UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

BERKLEY ASSURANCE COMPANY, Plaintiff, v. HUNT CONSTRUCTION GROUP, INC., Defendant.	Civil Action No. 1:19-cv-02879 ORAL ARGUMENT REQUESTED

MEMORANDUM OF LAW IN SUPPORT OF HUNT CONSTRUCTION GROUP'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON THE DUTY TO DEFEND

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Defendant and Counterclaimant Hunt Construction Group, Inc. ("Hunt") submits this memorandum of law in support of its motion for partial summary judgment declaring that Plaintiff insurance company Berkley Assurance Company ("Berkley") is obligated to pay the costs of defending Hunt in connection with claims arising from professional construction management services provided by Hunt in connection with the renovation of Hard Rock Stadium in Miami, Florida (the "Underlying Claims").

PRELIMINARY STATEMENT

The key facts relevant to this motion are not only undisputed by Berkley, but affirmatively alleged in Berkley's own complaint. In particular, Berkley affirmatively alleges that it sold Hunt insurance policies covering the period from June 15, 2016 to at June 15, 2017, with an extension through July 15, 2017 (the "2016-17 Policy"), and July 15, 2017 to June 15, 2018 (the "2017-18 Policy"). Berkley quotes the policy language providing that those Policies cover claims (1) first made during the policy period; and (2) reported to Berkley either during the policy period or during a 60-day "Automatic Extended Reporting Period" following each Policy's termination.[1] It admits that the Policies cover Professional Services Claims, defined to include, among other things, Claims alleging errors or omissions in the provision of construction management services.[2] Finally, Berkley admits that it is required to pay the costs of defending Hunt with respect to such Claims,[3] and does not dispute that this duty extends to even groundless or false Claims which potentially trigger the Policies' coverage.

Berkley also does not dispute the key facts relevant to the Underlying Claims, including that Hunt was sued in March 2017 by a former subcontractor ("Hillsdale") in connection with

[1] ECF 1 ("Complaint"), ¶¶ 7, 9, 29.
[2] Complaint, ¶¶ 11, 12.
[3] Complaint, ¶ 10.

construction management services provided by Hunt with the renovation of Hard Rock Stadium in Florida (the "Hillsdale Claim"). Berkley admits that Hunt provided notice of the Hillsdale Claim to Berkley on July 20, 2017, a date that was well within the Automatic Extended Reporting period applicable to the 2016-17 Policy.[4] Berkley acknowledges that on May 21, 2018, the Stadium project's owner ("SFS"), demanded that Hunt indemnify SFS in connection with claims brought against SFS against Hillsdale (the "SFS Claim"). Finally, it admits that Hunt provided notice of the SFS Claim to Berkley on June 5, 2018, during the policy period of the 2017-18 Policy.[5]

But perhaps the most striking aspects of the matter, and of the admissions in the Berkley complaint, concern Berkley's own post-notice conduct. From the time Berkley received notice of the Hillsdale Claim until the filing of Berkley's Complaint in this action, through months of meetings and communication with Hunt, Berkley never *once* either asserted that Hunt's notice of the Hillsdale Claim was untimely, or reserved its right to do so. Rather, Berkley denied coverage *solely* on the erroneous assertion that coverage for the Hillsdale Claim was barred by the Policies' "Contractual Liability Exclusion" – which, as a matter of the Exclusion's plain language and applicable law does not apply to that Claim.

Berkley's *admitted* response to the SFS Claim was even more striking. As Berkley's Complaint concedes, Berkley agreed to pay for the defense of that Claim, and demanded that Hunt provide it with information on underlying counsel and the bills being incurred.[6] Yet despite that admission, to date Berkley has failed to pay a single cent toward the defense of either

[4] Complaint, ¶ 30.
[5] Complaint, ¶ 33.
[6] Complaint, ¶ 38.

Underlying Claim, with the result that Hunt has been forced to incur millions of dollars in defense costs that it paid Berkley to bear when Hunt wrote its premium checks.

Then, without warning and in the middle of claim negotiations, Berkley filed this action, alleging for the first time both that Hunt did not give notice of the Hillsdale Claim during the time provided under the 2016-17 Policy, and that this supposed failure also applies to bar coverage for the SFS Claim because it purportedly is a "related claim" falling under the 2016-17 Policy. In addition, Berkley renewed its assertion that coverage is barred for the Hillsdale Claim by the Contractual Liability Exclusion, and – in direct contrast to its earlier agreement to defend the SFS Claim – for the first time sought to extend the reach of that Exclusion to bar coverage for the SFS Claim as well.[7]

As a matter of law and undisputed fact, Berkley's arguments are insufficient to relieve it of its obligation to defend its insured with respect to both Underlying Claims. Contrary to Berkley's assertion, the Policies expressly provide that the notice obligation is satisfied by notice during the policy period *or* the Automatic Extended Reporting Period. Here, that extended period ended with respect to the 2016-17 Policy on August 15, 2017 at the earliest, meaning that Hunt's July 20, 2017 notice of the Hillsdale Claim was timely, as was that of the SFS Claim. In addition, the Contractual Liability Exclusion expressly excludes from its scope any liability "that would have existed in the absence of such contract or agreement." The Hillsdale counterclaim alleges facts that could have been asserted as a basis for non-contractual claims based on covered "professional services" under the 2016-17 Policy. Hillsdale's choice to couch those facts and allegations in a breach of contract claim thus does not bring the allegations "solely and exclusively" within the scope of the exclusion, as Berkley must establish in order to negate its

[7] Complaint, ¶ 51.

duty to defend. Moreover, as Berkley itself apparently recognized in agreeing to defend the SFS Claim, SFS's demand for indemnity could have been based either on an asserted right of contract or common-law indemnity (though it would be without merit in either case), making the Exclusion inapplicable. Accordingly, under well-established law, Hunt is entitled under the Policies to an immediate defense to, and reimbursement of defense costs already incurred in, both Underlying Claims, and its motion for summary judgment should be granted in all respects.

