Orient Overseas Assoc. v SL Ins. Am., Inc.
2016 NY Slip Op 31009(U)
May 11, 2016
Supreme Court, New York County
Docket Number: 652292/2013
Judge: Shirley Werner Kornreich

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH **PART** 54

Justice

Index Number : 652292/2013
ORIENT OVERSEAS ASSOCIATES
vs.
XL INSURANCE AMERICA, INC.
SEQUENCE NUMBER : 017
SUMMARY JUDGMENT

INDEX NO. ______
MOTION DATE 4/18/16
MOTION SEQ. NO. ______

The following papers, numbered 1 to ____ , were read on this motion to/for ______

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ______ | **No(s).** 442-478, 502

Answering Affidavits — Exhibits ______ | **No(s).** 506-507, 549

Replying Affidavits ______ | **No(s).** 544

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION AND ORDER

Scanned to New York EF on 5/11

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE ______
FOR THE FOLLOWING REASON(S): ______

Dated: 5/11/16

______ J.S.C.
SHIRLEY WERNER KORNREICH
J.S.C.

1. **CHECK ONE:** ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. **CHECK AS APPROPRIATE: MOTION IS:** ☐ GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER
3. **CHECK IF APPROPRIATE:** ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE
☒ Cross Motion

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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ORIENT OVERSEAS ASSOCIATES,

Plaintiff,

-against-

XL INSURANCE AMERICA, INC., ACE AMERICAN INSURANCE COMPANY, ARCH INSURANCE COMPANY, WESTPORT INSURANCE CORPORATION, and CUSHMAN & WAKEFIELD, INC.,

Defendants.

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Index No.: 652292/2013

DECISION & ORDER

SHIRLEY WERNER KORNREICH, J.:

Motion sequence numbers 017 and 018 are consolidated for disposition.

This is an insurance action arising from damage to plaintiff's building during Superstorm Sandy. Defendant Westport Insurance Corporation (Westport) moves for summary judgment against plaintiff Orient Overseas Associates (Orient). Seq. 017. Defendants XL Insurance America, Inc. (XL), ACE American Insurance Company (ACE), and Arch Insurance Company (Arch) jointly move for summary judgment against Orient. Seq. 018. Orient opposes both motions, and separately cross-moves for summary judgment against Westport, XL, ACE, and Arch (collectively, the Carriers).[1] For the reasons that follow, the Carriers' motions and Orient's cross-motions are granted in part and denied in part.

I. Background & Summary of Issues

The court assumes familiarity with the extensive history of this action, including the prior decisions of this court and the Appellate Division. The court limits its discussion to the facts and

[1] The Carriers are the only remaining defendants. The claims against defendant Cushman & Wakefield, Inc. were dismissed by order dated October 29, 2015. *See* Dkt. 536. References to "Dkt." followed by a number refer to documents filed in this action in the New York State Courts Electronic Filing (NYSCEF) system.

issues pertinent to the instant motions. Unless otherwise indicated, the following facts are undisputed.

These motions and the issues remaining concern the amounts the Carriers must pay for property damage to Orient's building, located at 88 Pine Street in lower Manhattan (88 Pine). The building was damaged by a storm surge during Superstorm Sandy. It was insured in the name of its managing agent, Cushman & Wakefield, Inc. (Cushman), who assigned its coverage rights to Orient on December 18, 2012.[2] Each of the named defendant-insurers issued a separate policy covering a fixed percentage of the coverage.[3]

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[2] Orient had participated in Cushman's "Epic Program", in which the risks of multiple properties managed by Cushman were pooled. Orient does not dispute that its rights as an assignee are no greater than Cushman's rights under the Policies. *See Am. States Ins. Co. v Huff*, 119 AD3d 478, 479 (1st Dept 2014). As discussed herein, the Policies set limits on the amounts recoverable by Cushman if multiple covered properties suffered a loss during the same coverage year.

[3] It is undisputed that 88 Pine suffered losses in excess of $5 million. *See* Dkt. 436 (Joint Statement of Undisputed Facts) at 2. In December 2012, ACE paid Oreint $714,500. In January 2013, XL paid Orient $2,143,000, and Arch paid Orient $357,000. In October 2013, Westport paid Orient $892,500 pursuant to a stipulation discussed further herein. In total, the Carriers have paid $4,107,000 to Orient.

It is further undisputed that all of Orient's claimed losses were caused by flood, defined by the policies to include storm surge. The policies cover flood losses subject to applicable sublimits, discussed herein. There also is no question of fact that storm surge was the cause of Orient's losses. The parties do not dispute the meaning of storm surge – an abnormal overflow of water onto normally dry land, relative to normal tidal conditions. *See Nat'l R.R. Passenger Corp. v Arch Specialty Ins. Co.*, 124 FSupp3d 264, 269-70 (SDNY 2015); *see also Lord & Taylor LLC v Zim Integrated Shipping Servs., Ltd.*, 108 FSupp3d 197, 202 (SDNY 2015) ("A storm surge is [a]n abnormal rise in sea level accompanying a hurricane or other intense storm, and whose height is the difference between the observed level of the sea surface and the level that would have occurred in the absence of the cyclone. ... The severity of a storm surge also depends on the height of the tides when a storm arrives.") (citations and quotation marks omitted). It also is undisputed that the storm surge caused by Superstorm Sandy was abnormal. Orient's position that high tide should be considered a separate cause of loss is rejected by the court for the reasons set forth in the Carriers' briefs. *See* Dkt. 544 at 7-8. To subtract the portion of the water attributable to the tide and say that the rest, i.e., the storm surge, would be insufficient to cause flooding, is not a tenable position. All storm surge water that makes its way onto normally dry land, by definition, will include tide water. The water is fungible. The very occurrence of

Three points of contention are raised herein. *First*, the parties dispute whether the separate policies issued by the Carriers (collectively, the Policies) are part of a quota share program (the Quota Share Issue).[4] While the parties agree that the Policies function as a quota share program with respect to coverage in excess of the applicable deductibles, Orient contends that the Policies' sublimits are separate and not shared by the Carriers. Each of the Policies has a $5 million flood sublimit. As discussed below, the Carriers are entitled to summary judgment on this issue because their collective flood sublimit coverage obligation is limited to their respective pro rata shares of a single $5 million flood sublimit.

