MERCK & CO., INC., and INTERNATIONAL INDEMNITY, LTD., Plaintiff, v. ACE AMERICAN INSURANCE COMPANY, et al. Defendants	SUPERIOR COURT OF NEW JERSEY LAW DIVISION, UNION COUNTY DOCKET NO.: UNN-L-2682-18 CIVIL ACTION ORDER

THIS MATTER, having come before the court on Plaintiff's Motion for Partial Summary Judgment declaring that the War or Hostile Acts exclusion be deemed inapplicable to the current dispute, and Defendants' Cross-Motion to deem the same exclusion to be applicable, and the court having considered the pleadings, submissions, and arguments of counsel, and for good cause shown and the reasons stated in the attached opinion:

IT IS on this 6th DAY OF DECEMBER, 2021;

ORDERED, that Plaintiff's Motion for Partial Summary Judgment is GRANTED, and Defendants' Cross Motion for Partial Summary Judgment is DENIED.

Thomas J. Walsh

HON. THOMAS J. WALSH, J.S.C.

cc: Court Clerk

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

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Procedural History

Pursuant to a Case Management Order agreed to between the parties, on October 12th and 13th, 2021, the parties herein argued numerous Motions, both dispositive and non-dispositive. What follows is the court's decision as to the Cross-Motions for Summary Judgment as what has alternately been called the War Exclusion or Hostile Acts Exclusion as contained in the insurance contracts that are the source of this dispute.

Statement of Facts

On June 27, 2017, it is undisputed that Plaintiff Merck & Co. Inc.'s computer systems were infected by a malware which affected computers in countries around the world. In Plaintiff's case, it alleges that the damage spread to 40,000 computers and the resulting losses total more than $1.4 billion. Merck and its' captive insurer, International Indemnity, Inc. (hereinafter together, "Merck") had purchased $1.75 billion in property insurance to protect against this type of loss. The "all risks" policies provide coverage for loss or damage resulting from destruction or corruption of computer data and software. The existence of the policies and the nature of the coverage are not in dispute. However, Defendant Insurers contend that the

policy contains an applicable exclusion given the source of the malware, which they argue was an instrument of the Russian Federation as part of its' ongoing hostilities against the nation of Ukraine. The parties dispute the issue of whether the facts show conclusively for purposes of summary judgment that the malware, called 'Notpetya', was an instrument of the Russian Government. Insurers claim that the evidence overwhelmingly show that it was, such that no reasonable fact finder could conclude otherwise, and that the policy exclusion applies. Merck argues there are significant facts which show it was not an official state action, but rather was a form of ransomware, and moreover that even if it was instigated by Russia to harm Ukraine, the exclusion would still not apply. Needless to say, if the court agrees with their second argument, the first argument loses all relevancy. The exclusion language is identical in almost all of the policies in question. It reads as follows:

i. Hostile/Warlike Action Exclusion Language

A. 1) Loss or damage caused by hostile or warlike action in time of peace or war, including action in hindering, combating, or defending against an actual, impending, or expected attack:

a) by any government or sovereign power (de jure or de facto) or by any authority maintaining or using military, naval or air forces;
b) or by military, naval, or air forces;
c) or by an agent of such government, power, authority or forces;

This policy does not insure against loss or damage caused by or resulting from Exclusions A., B., or C., regardless of any other cause or event contributing concurrently or in any other sequence to the loss.

Legal Analysis

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c). In Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520 (1995), the New Jersey Supreme Court set forth a new standard for summary judgment. The Court held that trial courts must determine whether an alleged disputed issue of fact is genuine by deciding:

> A determination whether there exists a genuine issue of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in a light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged dispute issue in favor of a non-moving party. ... The import of our holding is that when the evidence "is so one-sided that one party must prevail as a matter of law," the trial court *should not hesitate* to grant summary judgment. If there exists a single unavoidable resolution of the alleged dispute of fact, that issue should be considered *insufficient* to constitute a "genuine issue of material fact" for purposes of R. 4:46-2.

Id. at 540 (citations omitted, emphasis added). As such, a summary judgment motion should be denied only when the non-moving party puts forth evidence that creates a genuine issue of material fact. Id.

