Indian Harbor Ins. Co. v Daikin Am., Inc.
2024 NY Slip Op 34061(U)
November 12, 2024
Supreme Court, Rockland County
Docket Number: Index No. 032586/2024
Judge: Sherri L. Eisenpress

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND
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INDIAN HARBOR INSURANCE COMPANY and
GREENWICH INSURANCE COMPANY,

Plaintiffs,

-against-

DAIKIN AMERICA, INC.,

Defendant.
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DECISION AND ORDER

Index No. 032586/2024

Motions #1-2

Sherri L. Eisenpress, J.

The following papers, NYSCEF documents numbered 14-60 and 118-135, and 62-115 and 136-164, were considered with respect to Plaintiffs' separate motions pursuant to Civil Practice Law and Rules ("CPLR") § 6301 for a preliminary injunction and Rule 3212 for summary judgment.

Upon a careful and detailed review of the foregoing papers, the Court now rules as follows:

This action for a declaratory judgment that Plaintiff insurance companies are not obligated to defend and indemnify Defendant insured company in connection with several claims made by Defendant and denied by Plaintiffs arises out of a dispute regarding excess insurance policy coverage. Specifically, at issue herein are three excess insurance policies issued by Plaintiff Indian Harbor Insurance Company ("Indian Harbor") to Defendant, covering the periods of: (i) May 31, 2008 to May 31, 2011 ("2008 Indian Harbor Excess Policy"); (ii) May 31, 2011 to April 1, 2014 ("2011 Indian Harbor Excess Policy"); and (iii) April 1, 2014 to April 1, 2017 ("2014 Indian Harbor Excess Policy"); and one excess insurance policy issued

by Plaintiff Greenwich Insurance Company ("Greenwich") to Defendant, covering the period of: (iv) April 1, 2017 to April 1, 2020 ("2017 Greenwich Excess Policy").

Each of the Indian Harbor excess insurance policies "follow form"[1] to three primary insurance policies issued by Steadfast Insurance Company ("Steadfast") for the same policy coverage years, and the Greenwich excess insurance policy "follows form" to a primary insurance policy issued by Allianz Global Corporate & Specialty ("Allianz") for the same policy coverage years. In particular, the 2008 Indian Harbor Excess Policy follows form to the Steadfast primary insurance policy for the same policy period of May 31, 2008 to May 31, 2011 (the "2008 Steadfast Primary Policy").

The policies are "claims made and reported" policies.[2] The 2008 Steadfast Primary Policy "provides coverage on a discovery and/or claims-made and reported basis" and states that "a 'pollution event' must be first 'discovered' and/or a 'claim' must be first made against an 'insured' during the 'policy period' and such 'discovery' or 'claim' must be reported to us in writing during the 'policy period' or during an applicable extended reporting period" [NYSCEF Doc. No. 65, 2008 Steadfast Primary Insurance Policy, pg. 1].

In thirty-three (33) causes of action set forth in the First Amended Complaint for Declaratory Judgment ("First Amended Complaint"), Plaintiffs seek declaratory judgment finding that Plaintiffs have no obligation to defend or indemnify Defendant on several claims, which were either: (i) previously accepted and now-denied; or (ii) subsequently filed and

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1 Follow form policies allow an insured that deals with multiple "insurers for the same risk to obtain uniform coverage, and to know, without a minute policy-by-policy analysis, the nature and extent of that coverage" (*Jin Ming Chen v. Ins. Co. of the State of Pennsylvania*, 36 NY3d 133, 141 [2020]).

2 "Claims made" policies generally provide coverage only when a claim is made during the policy period with regard to injury or damage that has taken place during that time (11 NYCRR 73.0(a)).

denied; as well as (iii) any future claims; made across the four excess insurance policies issued by Plaintiffs, in addition to one cause of action for reimbursement of amounts paid in connection with the settlement of a now-denied claim. The action was commenced on February 8, 2024.

Plaintiffs now move pursuant to CPLR § 6301 for a preliminary injunction and § 3212 for summary judgment.

