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

CERTAIN UNDERWRITERS AT LLOYD'S, LONDON, *et al.*,

Plaintiffs,

-against-

AT&T CORP.; AT&T INC.; NOKIA OF AMERICA CORPORATION, f/k/a ALCATEL-LUCENT USA, INC., *et al.*

Defendants.

Index No. 653090/2013

Hon. Joel Cohen (IAS Part 3)

Motion Sequence No. 26

Oral Argument Requested

JOINT OPPOSITION OF PLAINTIFFS AND DEFENDANT INSURERS TO NOKIA OF AMERICA CORPORATION'S MOTION FOR PARTIAL SUMMARY JUDGMENT "TO ESTABLISH THAT NOKIA HAS INSURANCE RIGHTS"

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTRODUCTION 1

STANDARD 3

ARGUMENT 3

I. NOKIA HAS DENIED THE INSURERS RELEVANT DISCOVERY 3

II. THE SDA DID NOT TRANSFER INSURANCE RIGHTS 5

A. Nokia Mischaracterizes the Effect of the SDA. 6

1. Section 2.2(a) 7

2. Section 7.1 9

B. Nokia's Argument Based Upon the Parties' Alleged Intent Fails. 11

C. Nokia Has Not Shown that Lucent or Any Member of the Lucent Group Had Rights Under the Legacy Policies in 1996 or Later. 14

III. ANY ATTEMPTED TRANSFER VIOLATED THE INSURERS' CONSENT-TO-ASSIGNMENT CLAUSES, WHICH ARE ENFORCEABLE ON THE FACTS HERE. 15

IV. Rights to Coverage Did Not Transfer by "Operation of Law." 19

CONCLUSION 21

TABLE OF AUTHORITIES

Page(s)

Cases

Am. Home Prods. Corp. v. Liberty Mut. Ins. Co.,
565 F. Supp. 1485 (S.D.N.Y. 1983) 16

Arrowood Indemnity Co. v. Atlantic Mutual Insurance Co.,
948 N.Y.S.2d 581 (1st Dep't 2012) 20, 21

Beal Sav. Bank v. Sommer,
8 N.Y.3d 318 (2007) 11

Blake-Veeder Realty v. Crayford,
488 N.Y.S.2d, 295 (3rd Dep't 1985) 3

Contemporary Mission, Inc. v. Famous Music Corp.,
557 F.2d 918 (2d Cir. 1977) 13

Continental Cas. Co. v. Employers Ins. Co. of Wausau,
871 N.Y.S. 2d 48 (1st Dep't 2008) 16

Continental Cas. Co. v. Rapid Am. Corp.,
80 N.Y.2d 640 (1993) 16

Gen. Acc. Ins. Co. v. Super. Ct.,
64 Cal. Rptr. 2d. 781 (Cal. Ct. App. 1997) 21

Globecon Group LLC v. Hartford Fire Ins. Co.,
434 F.3d 165 (2d Cir. 2006) 16

Greater New York Mut. Ins. Co. v. ERE LLP,
3 N.Y.S.3d 19 (1st Dep't 2015) 12

Heath v. Soloff Constr., Inc.,
487 N.Y.S.2d 617 (4th Dep't 1985) 3

Kaur v. Gokfeld,
50 N.Y.S.3d 370 (1st Dep't 2017) 5

Mallad Constr. Co. v. County Fed. Sav. & Loan Ass'n,
32 N.Y.2d 285 (1973) 12

Martin v. Briggs,
663 N.Y.S.2d 184 (1st Dep't 1997) 3

Natale v. Woodcock,
830 N.Y.S.2d 785 (3d Dep't 2006) 12

Natwest USA Credit Corp. v. Alco Standard Corp.,
858 F. Supp. 401 (S.D.N.Y. 1994) 11

Northern Insurance Co. of New York v. Allied Mutual Insurance Co.,
955 F.2d 1353 (9th Cir. 1992) 20, 21

SR Int'l. Bus. Ins. Co. v. World Trade Ctr. Props., LLC,
375 F. Supp. 2d 238 (S.D.N.Y. 2005) 17

Terrero v. New York City Housing Authority,
984 N.Y.S.2d 53 (1st Dep't 2014) 12

TPZ Corp. v. Dabbs,
808 N.Y.S.2d 746 (2d Dep't 2006) 11

Tribeca Broadway Assocs., LLC v. Mount Vernon Fire Ins. Co.,
774 N.Y.S.2d 11 (1st Dep't 2004) 14

Wallace v. 6600 Partners Co.,
618 N.Y.S.2d 298 (1st Dep't 1994) 12

Young Mee Oh v. Koon,
35 N.Y.S.3d 116 (2d Dep't 2016) 12

Rules

C.P.L.R. 3212(b) 3

Rule 3212(f) 4

INTRODUCTION

In its motion for partial summary judgment (the "Motion"), Nokia of America Corporation ("Nokia") seeks a declaration that it is entitled to insurance coverage under certain liability policies issued by the Insurers[1] to AT&T Corp. ("AT&T") before its reorganization in 1996 (the "Legacy Policies"). The reorganization was effected through a 1996 Separation and Distribution Agreement (the "SDA"), which split AT&T into three corporations -- the surviving AT&T, Nokia's alleged predecessor Lucent Technologies Inc. ("Lucent"), and NCR Corporation. It is uncontested that AT&T is an insured under the Legacy Policies. Nokia argues that it has rights to coverage under the policies because, in its view, the SDA transferred certain of AT&T's insurance rights under the Legacy Policies to Lucent, and it seeks a declaration to that effect. The Court should deny the Motion for the reasons set forth below.

