IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

COUNT BASIE THEATRE INC., Plaintiff, v. ZURICH AMERICAN INSURANCE COMPANY, Defendant.	Case No.: 3:21-cv-00615

DEFENDANT ZURICH AMERICAN INSURANCE COMPANY'S SUPPLEMENTAL MEMORANDUM OF LAW IN FURTHER OPPOSITION TO PLAINTIFF COUNT BASIE THEATRE INC.'S MOTION TO REMAND

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PRELIMINARY STATEMENT[1]

Count Basie Theatre Inc. ("Count Basie") moved to remand this case, arguing that its complaint raises novel and undecided questions of state law that outweigh the presumption that jurisdiction exists. During the recent hearing on this motion, the Court called this assertion into question and directed the parties to submit supplemental briefing. In accordance with that directive and for the reasons set forth herein, Zurich American Insurance Company ("Zurich") respectfully submits that the Court should not remand this case because the *Reifer* factors do not outweigh the presumption in favor of jurisdiction given the existence of numerous rulings from New Jersey courts addressing insurance coverage for COVID-19 claims.

When Count Basie commenced this action in early December 2020, three New Jersey courts had decided the issue of whether business-interruption losses arising out of the COVID-19 pandemic are covered under commercial first-party insurance policies. Since that time, an ever-growing body of case law has developed under New Jersey law that stands for the proposition that the presence of the COVID-19 virus on insured property and closures mandated by government stay-at-home orders issued in response to the pandemic do not constitute "direct physical loss of or damage to property" as well as that virus exclusions preclude coverage for business-interruption losses arising out of the pandemic.

Although the factual circumstances raised in these cases may differ in certain respects, these decisions are largely based upon existing precedent from New Jersey state courts and the Third Circuit. Because Count Basie's complaint raises neither novel nor undecided questions of state law, there is little reason for the Court to defer to the state courts. Moreover, the Court need not entertain Count Basie's argument in the first instance if it finds that it lacks the discretion to abstain because Count Basie seeks legal rather than declaratory relief.

[1] This supplemental brief is submitted in accordance with the Court's Order dated April 7, 2021.

LEGAL ARGUMENT

POINT I

THE *REIFER* FACTORS DO NOT SUPPORT ABSTENTION

In this case, there is a presumption in favor of jurisdiction because no parallel state court proceeding exists.[2] *See Reifer v. Westport Ins. Corp.*, 751 F.3d 129, 144 (3d Cir. 2014) (finding "the absence of pending parallel state proceedings militates significantly in favor of exercising jurisdiction"). This presumption can be overcome only if "the lack of pending parallel state proceedings is outweighed by opposing factors." *Id.* Although Count Basie asserts that the third *Reifer* factor, the public interest in settlement of the uncertainty of obligation, and the fifth *Reifer* factor, a general policy of restraint when the same issues are pending a state court, support abstention, the Court has rightly called into question this argument. For the reasons discussed below, neither *Reifer* factor outweighs the lack of a pending parallel state proceeding.[3]

A. The Third *Reifer* Factor Does Not Support Abstention

Resolving whether Count Basie is entitled to Business Income Coverage and Civil Authority Additional Coverage will require the Court to determine whether Count Basie's business-interruption losses were caused by "direct physical loss of or damage to property" at or within one mile of an insured location and, if so, whether coverage for those losses nevertheless is precluded by virtue of the exclusion for microorganisms. While these questions had not been considered by many New Jersey courts in COVID-19 cases at the time Count Basie commenced

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[2] Because a parallel state court proceeding does not exist, *Colorado River* abstention does not apply as that doctrine is premised on the existence of concurrent litigation. *See Owlpoint, LLC v. Spencer Thomas Grp.*, 2021 WL 321479 (D.N.J. Jan. 29, 2021) ("The *Colorado River* abstention doctrine 'allows a federal court to abstain, either by staying or dismissing a pending federal action, where there is a parallel ongoing state court proceeding.'" (quoting *Nationwide Mut. Fire Ins. Co. v. George V. Hamilton, Inc.*, 571 F.3d 299, 307 (3d Cir. 2009))).