In support of their motion for a preliminary injunction, Plaintiffs seek to enjoin Defendant from pursuing a lawsuit filed by Defendant and an individual, Ralph Werling, a former employee of Defendant, against Plaintiffs in the Circuit Court of Morgan County, Alabama, on March 1, 2024. Plaintiffs argue that they satisfy the elements for a preliminary injunction, including: (i) a likelihood of success on the merits because "claims made and reported" policies require a claim be made during the policy period, and the denied claims were not made within the pertinent policy period; (ii) irreparable harm if the Alabama lawsuit was permitted to proceed as it could result in conflicting judgments; and (iii) that the balance of equities favor enjoining the Alabama lawsuit because Alabama has no connection to the coverage determinations of insurance policies issued and delivered in New York, and to conserve judicial resources. Plaintiffs further argue that New York law applies to the present coverage dispute, and that the Alabama lawsuit is less complete than the matter herein because the instant matter seeks to clarify coverage under all of the potentially pertinent excess insurance policies, while the Alabama action only addresses one of the excess insurance policies (the 2008 Indian Harbor Excess Policy).

Defendant opposes the motion for a preliminary injunction, and argues that Plaintiffs have failed to meet the elements for a preliminary injunction. Defendant argues that

Plaintiffs have failed to show: (i) a likelihood of success on the merits because certain claims were timely made based upon a class action filing and the "Multiple Policy Periods" provision of the insurance policies; (ii) irreparable harm because financial cost is not an irreparable harm, and the alleged harm of conflicting judgments is speculative; and (iii) a favorable balance of equities because enjoining another court is highly disfavored. Significantly, Defendant agreed that New York law applies in either the New York or Alabama forum [NYSCEF No. 118, Defendant's Memorandum in Opposition, pp. 15-16]. Defendant also argues that Mr. Werling is not named as a party in the New York lawsuit although coverage is sought for Mr. Werling along with Defendant in one of the now-denied claims.

In reply, Plaintiffs largely stand by their moving arguments. Plaintiffs also argue that claims of putative class members are not made when the class action is filed and the claims made by class members that opted out of the class action settlement were therefore not timely made, particularly where said claims were also not made within the Multiple Policy Periods provision. Plaintiffs argue that the continuation of a foreign action is clear irreparable harm and that enjoinder in similar circumstances is supported in New York case law. Finally, Plaintiffs note that Defendant has acknowledged the jurisdiction and appropriate forum of this Court [NYSCEF Doc. No. 8].

In support of their motion for summary judgment, filed the same day as their motion for preliminary injunction, Plaintiffs preliminarily submit that New York law governs the dispute, and that New York law is clear that the interpretation of an unambiguous contract is a question of law for the Court that can be decided on summary judgment. Plaintiffs argue that there is no duty to defend or indemnify Defendant with respect to the claims at issue because the claims were not made and reported during the Indian Harbor policy periods.

Plaintiffs further argue that all of the claims are barred under the 2017 Greenwich Excess Policy based upon an exclusion endorsement to the Allianz primary insurance policy.

Defendant opposes the motion for summary judgment, and argues that despite agreeing to defend and indemnify Defendant in the now-denied claims for years, Plaintiffs are improperly taking an inconsistent position from the underlying primary insurance policies which agreed to defend and indemnify Defendant, in order to avoid further payout from the excess insurance. Defendant argues that the motion for summary judgment is premature, as Defendant is entitled to discovery to ascertain Plaintiffs' motivation and basis for changing its position on the excess insurance coverage of the now-denied claims, as well as denying related subsequently filed claims. Defendant posits that discovery would allow it to develop its waiver and estoppel defenses based upon the Multiple Policy Periods provision.

Defendant further argues that two of the now-denied claims were in fact timely, based upon a class action where the claim was made in 2009 and the two claims were lawsuits filed by putative class members that had opted-out of the class action and filed their own lawsuits. Defendant also argues that the Multiple Policy Periods provision renders all claims arising from the same alleged pollution event as the 2009 class action timely because the 2009 Class Action claim was timely. Defendant asserts that the primary insurance policy accepted coverage of the now-denied and subsequently filed claims under the Multiple Policy Periods provision, and Plaintiff Indian Harbor followed suit and should continue to follow suit. Significantly, Defendant asserts it only seeks coverage under the 2008 Indian Harbor Excess Policy for the now-denied and subsequent claims made [NYSCEF No. 118, Defendant's Memorandum in Opposition, p. 3, fn. 3].

