42 at 10].

[14]P-SAF-2 [100-1] ¶ 6; PX-38 at 9 [100-42 at 10].

deposited into the Lehman Brothers account, and $ 8,401,445.90 was diverted to the Ponzi scheme. The following chart summarizes the receipt and application of the funds:

Fund	Amount Received	Amount Diverted	Amount to Lehman Account
Emerald II	$ 11,055,956.35	$ 5,880,561.28	$ 5,175,395.07
Platinum II	9,313,164.98	2,520,884.62	6,792,280.36
Totals	$ 20,369,121.33	$ 8,401,445.90	$ 11,967,675.43

The Trustee asserts that the investors in the Emerald II and Platinum II Funds expected that their money would be invested in an actively managed account consisting primarily of common stocks of United States companies. (Expert Report [80-1] ¶¶ 11-13). Instead, the funds in the Lehman Brothers account were invested in index options, a highly leveraged and risky investment. (*Id.* ¶¶ 14-19). Between February and May 2005, losses as a result of the investment in index options resulted in a *de minimis* balance in the Lehman Brothers account.

The Trustee asserts that the investment of funds in index options was not permitted by the terms of the offering memoranda that investors received and that the investments were made negligently and in breach of contractual and fiduciary duties that IMA owed to the investors. These investors, the Trustee contends, have claims against IMA for their losses that IMA became legally obligated to pay them as the result of negligence, breach of fiduciary duty, and contract. (P-SAF-2 [100-1] ¶ 10; Trustee Brief-2 [100] 2-3, 5-7). The Trustee seeks coverage under the Policy for amounts that IMA owes to these investors on their claims. The Trustee emphasizes that he does not seek recovery for losses due to IMA's Ponzi scheme.

B. Summary of AISLIC's Defenses

AISLIC's two motions for summary judgment advance several defenses that AISLIC contends entitle it to judgment as a matter of law on the basis of undisputed material facts.

The Policy Invalidity Motion[15] seeks summary judgment that the Policy is invalid based on three independent reasons. (AISLIC Brief-1 [93-1] 2). First, AISLIC contends that the Policy is invalid because IMA gave false information to AISLIC when it sought coverage. The second ground is that the Policy is *void ab initio* because IMA failed to satisfy the conditions for coverage specified in the binder. Third, AISLIC asserts that the Policy is void for failure of consideration because IMA never paid the premium. Parts IV(A) and (B), respectively, set forth the Court's proposed findings of fact and its proposed conclusions of law with regard to these defenses.

AISLIC's Coverage Motion[16] presents six reasons that the Policy does not cover the claims the Trustee asserts. (Coverage Motion ¶¶ 2-6).

AISLIC's first two reasons are that the Trustee cannot establish that essential elements for coverage under the Policy exist. One is the existence of a "Wrongful Act" within the Policy's definition. The second is that the Trustee cannot show that IMA is "legally obligated to pay as damages" any amount for which the Trustee seeks coverage, as the Policy requires.

A third coverage defense is that the claims at issue were not "first made" and "reported" to AISLIC during the policy period.

Fourth, AISLIC relies on the Policy's exclusion of coverage for certain acts. The

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[15]Motion for Summary Judgment Based on Invalidity of Policy [93].

[16]Motion for Summary Judgment on Policy No. 625-53-43 [94].

exclusions AISLIC identifies are for claims arising out of criminal or deliberate acts; knowing or willful violation of statute; the gaining in fact of profit or advantage to which the insured was not entitled; and the commission of a "Wrongful Act" with knowledge that it is a "Wrongful Act."

Fifth, AISLIC contends that the Policy excludes coverage for the claims because they arose out of the same or essentially the same Wrongful Acts alleged in a prior litigation.

Finally, AISLIC invokes the "known loss" doctrine to bar the claims.

Parts V(A) and (B), respectively, set forth the Court's proposed findings of fact and its proposed conclusions of law with regard to the defenses that AISLIC presents in the Coverage Motion.

IV. Motion for Summary Judgment Based On Invalidity of Policy

AISLIC's Motion for Summary Judgment Based on Invalidity of Policy [93] (the "Policy Invalidity Motion") identifies the following three independent reasons to support AISLIC's conclusion that the policy is invalid as a matter of law (AISLIC Brief-1 [93-1] 2):

1. The Policy is invalid because IMA gave false information to AISLIC when it sought coverage.

2. The Policy is *void ab initio* because IMA failed to satisfy the conditions for coverage specified in the binder.

3. The Policy is void for failure of consideration because IMA never paid the premium.

The Court submits the following proposed findings of fact and conclusions of law with regard to the Policy Invalidity Motion.

A. Proposed Findings of Fact for Policy Invalidity Motion

Kirk Wright was the founder and chief executive officer of IMA, and IMA performed its advisory services through him. (D-SUMF-1 [93-2] ¶ 1). From the inception of IMA, Mr. Wright operated it and its subsequently created hedge fund affiliates as a Ponzi scheme. (D-SUMF-1 [93-2] ¶ 2). By August 2004, Mr. Wright was committing a variety of federal crimes through the operation of IMA. (D-SUMF-1 [93-2] ¶ 3).

1. The Prior Policy

At the end of 2005, IMA had insurance coverage with AISLIC under Investment Management Policy 884-65-60, which provided coverage for the period from January 1, 2005 to January 1, 2006 (the "Prior Policy" or the "2005-2006 Policy"). (D-SUMF-1 [93-2] ¶ 5). During this period, Mr. Wright used IMA to commit 25 federal offenses. (D-SUMF-1 [93-2] ¶ 6). Mr. Wright showed investors that IMA maintained tens of millions of dollars in brokerage accounts with Ameritrade, Inc., when, in fact, the purported Ameritrade documents were completely fabricated because IMA maintained no account with Ameritrade during the relevant period that contained anything close to such a sum. (D-SUMF-1 [93-2] ¶ 7).

2. Renewal of the Policy

Some of the issues in this adversary proceeding relate to IMA's efforts to renew the Prior Policy. At the end of 2005, IMA's retail insurance broker was NASDAQ Insurance Agency, LLC ("NASDAQ"), and Paul Rauner handled IMA's business. Susan Murray was the underwriter for AISLIC who worked on the IMA coverage. (D-SUMF-1 [93-2] ¶ 8). On December 28, 2005, four days before expiration of the Prior Policy, Mr. Rauner sent an e-mail

to Ms. Murray that said (D-SUMF-1 [93-2] ¶ 8):

> Could you work up some renewal numbers for me by tomorrow? I should have been on top of this renewal sooner and I apologize for the short time frame. If you need additional documentation, could we run a quote "subject to" so that we can run a timely renewal?

In a later e-mail, Mr. Rauner sent Ms. Murray a financial statement representing that IMA had assets of approximately $10.4 million and that IMA's chief executive officer, Dr. Fitz Harper, had advised him that the funds had been stable since the initial placement the previous year. (D-SUMF-1 [93-2] ¶¶ 9, 10). Dr. Harper was not IMA's CEO; rather, he was its Chief Compliance Officer and Chief Operating Officer. (P-Resp-1 [99-2] ¶ 10).

Ms. Murray testified that she would need more information than these items to underwrite the IMA risk (P-Resp-1 [99-2] ¶ 11], but on December 30, 2005, AISLIC provided a quote for a renewal policy that was expressly conditioned upon the receipt of a renewal application and an ADVII form. (D-SUMF-1 [93-2] ¶ 12).

In January 2006, Mr. Rauner notified Ms. Murray that he had resigned from NASDAQ and was starting his own firm, Chicago Risk Services ("Chicago Risk"). Mr. Rauner provided Ms. Murray with a Broker of Record letter indicating that Dr. Harper of IMA had granted permission for the IMA account to move with him. (D-SUMF-1 [93-2] ¶ 13).

Issuance of a policy like the one in question involves a surplus lines broker with a Georgia license in addition to the insured's retail agent. (D-SUMF-1 [93-2] ¶ 14). The surplus lines broker with whom Mr. Rauner was working was Risk Placement Services ("Risk Placement"). (D-SUMF-1 [93-2] ¶ 15). The person working on the IMA transaction for Risk Placement was Andrew Jarousse. (D-SUMF-1 [93-2] ¶ 16).

3. Issuance of the Cover Note (Conditional Binder)

On January 5, 2006, AISLIC sent to Mr. Jarousse of Risk Placement a "Temporary and Conditional Cover Note Evidencing Insurance Placement Confirmation Letter" (the "Cover Note"). (D-SUMF-1 [93-2] ¶ 16).

The Cover Note stated in material part (D-SUMF-1 [93-2] ¶ 16):

> **OUTSTANDING SUBJECT TO INFORMATION**
>
> 1. Completed, Signed and Dated Original Application
>
> 2. ADV II
>
> * * *
>
> **CONDITIONS OF CONDITIONAL COVER NOTE**
>
> Notwitstanding the payment of any premium or the issuance of any policy pursuant to this conditional binder, this conditional binder shall be considered to be a TEMPORARY AND CONDITIONAL COVER NOTE and is conditioned upon receipt, review and written underwriting approval of the additional information specified in the section entitled Outstanding Subject to Information. If such information is not received, reviewed and approved in writing by the Insurer within 30 days from the date that this conditional binder letter is executed by the Insurer, then this conditional binder and any policy issued pursuant thereto will be automatically null and void ab initio (void from the beginning) and have no effect. This conditional binder may be extended only in writing from the Insurer.

Also on that day, Ms. Murray asked that Risk Placement "forward the subject to items to my attention ASAP." (D-SUMF-1 [93-2] ¶ 17).

Mr. Jarousse of Risk Placement (the surplus lines broker) forwarded the conditional cover note to Mr. Rauner at Chicago Risk (IMA's retail broker), noting that it was conditional. (D-SUMF-1 [93-2] ¶ 18).

The communications just described with regard to the binder occurred on behalf of IMA

through Mr. Rauner with his new firm, Chicago Risk, and through Mr. Jarousse of Risk Placement, who was working with Mr. Rauner. On January 13, 2006, however, IMA changed back to NASDAQ. IMA sent AISLIC a new Broker of Record letter designating NASDAQ as its retail agent. (D-SUMF-1 [93-2] ¶ 20). ARC Excess & Surplus ("ARC") provided the new Broker of Letter record to AISLIC indicating that it would serve as the surplus lines broker for NASDAQ. (D-SUMF-1 [93-2] ¶ 21).

AISLIC requested that the new surplus lines broker, ARC, provide an updated underwriting package. (D-SUMF-1 [93-2] ¶ 22). Ralph Semeraro of NASDAQ advised IMA on January 17, 2006, that the "AIG application and filings will still be required at your earliest." (D-SUMF-1 [93-2] ¶ 25).

IMA never provided AISLIC with a completed application or with an updated ADV II form. (D-SUMF-1 [93-2] ¶ 19). Further, neither NASDAQ (IMA's retail broker) nor ARC (the surplus lines broker working with NASDAQ) provided AISLIC with an updated underwriting package. (D-SUMF-1 [93-2] ¶ 23).

4. Issuance of the Policy

On January 26, 2006, Ms. Murray sent Investment Management Policy No. 625-53-43 (the "Policy"), with a policy period of January 1, 2006 to January 1, 2007, to Mr. Jarousse at Risk Placement. (D-SUMF-1 [93-2] ¶ 26). Mr. Jarousse understood that his company, Risk Placement, was no longer serving as the broker for IMA and, accordingly, took no action with regard to the Policy. (D-SUMF-1 [93-2] ¶ 27). Specifically, he did not forward the Policy to the brokers IMA had designated, NASDAQ and ARC. (D-SUMF-1 [93-2] ¶ 28).

IMA made arrangements to finance a portion of the premium on the Policy through a

premium finance company, Premium Financing Specialists ("PFS"). Under this arrangement, PFS was to finance, and remit to NASDAQ (the broker IMA was using pursuant to the January 13 Broker of Record letter referenced above), part of the premium, and NASDAQ would collect a down payment from IMA for the balance. (D-SUMF-1 [93-2] ¶ 31; P-Resp-1 [99-2] ¶ 31). NASDAQ would then forward the entire premium payment to AISLIC. (D-SUMF-1 [93-2] ¶ 32).

PFS sent its portion of the premium payment to NASDAQ, and IMA sent a check for the down payment. (D-SUMF-1 [93-2] ¶¶ 33, 34). IMA's check, however, was returned for insufficient funds. (D-SUMF-1 [93-2] ¶ 33). The Court makes further proposed findings of fact regarding the payment of the premium in connection with its proposed conclusions of law on AISLIC's defense of failure of consideration. (Part IV(B)(3)(a), *infra*).

The parties dispute whether NASDAQ tendered a premium payment to AISLIC. AISLIC contends that it never received payment for the policy. (D-SUMF-1 [93-2] ¶ 35). The Trustee, however, points to testimony from AISLIC representatives that "the premium was received but never booked [sic] it was returned the same day and policy/binder canceled." (P-Resp-1 [99-2] ¶ 35).

5. Lawsuits filed against IMA and declaration that Policy is void ab initio

On February 17, 2006, IMA investor Steven Atwater and affiliated parties filed an eight-count complaint against IMA and its principals in the Superior Court of Fulton County alleging violations of the Securities Exchange Act, fraud, breach of fiduciary duty, unjust enrichment, and breach of contract. (D-SUMF-1 [93-2] ¶ 36; Complaint, Exhibit "G" [1-6]). Six days later, on February 23, 2006, IMA investor David Laird and others filed a suit in the same court making nearly identical allegations. (D-SUMF-1 [93-2] ¶ 37; Complaint, Exhibit "H" [1-7]).

The Superior Court, on February 17, and the District Court, on February 27 in an action brought by the Securities and Exchange Commission, appointed Mr. Perkins as receiver for IMA and its affiliates. He filed Chapter 11 cases on their behalf on March 16, 2006.

