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

PRESENT: HON. JOAN A. MADDEN J.S.C. Justice PART 11

Index Number : 107163/2010

AMERICAN ZURICH INSURANC

VS.

TRANS-PACKERS SERVICES

SEQUENCE NUMBER : 003

PARTIAL SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

| | PAPERS NUMBERED |
|---|---|
| Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... | |
| Answering Affidavits — Exhibits | |
| Replying Affidavits | |

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is consolidated for determination with motion seq. nos. 004, 005, 006+007, and the consolidated motions are determined in accordance with the annexed decision. Settle order.

Dated: January 29, 2013

HON. JOAN A. MADDEN J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

----------X

AMERICAN ZURICH INSURANCE COMPANY, ZURICH AMERICAN INSURANCE COMPANY, and AMERICAN GUARANTEE & LIABILITY INSURANCE COMPANY,

Index No. 107163/10

Plaintiffs,

- against -

TRANS-PACKERS SERVICES CORPORATION, SELECTIVE INSURANCE COMPANY OF AMERICA, SELECTIVE WAY INSURANCE COMPANY, and THE WORNICK COMPANY,

Defendants.

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**JOAN A. MADDEN, J.:**

Motion Sequence Numbers 003, 004, 005, 006, and 007 are consolidated for disposition.

In Motion 003, Trans-Packers Services Corp. (Trans-Packers) moves for partial summary judgment against American Zurich Insurance Company (AZIC) and American Guarantee & Liability Insurance Company (American Guaranty) on its counterclaim for breach of contract.

In Motion 004, Trans-Packers moves for partial summary judgment against cross claim defendants Selective Insurance Company of America (Selective Insurance) and Selective Way Insurance Company (Selective Way) (Selective Insurance and Selective Way, together, Selective) for a declaratory judgment.

Selective cross-moves for summary judgment on all claims asserted against it.

In Motion 005, Franklin Farms East, Inc. (Franklin) moves for an order permitting it to intervene in this action, pursuant to CPLR 1013 and 1014, or, in the alternative, permitting it to consolidate this action with Index Number 590580/10, pursuant to CPLR 602, and to join in

Trans-Packers' motion for summary judgment on its cross claims against Selective, directing that Franklin be added as a party-plaintiff, and allowing Franklin to serve a complaint setting forth its request for a declaratory judgment within 20 days after the entry of an order granting this motion.

In Motion 006, Trans-Packers moves for partial summary judgment against AZIC and American Guarantee, declaring that these plaintiffs are obligated to defend and indemnify Trans-Packers under a commercial general liability policy regarding claims asserted against Trans-Packers by its customers.

Plaintiffs cross-move for summary judgment against Trans-Packers to obtain a declaration that they have no duty to defend or indemnify Trans-Packers for claims asserted against Trans-Packers for a product recall.

In Motion 007, The Wornick Company (Wornick) moves, pursuant to CPLR 3212, for partial summary judgment (1) on its counterclaims against plaintiffs, and against plaintiffs on the seventh, eighth, ninth, and tenth causes of action of plaintiffs' first amended complaint, and (2) by joinder with Trans-Packers on Trans-Packers' motion for summary judgment on its counterclaim against plaintiffs concerning the "Vendor's Endorsement."

Plaintiffs cross-move for summary judgment against Wornick.

## Background

### *Amended Complaint*

During the relevant time period, Trans-Packers sold "Dairy Shake Blends" (Shakes) to AmeriQual Group, LLC (AmeriQual), SO-PAK-CO, Inc. d/b/a SOPAKCO Packaging (SOPAKCO), Wornick, D&B Specialty Foods USA, Inc. (D&B) (collectively, the Assemblers), and the United States Government (Government). The Assemblers incorporated the Shakes into

ration packs that they sold to the Government or to consumers. Trans-Packers also sold Shakes directly to the Government for use in ration packs.

Trans-Packers purchased non-fat dry milk (NFDM), one of the ingredients in the Shakes, from Franklin, which had purchased the NFDM from Plainview Milk Products Cooperative (Plainview). On June 23, 2009, Plainview issued a "Product Recall Notice" (Plainview Recall), in which Plainview issued a voluntary recall of NFDM, because it was potentially contaminated with salmonella, which was found at Plainview's manufacturing facility. On June 25, 2009, Franklin notified Trans-Packers of the Plainview Recall. On June 26, 2009, Trans-Packers issued its own notice to customers of the Shakes during the Plainview Recall period, which outlined the information contained in the Plainview Recall notice. Trans-Packers' notice stated that Plainview was one of several manufacturers that produce NFDM that Trans-Packers used, and that NFDM was a component in the production of the Shakes.

Also on June 26, 2009, the "Defense Supply Center - Philadelphia" (DSCP or Government) issued a "Do Not Consume Order" regarding "MRE[1] and UGR-E Dairyshake Powder, Fortified with Calcium and Vitamin D." The order instructed consumers and end users to "remove and destroy the Dairyshake Powder in a manner to ensure that it will not be accidentally consumed." On July 1, 2009, DSCP updated the Do Not Consume Order, reiterating that end users should destroy the dairyshake powder "until the potentially adulterated stocks are exhausted." The update explained that "[a] simple destruction method" would be "to open the

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[1]MRE refers to the Government's "Meals Ready to Eat" program. The Shakes are packaged with other products to form MRE cases. Each case contains 12 meal bags. Each meal bag consists of between 9 and 14 separate menu items. A Shake pouch is included in one of the 12 meal bags (Affidavit of Lester Weiss, Chief Operating Officer of Trans-Packers). The meal bags are referred to in the decision (as well as in the parties' papers) as ration packs.

dairyshake pouch and pour contents into the trash." On August 12, 2009, DSCP issued another update, stating that DSCP, in conjunction with the "DOD Veterinary Service Agency/Office of the Surgeon General," determined that the Plainview Recall "be expanded to include all MRE Dairyshakes assembled from 1 January 2006 to 30 June 2009 to ensure the safety of war fighters and other customers around the world."

Consequently DSCP and the Assemblers each asserted a claim against Trans-Packers. Specifically, on September 3, 2009, DSCP wrote to Trans-Packers, and demanded that it replace, at no cost to the Government, 90,656 bags of potentially contaminated Shakes that Trans-Packers had sold directly to the Government.

