

Chao Jiang v Ping An Ins.

2022 NY Slip Op 30072(U)

January 11, 2022

Supreme Court, New York County

Docket Number: Index No. 652260/2015

Judge: Andrea Masley

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

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<p>CHAO JIANG,</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">- v -</p> <p>PING AN INSURANCE, PING AN PROPERTY & CASUALTY INSURANCE CO. OF CHINA, LIMITED, CHINA PING AN INSURANCE OVERSEAS (HOLDINGS) LIMITED, HUATAI INSURANCE GROUP OF CHINA, HUATAI INSURANCE COMPANY OF CHINA LIMITED, HUATAI PROPERTY AND CASUALTY INSURANCE COMPANY LIMITED, CHUBB CORPORATION, FEDERAL INSURANCE COMPANY, and CHUBB INSURANCE (CHINA) COMPANY LIMITED,</p> <p style="text-align: center;">Defendants.</p>	<p>INDEX NO. <u>652260/2015</u></p> <p>MOTION DATE _____</p> <p>MOTION SEQ. NO. <u>012</u></p> <p>DECISION + ORDER ON MOTION</p>
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HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 012) 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 523, 525, 567, 581, 629, 640, 647, 650, 651, 652, 653

were read on this motion to/for JUDGMENT - DEFAULT.

This coverage dispute action involves a Directors and Officers Liability Insurance Policy issued to nonparty China North East Petroleum Holdings Ltd. (CNEP) by several insurers.

In June 2015, plaintiff Chao Jiang commenced this action against Ping An Insurance Group, Ping An Property & Casualty Insurance Company of China, Ltd., China Ping An Insurance Overseas (Holdings) Limited (collectively, Ping An Defendants)¹, Huatai Insurance Group of China (Huatai Group), Huatai Insurance

¹ On August 22, 2017, plaintiff discontinued this action against the Ping An Defendants. (NYSCEF 464, Stipulation of Discontinuance.)

Company of China Limited (Huatai Limited), Huatai Property and Casualty Insurance Company Limited (Huatai P&C) (collectively, Huatai Defendants), Chubb Corporation, Federal Insurance Company, and Chubb Insurance (China) Company Limited (collectively, Chubb Defendants)² for failure to defend and advance defense costs accrued by plaintiff in actions brought by the United States Securities and Exchange Commission (SEC Action) and the United States Department of Justice (DOJ Action) (together, Underlying Actions) against plaintiff. (NYSCEF Doc. No. [NYSCEF] 384, First Amended Complaint [FAC] ¶ 1.)

Procedural Background

In motion sequence number 012, plaintiff moves, pursuant to CPLR 3215(g), for a default judgment against Huatai Group.³ The Huatai Defendants⁴ cross-move to dismiss the FAC, pursuant to CPLR 3211(a)(1) and (8), or in the alternative CPLR 327(a).

On December 6, 2018, the court issued an interim order in both motion sequence numbers 012 and 015⁵ (Interim Order), denying the portion of Huatai Group's cross

² This action was discontinued against defendant Chubb Corporation. (NYSCEF 14, Stipulation of Discontinuance; see *also* NYSCEF 340, Stipulation.) On July 7, 2018, the court dismissed this action against the remaining Chubb Defendants, Federal Insurance Company and Chubb Insurance (China) Company Limited. (NYSCEF 563, Decision and Order [motion seq. no. 013].)

³ Plaintiff alleges that Huatai Defendants issued the Primary Policy to CNEP. (NYSCEF 384, FAC ¶ 13.) In the FAC, citing the affidavit of Douglas Wong of ACE Group Holdings Ltd., plaintiff alleges that Huatai Limited underwrote the Primary Policy issued by the Huatai Defendants. (*Id.* ¶ 14.) Huatai Limited is allegedly now known as Huatai P&C and is a subsidiary of Huatai Group. (*Id.* ¶ 15.)

⁴ The Notice of Cross Motion identifies the movants as Huatai Group and Huatai P&C f/k/a Huatai Limited. (NYSCEF 408, Notice of Cross Motion.)