Second, the parties dispute whether Orient's damages are actually capped at the Policies' $5 million flood sublimit or whether that sublimt may be "stacked" with other sublimits (the Stacking Issue). As further discussed below, the applicable language in the Policies is not meaningfully different than comparable language in *El-Ad 250 W. LLC v Zurich Am. Ins. Co.*, 44 Misc3d 633 (Sup Ct, NY County 2014) (*El-Ad I*), *aff'd* 130 AD3d 459 (1st Dept 2015) (*El-Ad II*). Hence, the Carriers' are entitled to summary judgment on their liability being capped at the $5 million flood sublimit, which, as noted above, is a single sublimit to be shared and to which the Carriers must make their applicable ratable contribution.

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flooding due to water in excess of what would be expected during normal tidal activity proves that storm surge is the proximate cause of the flood.

[4] The concept of a quota share program is a reinsurance concept, and it functions similarly with the subject policies. In the reinsurance context, "[t]he participating reinsurers in 'quota share' reinsurance treaties agree in each treaty year to accept a specified percentage of the cedent's covered losses in that year, and to receive in return the same percentage of the premiums paid to the cedent from all the policyholders in the particular 'book' of business." *Gulf Ins. Co. v Transatlantic Reinsurance Co.*, 69 AD3d 71, 74 (1st Dept 2009); *see also Travelers Cas. & Sur. Co. v Certain Underwriters at Lloyd's of London*, 96 NY2d 583, 588 (2001) ("The characteristics of the quota share ... are that a reinsurer takes a given percentage of the risk of each underlying policy and also receives a certain percentage of the premiums charged, all within stated upper limits of liability.").

Third, the parties dispute whether the sublimits applicable to 88 Pine must be shared with another nearby building, located at 125 Broad Street (125 Broad), which was part of the same pool in the subject quota share program (the Sharing Issue). As discussed below, the parties entered into a stipulation in an interpleader action commenced by Westport, pursuant to which Westport partially paid its share of its $5 million storm surge sublimit by splitting its ratable share equally between the owners of 88 Pine and 125 Broad. The parties dispute whether such payments were a stipulated resolution to the question of whether Westport's sublimits must be shared between the two buildings. As discussed below, while the court finds that the stipulation did not resolve the underlying question, the resolution of the Sharing Issue is different with respect to Westport and the other three Carriers because of Westport's unique storm surge sublimit. Westport is granted summary judgment against Orient on this issue.[5]

II. Relevant Policy Provisions & Underwriting History

The parties involved in the procurement of the Policies – Cushman (the insured), Willis (the broker), and the Carriers – agree that the Policies are part of a classic quota share program. Indeed, in the very first paragraph of the court's first decision in this action, Justice Schweitzer referred to the Policies as a "quota share insurance program." *See* Dkt. 96. Orient now argues that the quota share nature of the Policies does not affect the Policies' $5 million flood sublimits.

[5] The court has reviewed the extensive record on this motion and is mindful of the sentiments of John Liu, the President of Orient's general partner, who expressed frustration with the notion that properties in the same flood insurance pool can be subject to a single, shared flood sublimit, when they are located so close to each other in the same flood risk zone. *See* Dkt. 448 at 143-45. That said, as this court recently discussed with respect to Orient's claims again Cushman, Orient procured what it now believes to an undesirable level of flood insurance coverage because it failed to conduct the most basic of inquiries about its coverage. *See* Dkt. 536. For more than a decade, Orient never reviewed the actual insurance policies issued by the Carriers, nor did it inquire about the other members of its coverage pool. Had it done so, it would have been aware of the very coverage limitations it now complains of. Additional coverage may or may not have come at the same price.

Orient maintains that the express terms of the Policies clearly provide for multiple flood sublimits, as opposed to a single sublimit to be shared and ratably contributed to by the Carriers in accordance with their agreed-upon quota share allocation. However, Orient – unlike Cushman, Willis, and the Carriers – did not take part in negotiating the Policies. Orient, therefore, has no basis to opine on the contacting parties' intent.

As set forth below, the relevant, unambiguous terms of the Policies support the Carriers' position. Moreover, even if the Policies could be considered ambiguous, the parol evidence unequivocally demonstrates the parties' intent to have a single, shared flood sublimit. Additionally, to the extent the evidence is not perfectly clear, finding there to be a single sublimit is the only commercially reasonable way to interpret the Policies.

Prior to the subject quota share program going into effect in 2011, Orient's coverage was provided by a single carrier, FM Global. While Orient did not review the actual Policies, Orient did review an annual summary of its coverage provided to it by Cushman. The policy period of May 1, 2010 to May 1, 2011 was the last coverage year prior to Orient's participation in the subject quota share program. The policy summary for that year, dated April 20, 2010, states that there was one carrier, FM Global. *See* Dkt. 451 at 4. It indicates a $700 million policy limit ***with an annual aggregate flood sublimit of $5 million***.[6] The following "Earthquake/Earth Movement & Flood Limit" terms and conditions also were included:

> The pooled Earthquake/Earth Movement and Flood limits are per occurrence, <u>**aggregated annually**</u> and shared by all participants in the program. In the event

[6] With respect to its claims against Cushman, Orient claimed it told Cushman to keep its coverage constant. If that was the instruction, and Orient knew it had a single $5 million flood sublimit in 2010 (putting aside the question of whether debris removal was subject to that sublimit), then it cannot genuinely complain when the subject quota share program resulted in the same single $5 million sublimit. This is particularly true since, under the subject quota share program, Orient's premium went down. Had it stayed with FM Global, its premium was set to increase, but the single $5 million flood sublimit would have remained.

> of an Earthquake/Earth Movement or Flood loss that exceeds the available limits, coverage will be distributed proportionately according to the property owners reported insurable replacement value of your property and the premium paid as a percentage of the total. The additional premium associated with reinstating or repurchasing the limits used (if available) will be distributed among all participants in the program.

See id. at 6 (bold and underline in original).

Cushman switched to the subject quota share program for the May 1, 2011 to May 1, 2012 coverage year. The pre-agreement correspondence and policy summary leave no doubt that this was a true quota share program. For instance, a March 4, 2011 email sent by the broker, Willis, stated that "we are looking to put together a $700 [million] quota share program" with the FM policy form. *See* Dkt. 452 at 2. After agreeing to participate in that program for the 2011-2012 coverage year, Orient was sent a proposed renewal policy summary for the subject coverage year (May 1, 2012 to May 1, 2013),[7] dated April 26, 2011. *See* Dkt. 461 at 4. On the first page, the policy limit of $700 million is bolded and written in a larger font. Expressly disclosed are the Carriers and the percentage of their contribution of coverage. The $5 million annual aggregate flood sublimit – the very same disclosed sublimit from the prior years and the same sublimit as in the 2010-2011 FM Global policy – also is disclosed. *See id.* at 5. Likewise, the same "Earthquake/Earth Movement & Flood Limit" terms and conditions that was contained in the 2010-2011 FM Global policy summary, quoted above, is contained in the 2012-2013 policy summary. *See id.* at 7. Luther Hsu, the Vice President of Orient's general partner, testified at his deposition that he was told "the flood coverage was only [$]5 million," and blamed the broker, Willis, for not suggesting that Orient procure additional coverage. *See* Dkt. 449 at 180-81.