[3] Although there are eight *Reifer* factors, we address only the third and fifth *Reifer* factors given that Count Basie's argument for remand relies almost exclusively on these two factors. For reasons set forth in Zurich's initial opposition, the other *Reifer* factors also do not weigh in favor of remand.

this action, numerous decisions have been issued in the intervening months. In nearly every one of these cases, the courts have ruled in favor of the insurer in finding no coverage exists.

As Zurich previously explained, the position of New Jersey courts is consistent with the position taken by the overwhelming majority of courts in other districts in this circuit as well as the majority of courts throughout the country. The reason for the consensus on this issue is due to the relatively straightforward nature of these cases. Since Zurich filed its opposition to this motion only last month, numerous additional decisions have been added to the ever-growing body of case law finding no coverage for business-interruption losses caused by the COVID-19 pandemic. *See Stern & Eisenberg, P.C. v. Sentinel Ins. Co. Ltd.*, 2021 WL 1422860 (D.N.J. Apr. 14, 2021); *Podiatry Foot & Ankle Inst. P.A. v. Hartford Ins. Co. of the Midwest*, 2021 WL 1326975 (D.N.J. Apr. 9, 2021); *Quakerbridge Early Learning LLC v. Selective Ins. Co. of New England*, 2021 WL 1214758 (D.N.J. Mar. 31, 2021); *Benamax Ice, LLC v. Merchant Mut. Ins. Co.*, 2021 WL 1171633 (D.N.J. Mar. 29, 2021); *Chester C. Chianese DDS LLC v. Travelers Cas. Ins. Co. of Am.*, 2021 WL 1175344 (D.N.J. Mar. 27, 2021); *7th Inning Stretch LLC v. Arc Ins. Co.*, 2021 WL 1153147 (D.N.J. Mar. 26, 2021); *Carpe Diem Spa, Inc. v. Travelers Cas. Ins. Co. of Am.*, 2021 WL 1153171 (D.N.J. Mar. 26, 2021); *Downs Ford, Inc. v. Zurich Am. Ins. Co.*, 2021 WL 1138141 (D.N.J. Mar. 25, 2021); *Dezine Six, LLC v. Fitchburg Mut. Ins. Co.*, 2021 WL 1138146 (D.N.J. Mar. 25, 2021); *Savage City Strength, LLC v. Covington Specialty Ins.*, No. L-831-20 (N.J. Super. Ct. Apr. 8, 2021).

In light of the near-unanimous view that business-interruption losses caused by the COVID-19 pandemic are not covered under commercial property policies, Count Basie's argument that this Court should remand because state law is unsettled rings hollow. In fact, Chief Judge Wolfson recently rejected this precise argument based upon guidance from the Third

Circuit that, "absent an unsettled question of state law or important policy issue implicated by the claims in a matter, there is little reason for a federal court to be reluctant about deciding the case." *Casino Beach Pier LLC v. Westchester Surplus Lines Ins. Co.*, 2021 WL 1311047, at *6 (D.N.J. Apr. 8, 2021) (alteration adopted and quotation marks omitted).

In *Casino Beach*, Chief Judge Wolfson found that the question of what constitutes "direct physical loss or damage" to insured property in order to trigger coverage under an all-risk policy has been directly addressed by New Jersey state courts and the Third Circuit and, therefore, did not raise novel questions of state law. *Id.* In concluding that the dispute in *Casino Beach* involved a straightforward interpretation of policy language, Chief Judge Wolfson observed that the fact that existing precedent does "not specifically address the factual circumstances presented by this case is of no moment as district courts are routinely called upon to interpret contracts under state law." *Id.* (alteration adopted and quotation marks omitted).

Consistent with Chief Judge Wolfson's decision, the Court can justifiably retain jurisdiction in this case as Zurich contends in its Motion to Dismiss that Count Basie is not entitled to Business Income Coverage or Civil Authority Additional Coverage because it has failed to identify "direct physical loss or damage" to insured property. While Chief Judge Wolfson stated in dicta in *Casino Beach* that the question of whether an exclusion for loss or damage caused by a virus is enforceable in these circumstances implicates important issues of state public policy in an unsettled area of state law, this observation appears to be in direct conflict with her reasoning for declining to remand that case as this question has also been addressed by New Jersey courts.

