

Brian G. Friel
MILLER FRIEL, PLLC
89 Headquarters Plaza North
#1454
Morristown, NJ 07960
(973) 993-1286

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SUPERIOR COURT
2017 DEC 28 P 2 401
CIVIL DIVISION

Attorneys for Plaintiff

_____	:	SUPERIOR COURT OF NEW JERSEY
CAPSUGEL HOLDINGS US, INC.,	:	LAW DIVISION
	:	MORRIS COUNTY
	:	
Plaintiff,	:	Docket No.
	:	
vs.	:	CIVIL ACTION
	:	
ZURICH AMERICAN INSURANCE	:	COMPLAINT AND JURY DEMAND
COMPANY,	:	
ALLIANZ GLOBAL RISKS US INSURANCE	:	
COMPANY,	:	
XL INSURANCE AMERICA, INC.,	:	
	:	
Defendants.	:	
_____	:	

Plaintiff, Capsugel Holdings US, Inc. (“Capsugel”), for its Complaint against defendants Zurich American Insurance Company (“Zurich”), Allianz Global Risks US Insurance Company (“Allianz”), and XL Insurance America, Inc. (“XL”) (collectively, “Defendants”), alleges as follows:

Parties

1. Capsugel is a manufacturer of capsules for the pharmaceutical and health/nutrition industries. Capsugel is incorporated in the State of Delaware with its principal place of business at 412 Mt. Kemble Avenue, Suite 200C, Morristown, New Jersey.

2. Zurich is an insurance company incorporated in the State of Illinois with its principal place of business in Schaumburg, Illinois.

3. Allianz is an insurance company incorporated in the State of California with its principal place of business in Chicago, Illinois.

4. XL is an insurance company incorporated in the State of Delaware with its principal place of business in Stamford, Connecticut.

The Policy

5. Defendants sold Capsugel first-party property insurance policies (the “Master Policies”) with a policy period of August 1, 2011 to August 1, 2012 and total policy limits of \$500 million. Each defendant agreed to a “quota share” of the total policy limit and issued a separate policy to Capsugel with different policy numbers. Each of these separate policies has identical terms.

6. Zurich sold Capsugel policy number PPR 9311507-00 with a limit of \$200 million part of \$500 million. A true and correct copy of the Zurich policy is attached hereto as Exhibit A.

7. Allianz sold Capsugel policy number CLP3012685 with a limit of \$150 million part of \$500 million. A true and correct copy of the Allianz policy is attached hereto as Exhibit B.

8. XL sold Capsugel policy number US00034895PR11A with a limit of \$150 million part of \$500 million. A true and correct copy of the XL policy is attached hereto as Exhibit C.

9. The Master Policies provide coverage for both “Property Damage” and “Time Element” losses.

10. The Master Policies specifically cover property damage and time element losses caused by or resulting from Flood. The Master Policies provide:

Q. Flood

This Policy covers physical loss or damage caused by or resulting from Flood.

1) References and Application. The following term(s) wherever used in this Policy means:

a) Flood:

Flood; surface waters; rising waters; storm surge, sea surge, wave wash; waves; tsunami; tide or tidal water; the release of water, the rising, overflowing or breaking of boundaries of natural or man-made bodies of water; or the spray therefrom; all whether driven by wind or not; or sewer back-up resulting from any of the foregoing; regardless of any other cause or event, whether natural or man-made, contributing concurrently or in any other sequence of loss. Physical loss or damage from Flood associated with a storm or weather disturbance whether or not identified by name by the U.S. National Hurricane Center or any other meteorological authority, such as the Tokyo Typhoon Center or Central Pacific Hurricane Center, is considered to be Flood within the terms of this Policy. However, physical loss or damage by fire, explosion or sprinkler leakage resulting from Flood is not considered to be loss by Flood within the terms and conditions of this Policy.

b) High Hazard Flood Zones:

Any Real or Personal property located in a Flood Zone or Special Flood Hazard Area shown on FHBM or FIRM map and designated as "A, AO, A1-30, AE, A99, AH, AR, V, V1-V30, VE or VO," by the Federal Emergency Management Agency (FEMA) or foreign equivalent.

11. The Master Policies contain a limit of \$100 million ("Term Aggregate") for "Flood."

12. The Master Policies contain a sub-limit of \$20 million ("Term Aggregate") for "Flood" in "High Hazard Zones."

13. The Master Policies also contain a separate and additional limit of \$1 million for "Professional Fees" incurred by Capsugel in evaluating and quantifying the damages supporting a claim.

