American Home Assur. Co. v Port Auth. of N.Y. & N.J.
2017 NY Slip Op 32500(U)
November 28, 2017
Supreme Court, New York County
Docket Number: 651096/2012
Judge: Eileen Bransten

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 3

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AMERICAN HOME ASSURANCE COMPANY,

Plaintiff,

-against-

Index No. 651096/2012
Motion Seq. Nos. 014, 015, 016, 017
Motion Date: 4/28/17

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY, et al.,

Defendants.

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BRANSTEN, J.:

This is an insurance coverage action in which plaintiff American Home Assurance Company (American Home) seeks declaratory relief to determine its rights and obligations under a general liability insurance policy issued to defendant The Port Authority of New York and New Jersey (the Port Authority) in connection with the construction of the original World Trade Center (the WTC), known as the WTC Hudson Tubes Project. Since the 1980s, defendants the Port Authority, Mario & DiBono Plaster Co., Inc. (Mario & DiBono or M&D), Alcoa Inc. (Alcoa), and TTV Realty Holdings, Inc. (Tishman) (collectively, defendants or the Insureds), have been the subject of thousands of asbestos-related personal injury claims allegedly arising from exposure to asbestos at the WTC site during construction of the project (the WTC Asbestos Claims).

For more than 25 years, American Home defended and settled the WTC Asbestos Claims under American Home Policy No. CGB 448 229 (the Policy) on behalf of the Port Authority, Tishman and Alcoa. However, in 2012, after defending and settling the WTC Asbestos Claims

for decades, American Home filed this coverage litigation, contending that there was never coverage under the Policy for the WTC Asbestos Claims. American Home now seeks a declaration that it has no obligation to defend or indemnify defendants under the Policy against asbestos-related personal injury claims.

Motion sequence nos. 014, 015, 016, and 017 are consolidated for disposition. In motion sequence no. 014, American Home moves for partial summary judgment on two independent issues: (1) Timing of Injury: American Home seeks summary judgment that certain claims asserted against Mario & DiBono, Alcoa, Tishman and/or the Port Authority and tendered to American Home are not covered under the Policy because the Insureds cannot meet their burden of proving that claimants' alleged injuries occurred during the period covered under the Policy; and (2) Spray-On Fireproofing/Exhaustion: American Home seeks summary judgment that claims asserted against Mario & DiBono and other defendants premised on alleged exposure to asbestos-containing spray-on fireproofing material sprayed by Mario & DiBono at the WTC arise from a single "occurrence," and that the applicable $10,000,000 limit of liability has been exhausted.

In motion sequence no. 015, the Port Authority moves for summary judgment that: 1) coverage is triggered under the Policy for the WTC Asbestos Claims because the injuries alleged by the underlying claimants arose out of construction of the WTC; 2) coverage would be triggered in any case for the WTC Asbestos Claims because personal injury sufficient to trigger the Policy is alleged and could have occurred during the Policy period; 3) the WTC Asbestos Claims do not constitute a single occurrence under the Policy and New York law; 4) the WTC

Asbestos Claims arising out of "spray-on fireproofing" do not constitute a single occurrence under the Policy and New York law; 5) American Home's duty to defend under the Policy survives exhaustion of the Policy's liability limit; 6) American Home cannot obtain a declaration of no coverage for "Pending WTC Asbestos Claims"; 7) the Policy is not exhausted as a result of the WTC Asbestos Claims; and 8) American Home has waived and is estopped from asserting its trigger and exhaustion defenses.

In motion sequence nos. 016 and 017 both Alcoa and Tishman each separately move for summary judgment in their favor that: 1) coverage is triggered under the Policy for the WTC Asbestos Claims because the injuries alleged by the underlying claimants arose out of construction of the WTC; 2) coverage would be triggered in any case for the WTC Asbestos Claims because personal injury sufficient to trigger the Policy is alleged and could have occurred during the Policy period; 3) the WTC Asbestos claims do not constitute a single occurrence under the Policy and New York law; 4) the WTC Asbestos Claims arising out of "spray-on fireproofing" do not constitute a single occurrence under the Policy and New York law; 5) American Home's duty to defend under the Policy survives exhaustion of the Policy's liability limit; 6) American Home cannot obtain a declaration of no coverage for "Pending WTC Asbestos Claims"; 7) the Policy is not exhausted as a result of the WTC Asbestos Claims; 8) American Home's Recoupment Claim (the third cause of action) is without merit; and 9) American Home has waived and is estopped from asserting its trigger and exhaustion defenses and its Recoupment Claim.

For the reasons set forth below, American Home's motion is denied, and defendants' motions are granted in part, and denied in part.

I. TIMING OF INJURY

BACKGROUND

The Policy and Coverage for WTC Asbestos Claims

The Port Authority purchased the Policy from American Home on February 15, 1966. *Affirm. of Michael J. Garvey, Exhibit 1.* The Port Authority owned the site of the WTC Hudson Tubes Project. *Complaint, ¶ 6.* As characterized by the Port Authority itself, the Policy is a "wrap-up" liability policy that covered the Port Authority and the various contractors and subcontractors that worked on the construction of the World Trade Center. *Garvey Affirm., Exhibit 2.* The "insureds" under the Policy are the Port Authority and "[g]eneral contractors and subcontractors . . . who perform work at the construction site . . . in connection with the construction of the World Trade Center-Hudson Tubes Project". *Policy at AHA 000752.*

Alcoa was a contractor retained to install an aluminum curtain wall on the exterior of the two WTC towers. *Complaint, ¶ 7.* Mario & DiBono, now defunct, performed work at the WTC Hudson Tubes Project, including as a subcontractor of Alcoa, applying asbestos-containing fireproofing on the curtain wall. *Id., ¶ 8.* Tishman, operating under various entities, was the Port Authority's agent and construction manager. *Id., ¶ 24.* Thus, the Insureds include Mario & DiBono, Alcoa and Tishman.

Policy Limitation Regarding Timing of Injury

Under the Policy, American Home "agrees . . . subject to the limits of liability, exclusions, conditions and other terms of this policy . . . [t]o pay on behalf of the insured all sums which the insured shall become legally obligated by reason of the liability imposed upon the insured by law, or assumed by the insured under any contract, in connection with the [WTC construction] to pay as damages because of . . . personal injury . . . sustained by any person or persons". *Policy at AHA 000736.*

In the section entitled "Application of Policy," the Policy includes the following limitation:

"This policy applies only to:

> A. Premises-Operation Hazard: Personal injury or property damage which arises out of the premises-operation hazard, during the policy period, anywhere.

Policy at AHA 000739.

The Policy's Definitions section defines the "premises-operations hazard" as "all operations, including operations completed, by or for the insured during the policy period in connection with the construction of the Project". *Id. at AHA 000744.* American Home contends that, based on this language, the Policy "applies only to" personal injuries or property damage "during the policy period."

On December 9, 1975, American Home sent the Port Authority a notice of cancellation, effective February 7, 1976. *Garvey Affirm., Exhibit 3.* American Home contends that, thus, the Policy period ended on that date.

Claimants Sue the Insureds for Recent Injuries

The claimants in the underlying litigation (the Claimants), including the following five Claimants, are former workers in construction and related fields who worked on various construction sites in and around New York City. Each Claimant sued the Insureds sometime between 2011 and 2014, alleging a recent diagnosis of an asbestos-related illness.

A. ***John Breen***

John Breen worked as a steamfitter with the steamfitter's union from 1962 to1994. *Garvey Affirm., Exhibit 8.* He alleged that he was exposed to various asbestos-containing products over the course of his 32-year career, as well as to certain secondary exposures. *Garvey Affirm., Exhibit 9 at 93-96.*

From the early 1970s to 1974, Breen worked at the WTC site *(Id* at 62-64) He claimed that he was exposed to various asbestos-containing products while there. *Id.* at 75-77, 110-111, 224-226. Breen first experienced symptoms and sought medical care in the Spring of 2014. *Garvey Affirm., Exhibit 8.* In June 2014, doctors diagnosed Breen with mesothelioma. *Id.* On July 18, 2014, Breen filed suit against Mario & DiBono, Alcoa, Tishman and the Port Authority. *Garvey Affirm., Exhibits 10 and 11.*

B. ***Natale Susino***

Natale Susino worked for a contractor called Schatz Painting, primarily as a painter and plasterer, on various job sites from 1960 through the 1990s. *Garvey Affirm, Exhibit 12 and 13.* He alleged that he was exposed to various asbestos-containing products over the course of his career, as well as to secondary exposure. *Id.*

Susino spent approximately six months at the WTC site. He first arrived at the WTC the weekend of July 4, 1969, and spent four days working there. *Garvey Affirm., Exhibit 14 at 208-210; 658.* He then left to work at another job site and returned later that same year, or possibly in 1970. *Id.* at 303. He alleged that, during his time at the WTC, he was exposed to various asbestos-containing products, including fireproofing, tiles and insulation. *Id, Exhibit 16.* He testified to being present while workers applied spray-on fireproofing. *Id., Exhibit 14 at* 672-673.