Normally, Insurance policies are contracts of adhesion, and New Jersey courts scrutinize their terms and application because of the great "imbalance between insurance companies and insureds in their respective understanding of the [policies'] terms and conditions." Zacarias v. Allstate Ins. Co., 168 N.J. 590, 594, 775 A.2d 1262 (2001). However, "the 'sophistication' and 'knowledge' of an insured may be a factor in determining whether an insurance policy is a 'contract of adhesion'." Diamond Shamrock Chemicals Co. v. Aetna Casuatly & Surety

Company, 178 N.J. Super 167, at 209 (App Div. 1992) (citing to Werner Industries, Inc. v. First State Ins. Co., 112 N.J. 30, at 38 (1988). While Merck certainly qualifies in all ways as a sophisticated and knowledgeable party, in the instant matter, there is no indication that the exclusion in question was negotiated and was, for all intents and purposes, standard language.

The words of an insurance policy should be given their plain meaning, but when the language used creates an ambiguity, the policy should be interpreted to conform to the reasonable expectations of the insured. Kievit v. Loyal Protect. Life Ins. Co., 34 N.J. 475, 482, 170 A.2d 22 (1961).

Yet, an insurance policy is not ambiguous merely because two conflicting interpretations have been offered by the litigants. Rosario v. Haywood., 351 N.J. Super. 521, 530-531, 799 A.2d 32, 38-39 (App.Div.2002), (citing Powell v. Alemaz, Inc., 335 N.J. Super. 33, 44, 760 A.2d 1141, 1147 (App.Div.2000)). A genuine ambiguity exists when the "phrasing of the policy is so confusing that the average policyholder cannot make out the boundaries of coverage." Simonetti v. Selective Ins. Co., 372 N.J. Super. 421, 428-29 (App. Div. 2004).

Additionally, the insured's 'reasonable expectations in the transaction may not justly be frustrated and courts have properly molded their governing interpretative principles with that uppermost in mind.' Allen v. Metropolitan Life Ins. Co., 44 N.J. 294, 305, 208 A.2d 638[, 644] (1965). Moreover, New Jersey Courts have recognized the importance of construing contracts of insurance to reflect the reasonable expectations of the insured in the face of ambiguous language and phrasing, see State, Dep't of Envtl. Protection v. Signo Trading Int'l., 130 N.J. 51, 62, 612 A.2d 932[, 938] (1992), and in exceptional circumstances, when the literal meaning of the policy is plain. See Werner Indus. v. First State Ins. Co., 112 N.J. 30, 35-36, 548 A.2d 188[, 191]

(1988) ('At times, even an unambiguous contract has been interpreted contrary to its plain meaning so as to fulfill the reasonable expectations of the insured.')

In the present case, it is noteworthy that the policies in this case are "all risks" policies. "An 'all-risk' policy creates a 'special type of insurance extending to risks not usually contemplated, and recovery under the policy will generally be allowed, at least for all losses of a fortuitous nature, in the absence of fraud or other intentional misconduct of the insured, unless the policy contains a specific provision expressly excluding the loss from coverage." Victory Peach Group, Inc. v. Greater New York Mutual Insurance Co., 310 N.J. Super. 82, 88 (App. Div. 1998) (citing 43 Am.Jur.2d Insurance §505 (1982). So the question falls as to whether the exclusion applies, giving all favorable inferences of facts to the non-moving Insurers.

The burden of proof is on the insurer to show that a policy exclusion applies so that it may properly deny coverage. Princeton Ins. Co. v. Chunmuang, 151 N.J. 80, 96 (1997). In assessing such an exclusion, courts look at the policy "according to its plain and ordinary meaning," Longobardi v. Chubb Ins. Co., 121 N.J. 530, 537 (1990), to ascertain the "clear import and intent of a policy exclusion." Westchester Fire Ins. Co. v. Continental Ins. Co., 126 N.J. Super. 29, 41 (App. Div. 1973). "In the absence of an ambiguity, a court should not engage in a strained construction to support the imposition of liability." Longobardi, 121 NJ at 537.

Each exclusion is meant to be read with the insuring agreement, independently of every other exclusion. The exclusions should be read seriatim, not cumulatively. If any one exclusion applies there should be no coverage, regardless of inferences that might be argued on the basis of exceptions or qualifications contained in other exclusions. There is no instance in which an exclusion can properly be regarded as inconsistent with another exclusion, since they bear no relationship with one another. Weedo v. Stone-E-Brick, Inc., 81 N.J. 233, 248 (1979).

