

20-132
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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TOPGUN 21 ASTOR LLC,

Index No.:

Plaintiff,

SUMMONS

-against-

CERTAIN UNDERWRITERS AT LLOYDS
SUBSCRIBING TO POLICY NUMBER DCESP01777-01
HDI GLOBAL SPECIALTY SE F/K/A
INTERNATIONAL INSURANCE COMPANY
OF HANNOVER SE SUBSCRIBING
TO LLOYD POLICY NUMBER DCESP01777-01,
HISCOX SYNDICATE 0033 SUBSCRIBING
TO LLOYD POLICY NUMBER DCESP01777-01,
QBE CSN 1886 SUBSCRIBING
TO LLOYD POLICY NUMBER DCESP01777-01,
PIONEER SYNDICATE 1980 SUBSCRIBING
TO LLOYD POLICY NUMBER DCESP01777-01,
AXIS SYNDICATE 1686 SUBSCRIBING
TO LLOYD POLICY NUMBER DCESP01777-01,
ARGENTA SYNDICATE SUBSCRIBING
TO LLOYD POLICY NUMBER DCESP01777-01,
TRAVELERS AT LLOYD'S SUBSCRIBING
TO LLOYD POLICY NUMBER DCESP01777-01,
APOLLO SYNDICATE 1969 SUBSCRIBING
TO LLOYD POLICY NUMBER DCESP01777-01,

The Plaintiff designate New
York County as place of trial.

Basis of venue is Plaintiff's
principal place of business:
15 West 34th Street, 8th Floor
New York, NY 10001

Defendants.

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To the above-named Defendant(s):

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer, or if the complaint is not served with this summons, to serve a notice of appearance on the plaintiffs' attorney(s) within twenty days after the service of this summons exclusive of the day of service, where service is made by delivery upon you personally within the state, or within 30 days after completion of service where service is made in any other manner. In case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated: New York, New York
February 17, 2021

Yours, etc.,

WEG AND MYERS, P.C.
Attorneys for Plaintiff

By: /s/ Joshua L. Mallin
Joshua L. Mallin, Esq.
Federal Plaza
52 Duane Street, 2nd Floor
New York, New York 10007
(212) 227-4210

Defendants Addresses:

CERTAIN UNDERWRITERS AT LLOYDS
SUBSCRIBING TO POLICY NUMBER DCESP01777-01
c/o Mendes & Mount
750 Seventh Avenue, Suite 24
New York, NY 10019

HDI GLOBAL SPECIALTY SE F/K/A INTERNATIONAL
INSURANCE COMPANY OF HANNOVER SE SUBSCRIBING
TO LLOYD POLICY NUMBER DCESP01777-01
c/o Mendes & Mount
750 Seventh Avenue, Suite 24
New York, NY 10019

HISCOX SYNDICATE 0033 SUBSCRIBING
TO LLOYD POLICY NUMBER DCESP01777-01
c/o Mendes & Mount
750 Seventh Avenue, Suite 24
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c/o Mendes & Mount
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New York, NY 10019

20-132
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----X
TOPGUN 21 ASTOR LLC,

Plaintiff,

-against-

CERTAIN UNDERWRITERS AT LLOYDS
SUBSCRIBING TO POLICY NUMBER DCEP01777-01
HDI GLOBAL SPECIALTY SE F/K/A
INTERNATIONAL INSURANCE COMPANY
OF HANNOVER SE SUBSCRIBING
TO LLOYD POLICY NUMBER DCEP01777-01,
HISCOX SYNDICATE 0033 SUBSCRIBING
TO LLOYD POLICY NUMBER DCEP01777-01,
QBE CSN 1886 SUBSCRIBING
TO LLOYD POLICY NUMBER DCEP01777-01,
PIONEER SYNDICATE 1980 SUBSCRIBING
TO LLOYD POLICY NUMBER DCEP01777-01,
AXIS SYNDICATE 1686 SUBSCRIBING
TO LLOYD POLICY NUMBER DCEP01777-01,
ARGENTA SYNDICATE SUBSCRIBING
TO LLOYD POLICY NUMBER DCEP01777-01,
TRAVELERS AT LLOYD'S SUBSCRIBING
TO LLOYD POLICY NUMBER DCEP01777-01,
APOLLO SYNDICATE 1969 SUBSCRIBING
TO LLOYD POLICY NUMBER DCEP01777-01,

Defendants.