On September 10, 2009, AmeriQual wrote to Trans-Packers, stating that DSCP required AmeriQual to repair or replace 44,422 MRE cases containing Trans-Packers' potentially contaminated Shakes. AmeriQual stated that if the Government required AmeriQual to repair or replace the ration packs at its own expense, AmeriQual would seek reimbursement from Trans-Packers for all costs associated with the removal and replacement of the recalled Shakes. On February 23, 2010, counsel for AmeriQual wrote to Trans-Packers' counsel, asserting that Trans-Packers was responsible for indemnifying AmeriQual for all costs incurred to replace and rework the cases containing recalled Shakes that Trans-Packers supplied, amounting to $98,021.85.

On September 15, 2009, counsel for SOPAKCO wrote to Trans-Packers, stating that DSCP had demanded that SOPAKCO repair or replace ration packs containing potentially contaminated Shakes, seeking indemnification from Trans-Packers for all related losses.

On September 24, 2009, D&B wrote to Trans-Packers, stating that it was able to remove

and replace the potentially contaminated Shakes from the kits that it sent to its customers, but that it incurred $17,081.91 in costs associated with the process, for which it sought reimbursement from Trans-Packers.

On December 23, 2009, Wornick filed an action against Trans-Packers in the District Court for the Southern District of Ohio, entitled *The Wornick Co. v Trans-Packers Servs. Corp.*, Civil Action No. 09-931 (Wornick Ohio Action). In that action, Wornick alleges that, in response to the recall, the Government informed Wornick that it intended to file a warranty action under its contract with Wornick. Wornick further alleges that the Government has demanded that Wornick bear all costs associated with reworking the affected ration packs, which, according to Wornick, "would require Wornick to recall hundreds of thousands of cases of its products, ship them back to Wornick's facility, remove the suspect NFDM-containing products, replace it [sic] with non-contaminated products, and reseal and reship the products to the Government."

Wornick alleges that the purchase orders between Wornick and Trans-Packers contain express warranties that Trans-Packers' products would be free from defects and manufactured in compliance with state and federal law. Wornick seeks defense and indemnity from Trans-Packers for these losses resulting from Trans-Packers' alleged breach of warranties. Allegedly, as a result of Trans-Packers' conduct, Wornick has incurred damages resulting from its purchase and inability to use the recalled NFDM, discarding the recalled NFDM, receiving and reprocessing hundreds of thousands of cases of the ration packs containing the Shakes, removing and replacing the suspect NFDM-containing products, and resealing and reshipping the products to the Government. Wornick claims Trans-Packers is responsible for payment for all costs, damages, penalties, and losses, including, but not limited to, claims made by the Government.

On June 22, 2011, Wornick filed an action against Trans-Packers in the Eastern District of New York, Civil Action No. 1:11-CV-03008-FB-CLP (Wornick NY Action), containing the same allegations as set forth in the Wornick Ohio Action.

AZIC issued policies to Trans-Packers, bearing policy numbers CPO 5842127-02 and CPO 5842127-03, with effective dates of March 1, 2005 through March 1, 2006, and March 1, 2006 through March 1, 2007, respectively. ZAIC issued policies to Trans-Packers, bearing policy numbers CPO 5842127-04 and CPO 5842127-05, with effective dates of March 1, 2007 through March 1, 2008, and March 1, 2008 through March 1, 2009, respectively. AZIC issued a policy to Trans-Packers, bearing policy number CPO 5842127-06, with effective dates of March 1, 2009 through March 1, 2010. American Guarantee issued commercial umbrella liability policies to Trans-Packers, bearing policy numbers UMB 9374172 02, UMB 9374172 03, UMB 9374172 04, UMB 9374172 05, and UMB 9374172 06, with effective dates of March 1, 2005 through March 1, 2006, March 1, 2006 through March 1, 2007, March 1, 2007 through March 1, 2008, March 1, 2008 through March 1, 2009, and March 1, 2009 through March 1, 2010, respectively.

Selective Insurance issued a commercial general liability policy to Franklin, with effective dates of January 25, 2009 through January 25, 2010. Selective Way issued an excess umbrella policy to Franklin, with effective dates of January 25, 2009 through January 25, 2010.

On June 26, 2009, counsel for Trans-Packers wrote to AZIC and American Guarantee, advising them that Trans-Packers' customers would possibly seek indemnification for costs incurred as a result of the recall. On the same date, counsel for Trans-Packers wrote to Selective, stating that Trans-Packers "expects to be indemnified and held harmless by [Franklin Farms] from and against any and all liability (including its costs and expenses, consulting and legal fees)

Trans-Packers may suffer or incur as a result of its use of NFDM purchased from [Franklin Farms]."

On September 1, 2009, in response to Trans-Packers' counsel's June 26, 2009 letter, AZIC sent a disclaimer letter to Trans-Packers, disclaiming coverage, because the claims against Trans-Packers do not constitute allegations of "bodily injury" or "property damage" caused by an "occurrence." AZIC also reserved its right to disclaim on the basis of the "your product," "your work," "impaired property," and "recall" exclusions.

On October 7, 2009, Trans-Packers' counsel sent a letter to counsel for AZIC, stating that the Assemblers and the Government had asserted claims against Trans-Packers for the recall costs, and he asked AZIC to reconsider its September 1, 2009 disclaimer. On January 12, 2010, counsel for Trans-Packers again wrote to AZIC and American Guarantee, stating that, on December 29, 2009, Trans-Packers was served with the complaint in the Wornick Ohio Action, and reiterated Trans-Packers' request for defense and indemnification.

On May 28, 2010, plaintiffs issued a letter to Trans-Packers, reiterating the September 1, 2009 disclaimer, and refusal to defend or indemnify Trans-Packers in the Wornick Ohio Action. Plaintiffs issued a separate letter to Trans-Packers, stating that they had no duty to defend or indemnify Trans-Packers for the claims asserted against it by the Assemblers or the Government. On June 29, 2011, Trans-Packers' counsel wrote to counsel for plaintiffs requesting a defense in the Wornick NY Action. On July 5, 2011, Wornick wrote to AZIC, seeking additional insured coverage under AZIC Policy No. CPO 5842127-06 for the claims that the Government asserted against it.

