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VIA ECF
The Honorable Andrew L. Carter, Jr., U.S.D.J.
United States District Court, S.D.N.Y.
40 Foley Square, Room 435
New York, NY 10007

Re: *Jujamcyn Theaters LLC v. Federal Insurance Company and Pacific Indemnity Company*
Civil Action No. 1-20-cv-06781

Dear Judge Carter:

We represent Jujamcyn Theaters LLC ("Jujamcyn") and write, in accordance with Rule 2(A) of this Court's Individual Practices, to request a pre-motion conference. For the reasons that follow, Jujamcyn requests leave to move for judgment on the pleadings or, alternatively to strike certain of the Insurers' affirmative defenses.[1]

Jujamcyn owns and operates five Broadway theaters. As of March 12, 2020, it was forced to indefinitely suspend and postpone all shows at all theaters, with use and functionality of its premises substantially impaired due to SARS-CoV-2, COVID-19, the subsequent orders of civil authorities and the need to mitigate its losses. At issue here are two "all-risk" insurance policies promising broad coverage for Jujamcyn's business income and other losses. Federal denied coverage and Pacific paid a fraction of what it owes. This lawsuit followed. The Insurers plead affirmative defenses that cannot be maintained.

I. Standard of Review

"The standard for granting a Rule 12(c) motion for judgment on the pleadings is identical to that of a Rule 12(b)(6) motion[.]" *Patel v. Contemporary Classics of Beverly Hills*, 259 F.3d 123, 126 (2d Cir. 2001) (collecting cases). It also "governs the sufficiency of the pleading of affirmative defenses" (*E.E.O.C. v. Kelley Drye & Warren, LLP*, 2011 WL 3163443, at *2 (S.D.N.Y. July 25, 2011)) and a Rule 12(f) motion to strike. *Aspex Eyewear, Inc. v. Clariti*

[1] The "Insurers" are Federal Insurance Company ("Federal") and Pacific Indemnity Company ("Pacific").

Eyewear, Inc., 531 F. Supp. 2d 620, 622-23 (S.D.N.Y. 2008).

II. Coverage Defenses Not Previously Asserted Are Waived As A Matter Of Law

There is a "general rule that an insurer waives whatever defenses it does not include in its claim denial." *Rockland Exposition, Inc. v. Great Am. Assur. Co.*, 746 F. Supp. 2d 528, 544-45 (S.D.N.Y. 2010). The Insurers assert that their coverage obligations are excused "to the extent that" Jujamcyn failed to honor its contractual obligations to each of them (but do not know whether that, in fact, occurred). 9th, 12th and 13th Aff. Defs. They also now invoke a "loss of market" exclusion. 11th Aff. Def. This responsive pleading is the first time that either Insurer raised these defenses.[2] Having never before done so, they are waived.[3]

III. Certain Defenses Should Be Stricken Based on Rules of Policy Interpretation

The Insurers each sold Jujamcyn an "all-risk" policy. "An all-risk policy is one that allows recovery 'for all losses arising from any fortuitous cause, unless the policy contains an express provision excluding the loss from coverage.'" *Fabrique Innovations, Inc. v. Federal Ins. Co.*, 354 F. Supp. 3d 340, 348 (S.D.N.Y. 2019) (citation omitted).

The initial interpretation of an insurance policy, including the determination of whether the language is ambiguous, is a question of law for the court. *Shants, Inc. v. Capital One, N.A.*, 3 N.Y.S.3d 38, 42 (N.Y. App. Div. 2015). Undefined terms in an insurance policy are to be given their plain and ordinary meaning "consistent with the reasonable expectation of the average insured." *Matter of Viking Pump, Inc.,* 27 N.Y.3d 244, 257-58 (2016). Any ambiguity in the policy language must be resolved against the insurer and in favor of coverage. *Cragg v. Allstate Indem. Corp.*, 17 N.Y.3d 118, 122 (2011). Indeed, any arguably reasonable reading of the policy in favor of the insured controls as a matter of law. *Nat'l Football League v. Vigilant Ins. Co.*, 824 N.Y.S.2d 72, 73, 76 (N.Y. App. Div. 2006) (insured's "plausible interpretation" of exclusion "must be sustained").

A. Pacific's Interpretation of "Each Loss"

The Pacific policy is subject to a $250,000 limit of liability "each loss." It specifically insures five Jujamcyn theaters and "each" insured theater unarguably sustained "loss" (which is not defined). Yet, Pacific concluded that all five theaters sustained a single "loss" and, therefore tendered, only $250,000, which it claims is the limit of liability. 14th Aff. Def.

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[2] Jujamcyn will provide all such coverage correspondence in support of its motion if leave is granted. However, Jujamcyn respectfully submits that this is procedurally ripe for adjudication because the pre-litigation positions taken and not taken by the Insurers are "incorporated by reference in the complaint." *Ridenhour v. Bryant*, 2020 WL1503626, at *3 (S.D.N.Y. Mar. 29, 2020).