On February 26, AISLIC wrote to IMA stating that the Policy was *void ab initio* as a result of IMA's failure to provide the required outstanding "Subject To" information identified in the December 30 quote and Cover Note referenced above. (D-SUMF-1 [93-2] ¶ 38).

On March 9, 2006, counsel for IMA wrote to AISLIC to provide written notice of the Atwater and Laird claims in their lawsuits and to request coverage under the Prior Policy. (D-SUMF-1 [93-2] ¶ 39). AISLIC denied the claims because they were reported outside the policy period of the Prior Policy. (D-SUMF-1 [93-2] ¶ 40).

When IMA later reported the Atwater and Laird claims under the subject Policy, AISLIC denied coverage on the ground that the Policy was *void ab initio* due to the failure to submit "subject to" information that the conditional cover note required. (D-SUMF-1 [93-2] ¶ 41; P-Resp-1 [99-2] ¶ 41).

6. Alleged misrepresentations

AISLIC identifies three misrepresentations or that IMA made in connection with procuring a quote for the Policy: the false 2004 financial statement, the stability of funds, and the absence of a Ponzi scheme. With regard to these matters, the record shows the following.

It is undisputed that the 2004 financial statement sent to AISLIC was grossly inaccurate. (D-SUMF-1 [93-2] ¶ 11). It is also undisputed that the Emerald II and Platinum II Funds lost in excess of $11 million between February and May 2005. (D-SUMF-1 [93-2] ¶ 43). (Indeed, that fact forms part of the Trustee's case.) Finally, AISLIC's underwriter, Susan Murray, states

that AISLIC would not have offered insurance coverage to IMA if it had been aware that IMA was conducting a Ponzi scheme during 2004. (D-SUMF-1 [93-2] ¶ 44).

The Trustee points to evidence showing that Dr. Harper was not aware that Mr. Wright was conducting a Ponzi scheme (P-Resp-1 [99-2] ¶ 2) and that Dr. Harper thought that the financial statement was an accurate representation of IMA's financial situation at the end of the 2004 fiscal year. (P-Resp-1 [99-2] ¶ 10).

The Trustee also points out that, although AISLIC conditioned the quote for coverage (made on December 30, 2005) and issuance of the Cover Note on the receipt of a renewal application, AISLIC never made any further investigation or insisted on any further information before issuing the Policy. (P-Resp-1 [99-2] ¶ 11).

B. Proposed Conclusions of Law For Policy Invalidity Motion

AISLIC asserts that it is entitled to summary judgment based on the invalidity of the Policy for three reasons. First, AISLIC contends that the policy is void under O.C.G.A. § 33-24-7(b) due to IMA's material misrepresentations and omissions in connection with its request for renewal of the Prior Policy. Second, it asserts that the Policy is void because IMA failed to provide information that the Cover Note required as a condition precedent to issuance of the Policy. Third, it argues that the Policy is void because IMA never paid any premium, thereby resulting in a failure of consideration.

The Court will address each position and state its proposed conclusions of law in turn.

1. Invalidity of Policy under O.C.G.A. § 33-24-7(b) due to IMA's material misrepresentations or omissions

AISLIC identifies one omission or concealment of facts and two misrepresentations or incorrect statements that occurred during the discussions that culminated in issuance of a quote for insurance, a Cover Note, and the Policy itself. AISLIC asserts that the Policy is void because of them under O.C.G.A. § 33-24-7(b)(2), (b)(3). (AISLIC Brief-1 [93-1] 12-14).

The omitted or concealed fact is that IMA and Wright were operating a Ponzi scheme rather than a legitimate investment advisory business. The misrepresented or incorrect statements are the submission of IMA's financial statement for the year ending 2004 and the statement by IMA's officer, Dr. Harper, that the "funds" had been "stable" since IMA originally placed the Prior Policy with AISLIC.

Under O.C.G.A. § 33-24-7(b)(2) and (3), an insured's misrepresentation, omission, concealment of facts, or incorrect statement prevents a recovery under an insurance policy only under the circumstances they describe. For purposes of subsection (b)(2), the fact in question must be "material either to the acceptance of the risk or to the hazard assumed by the insurer." For purposes of subsection (b)(3), the requirement is that the insurer in good faith would not have issued the policy "if the true facts had been known to the insurer as required either by the application for the policy or contract or otherwise."

The Georgia Court of Appeals in *Pope v. Mercury Indemnity Co. of Georgia*, 297 Ga. App. 535, 677 S.E.2d 693 (2009), summarized the provisions of O.C.G.A. § 33-24-7(b)(2) and (b)(3). The court paraphrased the statutory language, *id.* at 538, 677 S.E.2d at 696 (punctuation altered):

> Misrepresentations, omissions, concealment of facts, and incorrect statements made by an insured during negotiations for an insurance policy will bar recovery under that policy where they were material either to the acceptance of the risk or to the hazard assumed by the insurer, or where the insurer in good faith would not have issued the policy or contract if the true facts had been known to the insurer.

After stating that an insurer need only show that a representation was false and that it was material, the Court of Appeals explained, "A material misrepresentation is one that would influence a prudent insurer in determining whether or not to accept the risk, or in fixing a different amount of premium in the event of such acceptance." *Pope,* 297 Ga. App. at 537, 677 S.E.2d at 696 (punctuation and citation omitted). The *Pope* court also observed, "While ordinarily the question of materiality is for the jury, where the evidence excludes every reasonable inference except that the misrepresentation was material, the issue becomes a question of law for the court." 297 Ga. App. at 537, 677 S.E.2d at 696 (punctuation altered and citation omitted).

It is undisputed that IMA was engaged in a Ponzi scheme. IMA, of course, did not reveal that fact when it asked for the renewal of its coverage. This was clearly an omission. Moreover, its request for continued coverage under an investment management policy must be an affirmative representation that it was, in fact, engaged in a legitimate investment advisory business.

It is also undisputed that the 2004 financial statement was "grossly inaccurate." (D-SUMF-1 [93-2] ¶ 11). Whether the "funds" to which Dr. Harper referred were the funds in question and what Dr. Harper meant by "stable" may not be fully capable of exact determination

based on the current record. But "funds" in context surely must refer to all the investments IMA was managing, and "stable" by any stretch of the imagination cannot be an accurate description of the activity in or status of the Emerald II and Platinum II Funds that went from over $11 million to almost nothing in about four months.

The Court cannot conclude on the present record that Drs. Harper and Bond knew about the Ponzi scheme, that IMA's financial statement did not accurately represent its financial condition as of the end of 2004, or that the two funds were worthless. But the record permits no inference other than that Mr. Wright knew at least that he was operating a Ponzi scheme and that the Emerald II and Platinum II Funds were far from "stable." In any event, the insured's knowledge of the falsity of a misrepresented, concealed, inaccurate, or omitted fact is immaterial. *E.g., United Family Life Ins. Co. v. Shirley,* 242 Ga. 235, 237, 248 S.E. 2d 635, 637 (1978); *White v. Am. Family Life Assur. Co.,* 284 Ga. App. 58, 61, 643 S.E.2d 298, 301 (2007). *See also Home Indem. Co. Manchester, N.H. v. Toombs,* 910 F.Supp. 1569, 1574 (N.D. Ga. 1995).

AISLIC has, therefore, established the undisputed facts that IMA made false or inaccurate representations.

The Trustee contends, however, that AISLIC is not entitled to summary judgment on this ground because factual disputes exist about their materiality and because, in any event, AISLIC waived the right to void the Policy on this ground. (Trustee Brief-1 [93-1]19-23).

AISLIC issued a quote for coverage, a Cover Note, and the Policy itself without any further investigation of IMA beyond its receipt of the 2004 financial statement and the statement that IMA's funds had been "stable," and AISLIC did not expressly ask whether IMA was conducting a Ponzi scheme. Furthermore, AISLIC processed IMA's request for coverage in this

manner and eventually issued the Policy without receiving the additional information that it said it would need before it could issue a quote, a binder, or a policy.

The Trustee invokes the general rule that an insurer cannot assert that something is material unless it has either made inquiry about it or apprised its prospective insured of the need for proper disclosure of the information in question. *E.g., Exec. Risk Ins. Co. v. AFC Enters., Inc.,* 510 F.Supp. 2d 1308, 1330 (N.D. Ga. 2007) (citing *Ga. Farm Bureau Mut. Ins. Co. v. First Fed. Sav. & Loan Ass'n,* 152 Ga.App. 16, 262 S.E.2d 147, 149 (1979) and *Block v. Voyager Life Ins. Co.*, 251 Ga. 162, 303 S.E.2d 742, 745 (1983)). Common sense, however, precludes application of this general rule in this situation.

The insurance at issue here is *investment management insurance.* An insurer surely would not issue such a policy to an entity where the entity and its principal are engaged in a massive Ponzi scheme, and a prospective insured engaged in such activity has no legitimate right to expect that it would obtain such coverage if it disclosed the true nature of its activities. IMA's omission in this regard was clearly material to AISLIC's risk and provides a basis for voiding the policy under O.C.G.A. § 33-24-7(b)(2) and (b)(3).

An insurer covering investment management risks has the right to assume that its prospective insured is a legitimate company and that it is not engaged in a Ponzi scheme. The Court declines to conclude that Georgia law imposes a rule that an insurer must ask whether a prospective insured is engaged in a Ponzi scheme when it issues such a policy.

IMA's false representation that its funds were "stable" provides another sufficient basis for voiding the policy under O.C.G.A. § 33-24-7(b)(2) and (b)(3). The Trustee observes that AISLIC failed to inquire further to determine what Dr. Harper meant when he stated that IMA's

funds were "stable" and that it did not follow up with further inquiry by requesting additional information that IMA had promised. In this sense, AISLIC may be the author of its own misfortune occasioned by its lack of due diligence or careful attention to underwriting procedures.

But whatever "stable" means, the word most assuredly does not describe funds whose balances have been wholly dissipated in a span of about four months. The Court concludes that, based on the evidence before the Court, a jury could not possibly find that AISLIC would have issued the Policy if the representation had been that IMA's funds had been "unstable."

The Trustee has emphasized that he seeks coverage only with regard to losses occasioned by "Wrongful Acts" that the Policy covers that related to investment of funds in the Emerald II and Platinum II funds in the Lehman Brothers account. In reaching the conclusions just stated, the Court has assumed that IMA's activities with regard to these funds were legitimate. The existence of some legitimate investment activities in connection with the operation of a Ponzi scheme, however, does not mean that IMA's operation of a Ponzi scheme was not material to the issuance of the Policy.

The undisputed facts are that IMA was operating a Ponzi scheme, that it did not disclose that it was doing so (and thus necessarily represented that it was a legitimate business engaged in legitimate investment advisory services), and that AISLIC would not have issued the policy if it had known that IMA was operating a Ponzi scheme. Further, the undisputed facts are that IMA represented that its funds were stable when they obviously were not.

The Court concludes, therefore, that IMA made misrepresentations, that they were material, and that AISLIC would not have issued the Policy if it had known the true facts. These

conclusions lead to the conclusion that AISLIC is entitled to void the Policy as a matter of law under O.C.G.A. § 33-24-7(b) and (c), but the Court must address one final issue.

The Trustee contends that AISLIC waived its right to void the policy on this ground. In support of his waiver argument, the Trustee advances the proposition that, if an insurer seeks to rescind a policy based on a misrepresentation or omission under O.C.G.A. § 33-24-7(b), it must "upon discovery of the facts, at once announce [its] purpose and adhere to it. Otherwise, [it] cannot avoid or rescind such contract." *E.g., Florida Indemnity Co. v. Osgood,* 233 Ga. App. 111, 503 S.E.2d 371 (1998).

In *Osgood* and other cases, the insurer advised the insured that it would *not renew* the policy in question at the expiration of its term based on its discovery of a misrepresentation and did not immediately declare the policy void. *E.g., State Farm Fire & Cas. Co. v. Jenkins,* 167 Ga. App. 4, 305 S. E.2d 801 (1983)*; Loeb v. Nationwide Mut. Fire Ins. Co.,* 162 Ga.App. 561, 563, 292 S.E.2d 409 (1982). The principle of these cases is that an insurer cannot discover a basis for voiding a policy, advise the insured that it will have continued coverage through the expiration of its term, and later claim that the policy is void.

The *Osgood* court put it this way, 233 Ga. App. at 113-14, 503 S.E. 2d at 373-74:

> One significant reason for this rule in insurance cases is that leading the insured to believe the validity of the policy is not questioned lulls the insured into not purchasing other insurance and thus subjects the insured's property to continuing non-coverage.

In this case, AISLIC voided the Policy *ab initio* for another reason and did not assert material misrepresentation or omission until it responded to the Trustee's complaint. But

AISLIC did not advise IMA that it would continue to have coverage. The Court concludes, therefore, that AISLIC did not waive the right to assert that the Policy was void for material misrepresentations when it gave another reason for its immediate termination.

For the foregoing reasons, the Court concludes that AISLIC is entitled to summary judgment based on its defense that the Policy is void under O.C.G.A. § 33-24-7(b)(2) and (b)(3) due to IMA's material misrepresentations and omissions.

2. Failure to provide information that the Cover Note required as condition precedent to issuance of the Policy

On January 5, 2006, AISLIC issued a "Temporary and Conditional Cover Note Evidencing Insurance Placement Confirmation Letter (the "Cover Note"). (D-SUMF-1 [93-2] ¶ 16). The Cover Note stated in material part (*id.*):

> Notwithstanding . . . the issuance of any policy pursuant to this conditional binder, this conditional binder shall be considered to be a TEMPORARY AND CONDITIONAL COVER NOTE and is conditioned upon receipt, review and written underwriting approval of the additional information specified in the section entitled Outstanding Subject to Information. If such information is not received, reviewed and approved in writing by the Insurer within 30 days from the date that this conditional binder letter is executed by the Insurer, then this conditional binder and any policy issued pursuant thereto will be automatically null and void ab initio (void from the beginning) and have no effect. This conditional binder may be extended only in writing from the Insurer

.