Under New Jersey law, "[e]xclusionary clauses are presumptively valid and are enforced if they are specific, plain, clear, prominent, and not contrary to public policy." *Flomerfelt v.*

Cardiello, 202 N.J. 432, 441 (2010). In other words, the enforceability of an exclusion will be based on whether the policy wording is ambiguous as New Jersey courts do not overrule policy terms on public policy grounds "when the literal meaning of the policy is plain." *Abboud v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 450 N.J. Super. 400, 409 (App. Div. 2017); *see also State v. Signo Trading Int'l, Inc.*, 130 N.J. 51, 66 (1992) (holding "public policy considerations alone are not sufficient to permit a finding of coverage in an insurance contract when its plain language cannot fairly be read otherwise to provide that coverage"). Thus, enforceability of the microorganism exclusion involves a straightforward interpretation of policy language. If this Court finds the policy wording to be plain and clear, then it easily can apply it to Count Basie's losses even though no case has specifically addressed identical factual circumstances presented here. As Chief Judge Wolfson acknowledged, district courts are routinely called to do just that.

In fact, numerous courts applying New Jersey law, including this Court in *Downs Ford* and *Dezine*, already have found that exclusions precluding coverage for loss or damage caused by a virus are unambiguous and preclude coverage for losses arising out of the COVID-19 pandemic, regardless of whether the losses are claimed to be the result of the actual presence of the COVID-19 virus or the loss of use of property due to governmental orders issued in connection with the COVID-19 pandemic.[4] (*See* ECF 15 at pp. 11-12.) Many of these same courts, including again this Court in *Downs Ford*, also have rejected public policy arguments raised by insureds in support of not enforcing virus exclusions under these circumstances. Thus, the Court would not be establishing state law on this issue.

Count Basie contends these decisions are inapposite because the exact same policy

[4] During the recent motion hearing, Count Basie asserted that courts in the Third Circuit have only addressed the enforceability of the virus exclusion developed by Insurance Services Office, Inc. ("ISO"). However, that is not the case. *See, e.g., Manhattan Partners, LLC v. Am. Guar. & Liab. Ins. Co.*, 2021 WL 1016113 (D.N.J. Mar. 17, 2021); *Eye Care Ctr. of N.J., PA v. Twin City Fire Ins. Co.*, 2021 WL 457890 (D.N.J. Feb. 8, 2021).

wording at issue here was not at issue in any of those cases and argues that the Court should be guided instead by a decision from the Northern District of Ohio. *See Henderson Rd. Res. Sys. Inc. v. Zurich Am. Ins. Co.*, 2021 WL 168422 (N.D. Ohio Jan. 19, 2021). While both arguments will be addressed in further detail in Zurich's reply brief in further support of its Motion to Dismiss should Count Basie's Motion to Remand be denied, we briefly address each argument here as neither is availing or warrants remand for a state court to consider their merits.

The exclusion at issue in this case provides, in relevant part, that Zurich "will not pay for loss or damage consisting of, directly or indirectly caused by, contributed to, or aggravated by the presence, growth, proliferation, spread, or any activity of 'microorganisms.'" The term "microorganism" is expressly defined as "any type or form of organism of microscopic or ultramicroscopic size including, but not limited to, … [a] virus…." Although this policy wording may not be identical to the wording in other cases, it nonetheless is enforceable because it is specific, plain, clear, prominent, and not contrary to public policy.

Count Basie's argument that the wording is ambiguous rests entirely upon its disregarding the definition of the term "microorganism" in the policy. It posits that the definition is confusing because a virus is not a microorganism. Setting aside questions of science, this argument ignores the policy's plain terms as well as the fact that the virus exclusion developed by ISO, which Count Basie acknowledges is unambiguous, also treats viruses and microorganisms as essentially interchangeable. The ISO exclusion specifically provides that "[w]e will not pay for loss or damage caused by or resulting from any virus, bacterium, or other microorganism that induces or is capable of inducing physical distress, illness, or disease." Thus, this is not a case where the "text appears overly technical or contains hidden pitfalls, cannot be understood without employing subtle or legalistic distinctions, is obscured by fine print, or

requires strenuous study to comprehend." *Abboud*, 450 N.J. Super. at 409. Although the wording may not be identical, the effect is the same—loss caused either directly or indirectly by a virus is not covered. *See Downs Ford*, 2021 WL 1138141, at *4 (finding plaintiff's "alleged knowledge of the scope of a virus exclusion provision is not a basis for a departure from the clear language of the Virus Exclusion. At best, such knowledge constitutes a trade practice or custom, which cannot override an unambiguous contract provision or be invoked to create an ambiguity.").