[3] Pacific's inclusion of these defenses is frivolous. The dispute between Jujamcyn and Pacific has never been about the existence of coverage—just the total amount available. Pacific actually paid Jujamcyn what Pacific claims is its policy's limit of liability so its own conduct belies these defenses. Pacific also now invokes for the first time a "lack of audience" exclusion that should be stricken for the same reasons. 15th Aff. Def.

A policy that utilizes but does not define "loss" "creat[es] ambiguities" that must be resolved in favor of coverage. *OTC Int'l., Ltd. v. All Those Underwriters At Lloyd's of London*, 781 N.Y.S.2d 626 (Sup. Ct. Qns. Cnty. Jan. 29, 2004) (policy does not define the term "loss" or "occurrence," thereby "creating ambiguities")(citing cases). Jujamcyn reasonably interprets a limit of liability "each loss" as at least $250,000 per theater.

B. Federal's Reliance on the "Acts or Decisions" Exclusion

The above principles are applied rigorously in the context of policy exclusions, which must be strictly and narrowly construed. *Seaboard Sur. Co. v. Gillette Co.*, 64 N.Y.2d 304, 311 (1984) (insurer burden to prove exclusions, which must not be "extended by interpretation or implication" (citation omitted)). Thus, to "'negate coverage by virtue of an exclusion, an insurer must establish that the exclusion is stated in clear and unmistakable language, is subject to no other reasonable interpretation, and applies in the particular case.'" *Belt Painting Corp. v. TIG Ins. Co.*, 100 N.Y.2d 377, 383 (2003) (citation omitted).

The only policy exclusion cited by Federal is the "Acts or Decisions" exclusion. 10th Aff. Def. Courts routinely deem this exclusion ambiguous because the insurer's interpretation would "leave [coverage] practically worthless." *Jussim v. Massachusetts Bay Ins. Co.*, 33 Mass. App. Ct. 235, 238–39, 597 N.E.2d 1379, 1382 (1992), *aff'd as amended*, 415 Mass. 24, 610 N.E.2d 954 (1993). So, too, here, the exclusion is ambiguous, cannot be reconciled with the rest of the Federal policy, and, if enforced, would render coverage illusory.

IV. Federal's Affirmative Defenses Regarding "Direct Physical Loss Or Damage"

Federal bases multiple affirmative defenses on the notion that Jujamcyn did not sustain "direct physical loss or damage to property." 2nd, 3rd, 4th and 7th Aff. Defs. This issue is, in the context of losses associated with COVID-19, the subject of litigation around the world. The policy does not define the phrase "direct physical loss or damage" or any word therein. However, "'physical' can mean more than material alteration or damage, [so] it was incumbent on the insurer to clearly and specifically rule out coverage in the circumstances where it was not to be provided[.]" *Wakefern Food Corp. v. Liberty Mut. Fire Ins. Co.,* 406 N.J. Super 524, 541-42 (2009) (citation omitted).

Courts around the country have, for decades, held that "direct physical loss or damage to property" exists when (i) a hazardous or noxious substance is present in property (including in the airspace and on surfaces inside a building) and (ii) the function or use of a building is substantially impaired even in the absence of structural alteration to the building. *See, e.g.*, *Pepsico, Inc. v. Winterthur Intern. America Ins. Co.*, 24 A.D.3d 734 (N.Y. App. Div. 2005).[4] Thus, Federal's defense that Jujamcyn did not sustain "direct physical loss

[4] *See Essex Ins. Co. v. BloomSouth Flooring Corp.*, 562 F.2d 399, 406 (1st Cir. 2009) (carpet and adhesive odor "can constitute physical injury to property"); *Oregon Shakespeare Festival Ass'n v. Great American Insurance*

or damage" fails as a matter of law.

We thank the Court for its consideration of this request.

Respectfully submitted,

/s/ Jeffrey L. Schulman
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All counsel of record (via ECF and Email)

Co., 2016 WL 3267247, at *9 (D. Ore. June 7, 2016) ("smoke infiltration in theatre caused direct property loss or damage by causing the property to be uninhabitable and unusable for its intended purpose"); *Sentinel Mgt. Co. v. New Hampshire Ins. Co.*, 563 N.W.2d 296, 300 (Minn. Ct. App. 1997) (asbestos contamination does not result in "tangible injury to the physical structure of a building" but is direct physical loss if rendered useless); *Port Authority of New York & New Jersey v. Affiliated FM Ins. Co.*, 311 F.3d 226, 236 (3d Cir. 2002) (same); *Hughes v. Potomac Ins. Co.*, 18 Cal. Rptr. 650, 655 (Cal. Ct. App. 1962), *abrogated on other grounds* (finding direct physical loss to building that sustained no structural damage but became unusable due to erosion).