

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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CLEARY GOTTLIEB STEEN & HAMILTON LLP,

Index No. 653829/2013

Plaintiffs,

-against-

**ANSWER OF FEDERAL
INSURANCE COMPANY**

FEDERAL INSURANCE COMPANY,

Defendants.

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Defendant, Federal Insurance Company (“Federal” or “Defendant”), by its attorneys,
Rosner Nocera & Ragone, LLP, as and for its Answer to the Complaint of Plaintiff (the
“Complaint”), alleges as follows:

AS TO THE NATURE OF THE ACTION

1. Denies the allegations contained in Paragraph “1” of the Complaint, except admits upon information and belief that on October 29, 2012, the Plaintiff’s three insured Manhattan locations, including One Liberty Plaza a/k/a 165 Broadway, 83 Maiden lane and 22 Cortland Street (collectively the “Premises”), lost electrical power and/or other related utility services due to flooding from storm Sandy, but denies that Plaintiff’s claimed loss of business income is covered under the policy of insurance issued by Federal to Plaintiff.

AS TO THE PARTIES

2. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph “2” of the Complaint.

3. Admits the allegations contained in Paragraph “3” of the Complaint.

AS TO JURISDICTION AND VENUE

4. With respect to the allegations contained in Paragraph “4” of the Complaint, admits that Plaintiff purports to invoke jurisdiction pursuant to CPLR §302(a) and 1101(b)(1).

5. With respect to the allegations contained in Paragraph “5” of the Complaint, admits Plaintiff claims that venue is proper for the reasons stated therein.

AS TO THE FACTUAL BACKGROUND

6. Denies the allegations contained in Paragraph “6” of the Complaint, except admits that on or about September 1, 2012 Federal issued to Plaintiff a policy of insurance bearing number 3528-83-06 (the “Policy”), but denies that a copy of the Policy is annexed to the Complaint as filed and served.

7. Denies the allegations contained in Paragraph “7” of the Complaint, except admits that subject to its terms the Policy provides certain coverage against loss of business income arising from a Loss of Utilities due to a covered peril, with a policy limit of \$6,500,000 for such Loss of Utilities Additional Coverage, but denies that Plaintiff’s business income loss caused by flood constitutes a loss covered under the Loss of Utilities Additional Coverage, which specifically states its coverage does not apply if a loss is caused by or results from flood.

8. With respect to the allegations contained in Paragraph “8” of the Complaint, admits that the Policy contains the quoted language, which language also states that the Policy’s Additional Coverage for Loss of Utilities “does not apply if the direct physical loss or damage is caused by or results from earthquake or **flood**” (as defined), and respectfully refers this honorable Court to such Policy for all of such terms, conditions, limitations and exclusions.

9. With respect to the allegations contained in Paragraph “9” of the Complaint, admits that the Policy’s Additional Coverage for Loss of Utilities provides that such coverage

“does not apply if the direct physical loss or damage is caused by or results from earthquake or **flood**” (as defined), but denies that such quoted language constitutes the Policy’s “Flood Exclusion” as mischaracterized by Plaintiff, but rather constitutes a “flood limitation” which remains applicable to the Policy’s Loss of Utilities Additional Coverage. Federal admits that the Policy contains a separate “Flood exclusion” applicable to other coverages provided in the Policy, and that the term **flood** is one of the words and phrases which appear in bold print and which have special meanings as defined in the Property/Business Income Conditions and Definitions form in the Policy.

10. Denies the allegations contained in Paragraph “10” of the Complaint, except admits that the Flood Additional Peril Endorsement (“Flood Endorsement”) partially quoted in such paragraph provides Plaintiff with insurance coverage for certain flood losses, but not for Loss of Utilities. The Flood Endorsement did not delete the separate **flood** limitation (as defined) contained in the Loss of Utilities Additional Coverage, since the Flood Endorsement expressly provides that the Flood exclusion and any **flood** limitations are not deleted and remain in effect for the Additional Coverage for Loss of Utilities.

11. Denies the allegations contained in Paragraph “11” of the Complaint, except admits that the Flood Endorsement provides that the Flood exclusion and any **flood** limitations are not deleted and remain in effect for the Loss of Utilities Additional Coverage, and admits that such Additional Coverage is *not* shown in the Schedule referred to, and respectfully refers this honorable Court to the Policy for all of the Policy’s terms, limitations and exclusions.

12. Denies the allegations contained in Paragraph “12” of the Complaint, and denies that the reference to the Business Income and Extra Expense coverage form in the Flood Endorsement is part of the Schedule referred to, or otherwise operates to “restore” coverage

since, *inter alia*, the Loss of Utilities Additional Coverage is *not* listed in the Flood Endorsement Schedule and, as Plaintiff states, such coverage by its terms does not apply to losses caused by or resulting from **lood** (as defined). Federal respectfully refers this honorable Court to the Policy for all of the Policy's terms, limitations and exclusions.

13. With respect to the allegations contained in Paragraph "13" of the Complaint, admits Sandy caused massive flooding in parts of Lower Manhattan on October 29, 2012, and that upon information and belief, flooding to Con Edison's property caused a loss of electrical and other utility power affecting Plaintiff's Premises, and denies knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph "13".

14. Denies the allegations contained in Paragraph "14" of the Complaint, except admits upon information and belief that the Premises lost electrical power and/or other related utility services for a period of time due to flooding from storm Sandy.

15. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in that in Paragraph "15" of the Complaint.

16. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in that in Paragraph "16" of the Complaint.

17. With respect to paragraph "17" of the Complaint, admits that on or about November 2, 2012, Plaintiff, through its broker, Willis Group, submitted a claim to Federal described as "Hurricane Sandy Loss", and Federal previously paid Plaintiff \$179,524 for covered property damage to the Premises and to Plaintiff's Washington DC office location, but denies that the loss of business income claimed in the Complaint constitutes a loss covered under the Policy.

AS TO COUNT ONE: DECLARATORY JUDGMENT

18. In response to paragraph “18” of the Complaint, Federal repeats, realleges and reiterates each and every response set forth above in paragraphs “1” through “17” of this Answer as if set forth fully at length herein.

19. In response to the allegations set forth in Paragraph “19” of the Complaint denies that the loss claimed by Plaintiff constitutes a loss covered under the Policy and denies knowledge or information sufficient to form a belief as to the truth of the remaining allegations in such Paragraph.

20. In response to the allegations in Paragraph “20” of the Complaint, denies that the loss claimed by Plaintiff constitutes a loss covered under the Policy, and denies that the Policy’s Loss of Utilities Additional Coverage covers flood losses, and respectfully refers this honorable Court to such Policy for all its terms, conditions, exclusions and limitations

21. In response to Paragraph “21” of the Complaint, admits upon information and belief that Plaintiff’s claimed loss of Business Income resulted from flooding, but denies that the Policy’s Loss of Utilities Additional Coverage covers flood losses

22. Denies the allegations contained in Paragraph “22” of the Complaint, and denies that the Policy’s Loss of Utilities Additional Coverage covers flood losses

23. With respect to the allegations contained in Paragraph “23” of the Complaint, admits Federal has advised Plaintiff that its business income claim due to loss of utilities from flooding during storm Sandy is not covered and/or is excluded under the Policy, avers that Federal previously paid Plaintiff \$179,524 for covered property damage to the Premises and to Plaintiff’s Washington DC office location, and denies that Plaintiff is entitled to the relief sought.

AS TO COUNT TWO: BREACH OF CONTRACT

24. In response to paragraph “24” of the Complaint, Federal repeats, realleges and reiterates each and every response set forth above in Paragraphs “1” through “23” of this Answer as if set forth fully at length herein.

25. Denies the allegations contained in Paragraph “25” of the Complaint, except admits that notice of claim was given.

26. Denies the allegations contained in Paragraph “26” of the Complaint, except admits Federal has advised Plaintiff that its business income claim due to loss of utilities from flooding during storm Sandy is not covered and/or is excluded under the Policy, avers that Federal previously paid Plaintiff \$179,524 for covered property damage to the Premises and to Plaintiff’s Washington DC office location, and denies that Plaintiff is entitled to the relief sought.

