At a Special Term of the Supreme Court for the State of New York, Commercial Division, held in and for the County of Monroe, at the Hall of Justice, Rochester, New York on the 12th day of September, 2013.

STATE OF NEW YORK
SUPREME COURT COUNTY OF MONROE

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HAHN AUTOMOTIVE WAREHOUSE, INC.,

Plaintiff,

- vs -

AMERICAN ZURICH INSURANCE COMPANY and ZURICH AMERICAN INSURANCE COMPANY,

Defendants.

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**ORDER**

Index No.: 10/14453

Defendants American Zurich Insurance Company and Zurich American Insurance Company (hereinafter "Defendants"), by their attorneys Damon Morey LLP, having moved this Court for an Order pursuant to CPLR 3212 granting summary judgment in favor of Defendants on the Verified Complaint; and Plaintiff Hahn Automotive Warehouse, Inc. (hereinafter "Plaintiff"); by its attorneys The Wolford Law Firm LLP, having opposed the motion; and Plaintiff having cross moved this Court for an Order pursuant to CPLR 3212, granting summary judgment in favor of Plaintiff on the Verified Complaint; and Defendants having opposed the motion; and Plaintiff having further moved, in the alternative, for an Order pursuant to CPLR 3025(b) granting Plaintiff leave to file an Amended Verified Complaint; and Defendants having not opposed that motion,

**NOW**, upon reading Defendants' Notice of Motion, dated May 13, 2013, and the Attorney Affidavit of Michael J. Willett, Esq., sworn to May 13, 2013, with Exhibits A through CC, all submitted in support of Defendants' motion for summary judgment; and the Affidavit of Jean Routon, sworn to August 21, 2013, with Exhibits A and B, submitted by Defendants in opposition to Plaintiff's cross motion for summary judgment; and Plaintiff's Notice of Motion, dated July 25, 2013, and the Attorney Affidavit of Michael R. Wolford, Esq., sworn to July 25, 2013, with Exhibits A through I, and the Affidavit of Max R. Schrayer, sworn to July 18, 2013, with Exhibits A through R, and the Affidavit of Michael Piccolo, sworn to July 25, 2013, with Exhibits A through E, all submitted in support of Plaintiff's cross motion for summary judgment; and Plaintiff's Notice of Motion, dated May 23, 2013, and the Attorney Affidavit of Michael R. Wolford, Esq., sworn to May 23, 2013, with Exhibits A through H, all submitted in support of Plaintiff's motion, in the alternative, for leave to file an Amended Verified Complaint,

**AND**, the Court having heard Damon Morey LLP, Michael J. Willett, of counsel, attorneys for Defendants, in support of Defendants' motion for summary judgment and in opposition to Plaintiff's cross motion for summary judgment; and The Wolford Law Firm LLP, Michael R. Wolford, of counsel, attorneys for Plaintiff, in support of Plaintiff's cross motion for summary judgment and in opposition to Defendants' motion for summary judgment,

**AND**, due deliberations being held thereon, and the Court having issued its written Reserve Decision on the 1st day of October, 2013, which is attached hereto as Exhibit A and made a part hereof, it is hereby

**ORDERED**, that Defendants' motion for summary judgment pursuant to CPLR 3212 is hereby **DENIED**; and it is further hereby

**ORDERED**, that Plaintiff's cross motion for summary judgment on its Verified Complaint pursuant to CPLR 3212 is hereby **GRANTED**, thereby rendering moot Plaintiff's motion, in the alternative, for leave to file an Amended Verified Complaint.

