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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

AJAY SARIN, ANITA KHANNA, GEETU KHANNA, DYKMAN 116, INC., BROADWAY 5601, INC., FRANKLIN 827, INC., 1508 FLATBUSH SUPERMARKET, INC., 153-21 JAMAICA SUPERMARKET, INC., 1559 WESTCHESTER SUPERMARKET, INC., 184 DYKMAN SUPERMARKET, INC., BROADWAY 157, INC., CHURCH STREET ENTERPRISES, INC., BROADWAY 5657, INC., NICHOLAS 916, INC., 1940 NOSTRAND SUPERMARKET, INC., YONKERS 109, INC., 116TH STREET SUPERMARKET, INC., 1623 FLATBUSH AVE. ENTERPRISES CORP., and 3700 NOSTRAND AVE., INC.,

Plaintiffs,

-against-

CNA FINANCIAL CORPORATION, NATIONAL FIRE INSURANCE COMPANY OF HARTFORD, TRANSCONTINENTAL INSURANCE COMPANY, and VALLEY FORGE INSURANCE COMPANY,

Defendants.

Index No.: 601453- 2007

AFFIRMATION OF STEVEN MANCINELLI
IN SUPPORT OF
PLAINTIFF'S MOTION FOR SUMMARYJUDGMENT

I, STEVEN MANCINELLI, an attorney admitted to practice in the State of New York and pursuant to CPLR § 2106, hereby affirms under penalty of perjury as follows:

1. I am a member in the firm of Codispoti & Mancinelli, LLP, attorneys for the Plaintiffs AJAY SARIN ("Sarin"), ANITA KHANNA, GEETU KHANNA, DYKMAN 116,

INC., BROADWAY 5601, INC., FRANKLIN 827, INC., 1508 FLATBUSH SUPERMARKET, INC., 153-21 JAMAICA SUPERMARKET, INC., 1559 WESTCHESTER SUPERMARKET, INC., 184 DYKMAN SUPERMARKET, INC., BROADWAY 157, INC., CHURCH STREET ENTERPRISES, INC., BROADWAY 5657, INC., NICHOLAS 916, INC., 1940 NOSTRAND SUPERMARKET, INC., YONKERS 109, INC., 116TH STREET SUPERMARKET, INC., 1623 FLATBUSH AVE. ENTERPRISES CORP., and 3700 NOSTRAND AVE., INC. (and collectively hereafter referred to as "Plaintiffs"). I have knowledge of the facts and circumstances of this matter through investigation, the files maintained by this office, and meetings with my clients.

2. I respectfully submit this Affirmation, together with Plaintiffs' Appendix of Exhibits ("Appendix"), in support of Plaintiffs' motion for summary judgment for an order and judgment declaring and directing that defendant insurance companies are obligated, with respect to the underlying action, to defend Plaintiffs (or to pay for all of Plaintiffs' defense costs) and to indemnify Plaintiffs, as well as ordering Defendants to reimburse Plaintiffs for all costs, including attorney's fees, for Plaintiffs' defense of the underlying action and to reimburse Plaintiffs for costs and attorney's fees associated with having to bring the instant action; or, in the alternative, for partial summary judgment for an order declaring that the defendant insurance companies are obligated to defend Plaintiffs in the underlying action (or to pay for all of Plaintiffs' defense costs in said action), as well as ordering defendant insurance companies to reimburse Plaintiffs for all costs, including attorney's fees, for Plaintiffs' defense of the underlying action and to reimburse Plaintiffs for costs and attorney's fees associated with having to bring the instant action.

NATURE OF THE ACTION

3. Plaintiffs herein commenced this action seeking a declaratory judgment as to the application of commercial insurance coverage on an underlying lawsuit, pursuant to policies issued to Plaintiffs by the Defendants CNA FINANCIAL CORPORATION ("CNA Financial"), NATIONAL FIRE INSURANCE COMPANY OF HARTFORD ("National Fire"), TRANSCONTINENTAL INSURANCE COMPANY ("Transcontinental"), and VALLEY FORGE INSURANCE COMPANY ("Valley forge") (hereinafter collectively referred to as Defendants or "CNA"), namely, that said defendant insurance companies are obligated to defend and indemnify Plaintiffs in connection with said underlying lawsuit. A copy of the Verified Complaint in this action is annexed as Exhibit A to the Appendix filed herewith.

4. Defendants have answered, denying Plaintiff's claims and asserting affirmative defenses of non-coverage under the relevant insurance policies. It is undisputed that National Fire, Transcontinental and Valley Forge are all wholly owned companies of CNA Financial, as admitted by Defendants in their Answer in this action at ¶¶ 29-34. A copy of Defendants' Verified Answer is annexed to the Appendix as Exhibit B.

5. In the underlying lawsuit, Colgate-Palmolive Company ("Colgate") sued the Plaintiffs herein, among others, in the United States District Court for the Southern District of New York, *Colgate-Palmolive Company v. J.M.D. All-Star Import and Export., et al.,* Case Number 06-CV-2857 (DLC) (hereinafter the "Colgate Action"). Colgate alleges various claims against Plaintiffs that fall within squarely the "advertising injuries" coverage of the applicable insurance policies issued by Defendants to Plaintiffs, namely: federal trademark and trade dress infringement; federal false designation of origin, unfair competition and passing off; federal trademark dilution; New York Common Law Trade Mark Infringement; New York common law

trade dress infringement; and New York State dilution. A copy of Colgate's First Amended Complaint is annexed to the Appendix as Exhibit C, without the exhibits thereto (also annexed to the Complaint in this action at Exhibit B, *see* Appendix Exhibit A).

6. Plaintiffs gave timely notice of claim to CNA of the Colgate Action. *See* Appendix Exhibit A, Complaint at ¶¶ 4 and 52 to 55 and Exhibits D to H thereto; Appendix Exhibit B, Answer at ¶¶ 4 and 52 to 55. CNA then disclaimed all coverage to Plaintiffs, refusing to defend or to indemnify Plaintiffs in the Colgate Action, which decision Plaintiffs disputed. *See* Appendix Exhibit A, Complaint at ¶¶ 56-58 and Exhibits G &H thereto.

7. There are no issues of material fact to be decided in the instant action and this Court may render judgment, granting Plaintiffs' motion as a matter of law. The four corners of the insurance Policies issued by Defendants to Plaintiffs and the complaint in the underlying action speak for themselves. Plaintiffs' claim for a declaration that the insurer has a duty to defend is ripe for summary judgment. *See, A. Meyers & Sons Corp. v. Zurich American Ins. Group,* 74 N.Y.2d 298, 302-03, 545 N.E.2d 1206, 1208, 546 N.Y.S.2d 818, 820 (1989). Furthermore, the primary issue here is the scope of CNA's duty to defend which, under New York law, is an issue for the Court to decide upon reviewing the terms of the Policies and the complaint in the underlying action. *National Casualty Co. v. Vigilant Insurance Co.,* 466 F.Supp.2d 533, 538 (S.D.N.Y. 2006), *citing Technicon Electronic Corp. v. Home Assurance Co.,* 74 N.Y.2d 66, 544 N.Y.S.2d 531 (1989).

