

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

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ZURICH AMERICAN INSURANCE COMPANY,

Plaintiff,

Index No. 651982/2011

- against -

**PRE-ARGUMENT
STATEMENT**

SONY CORPORATION OF AMERICA, *et al.*,

Defendants.

-----X

Defendants-Appellants Sony Corporation of America and Sony Computer Entertainment America LLC (collectively, “the Sony Appellants”) respectfully submit this pre-argument statement in accordance with Section 600.17 of the Rules of the Supreme Court, Appellate Division, First Department.

1. Title of the action:

The title of the action is as set forth in the caption above.

2. Full names of original parties and any change in the parties:

The full names of the original parties to the Complaint filed on July 20, 2011 were:

Plaintiffs Zurich American Insurance Company (“Zurich”) and Zurich Insurance Company Ltd. (collectively, “Plaintiffs”); and Defendants Sony Corporation of America, Sony Computer Entertainment America LLC, Sony Online Entertainment LLC, Sony Computer Entertainment Inc., Sony Network Entertainment International LLC, Sony Network Entertainment America Inc., Sony Pictures Entertainment Inc., Sony of Canada Ltd., Sony Corporation, Mitsui Sumitomo Insurance Company of America, National Union Fire Insurance Company of Pittsburgh, Pa., ACE American Insurance Company, A-K Insurance Companies (Fictitious Defendants), and L-Z Insurance Companies (Fictitious Defendants).

On September 27, 2011, Plaintiffs filed a First Amended Complaint adding as defendants AXIS Surplus Insurance Company, Certain Underwriters at Lloyd's, Syndicate 2623/623, and Chartis Specialty Insurance Company. The First Amended Complaint no longer named Sony Computer Entertainment Inc. as a defendant. Effective on September 30, 2011, Sony Network Entertainment America Inc. merged into its parent company, Sony Network Entertainment International LLC, and thus no longer exists as an independent corporate entity. Plaintiffs' claims against Sony Pictures Entertainment Inc. were dismissed by the Court's Order dated October 27, 2011.

On January 3, 2012, Plaintiffs dismissed without prejudice their claims against defendant Sony of Canada Ltd. by stipulation. On June 8, 2012, Plaintiffs dismissed without prejudice their claims against Sony Corporation by stipulation, and Plaintiff Zurich Insurance Company Ltd. dismissed without prejudice all of its claims against all Defendants by the same stipulation.

On August 30, 2012, Plaintiff Zurich filed a Second Amended Complaint. Zurich Insurance Company Ltd. did not join as a plaintiff in the Second Amended Complaint. The Second Amended Complaint did not name AXIS Surplus Insurance Company, Certain Underwriters at Lloyd's, Syndicate 2623/623, or Chartis Specialty Insurance Company as defendants. The Second Amended Complaint added as defendants XL Insurance Company Limited – Irish Branch, St. Paul Fire and Marine Insurance Company, Great American Insurance Company of New York. X-L Insurance Company Limited – Irish Branch was never served with the Second Amended Complaint and is not currently a party to the action.

As a result of all of the foregoing, the parties to the action now are: Plaintiff Zurich American Insurance Company, Defendants Sony Corporation of America, Sony Computer Entertainment America LLC, Sony Online Entertainment LLC, Sony Network Entertainment

International LLC, and Defendants Mitsui Sumitomo Insurance Company of America (“Mitsui”), National Union Fire Insurance Company of Pittsburgh, Pa., ACE American Insurance Company, St. Paul Fire and Marine Insurance Company, and Great American Insurance Company of New York.

3. Name, address, and telephone number of counsel for Appellants:

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4. Name, address, and telephone number of counsel for Respondents:

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5. Court and county from which the appeal is taken:

This appeal is taken from the Supreme Court, New York County, IAS Part 48. The appeal is from the Court's Order (Oing, J.), dated February 21, 2014 and docketed in the office of the New York County Clerk on February 24, 2014, and the So-Ordered Transcript, dated March 3, 2014 and docketed on March 4, 2014, relating to Sony's Motion for Partial Summary Judgment Declaring That Zurich and Mitsui Have a Duty to Defend and Zurich's and Mitsui's Cross-Motions for Summary Judgment (Motion Sequence No. 14) (collectively, the "February 21, 2014 Order"). A Notice of Entry with respect to the February 21, 2014 Order was filed and entered on March 10, 2014. A Notice of Appeal was filed by Defendants-Respondents on April 9, 2014, and was served on counsel for all parties on that same date by electronic mail, and through the New York State Courts Electronic Filing System ("NYSCEF").