Dated: October 17, 2013

Honorable Matthew A. Rosenbaum
Supreme Court Justice

**Exhibit A**

STATE OF NEW YORK
SUPREME COURT COUNTY OF MONROE

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HAHN AUTOMOTIVE WAREHOUSE, INC.,

Plaintiff

-vs- Index No. 2010/14453

AMERICAN ZURICH INSURANCE COMPANY and ZURICH AMERICAN INSURANCE COMPANY,

Defendants

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RESERVE DECISION

APPEARANCES

THE WOLFORD LAW FIRM LLP
*Michael R. Wolford, Esq.*
Attorneys for Plaintiff

DAMON MOREY LLP
*Michael J. Willett, Esq.*
Attorneys for Defendants

**Rosenbaum, J.**

Defendants, American Zurich Insurance Company and Zurich American Insurance Company, move for an order granting summary judgment dismissing Plaintiff's Complaint pursuant to CPLR 3212. Plaintiff, Hahn Automotive Warehouse, Inc., submits two notices of motion. First, Plaintiff seeks an order pursuant to CPLR 3212 granting summary judgment in Plaintiff's favor on the

Verified Complaint. Failing that, Plaintiff submits an additional Notice of Motion for an order pursuant to CPLR 3025(b) granting leave to file an Amended Verified Complaint against Defendants.

A companion action is also pending before the Court, *Hahn Automotive Warehouse Inc. v. American Zurich Insurance Company and Zurich American Insurance Company,* Index No. 2006/5800 ("the 2006 Action"). Both the pending action and the 2006 Action arise from invoices issued to Plaintiff by Defendant in connection with programs for auto liability, general liability, and worker's compensation insurance coverage for the period beginning September 30, 1992 and continuing through September 30, 2003. The 2006 Action has led to the determination and resolution of various issues.

This action was commenced on November 9, 2010, and issue was joined on December 13, 2010. Plaintiff commenced this action seeking to recover certain funds, amounting to $404,035.00, held in escrow by Defendants. In the Complaint, Plaintiff alleges that some of the insurance policies Plaintiff had with Defendants had large deductibles. Complaint, ¶7. Defendants paid the full amounts on the policies, and Plaintiff reimbursed Defendants for the deductible amounts. Id. Plaintiff provided money to Defendants to hold in an Escrow Fund in relation to the policies with large deductibles. Id. at ¶8. If Defendants were required at any time to pay an amount greater than the balance of the Escrow Fund or an amount greater or equal to the amount stated as a large loss payment, then Plaintiff was to be billed for that amount. Id. at ¶9. That amount was due on demand and payment was required within twenty days of billing, provided the amounts were timely billed. Id. The Escrow Fund was intended to cover approximately three months of payments. Id.

It is alleged that once it was determined that Defendants no longer needed an Escrow Fund, the remaining balance of the fund was to be returned to Plaintiff. Id. at ¶11. Plaintiff alleges that each of the agreements containing

an Escrow Fund provision provides for this. Id. All of the policies have since converted into loss plans, and the Escrow Funds are no longer necessary. Id. at ¶12.

Defendants hold $405,035.00 in the Escrow Fund, and Plaintiff contends that it must be returned. Id. at ¶13. Defendants have refused to return those funds, citing the pending litigation at bar as well as the 2006 Action. Id. at ¶14. Plaintiff argues that any right to offset is limited to undisputed balances due, and that the balance allegedly owed with respect to the pending litigations is disputed. Id. at ¶¶15-16. The Complaint states causes of action sounding in declaratory judgment, breach of contract, and unjust enrichment.

During the policy years of September 1993 to September 1996, the parties entered into the following insurance agreements requiring Plaintiff to provide Defendants with a certain amount of money to create a "claim reserve fund" or "loss fund": (1) Deductible Agreement (for policy year 1993 to 1994); (2) Premium Payment Agreement (for policy year 1993 to 1994); (3) Workers Compensation Deductible and Premium Payment Agreement (for policy years 1993 through 1996); and (4) Deductible Agreement - Other Than Workers Compensation (for policy years 1994 through 1996). Moreover, during the policy years September 1996 to September 2003, the policies issued to Plaintiff by Defendants were governed by Deductible Agreements.