As an initial matter, the Court should deny the Motion because Nokia has failed to provide the Insurers with relevant discovery, as the Court cautioned on May 8, 2019. As a simple matter of fairness, the Court should defer consideration of the Motion until the Insurers have had the opportunity to complete discovery on the issue of intent. The Court also should deny the Motion because Nokia has not yet produced documents that would allow the Insurers to show that the purported transfer has increased their risk and is therefore impermissible without their consent, as discussed below.

Should the Court entertain the Motion, it should deny it on the merits. Nokia's fundamental argument is that the SDA transferred rights under the Legacy Policies to Lucent and the entities it controlled after the reorganization (the "Lucent Group"). In fact, the SDA plainly does nothing of the kind, which is why Nokia, in addition to dragging in self-serving extrinsic evidence of alleged intent, distorts the text of the SDA. First, Nokia argues that Section 2.2 of

[1] The "Insurers" are those insurers who are signatories to this opposition.

the SDA effects a blanket transfer of all assets relating to the Lucent Business, an argument repeated throughout its brief. This argument is simply wrong, and to prop it up, Nokia splices together two phrases that, in the SDA, appear six subparagraphs apart. Second, Nokia argues that Section 7.1(c) effects the transfer of rights under the Legacy Policies to Lucent and the Lucent Group. But under that section, the parties did not *transfer* any rights; rather, the parties *retained* those rights that they already had. Nokia's problem is that neither Lucent nor any member of the Lucent Group had insurance rights that would cover the claims at issue in this action.

In short, the SDA expressly contradicts Nokia's argument. Nokia therefore goes on to argue that the parties to the SDA *must have intended* to transfer rights under the Legacy Policies. To the extent that this argument relies on extrinsic evidence, it is unavailing because (1) the Insurers have, as noted, been denied discovery of such evidence, (2) extrinsic evidence cannot be used to contradict the plain meaning of the SDA, and (3) reliance on extrinsic evidence means there is a question of fact precluding summary judgment. To the extent that Nokia relies on inferences that, it says, may be drawn from the SDA itself, those alleged inferences also create issues of fact.

Because the SDA does not actually effect a transfer but rather preserves the parties' rights as they existed before the reorganization in 1996, the question becomes: which members of the Lucent Group had rights to coverage before the reorganization? Answering this question requires an examination of the facts, which Nokia tries to avoid by seeking a blanket declaration. Some members of the Lucent Group may well have rights to coverage under certain Legacy Policies. The issue from Nokia's standpoint is that no member of the Lucent Group has any rights to coverage for liabilities attributable to Western Electric Company, Inc. ("Western

Electric"). Nokia's brief never mentions Western Electric, but it is the specter haunting this case, because Western Electric's operations are the source of a substantial share of the liability at issue here.

Finally, Nokia makes a half-hearted argument that, even if AT&T did not assign Lucent rights to coverage, those rights passed by operation of law. But that doctrine is not applicable here at all because, as Nokia admits, it can apply only where one corporation has acquired all or virtually all of the assets of another. Here, Nokia acquired only a portion of the assets of AT&T, which remained in business as a very large corporation.

The Insurers respectfully submit that the Court should deny Nokia's Motion.

STANDARD

Summary judgment should not be granted when there is any significant doubt as to the existence of a triable issue of fact; the moving party must adduce unrebutted evidence of entitlement to summary judgment. *Heath v. Soloff Constr., Inc.*, 487 N.Y.S.2d 617, 621 (4th Dep't 1985). The movant must show that there is no defense to the cause of action or that the defense has no merit. C.P.L.R. 3212(b). In deciding the motion, the Court must view the evidence in support of and in opposition to a summary judgment motion in the light most favorable to the party opposing the motion. *Martin v. Briggs*, 663 N.Y.S.2d 184, 187 (1st Dep't 1997) (citing *Blake-Veeder Realty v. Crayford*, 488 N.Y.S.2d, 295, 296 (3rd Dep't 1985)).

ARGUMENT

I. NOKIA HAS DENIED THE INSURERS RELEVANT DISCOVERY.

The Court warned Nokia that the Insurers would ask the Court to deny its anticipated dispositive motion if Nokia did not provide the Insurers with relevant discovery:

> [Nokia's] self-regulation here is if you bring [a summary judgment motion] prematurely, you're just going to get a response that you should deny this because we don't have discovery or whatever it is.

See Affirmation of Jourdan I. Dozier in Support of Insurers' Opposition to Nokia's Motion ("Dozier Aff."), Exhibit 50 (Transcript of May 8, 2019 Pre-Motion Conference at 53). This is the situation we have here.

The Insurers have concurrently filed a Rule 3212(f) affirmation explaining in detail their need for discovery that Nokia has failed to produce. *See* Rule 3212(f) Affirmation of Jourdan I. Dozier ("Rule 3212(f) Aff."). In short, Nokia's failure to provide discovery has prejudiced the Insurers in two ways.