14. The Master Policies do not list specific countries (or parts of them) in the Master Policies for the purpose of designating them as "High Hazard Flood Zones" for flood sub-limits. By contrast, the Master Policies do list specific countries for purposes of earth movement sub-limits.

15. The Master Policies insure Capsugel “and any subsidiary, affiliated, associated or allied company, corporation, firm, organization”

16. The Master Policies are part of Capsugel’s global business insurance coverage program. The program provides coverage on a global basis through the issuance of “master policies” issued by insurance companies in the United States and “local policies” issued in the countries where Capsugel operates.

17. The Master Policies cover Capsugel’s “Insured Locations” anywhere in the world (with certain exceptions not applicable to this lawsuit), including Thailand.

18. The Master Policies contain a “Difference in Conditions” (“DIC”) provision to make sure that Capsugel’s coverage at all of its locations outside the United States is at least as broad as the coverage provided in the Master Policies.

19. The DIC provision of the Master Policies states:

L. DIFFERENCE IN CONDITIONS

Subject to all other terms and conditions set forth herein, coverage under this policy is to apply only when the coverage and/or definitions and/or conditions set forth herein are broader in meaning or scope than those of specific underlying or primary policies. The insurance provided by this policy will apply as contributing or additional insurance as respects loss arising from loss or damage insured under such other policies. In the absence of any other valid and collectable insurance, this policy shall become primary, subject to the terms and conditions of this policy.

The Local Policy

20. Capsugel’s “affiliated, associated and/or allied company” in Thailand is Capsugel (Thailand) Co., Ltd. (“Capsugel-Thailand”).

21. Capsugel-Thailand is insured for “Property Damage” and “Business Interruption” under a local policy issued by ThaiSri Insurance Public Company Limited (“ThaiSri”) with a policy number of 1101100/F002000533 and a policy limit of 2,732,350,507 Baht, which is the

equivalent of approximately \$91 million (USD) (the “Local Policy”) (attached hereto as Exhibit D).

22. The Local Policy provides coverage for “any cause not otherwise excluded in the Policy”

23. The Local Policy covers “Property Damage” and “Business Interruption” caused by “Flood” because “Flood” is not an excluded cause in the Local Policy.

24. The Local Policy contains a limit for “Flood (including ensuing damage)” of 2,732,350,507 Baht, which is the equivalent of approximately \$91 million (USD).

25. The Local Policy contains a sub-limit for “Flood” in “High hazard zone” of 599,910,000 Baht, which is the equivalent of approximately \$20 million (USD).

26. The Local Policy does not define “Flood” or any of the flood-related terms referenced in the limits section, including “Flood (including ensuing damage),” “High hazard zone,” or “Flood (including ensuing damage) in High hazard zone.”

27. The Local Policy provides: “The Coverage is subject to DIC/DIL Policy.”

28. The Local Policy provides:

This Policy is an integral part of the International Program of Insurance provided to the Insured and/or its related or affiliated companies by one or more members of the Zurich Group of Companies. Pursuant to this international program of Insurance, one of the policies issued by one of the members of the Zurich Group of Companies is designated a Master Policy. Notwithstanding, if the Master Policy lapse, is cancelled or is not renewed by the Insured or its related and/or affiliated companies to which the Master Policy is issued, this Policy will be void as at the date of the lapse, expiry or cancellation of the Master Policy.

The Loss

29. During the policy period of the Master Policies, Capsugel operated a capsule manufacturing facility in the Rojana Industrial Park area of Ayutthaya, Thailand (the “Facility”).

The Facility manufactured annually billions of empty hard gelatin and liquid-filled capsules for the pharmaceutical and health/nutrition industries by using proprietary machines. Both the manufacturing process and the product produced are very sensitive to high humidity and moisture conditions.

30. In October 2011, massive rains caused flooding in certain parts of Thailand, including the Rojana Industrial Park area.

31. The Facility was inundated with flood water beginning in early October 2011 and the Facility was completely inaccessible for nearly two months.

32. Capsugel suffered significant losses as a result of the 2011 Thailand flooding.

33. Capsugel has suffered a loss currently estimated at more than \$123 million, including more than \$65 million in property damage and more than \$57 million in time element losses, including business interruption and extra expense.

Capsugel's Insurance Claim

34. Capsugel timely submitted a claim for its damages and losses caused by the 2011 Thailand flooding to Defendants and ThaiSri.