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PLAINTIFF TOPGUN 21 ASTOR LLC (“Plaintiff” and/or “Topgun”) by its attorneys
WEG AND MYERS, P.C., as for its Verified Complaint herein alleges as follows:

NATURE OF THE ACTION

1. PLAINTIFF brings this action against Defendants CERTAIN UNDERWRITERS
AT LLOYDS SUBSCRIBING TO POLICY NUMBER DCEP01777-01 (“Lloyds”), HDI

Index No.:
**COMPLAINT WITH
JURY DEMAND**

GLOBAL SPECIALITY SE F/K/A INTERNATIONAL INSURANCE COMPANY OF HANNOVER SE (“HDI”), HISCOX SYNDICATE 0033 SUBSCRIBING TO POLICY NUMBER DCESP01777-01 (“HISCOX”), QBE CSN 1886 SUBSCRIBING TO POLICY NUMBER DCESP01777-01 (“QBE”), PIONEER SYNDICATE 1980 SUBSCRIBING TO POLICY NUMBER DCESP01777-01 (“PIONEER”), AXIS SYNDICATE 1686 SUBSCRIBING TO POLICY NUMBER DCESP01777-01 (“AXIS”), ARGENTA SYNDICATE SUBSCRIBING TO POLICY NUMBER DCESP01777-01 (“ARGENTA”), TRAVELERS AT LLOYD'S SUBSCRIBING TO POLICY NUMBER DCESP01777-01 (“TRAVELERS”), and APOLLO SYNDICATE 1969 SUBSCRIBING TO POLICY NUMBER DCESP01777-01 (“APOLLO”) (collectively referred to as “Defendants”) for breach of contract.

2. This action arises from the failure of Defendants to indemnify Plaintiff for its losses which were covered by an all-risk Commercial Business Policy of Insurance, with policy number DCESP01777-01 (“Subject Policy”), issued by Defendants to Plaintiff.

3. On or about March 16, 2020, while the Subject Policy of Insurance was in full force and effect, Plaintiff suffered losses due to the Covid-19 outbreak and its effects, which subsequently resulted in various government orders effectively shutting down retail locations which generated rental income to Plaintiff.

4. Plaintiff timely provided notice and subsequently submitted an insurance claim on or about July 21, 2020 to the Defendants in connection with the damages suffered to date.

5. Notwithstanding the terms of the all-risk Subject Policy, Defendants have failed to indemnify Plaintiff for its losses.

6. As a result of Defendants' failure to pay Plaintiff the damages it has suffered, Plaintiff has commenced this action for breach of contract.

THE PARTIES

7. At all times hereinafter mentioned, Plaintiff TOPGUN 21 ASTOR LLC was and is a domestic business corporation created under and by virtue of the law of the State of New York, with its principle place of business at 15 West 34th Street, 8th Floor New York, NY 10001.

8. At all times hereinafter mentioned, Defendant LLOYDS are certain persons or entities in the business of underwriting, subscribing to or issuing policies of insurance. Though the individual Underwriters subscribing to the Policy may be located throughout the world, including New York, Underwriters' Underwriters principal place of business is in London, England and at all times was authorized to issue policies of insurance within the State of New York.

9. Defendant HDI GLOBAL SPECIALTY SE F/K/A INTERNATIONAL INSURANCE COMPANY OF HANNOVER SE, is a corporation existing under the laws of Germany with its registered office at RoderbruchstraBe 26, 30655. Hannover, at all relevant times, was authorized to issue policies of insurance within the State of New York.

10. At all relevant times herein mentioned Defendant HISCOX SYNDICATE 0033, is an entity organized and existing under the laws of England and Wales, with its principal place of business located in London, United Kingdom.

11. At all relevant times herein mentioned Defendant QBE CSN 1886, is an entity organized and existing under the laws of England and Wales, with its principal place of business located in London, United Kingdom.

12. At all relevant times herein mentioned Defendant PIONEER SYNDICATE 1980, is an entity organized and existing under the laws of England and Wales, with its principal place of business located in London, United Kingdom.

13. At all relevant times herein mentioned Defendant AXIS SYNDICATE 1686, is an entity organized and existing under the laws of England and Wales, with its principal place of business located in London, United Kingdom.

14. At all relevant times herein mentioned Defendant ARGENTA SYNDICATE, is an entity organized and existing under the laws of England and Wales, with its principal place of business located in London, United Kingdom.

15. At all relevant times herein mentioned Defendant TRAVELERS AT LLOYD'S, is an entity organized and existing under the laws of England and Wales, with its principal place of business located in London, United Kingdom.

16. At all relevant times herein mentioned Defendant APOLLO SYNDICATE 1969, is an entity organized and existing under the laws of England and Wales, with its principal place of business located in London, United Kingdom.

17. Each of the Defendants subscribe to Policy Number DCESP01777-01 for their own proportional share and not jointly.

18. At all relevant times, Defendants, through the Lloyd's of London marketplace, were and are authorized by the Superintendent of Insurance of the State of New York to issue policies of insurance in the State of New York, including the Policy issued to Plaintiff herein.

19. An actual controversy of a justiciable nature exists between Plaintiff and Defendants involving the rights and obligations under the aforesaid policies of insurance and depending on the constructions of said contract, the aforesaid controversy can be determined by judgment of this Court without further suit.

THE NOVEL CORONAVIRUS AND ITS EFFECTS

20. It is beyond cavil that the world is currently experiencing a global pandemic from a disease caused by a novel coronavirus (specifically, SARS-COV-2) and commonly referred to as Covid-19.

21. From at least as early as December 2019, Covid-19 began spreading, first in China and then, because the disease is highly contagious, rapidly around the globe.

22. On January 30, 2020, the World Health Organization (WHO) declared the Covid-19 outbreak constituted a public health emergency of international concern.

23. Not only is SARS-COV-2 transmitted via human-to-human, but the WHO and scientific studies have confirmed that the virus can remain infectious on objects or surfaces.

24. By February 25, 2020, the Center for Disease Control (“CDC”) warned Americans that the world was on the brink of a global pandemic, effectively dismantling any notion that SARS-COV-2 would not affect the population of the United States.

25. From that point forward, COVID-19 and its damaging consequences received wide spread media attention.

26. As a result of this outbreak the Center for Disease Control began recommending that individuals stay at home and those who are not sick engage in preventive measures such as constant hand washing and the avoidance of activities that would bring them into close proximity of people or surfaces where the virus resides.

27. Given the commercial nature of the Subject Properties, the spread of the Covid-19 virus led to physical loss and damage both within and within the vicinity of the insured locations. This physical loss and damage directly led to Plaintiff’s subsequent economic damages.

28. The physical loss and damage existed both on surfaces found within the insureds and surrounding premises as well as in the breathable air circulating within the insureds and surrounding premises.

29. Scientific studies suggest that the virus may remain active on surfaces for times varying from hours to days. Indeed, following an outbreak on a cruise ship, the CDC confirmed that the virus was still alive on surfaces within cabins on the ship up to seventeen days after the

passengers departed the ship.¹

30. In addition, human beings spread Covid-19 through the simple act of breathing in air that contains viral droplets. The New York Times recently reported that “[a]n infected person talking for five minutes in a poorly ventilated space can also produce as many viral droplets as one infectious cough.”²

31. Moreover, studies have verified that many individuals remain asymptomatic despite infection by Covid-19.³

32. Consequently, while it is possible to identify certain individuals who are suffering from obvious symptoms of the coronavirus, absent significant medical testing, it is impossible to distinguish between infected and non-infected members of the general public.

33. In addition to a decrease in revenue as a result of the desire of patrons to avoid contracting the virus while visiting the Subject Properties, civil authority orders began to be issued by various states and localities wherein Plaintiff maintained their commercial establishments, all of which required those properties to either close their doors to the public or suspend their normal business operations.

34. These orders were all predicated, in part, on the effect of the presence of Covid-19 within enclosed, highly trafficked locations.

35. In New York, the following orders were issued:

WHEREAS, on March 7, 2020, New York State Governor Andrew Cuomo declared a State disaster emergency for the entire State of New York to address the threat that COVID-19 poses to the health and welfare of New York residents and visitors; and

...

WHEREAS, this order is given because of the propensity of the virus to spread person to person and also because the virus physically is causing property loss and damage; and

NOW, THEREFORE, pursuant to the powers vested in me by the laws of

¹ <https://www.cdc.gov/mmwr/volumes/69/wr/mm6912e3.html>

² <https://www.nytimes.com/interactive/2020/04/14/science/coronavirus-transmission-cough-6-feet-arul.html>

³ <https://www.usnews.com/news/health-news/articles/2020-05-28/studies-detail-rates-of-asymptomatic-cases-of-coronavirus> (observing that 42% of infected persons in Wuhan, China were asymptomatic).

the State of New York and the City of New York, including but not limited to the New York Executive Law, the New York City Charter and the Administrative Code of the City of New York, and the common law authority to protect the public in the event of an emergency:⁴

...

Non-essential gatherings of individuals of any size for any reason (e.g. parties, celebrations or other social events) are canceled or postponed at this time.⁵

The provisions of Executive Order 202.6 are hereby modified to read as follows: Effective on March 22 at 8 p.m.: All businesses and not-for-profit entities in the state shall utilize, to the maximum extent possible, any telecommuting or work from home procedures that they can safely utilize. Each employer shall reduce the in-person workforce at any work locations by 100% no later than March 22 at 8 p.m. Any essential business or entity providing essential services or functions shall not be subject to the in-person restrictions. An entity providing essential services or functions whether to an essential business or a non-essential business shall not be subjected to the in-person work restriction, but may operate at the level necessary to provide such service or function. Any business violating the above order shall be subject to enforcement as if this were a violation of an order pursuant to section 12 of the Public Health Law.⁶

THE SUBJECT POLICY AND TOPGUN'S CLAIM

36. The commencement of this lawsuit resulted from a breach of insurance contract arising from Defendant's failure to provide any payment to Plaintiff for its losses resulting from

⁴ See March 16, 2020 New York City Emergency Executive Order No. 100. <https://www1.nyc.gov/assets/home/downloads/pdf/executive-orders/2020/eo-100.pdf>

⁵ See March 23, 2021 New York State Executive Order No. 202.10 which modified the March 7, 2020 Executive Order No. 202 (this being the Order which declared a state of emergency and which was referenced/cited aforementioned the March 16, 2020 Executive Order No. 100). In so modifying, the 202.10 Order eliminated all forms of public gatherings. It should be noted that from March 7, 2020 until the March 23, 2020 202.10 Order, the New York State government had limited gatherings pursuant to a per person limit. On March 23, 2020, the Government shut down all non-essential gatherings no matter the number of persons attending. <https://www.governor.ny.gov/news/no-20210-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency>

⁶ See March 21, 2021 New York State Executive Order No. 202.8 which modified the March 7, 2020 Executive Order No. 202 (this being the Order which declared a state of emergency and which was referenced/cited aforementioned the March 16, 2020 Executive Order No. 100). In so modifying, the 202.08 Executive Order eliminated all forms of public gatherings. It should be noted that from March 7, 2020 until the March 23, 2020 202.10 Executive Order, the New York State government had limited gatherings pursuant to a per person limit. On March 23, 2020, the Government shut down all non-essential worksites no matter number of workers appearing. <https://www.governor.ny.gov/news/no-2028-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency>.

the global pandemic commonly referred to as the coronavirus or Covid-19.

37. On or about October 4, 2019, for good and valuable consideration, Plaintiff procured a policy of insurance from Lloyds and its syndicates ("Subject Policy") bearing policy number DCESP01777-01.

38. The Subject Policy provides coverage for, *inter alia*, direct physical loss or damage, as well as losses of income due to business interruption (either caused by Civil Authority, or otherwise) up to \$396,000.00.

39. The Subject Policy bears effective dates from October 4, 2019 to October 4, 2020.

40. The Subject Policy was in full force and effect as of March 16, 2020.

41. The Subject Policy provided coverage for "Business Income" and "Extra Expense" losses, including but not limited to coverage for loss of rental income.

42. The Subject Policy provides in relevant part:

1. "Business Income:

Business Income means the:

- a. Net Income (Net Profit or Loss before income taxes) that would have been earned or incurred; and
- b. Continuing normal operating expenses incurred, including payroll.

For manufacturing risks, Net Income includes the net sales value of production.

Coverage is provided as described and limited below for one or more of the following options for which a Limit Of Insurance is shown in the Declarations:

- (1) Business Income Including 'Rental Value'.
- (2) Business Income Other Than 'Rental Value'.
- (3) "Rental Value".

If option (1) above is selected, the term Business Income will include 'Rental Value'. If option (3) above is selected, the term Business Income will mean 'Rental Value' only. If Limits of Insurance are shown under more than one of the above options, the provisions of this Coverage Part apply separately to each. We will pay for the actual loss of Business Income you sustain due to the necessary 'suspension' of your 'operations' during the 'period of restoration'. The "suspension" must be caused by direct physical loss of or damage to property at premises which are

described in the Declarations and for which a Business Income Limit Of Insurance is shown in the Declarations. The loss or damage must be caused by or result from a Covered Cause of Loss. With respect to loss of or damage to personal property in the open or personal property in a vehicle, the described premises include the area within 100 feet of such premises.”

43. The Subject Policy also provides **additional coverage** against losses resulting from:

- c. “Civil Authority – damage to property other than property at the described premises, we will pay for the actual loss of Business Income you sustain and necessary Extra Expense caused by action of civil authority that prohibits access to the described premises, provided that both of the following apply:
 - i. Access to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage, and the described premises are within that area but are not more than one mile from the damaged property; and
 - ii. The action of civil authority is taken in response to dangerous physical conditions resulting from the damage or continuation of Covered Cause of Loss that caused the damage, or the action is taken to enable a civil authority to have an unimpeded access to the damage property.