Count Basie's argument that the Court should be guided by *Henderson Road* is likewise unpersuasive. Notably, the Northern District of Ohio did not find the exclusion ambiguous on the grounds proffered by Count Basie. Rather, it found that the exclusion did not apply to losses caused by government orders issued in connection with the COVID-19 pandemic.[5] *Henderson Road*, 2021 WL 168422, at *14 ("Plaintiff's argument prevails because the Microorganism exclusion does not clearly exclude loss of property caused by a government closure."). However, another judge in the Northern District of Ohio expressly found the same microorganism exclusion enforceable in identical circumstances. *See Brunswick Panini's, LLC v. Zurich Am. Ins. Co.*, 2021 WL 663675, at *9 (N.D. Ohio Feb. 19, 2021). In addition, this argument already has been flatly rejected by New Jersey courts. *See Causeway Auto., LLC v. Zurich Am. Ins. Co.*, 2021 WL 486917 (D.N.J. Feb. 10, 2021); *Eye Care*, 2021 WL 457890. Indeed, several New Jersey courts have expressly declined to follow *Henderson Road* precisely for this reason. *See Podiatry Foot & Ankle Inst.*, 2021 WL 1326975, at *3 n.3; *In the Park Savoy Caterers LLC v. Selective Ins. Grp., Inc.*, 2021 WL 1138020, at *3 n.5 (D.N.J. Feb. 25, 2021).

Moreover, *Henderson Road* has been roundly rejected by numerous courts throughout the

[5] In reaching this conclusion the court ignored the express term of the exclusion, which states that Zurich "will also not pay for loss, cost, or expense arising out of any request, demand, order, or statutory or regulatory requirement that requires any insured or others to test for, monitor, clean up, remove, treat, detoxify, or neutralize, or in any way response to, or assess the effects of 'microorganisms.'" This additional wording makes clear that losses caused due to government closure orders issued in response to the pandemic will not be covered.

country, including in the Northern District of Ohio. It is largely considered to be an outlier decision. *See Tria WS LLC v. Am. Auto. Ins. Co.*, 2021 WL 1193370 (E.D. Pa. Mar. 30, 2021); *Equity Planning Corp. v. Westfield Ins. Co.*, 2021 WL 766802 (N.D. Ohio Feb. 26, 2021); *Ceres Enterps., LLC v. Travelers Ins. Co.*, 2021 WL 634982 (N.D. Ohio Feb. 18, 2021); *Mikmar, Inc. v. Westfield Ins. Co.*, 2021 WL 615304 (N.D. Ohio Feb. 17, 2021); *Family Tacos, LLC v. Auto Owners Ins. Co.*, 2021 WL 615307 (N.D. Ohio Feb. 17, 2021); *Robert E. Levy, D.M.D., LLC v. Hartford Fin. Servs. Grp. Inc.*, 2021 WL 598818 (E.D. Mo. Feb. 16, 2021); *Kahn v. Pa. Nat'l Mut. Cas. Ins. Co.*, 2021 WL 422607 (M.D. Pa. Feb. 8, 2021); *Protege Rest. Partners LLC v. Sentinel Ins. Co., Ltd.*, 2021 WL 428653 (Feb. 8, 2021).

B. The Fifth *Reifer* Factor Does Not Support Abstention

Finally, the fifth *Reifer* factor does not support abstention. Simply put, the same issues are not pending in state court.[6] As Chief Judge Wolfson explained, "[w]hile issues of insurance coverage for losses caused by the COVID-19 pandemic are currently pending throughout State and Federal Courts, each of those actions concerns different policy terms and different underlying factors." *Casino Beach*, 2021 WL 13111047, at *7 (finding the fifth *Reifer* factor did not support remand). Despite Count Basie's arguments to the contrary, none of the lawsuits filed against Zurich that it identified in its reply brief involve the same issues or policy terms. For instance, the *Louis Berger Group* action involved third-party liability coverage. (ECF 17-1 at p. 53, ¶ 1.) Likewise, neither the *Valley Health System* nor the *RWJBarnabas* actions are relevant because they involve commercial property policies tailored to healthcare providers. (ECF 17-1 at p. 79, ¶ 1; p 158, ¶ 1.) Moreover, the microorganism exclusion is not at issue in any of the cases.