⁵ In motion seq. no. 015, plaintiff moved to strike the Huatai Defendants' motion to dismiss and enter a default judgment against them pursuant to CPLR 3215, or

motion in sequence number 012 seeking dismissal, pursuant to CPLR 3211(a)(8), for lack of personal jurisdiction. (NYSCEF 567, Interim Order.) The court also (i) held plaintiff's default motion in abeyance (seq. 012), (ii) directed Huatai Group to post a bond in the amount of \$2.5 million pursuant to New York Insurance Law § 1213(c) or procure a license to do insurance business in New York (seq. 015), (iii) held the remaining portion of sequence number 015 in abeyance pending a traverse hearing, (iv) held the remainder of Huatai Group's cross motion to dismiss in abeyance pending compliance with (ii) (seq. 012); and (v) held Huatai P&C and Huatai Limited's cross motion to dismiss in abeyance (seq. 012). (*Id.* at 15-16.)

In December 2018, the Huatai Defendants filed a notice of appeal to the Appellate Division, First Department, and requested a stay pending its appeal of the Interim Order. In January 2020, the First Department affirmed the Interim Order. (*Jiang v Ping An Ins.*, 179 AD3d 517 [1st Dept 2020].) In November 2020, the Huatai Defendants waived their right to a traverse hearing with regard to the sufficiency of service of process, personal jurisdiction, and issues arising under New York Insurance Law §1213(c). (NYSCEF 639, Letter to Court.) Thus, all issues related to personal jurisdiction and sufficiency of process as to the Huatai Defendants have been resolved or waived.

On December 9, 2020, the Huatai Defendants filed an answer (NYSCEF 642) to the FAC. On December 23, 2020, the court held argument on this motion to address the remaining issue: the Huatai Defendants' cross motion pursuant to CPLR 3211 (a)(1). At argument, plaintiff's counsel asserted that the cross motion was moot in light

alternatively, compel Huatai Group and Huatai P&C to post a bond in compliance with New York Insurance Law §1213. This motion is now moot. (NYSCEF 644, Decision and Order [motion seq. no. 015].)

of filing an answer. (NYSCEF 653, tr at 9:14-15, 10:5-10.) As this raised a new argument, and due to the long history of this motion, the court directed the parties to brief this issue. (*Id.* at 20:19-20.)

Background

The following facts are taken from the FAC as relevant to the Huatai Defendants' cross motion to dismiss. Otherwise, familiarity with the underlying facts of this case is assumed.

The Insurance Policies

Plaintiff served as the Vice President of Corporate Finance and Secretary of CNEP. (NYSCEF 384, FAC ¶ 62.) In 2010, CNEP purchased a Directors and Officers Liability & Company Reimbursement insurance policy (Primary Policy), covering plaintiff. (*Id.*) For the period between May 1, 2010 and April 30, 2011, the Primary Policy was co-underwritten by the Ping An Defendants and nonparty Chartis/AIG (AIG). (*Id.* ¶ 65.) The Primary Policy had an aggregate \$5 million coverage limit for which each underwriter was 50% responsible on a pro rata basis. (*Id.* ¶ 65.) CNEP also purchased an excess liability policy underwritten by the Chubb Defendants (Excess Policy) for the period between May 1, 2010 to April 30, 2011. (*Id.* ¶¶ 86-87.) The Excess Policy provided for an additional \$5 million in coverage if the limits of the Primary Policy were reached. (*Id.* ¶¶ 86, 88.)

In June 2010, a dispute arose concerning timeliness of CNEP's premium payments to Ping An, and in response, the Ping An Defendants informed CNEP that they would not provide coverage. (*Id.* ¶ 67.) Around this time, CNEP alleges it also informed the Ping An Defendants and AIG of a class action lawsuit that was filed against it in New York, *Rosado v China North East Petroleum Holdings Ltd. et al.*, No.