[7] Superstorm Sandy occurred on October 29, 2012.

It is undisputed that the Carriers' respective quota share allocation for the subject 2012-2013 coverage year is as follows: XL (42.857%), Westport (35.714%), ACE (14.286%), and Arch (7.143%). Each Carrier issued a separate policy. *See* Dkt. 437 (ACE Policy); Dkt. 438 (Arch Policy); Dkt. 439 (XL Policy); Dkt. 440 (Westport Policy). The Policies are extensive but, as discussed at oral argument, only certain portions of the Policies are relevant.

The Declarations in the ACE and Arch Policies provide the Limits of Insurance. *See* Dkt. 437 at 1 ("$100,000,000 part of $700,000,000", i.e., ~ 14.286%); Dkt. 438 at 4 ("$50,000,000 Part of $700,000,000", i.e., ~ 7.143%). XL's and Westport's limits are set forth in section 7 of their policies. *See* Dkt. 439 at 15 ("$300,000,000 (that being 42.857%) part of the Policy limit of liability of [$]700,000,000"); Dkt. 440 at 14 ("$250,000,000 (that being 35.714%) part of $700,000,000"). Section 12 of the Policies also makes clear that the Carriers are only liable for covered losses in excess of the deductible and "only for [their] share of that greater amount." *See* Dkt. 437 at 11; Dkt. 438 at 36; Dkt. 439 at 19; Dkt. 440 at 19.

Section 7 of each of the Policies, which, as noted, were modeled on the prior FM Global policy, sets forth the Policies' limits of liability.[8] They each begin by stating that the Carriers' "maximum limit of liability in an Occurrence regardless of the number of Locations or coverages involved, including any insured TIME ELEMENT loss, will not exceed the Policy limit of liability [specific amount omitted; see above] subject to the following provisions." *See* Dkt. 437 at 8; Dkt. 438 at 33; Dkt. 439 at 15; Dkt. 440 at 14.[9] Section 7(A) states that "limits of liability stated below or elsewhere in this Policy are part of, and not in addition to, the Policy limit of liability." *See id.* Section 7(B) then provides:

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[8] As noted herein, the limits found in section 7, which were taken from the FM Global policy, like many other portions of the Policies, are sometimes modified by a policy endorsement.

[9] All quoted capitalization in this decision is contained in the policies.

> limits of liability in an Occurrence apply to the **total loss or damage at all Locations and for all coverages involved**, including any insured TIME ELEMENT loss, subject to the following provisions:
>
> 1) when a limit of liability applies in the Aggregate During Any Policy Year, the Company's maximum amount payable will not exceed such limit of liability during any policy year **regardless of the number of Locations, coverages or Occurrences involved**.
>
> 2) when a limit of liability applies to a Location or other specified property, such limit of liability will be the maximum amount payable for all loss or damage at all Locations arising from physical[10] loss or damage at such Location or to such other specified property.

See Dkt. 437 at 8-9; Dkt. 438 at 33-34; Dkt. 439 at 15-16; Dkt. 440 at 14 (emphasis added).

Section 7(C) further provides:

> Should an Occurrence result in liability payable under more than one policy issued to the Named Insured by the Company, or its Representative Companies, the maximum amount payable in the aggregate under all such policies will be the applicable limit(s) of liability indicated in this Policy regardless of the number of Locations, coverages or perils involved.

See Dkt. 437 at 9; Dkt. 438 at 34; Dkt. 439 at 16; Dkt. 440 at 14.

The Policies then set forth their various limits and sublimits, which are further modified by their respective endorsements. The ACE, Arch, and XL policies contain a virtually identical $100 million annual aggregate flood limit, with separate $5 million flood sublimits applicable to 88 Pine and 125 Broad; 125 Broad is listed in subpart b [*see, e.g.*, Dkt. 437 at 10], while 88 Pine is one of the locations covered in subpart a since it is listed in Appendix B. *See id.* at 67. The Westport Policy also contains a $100 million flood limit, and expressly provides (albeit

[10] While the *El-Ad* issue is discussed much further below, it bears mentioning at this point that the "physical" loss qualification is found only in subsection 2, and not in the preamble to section 7(B) or in subsection 1. The omission of such limitation outside of subsection 2, along with the other relevant policy provisions and endorsements discussed below, places the Policies within the rule set forth in *El-Ad*. Thus, while subsection 2, on its own, would not suffice to invoke the *El-Ad* rule, the Polices' other rules prohibiting sublimit stacking, which do not contain a physical loss limitation, demonstrate that Orient's position on the Stacking Issue is wrong.

formatted slightly differently) that 88 Pine and 125 Broad have $5 million flood sublimits. *See* Dkt. 440 at 17, 89. However, the Westport Policy, although like the other policies defines flood to include storm surge, has an additional $5 million storm surge sublimit, which, unlike the flood sublimits, is not separately attributable to the various covered properties. *See id.* at 89. The ACE, Arch, and XL policies do not contain this storm surge sublimit.

III. Legal Standard

A. Summary Judgment

Summary judgment may be granted only when it is clear that no triable issue of fact exists. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 (1986). The burden is upon the moving party to make a *prima facie* showing of entitlement to summary judgment as a matter of law. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); *Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065, 1067 (1979). A failure to make such a *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. *Ayotte v Gervasio*, 81 NY2d 1062, 1063 (1993). If a *prima facie* showing has been made, the burden shifts to the opposing party to produce evidence sufficient to establish the existence of material issues of fact. *Alvarez,* 68 NY2d at 324; *Zuckerman,* 49 NY2d at 562. The papers submitted in support of and in opposition to a summary judgment motion are examined in the light most favorable to the party opposing the motion. *Martin v Briggs*, 235 AD2d 192, 196 (1st Dept 1997). Mere conclusions, unsubstantiated allegations, or expressions of hope are insufficient to defeat a summary judgment motion. *Zuckerman,* 49 NY2d at 562. Upon the completion of the court's examination of all the documents submitted in connection with a summary judgment motion, the motion must be denied if there is any doubt as to the existence of a triable issue of fact. *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