Prior to the expiration of the specified 30-day period for the receipt of the additional information, AISLIC issued the Policy. (D-SUMF-1 [93-2] ¶ 26). IMA never complied with this condition of the Cover Note.

AISLIC asserts that, as the Cover Note expressly states, IMA's failure to submit the required additional information makes the Policy *void ab initio.*

The Court previously considered this argument in ruling on the motion to dismiss filed by NASDAQ OMX Group, Inc. ("NASDAQ"). [10, 3]. The Trustee's claim against NASDAQ in this proceeding is that NASDAQ, as IMA's insurance broker, breached a duty to IMA when NASDAQ failed to advise IMA of the actions it needed to take in order for the Policy to remain in effect. NASDAQ's motion to dismiss asserted that it could not be liable to the Trustee because the issuance of the Policy precluded AISLIC's voiding of the policy for failure to meet the condition the Cover Note specified.

In concluding that NASDAQ's motion to dismiss should be granted,[17] this Court in the Dismissal Opinion[18] [40 at 4-5] decided that the Policy superseded and replaced the Cover Note, relying on *King v. Allstate Ins. Co.,* 906 F.2d 1537, 1541 (11th Cir. 1990) (holding that it is "hornbook insurance law" that an insurance binder merges into the issued policy), and *Green v. Progressive Ins. Co.,* 196 Ga. App. 733, 734, 397 S.E.2d 20, 21 (1990). The District Court in its Dismissal Order approved and adopted the Court's analysis.[19]

AISLIC invites the Court to revisit this conclusion and also asserts that two additional facts developed during discovery require a different result. (AISLIC Brief-1 [93-1]14-18). The Court concludes that its (and the District Court's) prior analysis remains correct and that neither of the additional facts AISLIC now advances supports a different result.

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[17]at 4.

[18]Proposed Findings of Fact and Conclusions of Law Pursuant to 28 U.S.C. § 157(c)(1) Regarding Defendant NASDAQ OMXC GROUP, Inc.'s Motion to Dismiss (the "Dismissal Opinion") [40].

[19]District Court Civil Action File No. 1:10-CV-2940-TWT (Oct. 21, 2010) (the "Dismissal Order") [54].

AISLIC observes that, contrary to the Trustee's assertion at the time of the ruling on the motion to dismiss, the Trustee now concedes that the Policy is surplus lines insurance. AISLIC argues that the establishment of this previously disputed fact makes a difference in the analysis and that it is now clear that O.C.G.A. § 33-24-33 provides an exception to the general rule that a binder merges into a policy when the policy is surplus lines insurance. (AISLIC Brief-[93-1] 17).

AISLIC's argument ignores the fact that the analysis in the Dismissal Opinion expressly assumes that the Policy was surplus lines insurance. Making that assumption, the Dismissal Opinion addressed AISLIC's argument that "because O.C.G.A. § 33-24-33(b) does not apply to a surplus line policy, that statute's rule that issuance of an insurance policy supersedes an earlier binder is inapplicable." (Dismissal Opinion [40] at 5).

The recognition now that the Policy is surplus lines insurance does not change the ruling based on the assumption that it is. The Court will repeat the analysis set forth in the Dismissal Opinion ([40] at 5-6):

> [O.C.G.A. § 33-24-33(b)] is statute excludes surplus line policies from its imposition of, essentially, a nonnegotiable term but does not change or supplant otherwise applicable law that governs insurance contracts. In other words, the statute does not state any rule for surplus line insurance other than that its mandatory rule does not govern.
>
> Thus, the Court does not accept the proposition that general principles of law relating to merger and, particularly, insurance law do not apply to surplus line insurance. In this instance, the usual rules regarding contracts and insurance

policies are applicable. In this regard, the general rule of insurance is that a binder is a temporary contract of insurance and is merged into a subsequently issued policy. *See, e.g.,* 1A Steven Plitt, et al., *Couch on Insurance* § 13:8 (3d ed. 2009). Similarly, under the contract principle of merger, a later contract supersedes an earlier one covering the same subject matter. *E.g., Wallace v. Bock,* 620 S.E.2d 820, 822 (Ga. 2005) (holding that the contract principle of mergers operates to discharge an existing contract and the conditions contained therein "whenever the parties subsequently enter upon a valid and inconsistent agreement completely covering the subject matter embraced by the original contract.").

These general principles apply here, and no party has cited any authority to suggest that a policy for surplus line insurance is subject to different rules of contract interpretation. The Court concludes, therefore, that a conditional binder for surplus line insurance is not valid beyond the issuance of the surplus line insurance policy. Consequently, the terms of the Cover Note, as a conditional binder for the surplus line insurance, were not valid as a matter of law upon the issuance of the Policy, which replaced and superseded the Cover Note and extinguished any condition precedent not also included in the Policy, including the application requirement.

AISLIC still has provided no authority for the proposition that a different rule applies to surplus lines insurance. The Court adheres to the conclusion that O.C.G.A. § 33-24-33(b) does not provide an exception to the general rule that issuance of an insurance policy supersedes the

terms of a previous binder.

AISLIC's second factual point is that, although AISLIC delivered the Policy electronically to IMA's surplus lines broker of record, that broker did not review it, countersign it, pay the tax for it, file with the Georgia Department of Insurance, pay the premium for it, or deliver it to IMA, as the Georgia Insurance Code requires. (AISLIC Brief-1 [93-1]18).

The Court concludes that actual delivery of an insurance policy is not a necessary prerequisite to policy issuance. *E.g., New York Life Ins. Co. v. Babcock*, 104 Ga. 67, 30 S.E. 273 (1898); *Sur. Group, Inc. v. Ragsdale,* 197 Ga. App. 437, 398 S.E.2d 718 (1990). Thus, issuance of the Policy occurred when AISLIC sent it to the broker. The fact that any other requirements for issuance of the policy had not occurred prior to AISLIC's decision to declare it *void ab initio* provides no basis for concluding that the Policy did not become effective.

The Court concludes that AISLIC is not entitled to summary judgment on its theory that the Policy is *void ab initio* based on IMA's failure to meet required conditions set forth in the Cover Note because issuance of the Policy superseded the Cover Note's terms.

3. Failure of consideration based on nonpayment of premium

AISLIC contends that the Policy is void because IMA failed to pay any premium for it. (AISLIC Brief-1 [93-1] 18-19). AISLIC relies on O.C.G.A. § 33-24-44(d.1), which recognizes that an insurance policy may be *void ab initio* for failure of consideration, and *McDuffie v. Criterion Cas. Co.*, 214 Ga. App. 818, 449 S.E.2d 133 (1994), which holds that a binder for insurance coverage is *void ab initio* where the insurance application expressly makes collection of a check for the premium a condition precedent to coverage and the insured's check was dishonored.

In *McDuffie,* the existence of a contract provision making payment of the premium check a condition precedent to coverage under the binder was critical to the court's holding. In this regard, the court observed that, as a general rule, the actual payment of a premium is not a condition precedent to the validity of an insurance binder. *McDuffie, supra,* 214 Ga. App. at 820, 449 S.E.2d at 135.

With regard to AISLIC's failure of consideration defense, the Court makes additional proposed findings of fact and then states its proposed conclusions of law.

a. Additional proposed findings of fact

The Cover Note (Exhibit "A" to Complaint [1-1]) states that the premium payment is due within 30 days of the effective date of coverage or 15 days from the billing date, whichever is later. (*Id.* at 6). The Policy itself (Exhibit "B" to Complaint [1-2]) provides that AISLIC is providing coverage "in consideration of the payment of the premium," (*id.* at 5) and Clause 10 (as set forth in Endorsement # 4) permits AISLIC to cancel the Policy for "non-payment of premium *when due*." (*Id.* at 22) (emphasis added).

AISLIC has not addressed the questions whether the Policy contains a provision that makes payment of the premium a condition precedent or states when the premium was due. The parties have not identified any part of the record that addresses these issues, and the Court has not found answers to the questions.

The record shows what appears to be the customary practice for remittance of the premium for this type of policy. The retail broker, who deals directly with the insured, collects the premium, either from the insured or from a premium financing company or both, and remits

it to the surplus lines broker, who in turn forwards it to the insurer.[20]

Here, it appears that John Dulay, of NASDAQ (IMA's retail broker), sent an e-mail to Dr. Harper on January 20, 2006, which stated that the invoice for the Policy was attached, requested payment directly to NASDAQ "at your earliest," and stated that NASDAQ's "payment instructions/options" were attached. (PX-17 [99-20] at 2). Dr. Harper responded with a request for financing of the premium, as had occurred for the previous year. (*Id.*). The parties in their submissions with regard to undisputed facts have not referred to the invoice or the payment instructions, and they do not indicate that the record includes these attachments. [21]

Mr. Dulay contacted Premium Financing Services ("PFS"), which agreed to provide financing for a portion of the premium. In an e-mail to PFS sent on February 8, 2006, Mr. Dulay attached a signed and dated premium finance agreement. (PX-20 (Pt. 1) [100-23] at 6-9). It appears that IMA sent a revised finance agreement that NASDAQ received on February 9.[22] The premium financing agreement reflects a total premium of $ 51,509.00, a down payment of $12,877.25, and an amount financed of $ 38,631.75. It provided for nine monthly payments of

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[20]Deposition of John Semeraro (a representative of surplus lines broker ARC) at 44 (DX-22 [93-25] at 7); Deposition of Andrew Jarousse (a representative of surplus lines broker Risk Placement) at 75 (DX-13 [93-16] at 9).

[21]The record contains a copy of an invoice from NASDAQ to IMA (PX-21 [100-25]), but it refers to transactions dated February 9, 2006, so it could not be the invoice attached to the January 20 e-mail.

[22]An e-mail from Mr. Dulay to IMA dated February 7, 2006, states that NASDAQ has not yet received the signed finance agreement; an earlier e-mail dated February 2 asks for IMA to fax the "revised finance agreement." (DX-28 [93-31] at 2-3). An e-mail dated February 9 from IMA to Mr. Dulay, with reference to the "Revised Finance Agreement" states that IMA's records show delivery of the "FEDEX package sent to you yesterday." (*Id.* at 2). Perhaps IMA's down payment check deposited on February 9, as later text discusses, was in this package.

$ 4,417.68. (PX-20 (Pt. 1) [100-23] at 8-9).

PFS sent a "Fax Verify" stating that it had agreed to advance the premium and advising that IMA had assigned any unearned premium to PFS. (PX-19 [100-22]).[23] The Fax Verify further stated, "We will advance funds on behalf of your insured within two days unless you notify us before funding that the above referenced policy is not valid or that for some other reason we should not fund. Notice may be delivered via facsimile . . . by February 11, 2006. . . ."

Although the premium financing agreement provided for PFS to finance $38,631.75 of the premium, PFS remitted to NASDAQ only $34,214.07, on or before February 9, 2006. (P-SAF-1 [99-1] ¶¶ 54-55; PX-20 (Pt. 2) [100-24] at 6). Apparently, PFS retained $4,417.68 as the first payment, which was due on February 1 under the terms of the agreement executed after that date.[24] An e-mail from Mr. Dulay dated February 14, 2009, appears to explain this: It requests payment from IMA of $6,478.04, which is the amount of the first payment ($ 4,417.68) and Georgia tax ($ 2,060.36) for which IMA was responsible in addition to the premium. (DX-28 [93-31] 2).

IMA sent a check to NASDAQ dated January 31, 2006, in the amount of the down payment, $12,877.25. (DX-27 [93-30] at 3). NASDAQ deposited the check on February 9, 2006.

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[23]The copy of the Fax Verify in the record is unsigned and undated. The Trustee contends that PFS sent the Fax Verify to AISLIC (P-SAF-1 [99-1] ¶ 50], but the document (PX-19 [100-22]) does not reflect to whom it was sent. The Trustee provides no reference to other evidence that the Fax Verify was sent to AISLIC.

[24]An e-mail from Mr. Dulay to IMA states, "As I mentioned last week, due to timing, PFS (the finance company) has requested us to collect the first installment in order to avoid going through the process of re-working a new agreement. Subsequently, the first payment that will be due to PFS will be for the second installment." (DX-28 [93-31] at 2). The difference between the amount financed ($38,631.75) and the amount PFS sent to NASDAQ ($34,214.07) is the amount of the monthly payment ($4,417.68).

(D-SUMF-1 [93-2] ¶ 33; DX-27 [93-30] at 2). On February 14, 2005, the drawee bank advised NASDAQ that the check was returned unpaid. (*Id.*). Mr. Dulay sent an e-mail to IMA on February 15, 2006, advising IMA that the check had been returned for insufficient funds and asking whether NASDAQ should present the check again or whether IMA would send a follow-up payment. (DX-28 [93-31] at 2).

NASDAQ sent IMA an invoice reflecting receipt of $ 34,214.07 from PFS and showing application of $ 32,153.71 to the premium and $ 2,060.36 to State of Georgia tax, leaving a balance due of $ 19,355.29. (P-SAF-1 [99-1] ¶¶ 55-59; PX-21 [100-25]). The invoice amount is equal to the down payment ($12,877.25), the first installment payment ($ 4,417.65), and the taxes due in addition to the premium ($ 2,060.36).

As mentioned above, Mr. Dulay's e-mails of February 14 and 15 sought direction with regard to payment of two sums that equal the total amount shown on the invoice: $ 6,478.04 for the first installment due on the premium financing and the Georgia tax and $12,877.25 for the down payment. Notably, neither e-mail indicates any concern about the Policy being ineffective because IMA had not yet remitted the amounts due. Furthermore, they do not state a date by which IMA's payments are due. And the parties have not pointed to anything in the record that indicates that AISLIC was concerned about when the premium would be paid.

b. Proposed conclusions of law

In the Court's view, the evidence just reviewed permits fair inferences that some degree of confusion existed with regard to payment of the premium, perhaps due to the changes in IMA's designation of its broker of record and the revision of the premium financing agreement, that the confusion would have been straightened out in due course, and that IMA would have

paid its portion of the premium so that NASDAQ could have remitted the entire amount (through ARC, the surplus lines broker) to AISLIC, but AISLIC declared the policy *void ab initio* for other reasons before the premium payment problem could be sorted out.