The amended complaint contains 10 causes of action. The first five are against Trans-

Packers. The first cause of action is based on the insuring agreement in the AZIC and ZAIC policies and on Coverage A of the American Guarantee policies, which state:

> "1. Insuring Agreement
>
> a. We will pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' 'or 'property damage' to which this insurance applies. We will have the right and duty to defend the insured against any 'suit' seeking those damages even if the allegations of the 'suit' are groundless, false or fraudulent. However, we will have no duty to defend the insured against any 'suit' seeking damages for 'bodily injury' or 'property damage' to which this insurance does not apply."

The insuring agreement in Coverage B of the American Guarantee policies is substantially similar to this insuring agreement.

The Wornick Ohio Action and the claims that the Government and the Assemblers assert against Trans-Packers do not allege that Trans-Packers caused "bodily injury" or "property damage" within the meaning of plaintiffs' policies. Plaintiffs seek a declaration that Trans-Packers is not entitled to coverage for these claims.

The second cause of action alleges that, as part of its request for relief in the Wornick Ohio Action, Wornick seeks damages "resulting from its purchase and inability to use the recalled NFDM." The "your product" exclusion in plaintiffs' policies states that coverage is barred for "'property damage' to 'your product' arising out of it or any part of it." The "your product" exclusion bars coverage for the cost of Trans-Packers' allegedly contaminated product. Plaintiffs seek a declaration that they have no obligation to defend or indemnify Trans-Packers for Wornick's claim for damages resulting from its purchase and inability to use the recalled Shakes.

The third cause of action alleges that the Government has demanded that Trans-Packers

replace 90,656 bags of potentially contaminated Shakes at Trans-Packers' sole cost. The "your product" exclusion bars coverage for the cost of Trans-Packers' allegedly contaminated product. Plaintiffs seek a declaration that they have no obligation to defend or indemnify Trans-Packers for the Government's claim against it.

The fourth cause of action alleges that the impaired property exclusion provides that coverage is excluded for "property damage" to "impaired property" arising out of a defect, deficiency, inadequacy, or dangerous condition in "your product" or "your work," but the exclusion does not apply to the loss of use of other property arising out of sudden and accidental physical injury to "your product" or "your work" after it has been put to its intended use. The Assemblers' ration packs constituted tangible property that could not be used, or were less useful, because the packs incorporated Trans-Packers' Shakes, which were known or thought to be defective due to salmonella contamination. The ration packs were able to be restored to use by the replacement or removal of the Shakes.

Plaintiffs seek a declaration that, because the exclusion bars coverage for property damage to impaired property (the ration packs) arising out of a dangerous condition in "your product"(the potential salmonella in the Shakes), there is no coverage for the claims asserted against Trans-Packers in the Wornick Ohio Action or for the Assemblers' claims.

The fifth cause of action alleges that the product recall exclusion bars coverage for damages claimed for loss, cost, or expense incurred by Trans-Packers or others for the loss of use, withdrawal, recall, inspection, repair, replacement, adjustment, removal, or disposal of Trans-Packers' product or impaired property if such product or property is withdrawn or recalled from the market or from use by any person or organization because of a known or suspected

defect, deficiency, inadequacy or dangerous condition in it.

Plaintiffs seek a declaration that, because the Wornick complaint and the claims asserted by the Assemblers seek damages for the replacement, removal, and disposal of Trans-Packers' Shakes, and because the Shakes were withdrawn from use because of a suspected dangerous condition, the recall exclusion bars coverage.

The sixth cause of action, against Selective, alleges that Trans-Packers may qualify as an additional insured on any and all insurance policies issued to Franklin by Selective for the claims asserted against Trans-Packers in the Wornick Ohio Action and for the claims asserted against Trans-Packers by the Assemblers. Plaintiffs seeks a declaration that, to the extent that they have an obligation to defend or indemnify Trans-Packers for the claims asserted against it in the Wornick Ohio Action, or for the claims asserted against Trans-Packers by the Assemblers, and to the extent that Trans-Packers qualifies as an additional insured on policies issued by Selective, those policies are primary to plaintiffs' policies, and, therefore, plaintiffs have no duty to defend or indemnify Trans-Packers until the exhaustion of the Selective policies through the payment of judgments or settlements.

The seventh, eighth, ninth, and tenth causes of action are against Wornick. In the seventh cause of action, plaintiffs seek a declaration that they have no obligation to defend or indemnify Wornick for the Government claims, because Wornick cannot satisfy all of the requirements contained in the "vendors endorsement" in the AZIC and ZAIC policies.

The eighth cause of action is similar to the first cause of action, and is based on the insuring agreement in the AZIC and ZAIC policies and Coverage A of the American Guarantee policies. Plaintiffs seek a declaration that Wornick is not entitled to coverage for the Government

claims, because the Government does not allege the existence of bodily injury or property damage caused by an occurrence within the meaning of plaintiffs' policies.

The ninth cause of action is substantially the same as the fourth cause of action against Trans-Packers. Plaintiffs seek a declaration that there is no coverage for the Government's claims against Wornick, because the exclusion bars coverage for "property damage" to "impaired property" (the ration packs), arising out of a dangerous condition in "your product" (the potential salmonella in the Shakes).

The tenth cause of action is substantially the same as the fifth cause of action against Trans-Packers. Plaintiffs seek a declaration that the recall exclusion bars coverage, because the claim that the Government asserted against Wornick seeks damages for the replacement, removal, and disposal of the Shakes, and because a suspected dangerous condition caused the Shakes to be withdrawn from use.

***Trans-Packers Answer***

Trans-Packers states that, as a result of a positive finding of salmonella in the Shakes produced at its plant in December 2007, and again in March and April 2008, which it refers to as "prior contaminations," it was required to destroy inventory and shut down a significant portion of its operations for various periods of time, aggregating not less than 166 days. It claims that the prior contaminations caused it losses of at least $1.6 million, and that the Plainview Recall caused it losses of at least $5 million.

On June 24, 2009, Selective issued to Trans-Packers a "Certificate of Liability Insurance," certifying that Franklin was insured by Selective. Selective disclaims coverage for the losses for which Trans-Packers seeks recovery against Franklin. In its cross claim, Trans-

Packers seeks a declaration that Selective is obligated to cover and indemnify Franklin against all losses pertaining to the Plainview Recall, including the claims by Trans-Packers against Franklin.