The pertinent provisions in the policies state:

> K. CLAIM RESERVE FUND DEPOSIT; ADJUSTMENT OF CLAIM RESERVE FUND DEPOSIT
>
> 1. For each policy period subject to this Agreement, the Claim Reserve Fund Deposit is as stated in the Information Pages of this Agreement and is due and payable on or before the inception date of that policy period. This fund is held by the Company in anticipation of payments for losses and Allocated Claim Expenses prior to reimbursement by the Insured

through Paid Loss Billings. The Claim Reserve Fund Deposit Amount is determined and established by the Company, representing estimated paid losses and expenses for a three (3) month calendar period.

2. The Claim Reserve Fund Deposit shall be adjusted as follows:

a. At any time the Company determined the deposit is deficient, the Insured shall pay the amount of such deficiency within ten (10) days of receipt of the Company's demand therefore, and;

b. At such time, as determined and established at the sole discretion of the Company, the deposit exceeds the residual outstanding reserves for loss and Allocated Claim Expense, the Company may credit future payments on those outstanding items against the balance remaining in the deposit, and

c. At such time as determined and established by the Company, that all losses are closed and final, any balance remaining in the deposit shall be credited or returned to the insured, and

d. Upon Termination of this Agreement, except as otherwise provided in Section G of this Agreement, the balance in the deposit shall be credited against any amount then due and payable by the Insured.

Affidavit of Max R. Schrayer, Exhibit A. Other policies between the parties mirror this language with slight deviations. See id. at Exhibit B at (G) (referring to "Loss Fund Deposit" instead of "Claim Reserve Fund Deposit"); Exhibits C, D, & E at (I)(1) (referring to "Loss Fund Amount"). Likewise, the Deductible

Agreement- Other Than Workers Compensation provided a nearly identical description of the Loss Fund. See id. at Exhibits F & G at (H)(1). The policies also required the provision of collateral in the form of an Irrevocable Compromise Letter of Credit. See id. at Exhibit A at (F) and Information Pages at (8); Exhibit B at (D) and Information Pages at (5); Exhibits C, D, & E at (R) and Information Pages at (19); Exhibits F & G at (L) and Information Pages at (11).

During the policy years September 1996 to September 2003, the insurance policies issued were governed by Deductible Agreements and the Specifications to those agreements, which referenced an 'Escrow Fund" created by Defendants with Plaintiff's funds:

> C. Program Description
>
> Under the Program, We handle and pay the claims presented in accordance with the provisions of the Policy(ies) and bill You for the claim payments within the Deductible Amount(s), plus related expenses and assessments, as stated in the Specifications. We hold an Escrow Fund in an amount stated in the Specifications so that We do not use Our funds to pay Your obligations.
>
> Since the Escrow Fund does not prefund Your estimated total obligation under the Program, We assume a financial risk that may require Collateral. The initial amount of the Collateral and how and when the amount may be adjusted as stated in the Specifications.

Id. at Exhibits H, I, & L at (C). In the Definitions section, the "Escrow Fund" is defined as follows:

> Escrow Fund is a non-interest bearing account where Your funds are held by US to provide for the payment of Your obligations within the Deductible Amount(s) under the Policy(ies) prior to Your reimbursing Us.

Id. at (E). The escrow fund provisions in the Specifications state, in relevant part:

> Payment by You will be due within twenty (2) days of the billing date; payment by Us will be credited to Your subsequent Paid Loss billing. If at any time the minimum amount of the Escrow Fund exceeds the Loss Reserves and the ALAE Reserve, We may credit subsequent Paid Loss billing amounts against the Escrow Fund balance. When We have determined that We no longer need an Escrow Fund under this Agreement, the remaining balance in the Escrow Fund will be returned to You.

Id. at Exhibits H, I, J, K, L, M & N, Specifications at "Escrow Fund."