1:10-cv-4577 (MGS) (SDNY) (Shareholder Class Action). (*Id.*) Subsequently, five other class actions were filed against CNEP. (*Id.* at 28, n 4.) None of these class actions, including the Shareholder Class Action, named plaintiff as a defendant. (*Id.*)

Due to the dispute over CNEP's timely premium payments, the Ping An Defendants refused to provide co-insurance under the Primary Policy. (*Id.* ¶¶ 30, 67.) Thus, following the expiry of the Primary Policy in April 2011, CNEP engaged the Huatai Defendants to provide co-insurance under the Primary Policy. (*Id.* ¶¶ 30, 68.) The Huatai Defendants agreed to extend coverage for the policy year 2011-2012 provided that plaintiff agree to additional terms set out in the form of a special side agreement (Side Agreement). (*Id.* ¶ 68.) In May 2011, CNEP, AIG, and the Huatai Defendants signed the 2011-2012 extension of the Primary Policy with the Huatai Defendants replacing the Ping An Defendants as co-insurers.⁶ (*Id.* ¶¶ 30, 68, 74.) Plaintiff and the Huatai Defendants entered into the Side Agreement, discussed in greater detail below, which notably included liability exclusion language (Exclusion Clause). (*Id.* ¶ 74.) The Excess Policy was also renewed in 2011. (*Id.* ¶ 31.)

The Underlying Actions

Beginning August 2010, the SEC and DOJ commenced investigations into CNEP and its officers and directors. (*Id.* ¶ 32.) In November 2012, the SEC charged plaintiff with "committing wrongful acts in his capacity as an officer or employee of CNEP." (*Id.* ¶ 93.) In March 2013, the Federal Bureau of Investigation (FBI) arrested plaintiff and charged him in the United States District Court for the District of Columbia with

⁶ Plaintiff does not allege that the Primary Policy and the 2011-2012 extension of the Primary Policy by the Huatai Defendants differed in any material way, apart from the exclusionary terms set out in the Side Agreement. Any further reference by the court to the Primary Policy chiefly refers to the extended coverage period for the policy year 2011-2012.

securities fraud, conspiracy, making false statements, and committing wrongful acts in his capacity as an officer or employee of CNEP. (*Id.* ¶ 94.) According to plaintiff, the cost of defending the Underlying Actions surpassed \$8 million, exceeding the coverage limits of the Primary Policy and piercing the Excess Policy. (*Id.* ¶ 35.)

Plaintiff claims that the Huatai Defendants have failed to honor their obligations under the Primary Policy and left him short of “\$2.5 million in outstanding Primary Policy personal liabilities to Gibson Dunn and to third-party litigation support vendors.” (*Id.* ¶ 101.) Plaintiff submitted a payment demand letter to the Huatai Defendants on September 2, 2014 and followed up with an e-mail. (*Id.* ¶ 104.) After a month of silence, a purported representative of the Huatai Defendants, Alan Ding, responded. (*Id.*) After additional email communications, plaintiff’s claim was denied. (*Id.* ¶¶ 104-105.)

Plaintiff asserts that the Underlying Actions are covered under the Primary Policy and seeks coverage of the defense costs associated with the Underlying Actions in accordance with the Primary Policy. (*Id.* ¶ 99.)

Discussion

Mootness

Plaintiff argues that CPLR 3211(a)(1) motions are made prior to the filing of an answer, and the subsequent filing of an answer negates the relief requested by a pre-answer motion to dismiss. Plaintiff argues that because the Huatai Defendants filed their answer, the issues raised in their motion to dismiss no longer require judicial adjudication at this juncture, and litigation must proceed to discovery and summary judgment motions, pursuant to CPLR 3212, if so desired.

The Huatai Defendants assert that nothing in the CPLR precludes them from filing an answer after making a motion to dismiss.⁷ They also argue that they preserved their objections as they asserted the same basis for dismissal as the affirmative defenses in their answer.