8. CNA disclaimed coverage of Plaintiffs primarily on the grounds of five principal excuses: (1) "Knowledge of Falsity" based on allegations of willful infringement in Colgate's Amended Complaint; (2) "Material Published Prior to Policy Period" because the alleged wrongful conduct supposedly commenced prior to the inception of the CNA Policies; (3)

"Willful Violation of a Penal Statute" based on whole cloth assumptions with no allegations of criminal conduct whatsoever made in the underlying action; (4) "Failure of Goods to Conform" based on allegations in the Colgate Action of the sale of counterfeit COLGATE branded toothpaste; (5) "Fraud" apparently based on one single statement in the Colgate Amended Complaint of alleged fraudulent conduct (Appendix Exhibit C, Colgate's First Amended Complaint at ¶ 84), coupled with CNA's first excuse for disclaiming (i.e., alleged knowing and willful false conduct). *See*, Appendix Exhibit A, Complaint at Exhibit F thereto at p. 8.

9. In seeking a means to decline the insurance coverage, to which Plaintiffs are entitled, CNA cherry picks among the allegations in the Colgate Action in order to invoke the exclusion provisions in the relevant insurance policies. However, as a matter of law and as shown herein, policy exclusions must be construed narrowly and in favor of the insured, with all allegations in the underlying action being viewed in light of the disclaiming insurer's burden to show that there are no allegations in the underlying pleadings on which coverage can be based. *See infra*, at ¶¶ __ to __. To hold otherwise would directly contravene established New York precedent and the terms of the insurance policies issued by Defendants to Plaintiffs. It is well established that an insurer is still contractually obligated to defend its insured in a pending lawsuit if the underlying complaint alleges any covered occurrence, even if it may ultimately be shown that the claim may be meritless or not covered. *Fitzpatrick v. American Honda Motor Co., Inc.*, 78 N.Y.2d 61, 65, 571 N.Y.S. 2d 672, 674 (1991). Without a doubt, CNA is contractually obligated at a minimum to defend the Plaintiffs herein, if not ultimately to indemnify Plaintiffs in connection with the underlying Colgate Action.

BACKGROUND FACTS

10. Defendants had issued to Plaintiffs commercial general liability insurance policies, which are enumerated in the Complaint at ¶ 40 (Appendix Exhibit A at ¶ 40) and accordingly admitted by Defendants (Appendix Exhibit B at ¶¶ 40-43). The insurance policies issued by Defendants to Plaintiffs and at issue here are collectively referred to hereafter as the "Policies". Sample copies of the relevant insurance policies are annexed to the Appendix as Exhibit D (National Fire policy), Exhibit E (Valley Forge policy) and Exhibit F (Transcontinental policy).

11. The Policies provide that:

> [CNA] will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury", "property damage", "personal injury" or "advertising injury" to which the insurance applies. We have the right and duty to defend any "suit" seeking those damages. We may at our discretion investigate any "occurrence" and settle any claim or "suit" that results.

Appendix Exhibits D & E, policy form "G-20510-B", at § A "Coverages" ¶ 1(a) at p. 1of 12.[1] The coverage applies to "'[a]dvertising injury' caused by an offense committed in the course of advertising your goods, products or services; but only if

[1] The Transcontinental Insurance Company policy language differs only slightly as to this specific provision relevant to this Action, namely:

> We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury", "property damage", "personal injury" or "advertising injury" to which the insurance applies. We have the right and duty to defend *the insured* against any "suit" seeking those damages. *However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury," "property damage," "personal injury" or "advertising injury" to which this insurance does not apply.* We may at our discretion investigate any "occurrence" and settle any claim or "suit" that results.

Appendix Exhibit F, policy form "G-20510-C", at § A "Coverages" ¶ 1(a) at p. 1of 13 (emphasis added to highlight difference in language with the comparable provision in the National Fire policy and the Valley Forge policy. The only relevant differences among the three policies is this one § A Coverages, ¶ 1(a).

PLEASE NOTE: for purposes of economy herein and for the convenience of the Court, Plaintiffs will cite hereafter to Appendix Exhibit D, the National Fire policy, in referencing particular policy provisions as applicable to all three policies, unless differences are otherwise noted in the text.

the offense was committed in the 'coverage territory' during the policy period." Appendix Exhibit D, policy form "G-20510-B", at § A "Coverages" ¶ 1(b)(2)(b) (*see* footnote 1 below regarding citations to the other two insurance policies). The "Coverage Territory" is defined in the policy as including "[t]he United States of America (including its territories and possessions), Puerto Rico and Canada…." *Id.* at § F "Definitions" ¶ 4(a) at p. 9 of 12.

12. Since the Policies were in effect, it is clear that Plaintiffs bargained for and paid CNA for insurance that would cover the legal expenses and indemnify claims as they are incurred, especially since the Colgate Action is the exact type of risk CNA insured for and could have reasonably expected in light of the nature of Defendants' business. CNA is contractually obligated, at a minimum, to defend Plaintiffs in the underlying action. Obviously CNA gains a substantial pecuniary benefit in avoiding its contractual obligations to defend by construing the scope of coverage and exclusions under the Policies as narrowly as possible. By invoking the policy exclusions and refusing coverage to Plaintiffs, CNA saves the substantial cost of defense and possible judgment indemnification while imposing an enormous burden on Plaintiffs. However, since Plaintiffs bargained and paid for insurance coverage, the sole guide here cannot be CNA's pecuniary interest in refusing coverage. The terms of the Policies, the contractual obligation assumed by CNA, and the allegations in the underlying Colgate complaint clearly warrant Plaintiffs' defense by CNA, at the least, as well as CNA's indemnification of any judgment or settlement in the underlying action.

13. The Policies specifically provide coverage for advertising injuries "arising out of … [i]nfringement of copyright, title or slogan." (*Id.* § F "Definitions" ¶ 1 "Advertising Injury" at p. 9 of 12. The Policies, therefore, cover "advertising injuries" as

including federal trademark and trade dress infringement, false designation of origin, unfair competition and passing off, and trademark dilution arising out of Defendants' "advertising." As noted *supra* at ¶11, CNA has the "duty to defend any 'suit' seeking those damages [*i.e.*, damages for covered injury]." CNA's duty to defend is triggered by the allegations in the Colgate Action of trademark infringement and trademark dilution, among others.

14. A federal court in New York (construing New York law) held that the insurer had a duty to defend based, in part, on the policy's definition of "advertising injury" to include "infringement of copyright, title or slogan" – virtually the same definition as in the CNA Policies. *See, Energex Systems Corp. v. Fireman's Fund Ins. Co.*, Case No. 96-Civ-5993, 1997 WL 358007 (S.D.N.Y., June 25, 1997), a copy of which is annexed in the Appendix as Exhibit K. In *Energex*, the court further held that:

> While an injury defined as an "infringement of title" may not cover all trademark infringement claims, the language clearly suggests coverage of claims where there are allegations of infringing a company's mark or slogan.