A Right of Offset" is also set forth in agreements between the parties:

> Each party hereto shall have and may exercise at any time and from time to time, the right to offset any balance or balances, whether on account of premiums or on account of losses and expenses or otherwise, due from such party to the other (or, if more than one, any other) party hereto under this Agreement or under any other agreement heretofore or hereafter entered into by and between them and may offset the same against any balance or balances due or to become due to the former from the latter under the same or any other agreement between them and the party asserting the right of offset shall have and may exercise such right whether the balance or balances due or to become due to such party from the other are on account of premiums or on account of losses and expenses or otherwise and regardless of the capacity, in which each party acted under the agreement or, if more than one, the different agreements involved.

Affirmation of Michael J. Willett, Esq., Exhibit J (W). See also, id., Exhibits N, Q, & T.

A party seeking summary judgment "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986). "Failure to make such a prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing

papers." Id. See also, Qlisanr, LLC v. Hollis Park Manor Nursing Home, Inc., 51 A.D.3d 651, 652 (2d Dept. 2008). "Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." Alvarez, 68 N.Y.2d at 324, *citing* Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980).

*Previous Decision*

First, the Court finds that the previous decision, and decisions upon appeals, in the 2006 Action with respect to the treatment of the Letter of Credit are only dispositive herein if it is ultimately determined that Defendants are correct and the "escrow fund" was held by Defendants to cover any risk assumed by Defendants. As set forth *supra*, that is not the Court's determination.

*Nature of the Funds*

The determination of this issue between the parties hinges upon whether or not the funds held by Defendants were held as escrow funds. Plaintiff argues that they should be deemed escrow funds, and Defendants argue to the contrary.

"Escrow is defined as a 'written instrument which by its terms imports a legal obligation and which is deposited by the grantor, promisor, or obligor, or against thereof, with a stranger or third party to be kept by the depository until the performance of a condition or the happening of a certain event. The escrow relationship is of a fiduciary nature and has some characteristics of trust.'" In re Robinson ex rel. Snell, 194 Misc.2d 695, 697 (Surr. Ct. Nassau Co. 2003), *quoting* 55 N.Y.Jur.2d, Escrow, §9. "With an escrow account, the 'incidents of ownership remain in the person depositing the property into escrow until the conditions of the escrow agreement are fulfilled.'" Id. "There are four elements

that constitute the creation of an escrow agreement (1) an agreement as to the subject matter and delivery of the deposit or instrument; (2) a third-party depository; (3) delivery of the funds or instrument to the third-party conditioned upon the performance of some act or the happening of some event and (4) relinquishment by the grantor or depositor." Vellaringattu v. Caso, 144 Misc.2d 519, 521 (Dist. Ct. Nassau Co. 1989), *citing* Press v. Marvalan Ind., Inc., 422 F.Supp. 346 (S.D.N.Y. 1976). See also, Mortgage Elec. Registration Sys., Inc. v. Maniscalco, 46 A.D.3d 1279 (3d Dept. 2007); Great Am. Ins. Co. v. Canandaigua Natl. Bank & Trust Co., 23 A.D.3d 1025, 1027-28 (4th Dept. 2005), *rearg. and lv. denied* 26 A.D.3d 904 (4th Dept. 2006), *lv. dismissed* 7 N.Y.3d 741 (2006) (stating that an agreement "fulfills all the requisites of an escrow agreement" if it is "an agreement to which funds are delivered to a third-party depositary, the grantor relinquishes control over the funds, and the funds are to be delivered to a third party conditioned upon the performance of some act or the occurrence of some event"); In re Royal Business School, Inc., 157 B.R. 932 (E.D.N.Y. 1993) ("The word 'escrow' has been defined as: A scroll, writing, deed, money, stock or other property delivered by the grantor, promisor, or obligor into the hands of a third person, to be held by the latter until the happening of a contingency or performance of a condition and then by him delivered to the grantee, promisee, or obligee").