B. Interpretation of Insurance Policies

"An insurance agreement is subject to principles of contract interpretation. '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.''" *Universal Am. Corp. v Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 25 NY3d 675, 680 (2015), quoting *Vigilant Ins. Co. v Bear Stearns Cos.*, 10 NY3d 170, 177 (2008), quoting *White v Continental Cas. Co.*, 9 NY3d 264, 267 (2007); *see Oppenheimer AMT-Free Municipals v ACA Fin. Guar. Corp.*, 110 AD3d 280, 284 (1st Dept 2013) ("policies of insurance [] should be analyzed in accordance with general principles of contract interpretation and insurance law"). "Ambiguity in a contract arises when the contract, read as a whole, fails to disclose its purpose and the parties' intent or where its terms are subject to more than one reasonable interpretation." *Universal*, 25 NY3d at 680 (internal citations omitted; collecting cases). "[I]f the agreement on its face is reasonably susceptible of only one meaning, a court is not free to alter the contract to reflect its personal notions of fairness and equity." *Greenfield v Philles Records, Inc.*, 98 NY2d 562, 569-70 (2002). "Notably, the Court may not find the contract ambiguous merely because the parties present alternative interpretations. The touchstone of New York's ambiguity standard is 'reasonableness.'" *Neopharm Ltd. v Wyeth-Ayerst Int'l LLC*, 2016 WL 1076931, at *3 (SDNY 2016) (internal citations and emphasis omitted), accord *Greenfield*, 98 NY2d at 569-70.

Moreover, "a contract should be 'read as a whole, and every part will be interpreted with reference to the whole; and if possible it will be so interpreted as to give effect to its general purpose.'" *Beal Sav. Bank v Sommer*, 8 NY3d 318, 324-25 (2007), quoting *Westmoreland Coal Co. v Entech, Inc.*, 100 NY2d 352, 358 (2003). Importantly, "a contract should not be interpreted to produce an absurd result, one that is commercially unreasonable, or one that is contrary to the intent of the parties." *Cole v Macklowe*, 99 AD3d 595, 596 (1st Dept 2012), citing *In re Lipper Holdings, LLC*, 1 AD3d 170, 171 (1st Dept 2003) (citations omitted).

IV. Discussion

A. The Quota Share Issue

In arguing that it is entitled to separately recover each of the Policies' $5 million flood sublimits, Orient takes the position that such sublimits, unlike the total coverage of $700 million, are not subject to the quota share nature of the Policies. The Carriers disagree. They point to section 7(C), which addresses the circumstance when "an Occurrence result[s] in liability payable under more than one policy." In such a situation, "the maximum amount payable in the aggregate under all such policies will be the applicable limit(s) of liability [i.e., the $5 million flood sublimit] indicated in this Policy regardless of the number of Locations, coverages or perils involved" (emphasis added). This language appear in all four of the Policies. It, like the rest of the limits of liability, comes from the FM Global Policy. *See* Dkt. 452 at 14-16. The Carriers adopted this language, and according to them, they agreed to split whatever coverage may be owed to Orient between themselves in accordance with their agreed upon quota share.

Orient correctly responds that section 7(C) is not dispositive. These provisions copied from the FM Global policy were not changed when placed in the Carriers' Policies. As a result, the Carriers are each referred to as "the Company", a term previously used to refer to FM Global. *See* Dkt. 452 at 15. Each policy was written as if there was only one carrier, and the term "more than one policy" is qualified by "the Company". Thus, only other policies written by a particular carrier (e.g., ACE) are covered by section 7(C); the section does not apply to the other Carriers (e.g., Arch). Nor are the Policies' "other insurance" clauses dispositive. *See, e.g.*, Dkt. 440 at

76. That Orient was permitted to have additional layers of coverage in excess of the Policies' limits does not affect the limits of its primary insurers.

That being said, the Carriers are correct about the relevance and meaning of the rest of section 7. To understand the intended nature of the quota share program, it is useful to compare section 7 of the FM Global policy with section 7 of the subject Policies. Each section 7 (as modified by the Polices' respective endorsements) can fairly be described as having three parts: (1) an introductory section, which sets forth the insured's maximum amount of coverage from the carrier; (2) rules about how the limits and sublimits function (e.g., "when a limit of liability applies in the Aggregate During Any Policy Year, the Company's maximum amount payable will not exceed such limit of liability during any policy year regardless of the number of Locations, coverages or Occurrences involved"); and (3) a list of the various limits and sublimits.[11] In the FM Global policy, the introductory section states the maximum amount of coverage is $700 million. The subject Policies also indicate that Orient's maximum amount of coverage is $700 million, but make clear that each of the Carriers are only responsible for the amount (the percentage) listed in their respectively policies. Clearly, coverage was to be split between four carriers instead of one.

The second and third parts of the subject Policies' section 7 are essentially the same as in the FM Global policy (the notable exception being Westport's storm surge sublimit). The Carriers take the position that the amount of Orient's available coverage did not increase with the Policies; all that changed were the carriers, who would collectively fund the same amount of

[11] Orient's nomenclature quibbles regarding the words "limit" and "sublimit" are of no moment. The limit amount is listed in the left column and the applicable situation when the limit applies is set forth in the right column. In the case of flood, the right column contains additional limits (i.e., what the Carriers and court refers to as sublimits), which function as lower limits for flood applicable to certain locations, such as 88 Pine and 125 Broad.

coverage as FM Global. Orient disagrees, contending that by having four carriers, Orient actually gained the right to recover cumulative sublimits, thereby gaining more total flood coverage than provided by FM Global.

Orient's position neither accords with the Policies' language or makes commercial sense. For instance, the Multiple Policy Endorsement in the Arch Policy provides:

> The total amount to be indemnified, for any loss occurrence, under this policy and any other policy of insurance or reinsurance, or certificate of insurance or reinsurance issued by Arch Insurance Company (the Company) or any affiliated company, or any other insurer on behalf of the Company, shall not exceed **the limit(s) or sublimit(s) applicable to such loss, subject to the pro-rata participation of the company**, all as stated in this policy.

See Dkt. 438 at 25 (emphasis added). This endorsement cannot be reconciled with Orient's position. The words "subject to the pro-rata participation of the company" qualifies the applicable sublimits – such as the flood sublimit (e.g., Arch, whose share is 7.143%, would owe approximately $357,000 of the $5 million flood sublimit).