Id. at *4. Colgate's First Amended Complaint made numerous allegations of infringement by Plaintiffs in advertising and marketing of the Colgate trade dress and trademarks. *See infra* at ¶ 15. Furthermore, a "slogan," when used in connection with the promotion of goods and services, is a form of trademark. *See*, U.S. Patent & Trademark Office, Trademark Manual of Examining Procedure (the "TMEP") § 1202.04.[2] Therefore, *Energex* shows that Colgate's allegations of Plaintiffs' alleged trademark and trade dress infringement fall within the Policies' definition of "advertising injury."

15. The allegations in the underlying action clearly bring Colgate's claims within the

[2] The TMEP § 1202.04 states, in part: "A slogan can function as a trademark if it is not merely descriptive or informational. *See e.g., Roux Laboratories, Inc. v. Clairol Inc.* , 427 F.2d 823, 166 USPQ 34 (C.C.P.A. 1970) (affirming the Board's dismissal of an opposition to the registration of HAIR COLOR SO NATURAL ONLY HER HAIRDRESSER KNOWS FOR SURE for a hair coloring preparation); *In re The Hallicrafters Co.* , 153 USPQ 376 (TTAB 1967) (QUALITY THROUGH CRAFTSMANSHIP found registrable for radio equipment)."

terms of the "advertising injury" coverage of the CNA Policies. The Colgate Action specifically alleges that Plaintiffs "advertised, offered for sale, sold and distributed toothpaste… [that are] counterfeit and infringing copies of Colgate products." Appendix Exhibit C, Colgate's First Amended Complaint at ¶ 81. Colgate's pleadings are replete with further allegations of Plaintiffs' use, sale and advertising in connection with Colgate's claims of trademark and trade dress infringement, unfair competition, trademark dilution, etc. *See* Appendix Exhibit C, Colgate's First Amended Complaint at ¶¶ 80, 81, 96, 97, 104, 112, 113, 127, 134, 141 and 147.

16. Defendants have denied Colgate's allegations in the Colgate Action, including denying all claims that Defendants "willfully and knowingly distributed, offered for sale and/or sold counterfeit Colgate products to the consuming public, with willful disregard for public health and safety and misleading and deceiving the public in violation of the Trademark Act of 1946." A copy of the Answer of the Plaintiffs herein to the Colgate First Amended Complaint in the Colgate Action is annexed in the Appendix as Exhibit G.

17. It is not disputed that the Policies have "exclusion" provisions whereby CNA might decline coverage under certain specified conditions. In disclaiming all coverage for Plaintiffs, CNA invoked the following exclusionary clauses from the Policies:

> p. "Personal injury" or "advertising injury":
> (1) Arising out of oral or written publication of material, if done by or at the direction of the insured with knowledge of its falsity;
> (2) Arising out of oral or written publication of material whose first publication took place before the beginning of the policy period;
> (3) Arising out of the willful violation of a penal statute or ordinance committed by or with the consent of the insured….
> * * *
> q. "Advertising injury" arising out of:
> . . .
> (2) The failure of goods, products or services to conform with advertised quality or performance….

Appendix Exhibit D at § B "Exclusions" ¶ 1(q) at p. 5 of 12; *see also supra* at ¶ 8. The crux of

this action depends on the applicability of CNA's policy exclusions in light of the allegations in the underlying Colgate Action and CNA's contractual obligations to Plaintiffs.

THE ALLEGATIONS IN THE COLGATE ACTION, AS A MATTER OF LAW, REQUIRE PLAINTIFF TO DEFEND AND INDEMNIFY DEFENDANTS

18. CNA's grounds for disclaiming coverage amount to little more than cherry picking of facts in an obvious attempt to trump up an avoidance of its contractual obligation to defend Plaintiffs. However, if CNA invokes policy exclusions to disclaim all coverage, then CNA has the burden of proving that all the claims in the underling action come entirely within those exclusions. *International Paper Co. v. Continental Casualty Co.*, 35 N.Y.2d 322, 327, 361 N.Y.S.2d 873, 877 (1974). As discussed below, New York law especially favors the right of the insured to a defense of the underlying claims.

19. It is an indisputable point of law that an insurer's duty to defend its insured is heavy and broader than the insurer's duty to indemnify. *International Paper Co. v. Continental Ins. Co.*, 35 N.Y.2d 322, 326, 361 N.Y.S.2d 873, 876 (1974). In fact, the Court of Appeals "has repeatedly held that an insurer's duty to defend its insured arises whenever the allegations in a complaint state a cause of action that gives rise to the reasonable possibility of recovery under the policy." *Fitzpatrick v. American Honda*, 78 N.Y.2d at 65, 571 N.Y.S.2d at 673-74 (*emphasis added*). If the injured party in the underlying action can state any facts that bring the claim within the coverage, then "the policy requires the insurer to defend irrespective of the insured's ultimate liability." *Schnipper v. Home Indemnity Co.*, 99 A.D.2d 959, 960, 472 N.Y.S.2d 653, 655 (1st Dep't 1984).

20. As a general rule, insurance policies are to be construed liberally in favor of the insured and against the insurer who drew the contract and against exceptions and limitations to

coverage, taking into account the reasonable expectations of the businessman who purchased the insurance contract. *DeForte v. Allstate Insurance Co.*, 81 A.D.2d 465, 442 N.Y.S.2d 307 (4th Dep't 1981); *see also, Colon v. Aetna Life & Casualty Ins. Co.*, 66 N.Y.2d 6, 8, 484 N.E.2d 1040, 1041, 494 N.Y.S.2d 688, 689 (1985) (An insurer's obligation to defend the insured is "exceedingly broad" and different from the duty to indemnify and is construed "in the interest of the insured"). Furthermore, if any claims in the underlying action are "within the embrace of the policy, the insurer must come forward to defend its insured no matter how groundless, false or baseless the suit may be." *Colon v. Aetna Life & Casualty Ins. Co.*, 66 N.Y.2d at 8-9, 484 N.E.2d at 1041, 494 N.Y.S.2d at 689; *see also, Agoado Realty Corp. v. United Intern. Ins. Co.*, 95 N.Y.2d 141, 145, 733 N.E.2d 213, 215, 711 N.Y.S.2d 141, 143 (2000). In fact, the question of the insured's ultimate liability in the underlying claim is not a factor when it comes to the insurer's duty to defend. *Colon v. Aetna Life & Casualty*, 66 N.Y.2d at 8, 494 N.Y.S.2d at 689 ("[t]he ultimate responsibility of the insured [in the underlying action] is not a consideration"); *see also, Curtis v. Nutmeg Ins. Co.*, 204 A.D.2d 833, 612 N.Y.S.2d 256 (3d Dep't 1994).