"Merely '[c]alling an act an escrow does not necessarily make it such . . . The word is often used for a holding which has none of the effects which the law attributes to it.'" Lennar Northeast Partners Ltd. Partnership v. Gifaldi, 258 A.D.2d 240 (4th Dept. 1999). "Although the mere use of the term 'escrow' does not automatically create one . . . the term does indicate more clearly than any other word that the parties intended to create an escrow." In re Royal Business School, Inc., 157 B.R. at 938. However, "[n]o precise form of language is necessary to constitute an escrow." Russell v. Deandville Mtge. Corp., 11

Misc.3d 1056(A), *4 (Sup.Ct. Kings Co. 2006).

An escrow agent owes "the fiduciary duty of a trustee and [is] under 'a duty not to deliver the escrow to anyone except upon strict compliance with the conditions imposed' by the escrow agreement." Id., *quoting* Farago v. Burke, 262 N.Y. 229, 233 (1933). "[T]he escrow agent is the trustee of any individual or entity with a beneficial interest in the trust." Russell, 11 Misc.3d at *5. "As a fiduciary the escrow agent owes the parties to an escrow agreement 'the highest amount of loyalty.'" Id., *quoting* Muscara v. Lamberti, 133 A.D.2d 362, 363 (2d Dept. 1987). "New York case law recognizes a fiduciary duty where specific language in the contract obligates a creditor to make payments out of an escrow account on behalf of the debtor." Casey v. Citibank, N.A., 915 F.Supp.2d 255, 265 (N.D.N.Y. 2013), *citing* Davis v. Dime Sav. Bank of New York, FSB, 158 A.D.2d 50 (3d Dept. 1990).

Defendants contend that the ruling of the Appellate Courts in the 2006 Action, which substantively affirmed this Court's (Fisher, J.) June 2, 2009 Decision, is dispositive because the "escrow fund" is collateral similar to the Letter of Credit that was the subject of the previous decision. In the 2006 Action, the Fourth Department stated that the Letter of Credit at issue "unequivocally permitted defendants to apply the letter of credit to any debts that plaintiff owed to defendants." Hahn Automotive Warehouse Inc. v. American Zurich Insurance Company and Zurich American Insurance Company, 81 A.D.3d 1331, 1333 (4th Dept. 2011), *aff'd* 18 N.Y.3d 765 (2012). The Fourth Department noted that the passing of the statute of limitations did not wipe out the substantive right, but rather suspended the remedy. Id. Accordingly, despite the fact that the statute of limitations had run, Defendants were entitled to apply the Letter of Credit to the amounts owed. Id.

Defendants contend that the same logic and principles apply herein. According to Defendants, the agreements between the parties unequivocally

permitted Defendants to apply the amounts held in escrow to any debts that Plaintiff owed to them. The passing of the statute of limitations did not cancel the debt. Rather, Defendants argue, the passing of the statute of limitations merely limited Defendants' option with respect to recovery. As such, Defendants conclude that they are entitled to apply the amounts held in escrow to any debt owed by Plaintiff, including debt that Defendants could not otherwise recover because of the expiration of the statute of limitations.

Moreover, Defendants argue that a true escrow arrangement was not contemplated or achieved through the policies. Even if the term "escrow" was used in some instances in the policies, Defendants contend that the loss funds were held by them in anticipation of paying for deductible losses and expenses prior to reimbursement by Plaintiff through billings received from Defendants. Defendants state that the funds it held were to be applied to amounts expended by them on Plaintiff's behalf. Additionally, according to Defendants, it was left up to them whether to refund or credit the loss fund amounts when all losses were closed and final.

Plaintiff argues that the language of the insurance agreements drafted by Defendants created an escrow arrangement under New York law. Plaintiff notes: Plaintiff (the grantor) provided Defendants (third-party depositary) with escrow funds to pay Plaintiff's claims; Plaintiff transferred its funds to Defendants to "hold" for the specific purposes set forth in the policies and ceded control of the funds to Defendants; and Defendants delivered Plaintiff's funds to the claimants (grantees) upon the submission of a claim (condition) to Defendants.

"'The best evidence of what parties to a written agreement intend is what they say in their writing.'" Greenfield v. Philles Records, 98 N.Y.2d 562, 569 (2002), *quoting* Slamow v. Del Col, 79 N.Y.2d 1016, 1018 (1992). "Thus, a written agreement that is complete, clear and unambiguous on its face must be

enforced according to the plain meaning of its terms." Id.

