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

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH Hon. _____ Justice **PART** 54

Westchester Fire Ins.

-v-

MCI Communications Corp. et al

INDEX NO. 117236/09

MOTION DATE 6/9/09

MOTION SEQ. NO. 19

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for Summary Judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-6
Answering Affidavits — Exhibits	7-8
Replying Affidavits	9-11

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

DATED: _____ J.S.C.

Dated: 10/16/09

JUSTICE SHIRLEY WERNER KORNREICH

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

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

---------- X

WESTCHESTER FIRE INSURANCE COMPANY,

Plaintiff,

-against-

MCI COMMUNICATIONS CORPORATION, et al.,

Defendants.

---------- X

AND RELATED THIRD PARTY ACTIONS

---------- X

Index No.: 117236/01

DECISION and ORDER

KORNREICH, SHIRLEY WERNER, J.:

Motion sequence numbers 017, 019 and 020 are hereby consolidated for disposition.

This action for insurance coverage arises out of twenty-six "right-of-way" lawsuits filed by landowners throughout the United States alleging that MCI Communications Corporation and MCI WorldCom Network Services Inc. (collectively "MCI") used their property to lay cables for its fiber-optic cable network without their consent (the "ROW Suits"). Defendants Continental Casualty Company, Transportation Insurance Company and Continental Insurance Company (collectively CNA[1]), who issued primary general liability insurance policies to MCI between 1986 and 1998, asserted contribution and indemnity claims against numerous other insurance companies[2] (collectively the "Settling Insurers") with regard to CNA's defense and indemnity

[1] The CNA defendants are members of a related group of financial services companies that operate collectively under the name "CNA Insurance Companies."

[2] The other "insurance companies" are defendants: Travelers Casualty and Insurance Company, Travelers Casualty and Surety Company of America, Travelers Commercial Insurance Company, Travelers Property Casualty Insurance Company, Travelers Indemnity Company, Travelers Indemnity Company, Travelers Indemnity Company of America, Gulf Insurance Company (collectively "Travelers"); and Westchester Fire Insurance Company, Chubb Indemnity Insurance, Federal Insurance, ACE Property and Casualty Insurance Company, Fireman's Fund

obligations arising from the ROW Suits. On or about December 20, 2006, MCI entered into a settlement agreement with the Settling Insurers which subsequently led to the parties executing a Stipulation of Discontinuance with Prejudice, dismissing all claims between MCI and the Settling Insurers as well as those asserted amongst the Settling Insurers.

Here, in motion sequence 017, the Settling Insurers move for summary judgment dismissing CNA's cross-claims against them for contribution and/or indemnification. CNA opposes. In Motion sequence 019, MCI seeks partial summary judgment on two issues. First, that based upon the January 9, 2008 decision of the Hon. Herman Cahn (retired) (January Decision), CNA has an affirmative duty to defend MCI in the underlying ROW Suits. Second, a declaration that CNA's 1992-1995 Commercial General Liability Policies (1992-1995 Policies) are "first-dollar" in nature and, thus, CNA must pay all of MCI's defense costs and expenditures incurred in connection with defending the ROW suits. CNA opposes and, in motion sequence 020, cross-moves for: partial summary judgment seeking a declaration that it does not owe MCI first dollar defense costs under the 1992-1995 Policies; and for leave to amend its answer to add reformation as a defense pursuant to CPLR § 3025(b).