In May 2011, doctors diagnosed Susino with lung cancer (*Id.* at 509-11; *Plaintiff's responses to interrogatories, No. 7; plaintiff's amended responses at C&D 003460),* and asbestosis. *Plaintiff's Amended Responses* at C&D 003461. Susino filed suit on August 17, 2011. *Garvey Affirm., Exhibit 15 at ALCOA 54665.* He sued, among others, Alcoa, Mario & DiBono, and certain Tishman entities. *Id.*

C. ***Frank Bilello***

From 1957 to 1993, Frank Bilello worked as a tile setter for a contractor called Carlin Atlas. *Garvey Affirm., Exhibit 16.* He alleged that he was exposed to various asbestos-containing products over the course of his career, as well as to certain secondary exposures. *Id.*, No. 17.

While working for Carlin Atlas, he allegedly spent three to four years at the WTC site, beginning in March 1971 (*Garvey Affirm., Exhibit 17 at 279-280),* and ending in or around 1975 *Id, Exhibit 16.* He alleges that, while at the WTC, he was exposed to various asbestos-containing products, including pipe insulation, cement, and gaskets, among others. *Id.*

In June 2013, doctors diagnosed Bilello with lung cancer. *Garvey Affirm., Exhibit 17 at* 193-194. On August 28, 2013, Bilello filed suit against, among others, Mario & DiBono and Tishman Realty & Construction Co., Inc. *Garvey Affirm., Exhibit 18.*

D. ***Rolf T. Hammer***

Rolf Hammer worked as a salesman for U.S. Plywood from 1960 to 1985. *Garvey Affirm., Exhibit 19 at 84-85.* He alleged that he was exposed to various asbestos-containing products over the course of his 25-year career, as well as secondary exposures. *Garvey Affirm., Exhibit 20.* In 1970, Hammer spent a single half-day at the WTC site prior to April 1970. *Garvey Affirm., Exhibit 19 at* 103-104, 192. This was the only time he ever visited the site. *Id.* at 104. After working on the site, Hammer visited at least two dozen other sites where he alleges he was exposed to asbestos-containing products. *Id.* at 104-105.

In July 2012, doctors diagnosed Hammer with mesothelioma. *Garvey Affirm., Exhibit 19 at* 121. On August 14, 2012, Hammer filed suit against Mario & DiBono, Alcoa, Tishman and the Port Authority. *Garvey Affirm., Exhibit 21.*

E. ***Clive Tilley Nelson***

Clive Tilly Nelson brought suit against Mario & DiBono and Tishman, among others, in July 2012. *Garvey Affirm., Exhibit 22.* In his complaint, he alleges that he was exposed to asbestos at multiple construction sites, including the WTC, and that such exposures were each a substantial contributing cause of his disease. *Garvey Affirm., Exhibit 22,* ¶¶ 5, 8-18.

American Home Provides the Insureds a Defense, Subject to a Reservation of Rights

For more than 25 years, American Home defended and settled the WTC Asbestos Claims under the Policy on behalf of the Port Authority, Tishman and Alcoa, as insureds. *Kaminska Affirm, Exhibit 7 at AHA 105920-23; Kaminska Affirm., Exhibit 8 at 90-92; Kaminska Affirm., Exhibit 9.* In so doing, American Home interpreted the Policy as being triggered by all claims arising out of or resulting from exposure to asbestos products during construction of the WTC.

During the pendency of this action, American Home has continued to defend the Insureds against Claimants' claims, subject to a reservation of the right to deny coverage on multiple grounds, including in the event that "[c]laimants did not suffer personal injury during the policy period or in the five years thereafter". *Garvey Affirm., Exhibit 23.*

American Home Seeks to Enforce the Policy

In March 2012, after defending and settling the WTC Asbestos Claims for decades, American Home filed this coverage litigation, contending for the first time that "[t]he pending WTC Asbestos Claims involve injuries that happened after the Policy period. Therefore, they are not covered by the premises-operation hazard". *Complaint, ¶ 28.* Accordingly, American Home seeks a declaration that "it has no obligation, either in whole or in part, to defend or indemnify Port Authority, Alcoa, DiBono and the Tishman entities against pending WTC Asbestos Claims". *Id., ¶ 33.* On this motion, American Home seeks a declaration specifically with respect to the five Claimants, which American Home submits will provide the necessary guidance for addressing hundreds of additional pending claims.

Specifically, American Home asserts that (1) for the Policy's personal injury coverage to be "triggered" (i.e., coverage would be available, subject to the Policy's other terms and conditions), an actual diagnosable disease needed to exist during the policy period; and (2) no such injuries in fact occurred during the policy period. *Id.*; *see also Kaminska Affirm., Exhibits 10-13.*

In taking these positions, American Home offers new readings of the Policy's trigger language and the definition of personal injury, heavily relying on the First Department's decision in *Continental Cas. Co. v Employers Ins. Co. of Wausau,* 60 AD3d 128 (1st Dept 2008) ("*Keasbey*").

DISCUSSION

A. Legal Standard

"'[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact'". *Ayotte v Gervasio,* 81 NY2d 1062, 1063 (1993) (citation omitted; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d at 853; *see also Lesocovich v 180 Madison Ave. Corp.*, 81 NY2d 982, 985 (1993).

The party opposing summary judgment has the burden of presenting evidentiary facts sufficient to raise triable issues of fact. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); *CitiFinancial Co. [DE] v McKinney*, 27 AD3d 224, 226 (1st Dept 2006). The court is

required to examine the evidence in a light most favorable to the party opposing the motion. *Martin v Briggs*, 235 AD2d 192, 196 (1st Dept 1997). Summary judgment may be granted only when it is clear that no triable issues of fact exist (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]), and "should not be granted where there is any doubt as to the existence of a triable issue" of fact. *American Home Assur. Co. v Amerford Intl. Corp.*, 200 AD2d 472, 473 (1st Dept 1994); *see also Color by Pergament v Pergament*, 241 AD2d 418, 420 (1st Dept 1997) ("[s]ummary judgment is an exercise in issue-finding, not issue-determination, and may not be granted when material and triable issues of fact are presented").

B. Instant Motions

Both parties move for partial summary judgment seeking differing declarations. American Home seeks a declaration that the Insureds cannot meet their burden to prove that any of the Claimants suffered injuries during the period covered under the Policy. American Home contends that the Insureds cannot meet this burden because, under New York law, proving "injury" requires proving "actual injury," and it is not possible to prove that an asbestos claimant who developed a disease within the past few years was, in fact, injured more than three decades ago.

Conversely, the Port Authority, Tishman and Alcoa seek a declaration that: (1) coverage is triggered under the Policy for the WTC Asbestos Claims because the injuries alleged by the underlying claimants arose out of the construction of the WTC; and (2) coverage would be triggered in any case for the WTC Asbestos Claims because personal injury sufficient to trigger

the Policy is alleged, and could have occurred, during the Policy period; and (3) American Home cannot obtain a declaration of no coverage for "Pending WTC Asbestos Claims."

C. Analysis

i. Occurrence of injuries and triggered coverage

At the outset, it must noted that, although American Home argues that defendants have the "burden" to show that "injuries" occurred during the policy to trigger coverage under the Policy for any WTC Asbestos Claims, in fact, under New York law, American Home, as plaintiff, "bears the burden of affirmatively proving its right to the declaratory relief it seeks". *Mount Vernon Fire Ins. Co. v NIBA Constr.*, 195 AD2d 425, 427 (1st Dept 1993); *Gray v City of N.Y.*, 19 Misc 3d 1117(A) (Sup Ct, NY County 2008) (Feinman, J.) , *affd* 58 AD3d 448 (1st Dept 2009). That burden is high: in order "to obtain a declaratory judgment as to its obligation to indemnify in advance of trial, [an insurer] must demonstrate as a matter of law that 'there is no possible factual or legal basis on which the insurer may eventually be held liable under its policy'". *Keasbey*, 60 AD3d at 135. Thus, American Home has the burden of proving that it is entitled to a declaration that the Policy requires "injury" during the policy period, and that the WTC Asbestos Claims do not involve injuries during the policy period.

As the First Department also recognized in 1979 when it interpreted this Policy, American Home agreed to provide defendants with "litigation insurance". *American Home Assur. Co. v Port Auth. of N.Y. & N.J.*, 66 AD2d 269, 278 (1st Dept 1979) ("While policy coverage such as the one here involved is often referred to as 'liability insurance' it is clear that it is, in fact, 'litigation insurance' as well").

In making their summary judgment motions, both parties rely on differing interpretations of the relevant Policy language, as set forth in the premises-operation hazard. American Home contends that the Policy applies only to "personal injury" that occurs during the policy period, and that the Policy was not triggered because the Claimants did not incur "personal injury" during the policy period. On the other hand, the Insureds contend that the plain language of the American Home Policy does not require personal injury during the policy period for coverage to be triggered.

"An insurance agreement is subject to principles of contract interpretation". *Universal Am. Corp. v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 25 NY3d 675, 680 (2015). "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" *Id.* [internal quotation marks and citation omitted]; *accord Schron v Troutman Sanders LLP*, 20 NY3d 430, 436 (2013) (where, as here, a contract is "complete, clear and unambiguous on its face," it "must be enforced according to the plain meaning of its terms"); *see also Slattery Skanska Inc. v American Home Assur. Co.*, 67 AD3d 1, 14 (1st Dept 2009) (under New York law, the interpretation of an insurance policy is a legal question for the court to decide).