In the absence of case law on point, a reading of the CPLR guides disposition of this issue. Plaintiff correctly argues that a CPLR 3211(a) motion to dismiss is necessarily a pre-answer motion. (CPLR 3211[e] [“At any time before service of the responsive pleading is required, a party may move on one or more of the grounds set forth in subdivision (a), and no more than one such motion shall be permitted”].) However, plaintiff fails to support his assertion that an answer moots a pending 3211(a) motion to dismiss. Plaintiff cites to two cases, both of which deal with post-answer motions to dismiss; those motions based on waivable grounds for dismissal were found to be untimely. This is not the procedural posture here where an answer was filed after the 3211(a) motion.

Here, the Huatai Defendants’ motion to dismiss pursuant to 3211(a)(1) was made on March 22, 2017, while the answer was filed over three years later on December 9, 2020. The CPLR does not address the effect of filing an answer while a 3211(a) motion is pending, and the court sees no reason to moot the pending motion to dismiss. Although the CPLR is silent, it would be consistent to consider the Huatai Defendants’ objections made pursuant to CPLR 3211(a)(1) where they abided by CPLR 3211(e) and

⁷ Defendants stated on the record that they filed an answer out of an abundance of caution to prevent a potential default judgment. (NYSCEF 653, tr at 18:13-23.)

made a timely pre-answer objection. (CPLR 3211[e].) Those objections are preserved despite their premature answer.⁸

Accordingly, the court finds that the filing of the answer did not moot or otherwise waive the pending motion to dismiss. In addition to the above, it is the court's long-held policy, and preference for, deciding cases on their merits. (*Youwanes v Steinbrech*, 193 AD3d 492, 492 [1st Dept 2021] [citation omitted].) Thus, the court now turns to Huatai Defendants' CPLR 3211(a)(1) motion.

CPLR 3211(a)(1) Motion

To prevail on a CPLR 3211(a)(1) motion to dismiss, the movant has the "burden of showing that they relied upon documentary evidence 'resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim.'" (*Fortis Fin. Servs. v Filmat Futures USA*, 290 AD2d 383, 383 [1st Dept 2002] [citation omitted].) "A cause of action may be dismissed under CPLR 3211(a)(1) 'only where the documentary evidence utterly refutes [the] plaintiff's factual allegations, conclusively establishing a defense as a matter of law.'" (*Art and Fashion Group Corp. v Cyclops Prod., Inc.*, 120 AD3d 436, 438 [1st Dept 2014] [citation omitted].) The authenticity of documentary evidence must not be subject to genuine dispute, and it must be enough to "support the ground on which the motion is based." (*Amsterdam Hosp. Grp., LLC v Marshall-Alan Assocs., Inc.*, 120 AD3d 431, 432 [1st Dept 2014] [citation omitted].)

When reviewing a contract's terms pursuant to a 3211(a)(1) motion, the contract must be "unambiguous . . . [and] indisputably undermine[] the asserted causes of

⁸ As a matter of law, the Huatai Defendants were not required to submit a responsive pleading prior to the disposition of the motion to dismiss. (*Deutsche Bank Natl. Trust Co. v Hall*, 185 AD3d 1006, 1008 [2nd Dept 2020] ["Service of a notice of motion to dismiss a complaint pursuant to CPLR 3211(a) extends a defendant's time to answer the complaint (see CPLR 3211[f)].")

action.” (*Whitebox Concentrated Convertible Arbitrage Partners, L.P. v Superior Well Services, Inc.*, 20 NY3d 59, 63 [2012], citing *Greenfield v Philles Records*, 98 NY2d 562, 569-570 [2002].) It is well-settled law that a contract is ambiguous if it is “susceptible of two reasonable interpretations.” (*Lend Lease U.S. Const. LMB Inc. v Zurich Am. Ins. Co.*, 136 AD3d 52, 56 [1st Dept 2015] [internal quotation marks and citation omitted].) “[T]he unambiguous provisions of an insurance policy, as with any written contract, must be afforded their plain and ordinary meaning, and that the interpretation of such provisions is a question of law for the court.” (*Broad St., LLC v Gulf Ins. Co.*, 37 AD3d 126, 130 [1st Dept 2006] [citations omitted].) “If, however, there is ambiguity in the terms of the policy, any doubt as to the existence of coverage must be resolved in favor of the insured and against the insurer, as drafter of the agreement. (*Id.* at 131 [citations omitted].)