I. Background

A. MCI's Motion & CNA's Cross-Motion

In support of its motion, MCI offers copies of, *inter alia*: the twenty-six complaints which

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Insurance Company, Royal and Sun Alliance, RLI Insurance Company, First State Insurance Company, National Union Fire Insurance Company of Pittsburgh, Pennsylvania, The Insurance Company of the State of Pennsylvania, Lexington Insurance Company, U.S. Fire Insurance Company, TIG Insurance Company, Employer's Insurance Company of Wausau, Liberty Mutual Insurance Company, Great America Assurance, American National Fire Insurance Company, Great American Insurance Company, The Ohio Casualty Insurance Company, Royal Indemnity Company, Royal Surplus Lines Insurance Company, Regis Insurance Company, International Insurance Company and North River Insurance Company.

comprise the underlying Row Suits; the 1992-1995 Policies; and the January Decision. During the 1980's, MCI augmented its fiber-optic cable network by, *inter alia*, laying cable on actual railroad, utility, pipeline and highway rights-of-way and also on other privately owned property. As a result of this expansion, MCI was sued by property owners in numerous class actions and individual suits claiming that MCI laid its cable on their land without their consent. Some of the allegations contained within the ROW Suits include claims of trespass, slander of title, property damage, breach of contract and unjust enrichment. January Decision at pp. 2-3.

1. The 1992-1995 Policies

During the period from April 1, 1989, through April 1, 1998, CNA issued a series of Commercial General Liability policies to MCI.[3] The 1992-1995 Policies proffer three types of coverage: "Bodily Injury and Property Damage Liability" under Coverage A; "Personal and Advertising Injury and Liability" under Coverage B; and "Medical Payments" under Coverage C. Pursuant to these listed coverage items, the policies contain the following pertinent insurance limits: an "Each Occurrence Limit" of $1,000,000 for Bodily Injury and Property Damage; an "Each Occurrence Deductible" of $1,000,000; a combined "Personal and Advertising Injury Limit" of $1,000,000; and a "General Aggregate (other than products-completed operations) Limit" of $2,000,000.

Section I of the 1992-1995 Policies entitled "Coverages" contains the following relevant

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[3]Since the only policies at issue in this motion are the 1992-1995 Policies the court will not go into any detail regarding the terms and conditions contained in the other yearly policies. In addition, as noted by MCI, the 1992-1995 Policies (Policy Nos. SRL 334 50 72, SRL 334 51 13, SRL 334 51 52) are identical in all respects regarding the terms and conditions pertinent to this motion. Consequently, all references to the 1992-1995 Policies made in this decision have been derived from the 1992-1993 Policy (Pol. No. 334 50 72) submitted as Exhibit 33 in the Affirmation of Joan L. Lewis in support of MCI's motion for summary judgment.

terms and conditions regarding Bodily Injury and Property Damage Liability (Coverage A) and Personal and Advertising Injury Liability (Coverage B):

1. Insuring Agreement

a. [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 this coverage part applies. [CNA] will have the right and duty to defend any "suit" seeking those damages. [CNA] may at [its] discretion investigate any "occurrence" or offense or settle any claim or "suit" that may result[.] But

(1) The amount [CNA] will pay for damages is limited as described in LIMITS OF INSURANCE (SECTION III); and

(2) [CNA's] right and duty to defend end[s] when [it] ha[s] used up the applicable limit of insurance in the payment of judgments or settlements under Coverage A or B or medical expenses under Coverage C[.]

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided under SUPPLEMENTARY PAYMENTS - COVERAGES A AND B.

Section III of the 1992-1995 Policies entitled "Limits of Insurance" further provides:

1. The Limits of Insurance shown in the Declarations and the rules below fix the most we will pay regardless of the number of[:]
   a. Insureds;
   b. Claims made or "suits" brought; or
   c. Persons or organizations making claims or bringing "suits"

2. The General Aggregate Limit is the most [CNA] will pay for the sum of
   a. Medical Expenses under Coverage C;
   b. Damages under Coverage A, except damages because of "bodily injury" or "property damage" included in the "products completed operations hazard"; and
   c. Damages under Coverage B...

4. Subject to 2 above, the Personal and Advertising Injury Limit is the most we will pay under Coverage B for the sum of all damages because of all "personal injury" and all "advertising injury sustained by any one organization.

Section V of the 1992-1995 Policies defines the following material terms:

9. "Occurrence" means an accident, including continuous or repeated exposure to

substantially the same general harmful conditions.