The key inquiry at the initial interpretation stage is whether the contract is unambiguous with respect to the question disputed by the parties. *Breed v Insurance Co. of N. Am.*, 46 NY2d 351, 355 (1978). "Whether a contractual term is ambiguous must be determined by looking within the four corners of the document and not to extrinsic sources", *Slattery Skanska Inc.*, 67

AD3d at 14. "An agreement is unambiguous if the language it uses has a definite and precise meaning, unattended by danger of misconception in the purport of [the agreement] itself, and concerning which there is no reasonable basis for a difference of opinion". *Ellington v EMI Music, Inc.*, 24 NY3d 239, 244 (2014) (internal quotation marks and citations omitted). A dispute over the reading of an insurance policy does not, by itself, render the language ambiguous. *CT Inv. Mgt. Co, LLC v Chartis Specialty Ins. Co.*, 130 AD3d 1, 6-7 (1st Dept 2015).

Applying these rules of construction, it is clear that, contrary to American Home's arguments, the plain language of the Policy does not require injury during the policy period for coverage to be triggered. Indeed, under the plain language of the Policy, coverage is triggered if the injury "arises out of" construction of the Project, regardless of when the injury itself began.

American Home primarily relies on *Keasbey* to support its position that the WTC Asbestos Claims do not trigger coverage under the Policy. However, American Home's reliance on *Keasbey* is misplaced. American Home's fundamental argument is that, because the policies in *Keasbey* were triggered by injury during the policy period, the Policy here must be triggered by injury during the policy period. However, *Keasbey* expressly rejected the idea that the requirements for trigger are the same for all polices. As the Court there stated, "[a]s a starting point for any analysis as to what triggers coverage, the Court must look at the applicable policy provisions". *Keasbey*, 60 AD3d at 144. The provisions in the American Home Policy are very different than those in the *Keasbey* policies, and dictate a very different result.

The *Keasbey* policies were triggered by an "occurrence" that was expressly defined as an "accident including continuous or repeated exposure to conditions which results *during the*

policy period in bodily injury". *Id.* (emphasis in original). Those policies then defined "bodily injury" as "bodily injury, sickness or disease sustained by a person *which occurs during the policy period*". *Id.* (emphasis added). In light of these provisions, the *Keasbey* court undertook an analysis of what constitutes bodily injury "during the policy period". *Id.*

In contrast, the Policy here contains no language requiring injury during the policy period for the "premises-operations hazard." Rather, the Policy's "premises-operations hazard" coverage explicitly states that coverage is triggered when personal injury "arises out of" the "operations" by the insureds "during the policy period in connection with the construction of the Project". *Policy at AHA 000739, 744.*

The Policy begins with a broad grant of coverage reflecting that the Policy was issued to the Insureds specifically in connection with their construction of the original WTC. The "Insuring Agreement" states that American Home will:

> "[P]ay on behalf of the insured all sums which the insured shall become legally obligated by reason of the liability imposed upon the insured by law, or assumed by the insured under any contract, *in connection with the construction of the World Trade Center–Hudson Tubes Project (hereinafter referred to as Project) to pay damages because of: A. personal injury*, including death at any time resulting therefrom and including damages for care and loss of services sustained by an person or persons"

Id. at AHA 000736 [emphasis added]).

By contrast, the policies in *Keasbey* were not written in connection with any particular project or liability. Further, the American Home Policy's definition of "personal injury" differs from the *Keasbey* policies because it is not limited to injury that occurred during the policy period. The Policy states simply that "[t]he words 'personal injury' as used in this policy,

include without limitation (1) bodily injury, sickness, disease, disability, shock, mental anguish and mental injury". *Id.* at AHA 000746.

Reflecting this broad grant of coverage, the Policy then goes on to state, under the heading "Application of Policy," that it applies to:

> "A. Premises-Operation Hazard: Personal injury or property damage *which arises out of the premises-operation hazard, during the policy period*, anywhere"

Id. at AHA 000739 (emphasis added).

Thus, the Policy makes clear that American Home must pay "all sums" that an insured becomes legally obligated to pay "in connection with" the construction of the Project "as damages because of . . . personal injury," "which arises out of the premises operation hazard, during the policy period." Indeed, a plain reading of the Policy's terms reveals that the phrase "during the policy period" modifies the term "premises-operation hazard," not the term "personal injury". *Id.*

Five pages later, the Policy provides a definition of "premises-operations hazard" that mirrors, and is consistent with, the above quoted "Insuring Agreement" and "Application of Policy" provisions:

> "Premises-Operations Hazard - The term 'premises-operations hazard' means all operations, including operations completed, by or for the insured during the policy period in connection with the construction of the Project".

Id. The reference to "during the policy period" in this provision, like the reference in the "Application of Policy" provision, modifies "operations." When coupled with the above-quoted provisions, this definition confirms and reinforces that American Home must pay

1. "all sums" that

2. an insured becomes legally obligated to pay "as damages because of [] personal injury"

3. "which arises out of"

4. "all operations, including operations completed, by or for the insured during the policy period in connection with the construction of the Project."

It is thus clear that it is the Insureds' operations, not a plaintiff's injury, which must occur "during the policy period" to trigger coverage.

As reflected by the broad grant of coverage, defendants obtained coverage to protect themselves against liabilities "in connection with the construction of the World Trade Center-Hudson Tubes Project." American Home's new theory that personal injury liabilities arising from that Project are not covered is flatly inconsistent with the express policy language.

Nevertheless, American Home contends that defendants' plain reading of the Policy language leaves the term "during the policy period," as used in the "Application of Policy" section, without meaning and "completely superfluous". American Home memo at 18-20, citing *Lawyers' Fund for Client Protection for State of N.Y. v Bank Leumi Trust Co. of N.Y.*, 94 NY2d 398, 404 (2000) (it is axiomatic that a court should not construe a contract term in a way that renders other provisions "superfluous" or leads to illogical results); *Black Bull Contr., LLC v Indian Harbor Ins. Co.*, 135 AD3d 401, 406 (1st Dept 2016) (""The rules of construction of contracts require [a court] to adopt an interpretation which gives meaning to every provision of a contract or, in the negative, no provision of a contract should be left without force and effect'").

The court rejects this argument. As explained above, the phrase "during the policy period" modifies operations, not injury, in both the "Application of the Policy" provision and the provision defining the "premises-operation hazard."

Furthermore, when different provisions of an agreement use the same phrase in a consistent fashion, the issue of whether one provision is "superfluous" or "meaningless" is not even presented. *Imation Corp. v Koninklijke Philips Elecs. N.V.*, 586 F3d 980, 990 (Fed Cir 2009) (applying New York and finding that "[a] proper interpretation of a contract generally assumes consistent usage of terms throughout the Agreement"); *State of New York v R.J. Reynolds Tobacco Co.*, 304 AD2d 379, 379-380 (1st Dept 2003) (presumptively giving a phrase the same meaning in separate contract provisions); *Finest Invs. v Security Trust Co. of Rochester*, 96 AD2d 227, 230 (4th Dept 1983) (courts "may presume that the same words used in different parts of a writing have the same meaning"); *see also Schron v Troutman Saunders LLP*, 97 AD3d 87, 94-95 (1st Dept 2012), *affd* 20 NY3d 430 (2013) (rule that contract should not be construed so as to render any portion of it meaningless "should not be carried to absurd lengths in order to imbue meaning into every legalistic jotting").

Further, American Home has attempted to manufacture its "superfluousness" issue by misleadingly manipulating the Policy text. In essence, American Home combines two separate provisions into a single provision by taking the definition of "premises-operation hazard" (which contains the phrase "during the policy period",) and plugging it into the "Application of the Policy" provision (which also contains the phrase "during the policy period"):

"This policy applies only to:

> A. Premises-Operations Hazard: Personal injury or property damage which arises out of [all operations, including operations completed, by or for the insures *during the policy period* in connection with the construction of the project], *during the policy period*, anywhere.

American Home Memo at 4. American Home then contends that, because its manufactured Policy provision repeats the phrase "during the policy period," defendants' plain reading of the Policy results in a "superfluous" use of that phrase. However, the two uses of the phrase "during the policy period" actually appear in two separate provisions that are five pages apart. There is nothing "superfluous" about a contract including two mutually reinforcing provisions that reflect the same agreement of the parties.

Indeed, other examples can be found in the Policy where two different provisions mutually reinforce each other. For example, the Insuring Agreement section in the Policy provides that it covers liability "in connection with the construction of the World Trade Center-Hudson Tubes Project". *Policy* at AHA 000736. Eight pages later, in the definition of "premises-operations hazard," the Policy repeats the same phrase "in connection with the construction of the Project" to reinforce the same limitation on the scope of coverage. *Id.* at AHA 000744. Similarly, the "the Products Completed Operations Hazard" provision, which is a different coverage part in the Policy, requires the injury to be "sustained at the end of the policy period". *Id.* at AHA 000739. Eight pages later, the "Limits of Liability" section of the Policy repeats that requirement when stating that there is a $10 million aggregate limit applicable to injuries which arise out of the "Products Completed Operations Hazard" and "which are

sustained after the end of the policy period". *Id.* at AHA 000747.

Accordingly, American Home's theory that a claim is covered only if the underlying plaintiff's injury arises during the policy period is inconsistent with a plain language reading of the Policy provisions.

ii. Course of Conduct

American Home's new coverage position is also belied by its own decades-long interpretation of those provisions. For more than 20 years before initiating this action, American Home consistently applied the Policy to provide coverage for the WTC Asbestos Claims, in cases where the underlying plaintiffs alleged asbestos exposure during construction of the Project, but were diagnosed with a disease after the date American Home now contends that the policy period ended. It also continued to defend and settle WTC Asbestos Claims for four more years after the decision in *Keasbey*, the case on which it almost exclusively relies, before filing the complaint in this action. Thus, for more than two decades, American Home acted as an insurer that understood that it had a clear coverage obligation.