In reply, Plaintiffs argue that Defendant cannot create excess insurance coverage through waiver and estoppel, and discovery will not change the belated filing of the now-denied and subsequent claims. Because Plaintiffs accepted coverage pursuant to a reservation of rights, coverage was not created via waiver or estoppel. Plaintiffs then argue that claims by class members who opted out of the class action do not relate back to when the class action was filed, and that the remainder of the claims are not covered by the Multiple Policy Periods provision because they were filed after the consecutive and uninterrupted policies terminated. Finally, Plaintiffs note that while the underlying primary insurance had issued an extended reporting endorsement for claims filed after the expiration of coverage under the 2014 Indian Harbor Excess Policy, and some of the claims at issue herein were made during the extended reporting period, Plaintiffs state that the excess coverage policies did not follow form to the extension.

On both motions, the Parties submit copious amounts of exhibits, generally consisting of copies of the pertinent primary and excess insurance policies, various Complaints and pleadings, notices of claims made, and decisions on the coverage of the claims.

On a motion for summary judgment pursuant to CPLR Rule 3212, summary judgment "shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party[, and] the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact." Thus, the movant must submit evidentiary proof in admissible form which establishes that he is entitled to judgment as a matter of law, and one opposing the motion "must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim" (*Zuckerman v. City of*

New York, 49 NY2d 557, 562 [1980]). "[I]n determining a motion for summary judgment, evidence must be viewed in the light most favorable to the nonmovant" (*Dorival v. DePass*, 74 AD3d 729, 730 [2d Dept 2010] [internal quotation marks and citations omitted]).

"The Supreme Court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed" (CPLR 3001).

In the instant matter, Plaintiffs have demonstrated prima facie entitlement to summary judgment as a matter of law on 33 of the 34 causes of action set forth in the First Amended Complaint, and Defendant failed to raise a triable issue of fact in opposition to those causes of action.

As set forth by the Court of Appeals: "Insurance contracts are governed by the general rules of contract interpretation. When resolving disputes concerning the scope of coverage, we look to the specific language in the relevant insurance policies. As we have explained, [i]t is axiomatic that a contract is to be interpreted so as to give effect to the intention of the parties as expressed in the unequivocal language employed. The language of a policy, when clear and unambiguous, must be given its plain and ordinary meaning (*Jin Ming Chen v. Ins. Co. of the State of Pennsylvania*, 36 NY3d 133, 138 [2020] [internal citations and quotation marks omitted]).

Evidence establishes that the subject "pollution event" at issue was first reported in 2009 to both Steadfast and Indian Harbor by separate letters, dated December 8, 2009 [NYSCEF Nos. 139 and 140, respectively], when Defendant was added to a class action lawsuit ("Class Action") based upon the subject pollution event ("Pollution Event"). At issue is whether several claims stemming from the same Pollution Event are due coverage under

the 2008 Indian Harbor Excess Policy, following the exhaustion of the 2008 Steadfast Primary Policy in or about June 2022 [NYSCEF No. 149, June 13, 2022 email].

Preliminarily, the Court examines when coverage under the Indian Harbor excess insurance policies terminated. Ordinarily, coverage under the 2008 Indian Harbor Excess Policy would terminate on May 31, 2011, the end of the policy period. However, pursuant to a Multiple Policy Periods provision in the 2008 Steadfast Primary Policy, to which Indian Harbor followed form, coverage under the 2008 Indian Harbor Excess Policy was extended to April 1, 2017. The 2008 Steadfast Primary Policy provides, at section VI(E)(3):

> **3. MULTIPLE POLICY PERIODS**
>
> If we or an affiliate have issued pollution liability coverage to the "named insured" for the "covered location" in one or more consecutive and uninterrupted policy periods, and:
>
> (a) a "pollution event" or series of related "pollution events" that is first reported to us in accordance with all of the terms and conditions of this policy takes place over the "policy period" and one or more subsequent policy periods; and/or
>
> (b) a "claim" for "cleanup costs", "loss", "natural resource damages" or "other loss" is first made against the "insured" during the "policy period" and reported to us in accordance with all of the terms and conditions of this policy; and/or
>
> (c) a "pollution event" is first "discovered" during the "policy period" and reported to us in accordance with all of the terms and conditions of this policy;
>
> all "claims", "cleanup costs", "loss", "natural resource damages", and "other loss" arising out of the same, continuous or repeated "pollution event" or series of related "pollution events" whether reported during the "policy period" or during a subsequent policy period shall be subject to the Limits of Liability and Deductible corresponding with this policy.