The Huatai Defendants assert that Sections 5.16 and 5.17 of the Primary Policy,⁹ when read together, unambiguously confer jurisdiction in China or compel arbitration before a panel located in China.

Section 5.16 Exclusive Jurisdiction and Choice of Law Clause

Section 5.16 of the Primary Policy, states that

⁹ The Primary Policy and the Side Agreement were issued in the Chinese language. The Huatai Defendants proffered, in connection with their cross motion to dismiss, the English language version of the Primary Policy and the translation of the Side Agreement. (NYSCEF 442-443, Primary Policy [Chinese and English Translation]; NYSCEF 444-445, Side Agreement [Chinese and English Translation].) Additionally, the Huatai Defendants submitted, for the first time in their supplemental briefings, another translation of the Sections 5.16, 5:17, and 5.19 of the Primary Policy that purportedly supports their view. (NYSCEF 647, Ex A to Letter to Court, Lu aff ¶ 7.) The Huatai Defendants, however, make clear that they do not rely on this new translation in their cross motion. Nevertheless, the translation was done by an attorney at the firm representing the Huatai Defendants, and not by a neutral third-party.

“[a]ny interpretation of this policy relating to its construction, validity or operation shall be made in accordance with the laws of the country where this policy was issued. The parties agree to submit to the exclusive jurisdiction of the court of general jurisdiction of the country where the policy was issued.”

(NYSCEF 443, Primary Policy [English Translation] at 17¹⁰.)

While the court agrees that Section 5.16 clearly requires that the parties submit to the jurisdiction of court of the country where the Primary Policy was issued, what is not clear is what the term “issued” means as it is not defined in the Primary Policy and is subject to two reasonable interpretations.

The Huatai Defendants contend that the Primary Policy was issued in China, arguing that CNEP is Chinese company engaging in the exploration and production of oil in Northern China and its insurance broker is based in Shanghai. In support of their argument, the Huatai Defendants submit a closing slip issued by CNEP’s Shanghai-based insurance broker, Wealth Investment Management Company, Ltd. (WIMC) (Closing Slip), (NYSCEF 447, Closing Slip) and direct the court to the previously filed affirmation of Sun Yiqian, director of Ping An Insurance Company of China, Ltd.’s legal department, who attested that the “Chartis Insurance Company of China insurance policy filed by the Plaintiff was issued in Shanghai by the Shanghai branches of Chartis Insurance Company of China.” (NYSCEF 104, Yiqian aff at 1 [motion sequence no. 005].)

Plaintiff argues that New York courts have jurisdiction because the Primary Policy was issued in New York, where the risks and insureds were located. (NYSCEF 385, Primary Policy at 2 [listing CNEP’s New York address].) Plaintiff assert that Primary Policy makes no reference to China, but it does state in Item 8 of the Primary

¹⁰ Pages cited refer to NYSCEF generated pagination.
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Policy's Schedule that "Territory/Jurisdiction" is "Worldwide USA or Canada" further evidencing that China lacks jurisdiction. (*Id.*)

While both parties present reasonable arguments why the court should find the policy was issued in their respective jurisdictions, they both fail to provide the court with law supporting how contract provisions such as this are defined. The issue for the court to determine is what the parties intended by the term "issued," but the parties have failed to provide support allowing this court to decide this issue as a matter of law. Instead, plaintiff relies on cases involving long arm jurisdiction pursuant to CPLR 302, and the Huatai Defendants rely on a case involving Insurance Law §3420, both irrelevant. Thus, this issue cannot be resolved on this motion to dismiss.