This makes commercial sense. Generally, neither the insured nor the participating carriers will know how many carriers ultimately will subscribe to a quota share program and, in fact, the nominal number of carriers should not matter. The total premium paid by the insured is split on a percentage basis among the carriers in exchange for bearing responsibility for an approximately[12] proportional percentage of the covered risk. The scope of coverage and applicable limits and sublimits are supposed to be similar to ensure that the Carriers are indeed covering the same risk. The number of carriers, therefore, should be irrelevant to the total amount of available coverage. It would not make commercial sense if the result of adding an extra carrier – even one, such as Arch, who only agreed to bear a small percentage

[12] The Carriers explain that the premium distribution and quota share percentage slightly differ because the exact premium amounts are separately negotiated by the Carriers.

(approximately 7%) of the overall risk – is that the insured gets the benefit of an extra, non-cumulative, entire sublimit (here, another $5 million), while only paying a premium to that extra carrier based on the carrier's quota share percentage (i.e., approximately 7%). It makes no economic sense for the premium paid to bear no relation to the marginal amount of coverage being provided by the carrier. Only an economically irrational carrier would agree to such terms.

But that is exactly what Orient is claiming in this case. According to Orient, if there were only three carriers, and if Orient suffered $100 million of covered flood losses after accounting for applicable deductibles, Orient would recover $15 million because it would be entitled to separately collect the $5 million flood sublimit from each of the three carriers. But if there were, as here, four carriers, Orient would be entitled to recover $20 million (i.e., $5 million * 4). By Orient's logic, if there were 10 carriers, Orient would be entitled to recover $50 million. Each of the carriers would have identical sublimits even though their percentage coverage obligations and premiums are different, based on the percentage of the risk each agreed to assume.[13]

A review of the Policies' other sublimits confirms the economic absurdity of Orient's view. For example, Arch's liability to Orient is capped at $50 million, representing 7.143% of Orient's maximum possible coverage of the $700 million. Yet, the Arch Policy, like the other three policies, contains limits of liability *in excess of the maximum amount recoverable under the Arch Policy*. *See* Dkt. 438 at 34 (listing $100 million limits, such as errors and omissions, debris removal, and increased costs of construction). This seems nonsensical. Many of the limits and sublimits cannot actually represent the actual amount possibly owed by Arch because many of

[13] Under Orient's view, there is an unbelievable arbitrage opportunity in the quota share market since, without having to pay a higher premium, the insured could procure substantial additional coverage for free by maximizing the nominal number of participating carriers. The court does not believe the insurance market, which is populated by sophisticated companies like the Carriers in this action, would allow for such an arbitrage opportunity to exist.

those amounts exceeds Arch's maximum policy limit. The very concept of a sublimit is to cap a carrier's exposure at an amount below the policy limit if a particular type of covered peril caused the loss.

As the Carriers explain here, and Orient does not dispute, the point of the subject quota share program was to take the same overall scope of coverage that was insured by a single carrier (FM Global) and spread the risk across multiple carriers in order to lower Orient's annual premium. All of the parties that actually negotiated the Policies – Cushman, Willis, and the Carriers – claim they never intended the subject quota share program to provide more flood insurance coverage by having four carriers contribute to the program. Orient has not submitted any evidence to the contrary. That many of the Policies' sublimits exceed Arch's limit of coverage (and equal ACE's $100 million total coverage) exemplifies this fact.

The quotations for the Policies provided by the Carriers also make clear that the sublimits are subject to the quota share. *See, e.g.*, Dkt. 460 at 5. For example, Westport's quotation states that "Liability for all loss or damage arising out of one Occurrence, or in the annual aggregate … shall not exceed the **Insurer's Participation** shown above, of the stated Policy Limit *and Sublimits* of liability." (bold in original; underline and italics added for emphasis). Here, Westport is stating that it is only participating in a portion of the Policies' sublimits. Similarly, the Arch quotation states that the sublimits are "part of" the "100% Program Limit" of $700 million, and that Arch's participation is only 7.1429% of that limit. *See* Dkt. 490 at 2-3. Cushman, the insured, and its broker, Willis, never objected to the terms of the Carriers' quotations and have taken the position that they always understood the sublimits to be shared. Only Orient, the successor in interest to Cushman's rights, disagrees.

The evidence before the court demonstrates that the Policies were intended to and did provide substantially identical coverage to that previously provided by FM Global and that such coverage was to be split according to the agreed upon quota share.[14] The only wrinkle is that the Westport Policy has a separate $5 million storm surge sublimit. Westport avers (and the court takes judicial notice) that there has been litigation in this and other courts (*see, e.g., New Sea Crest, infra*) over whether losses caused by storm surge are subject to flood sublimits and deductibles. Westport claims that it sought to ensure that storm surge losses would not be subject to more coverage than flood losses. However, the subject Policies (including Westport's) are clear that storm surge is a defined type of flood, and, therefore, losses caused by storm surge are treated as if the loss was caused by flood, triggering all of the ensuing implications, such as applicability of the $5 million flood sublimit. Nevertheless, as discussed below, Westport's inclusion of a separate $5 million storm surge sublimit *does* substantively affect Orient's coverage because, while 88 Pine and 125 Broad have separate flood sublimits, they share a single $5 million storm surge sublimit. As further discussed below, since the sublimit stacking proposed by Orient is expressly prohibited by the Policies and since the Westport Policy's storm surge sublimit applies, Orient's recovery from Westport is only half of what it would be had there been no such storm surge sublimit.

That said, Westport's inclusion of a separate storm surge sublimit did not upend the quota share nature of the other Carriers' Polices, the lynchpin of their bargain. If Orient did not want its coverage from Westport to include a storm surge sublimit, Orient could have objected to its inclusion or declined to participate in the Epic Program. Only Orient, Cushman, and Willis were

[14] It should be noted that Orient only reviewed the policy summaries and not the actual Policies. The 2012-2013 policy summary described the flood sublimit as a single $5 million annual aggregate flood sublimit. *See* Dkt. 461 at 5. Orient, therefore, could not have thought it was purchasing separate flood sublimits.

in a position to determine if the Policies had the same sublimits. The other Carriers were not. The Carriers separately negotiated their policies through Willis and did not collaborate. Their intent, along with Willis and Cushman, was to engage in quota sharing and, as explained above, for the sublimits to be shared. The harm of undesirably low sublimits is suffered exclusively by the property owners, such as Orient. They not only have the strongest incentive to review the policies to assess their coverage, but also are in the best position to do so.

Orient never objected to Westport's storm surge sublimit because it did not review the Policies. Cushman and Willis also did not object. Not only is the storm surge sublimit clearly set forth in the Westport Policy, it is expressly disclosed in its annual quotation. *See* Dkt. 460 at 6. To be sure, the 2012-2013 policy summary does not indicate the existence of a storm surge sublimit, that such sublimit is exclusive to the Westport Policy, or that such submit is to be shared with 125 Broad. *See* Dkt. 461 at 5 (only indicating at $5 million flood sublimit). However, that is a grievance Orient may have with Cushman, not the Carriers, who never misrepresented the terms of their Policies to Orient or Cushman.[15] Such grievance, nonetheless, is not actionable for the reasons set forth on multiple occasions by this court. *See, e.g.*, Dkt. 536 at 10 n.11.