21. Where the four corners of the underlying Complaint contain any allegations that bring the claim even potentially within the protection of the policies, then the insurer's duty to defend is clearly established. *Fitzpatrick v. American Honda Motor Co., Inc.*, 78 N.Y.2d 61, 66, 571 N.Y.S. 2d 672, 674 (1991). Any ambiguity found in the insurance policy must be construed against the insurer and in favor of coverage. *Nationwide Mutual Insurance Co. v. CNA Insurance Co.*, 286 A.D.2d 485, 729 N.Y.S.2d 760 (2d Dep't 2001). Even the duty to defend or pay defense costs must be construed liberally, with any doubts about coverage resolved in the insured's favor and regardless of the insured's ultimate liability. *Volney Residence, Inc .v. Atlantic Mutual Insurance Co.*, 195 A.D.2d 434, 434, 600 N.Y.S.2d 707, 708 (1st Dep't 1993).

22. It is beyond dispute that the allegations of the underlying Colgate Action determine CNA's obligation to defend, coupled with CNA's contractual obligation; neither the merits of the underlying claims nor consideration of any claims that may fall outside the scope of the policy are relevant. The standards for determining an insurer's duty to defend is already well-established, as noted above and as outlined in the following:

> The duty to defend arises whenever the allegations in a complaint against the insured fall within the scope of the risks undertaken by the insurer, regardless of how false or groundless those allegations might be *(Goldberg* v. *Lumber Mut. Cas. Ins. Co.,* 297 N.Y. 148, 154, 77 N.E.2d 131 (1948).) The duty is not contingent on the insurer's ultimate duty to indemnify should the insured be found liable, nor is it material that the complaint against the insured asserts additional claims which fall outside the policy's general coverage or within its exclusory provisions. Rather, the duty of the insurer to defend the insured rests solely on whether the complaint alleges any facts or grounds which bring the action within the protection purchased. *(Ruder & Finn v. Seaboard Sur.* Co., 52 N.Y.2d 663, 669-670, 439 N.Y.S.2d 858, 422 N.E.2d 518 (1981); *Schwamb v. Fireman 's Ins. Co., 41* N.Y.2d 947, 949, 394 N.Y.S.2d 632,,363 N.E.2d 356 (1977); *Utica Mut. Ins. Co. v. Cherry, 38* N.Y.2d 735, 737, 381 N.Y.S.2d 40, 343 N.E.2d 758 (1975); *Prashker v. United States Guar. Co.,* 1 N.Y.2d 584, 590, 592, 154 N.Y.S.2d 910, 136 N.E.2d 871 (1956).) Though policy coverage is often denominated as "liability insurance", where the insurer has made promises to defend "it is clear that [the coverage] is, in fact, 'litigation insurance' as well." *(International Paper Co. v. Continental Cas. Co., supra,* 35 N.Y.2d, at p. 326, 361 N.Y.S.2d 873, 320 N.E.2d 619.) As such, "[s]o long as the claims [asserted against the insured] may rationally be said to fall within policy coverage, whatever may later prove to be the limits of the insurer's responsibility to pay, there is no doubt that it is obligated to defend." *(Schwamb v. Fireman's Ins. Co., supra,* 41 N.Y.2d, at p. 949, 394 N.Y.S.2d 632, 363 N.E.2d 356.)

Seaboard Surety Co. v. Gillette Co., 64 N.Y.2d 304, 310-11, 476 N.E.2d 272, 274-75, 486 N.Y.S.2d 873, 875-76 (1984) (*emphasis added*).

23. The terms of the Policies here confirm that they provide "litigation insurance" as well as liability insurance. *See, Seaboard Surety Co. v. Gillette Co., supra,* 64 N.Y.2d at 310, 476 N.E.2d at 275, 486 N.Y.S.2d at 876. The Policies specifically provide: "We will have the right and duty to defend [the insured against] any 'suit' seeking [covered] damages." *See supra* at 11; Appendix Exhibit D, Policy Form G-20510-B, § A Coverages at ¶ 1(a) at p. 5 of 15; *see also*

Footnote 1 for a slightly different, but substantively the same, language with respect to the Transcontinental policy.

24. It is settled law in New York that the insurer's duty to defend attaches if the complaint alleges any facts that any part of which, if proved, would fall within the coverage of the liability policy; even if the underlying claims ultimately may prove meritless or outside the policy, the insurer is still obligated to defend. *Fitzpatrick v. American Honda Motor*, 78 N.Y.2d at 65, 571 N.Y.S. 2d at 674; *Sturges Manufacturing Co. v. Utica Mutual Ins. Co.*, 37 N.Y.2d 69 (1975); *see also, Frontier Ins. Co. v. State of New York*, 87 N.Y.2d 864 (1995); *County of Columbia v. Continental Ins. Co.*, 189 A.D.2d 391, 595 N.Y.S.2d 988 (3d Dep't 1993). CNA can be excused from its duty to defend only if the Court can conclude as a matter of law that there is no possible factual or legal basis on which the insurer might be held to indemnify the insureds. *Villa Charlotte Bronte, Inc. v. Commercial Union Insurance Co.*, 64 N.Y.2d 846, 848, 487 N.Y.S.2d 314, 315 (1985).

25. The Court of Appeals has repeatedly held that the insurer's duty to defend is invoked where allegations *even potentially* fall within the scope of protection:

> The duty to defend insureds – long recognized as broader than that to indemnify – is derived from the allegations of the complaint and the terms of the policy. If the complaint contains any facts or allegations which bring the claim *even potentially* within the protection purchased, the insurer is obligated to defend *(Ruder & Finn v. Seaboard Sur. Co., 52* N.Y.2d 663, 669-670, 439 N.Y.S.2d 858, 422 N.E.23d 518 (1981).)

Technicon Electronics Corp. v. American Home Assurance Co., 74 N.Y.2d 66, 73, 542 N.E.2d 1048, 1050, 544 N.Y.S.2d 531, 533 (1989) (*emphasis added*). *See also, A. Meyers & Sons Corp. v. Zurich American Ins. Group*, 74 N.Y.2d 298, 302, 545 N.E.2d 1206, 1208, 546 N.Y.S.2d 818, 820 (1989) ("If the facts alleged [in the complaint] raise *a reasonable possibility* that the insured may be held liable for some act or omission covered by the policy, then the insurer

must defend.") (emphasis added); *ZKZ Associates LP v. CNA Ins. Co.*, 224 A.D.2d 174, 176, 637 N.Y.S.2d 117, 118 (1st Dep't 1996) ("It is well established that the duty to defend is 'exceedingly broad [and]...arises whenever the allegations of the complaint, for which the insured may stand liable, fall within the risk covered by the policy'.") (*quoting, Colon v. Aetna Life & Cas. Ins. Co.*, 66 N.Y.2d 6, 8, 484 N.E.2d 1040, 494 N.Y.S.2d 688 (1985)); *Ramos v. National Cas. Co.*, 227 A.D.2d 250, 642 N.Y.S.2d 290-91 (1st Dep't 1996) ("Where, as here, the claim, as pleaded within the 'four corners of the complaint' in the underlying action, falls within the scope of the insurance policy, the insurer must provide a defense....").