27. Denies the allegations contained in Paragraph “27” of the Complaint.

AS TO THE PRAYER FOR RELIEF

28. Denies that Plaintiff is entitled to the relief requested in paragraphs (A)-(C) of the Prayer for Relief.

AFFIRMATIVE DEFENSES

Defendant Federal, without assuming or altering Plaintiff’s burden of proof on any claims or matters for which Plaintiff bears such burden, alleges for its affirmative defenses as follows:

AS AND FOR A FIRST AFFIRMATIVE DEFENSE

29. Plaintiff’s Complaint fails to state a claim upon which relief may be granted.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE

30. Any liability of Federal, which is denied, is in all events subject to and limited by the Policy’s applicable limits of coverage, limits of insurance, coinsurance provisions, limitations

on coverage, and policy deductible amounts, including without limitation, the Policy's \$6,500,000 Loss of Utilities Additional Coverage limit of liability, and its separate Loss Payment Limitation applicable to any claim under the Policy's Loss of Utilities coverage, the Policy's \$50,000,000 limit of liability for Flood coverage, and all other limitations, conditions, definitions and exclusions otherwise applicable to any coverage under which Plaintiff claims or may claim.

AS AND FOR A THIRD AFFIRMATIVE DEFENSE

31. As admitted by Plaintiff in the Complaint, the Premises consists of three insured locations in New York City, including (1) Plaintiff's law firm offices on the 34th through 45th floors at One Liberty Plaza a/k/a 165 Broadway, (2) a file storage location at 83 Maiden Lane and (3) 22 Cortlandt Street. Upon information and belief, the One Liberty Plaza location is the only one of the Premises that generates business income.

32. Upon information and belief, and as admitted by Plaintiff in the Complaint, Plaintiff's claimed difficulty in operating at its Premises between October 29, 2012 and November 3, 2012, was due to a loss of electrical power or other utility related services.

33. To the extent Plaintiff may claim coverage under the Policy's "Business Income with Extra Expense for Law Firms," such insurance contract provides certain coverages for loss of business income and for extra expenses incurred as a result of the actual impairment of Plaintiff's operations as follows:

Premises Coverages

The following Premises Coverages apply only at those premises for which a Limit Of Insurance applicable to such coverages is shown in the Declarations.

Except as otherwise provided, direct physical loss or damage must:
· be caused by or result from a **covered peril**; and

· occur at, or within 1,000 feet of, the premises, other than a **dependent business premises**, shown in the Declarations.

Business Income and Extra expense

We will pay for the actual

- **Business income** loss you incur due to the actual impairment of your **operations**; or
- **Extra expense** you incur due to the actual or potential impairment of your operations,

During the **period of restoration**, not to exceed the applicable Limit of Insurance for Business Income with Extra Expense shown in the Declarations.

This actual or potential impairment of **operations** must be caused by or result from direct physical loss or damage by a **covered peril to property**, unless otherwise stated.

34. The Premises or any area within 1,000 feet of the Premises did not sustain any direct physical loss or damage covered under the Policy other than minor cracks in the sheetrock and ceiling at One Liberty Plaza and some water damage at the 83 Maiden Lane and 22 Cortlandt Street locations, which had no appreciable impact on Plaintiff's ability to conduct normal business operations at the Premises and for which damage Federal previously paid Plaintiff in full.

35. Accordingly, no coverage is provided to Plaintiff under the Policy's Business Income and Extra Expense section for any loss of **Business Income** or **Extra Expense** (as defined in the Policy) from the alleged impairment of Plaintiff's operations as claimed in the Complaint.

AS AND FOR A FOURTH AFFIRMATIVE DEFENSE

36. Federal incorporates by reference the allegations of the Third Affirmative Defense.

37. In its “Business Income with Extra Expense Insurance For Law Firms” contract, the Policy provides certain limitations upon payment of any business income or extra expense claim caused by or arising from a loss of utilities, as follows:

***Loss Payment
Limitations***

*Loss Or Damage To
Property Used To
Provide Utility Services*

Except as provided for in the Loss of Utilities Additional Coverage, we will not pay for any

business income loss or **extra expense** caused by or resulting from loss or damage to:

- **building;**
 - **personal property of a utility** located either inside or outside of a **building;** or
 - **service property,**
- used by you or a utility to provide you with utility services.

38. Plaintiff’s claimed loss was caused by or resulted from loss or damage either to a building as defined above, or to the types of property defined above, which were used to provide Plaintiff with utility services within the meaning of the foregoing quoted Loss Payment Limitation. As a result, Plaintiff’s business interruption claim only could be covered under the Policy, if at all, under the Policy’s Loss of Utilities Additional Coverage. However, that Additional Coverage does not cover losses caused by or which result from **flood** (as defined), as follows:

Loss Of Utilities

We will pay for the actual:

- **business income** loss you incur due to the actual impairment of your **operations;** and

· **extra expense** you incur due to the actual or potential impairment of your **operations**,

during the **period of restoration**, not to exceed the applicable Limit Of Insurance for Loss Of Utilities shown under Business Income in the Declarations.

This actual or potential impairment of **operations** must be caused by or result from direct physical loss or damage by a **covered peril** to:

· **building**;

· **personal property of a utility** located either inside or outside of a **building**; or

· **service property**,

excluding overhead communication, transmission or distribution equipment, necessary to supply your premises with:

· water supply;

· communication supply;

· power supply;

· natural gas supply;

· sewage treatment; or

· **on-line access**,

services.

This Additional Coverage does not apply if the direct physical loss or damage is caused by or results from earthquake or **flood**.

39. The loss of utility services to the Premises was not caused by direct physical loss from a covered peril to a building as defined above or to the types of property defined above, as required under the “Loss of Utilities Additional Coverage,” but rather was the result of **flood** (as defined) and/or resulted from actions taken by utility service provider Con Edison due to imminent flood conditions.

40. As a result, the loss or damage claimed by Plaintiff is not covered under the Policy.

AS AND FOR A FIFTH AFFIRMATIVE DEFENSE

41. Federal incorporates by reference the allegations of the Third and Fourth Affirmative Defenses.

42. The Policy contains the following provisions under its “Business Income with Extra Expense Insurance For Law Firms” contract:

Words and phrases that appear in **bold** print have special meanings and are defined in the Property/Business Income Conditions and Definitions form included in this policy and the Additional Definition and Amended Definitions Section of this contract.

43. The Policy’s “Property/Business Income Conditions and Definitions” contains the following definition of “Flood” as applicable to Plaintiff’s claim:

Definitions When used with respect to insurance under this Policy:

Flood means:

- waves, tidal water or tidal waves; or
- rising or overflowing or breaking of any boundary,

of natural or man-made lakes, reservoirs, ponds, brooks, rivers, streams, harbors, oceans, or any other body of water or watercourse, whether driven by wind or not.

Flood does not include:

- a **specified peril** that ensues from flood; or
- tsunami resulting from earthquake

44. Upon information and belief, the Premises lost electrical or other utility power on October 29, 2012 due to the flooding of utility service provider Con Edison’s property and/or resulted from actions taken by Con Edison due to imminent flood conditions.

45. As set forth in the Policy’s “Building and Personal Property” section, the Policy’s separate Flood Exclusion provides as follows:

Flood

This insurance does not apply to loss or damage caused by or resulting from:

- waves, tidal water or tidal waves; or
- rising, overflowing or breaking of any boundary, of natural or man-made lakes, reservoirs, ponds, brooks, rivers, streams, harbors, oceans or any other body of water or watercourse, whether driven by wind or not, regardless of any other cause or event that directly or indirectly:

- contributes concurrently to;
- contributes in any sequence to; or
- worsens,

the loss or damage, even if such other cause or event would otherwise be covered.

This Flood exclusion does not apply to ensuing loss or damage caused by or resulting from a **specified peril**.

46. As set forth in the Policy’s Property Insurance Schedule of Forms, the Policy contains an Additional Peril Endorsement with respect to Flood (the “Flood Endorsement”), which states as follows:

Additional Exclusions – Flood

Under Additional Exclusions, and only with respect to the premises shown in the Schedule above, the Flood exclusion is deleted from the forms shown above.

- A. Except as provided in paragraph E, below, this endorsement applies to the:
 1. Premises Coverages;
 2. Additional Coverages; and

3. Debris Removal Coverage,

applicable to the premises shown in the Schedule above, only if a Limit Of Insurance for such coverage is shown in the Declarations at such premises shown in the Schedule above.

47. The Flood Endorsement provides Plaintiff with certain insurance coverage for flood losses, by deleting the Policy's Flood exclusion for the coverages set forth on page 1 of the Flood Additional Peril Endorsement, namely:

This Endorsement applies to the following forms:

ACCOUNTS REC., FINE ARTS, MONEY & SEC., VALUABLE PAPERS
BUILDING AND PERSONAL, PROPERTY
BUSINESS INCOME WITH EXTRA EXPENSE
ELECTRONIC DATA PROCESSING PROPERTY
PROPERTY/BUSINESS INCOME CONDITIONS & DEFINITIONS

48. The flood coverage provided by the Flood Endorsement specifically does *not* apply to certain Premises Coverages or Additional Coverages and in this regard sets forth on page 3 in pertinent part as follows:

B. The Flood exclusion and any **flood** limitations are not deleted and remain in effect for:

1. Civil Authority;
2. Dependent Business Premises;
3. Fungus Clean-up Or Removal;
4. Ingress And Egress;
5. Loss of Utilities; and
6. Pollutant Clean-up And Removal.

Unless these Premises Coverages or Additional Coverages are shown in the Schedule above.

49. The Flood Endorsement therefore did *not* delete the Flood Exclusion or the **flood** limitation with respect to the Additional Coverages for Loss of Utilities, Civil Authority and Ingress and Egress, none of which are shown in the Schedule referred to. As such, the Flood exclusion and the **flood** limitation always remained in effect for the Policy's Loss of Utilities,

Civil Authority and Ingress and Egress Additional Coverages.

50. Any business income loss alleged by Plaintiff in the Complaint was caused by or resulted from the loss of electrical or other utility services due to or resulting from **flood**, as defined in the Policy, and/or from actions taken by utility service provider Con Edison due to imminent flood conditions caused by storm Sandy.

51. As a result, the loss claimed by Plaintiff is not covered under the Policy.

AS AND FOR AN SIXTH AFFIRMATIVE DEFENSE

52. Federal incorporates by reference the allegations of the Third, Fourth and Fifth Affirmative Defenses and asserts that, to the extent applicable, Plaintiff's claim is also excluded from coverage under the Policy's Exclusion for Utility Supply Failure, which provides as follows:

This insurance does not apply to loss or damage caused by or resulting from suspension or reduction of:

- water services;
- electrical or other power services;
- natural gas or other fuel services; or
- Internet or other communication services,
regardless of any other cause or event that:
- contributes concurrently to; or
- contributes in any sequence to,
the loss or damage, even if such other cause or event would otherwise be covered.

This Utility Supply Failure exclusion does not apply:

- if the suspension or reduction of such services is the direct result of direct physical loss or damage caused by or resulting from a peril not otherwise excluded; or
- to ensuing loss or damage caused by or resulting from a specified peril.

53. Federal asserts that any loss or damage which may be claimed by Plaintiff under the Policy's coverages, to which the Utility Supply Failure exclusion applies, is excluded from coverage under the Policy.

AS AND FOR A SEVENTH AFFIRMATIVE DEFENSE

54. In the alternative, and without admitting coverage or liability for Plaintiff's claim, Federal asserts that the damages claimed in the Complaint will be barred and/or reduced in whole or part to the extent Plaintiff failed to mitigate its claimed damages, or to continue or resume its operations with reasonable speed as required under the Policy.

