UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X Case No. 20-cv-3311

SOCIAL LIFE MAGAZINE, INC.,

Plaintiff,

v.

SENTINEL INSURANCE COMPANY LIMITED,

Defendant.

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PLAINTIFF'S REPLY MEMORANDUM OF LAW IN SUPPORT OF APPLICATION FOR A PRELIMINARY INJUNCTION

Plaintiff submits this reply memorandum of law in support of its application for a preliminary injunction.

BECAUSE PLAINTIFF IS ALREADY OUT OF BUSINESS, PLAINTIFF HAS SHOWN IRREPARABLE HARM

Defendant argues that plaintiff will not go out of business absent the preliminary injunction. (Def.Mem., p.8). However, as explained in plaintiff's motion papers, **plaintiff is already out of business**. (Pl.Reply Decl., para. 2). As plaintiff's business records show, plaintiff only has $2,106.94 total in two bank accounts. (Pl.Decl., Ex. 16). The business interruption caused by the coronavirus has meant that plaintiff lost more than $200,000 in business income in March, 2020 and April, 2020 as shown by a comparison of plaintiff's business income for the same period last year. (Pl.Decl., Exs. 15 & 16).

As result, plaintiff has no money to publish any magazines and is already out of business. (Pl.Reply Decl., para. 2). This

application for preliminary injunction is the only hope for plaintiff to survive and fulfill its contractual obligations for which plaintiff received approximately $240,000 from advertisers expecting their advertisements this summer. (Id.). Those obligations are in addition to ongoing expenses such as rent and loan debt. (Id.).

Defendant's conjecture that plaintiff cannot fulfill its contractual obligations this summer because some retail stores might be closed is also off the mark. Many retailers will still be open in the East End of Long Island this summer including grocery stores, gas stations, dry cleaners, drug stores, banks, pizza places, convenience stores, farmers markets, ice cream shops, and coffee shops. (Pl.Reply Decl., para. 3). In addition, to make up any shortfall in distribution, plaintiff can deliver its magazines directly to people's homes in the same manner as home newspaper deliveries. (Id.).

PLAINTIFF HAS APPLIED FOR A LOAN UNDER THE CARES ACT BUT HAS NOT YET RECEIVED ANY MONEY EXCEPT FOR $1,000.

Defendant mentions the CARES Act apparently to imply that plaintiff has not attempted to mitigate his damages caused by defendant's refusal to honor the insurance claims. (Def.Mem., p.8). As set forth in plaintiff's Reply Declaration, plaintiff has received only $1,000 under the CARES Act. (Pl.Reply Decl., para. 4). Plaintiff has applied for an SBA loan but the SBA has

not yet responded to plaintiff's application. (Id.). No part of the loan can be forgiven. (Id.). As a result, the SBA loan, if it is ever even processed and then issued by the SBA, is not a substitute for the money sought in this lawsuit. (Id.).

DEFENDANT'S ADMISSION THAT THE VIRUS IS PHYSICAL MEANS THAT PHYSICAL DAMAGES ARE THE OBVIOUS COROLLARY OF THAT.

Defendant admits that a virus is "physical" in nature by making the argument that the real issue in this case is whether a "physical" virus can cause "physical loss or physical damage." (Def.Mem., p.18). The insurance policy already answers this question because, if mold, spores and insects can cause physical loss or physical damage under the policy, then so can a virus. (Pl.Decl., Ex. 9, p.46 of 142 of pdf file (p.17 of 25 of Special Property Coverage Form), B. Exclusions, Section 2(c)(5)).

Accordingly, defendant's attempt to escape the plain language of the policy must fail.

DEFENDANT IS NOT A STAND-IN FOR THE ENTIRE INSURANCE INDUSTRY.

Given that the defendant argues that the insurance industry's well-being as a whole is relevant to this case (Def.Mem.,p.3 & 24), plaintiff respectfully requests that the Court take judicial notice of the history of virus pandemics in the U.S. that are well known to the insurance industry.