Trans-Packers also asserts a counterclaim against plaintiffs, alleging that its customers, the Assemblers, were named as additional insureds on the endorsement of the policies, and each asserts entitlement to indemnification from Trans-Packers resulting from the Plainview Recall. Trans-Packers contends that plaintiffs' denial of coverage constitutes a breach of the policies.

***Wornick Answer***

Wornick is a leading supplier of convenience foods and military rations to institutional customers, including the Government and other large consumer product companies. It acts as a supply-chain integrator or assembler of MRE's on behalf of the Government's MRE program.

In mid-2009, Government inspectors found that certain Shakes, a component of Wornick's MRE products provided to Wornick by one of its vendors, were contaminated with salmonella. An investigation revealed salmonella contamination at a milk products manufacturing facility as the source of the contamination. This required Wornick to re-work approximately 700,000 cases of contaminated MREs, and destroy the recalled Shakes that the Government rejected. At the time of the underlying contamination incident, one component of Wornick's MRE product was the Trans-Packers Shakes which contained the NFDM that Trans-Packers purchased from Franklin, which, in turn, was manufactured by Plainview.

On July 21, 2009, the Government notified Wornick of its intent to invoke a breach of warranty action against Wornick related to the recalled products. The Government demanded that Wornick assume all costs associated with reworking the recalled MRE, including recall, shipping, removal, replacement, and reshipping. Wornick recalled and re-worked approximately

700,000 cases of MREs, quarantining and destroying the recalled Shakes that the Government rejected. As a result of the contamination incident, Wornick has suffered losses in excess of $2,800,000. These losses include legal fees, recall expenses, shipping and reshipping costs, disposal and destruction costs, and costs associated with re-working the MREs.

Wornick asserts two counterclaims against plaintiffs, seeking a declaratory judgment and damages for breach of contract. They are based on the allegation that plaintiffs sold an endorsement to the polices issued to Trans-Packers, containing a "Vendor's Endorsement," under which Wornick is an additional insured, and pursuant to which plaintiffs are obligated to indemnify and defend Wornick for all losses arising out of the contamination incident.

***Selective Answer***

Selective's answer does not contain any cross claims or counterclaims. Selective seeks dismissal of the amended complaint against it, or, alternatively, for a declaration that Selective has no obligation to provide coverage to Franklin and Trans-Packers under Policy S 15771 78.

**Determination**

The motions are decided as follows: (1) Motion 003 by Trans-Packers, joined by Wornick, is granted; (2) Motion 004 by Trans-Packers against Selective is granted; Selective's cross motion is denied; (3) Motion 005 by Franklin to intervene in this action is granted; (4) Motion 006 by Trans-Packers is denied. Plaintiffs' cross motion is granted; and (5) Motion 007 by Wornick is granted. Plaintiffs' cross motion is denied.

**Discussion**

***Motion 005***

Franklin moves for an order permitting it to intervene in this action.

By order dated March 31, 2011, this court granted a motion to sever the third-party action brought by Trans-Packers against Franklin, because that action involved tort and breach of contract claims, and not the insurance coverage claims encompassed by this action. However, Franklin seeks to intervene to assert a claim against Selective pertaining solely as to coverage, and which raises issues germane to the issues already contained in this action.

Plaintiffs oppose the motion. In their amended complaint, however, they bring a cause of action against Selective, stating that Trans-Packers may qualify as an additional insured on insurance policies that Selective issued to Franklin for the claims asserted against Trans-Packers in the Wornick Ohio Action, and for the claims that the Assemblers assert against Trans-Packers. They seek a declaration that, to the extent that they have an obligation to defend or indemnify Trans-Packers for these claims, and to the extent that Trans-Packers qualifies as an additional insured on policies that Selective issued, plaintiffs have no duty to defend or indemnify Trans-Packers until all such policies have been exhausted through the payment of judgments or settlements. Hence, permitting Franklin to intervene is warranted, because its presence is highly relevant to the issue of coverage under Franklin's policy (*see Osowski v AMEC Constr. Mgt., Inc.*, 69 AD3d 99, 102 [1st Dept 2009] ["DCM was permitted to intervene in the declaratory judgment action to challenge AIG's denial of coverage"]).

Moreover, Franklin's claim against Selective is similar to the claim by Trans-Packers against Selective; thus, the intervention will not raise new issues. Plaintiffs' argument that intervention will delay a determination of the rights of the parties is conclusory. Furthermore, Franklin joins in the motion by Trans-Packers against Selective.

***Motion 004***

Trans-Packers moves for partial summary judgment on its cross claim against Selective. Franklin has joined in the motion. Selective cross-moves for summary judgment, to obtain a declaration that it has no duty to defend or indemnify Franklin, its insured, for the claims at issue in this action.

In its cross claim, Trans-Packers seeks a declaration that Selective is obligated to cover and indemnify Franklin against all losses pertaining to the Plainview Recall, including the claims by Trans-Packers against Franklin. These include claims that, because of the recall, three Assembler customers of Trans-Packers have asserted that Trans-Packers has a legal duty to compensate them for all of the damages that they have incurred by the purchase of the Shakes. Trans-Packers also alleges that it suffered a loss because it had to suspend a portion of its operations while various governmental entities, including the United States Food and Drug Administration (FDA), exhaustively tested its facilities for the presence of salmonella.

Selective first argues that, because Trans-Packers is not an insured under the Selective Policy, it does not have standing to seek coverage for the claims that it has asserted against Selective's insured, Franklin. The issue of standing is moot, because the court is granting Franklin's motion to intervene, and Franklin has joined in the motion by Trans-Packers (*see Whiteman v Yeshiva & Mesivta Torah Temimah*, 255 AD2d 378, 379 [2d Dept 1998] [appellants did not have standing to appeal, because they did not oppose the original motion for summary judgment, nor did they join in or submit any papers in support of the renewed motion which resulted in the order appealed from]).