26. If the insurer invokes an exclusion for coverage, then the "insurer is cloaked with the burden of proving that the incident and claim thereunder came within the exclusions of the policy." *Intern'l Paper Co. v. Continental Insurance Co.*, 35 N.Y.2d at 327, 361 N.Y.S.2d at 876. CNA cannot sustain that burden here.

27. CNA bears the heavy burden of showing that all the "allegations of the complaint [in the underlying action] cast that pleading solely and entirely within the policy exclusions, and, further, that the allegations, *in toto*, are subject to no other interpretation." *International Paper Co. v. Continental Casualty Co.*, 35 N.Y.2d 322, 325 (1974) (emphasis added); *see also, Curtis v. Nutmeg Ins. Co.*, 204 A.D.2d 833, 834, 612 N.Y.S.2d 256 (3d Dep't 1994); *Spielfogel v. North River Ins. Co.*, 148 A.D.2d 696, 539 N.Y.S.2d 444 (2d Dep't 1989). Regarding exclusion provisions in the policy, the Court of Appeals has held that "[w]hen an exclusion clause is relied upon to deny coverage, the burden rests upon the insurance company to demonstrate that the allegations of the [underlying] complaint can be interpreted only to exclude coverage." *Town of Massena v. Healthcare Underwriters Mut. Ins. Co.*, 98 N.Y.2d 435, 444 (2002). To be relieved of its duty to defend, CNA must "establish[ ] as a matter of law that

there is no possible factual or legal basis on which it might eventually be obligated to indemnify its insured under any policy provision." *Allstate Ins. Co. v. Zuk*, 78 N.Y.2d 41, 45 (1991).

A. CNA Improperly Disclaimed Coverage Based on Willful Conduct

28. CNA disclaimed coverage based on Colgate's allegations of willful infringement and/or fraudulent conduct in intentionally infringing Colgate's trademarked product or importing and selling counterfeit Colgate product, as alleged by Colgate in the underlying action. In disclaiming coverage, CNA claims that Plaintiffs "cannot satisfy the initial burden of demonstrating their entitlement under the Policy" (Appendix Exhibit A, Complaint at Exhibit F thereto at p. 6), and further asserts:

> Colgate's Amended Complaint alleges that the Defendants knowingly, intentionally, willfully, and deliberately engaged in a scheme involving the sale of counterfeit Colgate goods. Indeed, each cause of action is predicated upon the Defendants' intentional conduct in distributing counterfeit Colgate and "Colddate" toothpaste, with the intent to deceive the public, dilute the value of the trademarks and injure Colgate. In addition, attached to the Amended Complaint is an email from the Chinese manufacturer of the counterfeit products to Sarin specifically discussing the "fake Colgate" and the problems that would ensue if customs inspected the shipment. Thus, there can be no question of Defendants' knowledge of the falsity of the goods. Therefore, Colgate's allegations fall squarely within the Policy's "knowledge of falsity" exclusion and, consequently, there is no coverage for this claim.

Id. at 7. However, as noted *supra* at ¶ 26 & 27, CNA has it backwards – it is CNA which has the burden of demonstrating that its exclusions apply to the underlying claims in their entirety. It is not the insureds' burden to satisfy "entitlement under the policy," for which the insureds have contracted and paid. Such fallacious burden shifting by CNA shows its underlying bad faith here.[3]

[3] CNA's bad faith is highlighted in contrast to the conduct of Seneca Insurance in the related action before this Court, *Seneca Insurance v. JMD All-Star Import Export, Inc.*, NY County Index No. 602536/06, which is also

29. Foremost, the claims of willful and deliberate infringement, alleged in part by Colgate, are not even relevant to the question of an insurer's obligation to defend. The issue of Plaintiffs' alleged willful and deliberate conduct, including alleged deliberate infringement in violation of the Lanham Act as Colgate alleges, pertain to the issue of damages and not liability. *PG Insurance Co. v. S.A. Daly Manufacturing Co.*, 251 A.D.2d 1065, 1066, 674 N.Y.S.2d 199, 200 (4th Dep't 1998). Whether Plaintiffs might ultimately be liable to Colgate for any damages is not a factor when it comes to CNA's duty to defend Plaintiffs. *Colon v. Aetna Life & Casualty Co.*, 66 N.Y.2d at 8, 494 N.Y.S.2d at 689. Therefore, allegations in the underlying action of willful conduct are not, as a matter of law, a sufficient basis for CNA to refuse its obligation to defend Plaintiffs. *Cosser v. One Beacon Ins. Group*, 15 A.D.3d 871, 873, 789 N.Y.S.2d 586, 587 (4th Dep't 2005).

30. It is well settled that where the underlying action has multiple bases for potential recovery against an insured, some of which are covered and some of which potentially are not covered under the Policies, the insurer is nonetheless not absolved of its duty to defend its insureds. *See, New York Cent. Mutual Fire Ins. Co. v. Heidelmark*, 108 A.D.2d 1093, 1094, 485 N.Y.S.2d 661, 662 (3rd Dep't 1985). If there are any facts or grounds that bring the underlying action within the coverage, the insurer has a duty to defend. *Seaboard Surety Co. v. Gillette Co.*, 64 N.Y.2d at 310, 486 N.Y.S.2d at 873. It is clear that Colgate has alleged multiple claims, including garden-variety trademark infringement and unfair competition under the Lanham Act, in addition to claims alleging willful conduct of intentional trademark infringement and intentional trademark counterfeiting. Colgate thus has several bases for potential recovery against the insureds (Plaintiffs herein) within the scope of coverage that do not involve alleged

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based on the same underlying Colgate Action. Seneca at least came forward to defend its insured in the Colgate Action and then sought, while continuing its defense, an order with respect to its obligation to defend and indemnify.

willful, intentional or fraudulent conduct. Colgate's first cause of action alone, for federal trademark infringement, requires CNA to defend the entire action. *Mumford v. 854 Gerard Avenue Corp.*, 12 Misc.3d 1168(A), 829 N.Y.S.2d 844 (Table) (S.Ct. NY Cty. Dec. 19, 2005), *Slip Opin.* (a copy is attached here for convenience of the Court); *see also Town of Massena v. Healthcare Underwriters Mutual Ins. Co.*, 98 N.Y.2d at 445-46.