10. "Personal Injury" means injury, other than "bodily injury," arising out of one or more of the following offenses:...
    c. The wrongful eviction from, wrongful entry onto, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies by or on behalf of its owner, landlord or lessor;...

12. "Property Damage" means
    a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or
    b. Loss of use of tangible property that is not physically injured. All such loss shall be deemed to occur at the time of the "occurrence" that caused it

13. "Suit" means a civil proceeding in which damages because of "bodily injury," "property damage," "personal injury" or "advertising injury" to which this insurance applies...

The 1992-1995 Policies all contain Endorsement # 30 entitled "Deductible Liability Insurance Commercial General Liability." Endorsement # 30 provides:

It is agreed that:

1. [CNA's] obligation under the Bodily Injury Liability and Property Damage Liability Coverages to pay damages on behalf of the Named Insured, applies only to the amount of damages in excess of any deductible amounts stated in the schedule below as applicable to such coverages, and the limit of liability shown in this policy as being applicable to "each occurrence" for such coverage shall be reduced by the amount of such deductible. The limit of liability shown in this policy as "Aggregate", if any, for such coverage shall be reduced by the application of such deductible amount.

2. The deductible amounts stated in the schedule apply as follows:

   Per Occurrence Basis - If the deductible is on a "per occurrence" basis, the deductible amount applies under the Bodily Injury Liability or Property Damage Liability Coverage, respectively, to all damages because of all Bodily Injury or Property Damages as a result of any one occurrence, regardless of the number of persons or organizations who sustain damages because of that occurrence.

3. The terms of the policy, including those with respect to (a) [CNA's] rights and duties with respect to the defense of suits and (b) The Named Insured's duties in the event of an occurrence apply irrespective of the application of the deductible

amount.

4. [CNA] may pay any part or all of the deductible amount to effect settlement of any claim or suit and upon notification of the action taken, the Named Insured shall promptly reimburse [CNA] for such part of the deductible amount as has been paid by [CNA].

5. Any Loss Adjustment Expense incurred as the result of any occurrence or claim to which this insurance applies shall be allocated as follows:
   (a) Whether or not the judgment or settlement exceeds the deductible or whether or not the suit is settled without payment of damages, [t]he "Loss Adjustment Expense" in connection therewith shall be borne solely by the Named Insured and shall be promptly reimbursed to [CNA].

6. "Loss Adjustment Expense" shall mean:

   (a) Attorney's Fees;

   (b) Court costs and all other expenses of any nature whatsoever incurred in connection with investigation, defense or settlement, including without limitation medical examination, expert testimony, stenographic, witnesses and summons, copies of documents and photographs, premiums on bonds to release attachments, premium[s] on appeal bonds and interest on judgments.

   "Loss Adjustment Expense" shall not mean salaries of [CNA] employees involved in the investigation, defense or settlement nor [CNA's] other general operating expenses.

SCHEDULE

COVERAGE	AMOUNT AND BASIS OF INSURANCE	
Bodily Injury Liability	$	Per Claim
	$	Per Occurrence
Property Damage Liability	$	Per Claim
	$	Per Occurrence
Bodily Injury Liability & Property Damage Liability Combined	$	Per Claim
	$ 1,000,000	Per Occurrence

With regard to notice, Section IV of the 1992-1995 Policies provides, *inter alia*, that

"[MCI] must see to it that [CNA is] notified as soon as practicable of an 'occurrence' or an offense which may result in a claim." In addition, Section IV states that MCI must notify CNA "as soon as practicable" in the event any claim or suit is filed.

Endorsements # 13 and # 14 of the 1992-1995 Policies entitled "Notice of Occurrence" and "Knowledge of Occurrence" respectively provide:

> It is hereby agreed and understood that failure of any agent, servant or employee of [MCI], other than Mr. Eric T. Hovansky, Manager, Corporate Risk manager, to notify [CNA] of any occurrence, accident, injury, claim, suit or loss of which he/she has knowledge shall not invalidate the insurance afforded by this policy for other Insureds hereunder or for the [MCI].
>
> It is hereby understood and agreed that knowledge of an occurrence, accident, injury, claim, suit or loss by [an MCI] agent, servant or employee shall not itself constitute knowledge by [MCI], unless and until Mr. Eric T. Hovansky, Manager, Corporate Risk manager, [MCI]...has knowledge thereof.