STATEMENT OF FACTS

A. The Relevant Policy Language

As is pertinent to this motion, Coverage B of the 2016 and 2017 Policies[8] provides that Berkley will defend "Professional Claims" arising out of an actual or alleged negligent act, error or omission in the rendering of or failure to render "Professional Services" provided that:

> the **Professional Claim** is first made against you during the Policy Period or Optional Extended Reported Period, if applicable, and reported in writing by you to us during one of those periods or the Automatic Extended Reporting Period; and

(2016-17 Policy, p.11, Insuring Agreement Coverage B(2)). "Professional Claim" includes a "suit against you seeking Damages[9] or correction of Professional Services and alleging a negligent act, error or omission in the rendering of or failure to render Professional Services." *Id.,* p.22, Definition GG. "Professional Services," in turn, is defined to include, among other things, "Construction Management . . . Project Management . . . any delegated design responsibility or design assist services, including but not limited to constructability reviews or value engineering." *Id.,* Definition HH.

[8] The Berkley Policies are annexed as Exhibits 1 and 2, respectively, to the Dopheide Affidavit.
[9] "Damages" is broadly defined as "any amounts you are legally obligated to pay." 2016-17 Policy, p.17, Definition J.

The dichotomy between the time in which a Claim must be first made and when it must be reported to fall within the Policy's coverage is also highlighted in a notice set forth in all capital letters and boldface on the Policy's first page:

> **NOTICE: THIS IS A CLAIMS MADE AND REPORTED POLICY. SUBJECT TO ITS PROVISIONS, THIS POLICY APPLIES ONLY TO CLAIMS WHICH ARE FIRST MADE BY OR AGAINST YOU DURING THE POLICY PERIOD OR THE OPTIONAL EXTENDED REPORTING PERIOD, IF APPLICABLE, AND FIRST REPORTED IN WRITING TO US IN THOSE PERIODS OR THE AUTOMATIC EXTENDED REPORTING PERIOD . . .**

Id., p.10, Policy Form page 1 (emphasis added). This boldface notice is expressly quoted in Berkley's Complaint as setting forth the notice requirements under its Policies. Complaint, ¶ 9.

As these provisions state – and contrary to Berkley's contention in its Complaint – while the Professional Claim must be made during the Policy Period or the "Optional Extended Reporting Period," it will fall within the policy coverage if written notice of the Claim is provided to Berkley during either of those periods *or* during the "Automatic Extended Reporting Period." The Optional Extended Reporting Period, as its name implies, is an extension of the policy period that the policyholder may opt to buy for an additional premium. *Id.,* pp.27-28, Section IX (B). Hunt did not purchase any such period, which is therefore not at issue here.

The Automatic Extended Reporting Period, on the other hand, requires no purchase, affirmative action or payment of additional premium. Rather, it automatically extends the time for providing written notice of a claim made within the Policy Period for an additional 60 days after the Policy's termination:

> If we or you terminate or non-renew this insurance for any reason, other than nonpayment of premium or your failure to comply with any term or condition, or fraud or material misrepresentation, you shall be entitled to a period of sixty (60) days from the date of policy termination to report a Claim … which is made by or against you prior to such termination date. The Automatic

> Extended Reporting Period may not be canceled by you and does not require the payment of an additional premium. …

Id., p.27, Section IX(A).

In addition to the payment of defense costs, the Policies provide that Berkley will have "the right and duty to defend" the policyholder against any Coverage B Claim "a. even if groundless or false" and "b. with counsel of our mutual agreement." *Id.,* p.14, Section III(A). In addition, "Claim Expense" covered by the Policy expressly includes the reasonable and necessary fees incurred in the defense of Claims, and counts against both the Policies self-insured retention and its limit of liability. *Id.*, p.16, Section IV(D.)

The Policies also each provide a $10 million per-Claim and aggregate limit of liability for Professional Liability under Coverage B. *Id.,* p.7, Declarations, Item 4. There is no aggregate, however, applicable to the Policy's self-insured retention, with the result that Hunt must pay a separate $500,000 retention for each Coverage B Claim. However, the Policies further provide that where two or more Claims "aris[e] out of one or more acts, errors, omissions, incidents, events or Pollution Conditions, or a series thereof, that are related (either casually or logically)," they will be considered a single Claim subject to a single limit of liability and self-insured retention and be treated as falling under the Policy covering the earliest such Claim was made. *Id.,* p.26, Section VIII, Multiple Claims.