Indeed, the American Home claims handlers responsible for the WTC Asbestos Claims, up to and including the present claims handler, testified that, in determining whether the Policy was triggered, American Home considered only whether the claimant was exposed to asbestos during the construction of the Project. Not a single claims handler testified that the Policy provided coverage for the WTC Asbestos Claims only if some disease occurred or existed during the policy period. Further, American Home cannot point to a single instance in the pre-litigation

record in which coverage for a WTC Asbestos Claim was conditioned on some disease occurring or existing during the policy period.

Although American Home argues that a party's "course of conduct" is extrinsic evidence, which is inadmissible to interpret an unambiguous contract, the Insureds contend that they are "not presenting this as 'extrinsic evidence' to resolve an 'ambiguity' in the policy language". *Tishman Memo of Law at 7.* Rather, the testimony cited below establishes that, for more than 20 years, American Home has consistently interpreted and applied the Policy in accordance with the plain language reading that defendants present on their motions, and in opposition to American Home's motion, and that, accordingly, there is no dispute as to the meaning of the Policy language. This court agrees.

For example, Steven Parness, the American Home claims handler responsible for the WTC Asbestos Claims from 2000 to 2010, testified that he (1) "never refused to settle a [WTC Asbestos Claim]" on the basis that the disease developed after the policy period, because such information was not important "from a coverage point of view"; and (2) he could not recall a single time in which American Home denied coverage or refused to defend or settle a WTC Asbestos Claim because the plaintiff did not develop an asbestos-related disease during the policy period (*Kaminska Affirm., Exhibit 14* at 118-119); *see also Id.* at 166 ("As we sit here today, I cannot recall a point in time where Alcoa was denied coverage because, at some point during the litigation, we learned the date of the injury").

Likewise, Amy Fitzpatrick, American Home's corporate designee for the WTC Asbestos Claims, and the claims handler currently responsible for those claims, testified that she looks for exposure during construction – not bodily injury during the policy period – when evaluating a WTC Asbestos Claim under the Policy. *Kaminska Affirm., Exhibit 15* at 100-102 ("I look at the earliest possible date that exposure could be . . . attributable to work at the World Trade Center").

Further, the primary source of information that a claims handler relied upon in evaluating potential settlement of an underlying WTC Asbestos Claim is an "Asbestos Request For Settlement Authority" (ARFSA) form prepared by defense counsel. *Kaminska Affirm., Exhibit 16.* This form requires the date that a plaintiff was exposed to asbestos. *Id., see also Kaminska Affirm.*, Exhibit 15 at 42). Fitzpatrick equated exposure to the timing of the claimant's personal injury. *Id* at 42-43.

Fitzpatrick also testified that American Home had defense counsel input data on the number of claims filed and settlement amounts on a document entitled "Asbestos Claim Trend Data". *Kaminska Affirm.*, Exhibit 19; *see also Kaminska Affirm.*, Exhibit 15 at 42-45. The form was used in the management of WTC Asbestos Claims. *Id.* Importantly, the Asbestos Claim Trend Data report does not seek any information regarding when bodily injury occurred (*id*), again demonstrating that American Home does not consider such information when deciding whether a claim is covered.

Moreover, none of the prior claims handlers for the WTC Asbestos Claims (Peter Rand, Steven Schwesinger, Ryan Pitterson or Marci Shyavitz), or Laura Schoefer, the current third-party claims administrator employee responsible for the "coverage portion of this account," could

recall any instance in which American Home refused to defend or indemnify an insured on the ground that injury did not occur during the policy period. *Kaminska Affirm.*, Exhibit 20 at 60; *Kaminska Affirm.*, Exhibit 21 at 185; *Kaminska Affirm.*, Exhibit 22 at 104; *Kaminska Affirm.*, Exhibit 17 at 68-69; *Kaminska Affirm.*, Exhibit 23 at 93-95.

Similarly, John Goldwater, an outside analyst retained by American Home to audit and opine upon the potential liability to American Home because of WTC Asbestos Claims arising from lawsuits against Mario & DiBono, testified that American Home treated exposure to asbestos as the trigger for the Policy, as opposed to the timing of any bodily injury. *Kaminska Affirm.*, Exhibit 26 at 26. Goldwater understood that American Home's liability for WTC Asbestos Claims was based on whether or not the claimant was exposed to asbestos at the World Trade Center-Hudson Tubes Project. *Id.* at 27-28. He was not aware of any consideration given to the length of such exposure, or whether injury was alleged to have occurred during the policy period. *Id.* at 62-63.

Courts have stated that "the parties' course of performance under the contract is considered to be the 'most persuasive evidence of the agreed intention of the parties.' . . . 'The parties to an agreement know best what they meant, and their action under it is often the strongest evidence of their meaning'". *Federal Ins. Co. v Americas Ins. Co.*, 258 AD2d 39, 44 (1st Dept 1999) (citations omitted). American Home's more than 20-year history of providing coverage for WTC Asbestos Claims without ever determining whether the disease at issue was diagnosable during the policy is (1) consistent with a plain language reading that the Policy does not, as American Home now contends, require injury to occur "during the policy period" to

trigger coverage under the "premises-operation hazard"; and (2) inconsistent with American Home's new proposed interpretation designed to excuse it from providing any further coverage for such claims.

The court notes that, even though there is evidence that American Home did issue some reservation of rights letters sporadically over the years, the fact remains that it admittedly paid out over $30 million in claims, and, most importantly, it never disclaimed coverage.

The court also notes that, even under American Home's theory of the case, the claimed injuries in the WTC Asbestos Claims "arose out of" construction of the Project, as that phrase is used in the Policy. New York courts construe the phrase "arising out of" broadly. "Arising out of" has been interpreted to mean "'originating from, incident to, or having connection with,' and requires 'only that there be some causal relationship between the injury and the risk for which coverage is provided'" *Worth Constr. Co. v Admiral Ins. Co.*, 10 NY 3d 411, 415 (2008) (citations omitted). The evidence of record is uniform and uncontradicted that the underlying claimants allege that their injuries resulted from their exposure to asbestos during construction of the Project. *Complaint* ¶ 6. It follows, by definition, that those alleged injuries "arose out of" construction of the Project for purposes of the Policy. Consequently, coverage was triggered under the terms of the Policy.

Accordingly, because American Home's reinterpretation of the Policy is refuted both by a plain language reading of the applicable provisions, and by its own decades-long prior interpretation, American Home's motion for a declaratory judgment (Motion Sequence No: 14) is denied, and the Insureds' motions for a declaratory judgment that coverage is triggered under

the Policy for the WTC Asbestos Claims because the injuries alleged by the underlying claimants arose out of construction of the WTC (Motion Sequence Nos: 15, 16 and 17) are granted.

iii. Declaration of No Coverage

The branch of defendants' motions (Motion Sequence 15, 16, and 17) that seeks a declaration that American Home is not entitled to a declaration of no coverage as to Pending WTC Asbestos Claims is also granted. In the complaint, American Home seeks a declaration of no coverage for "pending WTC Asbestos Claims" on the ground that the claims do not involve injuries occurring during the policy period. *Complaint,* ¶¶ 28-29. As the Policy does not require injury during the policy period for coverage to apply, American Home is not entitled to a declaration of no coverage as to Pending WTC Asbestos Claims.

Given that the Policy does not require injury during the policy period, it is unnecessary to reach the branch of the Insureds' motions seeking a declaration that coverage would be triggered in any case for the WTC Asbestos Claims because personal injury sufficient to trigger the American Home Policy under *Keasbey* is in fact alleged, and could have occurred during the policy period. As such, this branch of the motions (Motion Sequence 15, 16 and 17) is denied as moot.

II. SPRAY-ON FIREPROOFING/EXHAUSTION

BACKGROUND

The Port Authority Engages Tishman as a Construction Manager

On August 22, 1968, the Port Authority and Tishman signed Contract WTC 01.000, making Tishman the construction manager for the project, effective "as of April 1, 1967". *Garvey Affirm.*, Exhibit 41 at PORT00025504). On September 18, 1968, the Port Authority and Alcoa signed Contract WTC 400.00, according to which Alcoa agreed "to install the curtain wall for the North and South Tower buildings of the World Trade Center" *Garvey Affirm.*, Exhibit 38 at PORT00027263. In 1969, Mario & DiBono was hired to apply the spray-on fireproofing of the structural steel used to construct the Twin Towers. *Robert Horkovich Affirm.*, Exhibits 5 and 6.