Civil Authority coverage for Business Income will begin 72 hours after the time of the firm action of civil authority that prohibits access to the described premises and will apply for a period of up to four consecutive weeks from the date on which such coverage began.”

44. The Subject Policy defines the **rent value protections** as follows:

2. "Rental Value

If the necessary ‘suspension’ of your ‘operations’ produces a ‘Rental Value’ loss payable under this policy, we will pay for the actual loss of ‘Rental Value’ you incur during the period that:

- (a) Begins on the date property is actually repaired, rebuilt or replaced and tenantability is restored; and
- (b) Ends on the earlier of:
 - (i) The date you could restore tenant occupancy, with reasonable speed, to the level which would generate the ‘Rental Value’ that would have existed if no direct physical loss or damage had occurred; or

- (ii) 60 consecutive days after the date determined in (2)(a) above.

However, Extended Business Income does not apply to loss of 'Rental Value' incurred as a result of unfavorable business conditions caused by the impact of the Covered Cause of Loss in the area where the described premises are located.

Loss of 'Rental Value' must be caused by direct physical loss or damage at the described premises caused by or resulting from any Covered Cause of Loss."

45. No exclusions contained in the Subject Policy are applicable to the dispute set forth herein.

46. The Subject Policy provides coverage for multiple locations, including 350 E. Fordham Road, Bronx, New York, 10458 ("Subject Property") and 2511 Marion Blvd., Bronx, New York 10458 (along with and inclusive of the 350. E Fordham address are referred to herein as "Subject Properties.").

47. As a result of the covered losses stemming from Covid-19 and its effects, Plaintiff experienced a significant loss in rental income. Specifically, Plaintiff lost income based upon the failure of its tenant, America's Kids to pay any of its \$150,000.00 monthly rent (to date) as a result of the premise suffering physical loss or damage as well as its inability to re-open as a result of the City's orders regarding Covid-19.

48. America's Kids had continuously paid its rent from the starting of its lease with Plaintiff on or about April 2015 up until March 2020. Since March 2020 to date, America's Kids has failed to pay any rent.

49. Within one mile of the tenant America's Kids, retail location, there are numerous other retail locations, restaurants and/or take out places which were also caused to closed as a result of the aforementioned City's orders.

50. Throughout the life of the Subject Policy, Plaintiff continuously paid their premiums and as such expected Defendant to investigate and adjust their claims in good faith.

51. In contrast to Plaintiff' expectations, on or around June 9, 2020, Defendant American by and issued a Denial letter, disclaiming coverage for the loss.

52. On or about July 21, 2020, Plaintiff submitted a sworn statement in proof of loss ("Proof of Loss") in the amount of \$750,000.00 for the actual and project damages suffered through July, 2020. To date, inclusive of any extended business income benefits from the policy, the Plaintiff has been damages in the amount of \$900,000.00

53. The Subject Property is an insurable property under the Subject Policy and suffered physical loss or damage as a result of the Covid-19 pandemic and its effect.

54. The Subject Property suffered economic loss as a result of physical loss or damage suffered to other retail and restaurants and/or take out places situated within one mile of the Subject Properties.

AS AND FOR A FIRST CAUSE OF ACTION AGAINST ALL DEFENDANTS
(Breach of Contract)

55. The Plaintiff repeat and re-allege paragraphs "1" through "55", with the same force and effect as if set forth at length herein.

56. The Subject Policy constituted a binding contract between Plaintiff and Defendants.

57. Plaintiff complied with all of the obligations under the Subject Policy, including through timely notification of a loss and the filing of a Sworn Statement in Partial Proof of Loss.

58. To date, Defendants have failed to compensate Plaintiff for its losses with regards to the Sworn Statement in the Partial Proof of Loss submitted to Defendants on or about July 21, 2020.

59. Defendant's failure to compensate Plaintiff for their loss constitutes a breach of the Subject Policy.

60. As a result of Defendants' breach of the Subject Policy, Plaintiff have suffered

damages in the amount of \$900,000.00 together with such additional and subsequent damages as may be proven at trial.

WHEREFORE, Plaintiff demands judgment against Defendants as follows:

- (a) On the First Cause of Action, a money judgment against Defendants in the amount of \$900,000.00 together with such additional and subsequent damages as may be proven at trial;
- (b) Reasonable fees and costs of this action; and
- (c) For such other and further relief as to which this Court deems just and proper.

Dated: New York, New York
February 17, 2021

Yours, etc.,

WEG AND MYERS, P.C.
Attorneys for Plaintiff

By: /s/ Joshua L. Mallin
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