31. Under the U.S. Trademark Act, claims of willful infringement or trademark counterfeiting pertain not to liability but to the enhancement of monetary damages, if the liability is proven to have been deliberate or counterfeit. *See* 15 U.S.C. § 1117(b) & (c). CNA is obligated to defend Plaintiffs, because in the end they may be liable to Colgate pursuant to the Lanham Act and the General Business Law in the underlying action without a showing of intentional or knowing conduct on their part. *PG Insurance Co. v. S.A. Daly Manufacturing Co.*, 251 A.D.2d at 1066, 674 N.Y.S.2d at 200. The fact that the Colgate complaint contains claims of willful infringement and trademark counterfeiting, which if ultimately proven might fall within the exclusion provisions of the Policies thus potentially barring indemnity, does not relieve CNA of its duty to defend against the entire Colgate Action; indeed, "an insurer must defend against an entire action even if only one claim potentially falls within the indemnity coverage of its policy." *GRE Insurance Group v. GMA Accessories, Inc.*, 180 Misc.2d 927, 931, 691 N.Y.S.2d 244, 247 (S.Ct. NY Cty. 1998).

32. Furthermore, CNA premised its refusal of coverage on conduct that Colgate specifically attributed to a co-defendants in the Colgate Action, namely, JMD All-Star Import Export, Inc. ("JMD") and Mr. Sarin as JMD's principal. While it is not disputed that the Store Defendants in the Colgate Action (Plaintiffs herein) admittedly sold toothpaste under the contested COLDDATE mark, it is also undisputed that they did not import the product from

China nor had any dealings with the Chinese exporter. *See*, Appendix Exhibit G, Store Defendants' Answer to Colgate's First Amended Complaint at ¶ 90. Indeed, Plaintiffs herein are retail stores and buy product for retail sales from local vendors and distributors. *Id*. at ¶¶ 90 to 94. The COLDDATE branded toothpaste sold by Plaintiffs was imported the product from China solely by the distributor JMD. *Id.* at ¶¶ 90 & 91.

33. Colgate's allegations concerning the knowing importation of counterfeit COLGATE branded toothpaste and offending COLDDATE branded toothpaste expressly refers to conduct of defendant JMD and co-defendant Ajay Sarin as president of JMD. (*See*, Appendix Exhibit C: Colgate's First Amended Complaint at ¶¶ 61-63). CNA's disclaimer of coverage wrongly imputes alleged conduct of JMD and Sarin as president of JMD to the Plaintiffs herein. It should also be noted that the Court in the Colgate Action has already ruled that the COLDDATE mark is not a counterfeit of the COLGATE trademarks and dismissed Colgate's claim of trademark counterfeiting as to the sale of COLDDATE toothpaste. A copy of Judge Stanton's decision and order regarding COLDDATE is annexed to the Appendix as Exhibit H. This dismissal of the COLDDATE trademark counterfeiting claim reduces Colgate's claim (with respect to the sale of COLDDATE) to garden-variety trademark infringement, which places Colgate's claim squarely within the coverage under the Policies and thereby clearly invokes CNA's duty to defend Plaintiffs.

CNA Improperly Disclaimed Coverage As Commencing Prior to Policy Inception Premised on Conduct of Prior and Different Entities.

34. CNA admits that the Policies were issued to Plaintiffs and were in force as of the dates set forth in ¶ 40 of the Complaint. *See* Appendix Exhibit B, Defendants' Answer at ¶ 40. Furthermore, CNA's letter of James Hoeffer disclaiming coverage shows the coverage profiles of

the Policies and constitutes an admission that coverage was in effect by CNA for Plaintiffs. *See* Appendix Exhibit, Complaint at Exhibit F thereto at pp. 3-4.

35. CNA's second basis for disclaiming coverage relied on Colgate's allegations that "wrongful conduct began at least as early as February 2003, prior to the inception of the Policy. As such this exclusion operates to bar coverage for all Colgate claims." Appendix Exhibit A, Complaint at Exhibit F thereto at p. 8. However, while the Colgate complaint may allege wrongful conduct dating as early as 2003, the specific conduct is not attributed to the Plaintiffs herein. Colgate's First Amended Complaint alleges that "in or about February 2003 [co-defendants] J.M.D. and Sarin [as principal of JMD] ordered, purchased, and or imported into the United States counterfeit COLGATE® branded products from Ningbo Haitian Import and Export Co., Ltd, a Chinese corporation located at No. 139 Yaohan St., Ningbo, China." (Appendix Exhibit C at ¶ 61).

36. Colgate's allegations with respect to the Plaintiffs herein pertain to alleged conduct that certainly falls with the term periods of the Policies. Colgate first learned of any alleged wrongful conduct by the Stores (the Plaintiffs herein) on or about October 28, 2005. On that date, Colgate's investigators first purchased allegedly infringing product from Store #16 (see chart below at ¶ 38). Appendix Exhibit C at ¶¶ 68 & 69. The term for the CNA policy issued to Store #16, plaintiff 3700 Nostrand Avenue, Inc., commenced on October 14, 2005. Therefore, it is clear that date of Colgate's investigation of alleged wrongful conduct falls entirely within the policy term with respect to Store #16.

37. Colgate's further investigations of the Plaintiffs herein occurred after February 28, 2006, when Colgate received a letter from a consumer, Aydin Turon. Appendix Exhibit C at ¶¶ 67 & 68. Mr. Turon complained, in substance, that toothpaste that allegedly infringed

Colgate's trademarks was being sold at Store #14, plaintiff 116th Street Supermarket, Inc. *Id*. Mr. Turon's notice to Colgate of alleged wrongful conduct certainly falls within the policy term of Store #14's CNA Policy.

38. Furthermore, Plaintiffs were not established corporate entities in 2003. The following table shows Plaintiffs' incorporation dates and the coverage inception dates:

Store #	**Plaintiff/Store**	**Incorporation Date**	**Policy Inception**
Store #1	Dyckman 116 Inc.	12/5/2005	1/23/06
Store #2	Broadway 5601 Inc.	12/8/2005	1/26/06
Store #3	Franklin 827 Inc.	12/8/2005	1/26/06
Store #4	1508 Flatbush Supermarket, Inc.	9/2/2004	9/27/05
Store #5	153-21 Jamaica Supermarket, Inc.	9/2/2004	9/28/05
Store #6	1559 Westchester Supermarket, Inc.	9/2/2004	8/22/05
Store #7	184 Dyckman Supermarket, Inc.	9/2/2004	11/3/05
Store #8	Broadway 157 Inc.	12/8/2005	1/26/06
Store #9	Church Street Enterprises, Inc.	8/12/2004	9/12/05
Store #10	Broadway 5657, Inc.	12/8/2005	1/11/06
Store #11	Nicholas 916, Inc.	12/8/2005	1/27/06
Store #12	1940 Nostrand Supermarket, Inc.	9/22/2004	8/23/05
Store #13	Yonkers 109, Inc.	12/8/2005	1/27/06
Store #14	116th Street Supermarket, Inc.	10/5/2004	1/19/05
Store #15	1623 Flatbush Avenue Enterprises Corp.	4/15/2005	9/9/05
Store #16	3700 Nostrand Avenue, Inc.	9/30/2005	10/14/05

Annexed to the Appendix as Exhibit I are true copies of Internet printouts from the New York State Secretary of State, Division of Corporations website showing the corporate status of each Plaintiff, which are public records, together with the certificates of incorporation for each Plaintiff, which are also public records; *see also* Appendix Exhibit A, Complaint at ¶ 40.