In these circumstances, the Court cannot conclude that AISLIC is entitled to summary judgment based on IMA's failure to pay the premium. In the absence of a showing of the date that the premium was due or that its payment was a condition precedent, IMA's failure to pay the premium prior to cancellation of the Policy for other reasons cannot form the basis for a conclusion that a failure of consideration occurred. It is clear that IMA promised to pay the premium, and PFS also promised to pay a substantial part of it on IMA's behalf. A promise to pay as a general rule provides sufficient consideration. Once AISLIC declared the policy *void ab initio*, of course, it would have been required to return any premium that IMA tendered; IMA's tender after that would have been a futile act.

An alternative reason for denial of AISLIC's motion for summary judgment on this ground is that a dispute of fact exists as to whether AISLIC received the premium. Although AISLIC points out that its records do not show receipt of any premium with regard to the Policy and that evidence from third parties supports its position, the Trustee has evidence from AISLIC employees that the premium was received but never booked and that it was returned the same day the Policy was cancelled. (P-SAF-1 [99-1] ¶¶ 66-68, 70-71). The evidence constitutes an admission by AISLIC on this point and presents an issue of material fact.

The Court concludes that AISLIC is not entitled to summary judgment on its defense that the policy is void due to failure of consideration.

V. Motion for Summary Judgment Based on Coverage

AISLIC's Motion for Summary Judgment on Policy No. 625-53-43 (the "Coverage Motion") [94] states six independent reasons that the Policy does not provide coverage with regard to the claims the trustee asserts:

1. The Trustee cannot establish that each claim for which he seeks coverage arises from a "Wrongful Act," as defined in the Policy, an essential element for recovery under the Policy.

2. The Trustee cannot establish that IMA is "legally obligated to pay as damages" the sums for which IMA investors have filed proofs of investment, another essential element for recovery under the Policy.

3. Coverage does not exist because the claims for which the Trustee seeks coverage were not "first made" and "reported" to AISLIC during the relevant policy period.

4. The Policy excludes the Trustee's claims because they arose out of criminal or deliberate fraudulent acts, knowing or willful violation of statute, the gaining in fact of profit or advantage to which the insured was not entitled, or "Wrongful Acts" committed with the knowledge that they were "Wrongful Acts."

5. The Policy excludes the claims because they arose out of the same or essentially the same Wrongful Acts alleged in a prior litigation.

6. The "known loss" doctrine bars the claims.

This Part V considers coverage issues on the assumption that IMA had insurance under Investment Management Policy No. 625-53-43 (the "Policy"), with a policy period of January

1, 2006 to January 1, 2007 (D-SUMF-2 [94-2] ¶ 59].[25]

For purposes of considering AISLIC's motion, the Court makes the following proposed findings of fact and conclusions of law.

A. Proposed Findings of Fact for Coverage Motion

1. The Ponzi scheme

Kirk Wright formed IMA in 1997 purportedly to manage hedge funds in which investors could purchase equity interests. (D-SUMF-2 [94-2] ¶ 8). In fact, however, Mr. Wright operated IMA and its subsequently created hedge fund affiliates as a massive Ponzi scheme from inception. He used money that subsequent investors provided to IMA to pay fictitious "returns" to earlier investors. (D-SUMF-2 [94-2] ¶¶ 9, 15). For the most part, IMA did not use investors' funds to make legitimate investments. (D-SUMF-2 [94-2] ¶ 10). As of at least 2000, Mr. Wright was embezzling investors' money and misappropriating it for his own personal use. (D-SUMF-2 [94-2] ¶ 11).

By August 2004, Mr. Wright was committing federal crimes, including money laundering and mail fraud, through his operation of IMA. (D-SUMF-2 [94-2] ¶ 12). Between January 1, 2005 and January 1, 2006, Wright continued to use IMA to commit no less than 25 federal offenses. (D-SUMF-2 [94-2] ¶ 14). Mr. Wright was convicted on May 21, 2008, of 47 federal offenses related to his operation of IMA as a Ponzi scheme. (D-SUMF-2 [94-2] ¶ 23).

[25] As Part II explains, consideration of coverage issues is not necessary if, as the Court has concluded in Part IV(B)(1), the Policy is void due to IMA's misrepresentations. The Court elects to make proposed findings of fact and conclusions of law with regard to the coverage issues, however, so that all of the issues that AISLIC raises will be before the District Court for de novo review.

2. The insurance policies

At the end of 2005, IMA had insurance coverage with AISLIC under Investment Management Policy 884-65-60, which provided coverage for the period from January 1, 2005 to January 1, 2006 (the "Prior Policy" or the "2005-2006 Policy"). (D-SUMF-2 [94-2] ¶ 13). During this period, Mr. Wright used IMA to commit 25 federal offenses. (D-SUMF-2 [94-2] ¶ 14). The policy was a "claims made" policy, *i.e.*, it provided coverage only with regard to claims made and reported during the policy period. IMA sought to renew the coverage under the Prior Policy for the year 2006, as discussed in Part IV. For purposes of this Part V, the Court assumes that IMA had insurance under Investment Management Policy No. 625-53-43 (the "Policy") with a policy period of January 1, 2006 to January 1, 2007.

The Policy[26] provides for coverage in pertinent part as follows (D-SUMF-2 [94-2] ¶¶ 24, 25):

> **1. INSURING AGREEMENTS**
>
> * * *
>
> **COVERAGE A: INVESTMENT ADVISER PROFESSIONAL LIABILITY – AND CORPORATE REIMBURSEMENT**
>
> This policy shall, subject to the limit of liability set forth in Item 3 of the Declarations, pay on behalf of the insured all sums which the Insured shall become legally obligated to pay as damages resulting from any claim or claims first made against the Insured and reported in writing to the Company during the Policy Period . . . for any Wrongful Act of the Insured or of any other person for whose Wrongful Act the Insured is legally responsible, but only if such Wrongful Act occurs prior to the end of the Policy Period and solely in rendering or failing to render Investment Advisory Services for others for compensation in the course of the Entity Insured's business as an Investment Adviser; . . .

[26]A copy of the policy is attached to the Complaint as Exhibit "B." [1-2].

* * *

COVERAGE B: MUTUAL FUND PROFESSIONAL LIABILITY AND DIRECTORS AND OFFICERS LIABILITY AND CORPORATE REIMBURSEMENT

This policy shall, subject to the limit of liability set forth in Item 3 of the Declarations, pay on behalf of the insured all sums which the Insured shall become legally obligated to pay as damages resulting from any claim or claims first made against the Insured and reported in writing to the Company during the Policy Period . . . for any Wrongful Act of the Insured or of any other person for whose Wrongful Act the Insured is legally responsible, but only if such Wrongful Act occurs prior to the end of the Policy Period and solely in the course of the management and/or operations of the Fund(s); and with respect to the Entity Insured including amounts which the Entity Insured is permitted or required to pay as indemnification for such liability of the Individual Insured.

The Policy defines "Wrongful Act" as "any breach of duty, neglect, error, misstatement, misleading statement, omission or other act wrongfully done or attempted by the Insured." (D-SUMF-2 [94-2] ¶ 26).

The Policy states the following condition (D-SUMF-2 [94-2] ¶ 28):

No action shall lie against the Company unless, as a condition precedent thereto, there shall have been full compliance with all of the terms of this policy, nor until the amount of the Insured's obligation to pay shall have been finally determined either by judgment against the Insured after actual trial or by written agreement of the Insured, the claimant and the Company.

The Policy contains the following exclusion (D-SUMF-2 [94-2] ¶ 60):

4. EXCLUSIONS

I. This policy does not apply:

1) to any claim arising out of, based upon or attributable to the committing in fact of any criminal or deliberate fraudulent act, or any knowing or willful violation of any statute;

2) to any claim arising out of, based upon or attributable to the gaining in fact of any profit or advantage to which any Insured was not legally entitled;

3) to any actual or alleged Wrongful Act committed with the knowledge that it was a wrongful Act.

* * *

The Policy is a "claims made" policy. Thus, a condition precedent to coverage is that a claim be "first made" and "reported" during the policy period. In this regard, it contains the following "Notice" (Exhibit "B" to Complaint [1-2] at 3)::

> EXCEPT TO SUCH EXTENT AS MAY OTHERWISE BE PROVIDED HEREIN, THE COVERAGE OF THIS POLICY IS LIMITED GENERALLY TO LIABILITY FOR ONLY THOSE CLAIMS THAT ARE FIRST MADE AGAINST THE INSURED AND REPORTED TO THE COMPANY DURING THE POLICY PERIOD.

With regard to the reporting of claims, the Policy provides (D-SUMF-2 [94-2] ¶ 61; Exhibit "B" to Complaint [1-2] at 23):

> NOTICE/CLAIM REPORTING PROVISIONS
>
> Notice hereunder shall be given in writing to Raymond DeCarlo, 175 Water Street, New York, N.Y. 10038. If mailed, the date of mailing of such notice shall constitute the date that such notice was given and proof of mailing shall be sufficient proof of notice. Notice given by or on behalf of the Insured to any authorized representative of the Company shall be deemed notice to the Company.
>
> (a) The Insured shall, as a condition precedent to the obligations of the Insurer under this Policy, give written notice to the Insurer of a Claim made against an insured as soon as practicable and either:
>
> (1) anytime during the Policy Period or during the Extended Reporting Period (if applicable); or
>
> (2) within 30 days after the end of the Policy Period or the Extended

> Reporting Period (if applicable) as long as such Claim(s) is reported no later than 30 days after the date of such Claim was first made against an Insured.

3. The Atwater and Laird litigation and claims in the Chapter 11 case

On December 5, 2005, Mr. Atwater and other investors affiliated with him made a request for a return of all of their investments, totaling approximately $ 20 million, which IMA did not honor. (D-SUMF-2 [94-2] ¶¶ 17, 18). They submitted a written request to withdraw their assets, with the expectation that they would be liquidated 30 days later, in January 2006. (P-Resp-2 [100-2] ¶ 17). Although they wanted their money back, they testified that they remained open to the possibility of re-investing with IMA if IMA established a transparent investing structure. (P-Resp-2 [100-2] ¶ 17).

On December 9, 2005, Crown Financial filed a complaint against IMA in the Superior Court of Fulton County in which it alleged that IMA was a mere instrumentality of Wright and that he used it to advance his personal interests. (D-SUMF-2 [94-2] ¶ 34). The complaint asserted that Wright and IMA made representations to Crown that it could recover the total amount it was owed and that they never indicated that the value of the Platinum Account had declined. Crown alleged that these representations that ignored and concealed the decline in the value of the Platinum Account were false, were made with the intent to deceive, and resulted in significant monetary harm. (D-SUMF-2 [94-2] ¶¶ 35, 36).

In February 2006, IMA investors Steven Atwater (and others) and David Laird (and others) filed lawsuits against IMA in the Superior Court of Fulton County. (D-SUMF-2 [94-2] ¶¶ 1, 4). Both lawsuits were reported to AISLIC in 2006. (D-SUMF-2 [94-2] ¶¶ 2, 5).

The complaint in the Atwater lawsuit alleged that, starting in "mid-2004," false

representations by IMA and others induced the plaintiff investors to invest millions of dollars in three plans, Platinum I, Platinum II, LP, and Emerald I. (D-SUMF-2 [94-2] ¶ 3). The complaint in the Laird lawsuit similarly alleged that "[f]rom 2003," false representations by IMA and others regarding the accounting and historical returns for the same three plans induced the plaintiffs to invest millions of dollars. (D-SUMF-2 [94-2] ¶ 6).

Both lawsuits also alleged that IMA had breached its contracts with the plaintiffs by not abiding by the terms of the offering documents associated with the funds, that IMA breached fiduciary duties owed to the plaintiffs, and that IMA negligently invested millions of dollars of the plaintiffs' money. (P-Resp-2 [100-2] ¶¶ 3, 6). The complaints sought "compensatory, general, and punitive damages for Defendants' fraud, breaches of contract and breaches of fiduciary duty." (P-Resp-2 [100-2] ¶¶ 3, 6).

The Superior Court of Fulton County, on February 17, 2006, and the District Court, on February 27, 2006, in an action brought by the Securities and Exchange Commission, appointed Mr. Perkins as Receiver for IMA and its affiliates.[27] On March 16, 2006, he filed Chapter 11 cases on their behalf, and became the Chapter 11 Trustee in the cases on April 28, 2006.[28] The cases were substantively consolidated,[29] and the Court confirmed a Chapter 11 plan on August 27, 2008. (PX-1 [99-4]).

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[27]See Affidavit of William Perkins, Bankruptcy Case No. 06-62966, Docket No. 9, ¶¶ 8-14.

[28]Order Approving Selection of Trustee (April 28, 2006), Bankruptcy Case No. 06-62966, Docket No. 56.

[29]Order Granting Trustee's Motion for Substantive Consolidation of the Debtors' Estates (April 17, 2008), Case No. 06-62966, Docket No. 607.

The automatic stay of 11 U.S.C. § 362(a) operated as a stay of the continuation of the Atwater and Laird lawsuits, and they did not pursue those civil actions. Instead, they pursued their claims in the Chapter 11 cases.