Accordingly, based upon the subsequent primary and excess insurance policies issued by Steadfast and Indian Harbor, respectively, with consecutive and uninterrupted coverage periods of May 31, 2011 to April 1, 2014, and April 1, 2014 to April 1, 2017, coverage under the 2008 Indian Harbor Excess Policy was extended to April 1, 2017.

However, the Multiple Policy Periods provision does not simply extend the 2008 Indian Harbor Excess Policy carte blanche to all claims stemming from the Pollution Event, as

Defendant generally argues. Rather, the Court finds that a plain reading of the Multiple Policy Periods provision provides that any claims made specifically in connection with the same pollution event before the termination of coverage are subject to the same policy coverage in effect when the first claim for the said pollution event was made, along with the corresponding excess policy.

In other words, here, the Multiple Policy Periods provision serves to allocate coverage for all claims stemming from the Pollution Event made during the 2008 Indian Harbor Excess Policy period or any consecutive and uninterrupted coverage period (e.g., the 2011 Indian Harbor Excess Policy or the 2014 Indian Harbor Excess Policy) to the 2008 Indian Harbor Excess Policy, which was the coverage policy in effect when the first claim concerning the Pollution Event was made via the Class Action. In practice, this means that any claim made regarding the Pollution Event would be allocated to the 2008 Indian Harbor Excess Insurance Policy, so long as the claim was made during the "policy period" or "during a subsequent policy period" (i.e., before coverage terminated on April 1, 2017 under the Multiple Policy Periods provision).

Based upon the foregoing, even when viewed in the light most favorable to Defendant, the Court is obligated to disagree with Defendant's interpretation of the Multiple Policy Periods provision, which would appear to essentially subject the 2008 Indian Harbor Excess Insurance Policy to any claim filed in connection with the Pollution Event, regardless of when it is filed (in this case, all after the April 1, 2017 termination of coverage). Defendant's interpretation, in addition to obviating the purpose of an insurance policy termination date,

would transform the instant "claims made" insurance policy into an "occurrence" policy[3], and ignores the part of the Multiple Policy Periods provision that specifies coverage will be provided for claims arising from the same pollution event "whether reported during the 'policy period' or during a subsequent policy." This language serves as a deadline for claims to be made under the provision, because the Multiple Policy Periods is not an invitation to continue filing claims stemming from the Pollution Event indefinitely. Likewise, the Court is also hard-pressed to find that the Multiple Policy Periods provision, which is set forth under Section VI. Limits of Liability and Deductible, was intended to create an open-ended temporal liability as Defendant implies, rather than to delineate a limitation on coverage under the claims made policy.

Because the earliest notice of claim at issue herein is dated November 27, 2017, Plaintiffs have shown that the claims were made outside of the coverage periods, and without more, there is no duty to defend or indemnify Defendant on any of the claims identified in the First Amended Complaint. The Court acknowledges that there are potential expansions of coverage raised directly or indirectly by the Parties. These are via waiver and/or estoppel insofar as Plaintiffs agreed to defend and indemnify Defendant on now-denied claims, and/or an extended reporting period endorsement to the Steadfast primary insurance policy for the period of April 1, 2014 to April 1, 2017 (the "2014 Steadfast Primary Policy"), and/or two class action members who opted out of the Class Action and filed separate lawsuits, on the presumption that the separate lawsuits relate back to the filing and claim of the Class Action which was made in 2009. However, no potential expansion of coverage raises an issue of triable fact.

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3 "Occurrence" policies generally provide coverage, even though an actual claim is made or suit is filed, arising from that occurrence, subsequent to the policy period (11 NYCRR 73.0(a)).