As our Supreme Court said in Flomerfelt v. Cardiello, 202 N.J. 432, 441-42 (2010):

> Exclusionary clauses are presumptively valid and are enforced if they are "specific, plain, clear, prominent, and not contrary to public policy." Princeton Ins. Co. v. Chunmuang, 151 N.J. 80, 95, 698 A.2d 9 (1997) (quoting Doto, *supra*, 140 N.J. at [*442] 559, 659 A.2d 1371); *see* Zacarias, *supra*, 168 N.J. at 601-02, 775 A.2d 1262 (holding that intra-family exclusion in boatowners' policy precluded coverage); Boddy v. Cigna Prop. & Cas. Cos., 334 N.J. Super. 649, 659-60, 760 A.2d 823 (App.Div.2000) (enforcing homeowners' [***20] policy exclusion for "motorized land vehicles"). If the words used in an exclusionary clause are clear and unambiguous, "a court should not engage in a strained construction to support the imposition of liability." Longobardi, *supra*, 121 N.J. at 537, 582 A.2d 1257; *see* Cobra Prods., Inc. v. Fed. Ins. Co., 317 N.J. Super. 392, 400-01, 722 A.2d 545 (App.Div.1998), *certif. denied*, 160 N.J. 89, 733 A.2d 494 (1999).
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> We have observed that "[i]n general, insurance policy exclusions must be narrowly construed; the burden is on the insurer to bring the case within the exclusion." Am. Motorists Ins. Co. v. L-C-A Sales Co., 155 N.J. 29, 41, 713 A.2d 1007 (1998) (quoting Chunmuang, *supra*, 151 N.J. at 95, 698 A.2d 9). As a result, exclusions are ordinarily strictly construed against the insurer, Aetna Ins. Co. v. Weiss, 174 N.J. Super. 292, 296, 416 A.2d 426 (App.Div.), *certif. denied*, 85 N.J. 127, 425 A.2d 284 (1980), and if there is more than one possible interpretation of the language, courts apply the meaning that supports coverage rather than the one that limits it, Cobra Prods., *supra*, 317 N.J. Super. at 401, 722 A.2d 545.

In the matter of Aetna Ins. Co. v. Weiss, *supra,* the Appellate Division upheld a decision by the trial court showing that a moped being operated by the policyholder's daughter at the time of an accident resulting in her death did not fit into an exclusion involving the operation of "any motor vehicle owned or operated by or rented or loaned to any insured". In agreeing with the trial court, the Appellate Division stated, "If there is any doubt, uncertainty or ambiguity in the phraseology of a policy, or if the phraseology is susceptible to two meanings, the construction favoring coverage must be adopted." Id. at 297 (citing Kook v. American Sur. Co. of N.Y., 88 N.J. Super. 43, 52 (App. Div. 1965) The Aetna court went on to say, "One of the factors which the courts must consider in construing language of a policy is whether the use by the insurer of alternative or more precise language would have 'put the matter beyond reasonable question'."

Id. at 297 (citing Mazzilli v. Accident & Cas. Ins. Co. of Winterthur, 35 N.J. 1, 7 (1961) In meeting their burden, "Plaintiff [Insurer] must show that the insured's interpretation of the exclusionary clause is entirely unreasonable." Aetna, supra, at 97. For the reasons that follow, the court finds that the Insurers cannot meet that burden.

The court starts by giving the words in the exclusion their "ordinary meaning". The exclusion cites to "hostile or warlike action". As Plaintiffs correctly note, warlike can only be interpreted as "like war", citing to the Oxford English Dictionary. That same dictionary defines 'hostile' as "of, pertaining to, or characteristic of an enemy; pertaining to or engaged in actual hostilities.". Merck maintains its' reasonable understanding of this exclusion involved the use of armed forces, and all of the caselaw on the war exclusion supports this interpretation.

In Stanbery v. Aetna, 26 N.J. Super. 498 (Law Div. 1953) Plaintiff's husband procured a life insurance policy from defendant. The policy contained an exclusion for death occurring before a certain time as a result of military service in time of war. Plaintiff's husband was killed while serving in the military in Korea by a mine explosion. Plaintiff applied for benefits under the policy and was paid the policy's face value. Her demand for further payment was refused, and plaintiff brought suit. The court entered judgment for defendant on the grounds that the term "war" as used in the exclusion was to be given its usual and ordinary meaning. The conflict in Korea fit within this meaning, and therefore, plaintiff's husband's service in the military at the time of his death fell within the policy's exclusion. The court in Stanbery wrote, "the word "war" when used in a private contract or document should not be construed on a public or political basis, in a legalistic or technical sense, but should be given its ordinary, usual and realistic meaning, actual hostilities between the armed forces of two or more nations or states de facto or de jure. Stanbery v. Aetna Life Ins. Co., 26 N.J. Super. at 505.

