

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

-----X
FISKER AUTOMOTIVE, INC.,

Plaintiff,

Index No. 654571/12

- against -

**ANSWER AND
AFFIRMATIVE DEFENSES**

XL INSURANCE AMERICA, INC.,

Defendant.
-----X

Defendant XL Insurance America, Inc. ("XL"), by its attorneys, Clausen Miller P.C., as and for its Answer and Affirmative Defenses to Plaintiff's Complaint, states upon information and belief as follows:

NATURE OF THE ACTION

1. Defendant admits that this is a civil action brought by Plaintiff for breach of contract and a declaration of coverage under Policy No. US00012156PR12A ("the Policy") arising out of a claim submitted by Plaintiff for losses it allegedly suffered on or about October 29, 2012 as a result of flooding to 338 Fisker Karma vehicles in Port Newark, New Jersey. Defendant denies that it has failed to honor any commitments under the Policy. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in Paragraph 1 and therefore denies same.

2. Defendant admits that Plaintiff notified it of the loss on or about November 13, 2012 and filed a Proof of Loss on December 3, 2012. Defendant admits that, on December 20, 2012, it rejected Plaintiff's Proof of Loss and provided written notice that it was denying coverage for the claim. Defendant further admits that certain of its representatives met with

representatives of Plaintiff on or about December 7, 2012. Defendant denies the remaining allegations of Paragraph 2.

3. Defendant denies that it has refused to perform its obligations under the Policy or that it forced Fisker to bring the instant lawsuit. Defendant admits that Plaintiff is seeking certain damages in this lawsuit, but Defendant denies that it breached its contract, denies that Plaintiff is entitled to any relief under the Policy and further denies that Plaintiff is entitled to an award of attorneys' fees or costs in bringing this action.

THE PARTIES

4. Defendant admits that Plaintiff is a corporation organized under the laws of Delaware with its headquarters in Anaheim, California. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in Paragraph 4 and therefore denies same.

5. Defendant admits that it is a corporation organized under the laws of Delaware with its principal place of business in Connecticut. Defendant admits that it issued Policy No. US00012156PR12A to Plaintiff and provided coverage pursuant to the terms, conditions, provisions, limitations and exclusions of the Policy. Defendant denies the remaining allegations of Paragraph 5.

JURISDICTION AND VENUE

6. Paragraph 6 states legal conclusions to which no response is required. To the extent a response is required, Defendant admits the allegations of Paragraph 6.

7. Defendant admits that it transacted business within the State of New York and provided services within the State of New York by insuring risks in New York. The remaining

allegations of Paragraph 7 state legal conclusions to which no response is required. To the extent a response is required, Defendant admits the allegations of Paragraph 7.

8. Paragraph 8 states legal conclusions to which no response is required. To the extent a response is required, Defendant admits the allegations of Paragraph 8.

FACTUAL BACKGROUND

I. THE UNDERLYING LOSS

9. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 9 and therefore denies same.

10. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 10 and therefore denies same.

11. Defendant admits that on or about October 29, 2012 a storm surge from Superstorm Sandy caused flooding at the FAPS facility in Port Newark, New Jersey, causing certain damage to Plaintiff's vehicles. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in Paragraph 11 and therefore denies same.

II. THE XL INSURANCE POLICY

Insuring Agreements and Nature of Coverage

12. Defendant admits that it issued Policy Number US00012156PR12A, effective from July 19, 2012 through July 19, 2013, to Plaintiff. Defendant admits that a copy of the Policy is attached to the Complaint as Exhibit A. Defendant states that the Policy is the best evidence of its terms, conditions, provisions, exclusions, and limitations, which are expressly pled as if copied herein. Any allegations of fact or law which purport to modify, extend, alter, or

otherwise vary the terms, conditions, provisions, exclusions, and limitations of the Policy are expressly denied.

13. Defendant admits that the Policy contains certain language quoted in Paragraph 13; Defendant denies that the language quoted in Paragraph 13 is complete and states that the Policy language must be read as a whole. Defendant states that the Policy is the best evidence of its terms, conditions, provisions, exclusions, and limitations, and any allegations of fact or law which purport to modify, extend, alter or otherwise vary the terms, conditions, provisions, exclusions, and limitations of the Policy are expressly denied.

14. Defendant admits that the Policy contains certain language quoted in Paragraph 14; Defendant denies that the language quoted in Paragraph 14 is complete and states that the Policy language must be read as a whole. Defendant states that the Policy is the best evidence of its terms, conditions, provisions, exclusions, and limitations, and any allegations of fact or law which purport to modify, extend, alter or otherwise vary the terms, conditions, provisions, exclusions, and limitations of the Policy are expressly denied.

15. Defendant admits that the Policy contains certain language quoted in Paragraph 15; Defendant denies that the language quoted in Paragraph 15 is complete and states that the Policy language must be read as a whole. Defendant states that the Policy is the best evidence of its terms, conditions, provisions, exclusions, and limitations, and any allegations of fact or law which purport to modify, extend, alter or otherwise vary the terms, conditions, provisions, exclusions, and limitations of the Policy are expressly denied.

16. Defendant admits that the Policy contains certain language quoted in Paragraph 16; Defendant denies that the language quoted in Paragraph 16 is complete and states that the Policy language must be read as a whole. Defendant states that the policy is the best evidence of

its terms, conditions, provisions, exclusions, and limitations, and any allegations of fact or law which purport to modify, extend, alter or otherwise vary the terms, conditions, provisions, exclusions, and limitations of the Policy are expressly denied.

Limits of Coverage Potentially Applicable to the Loss

17. Defendant admits that Paragraph F of the Commercial Property Insurance Declarations contains a \$100,000,000 per occurrence limit subject to a deductible, but denies that Plaintiff's citation to the Policy Limit is complete and states that the Policy language must be read as a whole. Defendant states that the Policy is the best evidence of the terms, conditions, provisions, limitations and exclusions and any allegations of fact or law which purport to modify, extend, alter or otherwise vary the terms, conditions, provisions, exclusions, and limitations of the Policy are expressly denied.

18. Defendant denies Plaintiff's allegations regarding the Premises and Transit provisions of the Policy contained in Paragraph 18. Defendant states that the Policy is the best evidence of the terms, conditions, provisions, limitations and exclusions and any allegations of fact or law which purport to modify, extend, alter or otherwise vary the terms, conditions, provisions, exclusions, and limitations of the Policy are expressly denied.

19. Defendant admits that the Policy contains certain language quoted in Paragraph 19; Defendant denies that the language quoted in Paragraph 19 is complete and states that the Policy language must be read as a whole. Defendant states that the Policy is the best evidence of its terms, conditions, provisions, exclusions, and limitations, and any allegations of fact or law which purport to modify, extend, alter or otherwise vary the terms, conditions, provisions, exclusions, and limitations of the Policy are expressly denied.

20. Defendant admits that the Policy contains certain language quoted in Paragraph 20; Defendant denies that the language quoted in Paragraph 20 is complete and states that the Policy language must be read as a whole. Defendant states that the Policy is the best evidence of its terms, conditions, provisions, exclusions, and limitations, and any allegations of fact or law which purport to modify, extend, alter or otherwise vary the terms, conditions, provisions, exclusions, and limitations of the Policy are expressly denied.

21. Defendant admits that the Policy contains certain language quoted in Paragraph 21; Defendant denies that the language quoted in Paragraph 21 is complete and states that the Policy language must be read as a whole. Defendant states that the Policy is the best evidence of its terms, conditions, provisions, exclusions, and limitations, and any allegations of fact or law which purport to modify, extend, alter or otherwise vary the terms, conditions, provisions, exclusions, and limitations of the Policy are expressly denied.

22. Defendant admits that the Policy contains certain language quoted in Paragraph 22; Defendant denies that the language quoted in Paragraph 22 is complete and states that the Policy language must be read as a whole. Defendant states that the Policy is the best evidence of its terms, conditions, provisions, exclusions, and limitations, and any allegations of fact or law which purport to modify, extend, alter or otherwise vary the terms, conditions, provisions, exclusions, and limitations of the Policy are expressly denied.

23. Defendant admits that the Policy contains certain language quoted in Paragraph 23; Defendant denies that the language quoted in Paragraph 23 is complete and states that the Policy language must be read as a whole. Defendant states that the Policy is the best evidence of its terms, conditions, provisions, exclusions, and limitations, and any allegations of fact or law

which purport to modify, extend, alter or otherwise vary the terms, conditions, provisions, exclusions, and limitations of the Policy are expressly denied.

24. Defendant admits that Paragraph G of the Commercial Property Insurance Declarations contains certain language addressing application of sublimits; Defendant denies that Plaintiff's characterization of Paragraph G is accurate or complete and states that the Policy language must be read as a whole. Defendant further states that the Policy is the best evidence of its terms, conditions, provisions, exclusions, and limitations, and any allegations of fact or law which purport to modify, extend, alter or otherwise vary the terms, conditions, provisions, exclusions, and limitations of the Policy are expressly denied.

25. Defendant denies the allegations of Paragraph 25. Defendant further states that the policy is the best evidence of its terms, conditions, provisions, exclusions, and limitations, and any allegations of fact or law which purport to modify, extend, alter or otherwise vary the terms, conditions, provisions, exclusions, and limitations of the Policy are expressly denied.

26. Defendant denies the allegations of Paragraph 26.

27. Defendant denies the allegations of Paragraph 27.

28. Defendant admits that the Policy contains certain language quoted in Paragraph 28; Defendant denies that the language quoted in Paragraph 28 is complete and states that the Policy language must be read as a whole. Defendant states that the Policy is the best evidence of its terms, conditions, provisions, exclusions, and limitations, and any allegations of fact or law which purport to modify, extend, alter or otherwise vary the terms, conditions, provisions, exclusions, and limitations of the Policy are expressly denied.

29. Defendant admits that the quoted language does not follow the sublimits for Named Storm and Flood; Defendant denies that the language quoted in Paragraph 28 is complete and states that the Policy language must be read as a whole. Defendant states that the Policy is the best evidence of its terms, conditions, provisions, exclusions, and limitations, and any allegations of fact or law which purport to modify, extend, alter or otherwise vary the terms, conditions, provisions, exclusions, and limitations of the Policy are expressly denied.

30. Defendant denies Plaintiff's characterization of the Policy language in Paragraph 30 and states that the Policy is the best evidence of its terms, conditions, provisions, limitations and exclusions, and any allegations of fact or law which purport to modify, extend, alter or otherwise vary the terms, conditions, provisions, exclusions and limitations of the Policy are expressly denied.

III. THE CLAIM

31. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 31 and therefore denies same.

32. Defendant admits the allegations of Paragraph 32.

33. Defendant admits the allegations of Paragraph 33.

34. Defendant denies the allegations of Paragraph 34.

35. Defendant admits that the Fisker vehicles that were allegedly damaged had been unloaded at the FAPS facility at various times from various ocean vessels. Defendant denies the remaining allegations of Paragraph 35.

36. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 36 and therefore denies same.

37. Defendant denies the allegations of Paragraph 37.

38. Defendant denies the allegations of Paragraph 38.

39. Defendant admits that the Fisker vehicles which are the subject of Plaintiff's claim were damaged by flooding resulting from a Named Storm. Defendant denies the remaining allegations of Paragraph 39.

FIRST CLAIM FOR RELIEF
(BREACH OF CONTRACT; SPECIFIC PERFORMANCE)

40. Defendant repeats and incorporates by reference its answers to Paragraphs 1 through 39 as if fully set forth in this Paragraph 40.

41. Defendant denies the allegations of Paragraph 41.

42. Defendant admits that the Policy is a valid and enforceable contract but denies that it provides insurance coverage for the alleged loss suffered by Plaintiff.

43. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 43 and therefore denies same.

44. Defendant denies the allegations of Paragraph 44.

44.[SIC] Defendant admits that it has denied Plaintiff's claim and has not tendered payment to Plaintiff, as Plaintiff's alleged loss is not covered under the Policy.

45. Defendant denies the allegations of Paragraph 45.

46. Defendant denies the allegations of Paragraph 46.

47. Defendant denies that Plaintiff is entitled to judgment awarding specific performance or the payment of damages in any amount under the Policy.

SECOND CLAIM FOR RELIEF
(DECLARATION OF COVERAGE AND OF APPLICABLE LIMITS)

48. Defendant repeats and incorporates by reference its answers to Paragraphs 1 through 47 as if fully set forth in this Paragraph 48.

49. XL admits that the Policy provides certain coverage for Property in Transit subject to all terms, conditions, provisions, limitations and exclusions of the Policy; Defendant denies the remaining allegations of Paragraph 49.

50. Defendant denies the allegations of Paragraph 50.

51. Defendant denies the allegations of Paragraph 51.

52. Defendant admits that the Policy provides up to \$100,000,000 in coverage for losses resulting from a Named Storm, subject to the terms, conditions, provisions, limitations and exclusions of the Policy. Defendant denies the remaining allegations of Paragraph 52.

53. Defendant admits that the Policy provides up to \$50,000,000 in coverage for losses resulting from Flood, subject to the terms conditions, provisions, limitations and exclusions of the Policy.

54. Defendant denies the allegations of Paragraph 54.

55. Defendant denies the allegations of Paragraph 55.

56. Defendant denies the allegations of Paragraph 56, and denies that the Policy covers any of Plaintiff's alleged losses.

WHEREFORE, Defendant XL Insurance Company of America, Inc. respectfully requests that this Court enter judgment dismissing Plaintiff's Complaint and award it costs, fees and such other relief as this Court deems proper.

AFFIRMATIVE DEFENSES

First Affirmative Defense

57. Plaintiff's Complaint fails to state a claim against Defendant upon which relief can be granted.

Second Affirmative Defense

58. Plaintiff has no capacity to sue this answering Defendant.

Third Affirmative Defense

59. All causes of action alleged in the Complaint are barred by the doctrine of waiver.

Fourth Affirmative Defense

60. All causes of action alleged in the Complaint are barred by the doctrine of ratification.

Fifth Affirmative Defense

61. All causes of action alleged in the Complaint are barred by the doctrine of estoppel.

Sixth Affirmative Defense

62. Plaintiff's Claims are subject to all of the terms, conditions, provisions, limitations and exclusions of Policy No. US00012156PR12A, issued for the policy period July 19, 2012 to July 19, 2013. Defendant's Policy speaks for itself and is the best evidence of its terms, conditions, provisions, limitations, and exclusions that are specifically plead herein by reference.

Seventh Affirmative Defense

63. On or about October 29, 2012, Superstorm Sandy hit the east coast of the United States resulting in flooding to the FAPS facility located at 371 Craneway Drive, Port Newark, New Jersey.

64. Three hundred thirty-eight (338) Fisker Karma vehicles were located in parking areas at the facility at the time Superstorm Sandy hit.

65. As of October 29, 2012, the 338 vehicles had been at the FAPS facility for periods of time ranging from a minimum of 80 days up to 363 days.

66. Fisker has alleged that as of October 29, 2012, many of the vehicles were subject to a safety recall requiring the replacement of cooling fans before they could be lawfully distributed to dealerships. Fisker also has alleged that some of the vehicles required the replacement of lithium ion batteries and software updates.

67. The majority of the 338 vehicles were located in a high hazard flood zone.

68. Substantial numbers of vehicles were categorized as "unassigned" and had not been consigned to dealers.

69. The Policy contains the following relevant provisions:

Physical Property Section

I. Property Interests Insured

Subject to all other provisions, this policy insures:

E. Transit

1. Damage to personal property included within Insured Property, while in transit within the Territory, including the navigable inland fresh waterways therein, by any means of conveyance from the time the property is moved for the purpose of loading and continuously thereafter while awaiting and during loading and unloading and in temporary storage, including temporary storage on any conveyance intended for use for any outbound shipment or used for inbound shipment, including during deviation and delay, until safely delivered and accepted at place of final destination.
2. This transit insurance includes personal property:
 - (a) Shipped by or to the Insured at the Insured's risk, while such property is in the due course of transit within the political subdivisions of a country within the Territory; and
 - (b) Sold and shipped by the Insured under terms of F.O.B. point of origin or other terms usually regarded as terminating the shipper's responsibility short points of delivery. (page 11 of 50)

* * *

II. Property Not Insured

This policy does not insure the following types of property or any Damage to them:

* * *

T. Property in transit:

1. Insured under any marine import or export ocean cargo insurance from the following time period:

Any export shipment once the earlier of the following occurs:

* * *

Any import shipment until the later of the following occurs:

- (a) The shipment is unloaded from the importing vessel or conveyance; or
- (b) Coverage under an ocean marine or other insurance policy covering the shipment ends; (page 13 of 50)

70. There is no coverage for Plaintiff's alleged loss under the XL Policy because the 338 Fisker Karma vehicles do not constitute Insured Property while in transit within the Policy Territory under the Policy.

Eighth Affirmative Defense

71. The Policy provides as follows with regard to sublimits and their application:

G. Sublimits

In the event of an Occurrence insured under this policy, the following sublimits apply to any claim made by the Insured.

All sublimits fall within the applicable Occurrence limit stated in **Paragraph F.** above and do not increase it. If more than one sublimit applies to an Occurrence, those sublimits are payable cumulatively up to the applicable Occurrence limit; except, sublimits stated below for perils (if any; and including by way of illustration and not limitation Earth Movement, Flood or Named Storm) are the maximum amount the Company shall pay under any circumstances for all Damage and Time Element loss caused by or resulting from each such peril, per Occurrence subject to any applicable annual aggregates. If one such peril ('initial peril') involves Damage or Time Element subject to any sublimited coverage or by any other sublimited peril (including by way of illustration and not limitation, Flood arising from or related to Named Storm), the maximum amount payable for that resulting coverage or peril is its respective sublimit which, when paid, also applies in that amount to reduce the remaining sublimit for the 'initial peril'. By entering into this insurance, the Insured and the Company agree that all such Damage and Time Element was proximately caused by the 'initial peril' and is subject to that sublimit.

All sublimits are per Occurrence unless otherwise stated. When a sublimit is stated as applying in the 'annual aggregate', the maximum the Company

shall pay under this policy under any circumstances for such matter will not exceed the stated aggregate limit during any policy year.

\$50,000,000 **Flood**, per Occurrence and the annual aggregate, except not to exceed the following per Occurrence and annual aggregate limits which are a part of and not in addition to this general **Flood** aggregate limit:

\$10,000,000 **High Hazard Flood Zones**

\$30,000,000 **Moderate Hazard Flood Zones**

\$5,000,000 **newly acquired Locations**, except no coverage is provided for Locations in **High Hazard Flood Zones**

\$2,500,000 **Unnamed / Unreported Locations**, except no coverage is provided for Locations in **High Hazard Flood Zones**

\$1,000,000 **errors and omissions**

Included **Named Storm** except, not to exceed the following which are a part of and not in addition to this general **Named Storm** limit:

\$5,000,000 **newly acquired Locations**, except no coverage is provided for Locations in **High Hazard Wind Zones**

\$2,500,000 **Unnamed / Unreported Locations**, except no coverage is provided for Locations in **High Hazard Wind Zones**

\$1,000,000 **Errors and Omissions**

\$2,500,000 **Unnamed/Unreported Locations**: *This coverage may be further sublimited elsewhere for certain perils*

* * *

\$5,000,000 **transit**

72. The Fisker vehicles located at the FAPS facility were not in transit when the loss occurred and the transit coverage provided under the Policy does not apply.

73. Pleading in the alternative, if the Fisker vehicles are found to constitute property in transit under the Policy, which Defendant denies, the Policy's \$5,000,000 transit sublimit applies to limit Fisker's loss.

WHEREFORE, Defendant XL Insurance Company of America, Inc. respectfully requests that this Court enter judgment dismissing Plaintiff's Complaint and award it costs, fees and such other relief as this Court deems proper.

Dated: New York, New York
January 30, 2013

CLAUSEN MILLER P.C.



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