As for the merits, New Jersey law is applicable, because that is the domicile of Franklin and Selective (*Certain Underwriters at Lloyd's, London v Foster Wheeler Corp.*, 36 AD3d 17,

24 [1st Dept 2006] ["What emerges from the foregoing is that, where it is necessary to determine the law governing a liability insurance policy covering risks in multiple states, the state of the insured's domicile should be regarded as a proxy for the principal location of the insured risk. As such, the state of domicile is the source of applicable law"]). Trans-Packers contends that New Jersey law is applicable, whereas Selective seems to argue that applying either the law of New Jersey or of New York would be reasonable under applicable standards.

The policy at issue is a commercial general liability policy. The claims at issue involve liability claims against Selective's insured, Franklin, pertaining to a commercial transaction. Movants met their initial burden of showing that the claim for losses falls within the basic terms of the policy (*Adron, Inc. v Home Ins. Co.*, 292 NJ Super 463, 473, 679 A2d 160, 165 [Super Ct NJ, App Div 1996]). Movants have established that Franklin's NFDM caused "property damage" to Trans-Packers by rendering the Shakes unusable through an "occurrence."

> "Property damage" is defined as:
>
> 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 of use shall be deemed to occur at the time of the 'occurrence' that caused it."
>
> The contaminated NFDM rendered the Shakes unusable.

"Occurrence is defined in the policy as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." An "accident" is defined as an "unexpected and undesirable event, especially one resulting in damage or harm" (American Heritage Dictionary of the English Language 10 [4th ED 2006]). It is not argued that anything but an accidental event caused the contamination.

Selective is not raising any issues, such as failure to provide timely notice, failure to pay premiums, or that that the policy was not in effect during the relevant time period. Selective argues, however, that the commercial general liability policy does not afford coverage because of several exclusions to coverage contained in the policy. "In general, insurance policy exclusions must be narrowly construed; the burden is on the insurer to bring the case within the exclusion" (*Princeton Ins. Co. v Chunmuang*, 151 NJ 80, 95, 698 A2d 9, 16-17 [1997]). Selective has not met this burden.

Under New Jersey law, there are two types of claims that a business insured may suffer: a claim resulting from the insured's defective product, requiring replacement or repair, and a claim resulting from a defective product that causes injury to a third-party's person or property (*see Weedo v Stone-E-Brick, Inc.*, 81 NJ 233, 239-240, 405 A2d 788, 791-792 [1979]). Liability insurance is not intended to cover business losses where the work performed by the insured is faulty, and which causes a breach of either an express or implied warranty, or both. In this instance, the customer did not obtain the benefit of the bargain, and the "dissatisfied customer can, upon repair or replacement of the faulty work, recover the cost thereof from the insured-contractor as the standard measure of damages for breach of warranties" (81 NJ at 239, 405 A2d at 791).

The other type of loss is for "injury to people and damage to property caused by faulty workmanship," and, in this instance, the accidental injury to property or persons substantially caused by the insured's unworkmanlike performance exposes "almost limitless liabilities" (*81 NJ* at 240, 405 A2d at 791).

> "The risk intended to be insured is the possibility that the goods, products or work of the insured, once relinquished or completed, will cause bodily injury or damage

> to property other than to the product or completed work itself, and for which the insured may be found liable. The insured, as a source of goods or services, may be liable as a matter of contract law to make good on products or work which is defective or otherwise unsuitable because it is lacking in some capacity. This may even extend to an obligation to completely replace or rebuild the deficient product or work. This liability, however, is not what the coverages in question are designed to protect against. The coverage is for tort liability for physical damages to others and not for contractual liability of the insured for economic loss because the product or completed work is not that for which the damaged person bargained"

(*Atlantic Mut. Ins. Co. v Hillside Bottling Co., Inc.*, 387 NJ Super 224, 233-234, 903 A2d 513, 519 [Sup Ct NJ, App Div], *cert denied* 189 NJ 104, 912 A2d 1264 [2006]). The New Jersey Supreme Court "has addressed the meaning of these provisions, concluding that claims that sound in breach of warranty, whether express or implied, and that are related to claims that the insured's work was faulty or that its product was defective, do not fall within the coverage provided to the insured by this language" (*id* at 233, citing *Weedo v Stone-E-Brick, Inc.*, 81 NJ at 237, 405 A2d at 788). But that is not the case here.

Selective first argues that the policy does apply to property damage to "your product," pursuant to exclusion "k" (the "your product" exclusion). "Your product" refers to:

> "(1) Any goods or products, other than real property, manufactured, sold, handled, distributed or disposed of by:
>
> (a) You;
>
> (b) Others trading under your name; or
>
> (c) A person or organization whose business or assets you have acquired; and
>
> (2) Containers (other than vehicles), materials, parts or equipment furnished in connection with such goods or products."

Selective posits that "it cannot be disputed that to the extent Trans-Packers is alleging 'property damage' (defined to include loss of use of tangible property not physically injured) to

the NFDM distributed to it by Franklin as a result of the salmonella contamination, this exclusion applies and operates to bar coverage for such claim" (Memorandum in Support of Cross Motion, at 17). However, Franklin seeks coverage for the damage that its product caused to the product of Trans-Packers, i.e., the Shakes. As such, the exclusion is inapplicable (*see Travelers Indem. Co. v Dammann & Co.*, 2008 WL 370914, 2008 US Dist LEXIS 9759 [D NJ, Feb. 11, 2008, No. 04-CV-5699 (DRD)]). In *Dammann*, cited by Trans-Packers, Dammann sold vanilla beans to International Flavors & Fragrances, Inc. (IFF) which used the beans to produce vanilla extract. IFF discovered that mercury may have contaminated certain lots of Indonesian vanilla beans that Dammann supplied to it, and for which IFF sought damages. Dammann filed an insurance claim with The Travelers Indemnity Company. Travelers denied coverage.

The Court found that the "damage is to IFF's product – the vanilla extract – and not to any product produced by Dammann" and that, although the vanilla beans provide an "important ingredient for IFF's product, IFF's product is distinct for these purposes, and the exclusions do not apply" (2008 WL 370914 at *9, 2008 US Dist LEXIS at *24). The Court also stated that "IFF's alleged property damage was not limited to the vanilla extract, and also included damage to IFF's equipment," constituting "separate and distinct third-party property, which, if damaged as a result of Dammann's faulty workmanship, is covered under the provisions of the Policies" (*id.*). IFF's claims include damages for clean up and remediation, and damage to IFF's property, and exposure to liability to other parties which may have used the contaminated vanilla extract (2008 WL 370914 at *5, 2008 US Dist LEXIS at *14).