> A familiar and eminently sensible proposition of law is that, when parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms. Evidence outside the four corners of the document as to what was really intended but unstated or misstated is generally inadmissible to add to or vary the writing (see, e.g., Mercury Bay Boating Club v. San Diego Yacht Club, 76 N.Y.2d 256, 269-270, 557 N.Y.S.2d 851, 557 N.E.2d 87; Judnick Realty Corp. v. 32 W. 32nd St. Corp., 61 N.Y.2d 819, 822, 473 N.Y.S.2d 954, 462 N.E.2d 131; Long Is. R.R. Co. v. Northville Indus. Corp., 41 N.Y.2d 455, 393 N.Y.S.2d 925, 362 N.E.2d 558; Oxford Commercial Corp. v. Landau, 12 N.Y.2d 362, 365, 239 N.Y.S.2d 865, 190 N.E.2d 230). That rule imparts "stability to commercial transactions by safeguarding against fraudulent claims, perjury, death of witnesses * * * infirmity of memory * * * [and] the fear that the jury will improperly evaluate the extrinsic evidence." (Fisch, New York Evidence § 42, at 22 [2d ed].) Such considerations are all the more compelling . . . where commercial certainty is a paramount concern.

W.W.W. Associates, Inc. v. Giancontieri, 77 N.Y.2d 157, 162 (1990).

Here, the insurance agreements at issue unambiguously fulfill all of the required elements of an escrow. While in the majority of the years the agreements were drafted specifically using the term "escrow," the mere terminology used is not dispositive; rather, the legal relationship created by the policies is dispositive. Plaintiff retained title to the funds and Defendants held the funds in trust for the specific purpose set forth in the insurance agreements: "To provide for the payment of [Hahn's] obligation within the Deductible Amount(s) under the Policy(ies) prior to [Hahn] reimbursing [Zurich." Affidavit of Max R. Schrayer, Exhibits H, I & L at (E), Exhibit A at (K), Exhibit B at (G)(1), Exhibits C, D, & E at (I)(1), and Exhibits F & G at (H)(1). The unequivocal policy terms presented to the Court create and govern the escrow arrangement

between the parties.

In making this determination, the Court necessarily distinguishes the present motion from the previous motion that culminated in the June 2, 2009 Decision and Order. In the June 2, 2009 Decision and Order the Court specifically dealt with the Letter of Credit and found that it was unconditional collateral. In contrast, the payments made into the escrow funds held by Defendants were not paid as security for a debt. There is no support in the policies for Defendants' argument that the escrow funds were provided as security or collateral. Indeed, the contrary is suggested:

> Since the Escrow Fund does not prefund [Hahn's] estimated total obligation under the Program, [Zurich] assume[s] a financial risk that may require collateral. The initial amount of the Collateral and how and when the amount may be adjusted is stated in the Specifications.

Id. at Exhibits H, I, and L at (C).

The Court further notes that while it finds no ambiguities in the case at bar, even if it did, those ambiguities would be "resolved in favor of the insured." See Kula c. State Farm Fire & Cas. Co., 212 A.D.2d 16, 19 (4th Dept. 1995). See also, Hunt v. Ciminelli-Cowper Co., Inc., 93 A.D.3d 1152 (4th Dept. 2012).

*Right to Offset Provision*

Defendants contend that it is permitted to retain and apply the escrow fund to the debt as it chooses pursuant to the "Right to Offset" provisions in the insurance agreements. Each of the policies contains a Right of Offset provision, with differing language depending upon the type of policy. The Workers Compensation Deductible and Premium Payment Agreement and Deductible Agreements- Other than Workers Compensation each contain the following Right of Offset provision:

> Each party hereto shall have and may exercise at any time and from time to time, the right to offset any balance or balances, whether on account of premiums

> or on account of losses and expenses or otherwise, due from such party to the other (or, if more than one, any other) party hereto under this Agreement or under any other agreement heretofore or hereafter entered into by and between them and may offset the same against any balance or balances due or to become due to the former from the latter under the same or any other agreement between them and the party asserting the right of offset shall have and may exercise such right whether the balance or balances due or to become due to such party from the other are on account of premiums or on account of losses and expenses or otherwise and regardless of the capacity, in which each party acted under the agreement or, if more than one, the different agreements involved.