As to waiver and/or estoppel, evidence shows that Plaintiffs initially accepted coverage of four now-denied claims at issue in the First Amended Complaint, which were filed in October 2017, October 2018, August 2022, and February 2023. Indian Harbor's acceptance of the August 2022 and February 2023 claims were done pursuant to a reservation of rights to deny coverage [NYSCEF Doc. No. 152] letter regarding the August 2022 claim, and [NYSCEF Doc. No. 153, letter regarding the February 2023 claim], and specifically noted in the February 2023 acceptance that the claim was not filed within the policy periods [NYSCEF Doc. No. 153] letter regarding the February 2023 claim]. The Indian Harbor acceptance letters for the October 2017, and October 2018, claims were not submitted to the Court. Notwithstanding, such acceptance pursuant to a reservation of rights to deny coverage does not change the plain meaning of the provision or create liability via waiver and estoppel. " 'The alternate doctrines of waiver or estoppel may not operate to create insurance coverage where none exists under the policy as written' " (*Fritz v. Edward A. Kurmel Brokerage, Ltd.*, 219 AD3d 1489, 1491 [2d Dept 2023]; *Waknin v. Liberty Ins. Corp.*, 187 AD3d 821 [2d Dept 2020]). Moreover, Indian Harbor's letter denying coverage of the previously accepted claims asserts that the initial agreement to defend and indemnify Defendant was made pursuant to a full reservation of rights [NYSCEF Doc. No. 151, Indian Harbor February 1, 2024 letter, pg. 11], and Defendant has failed to raise a triable issue of fact to the contrary.

As to the Extended Reporting Period endorsement to the 2014 Steadfast Primary Insurance Policy was made effective on March 29, 2017, and extended Defendant's reporting period to include June 1, 2017 to June 1, 2020 [NYSCEF Doc. No. 162]. The Extended Reporting Period endorsement provides:

Z Choice Pollution Liability - Claims Made and Reported Coverage

In consideration of the payment of premium and the Deductible by the "named insured" and in reliance upon the statements made in the application process and in the Application all of which are made a part hereof, we agree, subject to all the terms, exclusions, and conditions of the policy, that we will extend the time for reporting any "claim" first made against the "insured" after "termination of coverage." This period of extension shall be effective from 12:01 am on 06/01/2017 to 12:01 am on 06/01/2020.

We have the right to cancel this endorsement according to the policy terms if the "named insured" fails to pay any premium when due.

ALL OTHER TERMS, EXCLUSIONS, AND CONDITIONS OF THE POLICY APPLY AND REMAIN UNCHANGED.

If applicable, any claims stemming from the Pollution Event made during this extended reporting period would be subject to coverage under the 2008 Steadfast Primary Insurance Policy. Here, that would include two claims set forth in the First Amended Complaint. However, Defendant has failed to raise any triable issue of fact establishing that Plaintiffs' obligations under the 2008 Indian Harbor Excess Policy were likewise extended pursuant to the 2014 Steadfast Primary Insurance Policy Extended Reporting Period endorsement. Each of the Indian Harbor excess insurance policies specifically provide, at Section VI(A), that Indian Harbor will not be obliged to follow any elected discovery period or similar extension:

> A. Notwithstanding any statement to the contrary in this Policy, if the **Insured** elects a discovery period or similar extension as set forth in the **Followed Policy** upon cancellation or non-renewal of the **Followed Policy** or any **Underlying Policy**, the Company shall not be obliged to follow such extension.
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> [NYSCEF Doc. No. 64, the 2008 Indian Harbor Excess Policy].

> A. Notwithstanding anything in this Policy or any UNDERLYING INSURANCE to the contrary, if the INSURED elects or is entitled to a discovery period, extended reporting period or similar extension upon cancellation or non-renewal of any UNDERLYING INSURANCE, the Company is not obligated to follow or provide such period or extension.
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> [NYSCEF Doc. No. 66, 2011 Indian Harbor Excess Policy].

A. Notwithstanding anything in this Policy or any UNDERLYING INSURANCE to the contrary, if the INSURED elects or is entitled to a discovery period, extended reporting period or similar extension upon cancellation or non-renewal of any UNDERLYING INSURANCE, the Company is not obligated to follow or provide such period or extension.

[NYSCEF Doc. No. 67, 2014 Indian Harbor Excess Policy].

As such, where there is no allegation or evidence that Plaintiffs agreed to follow form to the extended reporting period, Defendant has failed to raise a triable issue of fact in this regard.

With respect to the Class Action opt outs, Defendant also fails to raise a triable issue of fact as to two of the now-denied claims, by Colbert County and the City of Muscle Shoals, which were class members of the Class Action that opted out of the Class Action settlement and filed their own separate lawsuits against Defendant in August 2022 and February 2023, respectively. Defendant argues that these claims relate back to the Class Action claim made in 2009 and are accordingly timely and warrant coverage under the 2008 Indian Harbor Excess Policy, while Plaintiffs argue that these claims were only made when the separate lawsuits were filed and are therefore not timely.