First, the Insurers need discovery regarding the intent of the parties to the SDA. To protect against Nokia's arguing the parties' alleged intent in drafting the SDA in its anticipated summary judgment motion, the Insurers requested the production of documents and communications relating to AT&T and Nokia's understanding of the SDA, including documents reflecting the negotiation, drafting and implementation of the SDA. Nokia produced some information that it believed helpful to its arguments, but refused to provide (i) all documents reflecting the drafting and negotiation of the SDA and (ii) documents relating to Nokia's and AT&T's course of performance over more than two decades, including communications between them reflecting their respective positions regarding how the SDA allocated asbestos-related liabilities. *See* Rule 3212(f) Aff. at ¶¶13-14. As the Court cautioned, it now should deny the Motion because the Insurers do not have the discovery they need to rebut fully Nokia's extrinsic evidence argument, an argument that Nokia made to this Court after assuring the Special Discovery Master that it would rely solely on the plain language of the SDA. *See* Dozier Aff., Exhibit 51 (Insurers engaging in "pure speculation" in suggesting Nokia would not "rely solely on plain language of SDA"; "The Motion Should Be Denied Because it is Based on the Faulty

Premise that Nokia Will Seek to Use Extrinsic Evidence in Support of its Motion for Summary Judgment.").[2]

Second, Nokia has failed to produce discovery -- perhaps intentionally -- that has affected the Insurers' ability to show prejudice. *See* Rule 3212(f) Aff. at ¶¶ 22-30. As shown below, the Legacy Policies prohibit an assignment of insurance rights without the Insurers' consent. Such clauses are enforceable at a minimum where the assignment increases the risk borne by the insurer. Here, the SDA's alleged assignment of rights under the Legacy Policies increases the risk to the Insurers (*i.e.*, increased defense and indemnity costs). The Insurers sought discovery relating to the underlying asbestos-related claims to show that increased risk, including defense counsel invoices and other documents that will show that AT&T and Nokia increased the costs to defend against and resolve the underlying lawsuits. *See* Rule 3212(f) Aff. at ¶24. Nokia has not produced such documents.

The Court should deny Nokia's Motion for failure to provide necessary discovery.

II. THE SDA DID NOT TRANSFER INSURANCE RIGHTS.

Despite Nokia's insistence to the contrary, the SDA did not transfer insurance rights from AT&T to Lucent and the Lucent Group. Rather, the parties retained the rights they had before the reorganization. Thus, the question is: what rights did Lucent and the Lucent Group have *before* the SDA? Nokia, of course, never addresses this question, because the answer is: *some* rights, but not rights to coverage for claims against Western Electric, which are at the heart of this case.

[2] *See, e.g.*, *Kaur v. Gokfeld*, 50 N.Y.S.3d 370, 371 (1st Dep't 2017) (summary judgment denied where discovery of extrinsic evidence had yet to be completed, leaving numerous issues of fact unresolved).

A. Nokia Mischaracterizes the Effect of the SDA.

Nokia's basic argument is that "the SDA clearly and unambiguously effected an assignment from AT&T to Lucent of insurance rights covering the liabilities of the Lucent Business." Motion at 13. In various ways, Nokia asserts that the SDA "assigns" or "transfers" insurance rights more than two dozen times. Yet, no matter how many times it is repeated, the assertion remains false: the SDA did not effect any transfer or assignment of insurance rights under the Legacy Policies.

Nokia's argument depends on sleight of hand. As Nokia explains it,

1. The term "Assets" includes "all rights under insurance policies."
2. AT&T transferred ***all "Assets" related to the "Lucent Business."***
3. Accordingly, "in receiving all of the 'Assets' related to the 'Lucent Business', as defined in the SDA, Lucent received 'all rights under insurance policies' covering the Lucent Business."

See Affidavit of Marc Manly at ¶10 (emphasis supplied). The smokescreen is in the second step of Nokia's analysis. Pursuant to the SDA, AT&T did not transfer "all "Assets" related to the 'Lucent Business.'" It transferred all "***right, title and interest in all Lucent Assets***." *See* Insurers' Counterstatement of Material Facts ("CSMF") ¶¶34, 36 (emphasis supplied). "Lucent Assets" is defined in Section 2.2(a) of the SDA. CSMF ¶37. The reason for Nokia's sleight of hand is clear: ***the "Lucent Assets" that were actually transferred pursuant to the SDA do not include AT&T's rights under the Legacy Policies.*** CSMF ¶¶34-37.

Elsewhere in its brief, Nokia attempts to gloss over this flaw in its argument by deceptively splicing the text of the SDA. It asserts:

> The SDA defined the "Lucent Assets" broadly as "any and all Assets that are expressly contemplated by this Agreement or any Ancillary Agreement . . . as Assets to be transferred to Lucent," including, *inter alia*, "any and all Assets owned or held

> immediately prior to the Closing Date by AT&T or any of its Subsidiaries that are used primarily in the Lucent Business.