Pursuant to procedures implemented in the Chapter 11 cases, the plaintiffs in the Atwater and Laird lawsuits, like other investors, filed proofs of claim. (D-SUMF-2 [94-2] ¶ 7; P-Resp-2 [100-2] ¶ 7). The procedures provided for IMA investors to file a "Proof of Investment." Under the Chapter 11 plan, the plaintiffs and others became "Investor Tort Claimants." The Chapter 11 plan defines "Investor Tort Claims" as "Claims of Persons who purchased Interests in one or more of the Debtors for damages arising from the purchase of such Interests." (P-Resp-2 [100-2] ¶ 7; (P-SAF-2 [100-1] ¶ 6). The plaintiffs described their claims as "claims arising under investment agreements." (P-Resp-2 [100-2] ¶ 7).

Between July 2006 and June 2009, investors filed Proofs of Investment in the Chapter 11 case in response to the Trustee's request. (D-SUMF-2 [94-2] ¶¶ 21, 22). The Proof of Investment Forms do not call for a description of the basis of each investor's claim and, consequently, none of the Proofs of Investment specifically refers to a "Wrongful Act." (D-SUMF-2 [94-2] ¶ 27; P-Resp-2 [100-2] ¶ 27). One of the plaintiffs in the Atwater litigation, however, filed a proof of investment that specifically references the legal action filed prior to bankruptcy. (P-Resp-2 [100-2] ¶ 27).

The theory of the Trustee's claim for coverage under the policy is that IMA is liable for the "Wrongful Acts" of investing the funds of investors in the Platinum II and Emerald II Funds in index options rather than in common stocks of U.S. companies, as the offering memoranda for the funds promised. (Expert Report [80-1] at 4; P-SAF-2 [100-1] ¶¶ 3-16).

Trustee's Exhibits 46 and 47 (PX-46 [99-53], PX-47 [99-54]) show the investors who filed a proof of claim and purchased shares of either Emerald II or Platinum II. The Trustee observes that the claims of the plaintiffs in the two lawsuits far exceed the $5 million Policy limit.[30]

According to the Trustee,[31] investors gave IMA $11,055,956.35 to invest in the Emerald II Fund, of which $5,175,395.07 was invested in the Lehman Brothers account, and $9,313,164.98 to invest in the Platinum II Fund, of which $6,792,280.36 was invested in the Lehman Brothers account.

Of the total investments in these two funds of $20,369,121.33, then, $11,967,675.43 was deposited into the Lehman Brothers account, and $ 8,401,445.90 was diverted to the Ponzi scheme. The following chart summarizes the receipt and application of the funds:

Fund	Amount Received	Amount Diverted	Amount to Lehman Account
Emerald II	$ 11,055,956.35	$ 5,880,561.28	$ 5,175,395.07
Platinum II	9,313,164.98	2,520,884.62	6,792,280.36
Totals	$ 20,369,121.33	$ 8,401,445.90	$ 11,967,675.43

As the discussion and chart above demonstrate, IMA received, for deposit into the Emerald II and Platinum II Funds, $20,369,121.33 and actually deposited $11,967,675.43 of those funds into an investment account with Lehman Brothers. The remaining investments, $8,401,.445.90, were diverted into the Ponzi scheme to pay earlier investors or for Mr. Wright's

[30]P-SAF-2 [100-1] ¶¶ 7, 30.

[31]P-SAF-2 [100-1] ¶¶ 22-23.

personal use. Between February 2005 and May 2005, trading losses on the index options eliminated all but a *de minimis* balance in the Lehman Brothers account.

The Trustee's contention is that, while some of the damages that IMA became legally obligated to pay to its investors were the result of the Ponzi scheme, many are directly attributable to negligence, breach of fiduciary duty, and breach of contract with regard to the investment of funds in index options. (P-SAF-2 [100-1] ¶ 10).

AISLIC asserts that it is impossible to tie any particular investor's loss to any particular Wrongful Act and that, due to the commingling of funds, it is impossible to ascertain which investors' monies were stolen and which were invested in the funds. (D-SUMF-2 [94-2] ¶¶ 19, 20).

The Trustee's evidence noted above, however, provides a calculation of which investors filed proofs of claim in the case and purchased shares in either the Emerald II or Platinum II Funds, how much money from each of the Emerald II and Platinum II investors was deposited into the funds, and the percentages of these deposits that were actually transferred to the Lehman Brothers account and invested in the funds. (P-SAF-2 [100-1] ¶¶ 17-26).

4. Reporting of claims to AISLIC

On March 9, 2006, counsel for the Trustee sent notice of the Atwater and Laird complaints to AISLIC, demanding coverage under the Prior Policy. The letter enclosed both complaints and put AISLIC on notice that the complaints alleged "various 'wrongful acts' which would trigger coverage under IMA's directors and officers liability policy with AIG." (P-SAF-2 [100-1] ¶ 38). On March 15, 2006, attorneys for two other principals of IMA, Drs. Bond and Harper, demanded coverage under the Policy. (P-SAF-2 [100-1] ¶ 39).

On March 28, 2006, AISLIC responded to both demands by denying all coverage under the Prior Policy. This letter did not mention the Policy. (P-SAF-2 [100-1] ¶ 40).

On April 19, 2006, counsel for Drs. Harper and Bond replied to AISLIC's March 28 letter, pointing out that AISLIC had not addressed coverage under the Policy. (P-SAF-2 [100-1] ¶ 41). On July 5, 2006, counsel for AISLIC sent a letter to the Trustee's counsel, again denying coverage under the Prior Policy. This letter also advised that coverage was not available under the Policy. The sole basis for denying coverage under the Policy was that "AISLIC never received the 'subject to' information and, according to the terms and conditions of the conditional binder, sent notice to the Insured on February 23, 2006, advising that the renewal policy was void ab initio." (P-SAF-2 [100-1] ¶ 42).

5. Operation of IMA and its affiliates prior to issuance of the Policy

As discussed above, Mr. Wright operated IMA and its affiliates as a massive Ponzi scheme. In this regard, Mr. Wright made investments and transfers with the actual intent to hinder, delay, or defraud persons because all of them were part of, in furtherance of, and intended to maintain, the fraudulent Ponzi scheme. (D-SUMF-2 [94-2] ¶ 33).

Mr. Wright was the sole portfolio manager of the hedge funds from 1997 until early 2006. As the investment manager, Mr. Wright exclusively handled the investment of funds, broker account statements, banking relationships and statements, and reporting of performance results, and provided the relevant documents and information to IMA. (D-SUMF-2 [94-2] ¶ 30). In particular, he personally managed the investments of IMA. (D-SUMF-2 [94-2] ¶ 37). The inference from Mr. Wright's personal management of the funds in question is that he was aware of the losses that occurred when, or shortly after, they took place. Nothing disputes this

inference. (P-Resp-2 [100-2] ¶ 37).

Two other persons were owners of IMA, Dr. Fitz N. Harper and Dr. N. Keith Bond. AISLIC asserts that Drs. Bond and Harper were aware that Mr. Wright was mismanaging IMA and acting inconsistently with the offering memoranda for the funds long before the Policy's effective date, January 1, 2006. (D-SUMF-2 [94-2] ¶ 38). The Trustee disputes these conclusions. (P-Resp-2 [100-2] ¶ 38).

AISLIC makes several contentions to support its position: (1) Dr. Bond authored a memorandum in 2004 that states that IMA was "grossly under serving our clients and poorly managing the Platinum Fund with inactivity in these accounts for now over three months (D-SUMF-2 [94-2] ¶ 38); (2) In February 2004, Dr. Bond knew that IMA was collecting fees from investors in a manner that was not consistent with industry standards and that, contrary to the requirements of the offering memoranda, the principals in IMA were not adequately invested in the funds and that certain investors in those funds did not meet the minimums dictated by the offering memoranda (*id.* ¶ 39); (3) In June 2004, Dr. Bond had notice that investor monies were being mishandled by Wright and/or IMA (*id.* ¶ 40); (4) Dr. Bond believed that Mr. Wright was engaged in transactions outside the fund's directives (*id.* ¶ 42); and (5) As early as February 2005, Dr. Bond thought that Mr. Wright was engaging in investments "outside of the parameters of the funds" and that these trades "didn't fit within the risk parameters of the funds" (*id.* ¶ 43).

With regard to Dr. Harper, AISLIC asserts that in 2004 he had knowledge that IMA did not have complete separation between firm and client accounts (D-SUMF-2 [94-2] ¶ 41).

The Trustee disputes the contention that Dr. Harper and Dr. Bond knew of Mr. Wright's fraudulent activities. Generally, the Trustee points to Dr. Harper's testimony that he had no idea

prior to the end of 2005 that Mr. Wright was engaged in any illegal activity, negligent investing, breaching of contracts, or breaching of fiduciary duties (P-Resp-2 [100-2] ¶ 38) and to Dr. Bond's testimony that it was his understanding that various investigations launched against IMA prior to the end of 2005 had revealed no wrongdoing, that he was not aware of any lawsuits filed against IMA as of November 2005, and that he did not anticipate at that time that any would be filed. (*Id.*). The Trustee contends, therefore, that while Drs. Bond and Harper "may have had some concerns regarding business practices from time to time, there is no record evidence that either of them had any knowledge of the type of conduct that resulted in the claims at issue here." (*Id.*).

The Trustee specifically disputes AISLIC's contentions (1) through (5) with regard to Dr. Bond as follows: (1) Dr. Bond testified at the deposition at which the memorandum was introduced that IMA had taken steps to insure that investments were being made in a manner consistent with the offering memoranda (P-Resp-2 [100-2] ¶ 38); (2) The memorandum cited in support of contention (2) contains only "suggestions on how to resolve various real and perceived business concerns" and does not prove that principals were not adequately invested in the funds (*id.* ¶ 39); (3) The memorandum cited to support contention (3) does not do so (*id.* ¶ 40); (4) The document cited to support contention (4) is an undated document used as an exhibit in a deposition of Dr. Bond in a different matter, it is unclear whether Dr. Bond authored it, and it is not possible to determine from the document to which "fund" the document refers (*id.* ¶ 42); and (5) Although the document cited to support contention (5) contains the quoted material on which AISLIC relies, the funds to which Dr. Bond referred in the document do not include the Emerald II and Platinum II Funds (*id.* ¶ 43).

AISLIC has other evidence to support its contentions regarding Dr. Bond's and Dr. Harper's knowledge.

On July 20, 2005, IMA's controller, Kenneth Turchin, sent an e-mail to Mr. Wright, Dr. Harper, and Dr. Bond that advised them to contact IMA's attorneys regarding issues related to David Laird, one of the plaintiffs who later brought the lawsuit referred to above. The issues were the mailing of statements without supporting documents and without the review of IMA's third party administrator, despite the fact that no actual trading activity had occurred in the Emerald II and Platinum II funds during the months in question. (D-SUMF-2 [94-2] ¶ 44; P-Resp-2 [100-2] ¶ 44). Dr. Harper testified that he believed, contrary to the e-mail, that the statements had been mailed and that Mr. Wright had spoken to the third party administrator about the statements and how to resolve the issues in the e-mail. Dr. Harper did not believe that counsel had been contacted. (P-Resp-2 [100-2] ¶ 44).

On August 23, 2005, Mr. Turchin sent an e-mail to Dr. Harper that raised additional concerns. In this e-mail, Mr. Turchin stated that: (1) IMA had failed to maintain true and accurate records; (2) no notice had been given to investors that no trading had occurred in the Emerald II or Platinum II Funds since May 5, 2005; (3) statements were sent to investors without approval of a third party administrator; (4) investors were told they had positive returns despite a 24% loss in the Emerald II and Platinum II funds; (5) trades were not properly segregated and were commingled with other funds; (6) no restricted list had been updated or distributed to IMA or IMAAG staff; (7) firm operating expenses were not being paid from the proper source; (8) he had received statements from JB Oxford purporting to show activity in an account that had been closed several months before; and (9) that these statements reflected certain transactions

"managed outside the firm." (D-SUMF-2 [94-2] ¶ 45). Dr. Bond received a copy of the e-mail. (*Id.* ¶ 46).

Dr. Harper testified that he did not agree with a number of Mr. Turchin's conclusions. Dr. Harper did not think IMA was in violation of SEC rules or the firm's own supervisory procedures, that Mr. Turchin lacked access to some information that would have allayed various concerns that Mr. Turchin identified, and that some of Mr. Tuchin's concerns were based on assumptions different from Dr. Harper's. Further, Dr. Harper testified that, to the extent Mr. Turchin's concerns were valid, Mr. Turchin had expressed them at Dr. Harper's direction as a way to address various business issues. (P-Resp-2 [100-2] ¶ 45).

Upon his receipt of Mr. Turchin's August 23 e-mail, IMA's counsel advised Dr. Harper to resign if he could not get his "hands around" all of Mr. Turchin's concerns. (D-SUMF-2 [94-2] ¶ 47). Dr. Harper tendered his resignation in November 2005, but stayed on with IMA until February 2006. (D-SUMF-2 [94-2] ¶ 48; P-Resp-2 [100-2] ¶ 48). Counsel similarly advised Dr. Bond to resign, and he did so. (D-SUMF-2 [94-2] ¶ 49).

The Securities and Exchange Commission conducted an informal investigation of IMA in September 2005. (D-SUMF-2 [94-2] ¶ 50). Mr. Wright, Dr. Bond, and Dr. Harper were aware of the SEC investigation (D-SUMF-2 [94-2] ¶ 51). Dr. Harper and Dr. Bond thought that the informal investigation did not reveal any wrongdoing and that it had been resolved to the SEC's satisfaction. (P-Resp-2 [100-2] ¶¶ 50, 51).

On October 3, 2005, IMA received a subpoena from the New York Attorney General seeking documents and information "relevant and material to an investigation and inquiry undertaken in the public interest and into whether persons and/or entities have been or are

engaged in fraudulent practices or illegal acts." (D-SUMF-2 [94-2] ¶ 52).