Section 5.17 Dispute Resolution Clause

Section 5.17 of the Primary Policy states that

"[c]ontractual disputes shall be resolved in one of the following methods determined by the parties in the contract:

- (1) Any disputes arising from the performance of this Contract shall be solved by negotiations between the parties, failing which the disputes shall be submitted to China International Economic and Trader Arbitration Commission (CIETAC) for arbitration;
- (2) Any disputes arising from performance of this Contract shall be solved by negotiation between the parties, failing which the parties may bring up litigation proceedings in people's court."

(NYSCEF 443, Primary Policy [English Translation] at 17.)

The Huatai Defendants argue that Section 5.17 lends additional support their position that this dispute belongs in China, either through arbitration or through the "people's court," i.e., the trial courts of China. Neither party challenges the meaning or clarity of the arbitration subpart, or argues that arbitration is required, but both challenge the meaning "people's court." Defendant's view of the litigation sub-provision is that

“people’s court” refers to the courts of the People’s Republic of China. In support, Defendants cite to two federal cases that have recognized the meaning of “people’s court” as courts in China and also point to the Chinese language version of the Policy, which according to Defendants, make clear that “people’s court” must be interpreted to mean the People’s Court of the People’s Republic of China. Plaintiff, however, argues the term “people’s court” is ambiguous because the term is not capitalized and undefined.

The court’s task in determining whether an ambiguity exists is by viewing “the entire contract and consider[ing] the relation of the parties and the circumstances under which it was executed.” (*Banco Espirito Santo, S.A. v Concessionaria Do Rodoanel Oeste S.A.*, 100 AD3d 100, 106 [1st Dept 2012] [internal quotation marks and citations omitted].)

The Huatai Defendants’ assertion that “people’s court” must refer to the courts of China is less convincing when the court considers that various courts in the state of New York have also referred to other courts in the State of New York, such as small claims court, as “people’s court.” (See, e.g., *Dyce v Singer*, 40 Misc3d 12, 13 [1st Dept 2012] [referring to small claims court as the “people’s court.”]; *Howie v Ravis*, 13 Misc2d 38, 41 [Civ Ct 1988] [“Small Claims is the people’s court.”].) The term “People’s Court,” capitalized, has also been referred to by the Appellate Division to a municipal court in Russia. (*Osipova v Osipova*, 240 AD2d 345, 345 [1st Dept 1997].)

The court agrees with the Superior Court of California, which in the related matter in that court, held

“The phrase ‘people’s court’ might reasonably be interpreted as referring to a trial court, generally. This interpretation is supported by the fact that the forum selection clause in Section 5.16 establishes jurisdiction not specifically in China, but in the location of issuance of the contract. If the

parties intended that only Chinese courts would adjudicate disputes, the parties could have easily stated this directly and clearly, and would not have had the language on the place of issuance.”

(*Chao Jiang v Ping An Ins.*, 2015 Cal. Super. LEXIS 14449, *7 [Cal Super Ct 2015].)

Side Agreement

As explained above, the Side Agreement was entered into as a condition of the Huatai Defendants’ extension of coverage under the Primary Policy. Notably, the Side Agreement set forth the terms and conditions of the Exclusion Clause. These terms and conditions are detailed under Section III, Part 1, subpart (1)-(3). (NYSCEF 445, Side Agreement at 3.)

In the event that their choice-of-law and forum selection arguments fail, the Huatai Defendants posit that the Side Agreement expressly limits coverage of the Underlying Actions. In relevant part, Section III, Part 1 of the Side Agreement states that losses are not covered for

“(1) [a]ny claim arising from, based on or attributable to any pending or previous actions that was started before May 1, 2011, *any claim made on the basis of the alleged facts that are the same or are basically the same as those alleged in pending or previous actions, or any claim resulting from the facts that are the same as those alleged in pending or previous actions;*

(2) Any claim arising from, based on or attributable to a report or notice given to Shanghai Branch of American International Underwriters Ltd. and/or China Ping An Property Insurance Co., Ltd. before May 1, 2011, or any claim for facts as alleged in any circumstance, or any claim for the same or affiliated improper act as alleged or contained; and

(3) Any claim arising from, based on or attributable to any pending U.S. securities class action case (including a consolidated or amended U.S. securities class action that is filed subsequently) against the insured company or the insured person.”