2. The January Decision

In the January Decision Justice Cahn denied CNA's motion for summary judgment and granted MCI's motion to vacate a discovery order of the Special Referee dated December 5, 2005. With regard to the summary judgment motion, CNA was seeking a declaration that it had no duty to defend MCI in the underlying ROW suits as well as dismissal of MCI's cross-claims for coverage. Justice Cahn denied the summary judgment motion on both grounds. In doing so, he held: "The court has reviewed each of the twenty-six complaints at issue and determined that each contains at least one claim which is *potentially* covered under the personal injury or property damage provisions of the policies."(emphasis added). January Decision at p. 6. On this point, Justice Cahn elaborated that coverage "may be" available pursuant to the personal injury portion of the policies because MCI's installation of its fiber-optic network "could" be considered "wrongful entry" onto the "premises" of one of the ROW plaintiffs. *Id.* at pp 6-7. In addition, Justice Cahn found that since nineteen of the twenty-six ROW Suit complaints contain

language that "may reasonably be read to allege property damage" MCI "may" be eligible for a defense to these ROW suits pursuant to the property damage provision of the policies. *Id.* at 9.

With regard to MCI's motion to vacate, during discovery leading up to this motion, MCI refused to turn over thousands of documents claiming attorney-client and work product privilege existed relating to communications made with its insurance counsel with regard to the underlying ROW Suits. *Id.* at 12. Following consultation with the Special Referee, MCI's submission of privilege logs and several unsuccessful attempts to resolve this dispute, the Special Referee, in a decision dated December 5, 2005, ordered MCI to turn over all of the documents. *Id.* In this decision, the Special Referee noted that "it is beyond certainty that the issues of what and when MCI knew (or should have known) of the existence, nature and extent of the right-of-way claims, when they afforded notice of such to its insurers are all matters which are material and necessary to the prosecution and defense of this action." *Id.* quoting December 5, 2005 Decision of the Special Referee. The Special Referee concluded that due to the "at-issue" and "common interest" doctrines, MCI's privilege claims could not "shelter" it from producing the documents. *Id.* at 13. The Special Referee also held that MCI could redact any matter which did not fall within the "at issue" or "common interest" doctrines. *Id.*

In his decision on this issue, despite concurring with the Special Referee's "identification of the issues and determination regarding the general relevance of the documents," Justice Cahn vacated the order. In doing so, he cited four reasons. First, Justice Cahn found fault with the Special Referee's assumption that all of the submitted documents were indeed privileged without evaluating them individually. Second, the Special Referee incorrectly applied the "at issue" and "common interest" doctrines "without any finding as to factors such as the specific need for the privileged matter or the ability to obtain the same information by other means." *Id.* at 13. Third,

that the order essentially rendered itself useless since it permitted MCI to redact any material it felt was not discoverable by the "at issue" and "common interest" doctrines. And fourth, since the record was replete with any of the privilege logs "no determination regarding their sufficiency can be made in a vacuum." *Id.* at 13-14. Consequently, Justice Cahn ordered the Special Referee's decision vacated, pending a subsequent conference with the court to resolve the discovery dispute.[4]

B. CNA's Submissions in Opposition & Support of Its Motion

In opposition to MCI's motion and in support of its cross-motion, CNA has submitted, *inter alia*, several pages of MCI's Privilege Log dated August 17, 2005 (Privilege Log). Several entries listed on the Privilege Log are relevant to this motion. For example, MCI lists several entries referencing documents from October 1986 regarding a "landowner dispute with MCI and CSX [concerning] cable on property." Affirmation of Joseph D'Ambrosio, dated June 18, 2008 (D'Ambrosio Aff.), Ex. N. Another set of entries ranging from June through November 1988 reference negotiations and settlement offers regarding right-of-way litigation in Pennsylvania. *Id.* Finally, a set of entities from 1988 and 1991 reference negotiations and settlement discussions with several different landowners. *Id.*

In addition, CNA proffers a letter from MCI Senior Attorney Brian D. Pedati dated January 30, 1995 (January Letter). D'Ambrosio Aff. Ex. L. In the January Letter, Mr. Pedati

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[4]It is not clear from the record what occurred at the subsequent conference with Justice Cahn on February 26, 2008. MCI states that the parties agreed at a May 3, 2007 conference that the parties should obtain summary judgment rulings from the court on certain legal issues before engaging in what MCI deemed "expensive discovery." MCI also states that the parties agreed that neither discovery nor examination of said privilege logs would resolve the issues placed before the court on summary judgment. CNA contends that the parties agreed that the instant motions do not address its coverage defenses due to MCI's refusal to disclose thousands of documents. As such, the court will proceed as if the discovery dispute outlined by Justice Cahn in the January Decision remains outstanding.

provides CNA with notice regarding a class action commenced against MCI in Louisiana. *Id.* The second page of the January Letter shows that it was cc'd to "Mr. Eric Hovansky, MCI." *Id.* In a letter to Mr. Pedati dated March 6, 1995, CNA acknowledged receipt of the January Letter:

> Apparently your letter was CNA's first notice of this matter. We cannot determine from your letter when and how MCI first received notice of the claim and when the petition was served on MCI. This information is necessary to determine whether MCI complied with or breached the notice condition of our polices. Please let us know by letter when and how MCI and the Risk Manager for MCI Communications Corporation first received notice of the claim and the lawsuit. If such notice was received in writing, please send a copy of the notice. Also, please confirm that your letter was MCI's first notice of the claim to CNA.

Id. at Ex. M. In this letter, CNA also stated that it needed more information pertaining to the Louisiana litigation and that it was reserving its right to assert any claims or defenses it possessed under the policies. *Id.*

C. The Settling Insurers Motion

In support of their motion, the Settling Insurers offer copies of: the Stipulation of Discontinuance with Prejudice they entered into with Verizon Business Global, LLC (Verizon), as successor in interest to MCI; CNA's answer to MCI's cross-claim; and Article VIII of the settlement agreement between Verizon and the Settling Insurers (Settlement Agreement). In its answer, CNA asserted a cross-claim against the Settling Insurers seeking contribution and/or indemnification for "their proportional share" of any liability asserted against CNA pursuant to its contractual relationship with Verizon/MCI.

Paragraph A of Section VIII of the Settlement Agreement entitled "Actions Involving Other Insurers and Judgment Reduction," states that in the event MCI obtains a judgment against any insurer who is not a party to the Settlement Agreement, in any action for coverage arising from the ROW Suits, MCI "agrees that it will not seek to obtain payments from such insurer or to enforce any related judgment to the extent such payments or judgment represent [the Settling

Insurers] allocable share of any obligation owed to MCI." Paragraph B further provides, in pertinent part:

> In the event MCI obtains a judgment or binding arbitration award against any other insurer in connection with any Claim released pursuant to this Agreement, and that insurer thereafter obtains a judgment or binding arbitration award against Insurers on the ground that the judgment or binding arbitration award granted to MCI against that other insurer included sums which are allocable to Insurers, MCI agrees to reduce its judgment or binding arbitration award against the other insurer to avoid such liability being imposed on the Insurers. Such a reduction in MCI's judgment or binding arbitration award will be accomplished by subtracting from the judgment or binding arbitration award against the other insurer the share of the judgment or binding arbitration award, if any, that is held to be allocable to Insurers. To ensure that such a reduction is accomplished, Insurers shall be entitled to assert this paragraph as a defense in any claim against them for any portion of the judgment or binding arbitration award, and shall be entitled to have the court or appropriate tribunal issue such orders as are necessary to effectuate the reduction to protect them from any liability from the judgment or arbitration award.