Affidavit of Max R. Schrayer, Exhibits C, D, & E at (W); Exhibits F & G at (P). The Deductible Agreement and Premium Payment Agreements in place from 1993 to 1994 both provided that "The Company and the Insured may offset any balance(s) due from one to the other under the terms of this Agreement." Id. at Exhibit A at (M); Exhibit B at (I). The Deductible Agreements in place from 1996 to 2003 provided that "The parties under this Agreement each reserve the right to offset any undisputed balance due from one party to the other under this or any other Agreement entered into between Us, except as prohibited by law." Id. at Exhibits H, I, & L at (M).

As set forth above, the policies at issue provided for Plaintiff to pay into an escrow fund from which Defendants could pay claims until losses were billed to Plaintiff. The escrow funds were not a "balance due" between these parties. The escrow fund was not a debt. As such, there was no right of offset with respect to the monies held in the escrow. Defendants are not entitled to apply the balance of the escrow fund to stale debts without authorization from Plaintiff. As the funds belong to Plaintiff, Plaintiff is entitled to condition the application of the escrow funds and mandate that those funds be applied to the interest owned by Plaintiff in connection with the 2006 action.

Moreover, the mutuality required for offset is lacking. The Court of Appeals has stated:

> The phrase 'mutual debts' is not new. It has been said: "Debts, to be applied against each other, must be mutual * * *. To be mutual, they must be due to and from the same persons in the same capacity."

Matter of People, 287 N.Y. 34, 38 (1941), *quoting* Beecher v. Vogt Mfg. Co., 227 N.Y. 468, 473 (1920). Mutuality is lacking where "one party is a trust beneficiary asserting his or her rights against a trustee, and the other is a creditor exercising his or her contractual rights." Westinghouse Credit Corp. v. D'Urso, 278 F.3d 138, 149 (2d Cir. 2002). "[A] person holding monies pursuant to a contractual obligation is 'a trustee . . . as to moneys in its hands belonging to the [beneficiary] or to be applied to a specific purpose,' in which case setoff may not be applied." Id., *quoting* Pink v. Amer. Sur. Co. of N.Y., 283 N.Y. 290, 296 (1940).

Here, there was no debtor-creditor relationship between with parties with respect to the escrow fund: the escrow fund was established for the specific purpose of paying Plaintiff's claims prior to billing Plaintiff.

Finally, with respect to the offset provision, the Court notes that specifically in cases of insurance contracts, "where 'there [is] an inconsistency between a specific provision and a general provision of a contract. . . the specific provision controls.'" Rocon Mfg. v. Ferraro, 199 A.D.2d 999, 1000 (4th Dept. 1993), *quoting* Muzak Corp. v. Hotel Taft Corp., 1 N.Y.2d 42, 46 (1956). See also, Israel v. Chabra, 537 F.3d 86, 100 (2d Cir. 2008). The Right of Offset provisions in the policies are general provisions, and are grouped within those policies with other general provisions. The escrow and loss fund provisions, however, are specific and set forth with unambiguous particularity the purpose of the fund. The Court declines to ignore the specific language set forth in the escrow and loss fund provisions to allow for the interpretation of the Right of

Offset provision proffered by Defendants.

Defendants' motion for summary judgment is denied. Plaintiff's motion for summary judgment is granted. The motion to amend is thereby rendered moot.

Signed at Rochester, New York this 1st day of October, 2013.

Matthew A. Rosenbaum
Supreme Court Justice