The WTC Asbestos Claims

In its complaint, American Home defines the "WTC Asbestos Claims" as the "thousands of asbestos-related personal injury claims allegedly arising from exposure to asbestos at the WTC site". *Complaint*, ¶ 26. The WTC-Hudson Tubes Project was a massive construction project involving multiple major buildings and below grade areas. Sitting on a 16-acre construction site in lower Manhattan, the Project encompassed not only the 110-story Twin Towers, but also included a Plaza Structure, the Northeast Plaza Building, the Southeast Plaza Building, the U.S. Customs Building, a hotel, 7 World Trade Centre, and a new PATH Station and underground tracks. *Charles Maikish Affid.*, former director of the WTC, ¶ 13. On any given day, there were

3,000 to 4,000 workers at the Project. *Id.*, ¶ 14. Each separate tower was comprised of multiple distinct areas. Each tower was divided into three zones, each zone with its own elevator lobby and multiple elevator shafts . *Id.*, ¶ 15. Mechanical equipment rooms were located on several floors of each separate tower. *Id.*

The allegations underlying the WTC Asbestos Claims vary considerably regarding the nature, timing and location of exposure. Claimants allege exposure to a variety of asbestos materials, including sheetrock, joint compound, fireproofing, pipe insulation, cement, gaskets, insulation, floor tiles, elevator brakes, ceiling tiles, pumps and valves. *The Port Authority's statement of facts (SOF),* ¶ 43. They allege exposures in different years, ranging anywhere from the late 1960s to the mid 1970s and beyond. *Id.*, ¶ 46. They allege exposures in different locations, including one or both Towers, the PATH areas, the Northeast Plaza Building, the Southeast Plaza Building, and the U.S. Customs Building. *Id.* They allege exposures at different locations within each Tower, including different floors, the mechanical equipment rooms, the elevator shafts, and below grade areas. *Id.*

The claimants worked for roughly 20 different companies, including as ironworkers, cement workers, steamfitters, ornamental ironworkers, tile workers, painters, laborers, plumbers, masons, operating engineers, elevator mechanics, carpenters, and insulators. *Id.*, ¶¶ 44-45. Thus, they allege exposure in a number of ways, including through cleaning up asbestos material or through the release of asbestos fibers due to sanding or disturbing asbestos materials. *Id.*, ¶ 49. They even allege "take-home" exposures, i.e., where the claimant was not present at the Project, but was exposed to asbestos through a spouse who brought asbestos home. *Id.*, ¶ 48. Given

these many differences, the claimants allege exposure for varying lengths of time, ranging from a matter of hours, to many months and years. *Id.*, ¶ 47.

Mario & DiBono's Operations at the WTC-Hudson Tubes Project

Mario & DiBono's fireproofing operation at the WTC lasted at least three years, and was littered with many intervening events. Mario & DiBono applied fireproofing material pursuant to three different contracts, made with different entities, which called for application of different fireproofing materials at different locations. *Maikish Affid.*, ¶¶16-20; SOF ¶¶ 52-72. For instance, Contract WTC 113.00 between the Port Authority and Mario & DiBono, covered fireproofing to the interior of the 200 floors and below grade areas of each Tower and the PATH areas. *Maikish Affid.*, ¶ 18. In contrast, Contract WTC 200.00, originally between the Port Authority and Alcoa, and later subcontracted to Mario & DiBono, applied to the exterior steel columns of each separate tower. SOF, ¶¶ 65-66.

Contract WTC 113.00 called for two varieties of fireproofing materials depending on location: (1) CAFCO Blaze Shield Type D (CAFCO D), which was used in the interior and on the exterior columns of each Tower; and (2) MARK II, which was used in the elevator shafts and mechanical equipment rooms. *Id.*, ¶¶ 60, 62-63). CAFCO D and Mark II each contained different amounts of asbestos (30% and 80%, respectively). *The Port Authority's counterstatement of material facts (CSOF)*, ¶¶ 20, 30.1, 3703, and accompanying citations).

Under Contract 113.00, Mario & DiBono applied fireproofing materials using two different methods – either by spraying or by hand applying with a trowel. *Maikish Affid.*, ¶ 18. Contract WTC 113.00 specifically required "patching" or hand application of fireproofing where Mario & DiBono previously applied fireproofing, but such fireproofing was later scraped off or disturbed by construction workers in other trades. *Id.*, ¶¶ 18-19, 55-59. Mario & DiBono's patching work was done because workers in other trades needed to remove previously applied fireproofing in order to complete their jobs, such as hanging HVAC equipment, which could not occur before fireproofing. *Id.*, ¶ 19; *see also, Horkovich Affirm.*, Exhibit 26 at 73-76 . Mario & DiBono also hand applied fireproofing in the various mechanical equipment floors of each Tower instead of spraying because spraying would damage the mechanical equipment present in those rooms. *Maikish Affid.*, ¶ 20; *Horkovich Affirm.*, Exhibit 26 at 73-76 .

Mario &DiBono began its work in the Twin Towers in August 1969, and continued until at least November 1972, with more than one stoppage in between. *Maikish Affid.*, ¶ 21. Mario & DiBono applied CAFCO D and Mark II for approximately eight months until April 20, 1970, when the Port Authority suspended all fireproofing operations so that it could explore asbestos-free fireproofing. *Id.* Mario & DiBono's work was not continuous, as it was interrupted by more than work stoppage for reasons including union issues, and Mario & DiBono's failure to abide by safety protocols. *Id.*, ¶¶ 22-23.

The Policy

The Policy provides general liability coverage for the Port Authority and its contractors for liability arising out of the construction of the WTC-Hudson Tubes Project. American Home promised "[t]o pay . . . all sums which the insured shall become legally obligated . . . in connection with the construction of the [Project] . . . to pay as damages because of . . . personal injury". *Policy*, § I [A]. "Personal injury" is defined as "includ[ing] without limitation . . . bodily injury, sickness, diseases, disability, shock, mental anguish and mental injury". *Id.*, § 11 [g]. The Policy states that the "total limit of the company's liability for all damages because of personal injury . . . caused by one occurrence shall be $10,000,000" (*id.*, ¶ 6 [a]). The Policy does not define the term occurrence.

Allegations In This Action With Respect to "Occurrence"

American Home's complaint alleges, among other things, that the Policy includes a coverage limit of "$10 million per occurrence for WTC Asbestos Claims" and that the limit has been exhausted by American Home's payment of "WTC Asbestos Claims". Complaint, ¶ 30. As American Home asserted in its complaint, American Home also claimed in its first interrogatory responses that all WTC Asbestos Claims constitute one occurrence under the Policy. Specifically, on August 20, 2012, American Home served interrogatory responses to the Port Authority's first set of interrogatories which state: "American Home states that under the applicable law governing the Policy, claims alleging bodily injury from exposure to asbestos during the construction of the World Trade Center Hudson Tubes Construction Projected are a

group of claims arising from exposure to an asbestos condition at a common location, at approximately the same time and therefore arise from one occurrence" *Horkovich Affirm.*, Exhibit 13 at 19.

Over two years into this litigation, American Home amended its interrogatory responses to assert an entirely new occurrence theory – namely, that only a subset of the claims related to "spray-on fireproofing" at the WTC-Hudson Tubes Project is a single occurrence. Specifically, on September 15, 2014, American Home served supplemental interrogatory responses to the Port Authority's first set of interrogatories that state: "American Home states that all WTC Asbestos Claims arising from the installation of spray-on fireproofing at the WTC Hudson Tubes Project arise out of one 'occurrence' and are subject to a $10,000,000 limit". *Horkovich Affirm.*, Exhibit 11 at 9. American Home refers to these claims as the "WTC Fireproofing Claims."

American Home's Handling of the WTC Asbestos Claims

As noted, American Home defended and settled WTC Asbestos Claims under the Policy for approximately 20 years prior to initiating this lawsuit. As American Home's claims handlers testified at their depositions in this action, while handling these claims, American Home never tracked whether the claims constituted one or multiple occurrences. SOF ¶¶ 74-78. For instance, Steven Parness, the American Home claims handler who handled the WTC Asbestos Claims against defendants for 10 years, testified that American Home "didn't look at it claim by claim" to determine whether the claims constituted a single or multiple occurrence. *Horkovich Affirm.*, Exhibit 31 at 98. Amy Fitzpatrick, American Home's designated corporate deposition witness in

this action with respect to the WTC Asbestos Claims, testified "I don't track it, period," when asked, "Do you track the occurrence that an individual plaintiff's claim arises out of in any way". *Horkovich Affirm.*, Exhibit 41 at 183.

American Home also did not track whether the claims arose from "spray-on fireproofing," exposures to other types of asbestos, or a combination of both. *Id at 18* (responding "[w]e don't track," when asked if "American Home track[s] which World Trade Center asbestos claims arise from spray-on fireproofing as opposed to . . . other types of exposure to asbestos at the World Trade Center").

American Home's Indemnity Payments Under the Policy

American Home contends that, to date, it has paid more than $30.5 million in indemnity under the Policy to settle claims alleging personal injuries resulting from exposure to asbestos in connection with the construction of the WTC. *Schoefer Affirm.*, ¶¶ 6-7. American Home further contends that more than $10 million in indemnity has been paid specifically to resolve WTC Fireproofing Claims. *Id.*, ¶¶ 9-14. According to American Home, it has paid more than $9.37 million in indemnity just with respect to WTC Fireproofing Claims against Mario & DiBono. (*Id.*, ¶¶ 9-11, 13), and has also paid more than $681,500 to resolve WTC Fireproofing Claims against Alcoa. *Id.*, ¶ 12.

DISCUSSION

American Home seeks a declaration that the WTC Fireproofing Claims arise from a single "occurrence," and that the applicable $10,000,000 limit of liability has been exhausted. Conversely, the Insureds seek declarations that (1) the WTC Asbestos Claims do not constitute a single "occurrence" under the Policy and New York law; (2) the WTC Fireproofing Claims do not constitute a single "occurrence" under the Policy and New York law; and (3) the Policy is not exhausted as a result of payment of the WTC Fireproofing Claims.