6. Nature and object of the causes of action:

In April 2011, criminal cyber-attacks were launched against the network platform for the Sony PlayStation Network and Qriocity services and against the network platform for the Sony Online Entertainment Network. Thereafter, 65 putative class action lawsuits were filed against

the Sony Appellants and other Sony entities, alleging that the cyber-attacks resulted in the unauthorized release of personal/confidential information regarding network users and asserting claims for (among other things) violations of the right of privacy (the “Data Privacy Suits”). The Sony Appellants tendered the Data Privacy Suits to their primary insurers, Zurich and Mitsui, for defense and indemnity under insurance policies that cover claims for “publication, in any manner, of material that violates a person’s right of privacy” (the “Privacy Coverage”). The insurers denied coverage under their policies, and Zurich filed this insurance coverage action seeking a declaration that it has no duty to defend or indemnify with respect to the Data Privacy Suits. Mitsui filed cross-claims against the Sony Appellants seeking a similar declaration. The Sony Appellants filed counter-claims against Zurich and cross-claims against Mitsui seeking (among other things) declarations that Zurich and Mitsui have a duty to defend the Data Privacy Suits.

7. **Result reached in the court below:**

The Sony Appellants moved for partial summary judgment declaring that Zurich and Mitsui have a duty to defend the Sony Appellants with respect to the Data Privacy Suits. Respondents Zurich and Mitsui filed cross-motions for summary judgment declaring that they have no such duty. In the February 21, 2014 Order, the Court found that the Data Privacy Suits alleged the publication of private information as required to trigger coverage under the Privacy Coverage. Nonetheless, the Court ruled that Zurich and Mitsui did not have a duty to defend because the alleged publication was not “conducted or perpetrated by the policyholder”—a requirement not found in the language of the insurance policies. Based on a misreading of the insurance policies and the underlying complaints, the Court denied the Sony Appellants’ motion and granted Respondents Zurich’s and Mitsui’s cross-motions.

8. Grounds for seeking reversal, annulment or modification:

Without limiting the grounds or arguments that the Sony Appellants may raise on appeal, the Sony Appellants seek reversal of the Court's February 21, 2014 Order on the following grounds:

- (1) The Court erred in denying the Sony Appellants' Motion for Partial Summary Judgment Declaring That Zurich and Mitsui Have a Duty to Defend; and
- (2) The Court erred in granting Respondents Zurich's and Mitsui's Cross-Motions for Partial Summary Judgment on the duty to defend.

9. Related actions or proceedings:

There are no related actions or proceedings now pending in any court of this or any other jurisdiction.

10. Additional appeals pending:

There are no additional appeals pending in this action.

Dated: New York, New York
April 9, 2014

ORRICK, HERRINGTON & SUTCLIFFE LLP

By: /s/ Stephen G. Foresta

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TO: See Attached Service List

Zurich Am. Ins. Co. v. Sony Corporation of America, et al.
Index No. 651982/2011
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2014 WL 3253541 (N.Y.Sup.) (Trial Order)
Supreme Court of New York.
New York County

ZURICH AMERICAN INSURANCE,

v.

SONY CORPORATION OF **AMERICA**.

No. 651982/2011.

February 24, 2014.

*1 Part 48

Sequence Number: 014

Partial Summary Judgement

Jeffery K. Oing, Judge.

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause - Affidavits - _____ No(s). _____
Exhibits _____

Answering Affidavits - Exhibits _____ No(s). _____

Replying Affidavits _____ No(s). _____

Upon the foregoing papers, it is ordered that this motion is

Mtn For Summary Judgment denied. X [Defendant] Mtns for summary judgment granted. The reasons for the decision & order are set forth on the 2/21/14 record and are incorporated herein for all purposes. [Plaintiff] directed to order the transcript & submit it to the court to be so ordered.

Dated: 2/21/14

<<signature>>, J.S.C

J.S.C.

1. CHECK ONE: ... CASE DISPOSED # NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: ... MOTION IS: GRANTED DENIED GRANTED IN PART # OTHER

3. CHECK IF APPROPRIATE: ... SETTLE ORDER SUBMIT ORDER DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

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127 A.D.3d 662, 6 N.Y.S.3d 915 (Mem), 2015 N.Y.
Slip Op. 03606

*1 Zurich American Insurance Company,
Respondent

v

Sony Corporation of America et al., Appellants,
and Mitsui Sumitomo Insurance Company of
America et al., Respondents, et al., Defendants.

Supreme Court, Appellate Division, First
Department, New York
14546, 14547, 651982/117
April 30, 2015

An appeal having been taken to this Court by the above-named appellants from an order of the Supreme Court, New York County (Jeffrey K. Oing, J.), entered on or about February 24, 2014, and said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated April 9, 2015, it is unanimously ordered that said appeal be and the same is hereby withdrawn in accordance with the terms of the aforesaid stipulation. Concur—Tom, J.P., Acosta, Andrias, Moskowitz and Kapnick, JJ.

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CITE TITLE AS: Zurich Am. Ins. Co. v Sony Corp.
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