39. Colgate's investigators continued their investigations by purchasing allegedly infringing product from Store #14 and Store #16 (plaintiffs 116th Street Supermarket, Inc. and 3700 Nostrand Avenue, Inc.) on March 6-10, 2006. Again, these allegations in the Colgate complaint fall squarely within the policy terms. *See*, Appendix Exhibit C, Colgate's First

Amended Complaint at ¶¶ 67 and 73-77. Clearly, CNA's disclaimer of coverage here is without any basis because the alleged wrongful conduct attributable to the Plaintiffs falls squarely within the scope of the Policies' coverage and term.

CNA's Disclaimer Premised on Alleged Violation of a Penal Statute and on Alleged Fraud Is Without Merit

40. Search as one may, the pleadings in the Colgate Action are devoid of any reference to criminal conduct or any violation of a penal statute. No where does Colgate's First Amended Complaint cite, reference, invoke or otherwise refer to the Criminal Trademark Infringement Statute, 18 U.S.C. § 2320. Nowhere does Colgate even use the words "criminal" or "crime" in reference to any alleged conduct by any defendant in the Colgate Action.

41. If anything indicates the bad faith of CNA in disclaiming all coverage to Plaintiffs, it is this attempt to manufacture a basis where none in fact exists. As has been tirelessly pointed out, it is well settled that the insurer's duty to defend is derived from the allegations of the underlying complaint and the terms of the policy. *Technicon Electronics Corp. v. American Home Assurance Co.*, 74 N.Y.2d at 73, 544 N.Y.S. 2d at 533. As discussed *supra* at ¶¶ 24-27, even if the underlying Colgate Action alleged criminal violations, CNA would nonetheless have the heavy burden of showing that all the claims in the underlying action fall within the exclusions of the Policies to be entitled to disclaim all coverage, including disclaiming its duty to defend. As discussed *supra id.* and at ¶¶ 30-31, even if the underlying Colgate Action alleged criminal violations along with the trademark infringement and trademark counterfeiting claims, CNA would nonetheless be obligated to defend Plaintiffs, since where the underlying complaint contains multiple bases for potential recovery against the insureds, some of which are covered and some of which potentially are not covered under the Policies, the insurer is

nonetheless not absolved of its duty to defend. Because the Colgate Action asserts claims, on which there is a " 'reasonable possibility that the insured may be held liable for some act or omission covered by the policy'", CNA has a duty to defend. *PG Insurance Co. v. S.A. Daly Mfg. Co.*, 251 A.D.2d at 1066, 674 N.Y.S.2d at 200, *citing Fitzpatrick v. American Honda Motor*, 78 N.Y.2d at 70, 571 N.Y.S. 2d at 672.

42. CNA's disclaimer of coverage based on non-alleged criminal conduct must necessarily look to (or look for) assumptions of fact outside the four corners of the complaint in the underlying Colgate Action. However, if the complaint's allegations give rise to a duty to defend, the insurer cannot use extrinsic facts to show otherwise. *Petr-All Petroleum Corp. v. Fireman's Ins. Co. of Newark*, 188 A.D.2d 139, 142, 593 N.Y.S.2d 693 (4th Dep't 1993), *citing Fitzpatrick*, 78 N.Y.2d at 63. Even where there is extrinsic facts suggesting that the underlying claim may ultimately prove meritless or outside the policy coverage, the insurer cannot avoid its commitment to provide a defense. *Fitzpatrick*, 78 N.Y.2d at 66, 571 N.Y.S.2d at 672.

43. Instructive here is the 1st Department's decision in *Volney Residence, Inc .v. Atlantic Mutual Insurance Co.*, 195 A.D.2d 434, 434, 600 N.Y.S.2d 707, 708 (1st Dep't 1993). The Court held that the insurer was nonetheless obligated to defend the insured even though the underlying action contained claims for non-covered Federal R.I.C.O. violations with allegations of corporate officers' self-dealing and fraud. *Id.* Similarly, the court in *PG Insurance Co. v. S.A. Daly Mfg. Co.*, 251 A.D.2d at 1066, 674 N.Y.S.2d at 200, held that claims of willful trademark infringement against an insured did not abrogate the insurer's duty to defend.

44. CNA's disclaimer of coverage based on Colgate's single reference to "fraudulent" conduct (Appendix Exhibit C, Colgate's First Amended Complaint at ¶ 84), is merely a typical pro-forma recitation without any particularized factual allegation of fraud. But in light of the

Volney decision, even if Colgate had alleged facts to support a claim of fraud, CNA is still obligated to defend the entire underlying action, since "fraud" would merely be one non-covered claim among the covered claims.

45. On point is *Cosser v. One Beacon Ins. Group*, 15 A.D.3d 871, 789 N.Y.S.2d 586 (4th Dep't 2005), a decision this Court particularly noted in its own decision in *T Juniors, Inc. v. Utica Mutual Ins. Co., et al.*, Index No. 601965/04, slip op. at 9-10 (*see* Appendix Exhibit J). In *Cosser*, the insured was sued in federal district court for copying, manufacturing and marketing a knock-off furniture polish product. The underlying federal action in that case alleged false advertising, false designation of origin and unfair competition in violation of the U.S. Trademark Act (15 U.S.C. § 1125[a]). The insurer declined coverage on the grounds that the underlying complaint did not allege "advertising injury," and that, in any event, the claims in the underlying complaint were excluded because the insured's alleged wrongful conduct was knowing and intentional. The *Cosser* court held that the trial court erred in finding that the allegations in the underlying federal complaint did not trigger possible "advertising injury" coverage:

> In granting defendant's cross motion, the [trial] court agreed with defendant that the causes of action in the federal complaint did not trigger possible coverage for advertising injury. That was error. We note at the outset that the court erred in agreeing with defendant that the complaint in the federal action fails to allege an advertising injury covered by the terms of the policies at issue. The complaint therein alleges the misuse or infringement of Stickley's trademark (*see Allou Health & Beauty Care v Aetna Cas. & Sur. Co.*, 269 AD2d 478, 479-480 [2000]) or "trade dress" within the terms of the policies at issue (*see American Mfrs. Mut. Ins. Co. v Quality King Distribs.*, 287 AD2d 527, 529 [2001]; *see also, Maritime Fish Prods. v World-Wide Fish Prods.*, 100 AD2d 81, 86-87 [1984], *appeal dismissed* 63 NY2d 675 [1984]).