(*Id.* [emphasis added].)

Section III, Part 4 of the Side Agreement provides that

“for the definitions of ‘the insured persons,’ ‘claims,’ ‘loss,’ ‘the insured company’ and ‘improper act’, the definitions stated in the directors’, supervisors’ and senior executives’ liability insurance policy as issued by Shanghai Branch of American International Underwriters Ltd. shall be taken as final and binding.”

(*Id.* at 4.) The Side Agreement identifies the “Shanghai Branch of American International Underwriters Ltd.” as the major underwriter of the “Coinsurance Project.”

(*Id.* at 2.). The “Coinsurance Project” is a defined term in the Side Agreement and refers to the “insurance policy number DOSH0000159, period of insurance: from May 1, 2011 to April 30, 2012 (*id.*), which is the Primary Policy. (NYSCEF 385, Primary Policy at 2 [Policy Number DOSH0000159].) Thus, Section III, Part 4 the Side Agreement requires the court to apply the Primary Policy’s definition of “claims.”

“Claim” is defined under the Primary Policy as

“(i) any suit or proceeding brought by any person or organization against an insured for monetary damages or other relief, including non-pecuniary relief; (ii) any written demand from any person or organization that it is the intention of the person or organization to hold an insured responsible for the results of any specified wrongful act; (iii) any criminal prosecution brought against an insured; (iv) any administrative or regulatory proceeding or official investigation regarding any specified wrongful act of the insured.”

(NYSCEF 443, Primary Policy at 6-7.)

The Huatai Defendants argue that coverage of the Underlying Actions is excluded by Section III, Part 1 (1) because they involved the same illegal cash transfers that gave rise to the Shareholder Class Action. Plaintiff counters that he was not a defendant in the Shareholder Class Action against CNEP, and the Shareholder Class Action asserted different claims, such as violations of the Securities and Exchange Act of 1934 Section 10(b) and 10b-5, against other defendants.

The Shareholder Class Action was commenced on January 14, 2011, (NYSCEF 418, Shareholder Class Action Complaint), and is the “pending or previous actions that

was started before May 1, 2011” under subpart (1) of the Exclusion Clause. Plaintiff was not a party to the Shareholder Class Action that was brought against CNEP and others. (NYSCEF 418, Shareholder Class Action Complaint at 6-8; NYSCEF 384, FAC ¶ 74.)

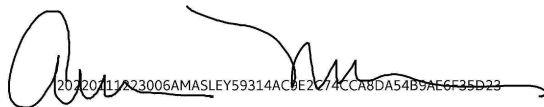
“A written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms.” (*Greenfield*, 98 NYS2d at 569.) The Primary Policy clearly defines “claim” as a suit or proceeding brought against an insured. This definition applies to the term claim used in the Side Agreement’s Exclusion Clause relied on by the Huatai Defendants. Thus, for the Exclusion Clause to apply, the claims in the Shareholder Class Action must have brought against plaintiff, and they were not. (*Condor Capital Corp. v CALS Investors, LLC*, 179 AD3d 592, 592 [1st Dept 2020] [finding an unambiguous defined term shall be enforced].) The Shareholder Class Action, initiated pre-May 1, 2011, cannot serve as the basis for denying coverage of the Underlying Actions because the Shareholder Class Action was not brought against plaintiff.

Accordingly, it is

ORDERED that the defendants’ cross motion to dismiss is denied in its entirety; and it is further

ORDERED that plaintiff’s motion for default judgment is moot because defendants waived their right to a traverse hearing and filed a bond with the County Clerk’s Office (NYSCEF 631, Affirmation of Compliance); and it is further

ORDERED that the parties will submit a proposed preliminary conference order ten days from this order. The attorneys shall forward the proposed order to the court at SFC-Part48@nycourts.gov.



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1/11/2022

DATE

ANDREA MASLEY, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE