

**SUPERIOR COURT OF THE DISTRICT OF COLUMBIA  
CIVIL DIVISION**

ACON INVESTMENTS L.L.C., *et al.* :  
 :  
v. : Case No. 2020 CA 004048 B  
 :  
ARCH SPECIALTY INSURANCE :  
COMPANY, *et al.* :

**ORDER**

The Court grants the motion of the seven insurance company defendants to compel an appraisal that includes assessment of the extent, if any, by which losses at Fiesta Mart stores closed due to Hurricane Harvey were reduced or mitigated because customers transferred their business to other Fiesta Mart stores. While the appraisal is proceeding, the Court stays the proceedings, and it schedules a status hearing in six months as a control date.

**I. BACKGROUND**

Plaintiffs ACON Investments L.L.C. and Fiesta Holdings Investments L.L.C. purchased insurance for business interruption losses from the seven insurance companies who are the defendants in this case: Allied World Assurance Company (U.S.) Inc., Arch Specialty Insurance Company, Aspen Specialty Insurance Company, HDI Global Insurance Company, Hiscox, Inc., Indian Harbor Insurance Company, and Westport Insurance Corporation. Defendants represent (Motion at 1), and plaintiffs do not dispute, that the Master Property Policy in all the policies is substantively the same.

The policies included Fiesta Mart grocery stores in the Houston area, and several of these stores sustained damages during Hurricane Harvey. Both sides agree that the business of these stores was interrupted by Hurricane Harvey and that the resulting actual losses are covered by the policies. *See* Motion at 2 (defendants paid a total of over \$12 million for hurricane-related

losses involving Fiesta Mart stores). Plaintiffs claim business interruption losses of just over \$3 million that defendants have not paid. *See* Motion at 3; Opp. at 2.

The primary dispute is whether the covered loss is reduced if, and to the extent that, customers who would have gone to the three closed stores instead bought groceries from other Fiesta Mart stores. Defendants contend that the business income losses at some locations “were offset by increased sales revenue at other, specific Fiesta Mart locations which, under the Policies, must be accounted for as ‘make-up’ under the Policies’ ‘Resumption of Operations’ provision in plaintiffs’ business interruption claim.” Motion at 5. Plaintiffs contend that “make up” sales at other Fiesta Mart stores are irrelevant under the insurance policies in determining the amount of the loss.

Section 46 of each policy provides that if the policyholder suffers a covered loss and the parties dispute the amount of the loss, each side shall pick an appraiser, and these two appraisers pick an umpire, who is empowered to resolve any dispute between the appraisers about the amount of the loss.

Because of the dispute about whether to include any make-up sales in calculating the amount of the loss, plaintiffs refused to appoint an appraiser. The insurance companies then filed this lawsuit.

On April 1, 2021, defendants filed their motion to compel an appraisal and for a stay (“Motion”). On April 16, plaintiffs filed their opposition (“Opp.”).<sup>1</sup>

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<sup>1</sup> On April 13, 2021, plaintiffs filed a consent motion for an extra week to file their opposition and for defendants to have an extra week until May 6 to file a reply. The Court grants the motion for a one week extension to file the opposition. Defendants did not file a reply on May 6. In any event, the types of motions for which Rule 12-I(g) allows a reply do not include a motion to compel an appraisal, and defendants do not demonstrate that a reply is necessary.

## II. DISCUSSION

Defendants argue (Motion at 14), and plaintiffs do not dispute, that appraisal is generally a condition precedent to any lawsuit. On the other hand, plaintiffs contend (Opp. at 4), and defendants do not dispute, that appraisers decide factual issues and not legal issues concerning the interpretation of contracts. *See Milligan v. CCC Information Services, Inc.*, 920 F.3d 146, 153 (2d Cir. 2019) (“An appraisal is appropriate not to resolve legal questions, but rather to address factual disputes over the amount of loss for which an insurer is liable,” and “questions over .... how to define the amount of loss also present legal questions of contract interpretation”) (cleaned up); *Duane Reade, Inc. v. St. Paul Fire & Marine Ins. Co.*, 411 F.3d 384, 389 (2d Cir. 2005) (“no appraisal can occur until the legal parameters for valuating Duane Reade’s losses have been set.”). The parties are at an impasse about whether the calculation of loss under the policies includes any make-up sales. Both sides agree that the Court can and should decide whether make-up sales affect the amount of plaintiffs’ actual loss under a proper interpretation of the terms of the insurance policies, and that this dispute about contract interpretation is ripe for decision.

Section 11 entitled “BUSINESS INTERRUPTION” provides, “This policy shall cover the loss resulting from necessary interruption of business conducted by the Insured including all interdependent loss of earnings between or among companies owned or operated by the Insured ...” Appendix A lists the Fiesta Mart stores covered by the policy. That the policy covers loss of earnings among plaintiffs’ companies that is “interdependent” indicates a recognition that a loss at one store may be interdependent on business at other stores. Under Section 11(a), historical gross earnings establish a ceiling, not a floor, on the actual loss.

Moreover, Section I(c) provides:

Resumption of Operations: It is a condition of this insurance that if the Insured could reduce the loss resulting from the interruption of business:

- (i) by a complete or partial resumption of operation at a location owned by the same entity suffering the loss, whether damaged or not; or
- (ii) by making use of available stock, merchandise, or other property;

Such reduction shall be taken into account in arriving at the amount of loss hereunder.

Plaintiffs themselves characterize this provision as involving its “duty to mitigate damages,” and they acknowledge that “under Section I(c), ACON is not permitted to sit idly by throughout the Period of Indemnity if it could reduce its loss with respect to a given closed store.” *See Opp.* at 9, 10 (cleaned up). Plaintiffs argue (*Opp.* at 11) that this duty requires it only to resume operations at the location where business was interrupted. But the provision applies to operation at “a” location owned by the same entity suffering the loss – not “the” location where the loss was suffered – and plaintiffs owned Fiesta Mart stores at other locations. This provision quite clearly indicates that business interruption losses at one store may be mitigated or reduced by sales at another store.

Plaintiffs assert (*Opp.* at 11) that this provision does not apply because operation at other locations where make-up sales may have occurred continued and did not stop and then resume, but that is an unreasonably narrow interpretation. Plaintiffs acknowledge (*Opp.* at 12) that their duty to mitigate damages may require them to build a reasonably equivalent store in a reasonably equivalent location, and it would make no sense to interpret this provision to mean that the actual loss is less if the insured builds a new store nearby where customers of the closed location take their business than if the insured already had another store close enough that its loyal customers would shop at that store unless and until the closed store reopened.

Moreover, defendants allege (Motion at 6-7), and plaintiffs do not dispute (Opp. at 3), that the closed Fiesta Mart locations had signs or banners with the addresses of other open Fiesta Mart stores in the surrounding area. Redirecting customers to other Fiesta Mart stores is exactly the kind of action that Section 11 – and the general duty to mitigate damages – required plaintiffs to take to mitigate its damages. If those signs had the effect that Fiesta Mart sought, its damages are correspondingly reduced, and the appraisal should assess the extent to which plaintiffs’ compliance with the loss mitigation obligation succeeded. The duty to mitigate reflected in Section 11(c) indicates that make-up sales affect the loss or damages that defendants have a duty to cover. If make-up sales at new stores mitigate damages, make-up sales at existing stores also reduce damages.

This result is consistent with common usage and common sense. Section 11(a) provides that the insurance company “shall be liable for the ACTUAL LOSS SUSTAINED by the insured resulting directly from such interruption,” and in the ordinary meaning of the term, plaintiffs’ actual loss is less to the extent that customers who had shopped at a Fiesta Mart store closed by Hurricane Harvey made purchases from another Fiesta Mart store instead. Internet sales provide an analogy (and a timely one given the change in purchasing patterns resulting from the pandemic). If a covered event caused a company to close a brick-and-mortar grocery store and customers instead order groceries over the Internet and have their order fulfilled from a different physical location, the “actual loss sustained” as a result of the closure would be reduced by the profits from the Internet sales. That would be true whether the company had the capacity to handle on-line orders before the natural disaster or whether it created the capacity in response to the disaster in order to mitigate its damages. If the insured made up all or part of the business lost to an interruption at one location with increased Internet sales fulfilled at other locations,

excluding the net revenues of the make-up sales from the payment of the claim would put the insured in a better position than it would have occupied without the interruption. *See Dictiomatic, Inc. v. U.S. Fidelity and Guaranty Co.*, 958 F. Supp. 594, 603-04 (S.D. Fla. 1997) (“Business interruption insurance may not be used to put [the insured] in a better position than it would have occupied without the interruption.”); *MKB Constructors v. American Zurich Insurance Co.*, 49 F. Supp.3d 814, 826 (W.D. Wash. 2014) (“Under the indemnity principle of insurance, an insured receives only that amount that will indemnify actual loss, not an additional windfall above this amount.”) (cleaned up).

The Court adds that if it did not resolve at this time the dispute about contract interpretation, it would still order the appraisal to proceed and to include an attempt to measure the extent to which plaintiffs’ actual loss was reduced or mitigated by make-up sales at other Fiesta Mart stores. Proceeding with such an appraisal would not require that the appraisers to interpret the contract – it would simply require the appraisers to assess the existence and extent of make-up sales. Plaintiffs are correct that the appraisers’ task is to make a factual determination about the amount of the loss consistent with the terms of the contract, but they do not dispute that the fact and extent of make-up sales are factual issues that appraisers can address. Plaintiffs assert (Opp. at 3) that no such make-up sales occurred, but that is a factual issue for the appraisers and not the Court, to resolve under the terms of the policies. Plaintiffs do not contend that including these factual issues within the appraiser’s scope would substantially increase the cost of the appraisal. In addition, the appraisers’ conclusion (with or without the involvement of the umpire) may resolve or at least lead to a resolution of the dispute. For example, if the appraisers agree with ACON that no make-up sales occurred, the insurance companies may pay plaintiffs’ business interruption claim in full. Conversely, if the appraisers

determine that make-up sales substantially reduced or mitigated plaintiffs' actual loss, this factual determination may result in a resolution of the dispute.

Defendants assert that other disputes exist concerning (a) "ACON's use of budgeted daily revenue to project sales without subtracting any *actual* sales that might have been achieved, and AON's lack of consideration of normal variances in budgeted sales," (b) whether it is reasonable to use the experience on one location concerning saved expenses to apply to other locations, and (c) the measure of loss for ACON's lost inventory. *See* Motion at 13-14. Plaintiffs do not dispute that these issues can and should be addressed in the first instance by the appraisal.

### **III. CONCLUSION**

For these reasons, the Court grants defendants' motion to compel appraisal. The parties do not indicate how long the appraisal will take, and for lack of a better alternative, the Court schedules a status hearing in six months as a control date. If the appraisal leads to resolution of the dispute, the parties can dismiss this case, and the hearing will be vacated. If the appraisal is completed sooner and further judicial proceedings are warranted, the parties can ask to move up the hearing. If the appraisal takes longer than six months to complete, the parties can file a motion proposing a later date for the status hearing.

Accordingly, the Court orders that:

1. Defendants' motion to compel an appraisal and stay proceedings is granted.
2. Plaintiffs' consent motion for a one-week extension to file their opposition is granted.
3. The case is stayed until the appraisal is completed.

4. The Court schedules a status hearing on October 29, 2021 at 10:00 a.m. as a control date. Instructions for remote participation are attached.

Handwritten signature of Anthony C. Epstein in cursive script.

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Anthony C. Epstein  
Judge

Date: May 11, 2021

Copies via CaseFileXpress to all counsel



## INSTRUCTIONS FOR PARTICIPATING IN REMOTE HEARINGS

During the pandemic, the Court is holding only remote hearings. Here are instructions for participating by video or audio. Participating by video requires a laptop, desktop, tablet, or smartphone.

Whatever method you use, please mute your device if you are not speaking. If you are using your computer and have problems with the sound, please disconnect and dial in by phone.

If you have problems accessing the hearing, call Judge Epstein's chambers at (202) 879-7812.

If you participate by video, you can enable or disable your camera, depending on whether you would like to be seen. The camera icon will be red when the camera is disabled

### **Video Option 1:**

1. Open a Web browser (preferably Google Chrome).
2. Type into your browser: <https://dccourts.webex.com>.
3. Enter the Meeting ID: 129 493 5162.
4. Hit "Enter" and then click "Join Meeting."
5. Enter your name and email address
6. Click "Next" and then "Join Meeting."

### **Video Option 2:**

1. Open a Web browser (preferably Google Chrome).
2. Type into your browser: <https://dccourts.webex.com/meet/cib221>
3. Your browser may prompt you to download the Cisco WebEx Application.
4. If you do not wish to download the application, click "Join from your browser."
5. Enter your name and email address
6. Click "Next" and then "Join Meeting."

### **Video Option 3 (for smartphones and tablets):**

1. Go to the App Store and download the WebEx app (Cisco WebEx Meetings).
2. Click "Join Meeting."
3. Enter the Meeting ID: 129 493 5162 in the space entitled "Meeting Number or URL."
4. Enter your name and email address, then click "Join."

### **Audio-only Option**

1. Call (202) 860-2110 (local) or 1 (844) 992-4726 (toll free).
2. Enter the Meeting ID: 129 493 5162 ##.