The Settling Insurers have failed to disclose the remainder of the twenty-seven page Settlement Agreement.

II. Conclusions of Law

It is well established that summary judgment may be granted only when it is clear that no triable issues of fact exist. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 (1986). The burden is upon the moving party to make a *prima facie* showing of entitlement to summary judgment as a matter of law. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); *Friends of Animals, Inc. v Associated Fur Mfts., Inc.*, 46 NY2d 1065, 1067 (1979). A failure to make such a showing requires a denial of the summary judgment motion, regardless of the sufficiency of the opposing papers. *Ayotte v Gervasio*, 81 NY2d 1062, 1063 (1993). If a *prima facie* showing has been made, the burden shifts to the opposing party to produce evidentiary proof sufficient to establish the existence of a material issue of fact. *Alvarez, supra*, 68 NY2d at 324; *Zuckerman, supra*, 49 NY2d at 562. The papers submitted in support of and in opposition to a summary judgment

motion are examined in a light most favorable to the party opposing the motion. *Martin v Briggs*, 235 AD2d 192, 196 (1st Dept 1997). Mere conclusions, unsubstantiated allegations, or expressions of hope are insufficient to defeat a summary judgement motion. *Zuckerman, supra*, 49 NY2d at 562. Upon the completion of the court's examination of all the documents submitted in connection with a summary judgment motion, the motion must be denied if there is any doubt as to the existence of a triable issue of fact. *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

A. MCI's Motion & CNA'S Cross-Motion

1. First-Dollar Defense Obligation

The well-established principles of insurance policy interpretation provide that, as in any other written agreement, unambiguous provisions of an insurance policy must be accorded their plain and ordinary meaning. *2619 Realty, LLC v Fidelity and Guar. Ins. Co.*, 303 AD2d 299, 300 (1st Dept 2003) citing *West 56th St. Assoc. v Greater N.Y. Mut. Ins. Co.*, 250 AD2d 109, 112 (1st Dept 1998); *Mazzuccolo v Cinelli*, 245 AZD2d 245, 246-247 (1st Dept 1997). The interpretation of an insurance policy's terms is a question of law for the court. *Seaport Park Condo. v Greater N.Y. Mut. Ins. Co.*, 39 AD3d 51, 54 (1st Dept 2007) citing *Chimart Assoc. v Paul*, 66 NY2d 570, 572-573 (1986). In its analysis, the court is not permitted to "make or vary the contract of insurance to accomplish its notions of abstract justice or moral obligation." *Seaport Park*, 39 AD3d at 55 quoting *Breed v Ins. Co. of N. Am.*, 46 NY2d 351, 355 (1978); *2619 Realty*, 303 AD2d at 300. If the court finds any ambiguity to exist in the policy, any doubt as to the existence of coverage must be decided in favor of the insured. *2619 Realty,* 303 AD2d at 300 citing *Westview Assoc. v Guar. Natl. Ins. Co.*, 95 NY2d 334, 339 (2000); *United States Fid. & Guar. Co. v Annunziata*, 67 NY2d 229, 232 (1986).

An insurance policy is ambagious if its language is susceptible to two or more reasonable interpretations. *Broad St., LLC v Gulf Ins. Co.*, 37 AD3d 126, 130, 131 (1st Dept 2006). An insurance policy is unambiguous if its language 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." *Id.* quoting *Breed*, 46 NY2d at 355.

Here, an examination of Endorsement # 30 in relation to the language articulated throughout the 1992-1995 Polices unambiguously shows that MCI is liable for its own defense costs and expenditures incurred in connection with defending the ROW suits. In fact, the language contained in Endorsement #30 is in complete congruence with the deductible and aggregate limits outlined in the policies. As the court will detail below, a clear distinction is made in the language of these policies between CNA's obligation to pay *damages* predicated upon certain *occurrences*, the impact of such damages on what CNA may be obligated to pay for liability in the *aggregate* versus any *Loss Adjustment Expenses, ergo* attorneys' fees that are incurred (emphasis added).