Similarly, Trans-Packers alleges that it suffered damages, because three Assembler customers have asserted that it has a legal duty to compensate them for all of the damages that

they incurred as a result of their purchase of the Shakes affected by the Plainview Recall. It claims that it was required to suspend a portion of its operations while various governmental entities, including the FDA, exhaustively tested its facilities for the presence of salmonella.

Selective attempts to distinguish *Dammann* by contending that there is a distinction between a raw food product, such as the vanilla beans in *Dammann*, and the NFDM, which is a manufactured product. Selective also contends that NFDM remains an identifiable and key component in the Shakes. This assertion, made only by counsel in Selective's memorandum of law, is of no probative value (*Hunter Roberts Constr. Group, LLC v Arch Ins. Co.*, 75 AD3d 404, 411 [1st Dept 2010]).

In contrast, Trans-Packers has submitted an expert affidavit stating that the Shake powder is a mixture of the NFDM, sugar, crème blend, maltodextrin, cornstarch, guar gum, and other fine powders. "During the blending process, heat is naturally generated, causing some of the ingredients to melt and stick to carrier-designated ingredients." The expert also states that, as a "finished product, it has a distinct identity from its multiple ingredients" and "[s]eparation of the of the components from a finished Dairy Shake is not possible" (Affidavit of John Wiginton). Although Selective challenges the expert's credentials, it has the burden to demonstrate the applicability of the exclusion (*Princeton Ins. Co. v Chunmuang*, 151 NJ at 95, 698 A2d at 17). Moreover, the expert's opinion is buttressed by the affidavit of Lester Weiss, Chief Operating Office of Transp-Packers, who states that Trans-Packers blends the NFDM with multiple other ingredients to manufacture the Shakes.

Therefore, Selective's citation to decisions such as *Atlantic Mut. Ins. Co. v Hillside Bottling Co., Inc.* (387 NJ Super 224, 903 A2d 520) is unavailing, because there the Court found

that the contaminated beverages that were recalled because of ammonia was the product of the insured, Hillside (387 NJ Super at 229). Also unavailing is Selective's reliance on *Lowville Producer's Dairy Coop. v American Motorists Ins. Co.* (198 AD2d 851 [4th Dept 1993]), in that it actually supports Trans-Packers' position. The issue in *Lowville Producer's Dairy Coop.* was damage to the insured's product. The Court noted that it did not matter if title to that product passed from plaintiff (the insured, seller of milk) to Kraft (the purchaser of the milk). The loss was merely the value of six truckloads of milk. Thus, a key issue was whether the "your product" exclusion applies, even after title passes to another, to which the Court answered in the affirmative. But here, the issue is the damage that Franklin's product (the NFDM) caused to Trans-Packers' product (the Shakes), and the loss caused by the contaminated NFDM. The Court in *Lowville Producer's Dairy Coop.* noted that the exclusion would not apply in a scenario similar to the one presented here (*id.* at 853 ["The policy was clearly intended to cover the possibility that the insured's product, once sold, would cause bodily injury or damage to property other than the product itself"]).

Selective next argues that the "impaired property" exclusion is applicable to bar coverage.

> [This insurance does not apply to:]
>
> "**m. Damage to Impaired Property or Property Not Physically Injured.**
>
> > 'Property damage' to 'impaired property' or property that has not been physically injured arising out of:
> >
> > > (1) A defect, deficiency, inadequacy or dangerous condition in 'your product' or 'your work'; or
> > >
> > > (2) A delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms.
> > >
> > > This exclusion does not apply to the loss of use of other property

> arising out of sudden and accidental physical injury to 'your product' or 'your work' after it has been put to its intended use.

The term "impaired property" is defined in the policy as follows:

> "'Impaired property' means tangible property, other than 'your product' or 'your work', that cannot be used or is less useful because:
>
> a. It incorporates 'your product' or 'your work' that is known or thought to be defective, deficient, inadequate or dangerous; or
>
> b. You have failed to fulfill the terms of a contract or agreement;
>
> If such property can be restored to use by the repair, replacement, adjustment or removal of 'your product' or 'your work' or your fulfilling the terms of the contract or agreement."

This exclusion is not applicable, because the "business risk exclusion only applies regarding claims for damage to the insured's own work arising out of his faulty workmanship, and does not exclude damage to other property not manufactured or provided by the insured, yet caused by the insured's poor performance" (*Newark Ins. Co. v Acupac Packaging, Inc.*, 328 NJ Super 385, 398-99, 746 A2d 47, 55 [Sup Ct NJ, App Div 2000]). The exclusion is inapplicable, because the contaminated Shakes could not be restored to use.

Selective contends that Trans-Packers failed to address whether the Shakes could be restored to use if Franklin were to furnish contamination-free NFDM. Selective asserts that the expert, John Wiginton, does not state that the Shakes could not be restored to use. This assertion is without merit. It is evident from his affidavit about the process by which the Shakes are made that the Shakes containing the contaminated NFDM powder could not be redone by removing the salmonella-infected powder, and replacing it with salmonella-free powder. As stated above, it is

the insurer who has the burden to "bring the case within the exclusion" (*Villa v Short*, 195 NJ 15, 24, 947 A2d 1217, 1222 [2008] [citation omitted]).

Selective also argues that the recall exclusion bars recovery. This exclusion provides:

[This insurance does not apply to:]

**"n. Recall of Products, Work or Impaired Property**

> Damages claimed for any loss, cost or expense incurred by you or others for the loss of use, withdrawal, recall, inspection, repair, replacement, adjustment, removal, disposal of:
>
> (1) 'Your product',
>
> (2) 'Your work', or
>
> (3) 'Impaired property',
>
> if such product, work or property is withdrawn or recalled from the market or from use by any person or organization because of a known or suspected defect, deficiency, inadequacy or dangerous condition in it."

For the reasons discussed above, this exclusion is inapplicable, because the recall did not pertain to any of the three products specified above. Rather, the recall pertained to property damage suffered by another property owner (*Newark Ins. Co. v. Acupac Packaging, Inc.*, 328 NJ Super at 401). Moreover, the exclusion is inapplicable, because of the existence of "two distinct products, one causing damage to the other" (*Atlantic Mut Ins. Co. v Hillside Bottling Co.*, 387 NJ Super at 236, 903 A2d at 520).