A. Occurrence and the "unfortunate event test"

First, those parts of defendants' motions seeking a declaration that the WTC Asbestos Claims do not constitute a single occurrence are denied as moot, as American Home asserts that it only seeks a declaration that the WTC Fireproofing Claims constitute a single occurrence, not all WTC Asbestos Claims. *American Home Opposition memo* at 1, 5. American Home further asserts that it is not contending that the WTC Asbestos Claims arise out of a single occurrence, or that coverage is exhausted for all WTC Asbestos Claims. *Id.*

With respect to the issue of whether the WTC Fireproofing Claims constitute a single occurrence, this court finds that application of the prevailing "unfortunate-event" test to the facts of this case demonstrates that these claims lack the requisite temporal and spatial relationship to constitute a single unfortunate event.

"[T]he issue of what constitutes an occurrence has been a legal question for courts to resolve". *Roman Catholic Diocese of Brooklyn v National Union Fire Ins. Co. of Pittsburgh, Pa.*,

21 NY3d 139, 148 (2013); *accord ExxonMobil Corp. v Certain Underwriters at Lloyd's, London*, 15 Misc3d 1144(A) (Sup Ct, NY County 2007) (Fried, J.) (number of occurrences is "a proper subject of a motion for summary judgment"), *affd* 50 AD3d 434 (1st Dept 2008).

Under New York law, an insurance company is free to define occurrence in a manner that combines multiple incidents as a single occurrence. *Appalachian Ins. Co. v General Elec. Co.*, 8 NY3d 162, 173 n3 (2007) ("There are many ways that parties to an insurance contract can provide for the grouping of claims"). In the absence of such a definition, New York applies the unfortunate-event test to determine whether a set of claims arises from one or multiple occurrences. *Id.* at 173. Here, American Home chose not to define "occurrence" in the Policy. Thus, the unfortunate-event test governs.

Under the unfortunate-event test, multiple claims may be grouped as a single occurrence only if they occur close in time and space without any intervening agents such that they can be considered a single unfortunate event. *Id.* at 171-174. The test is a two-part inquiry. First, the court must identify the "operative incident or occasion giving rise to liability". *Id.* at 174. Second, the court must "analyze the temporal and spatial relationships between the incidents and the extent to which they were part of an undisrupted continuum to determine whether they can, nonetheless, be viewed as a single unfortunate event – a single occurrence". *Id.*.

The "unfortunate-event" test derives from the Court of Appeals' opinion in *Arthur A. Johnson Corp. v Indemnity Ins. Co. of N.A.*, which defined "accident" in an insurance policy as an "'*event* of an unfortunate character that takes place without one's foresight or expectation'" (*Johnson*, 7 NY2d 222, 228 (1959) (citation omitted) (emphasis in original).

In *Johnson*, the Court considered whether the collapses of "two *entirely separate*, temporary cinder block walls" in two "adjoining" buildings constituted one or two "accidents" under a liability policy that did not define the term "accident". *Id.* at 225 (emphasis in original). The collapses, which occurred only one hour apart, were the result of a single rainfall. To determine the number of "accidents," the Court adopted the unfortunate-event test, which gives the term "accident" its "commonly accepted meaning" as "an event of an unfortunate character that takes place without one's foresight or expectation[,] . . . [t]hat is, an unexpected, unfortunate occurrence". *Id.* at 228. Applying the test, the Court found that two accidents occurred, even though only a single rainfall was involved, and only an hour had elapsed between the two collapses. *Id.* at 229-230.

Subsequent decisions by the Court have held that the undefined terms "accident" and "occurrence" were interchangeable, and thus applied the *Johnson* "unfortunate-event" test for purposes of determining whether multiple claimants' claims were caused by the same "occurrence." In *Hartford Acc. & Indemn. Co. v Wesolowski* (33 NY2d 169 [1973]), the Court of Appeals applied the unfortunate-event test to a policy that did not define "occurrence." The Court stated that "the words 'accident' and 'occurrence' are synonymous," and "that no distinction should be drawn on th[at] basis". *Id.* at 172-173. Applying the test, the Court found that a three-car accident, in which the insured driver's vehicle struck an oncoming vehicle and ricocheted into a second vehicle, was a single occurrence because "[t]he continuum between the two impacts was unbroken, with no intervening agent or operative factor". *Id.* at 174.

Following *Johnson* and *Wesolowski*, New York courts applying the unfortunate-event test in the mass bodily injury context have repeatedly found that multiple claims constitute multiple occurrences when the claimants are exposed at separate times. *See e.g. Appalachian*, 8 NY3d at 173-174 (exposure to asbestos); *International Flavors & Fragrances, Inc. v Royal Ins. Co. of Am.*, 46 AD3d 224, 232-233 (1st Dept 2007) (respiratory injuries caused by exposure to diacetyl); *Bausch & Lomb Inc. v Lexington Ins. Co.*, 414 Fed Appx 366, 370 (2d Cir 2011) (eye injuries caused by exposure to contact lens solution); *Matter of Prudential Lines, Inc.*, 158 F3d 65, 81-83 (2d Cir 1998) (exposure to asbestos); *see also Metropolitan Life Ins. Co. v Aetna Cas. & Sur. Co.*, 255 Conn 295, 317 (2001) (exposure to asbestos) (applying New York law).

In the asbestos context, New York courts have consistently concluded that asbestos claims constitute multiple occurrences because the claimants in such cases, like the claimants here, were invariably exposed to asbestos in different ways, for different periods of time, at different times and locations.

For instance, the New York Court of Appeals applied the unfortunate-event test in the asbestos context in *Appalachian*. There, the Court held that thousands of personal injury claims arising from exposure to asbestos in turbines arose from multiple occurrences. Applying the test, the Court found that the operative incident giving "rise to liability was each individual plaintiff's 'continuous or repeated exposure to asbestos'". *Id.* at 173. The Court then held that, even if the claims share a common cause (i.e., asbestos exposure due to the policyholder's "failure to warn"), the claims were still multiple occurrences because they "share[d] few, if any, commonalities, differing in terms of when and where exposure occurred, whether the exposure

was prolonged and for how long, and whether one or more . . . sites was involved". *Id.* at 174.

Similarly, in *Prudential*, the Court found that the claims of approximately 5000 claimants, alleging bodily injuries from exposure to asbestos while working aboard ships, constituted multiple occurrences. In that case, the policies at issue, like the Policy here, did not define the term "occurrence." Interpreting *Johnson*, the Court observed that, "[u]nder New York law, multiple injuries are grouped as a single 'occurrence' when they arise out of the same event of unfortunate character and occur close in time with no intervening agent". *Prudential,* 158 F3d at 81. The Court concluded that even claims brought by claimants exposed to asbestos on the same ship could not be attributed to a single occurrence, because the claimants separately were exposed to asbestos at different times:

> "[A]ll asbestos-related bodily claims against Prudential resulting from exposure to asbestos on a particular ship cannot be attributed to a single occurrence. . . . Claimants seek to hold Prudential liable for *bodily injury* and the last link in the causal chain leading to Prudential's liability for *bodily injury* was exposure to asbestos. Each Claimant was separately exposed to asbestos at different points in time. Therefore, the injuries arise from multiple occurrences"

Id. (emphasis in original).

Just two weeks before the *Appalachian* decision, American Home filed an appellate brief with the First Department in another insurance dispute regarding mass bodily injuries, and argued that the unfortunate-event test requires a multiple occurrence finding. In *International Flavors*, the First Department agreed with American Home, holding that thirty claims, alleging various respiratory injuries due to exposures to chemicals at the same food packaging plant, each constituted a separate occurrence due to the lack of temporal and spatial relationship between the

claims. *Id.* at 232-233. The court explained that, "under New York law, the injury imposing liability on the insured does not result until exposure occurs". *Id.* at 232. Thus, "the exposure of the individual claimants" to toxins "on different occasions, extending over different periods of time," constitute multiple occurrences under the unfortunate-event test. *Id.* at 232-233.

In sum, New York courts have applied the unfortunate-event test to claims involving individual exposures to injurious substances, and have consistently held that the exposures arise from multiple occurrences, even when the exposures occur at the same location.

Applying the unfortunate-event test to the facts at hand, it is clear that the WTC Fireproofing Claims do not constitute a single occurrence. As noted, the unfortunate-event test first requires identification of the "operative incident or occasion giving rise to liability". *Appalachian*, 8 NY3d at 174. Here, the incident giving rise to each defendant's liability is each underlying claimant's alleged injury. *Id.*; *Prudential*, 158 F3d at 81.

With respect to the second part of the test, the temporal and spatial relationship between the incidents, American Home asserts that "all negligence claims against Mario & DiBono ("M&D") and Alcoa are, by definition, WTC Fireproofing Claims because the only actionable asbestos claims against M&D and Alcoa are predicated on M&D's application of spray-on fireproofing". *American Home Memo at 11.* However, Mario & DiBono faces liability not only for alleged direct exposures to spray-on materials, but also for alleged exposures to various materials applied by hand, scraped off or disturbed after initial application. Indeed, American Home has allegedly funded settlements on behalf of Mario & DiBono for exposure to products other than spray-on fireproofing. *CSOF* ¶ 46-48. Moreover, as American Home admits, Alcoa is

a defendant in 19 of the 57 cases that admittedly involved multiple types of alleged asbestos exposure, of which spray-on fireproofing by Mario & DiBono was only one, and was named as a defendant in 4 of the 15 cases that admittedly did not involve spray-on fireproofing allegations at all. *Id.*, ¶ 66.