Finally, the Berkley Policies contain certain exclusions from coverage, only one of which Berkley ever cited prior to this litigation as potentially applying to either Underlying Claim. That Exclusion G (the "Contractual Liability Exclusion") excludes from coverage:

> liability under contract, agreement, warranty or guarantee, except such liability that would have existed in the absence of such contract or agreement. This Exclusion extends to any contractual obligation to make payments to others, including subcontractors, subconsultants, or their employees, or for materials.

Id., p.24, Section V(G.)

B. The Underlying Claims

In or around 2014, SFS, the owner and operator of Hard Rock Stadium in Miami, Florida engaged Hunt as the construction manager with respect to certain stadium renovations. In connection with that work, Hunt in turn retained Hillsdale as a subcontractor to perform certain work with respect to the roof-top structure.[10]

A dispute over Hillsdale's services led Hunt and SFS to commence a lawsuit against Hillsdale in Florida. On March 17, 2017, Hillsdale filed a counterclaim in that action (the "Hillsdale Counterclaim") against Hunt, SFS and a third party ("TT"). The Hillsdale Counterclaim alleged that the design and construction services performed by Hunt and TT, for which SFS was also responsible, had been improperly performed resulting in additional costs to Hillsdale. In particular, the Hillsdale Counterclaim alleged that the counterclaim defendants, not Hillsdale, were responsible for the proper performance of TT as "Engineer of Record" ("EOR") in compliance with applicable Florida building codes and the Code of Standard Practice of the American Institute of Steel Construction. Hillsdale Counterclaim, ¶¶ 5-22. In particular, Hillsdale alleged that Hunt was professionally responsible for the proper oversight and management of the design process:

> 18. Hillsdale provided "design assistance" to the Project as such assistance was defined in the Subcontract. Such "design assistance" did not include, and, in fact, expressly excluded assuming responsibility of the EOR or identifying mistakes of the EOR . . .
>
> 19. The Prime Contract expressly excluded from among the responsibilities of Hillsdale any acts that would be deemed the practice of engineering, other than the design of steel connections, which design was expressly delegated to Hillsdale. Hillsdale was not responsible for the

[10] Hillsdale's Counterclaim, Third-Party Complaint and Demand for Jury Trial is attached as Exhibit 3 to the Dopheide Affidavit.

> deficiencies in TT's design, as such deficiencies are more particularly set forth in this Complaint.
>
> 20. Nor was Hillsdale responsible for completing or correcting TT's design. . . .
>
> 21. Stated plainly, "design assist" is not the same as "design completion" or "design correction." Only the duly licensed EOR can design the Project.
>
> 22. Notwithstanding Hillsdale's willingness to provide design assistance as directed, Hunt failed to provide such direction and failed to properly manage the design assist process, with the result that the Project scope, budget and schedule were not maintained.

Hillsdale Counterclaim ¶¶ 18-22 (emphasis added).

Having alleged that the oversight and performance of the design process was the professional responsibility of Hunt as the general contractor, the Hillsdale Counterclaim then alleges that Hunt failed to fulfill that professional responsibility in several ways, including actions that could have been alleged as claims other than for breach of contract such as:

- providing plans and specifications to Hillsdale which were not constructible;
- providing plans and specifications to Hillsdale which violated the Florida Building Code;
- providing plans and specifications to Hillsdale which violated the industry Code of Standard Practice;
- failing to execute [Hunt's] design assist responsibilities so as to maintain the Project scope, schedule and budget;
- misstating the tonnage to be fabricated and erected;
- misstating the complexity of the connections to be designed, fabricated and erected;
- misstating the ratio of connection weight to member weight;
- misstating the grade and thickness of plate steel to be required for the work;
- failing to properly schedule and coordinate the work; and

- failing to properly manage the inspection of Hillsdale's work.

Counterclaim, Count I. In more general terms, Hillsdale alleged that Hunt "failed to consider, manage and address these issues and the impact they had upon Hillsdale, unreasonably denying Hillsdale's requests for time extensions and additional compensation." Counterclaim ¶ 36. Although the Counterclaim complains collectively of "[t]hese failings by SFS, Hunt and TT" (Counterclaim ¶ 35), Hillsdale styled its claim against SFS as one for negligence (Counterclaim, Count III), but its claim against Hunt based on virtually the same conduct and responsibilities as one for breach of contract. Counterclaim, Count I.

Neither Hunt nor SFS have filed formal crossclaims against each other in the context of the Underlying Action. However, by letter dated May 18, 2018, SFS demanded that Hunt defend and indemnify it with respect to the claims asserted by Hillsdale against SFS. Hunt has denied that it owes SFS any indemnity obligation, noting that the Hillsdale Counterclaim seeks to hold SFS liable for its own negligence, rather than asserting that SFS is vicariously liable for any negligence by Hunt. Dopheide Aff., Ex. 13.

C. Berkley's Improper Denial of Coverage and Commencement of This Action

Hunt provided Berkley with notice of the Hillsdale Claim on July 20, 2017, at least 24 days[11] before the expiration of the Automatic Extended Reporting Period. Dopheide Aff., Ex. 4. It followed that notice letter by sending a detailed status report on the litigation to Berkley on July 26, 2017. Dopheide Aff., Ex. 5.

[11] The term of the 2016-17 Policy was extended from June 15, 2017 to July 15, 2017, which means that the Automatic Extended Reporting Period did not commence until that later date, and that Berkley was provided with notice of the Hillsdale Claim a full 55 days before its expiration. However, in its Complaint, Berkley appears to challenge the validity of the policy extension. *See* Complaint, ¶¶ 22-26. Because notice of the Hillsdale Claim was equally timely under the original or extended termination date of the 2016-17 Policy, for purposes of this motion only, Hunt will treat the 2016-17 Policy as having terminated on its original June 15, 2017 date.

By letter dated September 25, 2017, Berkley denied coverage for the Hillsdale Claim, citing as the sole basis for doing so its assertion that coverage was barred by the Contractual Liability Exclusion. ECF 1 (Complaint), ¶ 32; Dopheide Aff., Ex. 6. In particular, although Berkley had every fact on which it now relies to assert that Hunt's notice of the Hillsdale Claim was untimely, it made no such assertion in its September 25 letter. ECF 24, ¶ 35; Dopheide Aff., Ex. 6.

Hunt provided Berkley with notice of the May 2018 SFS Claim on June 5, 2018, within the 2017-18 policy period. ECF 1 (Complaint), ¶ 33; Dopheide Aff., Ex. 7. In response, by email dated June 7, 2018, Walter J. Adams Jr., Vice President and Senor Claims Examiner for Berkley stated that "it looks like the tender alleges allegations that are covered, as well as the attached pleading to the tender" – i.e., the Hillsdale Counterclaim. Berkley's Adams accordingly requested that Hunt provide Berkley with the rates being paid to attorneys and paralegals "for the Miami Dolphin Stadium Matter." Dopheide Aff., Ex. 8. Hunt's underlying counsel, Carlton Fields, provided that information to Berkley the following day by email, specifically referencing the hourly rates and discounts for the defense of the Hillsdale Claim as a whole. Dopheide Aff., Ex. 9. Approximately three weeks later, by email dated June 27, 2018, Mr. Adams responded with the maximum rates that Berkley would pay, and specifically noted that "I will need to get approval to use George's firm as well, which I think I will be able to obtain since George has been intimately involved in this matter for a long time." Dopheide Aff., Ex. 10.

Once again, at no time during this process, or during the subsequent conversations between representatives of Hunt and Berkley did Berkley suggest that the notice for either the Hillsdale or SFS Claims was untimely. Dopheide Aff., ¶ 15. Nor, unlike with the Hillsdale Claim, did Berkley ever contend that coverage for the SFS Claim was barred by the Contractual

Liability Exclusion. In short, at no time from the receipt of the SFS Claim in June 2018 until the filing of its Complaint in this action on April 1, 2019 did Mr. Adams, or any other representative of Berkley, indicate that Berkley would renege on its original assertion that the SFS Claim "alleges allegations that are covered." To the contrary, after Hunt sent a letter further demanding payment of the millions of dollars of defense expenses it was incurring (Dopheide Aff., Ex. 11), Berkley represented on December 20, 2018 that it would reimburse Hunt's defense costs for the SFS Claim. Dopheide Aff., Ex. 12.

Despite that representation, however, Berkley still failed to make any payment toward Hunt's defense costs for either of the Underlying Claims. In yet another attempt to commence that promised payment on the SFS Claim, and to convince Berkley to revisit its reliance on the Contractual Liability Exclusion to deny coverage for the Hillsdale Claim, Hunt agreed to continue negotiations in a further meeting which was held on March 25, 2019. At the end of that meeting, Berkley agreed to consider the points raised, leaving Hunt with the clear impression that the parties would continue to seek to find a resolution.

Instead, on April 1, 2019, Berkley filed this action, not only reneging on its prior admission that it was obligated to defend the SFS Claim, but asserting for the first time wholly new grounds for its denial of the Hillsdale Claim. Specifically, the Berkley Complaint asserts for the first time that the Hillsdale Claim was not covered due to the provision of untimely notice. Complaint, ¶ 43; *see also* ECF 24 (Berkley Insurance Company's Answer to Hunt Construction Group Inc.'s Counterclaim) ¶ 35 ("Berkley admits that it did not previously [prior

to filing the Complaint] assert that Hunt had failed to timely report [the Hillsdale Claim]."[12]). The Complaint also asserts, for the first time, that the supposed failure of notice also bars coverage for the SFS Claim on the ground that the SFS and Hillsdale Claims are a single "related" claim under the 2016-17 Policy. Finally, in addition to renewing its allegation that coverage for the Hillsdale Claim is barred by the Contractual Liability Exclusion, the Complaint for the first time also asserts that this Exclusion is applicable to the SFS Claim, which Berkley had previously conceded it was obligated to defend. Hunt answered the Complaint and asserted counterclaims, including those on which it now moves seeking payment of its defense costs and a declaration of its right to a defense of the Underlying Claims. ECF 18.

ARGUMENT

I. STANDARDS APPLICABLE TO THIS MOTION

A. Summary Judgment Standard

Rule 56 of the Federal Rules of Civil Procedure provides for summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "Although the moving party bears the initial burden of establishing that there are no genuine issues of material fact, once such a showing is made, the non-movant must 'set forth specific facts showing that there is a genuine issue for trial.'" *Weinstock v. Columbia Univ.*, 224 F.3d 33, 41 (2d Cir. 2000) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986)). Berkley may not "rest upon . . . mere

[12] Berkley sometimes refers to the Hillsdale Claim as the "SFS Action" (presumably because SFS was the first-named plaintiff in the Florida action in which the Hillsdale Counterclaim was filed) and to the SFS Claim as the "Indemnity Demand."

allegations or denials." *St. Pierre v. Dyer*, 208 F.3d 394, 404 (2d Cir. 2000) (citation and quotation marks omitted).[13]

B. Applicable Insurance Law Standards

1. Insurance Policy Construction

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). Under New York law,[14] insurance contracts must be interpreted "consistent with the reasonable expectations of the average insured." *See*, *e.g.*, *Matter of Viking Pump, Inc.,* 27 N.Y.3d 244, 257 (2016); *Belt Painting Corp. v. TIG Ins. Co.*, 100 N.Y.2s 377, 383 (2003). Undefined terms in an insurance policy are to be given their plan and ordinary meaning. *Matter of Viking Pump*, 27 N.Y.3d at 257-58 ("contracts must be interpreted according to common speech and consistent with the reasonable expectation of the average insured"); *In re Viking Pump, Inc.*, 148 A.3d 633, 660-663 (Del. 2016) (interpreting undefined term "covered under" "according to common speech and consistent with the reasonable expectation of the average insured"). Any ambiguity in the policy language must be resolved against the insurer and in favor of coverage. *See*, *e.g.*, *Cragg v. Allstate Indem. Corp.*, 17 N.Y.3d 118, 122 (2011); *Westview Assocs. v. Guar. Nat'l Ins. Co.*, 95 N.Y.2d 334, 339 (2000). Indeed, any arguably reasonable reading of the policy in favor of the policyholder controls as a matter of law. *See*, *e.g.*, *Nat'l Football League v. Vigilant Ins. Co.*, 824 N.Y.S.2d

[13] *See also Bickerstaff v. Vassar Coll.,* 196 F.3d 435, 452 (2d Cir. 1999) ("Statements that are devoid of any specifics, but replete with conclusions, are insufficient to defeat a properly supported motion for summary judgment."); *see also Scotto v. Almenas*, 143 F.3d 105, 114 (2d Cir. 1998) ("If the evidence presented by the non-moving party is merely colorable, or is not significantly probative, summary judgment may be granted.") (quotation marks, citations, and alterations omitted).

[14] The Policies specifically provide that they are to be governed by New York law. *See* 2016-17 and 2017-18 Policies, Section XI(N).

72, 73, 76 (N.Y. App. Div. 2006) (insured's "plausible interpretation" of exclusion supporting coverage "must be sustained"); *Woods v. Gen. Accident Ins.,* 738 N.Y.S.2d 791, 792 (N.Y. App. Div. 2002) ("'If an ambiguity exists, the *insurer* bears the burden of establishing that the construction it advances is not only reasonable, but also that it is the *only* fair construction.'") (citation omitted) (emphasis added).

These principles are applied rigorously in the context of policy exclusions, which must be strictly and narrowly construed. *See, e.g.*, *Cragg,* 17 N.Y.3d at 122 (exclusions to be given "strict and narrow construction") (citation omitted); *Westview*, 95 N.Y.2d at 339; *Seaboard Surety 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, in order 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*, 100 N.Y.2d at 383 (citation omitted).

2. Duty to Defend Standard

An insurance company's duty to defend is broader than its duty to indemnify, and arises whenever a complaint suggests "a reasonable possibility of coverage" or "contains any facts or allegations which bring the claim even potentially within the protection purchased." *Regal Constr. Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA,* 15 N.Y.3d 34, 37 (2010) (citation and quotation marks omitted); *see also Auto. Ins. Co. of Hartford v. Cook*, 7 N.Y.3d 131, 136-38 (2006). An insurer with a duty to defend must provide or pay for its insured's defense unless it can "'cast that pleading solely and entirely within the policy exclusions.'" *Seaboard*, 64 N.Y.2d at 312 (citations and emphasis omitted); *see also Spoor-Lasher Co. v. Aetna Cas. & Sur. Co.*, 39 N.Y.2d 875, 876 (1976) (defense may be denied "only if it could be concluded as a matter of law

that there is no possible factual or legal basis on which [the insurer] might eventually be held to be obligated to indemnify [the insured] under any provision.").

Berkley cannot escape its defense obligations even if the Hillsdale Claim includes some allegations that are not covered by the Policy. If any allegation in the complaint is covered, Berkley must defend the entire action. Thus, the court in *McGroarty v. Great American Insurance Co.*, 36 N.Y.2d 358, 365 (N.Y. 1975), required the insurer to defend its policyholder because some of the allegations "should have signaled [the insurer] to the likelihood that [a covered action] might be proved" even though other allegations clearly were not covered. Moreover, an insurer must defend its insured "no matter how groundless, false or baseless the suit might be." *Zurich-Am. Ins. Cos. v. Atl. Mut. Ins. Cos*., 531 N.Y.S.2d 911, 914-16 (1st Dep't 1988) (citation and quotation marks omitted). With respect to Berkley's defense obligation, "[t]he ultimate validity of the underlying complaint's allegations is irrelevant. 'The existence of the duty is dependent upon whether sufficient facts are stated so as to invoke coverage under the policy.'" *Fed. Ins. Co. v. Kozlowski*, 792 N.Y.S.2d 397, 402 (N.Y. 2005) (citation omitted).

II. THE UNDERLYING CLAIMS TRIGGER BERKLEY'S DUTY TO DEFEND AS POTENTIALLY COVERED CLAIMS

Even now, Berkley has never disputed, in its Complaint or otherwise, most of the elements necessary to trigger its duty to defend and pay defense costs. It does not dispute, for example, that Hunt is insured under the Policies. Neither has it ever disputed – nor can it – that the Hillsdale and SFS Claims are suits or written demands for Damages. It does not dispute – again because it cannot – that the Claims arise from the rendering or failure to render Professional Services in the form of construction management or project management of the Stadium renovation. And it does not dispute that the Hillsdale Counterclaim contains allegations of negligent acts, errors or omissions in the performance of those Professional Services.

Rather, other than its erroneous reliance on the Contractual Liability Exclusion discussed below, the opening paragraph of the Berkley Complaint identifies only one basis for its contention that the Underlying Claims do not trigger the Policies: Berkley's claim that "Hunt failed to report the claims during the policy period in which they were first asserted." Complaint, Introduction. That argument fails, because Hunt was not obligated to provide notice during the policy period. Rather, by its plain language, the 2016-17 Policy is triggered by claims first made during the policy period *and noticed to Berkley before the end of the Automatic Extended Reporting Period.* With respect to the 2016-17 Policy, that period did not end until August 14, 2017 at the earliest, meaning that Hunt's July 20, 2017 notice of claim triggered Berkley's duty to defend as a matter of law and undisputed fact.

Because even Berkley did not question that conclusion until filing this action, and because the Complaint does not address the existence, let alone scope and effect, of the automatic extension in any way, Hunt is left to guess at the basis for Berkley's belated assertion that notice during the policy period was required. However, to contend that Hunt was required to give notice "during the policy period," Berkley would have to argue that the *Automatic* Extended Reporting Period is not, in fact, "automatic." Accordingly, Berkley appears to be asserting that the Period is triggered only where the policy is "terminated" by some means other than the expiration of the policy period, or where the coverage is not renewed at the end of the policy period. Not only is that strained reading not the only fair construction of the language in question,[15] it would lead to anomalous and unreasonable forfeitures of coverage.

[15] *See Cragg,* 17 N.Y.3d at 122 ("To the extent that there is any ambiguity in an exclusionary clause, we construe the provision in favor of the insured."); *Woods,* 738 N.Y.S.2d at 792 ("If an ambiguity exists, the insurer bears the burden of establishing that the construction it advances is not only reasonable, but also that it is the only fair construction.").

Absent operation of the Automatic Extended Reporting Provision, the policyholder would effectively be denied coverage for claims first made within, but close to the end of the policy period. By the time the policyholder decided that notice was required, the new policy period would have begun. Coverage would not be available under the new policy because the claim was not "first made" during the new policy period. But neither would it be available under the original policy, as the ability to give timely notice would have ended at or about the time the claim was received. The Automatic Extended Reporting Period bridges that gap.[16] Berkley's unreasonable suggestion to limit artificially the operation of the automatic extension to policy terminations other than by policy expiration would defeat the very purpose of the automatic extension reporting period.

Indeed, courts addressing the operation of the Automatic Extended Reporting Provision consistently recognize that its purpose and intent preclude a narrow construction of the events triggering the automatic extension. For example, in *New England Environmental Technologies v. American Safety Risk Retention Group, Inc.*, 738 F. Supp. 2d 249 (D. Mass. 2010), the policyholder had given notice of a claim made during an initial claims-made policy period a few days into what would have been the automatic extended reporting period. The insurer argued, however, that the period had not been triggered because the policyholder had renewed coverage with the same carrier under a second claims-made policy. The court rejected as illogical the

[16] Unlike the automatic extension, the Optional Extended Reporting Period extends not only the time for giving notice but also the time in which a claim will be deemed to have been "first made" under the policy. It thus differs fundamentally in scope and operation from the Automatic provision. For that reason, any case addressing the effect of the Optional extension, including *Checkrite Ltd. Inc. v. Illinois Nat. Ins. Co.,* 95 F. Supp. 2d 180 (S.D.N.Y. 2000), is inapposite to the analysis of when and whether a specifically-denominated *Automatic* Extended Reporting Period has been triggered. *See,* 95 F. Supp. 2d at 193 (noting that the Extended Reporting Period in the policy at issue was available "where there is nonrenewal or cancellation, and only in exchange for additional premium dollars.").

insurer's argument that because of that renewal, the automatic extension for reporting the claim was not triggered: "The purpose of the extended reporting period is to provide a short period after a policy's expiration within which the insured may report a claim that occurred during the policy period and still obtain coverage." *Id.* at 256.

Similarly, in *Cast Steel Prods, Inc. v. Admiral Ins. Co.*, 348 F.3d 1298 (11th Cir. 2003), the Eleventh Circuit reversed a district court's denial of summary judgment to an insured, and directed that summary judgment be granted determining that the claim at issue was covered where the policyholder gave notice months after the claim was made, but within the automatic reporting extension. Strikingly, the language of the provision at issue in that case was even more restrictive than the one at issue here, as it provided that the automatic reporting extension was triggered in the event of policy "cancellation," not merely its "termination." Nonetheless, the Eleventh Circuit held that even though the policyholder had renewed its coverage with the same insurer, it still had the right to obtain coverage under the first policy by giving notice during the automatic extension: "[I]f choosing to cancel or non-renew provided the insured with an extended reporting period, electing to continue to do business with the same insurer by renewing the claims-made policy certainly 'should not precipitate a trap wherein claims spanning the renewal are denied.'" *Id.* at 1304.

In short, under both the plain language and any reasonable interpretation of the policy language, the Automatic Extended Reporting Period is just that – automatic. Once the policy period ended, terminating the coverage for new claims, Hunt had an additional 60 days in which to trigger Berkley's duties under the 2016-17 Policy by giving notice of the Hillsdale Claim. Because Hunt met that deadline as a matter of law and undisputed fact (and as Berkley itself

apparently recognized for eighteen months before filing this action), the Hillsdale Claim falls within the coverage of the 2016-17 Policy.[17]

III. BERKLEY MAY NOT AVOID ITS DEFENSE OBLIGATIONS BY RELIANCE ON THE CONTRACTUAL LIABILITY EXCLUSION

Because both Underlying Claims triggered the grant of coverage under the Berkley Policies, Berkley is obligated as a matter of law to defend those Claims unless it can establish that they fall solely and exclusively within the scope of a policy exclusion. Under well-established New York law, to avoid the duty to defend on the basis of a policy exclusion, an insurer has the burden to prove that all claims fall entirely and unambiguously within any policy exclusion, which must be interpreted strictly and narrowly in favor of coverage. *See e.g., Seaboard Sur. Co.*, 64 N.Y.2d at312 (insurer may avoid defense obligation by showing that allegations "cast that pleading *solely* and *entirely* within the policy exclusions, and, further, that the allegations, *in toto*, are subject to no other interpretation.") (emphasis in original)*; Syracuse Univ. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA,* 40 Misc.3d 1205(A) (Sup. Ct., Onondaga Cnty., 2013), aff'd, 112 A.D.3d 1379 (4th Dep't 2013)*; Belt Painting Corp. v. TIG Ins. Co.,* 100 N.Y.2d 377, 383 (2003); *Town of Massena v. Healthcare Underwriters Mut. Ins. Co.,* 98 N.Y.2d 435, 444 (2002). Indeed, "[t]o 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." *Westview*, 95 N.Y.2d at 340; *see also Am. Home Assur. Co. v. Port Auth. of N.Y. & N.J.*, 412 N.Y.S.2d 605, 609 (1st Dep't 1979)

[17] For this reason, Berkley's claim that the SFS Claim is related to the Hillsdale Claim is irrelevant to this motion. If the two are a single related claim under the 2016-17 Policy, then the timely notice of the Hillsdale Claim applies to the SFS Claim as well. If not, then even Berkley does not dispute that the SFS Claim on its own was made and noticed during the period of the 2017-18 Policy, triggering that Policy's identical duty to defend.

(carrier must show its interpretation "is the only construction that can fairly be placed" on exclusion at issue); *Nat. Organics, Inc. v. OneBeacon Am. Ins. Co.,* 959 N.Y.S.2d 204, 207 (2d Dep't 2013) ("'When an exclusion clause is relied upon to deny coverage, the burden rests upon the insurance company to demonstrate that the allegations of the complaint can be interpreted only to exclude coverage.'") (citations omitted).

In an attempt to meet its burden, Berkley argues that the Hillsdale Claim falls within the Contractual Liability Exclusion because the only claim asserted against Hunt is for breach of contract. That argument is insufficient as a matter of law and undisputed fact to relieve Berkley of its duty to defend.

New York courts have long held that an insurer's defense obligation is based solely on the underlying complaint's factual allegations, not the legal theories an underlying plaintiff chooses to assert. *See, e.g.*, *Auto. Ins. Co. of Hartford*, 7 N.Y.3d at 136-37; *Ruder & Finn, Inc. v. Seaboard Sur. Co.*, 52 N.Y.2d 663, 667-672 (1981). Moreover, New York law provides that the obligation to defend established by a complaint "is not affected by facts ascertained before suit or developed in the process of litigation or by the ultimate outcome of the suit." *See also Auto. Ins. Co. of Hartford*, 7 N.Y.3d at 138 (defense costs covered based on negligence allegations in complaint; fact finder's potential finding of intentional conduct was "immaterial" to defense analysis); *Fitzpatrick v. Am. Honda Motor Co.*, 78 N.Y.2d 61, 63 (1991) (defense obligation arises if "pleadings allege a covered occurrence, even though facts outside the four corners of those pleadings indicate that the claim may be meritless or not covered."); *Frontier Insulation Contractors, Inc. v. Merchants Mut. Ins. Co.*, 91 N.Y.2d 169, 175 (1997) (defense obligation "arises whenever the allegations within the four corners of the underlying complaint potentially give rise to a covered claim,").

With respect to the Contractual Liability Exclusion in particular, New York courts have given effect to these standards by holding that the exclusion is inapplicable, even to a claim asserting a breach of contract, where the plaintiff might have asserted that the fact alleged gave rise to non-contractual liabilities. See e.g. *United States Underwriters Ins. Co. v. Falcon Construction Corp.*, 2013 U.S. Dist LEXIS 14817 *18 (S.D.N.Y. Aug. 27, 2003) ("Contractual liability exclusions are inapposite where there is a basis for liability independent of a contractual indemnity provision"); *Modern Scaffold Co. v. Karell Realty Corp.*, 279 N.Y.S.2d 436, 439 (3d Dept. 1967) ("it is possible that the insured will be held responsible on the basis of liability which exists at law and without regard to the express agreement, in which event the [contractual liability] exclusion clause would be inoperative and coverage possible").

Indeed, these black-letter legal parameters for the duty to defend are expressly incorporated in the language of the Contractual Liability Exclusion itself. The savings clause in the Exclusion expressly provides that the exclusion will not apply to liability that could have been asserted even in the absence of a contractual basis.

Such is the case here. The Hillsdale Counterclaim alleges that as the construction manager, Hunt owed a duty to make sure that its project oversight and its provision of information to Hillsdale were in accordance with industry standards, and that it failed in that duty. Such allegations, even though false, could support a claim under Florida law even if Hillsdale and Hunt were not in privity of contract. *See, e.g. NCM of Collier Co., Inc. v. Durkin Grp., LLC,* 2012 U.S. Dist. LEXIS 87326, at *5-6 (M.D. Fl. June 25, 2012) (setting forth elements of claim by third-party for negligent misrepresentation). Similarly, SFS's allegation that Hillsdale seeks damages from SFS solely as a result of Hunt's negligent acts (which it does not) could have resulted in a claim for common-law indemnification regardless of the existence

of any contractual right to such indemnification asserted by SFS. *See, e.g., Diplomat Props., L.P. v. Tecnoglass, LLC,* 114 So. 3d 357 (Fla. App. 2013).

Moreover, interpreting the Exclusion – as Berkley apparently argues[18] – to apply whenever the professional duties alleged to have been breached were the result of a contractual relationship would render the professional liability coverage illusory, a result prohibited by New York law. *See, e.g., Thomas J. Lipton, Inc. v. Liberty Mut. Ins. Co*., 34 N.Y. 2d 356, 357 (1974) (rejecting interpretation that would exclude "largest foreseeable elements" of damage and render coverage purchased "nearly illusory"); *Cont'l Cas. Co. v. Rapid-Am. Corp*., 581 N.Y.S.2d 669, 673 (1st Dep't 1992) (not allowing "narrow exclusion [to] overwhelm the clear meaning of the coverage provisions"), aff'd, 80 N.Y.2d 640 (1993). All the various definitions of "Professional Services" for which coverage is provided – including construction and project management – necessarily involve a contractual relationship between Hunt and the party for whom it is providing services. *See* 2016-17 Policy, Definition HH. If, as Berkley seems to contend, the very existence of the contract giving rise to those services and professional duties brings a claim for their breach within the scope of the Exclusion, the Policies in fact do not provide coverage for professional liabilities, and their promise to do so is illusory.

Idaho Trust Bank v. BancInsure, Inc., 2014 U.S. Dist. LEXIS 37660 (D. Idaho Mar. 20, 2014) is on point, and precludes the broad reading Berkley would place on the scope of the Exclusion. The policy in that case provided coverage for errors and omissions by the bank/policyholder, including "lending wrongful acts" which, by its very definition included "an

[18] Berkley has failed to give any explanation for its application of the Exclusion beyond the mere fact that the Hillsdale Counterclaim asserts a breach of contract claim, leaving Hunt to speculate as to Berkley's justification for overlooking the specific allegations of professional negligence in that pleading.

actual or alleged agreement by the company to extend credit." *Id.* at *31. Despite that express grant of coverage, the insurer argued that the contractual liability exclusion barred coverage for a claim for breach of a settlement agreement relating to the bank's lending. The court held that applying the contractual liability exclusion to such claims would render the express grant of coverage illusory, and thus held the exclusion did not apply:

> To the extent that BancInsure contends the contractual liability exclusion would exclude these types of claims, the Court rules that such an exclusion would not be enforceable as it would eliminate coverage for something otherwise clearly covered under the Policy. An insurer cannot seek to apply policy limitations and exclusions in a way to defeat the precise purpose for which the insurance is purchased. While the Court does not find the contractual liability exclusion to render the Policy completely illusory, the Court will not enforce it against Idaho Trust on the particular facts in this case. Again, the Court emphasizes that an insurer cannot in one section provide coverage for acts that include "an actual or alleged agreement" and then, in another section, attempt to exclude coverage for claims "based upon [or] arising out of" "the failure to perform any contract or agreement[.]"

Id. at *34-35 (citations omitted).

In short, even if Berkley could establish that the allegations of the Underlying Claims fell solely and exclusively within the scope of the Contractual Liability Exclusion – which it cannot – New York law would preclude the application of that Exclusion here, as doing so would render the promised professional services liability coverage illusory. Accordingly, Hunt is entitled to summary judgment holding that Hillsdale is obligated to defend and pay for the defense of the Underlying Claims.

CONCLUSION

For the reasons set forth above, Plaintiff respectfully requests that this Court grant Partial Summary Judgment on its Second Cause of Action and declare that Berkley has an immediate

obligation to defend Hunt from and against the Hillsdale Claim and the SFS Claim, and that Berkley is obligated to reimburse Hunt for defense costs incurred prior to entry of this Order.

Dated: August 29, 2019.

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