Motion at 4. Nokia pretends that two quoted clauses (Sections 2.2(a)(i) and 2.2(a)(vii)) are part of the same subparagraph to argue that the first qualifies the second. This is an attempt to deceive the Court. Nokia's quote clips phrases from two independent subparagraphs, neither of which modifies the other. Nokia does this because it knows that Section 2.2 does not support its argument. Pursuant to Section 2.2(a)(i), Nokia needs to find support for its transfer elsewhere in the SDA. CSMF ¶¶38-44. But, as Nokia concedes, the only section in the SDA that expressly addresses the Legacy Policies is Section 7.1, and that section does not support Nokia's argument. CSMF ¶¶43-44.

1. Section 2.2(a)

Section 2.2(a) defines the term "Lucent Assets" to mean "Assets" specified in any of that section's seven clauses that were not otherwise excluded by Section 2.2(b). CSMF ¶37. Clause (i), the first and most general, specifies "any and all Assets that are expressly contemplated by this Agreement or any Ancillary Agreement (or Schedule 2.2(a)(i) or any other Schedule thereto) as Assets to be *transferred* to Lucent or any other member of the Lucent Group." CSMF ¶37-38. But neither this clause nor any neighboring clause identifies what those Assets are. Moreover, there is a mirror-image clause in Section 2.2(b) providing that "Lucent Assets" does not include "Assets" that are "expressly contemplated by this Agreement . . . to be *retained* by AT&T." CSMF ¶39. In order to determine whether Assets were "contemplated . . . to be transferred" or "retained," one must look elsewhere in the SDA, especially in the schedules, which run to more than 3,000 pages and delve into extraordinary detail, specifying a rock saw, a dispensing machine, a clock timer, and tens of thousands of similar assets. CSMF ¶¶40-41. The schedules include references to certain insurance policies in effect in 1996, but there is no mention of the

Legacy Policies. CSMF ¶42. And nowhere is there any general assignment to Lucent of Assets used primarily in the Lucent Business. In short, clause (i) of Section 2.2(a) does not support Nokia's assertion that the SDA effects a general transfer of all assets of the Lucent Business.

And neither do any of the other six clauses of Section 2.2(a), each of which addresses a very specific type of asset not relevant here. Nokia does not argue that any of them *is* relevant. Instead, it progresses from sleight of hand to outright distortion by borrowing a few words from clause (vii) and splicing them into clause (i). Clause (vii) has no application here; it does nothing but give Lucent a one-year grace period to identify assets it should have received but the parties forgot to transfer; it is a mere catchall for correcting mistakes.[3] CSMF ¶¶66-73.

Accordingly, a fair reading of Section 2.2(a) of the SDA gives no support to Nokia's argument that the agreement transfers any or all "Assets . . . used primarily in the Lucent Business." CSMF ¶¶38-42. Clause (vii) is irrelevant, *see* CSMF ¶¶66-73, and clause (i) merely directs the reader to look elsewhere for what is "expressly contemplated" to be transferred or retained. CSMF ¶37-38. The parties agree that the place to find what the parties contemplated for coverage rights under the Legacy Policies is Article VII of the SDA, and specifically Section 7.1 concerning "Insurance Matters." CSMF ¶¶43-44. After its misleading citation to Section

[3] Clause (vii) states in relevant part: "The intention of this clause (vii) is only to rectify any inadvertent omission of transfer or conveyance of any Assets that, had the parties given specific consideration to such as of the date hereof, would have otherwise been classified as a Lucent Asset . . . . [N]o Asset shall be deemed a Lucent Asset solely as a result of this clause (vii) unless a claim with respect thereto is made by Lucent on or prior to the first anniversary of the Distribution Date." CSMF ¶37. Nokia is not relying on this clause, presumably because the parties did not forget about insurance policies but rather gave them "specific consideration" in Section 7.1, as discussed below. CSMF ¶¶66-73. And, Nokia has offered no evidence that (1) AT&T's rights under the Legacy Policies were used primarily in the Lucent Business (indeed, the evidence is to the contrary) or (2) Lucent made a timely claim to AT&T for rights under the Legacy Policies. CSMF ¶¶71-72.

2.2(a), Nokia shifts its reliance to Section 7.1, and both its and AT&T's corporate designees pointed there as well. CSMF ¶¶43-44.

2. Section 7.1

Nokia's problem with Section 7.1 is that nowhere in that section does the SDA purport to transfer rights under the Legacy Policies. CSMF ¶45. Section 7.1(a) concerns only those insurance policies that were still current at the time of the SDA, and no party contends that it is relevant here. Nokia relies instead on Section 7.1(c), which addresses the Legacy Policies. That section provides, in relevant part:

> [T]he parties intend by this Agreement that Lucent and each other member of the Lucent Group be successors-in-interest to all rights that any member of the Lucent Group may have as of the Closing Date as a subsidiary, affiliate, division or department of AT&T prior to the Closing Date under any policy of insurance issued to AT&T by any insurance carrier unaffiliated with AT&T[,] . . . including any rights such member of the Lucent Group may have as an insured or additional named insured, subsidiary, affiliate, division or department, to avail itself of any such policy of insurance . . . as in effect prior to the Closing Date.

CSMF ¶45. Although Nokia insists that this provision "clearly and unambiguously effected an assignment from AT&T to Lucent of insurance rights covering the liabilities of the Lucent Business," Motion at 13, it is obvious that it does no such thing. The words "assign," "transfer," and their cognates appear nowhere; neither do synonyms such as "convey." Indeed, AT&T, the alleged transferor or assignor, does not take any action here at all. CSMF ¶47. The provision focuses on the Lucent Group, of which AT&T is not a member; AT&T appears only in a passive role as the insured under insurance policies issued long before. Literally nothing in Section 7.1(c) suggests an assignment or transfer. Indeed, the only portion of Section 7 that addresses a transfer at all is Section 7.1(d). That section provides in relevant part: "This Agreement shall not be considered as an attempted assignment of any policy of insurance." CSMF ¶48.

What Section 7.1(c) does do, explicitly, is preserve those rights that Lucent and members of the Lucent Group already had at the time of the reorganization. CSMF ¶¶45-46. It recognizes Lucent and other members of the Lucent Group as successors-in-interest to all rights that they "*may have as of the Closing Date as a subsidiary, affiliate, division or department of AT&T*" (emphasis supplied). CSMF ¶45. The italicized phrase shows that Section 7.1(c) does not refer to rights that Lucent and the Lucent Group are *acquiring* by assignment; rather, it refers to rights that Lucent and the Lucent Group *already have*. In other words, Section 7.1(c) does not concern the transfer of rights but rather the retention of rights. CSMF ¶¶45-49. And, because the SDA contemplated that both AT&T and members of the Lucent Group would retain certain rights to coverage under Legacy Policies (*see infra*), the parties in the SDA (1) addressed the ability of the parties to exhaust limits of liability (permissible) and to release insurance rights in a manner that would adversely affect the other party (impermissible), and (2) agreed to share information with each other to assist in the conduct of insurance claims. CSMF ¶75.

[redacted]

In addition, although Section 7 is the only section of the SDA that addresses the issue of AT&T's retention of its rights under the Legacy Policies directly, there is another section that confirms that the parties to the SDA intended for AT&T to retain its insurance rights. Section 5.2 of the SDA requires Lucent to indemnify AT&T for, *inter alia*, liabilities relating to the

Lucent Business, likely to fill coverage gaps created by AT&T's significant self-insured retentions. CSMF ¶¶74, 80. In Section 5.4, the SDA provides that Lucent's indemnification obligation is "Net of Insurance." CSMF ¶75. In other words, the amount Lucent is required to pay to AT&T in indemnity is "reduced by" any insurance proceeds AT&T recovers. If AT&T had in fact transferred its rights to coverage under the Legacy Policies for all liabilities related to the Lucent Business, then this section would make no sense. Had AT&T assigned its insurance rights away, it could not assert those same rights itself, for the obvious reason that a transfer or assignment of its insurance rights would have left AT&T without those rights to assert. *See TPZ Corp. v. Dabbs*, 808 N.Y.S.2d 746, 751 (2d Dep't 2006) ("Under New York law, an assignment occurs only where the assignor retains no control over the funds, no authority to collect and no power to revoke.") (quoting *Natwest USA Credit Corp. v. Alco Standard Corp.*, 858 F. Supp. 401, 413 (S.D.N.Y. 1994)). As a result, by definition there would be no "insurance proceeds" available to "reduce" the amount of Lucent's indemnification obligation, rendering Section 5.4 superfluous. *See Beal Sav. Bank v. Sommer*, 8 N.Y.3d 318, 324 (2007) (New York courts must construe contracts "so as to give full meaning and effect to the material provisions," mindful that a proper reading of the contract "should not render any portion meaningless.").

Accordingly, there is no provision in the SDA that transfers insurance rights under the Legacy Policies from AT&T to Lucent and the Lucent Group.

B. Nokia's Argument Based Upon the Parties' Alleged Intent Fails.

Because Nokia knows the SDA does not "clearly and unambiguously" transfer rights to insurance coverage to Nokia, it offers the following arguments.

First, Nokia points to the extrinsic evidence provided by Mr. Manly and Mr. O'Reilly. Extrinsic evidence cannot be used to contradict the express terms of the SDA, which plainly do not effect any transfer of rights under the Legacy Policies. *See Wallace v. 6600 Partners Co.*,

618 N.Y.S.2d 298, 300-301 (1st Dep't 1994). Moreover, if extrinsic evidence is necessary to determine the intent of the parties, there is a question of fact precluding summary judgment. *Greater New York Mut. Ins. Co. v. ERE LLP*, 3 N.Y.S.3d 19 (1st Dep't 2015).[4]

Second, Nokia contends that the Court may "infer" the intent to transfer. In principle, the Court could do so *if* there were evidence of intent to transfer; in fact, the SDA shows plainly the *absence* of an intent to transfer in its express confirmation of the *status quo*.

Third, and at length, Nokia argues that the parties *must* have intended to transfer insurance rights: Lucent had assumed AT&T's liabilities, and, according to Nokia, AT&T had no reason not to transfer insurance rights to Lucent. Even if Nokia were right about the parties' motives, the inferences it draws from those alleged motives would, at best, create an issue of fact unsuited to summary disposition. *See Mallad Constr. Co. v. County Fed. Sav. & Loan Ass'n*, 32 N.Y.2d 285, 291 (1973) ("[W]here a question of intention is determinable by written agreements, the question is one of law . . . . Only where the intent must be determined by disputed evidence *or inferences outside the written words of the instrument* is a question of fact presented.") (emphasis supplied). But, in fact, Nokia's assertions about the parties' motives are wrong.