MCI contends that the "Each Occurrence Limit" and "Each Occurrence Deducible" language of the polices mean that MCI is responsible for defense costs and damages up to the $1,000,000 limit applicable under Coverage A. MCI further contends that since Endorsement # 30 contains no language addressing Coverage B (personal and advertising injury), CNA is obligated to provide first-dollar coverage for any claims which fall under such coverage. In essence, MCI's argument can be summed up as follows: reading the policies as a whole, since the words "personal and advertising injury" are not mentioned at all in any of the six paragraphs contained within Endorsement # 30, this provision should not be applied to any claims falling under Coverage B of the policies. Therefore, CNA owes MCI first-dollar defense coverage for

any and all claims arising out of Coverage B. A complete reading of the language contained within Endorsement # 30 shows this not to be the case.

The language contained within the six paragraphs of Endorsement # 30 create a distinction between those which apply to damages and liability associated with Coverage A (Paragraphs 1 and 2) and those which apply to *any claim or occurrence* regardless of coverage category (emphasis added) (Paragraphs 3-6). Paragraphs 1 and 2 deal with CNA's obligation under Coverage A to pay damages to MCI, how such payment is impacted by the listed deductible schedule and what happens under Coverage A if the deducible is found to occur on a "per occurrence basis." Paragraph 3 states that the "terms of the policy" as a whole apply to the parties rights and duties regardless of whether or not the deductible is ever applied. This paragraph makes no distinction between Coverage A and B. Paragraph 4 deals with CNA's right to use the listed deducible amounts to effectuate settlement of any *claim or suit* (emphasis added). As noted in the definitions section (Section V), "Suit" is defined as any "civil proceeding in which damages because of 'bodily injury,' 'property damage,' 'personal injury' or 'advertising injury' to which this insurance applies." Once again, no distinction is made between Coverages A and B. Paragraph 5 states:

> Any Loss Adjustment Expense incurred as the result of *any occurrence or claim* to which *this insurance* applies shall be allocated as follows:
>
> (a) Whether or not the judgment or settlement exceeds the deductible or whether or not the suit is settled without payment of damages, [t]he "Loss Adjustment Expense" in connection therewith shall be borne solely by the Named Insured and shall be promptly reimbursed to [CNA].

(emphasis added). This language clearly states that it apples to "any occurrence or claim" regardless of coverage category. It does not distinguish between Coverages A and B. If Paragraph 5 was meant to apply solely to Coverage A, as MCI contends, or was meant to distinguish between Coverages A and B, it would have articulated such language as was done in

other sections of the policy, including paragraphs 1 and 2 of Endorsement # 30. Paragraph 5 makes no such distinction. This language is clear, definite, precise, and is not subject to another interpretation. *See Broad St.*, 37 AD3d at 131 quoting *Bretton v Mut. of Omaha Ins. Co.*, 110 AD2d 46, 49 (1st Dept 1985). ("a court [should not] disregard the provisions of an insurance contract which are clear and unequivocal...or accord a policy strained construction merely because that interpretation is possible."). The mere assertion by a party that policy language means something to them, when it is otherwise clear, unequivocal and understandable when read in conjunction with the entire policy, is not by itself enough to raise a triable issue of fact. *Broad St.*, 37 A.D.3d at 13. In addition, outside of Endorsement # 30, none of the policy provisions cited by MCI make any reference to "Loss Adjustment Expenses," attorneys' fees or defense costs. Consequently, MCI is liable for any "Loss Adjustment Expenses" it incurs in connection with defending the underlying Row Suits.