According to the Center for Disease Control (cdc.gov/flu/pandemic-resources), the "Spanish Flu" caused by

the H1N1 virus killed at least 50 million people worldwide and 675,000 in the U.S. in 1918-1919. The next pandemic was the "Asian Flu" caused by the H2N2 virus in 1957. That pandemic killed 1.1 million people worldwide and 116,000 in the United States.

Thereafter, in 1968, the "Hong Kong Flu" caused by the H3N2 virus killed 1 million people worldwide and 100,000 in the United States.

In 1976, Congress passed the Swine Flu Act to prevent the collapse of the **commercial liability insurance market**. (Cong.Rec., Liability, E 4698-4699). See Sparks v. Wyeth Laboratories Inc., 431 F.Supp. 411, 415-416 (W.D.Okla. 1977) (discussing the intent and purpose of the Swine Flu Act resulting from the Hong Kong Flu).

In 2003, the SARS pandemic killed approximately 800 people and infected people in 26 countries. In 2009, the "Swine Flu" caused by H1N1 virus killed 12,469 people in the U.S. and 151,700-575,400 worldwide. See cdc.gov/flu/pandemic-resources.

Given all this history, some insurance companies have decided to issue commercial policies specifically excluding viruses (and/or the pandemics they cause) from coverage. See, e.g., Meyer Natural Foods LLC v. Liberty Mut. Fire Ins. Co., 218 F.Supp.3d 1034, 1038 (D.Neb. 2016).

In issuing the policy in this case, defendant elected to have no such exclusion therein. Accordingly, defendant is not a stand-in for the insurance industry as a whole. Because defendant made a deliberate business decision not to exclude viruses and/or the pandemics they cause from coverage in the policy at issue, defendant cannot conflate the insurance policy at issue with all other policies issued by other insurance companies that provide business interruption insurance during this time that the SARS-Cov-2 virus is infecting the United States.

It is quite likely that defendant's insurance policy in this case is merely an outlier in the commercial insurance industry because many insurance companies like Liberty Mutual exclude viruses from coverage. As a result, a decision in this case will not have an impact on the insurance industry, let alone the "economy as a whole." (Def.Mem., p.3).

DEFENDANT IMPROPERLY CONFLATES THE CORONAVIRUS WITH COVID-19 DISEASE.

Throughout defendant's Memorandum of Law, defendant conflates the coronavirus designated as SARS-Cov-2 with the disease caused in humans by the virus known as COVID-19. The Complaint is clear that it is the virus that has caused the business interruption and physical loss and damage to plaintiff's property. COVID-19 is mentioned in the Complaint

only as the disease resulting from an infection by the SARS-Cov-2 virus. All the relevant Executive Orders are clear that their purpose is prevent the spread of the SARS-Cov-2 virus that causes the COVID-19 disease. See, e.g., Pl.Decl., Ex. 2, E.O. No. 202, referring to World Health Organization designation of the novel coronavirus; Ex. 10, WHO website referring to "virus that causes COVID-19"); Ex. 17, EO No. 202.17 requiring face-covering in a public place to prevent "transmission" of COVID-19.

Accordingly, defendant's attempt to minimize the purpose of the relevant Executive Orders to involve only "social distancing" is untenable. (Def.Mem., p.14). The obvious purpose of the Executive Orders is combat the virus itself, not the disease caused by the virus which is combated by medical treatment and/or quarantining.

PLAINTIFF WAS SPECIFICALLY PROHIBITED FROM ACCESSING ITS PREMISES BY CIVIL AUTHORITY

Defendant incorrectly argues that plaintiff was not specifically prohibited from accessing its premises by any Civil Authority. (Def.Mem., p.22). As explained in plaintiff's motion papers, on March 20, 2020, New York Governor Andrew M. Cuomo issued Executive Order 202.8 that continued and modified Executive Order 202 by requiring each employer providing non-essential services or functions to reduce the in-person

workforce at all work locations by **100%** by March 22, 2020 at 8pm. (Pl.Decl., Ex. 3). As set forth in Executive Order 202.6 dated March 20, 2020 that defined essential services and functions, plaintiff's magazine business does not provide essential services excluding it from complying with Executive Order 202.8. (Pl.Decl., Ex. 4).