Id. at 873, 789 N.Y.S.2d at 587. Accordingly, the *Cosser* court held that the insurer had a duty to defend the insured in the underlying federal action. *Id.* Furthermore, the issue of the insured's

alleged knowing or willful conduct was irrelevant to the determination of an insurer's duty to defend: "Whether [the insured] engaged in intentional or knowing conduct is relevant on the issue of damages only and not liability." *Id*.

46. Accordingly, Defendants' disclaimer based on non-alleged criminal conduct and on fraud is without any merit.

CNA's Disclaimer Based on Failure of Goods to Conform is Equally Without Merit

47. A number of courts, in construing insurance policies providing coverage for advertising injury have uniformly held under New York law that suits for trademark infringement, false advertising and unfair competition fall squarely within the definition of "advertising injury." *See, PG Ins. Co. of New York v. S.A. Day Mfg. Co., Inc.*, 251 A.D.2d 1065, 674 N.Y.S.2d 199 (4th Dept Dep't. 1998); *Simply Lite Food Corp. v. Aetna Cas. & Sur. Co. of Amer.*, 245 A.D.2d 500, 666 N.Y.S.2d 714 (2d Dept Dep't. 1997); *J.A. Brundage Plumbing & Roto Rooter, Inc. v. Massachusetts Bay Ins. Co.*, 818 F. Supp. 553 (W.D.N.Y. 1993).

48. A claim for non-conforming goods is not actually a count in the Colgate Action, albeit it may be an allegation gleaned from Colgate's claim of counterfeit toothpaste product. However, be that as it may, it is only one allegation among otherwise covered claims. As discussed *supra* at ¶¶ 25-27 and 40-44, "if the insurer may be obligated to indemnify the insured for at least some of the causes of action asserted in the underlying complaint, it must defend the insured on all of the causes of action asserted therein." *American Mfrs. Mut. Ins. Co. v. Quality King Distributors, Inc.*, 287 A.D.2d 527, 529, 731 N.Y.S.2d 234 (2nd Dep't 2001); *see also Fitzpatrick v. American Honda Motor*, 78 N.Y.2d at 65.

49. The bottom line on Defendants attempt to cast about for anything on which they might hang their claims for exclusion of coverage, forgetting or ignoring that the law in New York looks to the four-corners of the complaint in the underlying action to determine the insurer's obligation to defend:

> the courts of this State have refused to permit insurers to look beyond the complaint's allegations to avoid their obligation to defend and have held that the duty to defend exists "[i]f the complaint contains any facts or allegations which bring the claim even potentially within the protection purchased" (*Technicon Elecs. Corp. v. American Home Assur. Co.*, *supra*, 74 N.Y.2d at 73, 544 N.Y.S.2d 531, 542 N.E.2d 1048). The holdings thus clearly establish that an insurer's duty to defend is at least broad enough to apply when the "four corners of the complaint" suggest the reasonable possibility of coverage.

50. *Fitzpatrick v. American Honda Motors Co.*, 78 N.Y.2d at 66, 571 N.Y.S.2d at 674. Certainly, the complaint in the Colgate Action "is at least broad enough … to suggest the reasonable possibility of coverage" at least to some claims alleged by Colgate, notwithstanding the claims of willful conduct. Therefore, CNA disclaiming and refusing its obligation to defend Plaintiffs "'could now properly be made only if it could be concluded as a matter of law that there is no possible factual or legal basis on which [the insurer] might eventually be held to be obligated to indemnify [the insured] under any provision of the insurance policy'." *Seaboard Surety Co. v. The Gillette Co.*, 64 N.Y.2d at 312, *quoting, Spoor-Lasher Co. v Aetna Cas. & Sur. Co*., 39 NY2d 875, 876 (1976).

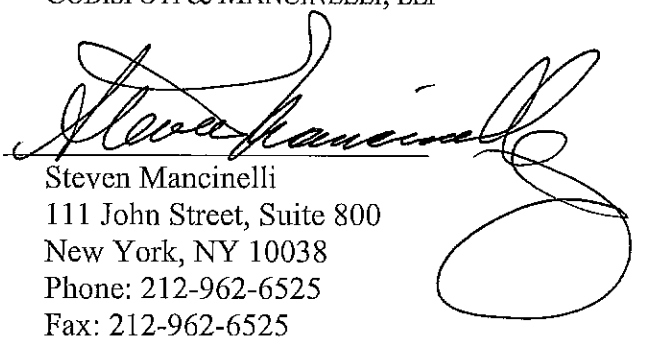
51. Finally, Plaintiffs are entitled to recover their costs and reasonable attorneys fees for both defending the underlying Colgate Action and in bringing this instant action based on Defendants' disclaimer. *NWL Holdings, Inc. v. Discover Property & Casualty Ins. Co.*, 480 F.Supp2d 655, 662 (E.D.N.Y. 2007).

CONCLUSION

52. Accordingly and for the foregoing reasons, Defendants respectfully request that the Court grant Plaintiffs' motion for summary judgment in its entirety, order Defendants to reimburse Plaintiffs for all costs and attorney's fees for their defense of the Colgate Action to date, and the award costs and disbursements, including reasonable attorney's fees, in bringing this action, and for such other and further relief as this Court may deem just and proper.

Dated: October 25, 2007
New York, New York

CODISPOTI & MANCINELLI, LLP

By: 

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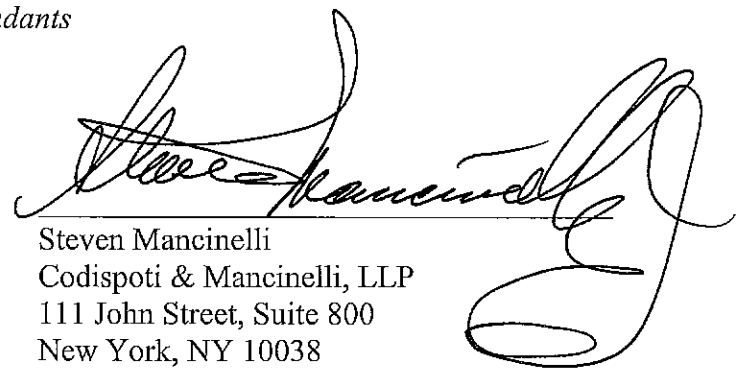
AFFIRMATION OF SERVICE

STEVEN MANCINELLI, an attorney duly admitted to practice before the Courts of the State of New York, hereby affirms under penalty of perjury that on October 26, 2007, he served a copy of the foregoing NOTICE OF MOTION, RJI, STATEMENT IN SUPPORT OF REQUEST FOR ASSIGNMENT TO COMMERCIAL DIVISION, and AFFIRMATION OF STEVEN MANCINELLI IN SUPPORT PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT, by U.S. Priority Mail, upon:

Margaret Catalano, Esq.
Carroll McNulty Kull, LLC
120 Mountain View Boulevard
Basking Ridge, NJ 07920
Attorneys for Defendants

Dated: October 26, 2007
New York, New York



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