***Motion 003 & 007***

Motions 003 and 007 involve the claim, made by Trans-Packers and Wornick, that plaintiffs must afford coverage to Wornick, as an additional insured under the Vendor's Endorsement, for the claims against Wornick asserted by the Government. Specifically, in

Motion 003, Trans-Packers seeks partial summary judgment against plaintiffs on its counterclaim alleging breach of contract. The counterclaim is based on the allegation that plaintiffs wrongfully failed to indemnify Trans-Packers' customer – Wornick – as they were required to do by the Vendor's Endorsement that Trans-Packers purchased from plaintiffs.

In Motion 007, Wornick seeks partial summary judgment on its counterclaims against plaintiffs. It also seeks dismissal of plaintiffs' seventh, eighth, ninth, and tenth causes of action of plaintiffs' first amended complaint. It also joins with Trans-Packers on Trans-Packers's motion for partial summary judgment on its counterclaim.

Plaintiffs cross-move for summary judgment against Wornick.

In its answer, Wornick asserts two counterclaims against plaintiffs. The first alleges as follows: plaintiffs sold an endorsement to plaintiffs' policies which set forth "ADDITIONAL INSURED - VENDORS (Vendor's Endorsement) which states:

> "Section II - Who Is An Insured is amended to include as an additional insured any person(s) or organization(s) (referred to below as vendor) shown in the Schedule, but only with respect to "bodily injury" or "property damage" arising out of "your products" shown in the Schedule which are distributed or sold in the regular course of the vendor's business, subject to the following additional exclusions."

Wornick alleges that it is an additional insured under the Vendor's Endorsement, and plaintiffs are obligated to indemnify and defend it for all losses arising out of the contamination incident. The second counterclaim alleges that, by denying coverage and refusing to pay Wornick's losses arising from the contamination incident, plaintiffs materially breached the policies, causing damages in excess of $2,800,000.

Plaintiffs argue that Wornick is not entitled to coverage under plaintiffs' policies

because (1) the claims that the Government asserted against Wornick do not allege the existence of an "occurrence" causing "property damage"; (2) the impaired property and product recall exclusions are applicable; and (3) the contractual liability exclusion in the Vendor's Endorsement independently precludes coverage for the Government's claims against Wornick.

Plaintiffs also argue that the Government's claims do not allege the existence of an "occurrence" causing "property damage." The Government only alleged that the ration packs were unfit for use because of the potential presence of salmonella in the Shakes. Hence, the packs had to be replaced at Wornick's cost. The Government never alleged that Wornick's ration packs caused damage to other property.

As a preliminary matter, the Court is not accepting the additional submissions that counsel for plaintiffs and Wornick sought to make, after the motions were deemed submitted, through correspondence sent to the Court in May 2012, and again in November 2012. Even if the court were to consider them, consideration of the issue raised in the correspondence (as to whether title to the ration packs passed to the Government) would not affect the dispositions rendered herein (*see Lowville Producer's Dairy Coop. v American Motorists Ins. Co.* (198 AD2d 851, supra).

Movants have demonstrated that Wornick is entitled to coverage as an additional insured under the Vendor's Endorsement of plaintiffs' policy for the claims of the Government against Wornick (*Raymond Corp. v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 5 NY3d 157 [2005]). The Shakes were integrated into the ration packs, because they were sealed and the packs were harmed in reworking the Shakes, which would make it a covered damage, and not an excluded harm to the manufacturers' product (the Shakes) (*Sturges Mfg. Co. v Utica Mut. Ins.*

*Co.*, 37 NY2d 69, 71 [1975]).

As set forth in the Vendor's Endorsement, Wornick is an additional insured with respect to "bodily injury" or "property damage" arising out of Trans-Packers' products ("your products") which are distributed or sold in the regular course of Wornick's business (the vendor). Wornick alleges that it suffered property damage "arising out of" the sale of Trans-Packers' product. It submitted uncontroverted support (affidavit) for the damage allegation.

According to the affidavit of Michael Hyche, Vice President of Operations for Wornick, Wornick paid to transport the recalled ration MREs from the Government depot to Wornick. As part of the recall process, Wornick had to open the affected cases, damaging the packaging in some instances. Wornick then opened the ration menu bags which contained each MRE. These menu bags had to be torn open and could not be reused. After removing the affected Shakes, and replacing with new Shakes, Wornick placed the contents of each MRE into a new menu bag. Wornick then repackaged the MRE cases utilizing the original MRE cases when possible, using new glue and strapping to close the case, but in some instances, new packaging was required. Wornick paid to ship the reworked MREs back to the Government.

Wornick claims that replacing the Shakes contained in the MREs cost $3.1 million, which it seeks to recover from Trans-Packers (Sussman Aff. Exh 20). It contends that this amount far exceed the costs of simply replacing the Shakes. According to a schedule prepared by Wornick, the $3.1 million includes the following components: (1) cost of transportation from the depot to Wornick and from Wornick to the depot ($626,000); (2) cost of materials and packaging ($943,000); (3) cost of labor ($1,101,000); (4) legal fees ($250,000); and (5) consulting and other [expenses] ($180,000).

This determination is consistent with the purpose of the Vendor's Endorsement, because there is no evidence or allegation that the resulting damage was attributable to any fault of Wornick, the vendor, as the additional insured. As stated by the Court of Appeals:

> "Accordingly, '[s]uch an endorsement covers the vendors' liability arising out of their role in passing the manufacturer's product on to customers, but does not cover vendors for their own negligence.'"
>
> "[T]he purpose of a vendor's endorsement is to protect the vendor (i.e., dealer or other distributor) *against the expense of being dragged as an additional defendant into a lawsuit arising from a defect in a product that it distributes*"

(*Raymond Corp. v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 5 NY3d at 164).

Plaintiffs argue that the property damage alleged here is not to a sufficient degree under Raymond to invoke coverage, but Raymond did make such distinction, especially since Raymond involved bodily injury, not property damage. Moreover, the Court of Appeals stated: "The vendor's endorsement here also extends coverage for any defective-product suits arising out of all the activities in addition to sale and distribution which Arbor, in fact, performs with respect to Raymond's products" (*id.* at 163). At issue here is a defective-product suit arising out of all the activities in addition to sale and distribution of Trans-Packers' product.