In essence, Orient is taking the position that because, unbeknownst to ACE, Arch, and XL, Westport added a separate storm surge sublimit that had to be split by 88 Pine and 125 Broad, the quota share nature of the policy was vitiated. Orient argues that since Westport's policy differs from the other three Policies, the program no longer is subject to quota-sharing. In other words, Orient contends that because Westport added a lower sublimit for its own benefit,

[15] The notion that Westport did so was rejected by Justice Schweitzer and the Appellate Division. *See Orient Overseas Assocs. v XL Ins. Am., Inc.*, 132 AD3d 574, 577-78 (1st Dept 2015) (misrepresentation allegation regarding "applicable sub-limit and deductible" merely repackaged and duplicative breach of contract claim).

Westport unilaterally caused ACE, Arch, and XL to incur millions of extra dollars of liability. ACE, Arch, and XL, however, specifically agreed to be liable for their pro rata share of Orient's coverage, including the sublimits, in exchange for accepting a corresponding pro rata share of the premium paid by Orient. Westport lacks the power to unilaterally alter that bargain. To hold otherwise would be to grant Orient a windfall neither expected nor intended by any of the parties. Accordingly, Westport's storm surge sublimit does not defeat this agreement.

Contrary to Orient's protestations, this holding does not contravene any governing precedent. Orient maintains that a purported quota share program cannot, as a matter of law, be considered a quota share program when one of the Policies has a different term. Orient repeatedly asserts this proposition, but cites no supporting authority. Rather, Orient relies on *Union Carbide Corp. v Affiliated FM Ins. Co.*, 2007 WL 6734305 (Sup Ct, NY County 2007) (Ramos, J.) (*Union Carbide I*), *mod.* 68 AD3d 534 (1st Dept 2009) (*Union Carbide II*), *mod.* 16 NY3d 419 (2011) (*Union Carbide III*). Neither Justice Ramos, the Appellate Division, nor the Court of Appeals made such a holding.

Unlike the subject Policies which provide one layer of primary coverage, the policies in *Union Carbide* were umbrella, excess liability policies issued in successive layers. In *Union Carbide I*, Justice Ramos addressed five of the eight policies, which were part of a quota share program. He explained that "[u]nder quota share coverage, participating carriers share limits of liability and premiums, and agree to the same policy terms, in lieu of issuing multiple, stand-alone policies." The policies at issued in *Union Carbide* are known as "follow form" policies. *Union Carbide* concerned the operation of such policies and explicitly addressed the implications of conflict between the excess policies and the underlying policies.

The issues and holdings in *Union Carbide* are inapplicable to this case. Here, the subject Policies, while modeled on the same FM Global policy, were issued as separate policies for primary coverage. There is no excess policy to look to in the event of conflict. Justice Ramos' decision in *Union Carbide I* contains no analysis suggesting that he would not consider the subject policies to be part of a "true" quota share program. In any event, *Union Carbide II* and *Union Carbide III* modified the decision in *Union Carbide I,* and neither decision contains any meaningful discussion about what it means for policies to generally be considered part of a "true"[16] quota share program. In fact, the expression "quota share" is not even mentioned in *Union Carbide III.* Orient's contention that the *Union Carbide* cases provide a definition of a quota share program incompatible with the subject Policies is wrong.

This court has no occasion to opine, as a general matter, on the degree to which policies in a purported quota share program governing a single layer of primary coverage must be identical. Here, where all applicable terms except the Westport storm surge sublimit are essentially identical, and where both the Policies and the parties' pre-contract discussions evidence a clear intent to enter into a quota share program that calls for shared sublimits, no reasonable finder of fact could conclude that they failed to effectuate such intent.

In sum, the only commercially reasonable way to address the Westport storm surge sublimit issue is to find that it only affects the amount of Westport's pro rata contribution to the flood sublimit. This is addressed more specifically below. Westport's storm surge sublimit does not create additional liability for the other Carriers because they expressly bargained to have

[16] It is not necessarily the case that the outcome here must turn on whether the Polices should be considered part of a "true" quota share program. Rather, where, as here, the parties' intent with respect to the Carriers' coverage obligations and the operation of the sublimits is explicit, such intention carriers the day, no matter the nomenclature used to describe the parties' agreement.

their flood sublimit contribution capped at their applicable pro rata share. For these reasons, summary judgment is granted to the Carriers on the Quota Share Issue.

B. The Stacking Issue

The court now turns to the Stacking Issue: the question of whether the Policies' lower sublimits can be stacked with higher applicable sublimits. *In El-Ad I*, this court addressed whether delay in completion losses that would not have occurred but for the occurrence of a flood are subject to a policy's flood sublimit and deductible where the policy (1) defines flood losses as "all losses or damages arising" during a flood; and (2) provides that the "[t]he maximum amount [the carrier] will pay for loss or damage in any one [occurrence], and/or in the aggregate annually for loss or damage from all [occurrences], shall not exceed" the policy's $5 million flood sublimit if the loss arises during the flood. *See El-Ad I*, 44 Misc3d at 635-38. Lacking precedential New York law, this court examined applicable case law from other jurisdictions. The court agreed with the cases in those jurisdictions, which held that stacking is dependent on the policy's language – that is, whether the policy states that a flood sublimit applies to *all* losses or only to *certain* losses (i.e., property damage) that would not have occurred but for a flood. *See id.* at 638 ("a loss that would not have occurred but for a flood is subject to a $5 million annual aggregate limit, without regard to the type of loss suffered, since the expression 'all losses or damages arising during [a flood]' clearly does not exclude nonphysical losses."). The Appellate Division affirmed, relying on the very same out-of-state case law as persuasive authority, such as *Altru Health Sys. v Am. Protection Ins. Co.*, 238 F3d 961 (8th Cir 2001). *See El-Ad II*, 130 AD3d at 459. Ergo, if a policy provides that all losses caused by flood are subject to a flood sublimit and caps the insured's recovery for all losses that would not have occurred but for the flood at that flood sublimit, the insured may not separately seek to recover a higher amount under a greater limit, such as civil authority, when such loss would not have occurred but for the flood.[17]

That being said, Orient takes the position that the Policies do not contain "all losses or damages" language comparable to the policy in *El-Ad*. The court disagrees. As previously discussed, section 7 of each of the Policies begins by stating that the Carriers' "maximum limit of liability in an Occurrence regardless of the number of Locations or coverages involved, including any insured TIME ELEMENT loss, will not exceed the Policy limit of liability … subject to the following provisions." *See, e.g.*, Dkt. 437 at 8. Section 7(B) then provides

> limits of liability in an Occurrence apply to the **total loss or damage** at all Locations and for all coverages involved, including any insured TIME ELEMENT loss, subject to the following provisions:
>
> 1) when a limit of liability applies in the Aggregate During Any Policy Year, **the Company's maximum amount payable will not exceed such limit of liability during any policy year** regardless of the number of Locations, coverages or Occurrences involved.
>
> 2) when a limit of liability applies to a Location or other specified property, such limit of liability will be the maximum amount payable for all loss or damage at all Locations arising from physical loss or damage at such Location or to such other specified property.