In August 2005, Steve Atwater and Blaine Bishop raised concerns that there was no transparency and that they had no access to brokerage statements. (D-SUMF-2 [94-2] ¶ 53). Mr. Wright met with them in November 2005 and provided purported account documents from Ameritrade. (D-SUMF-2 [94-2] ¶ 54). The statements were false. (D-SUMF-2 [94-2] ¶ 55).

Mr. Atwater and Mr. Bishop made written demands for return of their investment funds on December 5, 2005. (D-SUMF-2 [94-2] ¶ 56). They expected that their request to withdraw their assets would occur upon their liquidation 30 days later, in January 2006. (P-Resp-2 [100-2] ¶ 56). Mr. Wright knew that IMA could not return their funds. (D-SUMF-2 [94-2] ¶ 57).

B. Proposed Conclusions of Law for Coverage Motion

In ruling on a motion for summary judgment, a court must construe the evidence and draw inferences in favor of the party opposing summary judgment. What inferences should be drawn from the evidence is a question of fact; whether the inference is permissible based on the evidence presented is a question of law. In this Court's view, it is appropriate to resolve close questions with regard to permissible inferences in favor of the party opposing a motion for summary judgment to insure that disputed facts are resolved after a full presentation of the evidence, rather on the basis of a cold record.

Applying these standards here, the Court concludes that the evidence supports inferences with regard to factual matters material to the issues as follows. The Court refers to these facts as the "Inferred Facts:"

1. A number of investors, including the plaintiffs in the Atwater and Laird litigation

discussed above, invested money with the understanding and expectation that it would be invested in the Platinum II and Emerald II Funds and that the Funds would be actively managed accounts consisting of, for the most part, common stocks of U.S. companies, in accordance with the offering memoranda with regard to these funds.

2. Wright and IMA stole a substantial part of the money. The rest of it went into the Lehman Brothers account as the investment account for the Funds.

3. Contrary to the terms of the offering memoranda, Wright and IMA invested the money in highly leveraged index options. Over the course of about four months, the money evaporated through trading losses.

4. The investors in these Funds sustained losses for two reasons. First, Wright stole a substantial part of it. Second, what Wright did not steal, he lost through investments that were contrary to the terms of the offering memoranda.

5. After the Atwater and Laird plaintiffs filed lawsuits, IMA and its affiliates filed Chapter 11 bankruptcy cases under the management of Mr. Perkins, as the receiver appointed by the District Court. Mr. Perkins eventually became the bankruptcy trustee in the cases.

6. For purposes of the bankruptcy cases, the basis on which these investors had claims against IMA and its affiliates for the total loss of their investments did not matter. Further, it was not necessary for the Atwater and Laird plaintiffs to pursue their claims in the Superior Court in order to participate in the bankruptcy cases and to receive distributions along with other creditors. Whether they had a claim based on fraud, negligent investment, breach of contract, or breach of fiduciary duties was immaterial to their treatment under the Plan or to the distributions they would receive.

On the basis of these Inferred Facts and other undisputed facts as discussed below, the Court addresses each of AISLIC's defenses that it raises in the Coverage Motion.

1. The existence of a "Wrongful Act"

AISLIC seeks summary judgment on the ground that the Trustee cannot establish the existence of any Wrongful Act, as the Policy defines that term. (AISLIC Brief-2 [94-2] 7-11). The Policy defines "Wrongful Act" as "any breach of duty, neglect, error, misstatement, misleading statement, omission or other act wrongfully done or attempted by the Insured." (D-SUMF-2 [94-2] ¶ 26). It appears that a "Wrongful Act" includes the conduct that the Trustee contends occurred: negligent, breach of contract, or breach of fiduciary duty.

AISLIC, however, makes two arguments that the undisputed facts do not show a "Wrongful Act." One is that the investors in their Proofs of Investment do not allege any Wrongful Acts in their proofs of claim. The second is that the Trustee cannot prove that sums IMA owes to the investors are based on any distinct act or omission on behalf of IMA. Specifically, AISLIC argues, the Trustee cannot establish how much money Wright stole or how much he may have legitimately invested on the investors' behalf.

The first argument fails because AISLIC has pointed to nothing in the Policy that requires that any particular investor allege any particular Wrongful Act. The point may be relevant to other defenses AISLIC may have, but it does not provide a basis for determining that a "Wrongful Act" did not occur.

The second argument fails because the Inferred Facts, as set forth at the beginning of this subpart V(A), do not support it. The investors sustained a loss of their money because IMA and Wright committed Wrongful Acts, specifically, the investment of their money in risky index

options rather than in common stock of U.S. companies. In this regard, the Trustee's analysis of money advanced by the investors, the deposit of money into the Lehman Brothers Investment account, and the loss of that money through trading in index options is sufficient to establish that investors lost part of their money through improper investment, not theft. Of course, whether the Trustee's evidence on this point is ultimately persuasive remains to be determined at trial.

2. Whether IMA is "legally obligated" to pay damages

The Policy provides coverage for "all sums which the Insured shall become legally obligated to pay as damages." (D-SUMF-2 [94-2] ¶¶ 25, 26). AISLIC contends that the Trustee cannot meet this coverage requirement because IMA's obligation is to pay restitution, rather than damages, pointing out the general principle that one may not insure against the risk of being ordered to return money or property that has been wrongfully acquired. (AISLIC Brief-2 [94-2] 11-12). *E.g.*, *Level 3 Communications, Inc., v. Fed. Ins. Co.*, 272 F.3d 908 (7th Cir. 2001).

The premise of the argument is that IMA is obligated to the investors because it stole their money through a Ponzi scheme. AISLIC concludes that, because Wright and IMA were operating a Ponzi scheme, all losses of investors arise from that conduct.

The Inferred Facts, set forth at the beginning of this Subpart V(B), do not support the premise. The Trustee does not seek coverage based on IMA's theft of money, but on the basis of IMA's liability to the investors for the improper investment of it. It is true that part of the investors' losses resulted from the theft of their money, but IMA also lost a substantial portion of it as a result of a Wrongful Act, as defined in the Policy, as the preceding section concludes. IMA and Wright could not steal what they no longer had after they had lost it through investments. So, under the Trustee's theory, the investors in these funds, must have a claim for

damages rather than theft.

As matters in the bankruptcy case now stand, the Court has confirmed a Chapter 11 plan and the investors have allowed claims that are "Investor Tort Claims." IMA's liability has thus been determined, but the specific basis for liability with regard to any particular claim has not been. No court has determined by final judgment whether IMA is liable to any investor for Wrongful Acts resulting in the loss of the investor's money, as opposed to its theft.

These circumstances provide the basis for AISLIC's contention that the Policy does not provide coverage because IMA's liability has not been established by a final judgment or settlement in which AISLIC participated. (AISLIC Brief-2 [94-2]12-13).

The Policy states in pertinent part, "[N]o action shall lie against the Company unless, as a condition precedent thereto, . . . the amount of the Insured's obligation to pay shall have been finally determined either by judgment against the Insured after actual trial or by written agreement of the Insured, the claimant, and the Company." (D-SUMF-2 [94-2] ¶ 28). AISLIC concludes that this provision prevents any recovery because the conditions it states have not been met.

The court in *National Union Fire Ins. Co. of Pittsburgh v. Porter Hayden Co.,* 408 B.R. 66, 77-78 (D. Md. 2009), rejected the legal principle advanced by AISLIC. The *Porter Hayden* court, considering a "no action" clause with the same language as the provision here, ruled that the provision did not eliminate the Chapter 11 debtor's coverage under the policy notwithstanding the fact that a judgment after trial or a settlement agreement was not possible in view of the bankruptcy discharge and injunction on the prosecution of claims against the debtor under the terms of the plan. Citing the Supreme Court's decision in *St. Louis Dress Beef*

& Provision Co. v. Maryland Cas. Co., 201 U.S. 173, 182 (1906), the court ruled, "A claimant need not have obtained a judicial judgment against [the debtor] as a condition precedent to an action by [the debtor] against [the insurer]. 408 B.R. at 77-78. The Court agrees with the *Porter Hayden* ruling. AISLIC is not entitled to summary judgment on this ground.

An alternative theory supports denial of summary judgment based on the "no action" provision. The Trustee contends that, when AISLIC purported to declare the Policy *void ab initio,* it effectively waived this condition of the Policy. AISLIC had notice of the claims of the Atwater and Laird plaintiffs and of the pending Chapter 11 cases that would result in the resolution of claims against IMA. Thus, it had the opportunity to participate in litigation or settlement of the claims, but declined to do so. These facts, which the Court must accept for present purposes, establish a waiver of the provision of the Policy requiring a final judgment after a trial as a condition to coverage. *See Twin City Fire Ins. Co., Inc. v. Ohio Cas. Ins. Co., Inc.,* 480 F.3d 1254, 1258 (11th Cir. 2007).

3. Whether the claims were "first made" and "reported" during the Policy period

The Policy is a "claims made and reported" policy. It provides in pertinent part, "[T]he coverage of this policy is limited generally to liability for only those claims that are first made against the insured and reported to the Company during the policy period." (D-SUMF-2 [94-2] ¶ 58).

AISLIC points out that the Atwater plaintiffs made written demands for the return of their $20 million investment on December 5, 2005, and the Policy did not commence until January 1, 2006. Consequently, AISLIC concludes, the claim was not "first made" during the policy period, and the Policy provides no coverage under this provision. (AISLIC Brief-2 [94-2] 14-15).

For purposes of AISLIC's motion, the Court must assume, as the Trustee's evidence shows, that the December 5 communication was a request for a withdrawal of the investors' account balances. (P-Resp-2 [100-2] ¶ 17). This demand did not assert claims of improper conduct in connection with their investments; indeed, some of the investors testified that they would consider re-investing with IMA if it established a transparent investing structure. (P-Resp-2 [100-2] ¶ 17).

The Court concludes that the December 2005 request for withdrawal of assets was not the assertion of a "claim," for purposes of the policy. Rather, the assertion of a claim occurred when they filed their lawsuit that alleged improper conduct by IMA. AISLIC is not entitled to summary judgment on this ground.

4. Exclusion for certain wrongful acts

Exclusion 4(I) sets forth categories of exclusions from coverage under the Policy. AISLIC invokes three of them in its Coverage Motion.

First, the Policy does not apply "to any claim arising out of, based upon or attributable to the committing in fact of any criminal or deliberate fraudulent act, or any knowing or willful violation of any statute." (D-SUMF-2 [94-2] ¶ 60). Second, the Policy does not apply to "any claim arising out of, based upon or attributable to the gaining in fact of any profit or advantage to which any Insured was not legally entitled." (*Id.).* Finally, the Policy does not apply to "any actual or alleged Wrongful Act committed with the knowledge that it was a Wrongful Act." (*Id.).*

The operation of a Ponzi scheme, clearly, qualifies for exclusion under any of these provisions. But as discussed earlier in section 2 of this Part V(B), the Trustee does not seek

coverage based on the operation of a Ponzi scheme. His theory is that IMA is liable to the investors in the Emerald II and Platinum II Funds because it lost their money through improper investments, not theft.

The record is replete with undisputed evidence of Wright's criminal and fraudulent conduct, but the Court cannot make an inference that the improper conduct that forms the basis of the Trustee's claims – wrongful investments that were made negligently or in breach of contractual or statutory duty – were criminal, deliberately fraudulent, or in knowing or willful violation of any statute. If it turns out, as a matter of fact, that Mr. Wright and IMA took the funds of the investors with the intent to steal them at the time they were received, the exclusion might apply. But the Court cannot draw such an inference for purposes of summary judgment on the current record.

Similarly, it is clear that the Ponzi scheme resulted generally in Wright and IMA gaining profit or advantage to which they were not legally entitled. But, just as obviously, they gained no profit or advantage from the conduct that forms the basis of the claim, *i.e.,* wrongful investments that lost millions of dollars.

Finally, the alleged "Wrongful Acts" are, again, the wrongful investment of the investors' money. The Court cannot draw an inference from the record that Wright knew that investing in index options was a Wrongful Act.

IMA is not entitled to summary judgment on this defense.

5. Exclusion for Wrongful Acts alleged in prior litigation

On December 9, 2005, Crown Financial filed a complaint against IMA in the Superior Court of Fulton County in which it alleged that IMA was a mere instrumentality of Wright and that he used it to advance his personal interests. (D-SUMF-2 [94-2] ¶ 34). The complaint asserted that Wright and IMA represented to Crown that it could recover the total amount it was owed and that they never indicated that the value of the Platinum Account had declined. Crown alleged that these representations that ignored and concealed the decline in the value of the Platinum Account were false, were made with the intent to deceive, and resulted in significant monetary harm. (D-SUMF-2 [94-2] ¶¶ 35, 36).

Exclusion 4(II)(18) of the Policy excludes any claim "arising out of any pending or prior litigation as of the inception date of this policy, or arising out of the same or essentially the same Wrongful Acts alleged in such pending or prior litigation." (Page 5 of Policy attached as Exhibit "B" to Complaint [1-3 at 12]). AISLIC seeks summary judgment on its defense that this provision excludes coverage because the Wrongful Acts that the Trustee alleges arise out of the same or essentially the same Wrongful Acts that Crown Financial alleged in litigation that began before the Policy commenced on January 1, 2006. (AISLIC Brief-2 [94-2]19-20).

The Trustee points out that the Crown Financial complaint involved a loan Crown made to a third party that was secured by the borrower's interest in a different account and that it does not make claims for negligent investment, breach of contract, and breach of fiduciary duty that are the Wrongful Acts that the Trustee alleges. (Trustee Brief-2 [94-2] 21- 22).

The conduct of which Crown Financial complained in its litigation is substantially different from the Wrongful Acts on which the Trustee relies. AISLIC is not entitled to summary

judgment based on the prior litigation exclusion.