2. CNA's Duty to Defend based upon the January Decision

Here, since the court has found MCI liable for its own defense costs, this portion of MCI's motion is moot. However, in denying CNA's motion for summary judgment, Justice Cahn found that issues of fact exist as to whether or not CNA had a duty to defend MCI in the Row Suits. For example, throughout the decision, Justice Cahn made constant reference to the fact that after his review of the twenty-six underlying ROW complaints, coverage "potentially," "may be" or "could be available." January Decision at pp 6-9. Nowhere in his decision did Justice Cahn affirmatively declare that CNA had to definitively proffer MCI coverage.

3. CNA's Motion to Amend

CNA's motion to amend seeks to amend its answer to add reformation of the 1992-1995 Policies as a defense to MCI's "hypothetical" indemnification claim. In its memorandum of law

submitted in support of this motion, CNA states that "there is currently no need to seek reformation of the 1992-1995 Policies" because paragraph 5 of Endorsement # 30 states that MCI must bear its own defense costs. CNA's Memorandum of Law in Opposition to MCI's Motion for Summary Judgment and in Support of CNA's Cross-Motion at p. 24, fn 67. CNA additionally states that it wants to add reformation as a defense "in the event that at some future time" MCI asserts an indemnification claim under the "personal injury" provision of the 1992-1995 Polices. Since, to date, MCI has not filed such a claim, this motion is denied, with leave to renew, in the event MCI indeed seeks such indemnification.

B. The Settling Insurers Motion

In examining Article VIII of the Settlement Agreement in a light most favorable to CNA, the Settling Insurers have not made a *prima facie* showing of entitlement to summary judgment. First, the Settling Insurers' failure to disclose the entire Settlement Agreement prevents the court from properly interpreting its effect on CNA. *Bijan Designer For Men, Inc. v Fireman's Fund Ins. Co.*, 264 AD2d 48, 52 (1st Dept 2000) quoting *Eighth Ave. Coach Corp. v City of New York*, 286 NY 84, 88-89 (1941) ("Words considered in isolation may have many and diverse meanings. In a written document the word obtains its meaning from the sentence, the sentence from the paragraph, and the latter from the whole document, all based upon the situation and circumstances existing at its creation"). The court cannot be expected to dismiss CNA's claims, with prejudice, based on two paragraphs of a twenty-seven page settlement agreement without having viewed the entire agreement.

Second, as CNA correctly notes, pursuant to paragraph B of Article VIII, MCI would not be contractually bound to abridge any judgment obtained against CNA unless CNA were to also attain a judgment against the Settling Insurers. If the court were to grant the Settling Insurers

summary judgement at this stage, thereby dismissing CNA's claims with prejudice, CNA would be deprived of the opportunity to obtain the relief necessary to trigger the effect of this provision. Accordingly, it is

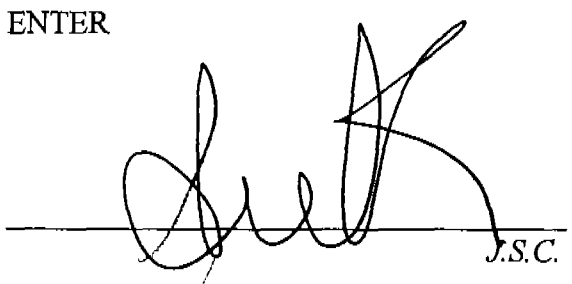
ORDERED that the Settling Insurers motion for summary judgment (motion sequence 017) is denied; and it is further

ORDERED that MCI's motion for partial summary judgment (motion sequence 019) is denied; and it is further

ORDERED that CNA's motion for partial summary judgment (motion sequence 020) seeking a declaration that CNA does not owe MCI first-dollar defense costs under the 1992-1995 Polices is granted and; it is further

ORDERED that the portion CNA's motion (motion sequence 020) seeking leave to amend its answer is denied, with leave to renew, in the event MCI asserts a claim for indemnification arising out of the "personal injury" provision of the 1992-1995 Polices.

ENTER



J.S.C.

DATE: October 16, 2009
New York, NY