35. Capsugel has submitted to Defendants information and documentation necessary to adjust the claim and further information and documentation sought by Defendants.

36. Capsugel has informed Defendants of the amount of its loss and has submitted a detailed proof of loss as set forth in the Master Policies. Defendants have rejected the proof of loss.

37. Capsugel has complied with all conditions precedent and all other conditions set forth in the Master Policies.

38. Capsugel's insurers have investigated and adjusted the loss in part.

39. On investigation and belief, the investigation and adjustment has been conducted and controlled solely by Defendants and their consultants, on behalf of both ThaiSri and themselves.

40. All, or mostly all, communications to Capsugel involving its claim for the 2011 Thailand flooding have come from representatives of Defendants.

41. All, or mostly all, communications involving the coverage positions taken by Defendants and ThaiSri have come from Defendants, particularly John Harmon of Defendant Zurich.

42. To date, Capsugel has been paid approximately 581,912,700 Baht, which is the equivalent of approximately \$19.4 million (USD) by ThaiSri under the Local Policy for its losses for the 2011 Thailand flooding. Defendants claim that the ThaiSri policy has been exhausted by those payments for Capsugel's claim for the 2011 Thailand flooding.

43. Upon information and belief, Defendants have reimbursed ThaiSri for the entire \$19.4 million (USD) amount paid to Capsugel-Thailand.

44. Defendants and ThaiSri refuse to pay any additional amounts to Capsugel for its losses under the Master Policies or the Local Policy because they claim that the \$20 million sub-limit in each policy for "Flood" in "High Hazard Zones" applies to Capsugel's loss. The position of Defendants and ThaiSri is set forth in several letters from John Harmon to Edward Prosapio of Capsugel, including: letter dated May 9, 2012 (attached as Exhibit E) and letter dated July 13, 2012 (attached as Exhibit F).

45. To date, Capsugel has incurred in excess of \$600,000 (USD) in "Professional Fees" related to its assessment and quantification of damages to its facility.

FEMA and the NFIP Program in the United States

46. In the United States, FEMA is a federal agency that is part of the Department of Homeland Security. FEMA administers the National Flood Insurance Program ("NFIP").

Among other things, FEMA administers the development and modification of Flood Insurance Rate Maps (“FIRM”) and Flood Hazard Boundary Maps (“FHBM”). FEMA also develops and publishes flood zone definitions used for FIRM maps.

47. FIRM maps are the official maps of a community on which FEMA has designated the special flood hazard areas applicable to the community.

48. For communities that participate in the NFIP program, geographic areas classified into flood hazard zones, depending on the risk of flooding. These zones are depicted on FIRM maps that are indexed by state, county, and community representatives.

49. FIRM maps and associated flood zones are developed pursuant to a published administrative process that is described in Title 44 of the Code of Federal Regulations, at Part 65.

Flood Zones in Thailand

50. On information and belief, as of the 2011 Thailand flooding, Thailand did not have a governmental system for designating or classifying flood plains, flood zones, or special flood hazard areas.

51. On information and belief, as of the 2011 Thailand flooding, Thailand did not have an equivalent agency to FEMA that classified flood zones or flood hazard areas.

52. On information and belief, as of the 2011 Thailand flooding, Thailand did not have an equivalent process to the FEMA flood zone or flood hazard area designation process.

53. On information and belief, as of the 2011 Thailand flooding, Thailand did not depict flood plains or zones or areas on maps equivalent to the FEMA flood zone designation process.

54. On information and belief, as of the 2011 Thailand flooding, Thailand did not have flood maps equivalent to FIRM or FHBM maps.

55. On information and belief, as of the 2011 Thailand flooding, no governmental authority in Thailand had designated a high hazard flood zone in the Rojana Industrial Park area of Thailand.

56. On information and belief, as of the 2011 Thailand flooding, no governmental authority in Thailand had designated the Facility to be in any type of flood zone or special flood hazard area, including a high hazard flood zone.

57. To date, Defendants have not identified any governmentally-designated flood zone or special flood hazard area for the Facility in Thailand.

58. Capsugel does not agree with Defendants that the sub-limit for high hazard flood zone applies to Capsugel's loss in Thailand. Capsugel contends that \$100 million of insurance is available under the Master Policies for Capsugel's property damage and time element losses as a result of the 2011 Thailand flooding.