AS AND FOR A EIGHTH AFFIRMATIVE DEFENSE

55. At the time of this Answer, Federal does not know whether additional affirmative defenses, if any, may apply. Federal reserves its right to amend this Answer to assert additional matters constituting an avoidance or affirmative defense which may be revealed through discovery or otherwise.

WHEREFORE, Defendant Federal Insurance Company requests that judgment be entered (i) dismissing the Complaint in its entirety; (ii) for the costs and disbursements of this action; and (iii) granting Federal such other and different relief as may be just and proper.

Dated: New York, New York
January 8, 2014

WHEREFORE, Defendant Federal Insurance Company requests that judgment be entered (i) dismissing the Complaint in its entirety; (ii) for the costs and disbursements of this action; and (iii) granting Federal such other and different relief as may be just and proper.

Dated: New York, New York
January 9, 2014

ROSNER NOCERA & RAGONE, LLP

By: _____

John A. Nocera

John P. Foudy

Scott J. Kantor

Attorneys for Federal Insurance Company
61 Broadway, Suite 1900
New York, New York 10006
(212) 635-2244

TO: **BY MAIL**

Jonathan I. Blackman

CLEARY GOTTLIEB STEEN & HAMILTON, LLP

Attorneys for Plaintiff

One Liberty Plaza

New York, New York 10006

JOHN P. FOUDEY
Attorney at Law
12/13
SUFFOLK COUNTY
EXPIRES MAY 23, 2014

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
) ss:
COUNTY OF NEW YORK)

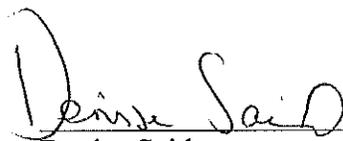
I, Denise Said, being duly sworn, depose and say:

deponent is not a party to the action, is over the age of 18 years and resides in Jersey City, New Jersey.

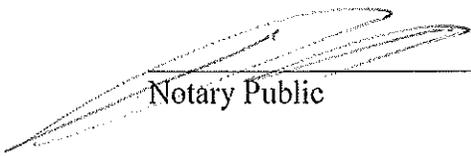
That on January 9, 2014 deponent served the within Answer Of Federal Insurance Company

Upon: Jonathan I. Blackman
 CLEARY GOTTLIEB STEEN & HAMILTON, LLP
 Attorneys for Plaintiff
 One Liberty Plaza
 New York, New York 10006

the addresses designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.


Denise Said

Sworn to before me this
9th day of January, 2014


Notary Public

JOHN P. FOU DY
NOTARY PUBLIC, STATE OF NEW YORK
NO. 02FO5027891
QUALIFIED IN SUFFOLK COUNTY
COMMISSION EXPIRES MAY 23, 2014

CLEARY GOTTLIEB STEEN & HAMILTON LLP,

Plaintiffs,

-against-

FEDERAL INSURANCE COMPANY,

Defendant.

**ANSWER OF FEDERAL
INSURANCE COMPANY**

ROSNER NOCERA & RAGONE, LLP
Attorneys at Law
61 Broadway, Suite 1900
New York, New York 10006
Tel: (212) 635-2244
Fax: (212) 635-0533

To: Service of a copy of the within
is hereby admitted.
Dated: , 2013

Attorneys for

Pursuant to 22 NYCRR 130-1.1, the undersigned attorney admitted to practice in the courts of the State of New York, certifies that, upon information and belief and reasonable inquiry, the contentions contained in the annexed document are not frivolous.

Dated: New York, New York

Esq.

PLEASE TAKE NOTICE:

Notice of Entry

That the within is a (certified) true copy of a _____ duly entered in the office of the clerk of the within named court on _____

Notice of Settlement

That an order _____ of which the within is a true copy will be presented for settlement to the Hon. _____ one of the judges of the within named Court, at _____ on _____, 2013 at _____

Dated: _____
New York, New York

Very truly yours,

ROSNER NOCERA & RAGONE, LLP
ATTORNEYS AT LAW