The Class Action was filed on behalf of, *inter alia*, owners of property in Colbert County (i.e., Colbert County, and the City of Muscle Shoals which is located in Colbert County), and subjected Defendant to liability to the Class. The subsequent Colbert County and City of Muscle Shoals lawsuits were filed on behalf of Colbert County and the City of Muscle Shoals, respectively, and subjected Defendant to new liability separate and apart from the Class Action. Plaintiffs have shown that the Colbert County and City of Muscle Shoals claims were filed after the 2008 Indian Harbor Excess Insurance Policy coverage period, and in response Defendant has not raised a triable issue of fact otherwise. Further, to hold that claims of Class

Members could be filed at any time would again render the 2008 Indian Harbor Excess Policy an occurrence policy.

As applicable here, 11 NYCRR § 73.1(a) provides: "Claims-made policy means an insurance policy that covers liability for injury or damage that the insured is legally obligated to pay (including injury or damage occurring prior to the effective date of the policy, but subsequent to the retroactive date, if any) arising out of incidents, acts or omissions, as long as the claim is made during the policy period or any extended reporting period."

Not applicable here, 11 NYCRR § 73.1(j) provides: "Occurrence policy means an insurance policy that covers liability for injuries or damage that the insured is legally obligated to pay arising out of incidents, acts or omissions that occurred during the policy period, and where a claim may be made during or subsequent to the policy period."

Coverage for the Class Action was triggered when Defendant was named a Defendant in 2009 and a claim was filed. Coverage for the separate lawsuits filed by Colbert County and the City of Muscle Shoals were not triggered until those claims were filed, even if they arose from the same Pollution Event at issue in the Class Action and Colbert County and the City of Muscle Shoals were members of the Class.

Finally, Defendant argues that summary judgment is premature, and it should be permitted to seek discovery to show that Plaintiffs waived their right to dispute and/or are estopped from disputing any purported ambiguity of the Multiple Policy Periods provision. However, "while a party is entitled to a reasonable opportunity to conduct discovery in advance of a summary judgment determination, [a] party contending that a summary judgment motion is premature must demonstrate that discovery might lead to relevant evidence or that the facts essential to justify opposition to the motion were exclusively within

the knowledge and control of the movant" (*Skura v. Wojtlowski*, 165 AD3d 1196, 1200 [2d Dept 2018] [internal citations and quotation marks omitted]).

Here, and as discussed above, interpretation and application of the pertinent insurance policies and provisions at issue are not subject to dispute, as the terms cannot be changed by any amount of discovery. "As with the construction of contracts generally, unambiguous provisions of an insurance contract must be given their plain and ordinary meaning, and the interpretation of such provisions is a question of law for the court... parties cannot create ambiguity from whole cloth where none exists, because provisions are not ambiguous merely because the parties interpret them differently" (*Universal Am. Corp. v. Natl. Union Fire Ins. Co. of Pittsburgh, Pa.*, 25 NY3d 675, 680 [2015] [internal citations and quotation marks omitted]).

Accordingly, the causes of action seeking declaratory judgment that Plaintiffs are not obligated to indemnify Defendant on claims filed after the termination of the 2008 Indian Harbor Excess Insurance Policy are granted. As Defendant is not seeking coverage under the 2011 Indian Harbor Excess Policy, 2014 Indian Harbor Excess Policy, or 2017 Greenwich Excess Policy, the Court does not address these [NYSCEF No. 118, Defendant's Memorandum in Opposition, p. 3, fn. 3].

Because no argument on summary judgment or reference to any provision providing a right to seek reimbursement of any defense costs paid, in either the 2008 Steadfast Primary Policy and/or 2008 Indian Harbor Excess Policy, was submitted regarding the Seventeenth cause of action for reimbursement of settlement contribution funds previously made, that cause of action continues.