6. The "known loss" defense

AISLIC asserts that it is entitled to judgment as a matter of law under the "known loss" doctrine. (AISLIC Brief-2 [94-2] 20-24). The "known loss" doctrine is a common law defense that excludes coverage of a loss to the insured of which the insured had actual knowledge prior to the policy's effective date or that the insured knew was substantially certain to occur. *E.g.*, *Stonehenge Engineering Corp. v. Employers Ins. of Wausau*, 201 F.3d 296, 301-02 (4th Cir. 2000); *U.S. Liab. Ins. Co. v. Selman*, 70 F.3d 684, 690-91 (1st Cir. 1995); *Outboard Marine Corp. v. Liberty Mut. Ins. Co.*, 154 Ill.2d 90, 607 N.E.2s 1204, 1210 (1992); *Couch on Insurance* (3d ed.) § 102:8.

AISLIC points to a variety of facts to establish that IMA and its principals knew, or at least should have known, that investors would assert claims against IMA when IMA obtained coverage. (AISLIC Brief-2 [94-2] 21-24). The Trustee does not dispute that Mr. Wright was engaged in criminal activity and thus knew of potential claims that investors could make, but his evidence shows that Dr. Harper, the only individual involved in seeking insurance from AISLIC, and Dr. Bond were unaware of Mr. Wright's illegal and fraudulent conduct, negligent investing, or breaching of contracts or breaching of fiduciary duties. (Trustee Brief-2 [100] 24-25).

Consideration of AISLIC's known loss defense requires analysis of several legal issues. A threshold issue is whether Georgia law recognizes the defense, an issue that courts in Georgia have not considered.[32] AISLIC does not address this issue (AISLIC Brief-2 [94-1] 20-24), while

[32]A District Court in Georgia considered the known loss defense in *Essex Ins. Co. v. H & H Land Development Corp.,* 525 F.Supp. 2d 1344 (M.D. Ga. 2007), in the context of a policy that contained an express exclusion for a known loss.

the Trustee asserts that the doctrine does not apply in Georgia, based on the principle of Georgia insurance law stated in *Alley v. Great American Ins. Co.*, 160 Ga. App. 597, 600, 287 S.E.2d 613 (1981), that an insurer must define limitations on coverage in clear and explicit terms. (Trustee Brief-2 [100] 22-23).

If the Georgia courts would adopt the known loss doctrine, questions arise as to the standards for its application. Is the standard a subjective one (*i.e.,* that the insured knew of the loss), an objective one (*i.e.,* that the insured should have known of the loss based on the circumstances in existence at the time the coverage took effect), or some combination of both? *See generally Couch on Insurance* (3d ed.) § 102:8. If the insured is an entity, *whose* knowledge is material, the individual responsible for procuring coverage or the chief executive officer who did not participate in procuring the insurance?

Based on the record before the Court, the only undisputed fact with regard to the known loss defense is that Mr. Wright knew that he was defrauding investors. Whether Dr. Harper and Dr. Bond had such knowledge, or whether they should have had such knowledge, are disputed factual issues. (See Part V(A) *supra).* Moreover, the fact that Mr. Wright knew that defrauded investors would have claims for theft does not necessarily mean that he knew that they would have claims for the improper investment of funds he did not steal.

The undisputed facts present at least three legal issues. First, does the known loss doctrine apply in Georgia? Second, if it does, is Mr. Wright's knowledge alone sufficient to permit application of the doctrine to IMA? Third, does application of the known loss doctrine require that Mr. Wright knew (or should have known) that investors would have claims based on improper investment in addition to claims for defrauding them?

AISLIC has not addressed the first issue and neither party has provided any authority or argument with regard to the second and third. The Court concludes that it is not appropriate to resolve what appear to be issues of first impression under Georgia law when the parties have not adequately addressed them and when determination of disputed facts may well be necessary to apply the legal principles that the Court determines Georgia courts would apply. Consequently, the Court concludes, on the current record, that AISLIC is not entitled to summary judgment on its known loss defense.

VI. Motions to Exclude Testimony of Expert and to Strike Expert's Declaration

The Trustee has engaged an expert, Dr. Craig J. McCann, to provide expert opinion testimony with regard to whether the investments that IMA made for investors in the Emerald II and Platinum II funds complied with the standard of care IMA owed to investors and the offering memoranda for the investments and the calculation of any losses that the investors suffered as a result of any actionable conduct in which IMA engaged.

Dr. McCann prepared, and the Trustee filed, the "Expert Report of Craig J. McCann, Ph.D., CFA" (the "Expert Report"). [80-1]. AISLIC took Dr. McCann's deposition[33] and has moved to exclude his testimony for a number of reasons (the "Expert Motion" [92]). The Trustee's opposition to the Expert Motion [98] includes a declaration by Dr. McCann that expands on his report and testimony. (Exhibit "C" to Trustee Expert Brief [98-3]). AISLIC has moved to strike Dr. McCann's declaration, asserting that the declaration is an after-the-fact attempt to remedy deficiencies in the expert report that Fed. R. Civ. P. 26(e) does not permit.

[33]Notice of Deposition [85]. Excerpts from Dr. McCann's deposition are attached as Exhibit "E" to the Expert Motion [92-5] and as Exhibit "B" to Trustee Expert Brief [98-2].

(the "Expert Declaration Motion" [102]).

The following constitutes the Court's proposed findings of fact and conclusions of law with regard to AISLIC's Expert Motion [92] and Expert Declaration Motion [102].

Rules 26(a) and (e) of the Federal Rules of Civil Procedure "require parties to disclose all bases of their experts' opinions and to supplement timely their expert disclosures upon discovery of an omission or as required by court order." *Mitchell v. Ford Motor Co.,* 318 Fed. Appx. 821, 824 (11th Cir. 2009). The trial court has discretion with regard to the admissibility of expert testimony and the permissible supplementation of an expert's report. *Id.*

In some respects, it appears to the Court that AISLIC's challenge to Dr. McCann's expert testimony is an attack on the Trustee's theories of causation and damages. It is helpful, therefore, to begin analysis of AISLIC's motion to exclude his testimony with consideration of the context in which it is offered.

As set forth in Parts III, IV and V in connection with the Court's consideration of AISLIC's motions for summary judgment, the Trustee's theory is that IMA caused losses to certain investors through the improper investment of their funds in the Emerald II and Platinum II accounts and that those investors have claims for those losses, *in addition to* their claims for losses from the Ponzi scheme. The Court has determined that AISLIC is not entitled to summary judgment on issues related to its defenses to this theory.

It may be that, at trial, the Trustee cannot carry his burden of persuasion on the facts essential to his theory. But for present purposes, the Court must, and does, accept the Trustee's theory as viable. Consequently, the assumption for present purposes is that certain investors put their money in the two funds in question with the expectation that investments would occur in

accordance with the offering memoranda.

Dr. McCann's testimony is irrelevant to the question of whether the Trustee will sustain his burden of proof and whether the jury will determine the facts as thus assumed. In other words, Dr. McCann's testimony begins with that assumption and then addresses issues that arise from that assumption.[34] The Trustee presents Dr. McCann's testimony to prove his claim that some investors have claims that the investments were improper because IMA made them contrary to the offering memoranda, negligently, or in breach of IMA's contractual and fiduciary duties and to establish the amount that they are entitled to recover as damages. To the extent that AISLIC's Expert Motion challenges the Trustee's theory or the assumptions that are necessary for Dr. McCann's testimony to matter, it has no merit.

The material points in the Expert Report are: (1) the offering memoranda represent that investments in the funds would be in actively managed portfolios of common stock of individual U.S. companies (Expert Report [80-1] ¶¶ 12-13); the funds instead invested "virtually all of their portfolios in index options" (*id.* at ¶¶ 14-16); (3) investments in index options are different in nature and substantially riskier than investments in common stock (*id.* at ¶¶ 11, 17-19); (4) the investments in index options that IMA made were inconsistent with the investment strategy that the offering memoranda described (*id.* at 11, 14-16); (5) the investments were made "contrary to contractual obligations and/or other duties or standards of care" that IMA owed to investors

[34]The separation of losses from the Ponzi scheme from losses due to investment activity – which AISLIC vigorously opposes but that the Court for purposes of consideration of the summary judgment motions has determined to be correct – makes the existence of the Ponzi scheme immaterial to consideration of IMA's duties of care or the losses that investors suffered. Thus, contrary to AISLIC's criticism (AISLIC Expert Brief [92] 16), Dr. McCann's opinion is not faulty based on his failure to take the Ponzi scheme into account.

(*id.* ¶ 11); (6) investors in the two funds lost $11,867,708 during the period (*id.* ¶ 20); (7) the losses were not attributable to market forces in view of the fact that recognized composite stock indices were virtually unchanged during the same period (*id.* ¶ 21); and (8) investors lost $10 million because of the investments IMA made contrary to representations in the offering memoranda (*id.* ¶ 22).

The Court finds and concludes that Dr. McCann's training, skill, education, and experience qualify him to testify with regard to these matters. Dr. McCann holds a Ph.D in economics from the University of California, has worked as a senior financial economist in the Office of Economic Analysis at the Securities and Exchange Commission, is a Chartered Financial Analyst, has taught graduate investment management courses at Georgetown University and the University of Maryland, has done consulting work primarily involving the analysis of investments, has authored various publications, and has testified as an expert in other cases. (Expert Report [80-1] ¶¶ 1-6). He is, therefore, qualified to provide opinion testimony as to the types of investments that the offering memoranda promised, what types of investment actually occurred, what the standards of care are for an investment advisor, whether IMA properly performed its duties, and the losses that investors suffered on account of the investment activity that took place as compared to what it should have been.[35]

AISLIC does not like Dr. McCann's opinions and questions whether the Expert Report fully sets forth his methodology, whether his methodology is reliable, and whether he has taken into account all matters that are material to his opinion. In its effort to exclude Dr. McCann's

[35]AISLIC's objection based on Dr. McCann's "apparent lack of independence" (AISLIC Expert Brief [92] 13-14) goes to the weight of his testimony. The Court concludes that the asserted facts do not require its exclusion.

testimony, AISLIC challenges both the adequacy of the Expert Report and the admissibility of his expert testimony on numerous grounds.

Some of AISLIC's arguments have no apparent application to the subject matter of Dr. McCann's testimony. The types of issues and analysis that are necessary for providing an opinion with regard to the matters at issue here are not properly evaluated on the basis of a "testing" of methodology or the calculation of a potential rate of error. (AISLIC Expert Brief [92] 8-9, 12). The opinions here involve financial analysis, not scientific testing or evaluation. One simply cannot "test" an opinion or methodology with regard to the standard of care for an investment advisor or the determination of damages such as those at issue here.

To the extent that AISLIC objects to Dr. McCann's testimony because it expresses an opinion on ultimate legal issues, the Court concludes that such an argument is better addressed at the time of trial. The trial court can, in the context of the evidence presented and the issues developed at trial, determine the extent, if any, to which Dr. McCann's testimony and opinions should be appropriately limited.

One may quibble with some aspects of the Expert Report, and it could have provided more detail. It lacks a full description of the standard of care that IMA owed as a matter of contractual, fiduciary, or other duty (*id.* ¶ 11), but the basis for the conclusion and the methodology for reaching it are both obvious, intuitive, and virtually self-evident in the context of the facts of this dispute. An investment manager has a duty to pursue an investment strategy that it promised its investors, not one that is dramatically different in nature and risk. Moreover, Dr. McCann can properly state the obvious – for example, index options involve substantially more risk than investments in common stocks – without having to express all of the reasons that

support it when, as here, the audience for purposes of the report consists of persons familiar with its subject matter. AISLIC cannot seriously question these propositions, and it cannot really be surprised that Dr. McCann's declaration elaborates on the issues.

AISLIC argues that Dr. McCann did not consider the "significant discretion" that the offering memoranda gave IMA. (AISLIC Expert Brief [92] 4, 12, 15). The Court does not read the offering memoranda as authorizing IMA to invest almost all of the Funds in risky Index Options, but AISLIC may cross-examine Dr. McCann on this issue and present any factual or legal arguments at trial to support its proposition that wholly investing in index options is not improper when the offering memoranda state that the bulk of the total assets will be invested in securities of U.S. companies that offer superior earnings growth and income.

Another possible defect in the Expert Report AISLIC identifies is that it does not describe the bases and methodologies by which Dr. McCann calculated the loss. AISLIC advances a variety of arguments attacking Dr. McCann's methodologies and reasoning and concludes that Dr. McCann's testimony should be excluded.

AISLIC argues that Dr. McCann's testimony that investors sustained losses due to investments made outside the parameters of the offering memoranda is impermissible because it is based on only four premises: (1) the contents of the offering memoranda; (2) the types of investments actually made; (3) the general attributes of options; and (4) the performance of the composite stock indices. AISLIC's point is that reliance only on these parameters ignores the discretion that IMA had under the offering memoranda and assumes that every other type of investment that the offering memoranda allowed would not have resulted in such losses. (AISLIC Expert Brief [92] 14-15).

What AISLIC's argument misses is that the case law recognizes this method of estimating losses based on these types of premises when improper investment activity occurs.

An appropriate measure of damages when an investment advisor is liable for the improper management of an investor's funds is "the difference between what he would have had if the account [had] been handled legitimately and what he in fact had at the time the violation ended." *Miley v. Oppenheimer & Co., Inc.*, 637 F.2d 318, 327 (5th Cir. 1981).[36] The measure of damages is an approximation of trading losses sustained as a result of the improper investment activity. *Id.* at 328. *Accord, See e.g., Rolf v. Blyth, Eastman Dillon & Co., Inc.*, 637 F.2d 77, 84 (2d Cir. 1980). Exact certitude in the calculation of damages is not required. *See, e.g., Fey v. Walston & Co., Inc.*, 493 F.2d 1036, 1055 (7th Cir. 1974) ("It is now elementary that when precise damage measurements are precluded by wrongful acts, the wrongdoer cannot insist upon exact measurements and the precise tracing of causal lines to an impractical extent; fair approximations are in order.").