[6] The Third Circuit has recently consolidated fourteen appeals involving insurance coverage for COVID-19 claims. Because the Third Circuit has the ability to certify questions about coverage to the New Jersey Supreme Court, it is possible that this might be the fastest and most direct route to a final resolution. *See, e.g, Sun Life Assur. Co. v. Wells Fargo Bank, N.A.*, 238 N.J. 157 (2019).

* * *

In sum, the *Reifer* factors do not outweigh the presumption that the Court should retain jurisdiction in this case. Most importantly, the existence of decisions from New Jersey state courts provide "important guidance" that the Court can follow in addition to the numerous federal court decisions that exist.

POINT II

THE COURT LACKS THE DISCRETION TO DECLINE JURISDICTION

The Court need not consider whether the *Reifer* factors support abstention if it finds in the first instance that it lacks the discretion to remand because Count Basie seeks legal relief.

In deciding whether it has jurisdiction, the Court must "look to the substance of the action and not only at the labels that the parties may attach … to ensure that parties are not improperly creating or destroying diversity jurisdiction." *Mississippi ex rel. Hood v. AU Optronics Corp.*, 571 U.S. 161, 174 (2014). Indeed, the Third Circuit has specifically cautioned that "[it] may, in some circumstances, be possible for a party's claim for legal relief to masquerade as a declaratory judgment, improperly activating discretionary jurisdiction." *Reifer*, 751 F.3d at 137.

Since *Reifer*, the Third Circuit has not addressed the circumstances under which a district court's discretionary jurisdiction under the DJA would not be activated despite encountering a purported claim for declaratory relief. However, at least one district court in this circuit has addressed this issue in connection with a claim involving insurance coverage for business-interruption losses caused by the COVID-19 pandemic, explaining that a legal claim masquerades as a declaratory claim when the insured seeks a narrow declaration as to whether the insurer's denial was proper and includes a very obvious and specific damages award as part of its proposed declaration in its favor. *See Greg Prosmushkin, P.C. v. Hanover Ins. Grp.*, 2020

WL 4735498, at *3 (W.D. Pa. Aug. 14, 2020).

As previously explained, a fair reading of the complaint demonstrates that an award of declaratory relief to Count Basie would be indistinguishable from an award of legal relief. Count Basie's claims are limited to resolving whether Zurich's denial was proper and it has asked this Court to award specific monetary damages. As such, this matter is readily distinguishable from those cases involving business-interruption losses arising out of the pandemic where remand has been granted insofar as Count Basie, unlike the plaintiffs in each of those cases, is not seeking coverage for ongoing losses due to the pandemic.

Count Basie's assertion that it too is seeking coverage for future losses simply is not supported by its own allegations in the complaint. There, Count Basie alleges that Zurich improperly denied its claims for Business Income Coverage and Civil Authority Additional Coverage and that its losses have exceeded the limits of liability such that it should be awarded the policy limits available under each coverage provision. (*See* ECF 1-1 at ¶¶ 90, 93.) The lack of future losses confirms that a declaration will not alter future conduct.

Count Basie also argues that it is seeking a declaration because it will influence the parties' future decision-making process, including whether to renew coverage with Zurich. Again, Count Basie's arguments do not match its allegations. The complaint frames this dispute as one that is entirely over whether Zurich has breached the terms of the policy by refusing to cover Count Basie's already existing losses. (ECF 1-1 at ¶¶ 155-158.)

By looking behind what is pleaded in the complaint to the substance of the allegations, it is clear that legal relief is being sought. In these circumstances, abstaining from jurisdiction would be inconsistent with the principles of sound judicial administration and would unjustifiably deny Zurich the right to obtain a remedy in federal court.

CONCLUSION

For the foregoing reasons, the Court should deny Count Basie's motion to remand.

Respectfully submitted,

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