In addition, even if certain claims relate 100% to spray-on fireproofing, the claims still lack the requisite "temporal and spatial relationship," such that they can "be viewed as a single unfortunate event". *Appalachian*, 8 NY3d at 174. There are numerous differing events within Mario & DiBono's operations that preclude a finding that any claims alleging exposure to "spray-on fireproofing" were "part of an undisrupted continuum," including that: (1) Mario & DiBono installed fireproofing over parts of many years; (2) Mario & DiBono installed fireproofing in different locations and at different times, pursuant to different construction contracts; (3) Mario & DiBono used at least two varieties of fireproofing materials depending on location; (4) in addition to being applied at different locations, the asbestos products contained different amounts of asbestos, and were applied using different equipment and techniques to apply the asbestos; (5) Mario & DiBono applied fireproofing not only by spraying, but also by "patching" or hand application after initial application; and (6) Mario & DiBono's work was not continuous, as it was interrupted by several work stoppages. *SOF* ¶¶ 52-72.

In light of these different events within Mario & DiBono's operations, as well as the intervening agents and the protracted nature of Mario & Di Bono's operations, it is plain that the WTC Fireproofing Claims do not constitute a single occurrence.

Nonetheless, American Home argues that some of these distinctions are "immaterial" as to "claimants working at the same building during the same time frame". *Opposition Memo at 9*. The court rejects this argument.

Contrary to American Home's contention, Mario & DiBono's use of at least two varieties of fireproofing material requires a multiple occurrence finding. CAFCO D and Mark II contained different amounts of asbestos, and were applied using different equipment and methods, resulting in different types and doses of asbestos exposure to different claimants. These materials resulted in a multiplicity of different exposure amounts and duration to different claimants, a fact that the *Appalachian* court relied on in finding that there were multiple occurrences in the underlying asbestos claims. *Appalachian,* 8 NY3d at 174 (finding multiple occurrences because the claims "share few, if any, commonalities, differing in terms of when and where exposure occurred, whether the exposure was prolonged and for how long").

American Home also contends that "[t]he fact that different workers' exposure to Mario & DiBono's spray-on fireproofing . . . may have occurred on different floors of the Twin Towers does not mean those exposures lacked 'spatial relationship' that would support a multiple occurrence finding". *Opposition Memo at 11*. In making this argument, however, American Home ignores both the size and the layout of the Twin Towers. Each tower was comprised of multiple distinct areas, including three zones with separate elevator lobbies and multiple elevator shafts, and mechanical equipment rooms that were located on several floors of each tower. *Maikish Affid.*, ¶ 15. American Home also ignores that the claimants allege exposure to fireproofing and other asbestos-containing materials at various locations, other than just the

different floors of the Twin Towers, including below-grade areas of the Twin Towers, the PATH areas, the Northeast Plaza Building, the Southeast Plaza Building, and the U.S. Customs Building. *SOF*, ¶ 46).

In support of its argument, American Home cites to *Allied Grand Doll Mfg. Co. v Globe Indem. Co.*, 15 AD2d 901 (1st Dept 1962), where the court found that the "leaving on of a faucet" over a weekend, which damaged several businesses on different floors of a single building, was a "single accident with separate consequences". *Id.* at 901. American Home contends that "the same is true for Mario & DiBono's spray-on fireproofing work on the Twin Towers". *Opposition Memo at 11*. That case, however, is completely inapposite, as the property damage arose out of a single act over a short period of time, i.e., the "leaving on of a faucet" over a weekend. Here, in contrast, multiple events occurred over the course of three years in different locations, resulting in thousands of personal injuries.

American Home further argues that the fact that "there was more than one work stoppage" while Mario & DiBono was spraying fireproofing in the Twin Towers does not "militate in favor of" multiple occurrences. *Id.* To the contrary, the interruption of Mario & DiBono's operations by work stoppages prevents the claims from being "part of the same causal continuum, without intervening agents or factors," as is necessary for all the claims to be considered a "single unfortunate event". *Appalachian*, 8 NY3d at 172. The cases that American Home cites for the proposition that claims may be grouped as a single occurrence "despite limited interruptions between incidents" are distinguishable. They involved single acts over short periods that resulted in property damage, not in thousands of personal injuries over many

years. *Michaels v Mutual Mar. Off., Inc.*, 472 F Supp 26, 29 (SDNY 1979) (unloading cargo "was a unified and continuous function . . . over a period of days" resulting in a "single loss"); *Aguirre v City of N.Y.*, 214 AD2d 692, 693 (2d Dept 1995) ("single act" of spray painting a single ship, damaging 40 vehicles).

Although the nature of Mario & DiBono's operations alone compels the conclusion that claims alleging exposure to "spray-on fireproofing" could not possible be "part of an undisputed continuum," a review of the claims that American Home contends are attributable to a single "spray-on fireproofing" occurrence confirms this point. According to American Home's expert report, of 81 WTC Asbestos Claims cases settled by American Home on behalf of Port Authority, Tishman and Alcoa, 57 involved multiple types of asbestos exposures, of which spray-on fireproofing was only one. *Garvey Affirm.,* Exhibit 38 at Appendix C.

Moreover, a review of the individual claims referred to by Imhoff in his report reveals significant differences among the circumstances and extent of the various claimants' alleged exposure. For instance, in one claim, the claimant alleged that he was a sheet metal worker and was exposed to asbestos in the PATH areas for seven months in 1971 through exposure to sheetrock, joint compound, tape and spray fireproofing. In another claim, the claimant alleged that he was an estimator for a wire company that would visit the Project on various occasions during the late 1960s to early 1970s, and that he was exposed to asbestos in pipe insulation, cement, sheetrock, spray fireproofing and asbestos tiles that were being cut and sanded.

Another claimant alleged that he was a steamfitter, and that he was exposed to asbestos only in the elevator shafts and mechanical equipment rooms of the South Tower while handling and installing pumps and valves, and by working next to others that were wrapping pipes and installing spray-on fireproofing. In yet another claim, the claimant alleged that he worked for Mario & DiBono spraying and cleaning up fireproofing in one of the Towers only on the 79th to 109th floors. *Id.*

Based on these differences in the manner of exposure, time and spatial relationship between these claims alone, American Home cannot contend that the fireproofing claims are attributable to a single "spray-on fireproofing" occurrence.

A comparison of the facts in this case with the Court of Appeals' decisions in *Johnson* and *Wesolowski* confirms this. In *Johnson*, a single rainfall caused the collapse of "two *entirely separate*, temporary cinder block walls" in "adjoining" buildings. *Johnson*, 7 NY2d at 225 (emphasis in original). Yet, even though the walls collapsed only an hour apart and due to the same rainfall, the Court still found that each collapse was a separate unfortunate event under the policy in that case, which, like here, did not define "occurrence." Conversely, in *Wesolowski*, the Court found that the three-car accident in that case was a single occurrence, because the "continuum between the two impacts was unbroken, with no intervening agent or operative factor". *Wesolowski*, 33 NY2d at 174.

In this case, even if the claimants were exposed to a common source of "spray-on fireproofing" (analagous to the single rainfall in *Johnson*), it is the exposure and injury of each claimant (analogous to the collapses of the walls) that constitutes the unfortunate event.

Moreover, unlike the car accident in *Wesolowski*, Mario & DiBono's operations were protracted and intermittent, and thus, each alleged exposure to "spray-on fireproofing" could not be part of an "unbroken continuum."

In sum, the WTC Fireproofing Claims do not arise from a single occurrence, because they lack the temporal and spatial relationship required to be a single unfortunate event.

Finally, American Home's course of conduct in defending and settling the WTC Asbestos Claims for over two decades supports a multiple occurrence finding. The American Home claims handlers testified that they never tracked, or could not recall if they tracked whether WTC Asbestos Claims arose from a single occurrence, nor did American Home track whether the claims were attributable to "spray-on fireproofing," or a different source of asbestos. *SOF, §§ 74-78.* This testimony demonstrates that American Home's present occurrence position, which American Home first adopted over two years into this litigation, is an after-the-fact argument completely removed from the facts of this case, and inconsistent with American Home's own course of conduct. *Federal Ins. Co.*, 258 AD2d at 44 (internal quotation marks and citation omitted) ("the parties' course of performance under the contract is considered to be the most persuasive evidence of the agreed intention of the parties").

Accordingly, the Insureds are entitled to a declaration that the WTC Asbestos Claims arising out of "spray-on fireproofing" do not constitute a single occurrence under the Policy and New York law.

B. Exhaustion

American Home's motion for a declaratory judgment that the $10,000,000 per occurrence limit applicable to WTC Fireproofing Claims has been exhausted is denied. Even if this court were to accept as true American Home's contention that it has spent over $10 million in indemnity "specifically to resolve WTC Fireproofing Claims" (*American Home Memo at 10-12, 19),* the Policy would only be exhausted if American Home had demonstrated that the WTC Fireproofing Claims constitute a single occurrence. Because American Home has failed to do so, this branch of its motion is denied, and the branch of the Insureds' motions seeking a declaratory judgment that the Policy is not exhausted as a result of the WTC Asbestos Claims (which American Home concedes), or the WTC Fireproofing Claims, is granted.

III. EXTRA-CONTRACTUAL DEFENSES

A. The Duty to Defend

The Insureds seek a declaration that American Home's duty to defend under the Policy does not terminate upon exhaustion of the Policy's liability limit. The Insureds contend that, even if American Home could demonstrate exhaustion of the Policy, it would still have a continuing duty to defend WTC Asbestos Claims under the Policy.

American Home previously asked this court to deny the Port Authority's 2012 summary judgment motion on the duty to defend on the ground that discovery would allegedly demonstrate exhaustion of the Policy's liability limit. In its 2013 decision granting the Port Authority's motion, this court rejected American Home's argument, explaining that the duty to defend survives exhaustion of the liability limit unless the policy "expressly limit[s] the duty to defend".

American Home Assur. Co. v Port Auth. of N.Y. & N.J., 40 Misc 3d 1235(A), *citing cases*. In rejecting American Home's argument, the court held that it "cannot presume that such a limitation exists". *Id.*

In fact, the Policy contains no such limitation provision. Indeed, three indisputable facts compel the conclusion that American Home sold the Insureds "litigation insurance," agreeing to provide a defense even after exhaustion of the liability limit. First, the Policy expressly provides that American Home "shall . . . defend any suit against the insured alleging . . . personal injury". *Policy at 1, § II (a).* Second, the Policy expressly provides that defense costs are "payable . . . in addition to the applicable limit of liability". *Id. at 3, § II (b)(4).* Third, the Policy does not include any language expressly limiting the duty to defend upon exhaustion. Thus, this court finds that the Insureds are entitled to a declaration that American Home must continue to defend the WTC Asbestos Claims, even if the Policy becomes exhausted.

Although American Home argues that "New York law is settled that the duty to defend is extinguished when there is no possibility of an indemnity obligation" *(Opposition Memo at 14)*, this statement directly contradicts the court's prior holding in this case, and is thus barred by the doctrine of the law of case. *People v Evans*, 94 NY2d 499, 502 (2000). In opposing the Port Authority's motion for summary judgment on the duty to defend, American Home had a "full and fair opportunity" to make the argument that it belatedly makes now, and it "has not presented any extraordinary circumstances permitting this court to ignore its prior decision". *Travelers Cas. & Sur. Co. v Honeywell Intl., Inc.*, 26 Misc 3d 1202(A) (Sup Ct, NY County 2006) (Tolub, J.)

B. Waiver and Estoppel

The Insureds also seek a declaration that American Home has waived and is estopped from asserting its trigger and exhaustion defenses. The Insureds argue that, by defending the Insureds and paying settlements on their behalf for the last two decades, American Home has waived and is estopped from asserting declaratory judgment claims regarding the timing of the injury and exhaustion. *Alcoa Memo at 21-24.*

This branch of the motion is denied as moot, as it has already been determined that American Home cannot assert its trigger defense, as the Policy does not require injury during the policy period, or its exhaustion defense with respect to the WTC Fireproofing Claims, as there was more than one occurrence.

C. Recoupment

Alcoa and Tishman seek a declaration that American Home's Recoupment Claim (the third cause of action) is without merit, and that American Home has waived and is estopped from asserting such a claim.

Under New York law, where an insurer "reserved the right to reimbursement," the insurer is entitled to recoup defense costs that were not covered . *Ostrager & Newman § 5.07* (3d ed 2014) (citing *Certain Underwriters at Lloyd's London v Lacher & Lovell-Taylor, P.C.*, 112 AD3d 434, 435 (1st Dept 2013), *affd* 29 NY3d 907 (2014) (an insurer is entitled to reimbursement of defense costs following a finding of no coverage where it has reserved its rights to do so). Likewise, for prior indemnity payments, "where an insurer defends a suit under

a reservation of rights, it may recover settlement payments if it is later determined in a declaratory judgment action that the underlying claims are not covered by the policy". *Id.* at § 22.05 (citing *American Guar. & Liability Ins Co. v CNA Reins. Co.*, 16 AD3d 154, 155 [1st Dept 2005] [finding that because the insurer had no responsibility for an additional insured, the insurer was entitled to recover amounts spent on the additional insured's behalf, including indemnity]).

"The issuance of a reservation of rights allows the insurer the flexibility of fulfilling its obligation to provide its insured with a defense, while continuing to investigate the claim further". *Law Offs. of Zachary R. Greenhill P.C. v Liberty Ins. Underwriters, Inc.*, 128 AD3d 556, 559 (1st Dept 2015). If the insurer concludes that there was no obligation to provide a defense, the insurer is then entitled to recoupment. *Id.* at 560 (approving insurer's assumption of the defense subject to "a reservation of rights to, among other things, later recoup their defense costs upon a determination of non-coverage"); *see also Federal Ins. Co. v Kozlowski*, 18 AD3d 33, 42 (1st Dept 2005) (finding insurers "must pay all defense costs as incurred, subject to recoupment when Kozlowski's liabilities, if any, are determined"); *Dupree v Scottsdale Ins. Co.*, 96 AD3d 546, 546 (1st Dept 2012) (defense costs were "subject to recoupment").

Although Alcoa and Tishman argue that American Home never reserved the right to recoup, this argument is contrary to fact. In May 2012, after commencing this coverage litigation, American Home sent letters to each of the four Insureds in which they reserved the right to recoup "all past and future uncovered payments related to the Claimants" in the event "[t]he Policy does nor provide coverage". *Garvey Opposition Affirm.*, exhibit 2 at AHA 010301; *id.*, Exhibit 3 at AHA 010384; *id.*, Exhibit 4 at AHA 010412; *id.*, exhibit 5 at AHA008350.

Moreover, pre-2012 letters to Tishman specifically reserved the right to "seek reimbursement of any defense costs paid" (*Id.*, Exhibit 10 at TRC 04251), and to "seek and demand reimbursement for any indemnity or any other payments paid". *Id.*, Exhibit 75 at TRC 05947; *see also* exhibit 12 at TRC 04267; Exhibit 14 at TRC 04269, Exhibit 11 at TRC 04280, Exhibit 42 at TRC 04283.

Alcoa and Tishman also contend that American Home may not seek recoupment of defense costs because the Policy does not expressly provide for it. *Alcoa Memo at 17-19.* This argument, however, is flawed. New York law "permits reimbursement of costs incurred in defending claims that are later determined not to be covered" *unless* the policy expressly prohibits it. *National Union Fire Ins. Co. of Pittsburgh, Pa. v Turner Constr. Co.*, 119 AD3d 103, 109 (1st Dept 2014) (denying recoupment because the policy expressly provided that the insurer could not seek recoupment).

Alcoa and Tishman further contend that they each negated American Home's recoupment claim by sending a pro forma response letter to American Home's May 2012 reservation of rights letters in which they purported to "reject" American Home's right of recoupment. *Alcoa Memo at 17-19.* Nevertheless, Alcoa and Tishman then accepted American Home's payment of defense costs and indemnity throughout the pendency of the coverage litigation, all of which were made subject to American Home's reserved right of recoupment. This court finds that, by accepting such monies, Alcoa and Tishman waived their objection.

Finally, Alcoa and Tishman argue that they are entitled to summary judgment on American Home's recoupment claims, because American Home has not identified the date on which it contends the Policy became exhausted. *Alcoa Memo at 20.* The court rejects this

argument, as the Insureds have not cited any law for the premise that American Home has such an obligation in order to survive summary judgment.

Accordingly, Alcoa and Tishman are not entitled to a declaration that American Home's recoupment claim fails as a matter of law, and has been waived by American Home. The court notes, however, that because it has been determined that the Policy does not require injury during the policy period, American Home is not entitled to recoupment on the ground that the Insureds' claims involved injuries that did not occur during the policy period. If, however, in the (unlikely) event that American Home could prove at trial that the aggregate Policy limits have been exhausted with respect to the WTC Asbestos Claims, American Home would be entitled to recoup any amounts that it proves were paid after the limit applicable to such claims was exhausted.

The court has considered the remaining arguments, and finds them to be without merit.

Accordingly, it is

ORDERED that plaintiff's motion for partial summary judgment (motion sequence no. 014) is denied; and it is further

ORDERED that defendants' motions for summary judgment (motion sequence nos. 015, 016, and 017) are granted to the limited extent that they are entitled to declarations that (1) coverage is triggered under the American Home Policy No. CGB 448 229 (the Policy) for the asbestos-related personal injury claims allegedly arising from exposure to asbestos at the World Trade Center (the WTC) site during construction of the project (the WTC Asbestos Claims) because the injuries alleged by the underlying claimants arose out of construction of the WTC;

(2) the WTC Asbestos Claims arising out of "spray-on fireproofing" (the WTC Fireproofing Claims) do not constitute a single occurrence under the Policy and New York law; (3) The Policy is not exhausted as result of the WTC Asbestos Claims or the WTC Fireproofing Claims as those claims are not considered "one occurrence"; (4) plaintiff's duty to defend under the Policy survives exhaustion of the Policy's liability limit; and (5) American Home Assurance Company (American Home) cannot obtain a declaration of no coverage for pending WTC Asbestos Claims ("Pending WTC Asbestos Claims") and are denied in all other respects; and it is further

ORDERED that the remainder of the action shall continue. All parties are to appear for a Pre-Trial Conference on January 16, 2018 at 10:00 a.m.

Dated: November 28, 2017

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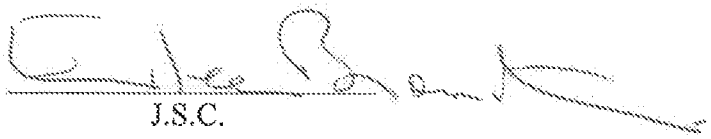

J.S.C.