Plaintiffs reliance upon *Sokol & Co. v Atlantic Mut. Ins. Co.* (430 F3d 417 [7th Cir 2005]) is not persuasive, because there the Court found that the only loss was the cost of the product itself. The packaging that contained the peanut butter packets was not damaged, whereas here evidence was submitted to show that there was damage to some of the packs. Significantly, in *Sokol & Co.*, the insured was the supplier of the defective product – the rancid peanut butter. Here, it is Trans-Packers that supplied the defective product, and Wornick is seeking coverage under the Vendor's Endorsement.

Plaintiffs argue that the Government has not asserted that it suffered any property damage, and it sought only the reworking of the affected ration packs. Trans-Packer is the insured (as was Sokol), and the policy provides that an insured is an entity shown on the schedule "but only with respect to 'bodily injury' or 'property damage' arising out of 'your products.'" "[Y]our products" refers to the products of Trans-Packers, not the products of Wornick. The damage claim is damage to the ration packs "arising out of" the salmonella-contaminated Shakes. The phrase "arising out of" is broad enough to embrace the damage, discussed above. To the extent that plaintiff's own policy language is ambiguous, the ambiguity must be resolved in favor of the insured (*Belt Painting Corp. v TIG Ins. Co.*, 100 NY2d 377, 384 [2003]).

As discussed above, Wornick has submitted evidence that the Shakes damaged the ration packs, because they were sealed, and were damaged in the reworking of the packs, and plaintiffs have not introduced any controverting evidence.

Plaintiffs argue that the exclusion applies because there is no coverage for damage to impaired property (i.e., the ration packs) because of a defect in "your property" (i.e., the property of Trans-Packers). Ration packs are impaired property that was damaged because of a defect in Trans-Packers' product. For the reasons discussed above, the impaired property exclusion does not apply, because of the resulting property damage from the replacement of the Shakes. The same holds true for the recall exclusion.

Plaintiffs next argue that the contractual liability exclusion in the Vendor's Endorsement bars coverage for Wornick. The exclusion provides:

"The insurance afforded the vendor does not apply to:

> a. 'Bodily injury' or 'property damage' for which the vendor is obligated to pay damages by reason of the assumption of liability

> in a contract or agreement. *This exclusion does not apply to liability for damages that the vendor would have in the absence of the contract or agreement*" (emphasis added).

This exclusion is inapplicable, because the liability is not based on contract; it would result from selling ration packs that have a salmonella contaminated item enclosed. Liability would exist even in the absence of the contract (*see McClinch Crane Inc. v Steel Consulting Corp.*, 1990 WL 102211, n 5, 1990 US Dist LEXIS 8513, n 5 [SD NY, July 12 1990, No. 87-CV-4054 (KMW) ["However, the court notes that an exclusion such as this generally serves to exclude only liability that would not exist but for the contract"]; *see also U.S. Underwriters Ins. Co. v Falcon Constr. Corp.*, 2003 WL 22019429, *6, 2003 US Dist LEXIS 14817, *18 [SD NY, Aug. 27, 2003, No. 02-CV-4182 (LTS) (GWG)] ["Contractual liability exclusions are inapposite where there is a basis for liability independent of a contractual indemnity provision"]).

***Motion 006***

Trans-Packers seeks partial summary judgment for a declaration that plaintiffs are obligated to defend and indemnify it for the claims asserted by the Assemblers and the Government. Plaintiffs cross move for summary judgment seeking a declaration that they have no duty to defend or indemnify Trans-Packers for these claims.

Plaintiffs argue that Trans-Packers cannot meet its burden of demonstrating that it caused property damage, as required by the policy for coverage. As discussed above, pertaining to Selective, "property damage" involves either "physical injury to tangible property" or "loss of use of tangible property." As for the first, plaintiffs argue that, because the Shakes are a powder, wrapped and sealed in their own pouches, they did not come into physical contact with any other part of the Assembler packs. Plaintiffs contend that the second prong ("loss of use of property")

is not satisfied, because the Assemblers never lost use of the ration packs. The Assemblers seek damages for the costs associated with the removal and replacement of the Shakes, not for the loss of use of the ration packs.

Relying on *Sokol & Co. v Atlantic Mut. Ins. Co.* (430 F3d 417), plaintiffs distinguish the claims that Trans-Packers asserts against Franklin, and the claims that the Assemblers assert against Trans-Packers. Once Franklin's product (the salmonella-contaminated NFDM) had been mixed with other ingredients to form the Shakes, the NFDM could not be removed, whereas, the Shakes could be removed from the ration packs that Trans-Packers sold to the Assembler Customers.

Relying on *Sturges Mfg Co. v Utica Mut. Ins. Co.* (37 NY 69), Trans-Packers argues that, once the Shakes were placed into the ration packs, those became unusable, and Trans-Packers faces liability to Wornick, claiming to have incurred $3.1 million in damages in replacing the Shakes.

The bulk of the issues presented on the motion and cross motion are the same as discussed above in the other motions, and warrant the same analysis. Where this motion differs is that, as plaintiffs contend, the "impaired property" exclusion bars coverage, and that finding is dispositive of the motion and the cross motion in plaintiffs' favor.

"Impaired property" is defined in the policy as "tangible property, other than 'your product' or 'your work', that cannot be used or is less useful because: a. It incorporates 'your product' or 'your work' that is known or thought to be defective, deficient, inadequate or dangerous . . . [i]f such property can be restored to use by the repair, replacement, adjustment or removal of 'your product' or 'your work' . . . ."

Concerning Trans-packers' product, the Shakes constitute impaired property, because they were contaminated, but could be restored to use by removal and replacement. This differs from the situation involving the product of the Assemblers such as Wornick (the ration packs), for the reasons discussed above.

Finally, the exception to the exclusion is inapplicable. It provides:

> "This exclusion does not apply to the loss of use of other property arising out of a sudden and accidental physical injury to "your product" or "your work" after it has been put to its intended use."

The damage occurred prior to the ration packs being put to their intended use.

Settle Order.

Dated: January 29, 2013

ENTER:

J.S.C.