59. Capsugel contends that certain coverage, definitions and/or conditions set forth in the Master Policies are broader in meaning and/or scope than in the Local Policy for the losses caused by the 2011 Thailand flooding. Defendants have asserted that the Master Policies are not broader in meaning and/or scope than the Local Policy.

Count I – Declaratory Judgment

60. Capsugel incorporates by reference paragraphs 1 through 59 above.

61. There is a controversy between Capsugel and Defendants regarding the parties' rights and obligations under the Master Policies and applicable law with respect to coverage for Capsugel's losses caused by the 2011 Thailand flooding and the limit applicable to Capsugel's claim.

62. A declaratory judgment will resolve the controversy between the parties regarding application of the Master Policies and the parties' rights and obligations under the Master Policies.

63. The Court should make declarations about the meaning of the Master Policies as follows:

- a. The "High Hazard Flood Zones" definition does not apply to Capsugel's Facility in Thailand.
- b. The \$20 million "(Term Aggregate) for Flood in High Hazard Zones" sub-limit in the Master Policies does not apply to the Capsugel loss arising out of the 2011 Thailand flooding.
- c. The \$100 million "(Term Aggregate) for Flood" limit in the Master Policies applies to the flood damage to Capsugel's Facility in Thailand arising out of the 2011 Thailand flooding.
- d. With respect to any other coverage defense raised by Defendants, Capsugel reserves the right to request a declaration with respect to coverage under the Master Policies or applicable law.

WHEREFORE, Capsugel seeks the entry of a judgment declaring its rights and the Defendants' obligations with respect to the coverage provided by the Master Policies for Capsugel's losses caused by the 2011 Thailand flooding, along with the costs of this action, attorneys' fees, and all other just and proper relief.

Count II – Breach of Contract

64. Capsugel incorporates by reference paragraphs 1 through 63 above.

65. Defendants are obligated under the terms of the Master Policies to provide the coverage required by the Policies for Capsugel's losses caused by the 2011 Thailand flooding.

66. Capsugel's losses caused by the 2011 Thailand flooding are not subject to the High Hazard Zones sub-limit.

67. Defendants have breached the Master Policies by taking an unfounded coverage position with respect to the applicable limit that applies to Capsugel's losses caused by the 2011 Thailand flooding.

68. Capsugel has sustained and will continue to sustain damages in the form of unpaid but covered losses as a result of Defendants' breach of their obligations under the Master Policies and applicable law. Capsugel's damages include both the Policies' proceeds denied to Capsugel and consequential damages in the form of the lost use of those funds.

69. Capsugel's current estimate of all damages, including property damage and time element losses, is approximately \$123 million. In addition, Capsugel has incurred and paid in excess of \$600,000 in Professional Fees related to its assessment and quantification of its damages.

70. Capsugel has performed any and all conditions precedent under the Policies and applicable law.

WHEREFORE, Capsugel prays that the Court enter judgment against Defendants for their breach of contract, that the Court award Capsugel damages of \$100 million (USD) under the applicable Flood limit set forth in the Master Policies and an additional amount to cover all Professional Fees incurred and paid by Capsugel up to the applicable

limit of \$1 million (USD) set forth in the Master Policies, and that the Court award Capsugel its costs, attorneys' fees, consequential damages in the form of the lost use of the Master Policies' proceeds, and all other just and proper relief.

JURY DEMAND

Capsugel demands a jury trial as to all claims asserted herein that involve issues triable as of right by a jury.

DESIGNATION OF TRIAL COUNSEL

Capsugel designates Brian G. Friel as trial counsel.

CERTIFICATION PURSUANT TO R. 4:5-1

Capsugel, by its attorneys, certifies that the matter in controversy is not the subject of any other action pending in any court and is not the subject of any other contemplated action.

Dated: December 28, 2012



Brian G. Friel
MILLER FRIEL, PLLC
89 Headquarters Plaza North
#1454
Morristown, NJ 07960
(973) 993-1286
frielb@millerfriel.com

Of Counsel:

Mark E. Miller
Murray D. Sacks
MILLER FRIEL, PLLC
2101 L Street, NW
Suite 1000
Washington D.C. 20037
(202) 452-4876
millerm@millerfriel.com
sacksm@millerfriel.com

and

John E. Heintz
Paul R. Taskier
DICKSTEIN SHAPIRO LLP
1825 I St., N.W.
Washington, DC 20006
(202) 420-2200
heintzj@dicksteinshapiro.com
taskierp@dicksteinshapiro.com

Attorneys for Plaintiff