As the cases just cited make clear, the damages analysis must take into account what the performance of the investments would have been if investments had been proper. This includes adjustment of the loss by reference to what occurred in the market. A composite stock index provides a basis for making this adjustment. *See, e.g., Rolf, 637 F.2d at 84.*

The methodology in the Expert Report is consistent with these recognized principles for calculating damages. Dr. McCann calculates the loss in each account and concludes that those losses represent the loss due to the investment activity in question because various composite

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[36]The case involves improper "churning" by a broker rather than negligent or otherwise improper choice of investments. The damages principle is the same.

indexes (the S & P 500, S & P 100, and NASDAQ 100) were virtually unchanged during that period. (Expert Report [80-1] ¶¶ 20-21).

It is difficult to come up with more of an explanation for the method of calculating damages than what the Expert Report contains. In summary, the Expert Report states: With *de minimis* exceptions, the funds were invested in index options, this investment activity was inconsistent with the terms of the offering memoranda and resulted in virtually a total loss of the funds, and a comparison to standard market indices reveals that the losses are not attributable to market conditions. (Expert Report [80-1] ¶¶ 14-21).

AISLIC questions Dr. McCann's use of composite indices in analyzing damages because this "does not account for the reality that, even if Wright invested in the manner McCann says is required by the offering memoranda, he might well have picked more stocks that lost value than gained value from the stocks included in the indices." (AISLIC Expert Brief [92] 10). True enough, but the case law recognizes the validity of Dr. McCann's approach and does not require exact certainty, as discussed above.

It is also true that the Expert Report does not explain why Dr. McCann chose the S & P 500, S & P 100, and NASDAQ 100 indices rather than some other composite index. (Expert Report [80-1] ¶ 21). The Court concludes that this is not fatal to its sufficiency.[37] The clear implication of the Expert Report, in context, is that Dr. McCann chose these particular indices as a proxy to account for what would have happened to the investments if they had been

[37]In this regard, *Rolf v. Blyth, Eastman Dillon & Co., Inc.*, 637 F.2d 77, 84 (2d Cir. 1980), may suggest that which index is appropriate may be question of law for the court. If this is so, the court must be able to inform itself as to relevant factors to take into account by hearing from an expert witness as to what various indices measure

invested largely in common stocks of U.S. companies as the offering memoranda represented.[38]

AISLIC also criticizes Dr. McCann's conclusion with regard to losses because "it appears that McCann failed to consider the impact on these alleged losses resulting from an admitted trading error by Lehman Brothers." (AISLIC Expert Brief [92] 16). AISLIC states that whether the loss from a trading error was "one dollar or six million dollars, it is a loss not due to Wright's 'negligent investing,' and the failure to quantify it makes McCann's opinion completely invalid." (AISLIC Expert Brief [92] 17).

The Court disagrees with AISLIC's view of materiality and the effect of any failure to account for a possible loss due to a trading error that really is material. If the loss arising from the broker's trading errors was one dollar, it makes no difference. If the loss was six million dollars, it would require an adjustment in the amount of the loss but would not mean that Dr. McCann's testimony is inadmissible.

If, as AISLIC asserts, Dr. McCann did not properly take into account this or any other reasons that explain all or part of the loss, any such deficiencies go to the weight of his testimony, not its admissibility. And presumably, if other reasons actually do exist that Dr. McCann's calculation fails to adjust for, simple arithmetic calculations can be made to arrive at a properly adjusted loss.

Taking the Expert Report as a whole and in the context of the issues in this adversary proceeding, the Court finds and concludes that the Expert Report adequately discloses what Fed.

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[38]AISLIC appears to concede that what these indices measure and how they function is a matter of common knowledge. In its Expert Motion [92 at 10 n. 4], AISLIC invites the Court to take judicial notice of the fact that these indices are weighted indices of stock because that is "generally known" within the Court's territorial jurisdiction based on materials attached as Exhibit "F" [92-6] to its Expert Motion.

R. Civ. P. 26(a)(2) requires. After review and comparison of the Expert Report and Dr. McCann's declaration [98-3], the Court concludes that the declaration provides further detail and explanation with regard to matters fairly covered by the Expert Report and that it does not constitute an impermissible or prejudicial supplement to the Expert Report.

The Court further finds and concludes that Dr. McCann's expert testimony qualifies under the standards that the Supreme Court announced in *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579, 113 S.Ct. 2786 (1993) and that it meets the requirements of Fed. R. Evid. 702. Specifically, Dr. McCann is qualified to provide expert testimony, his testimony is based on sufficient facts and data, his opinions are the result of reliable principles and methods (that applicable case law supports), and he has reliably applied those principles and methods to the facts of this proceeding. Of course, the admissibility of his testimony is subject to the District Court's discretion to limit his testimony, based on the evidence presented and the issues developed at trial, to the extent that it invades the province of the jury as an opinion on the ultimate issue or to the extent that the testimony is not appropriately applicable to the evidence and issues. Similarly, his testimony is subject to AISLIC's rights at trial to make appropriate challenges to its weight.

Based on these proposed findings of fact and conclusions of law, the Court concludes that AISLIC's Expert Motion [92] and its Expert Declaration Motion [102] should be denied.

VII. Submission to District Court

Pursuant to 28 U.S.C. § 157(c)(1) and Fed. R. Bankr. P. 9033, the Court submits to the District Court, for its de novo review, the foregoing proposed findings of fact and conclusions of law with regard to AISLIC's two motions for summary judgment (the Policy Invalidity Motion

[93] and the Coverage Motion [94]) and its two motions with regard to the Expert Report [80] and testimony of Dr. Craig J. McCann (the Expert Motion [92] and the Expert Declaration Motion [102]). Based on the Court's proposed findings and conclusions, the Court proposes the following:

(1) AISLIC is entitled to summary judgment that the insurance policy is void due to IMA's material misrepresentations or omissions on the defense, as asserted in the Policy Invalidity Motion [93], for reasons set forth in Part IV(B)(1);

(2) AISLIC is not entitled to summary judgment on any of its other defenses asserted in its Policy Invalidity Motion [93] for reasons set forth in Part IV(B)(2) and (3);

(3) AISLIC is not entitled to summary judgment on any of its defenses asserted in the Coverage Motion [94] for reasons set forth in Part V(B); and

(4) AISLIC's Expert Motion [92] and its Expert Declaration Motion [102] should be denied for reasons set forth in Part VI.

In connection with its de novo review of these matters, the District Court may wish to consider certain matters that the Court has discussed in Part I.

[END OF PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW]

These proposed findings of fact and conclusions of law do not constitute an Order of the Court. They have been prepared for submission to the District Court for its de novo review pursuant to 28 U.S.C. § 157(c). They have not been prepared for publication, are not intended for publication, and the Court has not authorized their publication.

APPENDIX

Abbreviations and Format for Citations to the Record and List of Defined Terms

Explanation With Regard to Docket References

The Court's electronic docket provides two ways to access a document when the docket entry contains more than one document. In such instances, the docket entry typically refers to "Attachments" in the text of the docket entry and provides numbered links to the "attached" documents. The first attachment becomes "-1" to the docket entry. For example, docket entry 80 is the "Notice of Filing of Expert Report" and it indicates one attachment. The docket entry for the attachment, which is the Expert Report itself, is 80-1. This is the system that the Court uses herein.

The other method is to select the docket number itself from the docket number ("#") column. When the docket entry contains more than one document, a window appears from which the user may select the appropriate document from the column labeled "Part." The main document is part number 1, the first attachment is part number 2, and so on. Under this numbering system, the Expert Report just referred to (No. 80-1) is Part 2. The Court uses the first docket numbering system rather than the "Part" numbering system because it is typically more convenient to select the desired document from the list of attachments.

MOTIONS

Reference	Description	Docket
Expert Motion	AISLIC's Motion to Exclude the Testimony of Craig J. McCann [Expert Report is filed at Docket No. 80-1]	92
Policy Invalidity Motion	AISLIC's Motion for Summary Judgment Based Upon Invalidity of Policy	93
Coverage Motion	AISLIC's Motion for Summary Judgment on Policy No. 625-53-43	94
Expert Declaration Motion	AISLIC's Motion to Strike the December 16, 2011 Declaration of Craig J. McCann	102

STATEMENTS REGARDING FACTS		
Reference	Description	Docket
D-SUMF-1	Defendant AISLIC's Statement of Undisputed Material Facts In Support of Policy Invalidity Motion	93-2
D-SUMF-2	Defendant AISLIC's Statement of Undisputed Material Facts In Support of Coverage Motion	94-2
P-Resp-1	Plaintiff Trustee's Response to Defendant AISLIC's Statement of Undisputed Material Facts in Support of Policy Invalidity Motion	99-2
P-Resp-2	Plaintiff Trustee's Response to Defendant AISLIC's Statement of Undisputed Material Facts in Support of Coverage Motion	100-2
P-SAF-1	Plaintiff Trustee's Statement of Additional Facts Which Are Material and Present a Genuine Issue to Be Tried (in response to Policy Invalidity Motion)	99-1
P-SAF-2	Plaintiff Trustee's Statement of Additional Facts Which Are Material and Present a Genuine Issue to Be Tried (in response to Coverage Motion)	100-1
BRIEFS		
Reference	Description	Docket
AISLIC Brief-1	Defendant AISLIC's Brief in Support of Policy Invalidity Motion	93-1
AISLIC Brief-2	Defendant AISLIC's Brief in Support of Coverage Motion	94-1
AISLIC Expert Brief	Defendant AISLIC's Brief in Support of Expert Motion	92
Trustee Brief-1	Plaintiff Trustee's Brief in Opposition to Policy Invalidity Motion	99
Trustee Brief-2	Plaintiff Trustee's Brief in Opposition to Coverage Motion	100
Trustee Expert Brief	Plaintiff Trustee's Brief in Opposition to Expert Motion	98

EXHIBITS

Both the Trustee and AISLIC have referred to exhibits in their papers.

AISLIC attached exhibits to its Policy Invalidity Motion [93] (found at Docket Nos. 93-4 (Exhibit 1) through 93-66 (Exhibit 62)). AISLIC refers to the exhibits attached to the Policy Invalidity Motion in connection with the Coverage Motion [94]. AISLIC filed a combined list of its exhibits with regard to the Policy Invalidity Motion and the Coverage Motion. [93-3].

The Trustee attached exhibits to his responses to the Policy Invalidity Motion [99] and to the Coverage Motion [100]. The exhibits are identical and are found at Docket Nos. 99-4 and 100-4 (Exhibit 1) through 99-61 and 100-62 (Exhibit 55), respectively). The Trustee filed the same combined list of its exhibits with both responses. [99-3 and 100-3].

AISLIC attached exhibits to its Expert Motion [92] (found at Docket Nos. 92-1 (Exhibit A) through 93-8 (Exhibit "H")).

The Trustee attached exhibits to his response to the Expert Motion [98] (found at Docket Nos. 98-1 (Exhibit "A") through 98-3 (Exhibit "C")).

The Court refers to an exhibit by the assigned number or letter and the docket number and part at which it is found, as set forth below.

FORMAT FOR CITATIONS TO THE RECORD

[***a***] or [***a-b***]	Brackets denotes a reference to a Docket Entry. In instances where the Docket Entry includes several parts, the applicable part appears after the hyphen.
DX-***a*** or PX-***a***	"DX" means "Defendant's Exhibit" and refers to exhibits that AISLIC attached to its Motions. "PX" means "Plaintiff's Exhibit" and refers to exhibits that the Trustee attached to his Responses to the Motions. A reference to the applicable docket entry where the exhibit is found is typically included.

DEFINED TERMS	
AISLIC	American International Specialty Lines Insurance Company (Defendant)
ARC	ARC Excess & Surplus, a surplus lines broker that worked with NASDAQ
Chicago Risk	Chicago Risk Services, a retail broker firm started by Paul Rauner, a former representative of NASDAQ who worked with IMA prior to starting his own firm
Cover Note	Temporary and Conditional Cover Note Evidencing Insurance Placement Confirmation Letter. A copy is attached as Exhibit "A" to the complaint [Docket No. 1-1].
Dismissal Opinion	Bankruptcy Court's Proposed Findings of Fact and Conclusions of Law Pursuant to 28 U.S.C. § 157(c)(1) Regarding Defendant NASDAQ OMX Group, Inc.'s Motion to Dismiss [Docket No. 40]. The District Court approved and adopted the proposed findings and conclusions. District Court Civil Action File No. 1:10-CV-2940-TWT (Oct. 21, 2010) [Docket No. 54].
Dismissal Order	District Court's Order in District Court Civil Action File No. 1:10-CV-2940-TWT (Oct. 21, 2010) [Docket No. 54 in this adversary proceeding], which approved and adopted this Court's proposed findings of fact and conclusions of law set forth in the Dismissal Opinion [Docket No. 40].
Expert Report	Expert Report of Craig J. McCann, Ph.D, CFA, July 7, 2011 [Docket No. 80-1].
IMA	International Management Associates, LLC
NASDAQ	NASDAQ OMX Group, Inc. (Defendant conditionally dismissed, Docket Nos. 40, 54, and IMA's retail broker)
Policy	Policy for investment management insurance issued by AISLIC to IMA, Policy No. 625-53-43, for the period January 1, 2006, to January 1, 2007. A copy of the Policy is attached as Exhibit "B" to the complaint [Docket No. 1-2].
PFS	Premium Financing Services, a company involved in arrangements to provide IMA with financing for the premium for the Policy

Prior Policy	Policy for investment management insurance issued by AISLIC to IMA, Policy No. 884-65-60, for the period from January 1, 2005 to January 1, 2006.
Risk Placement	Risk Placement Services, a surplus lines broker that worked with Chicago Risk
Trustee	William F. Perkins, Plan Trustee under the confirmed Chapter 11 Plan of International Management Associates, LLC (Plaintiff)