[4] An issue of fact remains even though AT&T and Nokia now agree on the alleged meaning of the SDA. A factfinder need not credit a witness's testimony, *see Young Mee Oh v. Koon*, 35 N.Y.S.3d 116, 118 (2d Dep't 2016), particularly where, as here, the testimony conflicts with the SDA itself. For example, the factfinder may consider (1) whether AT&T's and/or Nokia's payments to Mr. Manly in connection with this litigation influenced his testimony, (2) Mr. Manly's September 17, 2019 Errata Sheet, [redacted] and (3) Mr. O'Reilly's September 18, 2019 Errata Sheet, [redacted] CSMF ¶¶88, 100-102. *See Natale v. Woodcock*, 830 N.Y.S.2d 785, 786-87 (3d Dep't 2006) ("Where, as here, there is a significant conflict on a material issue between the original deposition testimony and the correction on the errata sheet a credibility issue is created that cannot be resolved by summary judgment."); *Terrero v. New York City Housing Authority*, 984 N.Y.S.2d 53, 54 (1st Dep't 2014) ("[c]orrections in the errata sheet raise issues of credibility that cannot be resolved on a motion for summary judgment").

Nokia incorrectly argues that it made commercial sense for the SDA to transfer AT&T's rights under the Legacy Policies to Lucent. Motion at 1, 15-16. From a commercial standpoint, however, it made perfect sense for the SDA to leave AT&T's rights under the Legacy Policies with AT&T. Indeed, there is no reason why AT&T would have transferred rights under the Legacy Policies to Lucent because AT&T also retained all liabilities that it had at the time of the reorganization, including those of the businesses it transferred to Lucent. As a matter of hornbook law, one corporation cannot defeat third-party claims by sloughing off its liabilities to another corporation. *See Contemporary Mission, Inc. v. Famous Music Corp.*, 557 F.2d 918, 924 (2d Cir. 1977) ("[O]ne who owes money or is bound to any performance whatever, cannot by any act of his own, or by any act in agreement with any other person, except his creditor, divest himself of the duty and substitute the duty of another") (quoting 3 Williston on Contracts § 411 (3d ed. 1960)). Nokia itself acknowledged this fact. CSMF ¶74. Thus, AT&T needed to keep its rights under the Legacy Policies for itself in order to insure the very liabilities it retained -- and so, under the SDA, it did.

And, although the SDA was designed to protect AT&T, not Lucent [redacted], keeping the insurance rights with AT&T also protected Lucent's interests because of its net-of-insurance indemnity obligation. CSMF ¶33 (the "guiding principle" of the SDA was that "it would be for the best interests of the existing AT&T shareholders, not the interests of the shareholders of the companies post-restructuring, but the existing AT&T shareholders."). By leaving AT&T's rights under the Legacy Policies with AT&T, Lucent preserved coverage for its indemnitee. CSMF ¶¶74-75.

C. Nokia Has Not Shown that Lucent or Any Member of the Lucent Group Had Rights Under the Legacy Policies in 1996 or Later.

As just shown, the SDA did not transfer rights under the Legacy Policies; it merely preserved the *status quo*. The question, therefore, is what rights did Lucent and the members of the Lucent Group have "as a subsidiary, affiliate, division or department of AT&T" under the Legacy Policies? CSMF ¶45; *see also* CSMF ¶¶49-53. Nokia has not shown that they had *any* rights under those policies "as a subsidiary, affiliate, division or department of AT&T" and it has not even put the Legacy Policies into evidence. CSMF ¶45. Its Motion must therefore be denied.

The Insurers acknowledge that *some* members of the Lucent Group may have a claim for coverage. Certain companies in the Lucent Group, *i.e.*, wholly owned subsidiaries of Lucent immediately following the SDA's execution, (1) appear to have been covered by at least some of the Legacy Policies, (2) retained their insurance rights under the SDA, and (3) to the extent they still exist today (and at least some do), still retain potential rights to coverage under the Legacy Policies, although not for the asbestos suits at issue in this action. But it is Nokia's burden to identify the member of the Lucent Group seeking coverage and to show that such member is covered under a Legacy Policy for an asbestos suit at issue in this case. CSMF ¶¶49-53. It has wholly failed to meet that burden. *See Tribeca Broadway Assocs., LLC v. Mount Vernon Fire Ins. Co.*, 774 N.Y.S.2d 11, 13 (1st Dep't 2004).

Nokia has not attempted to make the necessary showing because an examination of the facts will make plain that particular members of the Lucent Group are *not* entitled to coverage under the Legacy Policies. CSMF ¶¶54-56. For example, at least some of the asbestos claims for which Nokia seeks coverage here pertain to Automatic Electric Company ("Automatic Electric"), but that entity was never covered under a Legacy Policy and therefore had no rights to

retain. CSMF ¶¶55-58. AT&T did not acquire any interest in Automatic Electric until December 1988, when Automatic Electric's assets were placed into a joint venture called AG Communications Systems Corporation ("AGCSC"). CSMF ¶¶55-56. Although AGCSC was transferred to Lucent as part of the SDA, plainly there is no coverage for claims against Nokia as its successor under Legacy Policies that expired before AGCSC even came into being in 1988. CSMF ¶¶50, 57-58.

For different but equally compelling reasons, the facts show that there is no tenable argument that Nokia is entitled to coverage for the asbestos liabilities of Western Electric. CSMF ¶¶59-65. Western Electric, a significant source of the asbestos liabilities in question, was incorporated generations ago. CSMF ¶¶1-5. In 1983, it changed its name to AT&T Technologies, Inc., *see* CSMF ¶17, and in 1989, AT&T Technologies, Inc. merged into AT&T, *see* CSMF ¶24, thereby ceasing to exist as an independent entity. CSMF ¶¶1-32. All parties agree that AT&T is the corporate successor to both AT&T Technologies, Inc. and Western Electric and is entitled to whatever rights to coverage that Western Electric may have had under the Legacy Policies. But those rights are *AT&T's* rights, not Nokia's, and, as shown, the SDA did not transfer AT&T's rights to Nokia, but rather preserved them for AT&T's own use. CSMF ¶¶59-65.

III. ANY ATTEMPTED TRANSFER VIOLATED THE INSURERS' CONSENT-TO-ASSIGNMENT CLAUSES, WHICH ARE ENFORCEABLE ON THE FACTS HERE.

Even if the SDA attempted to effect some sort of transfer of AT&T's rights under the Legacy Policies, the attempted assignment was void because it violated the terms of the Legacy Policies. CSMF ¶¶76-79. Nokia concedes that the Legacy Policies contain, or follow form to policies that contain, clauses barring any assignment of the policy or rights thereunder without the Insurers' consent. CSMF ¶¶76-78. Nokia acknowledges the consent-to-assignment clauses,

but it asserts that those clauses are unenforceable here. As Nokia's own cases show, consent-to-assignment clauses may be unenforceable only where (1) the assignment takes place after the loss, and (2) the assignment does not increase the insurer's risk. Nokia has not shown that the assignment took place after the loss. Moreover, Nokia cannot possibly show that the assignment does not increase the Insurers' risk, because it plainly does, by forcing the Insurers to provide coverage for two corporations, not one, where both corporations are active, operating, and being sued. CSMF ¶¶79, 81-96. *See also* Affirmation of Peter Wilson.

Nokia assumes without argument that the "loss" for which it seeks coverage "happened during the policy periods" of the Legacy Policies because there were "accidents" or "occurrences" during the policy periods of the Legacy Policies. But Nokia has not even attempted to demonstrate this "fact" for any claim, much less all of them. Whether there has been a "loss," "occurrence," or "accident" under any of the Legacy Policies is one of the most significant coverage issues in the case, is the subject of discovery and there are numerous disputed facts.[5] *See* Rule 3212(f) Aff. Accordingly, to the extent Nokia is arguing that the Insurers' consent-to-assignment provisions are not enforceable because the assignment occurred after loss, issues of fact preclude summary judgment.

Moreover, there is no *per se* rule that a consent-to-assignment clause is unenforceable as to post-loss assignments in any event. As *Globecon Group LLC v. Hartford Fire Ins. Co.*, 434 F.3d 165, 171 (2d Cir. 2006), states: "under New York law, a no-transfer clause may, in certain

[5] Indeed, Nokia asks this Court to assume that there has been an "accident" or "occurrence" under each Legacy Policy without even identifying what the "accident" or "occurrence" is. At a minimum, in order to prove that there has been a covered occurrence under any Legacy Policy, Nokia must show on a per claimant basis that there has been injury-in-fact during the policy period. *See generally Am. Home Prods. Corp. v. Liberty Mut. Ins. Co.*, 565 F. Supp. 1485 (S.D.N.Y. 1983); *Continental Cas. Co. v. Rapid Am. Corp.*, 80 N.Y.2d 640 (1993); *Continental Cas. Co. v. Employers Ins. Co. of Wausau*, 871 N.Y.S.2d 48 (1st Dep't 2008).

unusual circumstances, remain valid as to some pre-transfer claims even though the loss occurred before the transfer." Circumstances precluding assignment exist when a post-loss assignment "would unduly increase the risk borne by the insurer." *SR Int'l. Bus. Ins. Co. v. World Trade Ctr. Props., LLC*, 375 F. Supp. 2d 238, 249 (S.D.N.Y. 2005). Here, it is obvious that invalidating the consent-to-assignment clauses in order to give effect to the alleged assignment of rights would increase the Insurers' risk because they would have two insureds, not one.

Nokia's position is that, as a result of the SDA, it now has AT&T's rights under the policies for Western Electric liabilities. But AT&T also believes that it has those rights, and both companies are regularly sued for the same liability -- AT&T as the corporate successor to Western Electric and Nokia as successor to Lucent, which assumed Western Electric-related liabilities. Indeed, Nokia's position is that AT&T and Nokia both have coverage for the Western Electric-related liabilities. CSMF ¶83. In those suits, AT&T and Nokia have typically retained separate counsel[6] and, in at least some cases, settled separately. CSMF ¶85. Nokia wants the Insurers to pay both sets of costs -- to cover Nokia as an insured, and to pay AT&T directly for its costs or to reimburse Nokia's payment as AT&T's indemnitor. But it is obvious that multiplying the number of insureds by two obligates the Insurers to pay two sets of costs and necessarily increases their risk. CSMF ¶¶81-96, 99.