In Pan American World Airways, Inv. v. Aetna Casualty & Surety, 368 F. Supp. 1098 (S. D. N.Y. 1973), Plaintiff sued under its' all risk policy in a situation involving a plane hijacked and then destroyed by members aligned with a terrorist organization. The trial court rejected the Defendant's claimed exclusion under a differently worded war exclusions clause, holding "It seems safe to conclude that reasonable insurers and insureds cannot be deemed to have imagined such things when they used the terms "war" and "warlike operations." This does not mean, we may recall, that they were unaware of terrorist projects like hijackings, however, that such projects were not fairly identified in the standard exclusion clauses..." Id. at 1132

In International Dairy Engineering Co. of Asia, Inc. v. American Home Assurance Company, 352 F. Supp. 827 (N.D. Cal. 1970), the District Court found that the war exclusions clause did apply when Plaintiff's warehouse in an active war zone caught fire and burned when a flare was dropped by an unidentified airplane. The court held that it was uncontroverted that the warehouse was in an area where hostilities and warlike operations were ongoing, and the flare was dropped as part of combat operations.

In Universal Cable Prods., LLC v. Atlantic Specialty Ins. Co., 929 F.3d. 1143 (9th Cir. 2019), the 9th Circuit Court of Appeals reversed the decision of the trial court granting Defendant Insurer Summary Judgment under a war exclusions clause when Plaintiff was forced to move operations due to Hamas firing rockets into Israel, holding that the clause required hostilities between de jure or de facto sovereigns, of which Hamas was not.

In Queens Ins. Co. v. Globe & Rutgers Fire Ins. Co., 282 F. 976 (2nd. Cir. 1922), the Circuit Court affirmed a trial court ruling that two ships colliding at sea during a time of war was covered by a Marine Policy and not the War Risk Insurance Policy. In doing so, the court reasoned; "In order to impose liability under the war risk clause policy, 'all forms of hostilities or

warlike operations of whatever kind' must consist of some form or kind of hostility or warlike operations which have proximately caused the loss. **Remote consequences of hostilities cannot become a recoverable loss, even if they may be said to be proximately caused by something itself ascribable as a consequence of hostilities.**" Id. at 979 (emphasis added) (citing to British Steamship v. The King (1921) 1 A.C. 99, 107, 131

In Holiday Inns, Inc. v. Aetna Ins. Co., 571 F. Supp. 1463 (S.D.N.Y. 1983), Plaintiff's hotel in Beirut, Lebanon had been severely damaged by a battle between factions within Lebanon. In finding that an exclusion that included insurrection, civil war and war would not prevent Plaintiff recovering under the policy, the court cited various principles as previously cited in the Pan Am. (supra) case, namely: "Exclusions 'will be given the interpretation which is most beneficial to the assured'. To avoid coverage, 'it is not sufficient for the all risk insurers' case for them to offer a reasonable interpretation under which the loss is excluded; they must demonstrate that in interpretation favoring them is the only reasonable reading of at least one of the relevant terms of exclusion… *Contra proferentem* ' defines the scope of coverage as much as if it were a clause in the all risk policies'; experienced all risk insurers must expect 'the exclusions drafted by them to be construed narrowly against them.'" Id. at 1464-65

Given the plain meaning of the language in the exclusion, together with the foregoing examination of the applicable caselaw, the court unhesitatingly finds that the exclusion does not apply. As Plaintiff correctly notes in its' brief, no court has applied a war (or hostile acts) exclusion to anything remotely close to the facts herein. The evidence suggests that the language used in these policies has been virtually the same for many years. It is also self-evident, of course, that both parties to this contract are aware that cyber attacks of various forms, sometimes from private sources and sometimes from nation-states have become more common. Despite

this, Insurers did nothing to change the language of the exemption to reasonably put this insured on notice that it intended to exclude cyber attacks. Certainly they had the ability to do so. Having failed to change the policy language, Merck had every right to anticipate that the exclusion applied only to traditional forms of warfare. Given the rules of construction, Merck's position that they did not anticipate that the exclusion would be applied to acts of cyber based attacks reasonably shows that the expectation of the insured was that the exclusion applied only to traditional forms of warfare. Accordingly, the court finds that the exclusion is not applicable under the facts presented.

Conclusion

For all of the foregoing reasons, the court finds that Plaintiff is entitled to summary judgment that the hostile or warlike acts exclusion is not applicable to the instant dispute and the Defendants' Motion is denied.