In light of the foregoing, the Court now addresses Plaintiffs' motion for a preliminary injunction enjoining Defendant from proceeding with the Alabama lawsuit. "A party seeking the drastic remedy of a preliminary injunction must establish a clear right to that relief under the law and the undisputed facts upon the moving papers" (*Gagnon Bus Co., Inc. v. Vallo Transp., Ltd.*, 13 AD3d 334, 335 [2d Dept 2004]). "To be entitled to a preliminary injunction, a movant must establish (1) a likelihood or probability of success on the merits, (2) irreparable injury absent granting the preliminary injunction, and (3) a balancing of the equities in the movant's favor. The decision to grant or deny a preliminary injunction rests in the sound discretion of the Supreme Court" (*Rowland v. Dushin*, 82 AD3d 738, 739 [2d Dept 2011] [internal citations omitted]). A party seeking a preliminary injunction must demonstrate all of the elements necessary (*Town of Deerpark v. City of Port Jervis*, 240 A.D.2d 487, 488 [2d Dept 1997]), and the movant must satisfy each requirement with "clear and convincing evidence" (*County of Suffolk v. Givens*, 106 AD3d 943, 944 [2d Dept 2013]).

Here, as set forth above, Plaintiffs have shown a likelihood of success on the merits of 33 of the 34 causes of action alleged in the First Amended Complaint, and the remaining cause of action for reimbursement does not demand a finding to the contrary. "[T]he mere fact that there indeed may be questions of fact for trial does not preclude a court from exercising its discretion in granting an injunction, for even when facts are in dispute, the nisi prius court can find that a plaintiff has a likelihood of success on the merits, from the evidence presented, though such evidence may not be 'conclusive' " (*Ying Fung Moy v. Hohi Umeki*, 10 AD3d 604, 605 [2d Dept 2004] [internal citations and quotation marks omitted]).

However, Plaintiffs have not shown irreparable injury absent a preliminary injunction. Judicial resources and legal expenses, while unfortunate to expend unnecessarily,

are economic damages and do not constitute irreparable harm, and the potential for a conflicting judgment is speculative, particularly where the Alabama Court may grant the pending motion to dismiss filed by Indian Harbor therein and set for a hearing on December 11, 2024 [NYSCEF Doc. No. 134, Alabama Court Order]. "Irreparable injury, for purposes of equity, has been held to mean any injury for which money damages are insufficient. Conversely, [e]conomic loss, which is compensable by money damages, does not constitute irreparable harm" (*DiFabio v. Omnipoint Communications, Inc.*, 66 AD3d 635, 636-37 [2d Dept 2009] [internal citations and quotation marks omitted]). "Moreover, the irreparable harm must be shown by the moving party to be imminent, not remote or speculative" (*Golden v. Steam Heat, Inc.*, 216 AD2d 440, 442 [2d Dept 1995]).

Because Plaintiffs have not shown irreparable harm, the Court does not address the balance of the equities.

However, with all due respect to this Court's sister Alabama Court, the Court further acknowledges that "the rule of comity forbids the granting of an injunction to stay proceedings which have been commenced in a court of competent jurisdiction of a sister state unless it is clearly shown that the suit sought to be enjoined was brought in bad faith, motivated by fraud or an intent to harass the party seeking the injunction, or if its purpose was to evade the law of the domicile of the parties" (*George Hyman Const. Co. v. Precision Walls, Inc. of Raleigh*, 132 AD2d 523, 526 [2d Dept 1987]). As there is no showing of bad faith, fraud or intent to harass or to evade the law of the domicile of the parties, this Court would not readily seek to impose upon the Alabama Court, even if a showing of entitlement to a preliminary injunction was made.

Accordingly, it is hereby

ORDERED that Plaintiffs' motion for summary judgment is GRANTED in part as to the First through Sixteenth and the Eighteenth through Thirty-Fourth Causes of Action for Declaratory Relief, and DENIED in part as to the Seventeenth Cause of Action for Reimbursement of Amounts Paid for King Claim;

ORDERED that judgment be entered declaring that Plaintiffs are not obligated to defend or indemnify Defendant under the 2008 Indian Harbor Excess Policy on any claims filed after April 1, 2017;

ORDERED that Plaintiffs' motion for a preliminary injunction is DENIED; and it is further

ORDERED that the Parties are to appear for a Preliminary Conference on **December 11, 2024, at 10:00 a.m. in person.**

The Parties' remaining contentions not specifically addressed herein have been considered and found to be without merit or rendered moot in light of this decision.

The foregoing constitutes the Decision and Order of this Court on Motion Nos. 1 and 2.

Dated: New City, New York
November 12, 2024

HON. SHERRI L. EISENPRESS
Justice of the Supreme Court

TO:

All Parties by E-Filing