Accordingly, the "100%" in Executive Order 202.8 means that plaintiff was specifically prohibited from accessing its premises.

Defendant, like plaintiff, has been unable to find or cite to any cases that involve a denial of insurance coverage relating to a claim based on a virus pandemic. Thus, it appears that the parties agree that this case will be a matter of first impression for the Court.

With respect to the three cases cited by defendant on pages 22-23 of its Memorandum of Law, those cases are inapposite because they involve Orders of civil authority merely based on "fears" of a future terrorist attack or a future hurricane. The Executive Orders at issue herein involve a current danger (the SARS-Cov-2 virus) that (1) currently exists in New York City, (2) is carried around by a large percentage of humans in New York City and (3) is deposited on surfaces everywhere whenever those carriers breathe, talk, sing, cough or sneeze. The virus is not a future fear, but a real and current danger that has

killed more than 24,000 New York City residents in the last 2 months and is continuing to infect and kill people daily.

BECAUSE PLAINTIFF IS INSOLVENT, PLAINTIFF IS NOT REQUIRED TO PROVIDE SECURITY FOR THE PRELIMINARY INJUNCTION UNDER FED.R.CIV.PROC. 65(c)

Contrary to defendant's argument that plaintiff must post security in return for preliminary injunctive relief (Def.Mem., p.25), a District Court has "wide discretion" in setting the amount of such security. Doctor's Assocs., Inc. v. Stuart, 85 F.3d 975, 985 (2d Cir. 1996)). "[B]ecause, under Fed. R. Civ. P. 65(c), the amount of any bond to be given upon the issuance of a preliminary injunction rests within the sound discretion of the trial court, the district court may dispense with the filing of a bond." Id.

A security bond under under Fed.R.Civ.Proc. 65(c) is not required where the party seeking the security is insolvent. Doe by Doe v. Perales, 782, F.Supp. 201, 206 (W.D.N.Y. 1991), citing LaPlaza Defense League v. Kemp, 742 F.Supp. 792, 807, n.13 (S.D.N.Y. 1990) (no security bond required under Fed.R.Civ.Proc. 65(c) where plaintiff did not have sufficient resources to post one). See also Golden Goose Deluxe Brand v. Aierbushe, 19-cv-2518, (S.D.N.Y. 2019) Order dated 6/14/2019 by Judge Valerie E. Caproni (only $5,000 security bond required upon granting preliminary injunction in trademark infringement case involving $4 million in statutory damages); Trustees of the 1199SEIU Nat'l

Benefit Fund for Health & Human Serv.Emp.s v. Cotto, 18-cv-7123 (E.D.N.Y. 2019), Order dated 1/3/2019 (no bond required upon granting preliminary injunction imposing constructive trust on settlement funds); Lighting & Supplies, Inc. v. Sunlite U.S.Corp., 14-cv-4344 (E.D.N.Y. 2015), Order filed 6/17/2015, p.6 (no bond required under Fed.R..Civ.Proc. 65(c) "where likelihood of success on the merits is overwhelming"); Kermani v. NY State Bd. Of Elections, 487 F.Supp.2d 101, 115-116 (N.D.N.Y. 2006) (no bond required under Fed.R..Civ.Proc. 65(c) "given the important constitutional and public policy issues arising in the matter").

In this case, as shown in plaintiff's motion papers, plaintiff has (1) only $2,106.94 total in its 2 bank accounts and (2) approximately $240,000 in liabilities owed to more than 17 advertisers if it does publish its magazines this summer. Because plaintiff does not have sufficient resources to post a security bond, no security bond should be required.

CONCLUSION

For all the foregoing reasons, plaintiff respectfully requests that its application be granted in its entirety.

Dated: New York, New York
May 13, 2020

_____/s/_____
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