See id. at 8-9 (emphasis added). These provisions mandate the same holding as in *El-Ad*. The expression "total loss or damage" in the prefatory portion of section 7(B) is not meaningfully different than the expression "all losses or damages" in *El-Ad*. As noted earlier, the aggregate sublimit rule set forth in section 7(B)(1) applies to all losses, and unlike the multiple locations rule addressed in section 7(B)(2), contains no "physical loss" limitation language.

[17] As noted earlier, it is undisputed that all of Orient's losses would not have occurred but for the flood caused by Superstorm Sandy. Orient does not allege, for instance, that it suffered damages from wind that had nothing to do with flood. The Carriers concede that if Orient alleged such a non-flood-related loss, further coverage not limited by the flood sublimit may have been available.

In fact, section 7 is not the only portion of the policies that refutes Orient's sublimit stacking position. Section 6 in the main portion of the Policies defines Occurrence as "[t]he sum total of all loss or damage … including any insured TIME ELEMENT loss, arising out of or caused by one discrete event of physical loss or damage." *See* Dkt. 437 at 8. Moreover, the Polices' endorsements speak to the issue. The ACE Policy defines loss occurrence as "the sum of all individual losses directly occasioned by any one disaster, accident or loss or series of disasters, accidents or losses arising out of one event which occurs anywhere within the policy territory", and, with respect to hurricane and water damage, "all individual losses sustained by the Insured occurring during any period of 72 consecutive hours arising out of and directly occasioned by the same event." *See id.* at 88. The other Policies have similar endorsements. *See* Dkt. 438 at 14-15; *see also* Dkt. 439 at 85, 91. Since Civil Authority loss is defined as a type of Time Element loss (*see, e.g.*, Dkt. 437 at 41), according to all of the Policies, it is considered to be part of the total loss in an Occurrence.

Nonetheless, even if Orient's alleged Civil Authority losses arose from a separate Occurrence that did not involve "physical loss or damage", that would not matter. Under section 7(A)(1) and the cited endorsements, if the Civil Authority loss was caused by flood, the flood sublimit applies and caps Orient's recovery. There is no question of fact that Orient's Civil Authority loss would not have occurred had there not been storm surge flooding in lower Manhattan caused by Superstorm Sandy. This means the Civil Authority loss was caused by flood and is subject to the flood sublimit. *See Altru*, 238 F3d at 964.

The notion that sublimit stacking is prohibited is further bolstered by the XL Policy's General Change Endorsement, which provides:

> Insured loss or damage directly caused by or resulting from a Named Storm shall, for all purposes, include but not be limited to any associated physical force (to the

> extent insured under this policy) whether described as wind, hail, lightning, tornado, rain or water (whether driven by wind or not), Flood, tidal wave, wind driven objects or debris.
>
> To the extent Named Storm is Insured, **if the Named Storm involves Insured loss or damage subject to any sublimited coverage or by any sublimited peril (including but not limited to Flood), the maximum amount payable is the sublimit stated for that coverage or peril**. Additionally, when such sublimited coverage or peril is paid, if Named Storm is sublimited, it will also apply in that amount to reduce any remaining Named Storm sublimit. The Named Storm sublimit is the maximum amount payable for all insured loss or damage caused by or resulting from that storm. By entering into this insurance, the parties agree that all such loss or damage was proximately caused by the Named Storm and is subject to that sublimit.

See Dkt. 439 at 85 (emphasis added).

This is an example of the rule set forth in section 7, namely that if one sublimited peril (Named Storm) causes another sublimited peril (Flood), the lower sublimit (here, Flood) applies. This rule is reiterated later in that General Change Endorsement, where it states:

> If more than one limit of liability applies to an Occurrence, those limits are payable cumulatively up to the applicable policy limit; **except, limits of liability stated below for perils (if any; and including by way of illustration and not limitation Earth Movement, Flood or Named Storm) are the maximum amount the Company shall pay under any circumstances for all direct physical loss or damage and any time element loss caused by or resulting from each such peril, per Occurrence subject to any applicable annual aggregates.** If one such peril ('initial peril') involves direct physical loss or damage and any time element loss subject to any sublimited coverage or by any other sublimited peril (including by way of illustration and not limitation, Flood arising from or related to Named Storm), the maximum amount payable for that resulting coverage or peril is its respective limit of liability which, when paid, also applies in that amount to reduce the remaining limit of liability for the 'initial peril'. The Insured and the Company agree that all such direct physical loss or damage and any time element was proximately caused by the 'initial peril' and is subject to that limit of liability.

See id. at 88.

In light of the clear policy language set forth above, the court will not compare such language to different policy language in the cases cited by the parties.[18] Under the applicable and governing rule set forth in *El-Ad*, Orient's coverage is capped by the Policies' $5 million flood sublimit because all of its alleged losses were caused by storm surge, a defined type of flood. Additional recovery for losses caused by Named Storm or Civil Authority is expressly prohibited by the Policies. Summary judgment on the Stacking Issue is granted to the Carriers.

C. The Sharing Issue

The ACE, Arch, and XL Polices contain $5 million flood sublimits separately applicable to 88 Pine and 125 Broad. Generally, as discussed above, once a sublimit applies, it functions as an annual aggregate sublimit regardless of the number of occurrences or locations affected. Yet, while the Policies have $100 million annual aggregate flood limits, they do not, as they could have, provide for a single $5 million annual aggregate flood sublimit collectively applicable to 88 Pine and 125 Broad. Instead, the Polices provide for *separate* $5 million sublimits for each property. *See* Dkt. 437 at 10. If aggregation of 88 Pine's and 125 Broad's flood sublimits was intended, each property would not have been given a separately listed sublimit. Any other

[18] That said, the court in *New Sea Crest Health Care Ctr., LLC v Lexington Ins. Co.*, 2014 WL 2879839 (EDNY 2014), another case involving Superstorm Sandy, made three pertinent observations worth mentioning. First, in *New Sea Crest*, as here, the court held that losses caused by the peril of storm surge are subject to the policy's flood sublimit. *See id.* at *3-4. Second, the *New Sea Crest* court noted the disputes over whether storm surge and flood are separate perils that were litigated after Hurricane Katrina. *See id.* at *3. Such historical disputes may help explain why the Westport Policy included a separate storm surge sublimit out of an abundance of caution. Third, as here, the *New Sea Crest* court held that the insured "may be entitled to recover beyond the flood sublimit for pure non-flood losses ... [but] these potential losses are not at issue in this litigation because plaintiffs were only denied coverage for flood loss beyond the flood sublimit." *See id.* at *4. It also should be noted that the Delaware case Orient provided to the court before oral argument, *Almah LLC v Lexington Ins. Co.*, 2016 WL 369576 (Del Super Jan. 27, 2016), not only fails to support Orient's position, but actually stands for the uncontroversial proposition that time element losses can be subject to lower sublimits, such as a flood sublimit. *See id.* at *6.

interpretation would render these separately listed sublimits to be surplusage. *See In re Viking Pump, Inc.*, 2016 WL 1735790, 2016 NY Slip Op 03413, at *8 (Ct App May 3, 2016), citing *Westview Assocs. v Guar. Nat'l Ins. Co.*, 95 NY2d 334, 339 (2000) (courts must avoid interpreting provisions in insurance policies to be surplusage).

Further, the Policies contain other indications that 88 Pine and 125 Broad are separately entitled to collect the full $5 million flood sublimit. For example, the XL General Change Declaration provides that there is $5 million flood sublimit for locations included in Appendix B (which includes 88 Pine), "except 125 Broad Street." *See* Dkt. 439 at 88. The court therefore holds, with respect to the ACE, Arch, and XL Policies, that the flood sublimits for 88 Pine and 125 Broad are separate.

That said, the issue is more complicated with the Westport Policy which, as noted, contains a separate, stand-alone $5 million storm surge sublimit. *See* Dkt. 440 at 89. Unlike the flood sublimits, the storm surge sublimit is not broken down by property. Under the Policy's aggregate sublimit rule, the Westport Policy's storm surge sublimit would limit 88 Pine and 125 Broad to a collective pro rata share of Westport's contribution: 35.714% of $5 million, $1,785,700.

The parties contemplated this possibility early on in this litigation. After Westport filed an interpleader action on September 4, 2013 (*see* Dkt. 37), the parties executed an Insurance Proceeds Sharing Agreement dated October 17, 2013 (the Sharing Agreement). *See* Dkt. 477. The Sharing Agreement memorialized the parties' disputes at issue in this action with numerous whereas clauses, the latter of which provides:

> **WHEREAS**, ORIENT, CUSHMAN, and THE 125 BROAD CONDOMINIUM desire by this Agreement to resolve any potential disputes concerning the manner in which such sublimits will be shared between ORIENT and THE 125 BROAD

CONDOMINIUM for purposes of coverage from Westport on account of LOSS DUE TO SUPERSTORM SANDY;

See id. at 3 (bold and capitalization in original).

The parties agreed that:

(1) the Parties adopt as part of this Agreement each of the recitals appearing above in the WHEREAS clauses, and agree that such recitals shall be binding upon the Parties by way of contract and not merely by way of recital or inducement;

(2) if the flood sublimit of subparagraph (a) of Endorsement 4 of the Policy dealing with properties located in Zone A is held to be an aggregate sublimit, and not a sublimit which applies on a per property, per occurrence basis, then for purposes of LOSS DUE TO SUPERSTORM SANDY which is subject to that sublimit, ORIENT and THE 125 BROAD CONDOMINIUM shall each be entitled to and shall share one half of that sublimit;

(3) if the surge sublimit of subparagraph (d) of Endorsement 4 of the Policy is held to be an aggregate sublimit, and not a sublimit which applies on a per property, per occurrence bases, then for purposes of LOSS DUE TO SUPERSTORM SANDY which is subject to that sublimit, ORIENT and THE 125 BROAD CONDOMINIUM shall each be entitled and shall share one half of that sublimit;

. . .

See id. at 3-4 (capitalization in original).

The parties, therefore, agreed that if the Westport Policy's flood and storm surge sublimits are held to be aggregate limits equally applicable to 88 Pine and 125 Broad, then the owners of 88 Pine and 125 Broad would split those sublimits. The parties then filed a stipulation for the withdrawal of the interpleader claim to permit the money Westport deposited with the court ($1,785,700) to be released and divided evenly (i.e., $892,850) between 88 Pine and 125 Broad. *See* Dkt. 441. Neither the Sharing Agreement nor the stipulation purports to settle the parties' substantive disputes over the Sharing Issue. The court decides those disputes now and grants summary judgment to Westport on this issue.

V. Conclusion

The court has considered Orient's other arguments and finds them unpersuasive. Since all outstanding claims have been resolved in this decision, the parties shall submit a proposed judgment conforming with this decision and the following orders. Accordingly, it is

ORDERED that the parties' respective motions and cross-motions for summary judgment are decided as follows: (1) summary judgment is granted to the Carriers on the Quota Share Issue and the Stacking Issue; (2) summary judgment is granted to Orient on the Sharing Issue to the extent that the Polices' flood sublimit applicable to 88 Pine is separate from the flood sublimit applicable to 125 Broad, and thus ACE, Arch, and XL are liable to Orient for their pro rata share of the full $5 million flood sublimit; (3) summary judgment is granted to Westport on the Sharing Issue to the extent that its storm surge sublimit is shared with 125 Broad, Westport's maximum liability to Orient under the Policy is its pro rata share of the $5 million storm surge sublimit, and Westport has no further liability to Orient by virtue of its payment made under the Sharing Agreement; and (4) the motions and cross-motions are otherwise denied; and it is further

ORDERED that within 14 days of the entry of this order on the NYSCEF system, the Carriers shall file a proposed judgment, and Orient may file a counter-proposed judgment within 28 days of the entry of this order on the NYSCEF system along with a redline of the Carriers' proposal; and it is further

ORDERED a telephone conference will be held on June 28, 2016 at 3:30 pm to resolve any disputes over the proposed judgments, before which the parties must meet and confer to attempt to resolve their disputes.

Dated: May 11, 2016

ENTER:

J.S.C.

SHIRLEY WERNER KORNREICH
J.S.C