With the exception of one underlying case, Nokia has not provided discovery that would permit the Insurers to identify with specificity the costs Nokia is seeking on account of payments it made to defend and indemnify itself and the costs Nokia is seeking on account of its payments as AT&T's indemnitor. [redacted]

[redacted]

[redacted] By any standard, that is a huge increase in risk.[7] And, to make matters worse, AT&T is seeking coverage for the exact same payment. CSMF ¶83-84, 93.

Nokia cannot be heard to complain that the *Burrell* case is an outlier. Whether the alleged transfer of coverage rights increased the Insurers' risk is a question of fact. Nokia has submitted no evidence that the risk has not increased, and *Burrell* shows it has. The Insurers can

[7] It appears that Nokia also seeks coverage for both sets of defense costs, but the Insurers cannot demonstrate that point with documents because Nokia to date has not produced any of its defense costs invoices or payment records, [redacted] CSMF ¶93.

do no more, because Nokia has failed to produce the documents that would allow them to make a more extensive showing. In short, the one indisputable point is that, in the only case where Nokia's production is sufficient to show whether there was prejudice, there was, and it was enormous. And because Nokia bears the burden of showing that there is no defense to its claim and has failed to so show, its Motion should be denied.

Indeed, the Insurers' considerable experience suggests that the *Burrell* case may be all too typical. The demands of claimants' counsel are not governed by mathematical logic, under which two entities liable for the same liability should each pay half, but by the simple rule "everybody pays." Two solvent targets means two payments and in the asbestos-litigation context, one plus one often equals three or more. As the *Burrell* case shows vividly, the settlement of asbestos-related claims often has a casino-like aspect, so the presence of two solvent targets may greatly increase the total exposure. CSMF ¶¶91, 93. But, be that as it may, there is at a minimum a question of fact here whether the alleged transfer increased the insurers' risk, and that is enough to preclude summary judgment.

IV. Rights to Coverage Did Not Transfer by "Operation of Law."

Finally, Nokia offers an alternative argument: that the rights to coverage under the Legacy Policies passed to Lucent by operation of law. But this alternative argument plainly fails, because, as even Nokia admits, the few cases that have transferred insurance rights by operation of law have done so *solely* when (1) one corporation's liabilities have passed to another by operation of law because (2) the second corporation acquired all or virtually all of the assets of the first. *See* Motion at 17 ("[t]his rule of law applies where 'substantially all the assets' of a business are transferred"). Neither of those conditions is even arguably fulfilled here, and Nokia's argument therefore fails.

In the only New York case Nokia cites, *Arrowood Indemnity Co. v. Atlantic Mutual Insurance Co.*, 948 N.Y.S.2d 581 (1st Dep't 2012), the acquiring corporation acquired "virtually all" of the assets of another corporation. It was sued for liabilities attributable to the acquired corporation by plaintiffs asserting "a de facto merger or continuation theory," and it sought insurance coverage under the acquired corporation's policies. The court held that the acquisition agreement transferred rights to insurance and that, even if it did not, those rights passed by operation of law. *Id.* at 582. *Arrowood* has no application here for two reasons. First, here liability transferred not by operation of law, but by Lucent's express assumption of liability. CSMF ¶¶34-35. Equally important, it is ridiculous even to suggest that Lucent acquired "substantially all the assets" of AT&T. The SDA did not leave AT&T substantially without assets; rather, it transformed one enormous corporation into three very large corporations, of which AT&T may well have been the largest.

Nokia also relies on *Northern Insurance Co. of New York v. Allied Mutual Insurance Co.*, 955 F.2d 1353 (9th Cir. 1992). There, the court applied California's theory of "product-line successor liability," which is an exception to the general rule that a purchaser of assets does not assume liabilities. Under product-line successor liability, "a purchaser of substantially all assets of a firm assumes, with some limitations, the obligation for product liability claims arising from the selling firm's presale activities." *Id.* at 1357. The court held that, where liability transferred by operation of law in this fashion, insurance coverage should also, even absent an express assignment of insurance rights. *Northern Insurance* is therefore inapplicable for the same

reasons as *Arrowood*: it concerned both transfer of liability by operation of law and the acquisition of virtually all corporate assets, while this case involves neither.[8]

CONCLUSION

For the reasons set forth above, Nokia's Motion should be denied.

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[8] Even courts in California, whose law *Northern Insurance* purported to apply, have rejected the notion that, under product-line successor liability, insurance coverage *necessarily* follows liability. *See Gen. Acc. Ins. Co. v. Super. Ct.*, 64 Cal. Rptr. 2d. 781, 785 (Cal. Ct. App. 1997) ("It is one thing to deem the successor corporation liable for the predecessor's torts; it is quite another to deem the successor corporation a party to insurance contracts it never signed, and for which it never paid a premium, and to deem the insurer to be in a contractual relationship with a stranger.").

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CERTIFICATION

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