IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

HOWARD MORRIS, on behalf of himself and all others similarly situated, Plaintiff, v. ASSICURAZIONI GENERALI GROUP, S.p.A., GENERALI US BRANCH, and GENERALI GLOBAL ASSISTANCE, INC. Defendants.	))))))))))))	Case No. 20-CV-4430

MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

This case concerns a travel insurance policy (the "Policy") purchased by Plaintiff and underwritten by Generali US Branch and allegedly administered by Generali Global Assistance, Inc. (jointly, "Generali").[1] Plaintiff paid a single, undivided premium to cover a package of pre- and post-departure risks related to a $12,600 cruise that he was scheduled to take from Rome to Greece between April 29 and May 9, 2020. The trip was later allegedly cancelled by the cruise operator due to the COVID-19 pandemic. Plaintiff does *not* contend that he experienced any losses that are covered by the Policy. Instead, Plaintiff asserts that the Court should attempt to allocate the actuarial value of the $1,298 premium between pre- and post-departure risks and refund the portion of the premium that he contends Generali did not earn because the trip did not occur.

Plaintiff seeks to bring claims for unjust enrichment and conversion, but those claims fail as a matter of law because a contract—the Policy—governs the parties' obligations. The Policy provides that Plaintiff purchased "single pay, single term" insurance with an undivided premium for a package that included both pre- and post-departure coverages. Compl. Ex. 1 at ECF p. 14 of 32. (not located). As part of his Policy rights, Plaintiff was afforded a "right to examine" the Policy and cancel for a full refund; after that period expired, the Policy provided that "***the payment for this coverage is non-refundable***." *Id.* at ECF p. 10 (emphasis added). Plaintiff did not cancel the Policy during the examination period, and therefore, according to the Policy's express terms, the premium became non-refundable. At that point, Generali had accepted the insured risk—it was at risk that the trip would be cancelled pre-departure for a covered reason, and it also was at risk that the trip would go forward and Plaintiff would suffer a covered loss. There is no implied right to a

[1] For purposes of a motion to dismiss, Defendants accept Plaintiff's well-pled allegations as true, *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009), but Plaintiff's Policy was in fact administered by Customized Services Administrators, Inc., not Generali Global Assistance, Inc.

partial refund of insurance premiums that are expressly non-refundable simply because ***part*** of the covered risk, or even some precursor to part of the covered risk, is not realized.

Plaintiff also asserts claims against Generali's Italian parent, Assicurazioni Generali Group ("AGG"). It is not clear why. The complaint does not allege that AGG had any involvement in issuing the Policy or handling Plaintiff's request for a partial refund, that it received or converted any property, or that it was unjustly enriched. Indeed, the Policy shows that the only parties are U.S. subsidiaries. As a result, Plaintiff has failed to allege a basis for exercising personal jurisdiction over AGG. Plaintiff admits that AGG is an Italian company, and he does not allege that AGG transacted any business with Plaintiff in New York or otherwise engaged in suit-related contacts that would subject itself to jurisdiction here. Similarly, Plaintiff has not stated a plausible claim against AGG and has not attempted to allege a basis for veil-piercing.

BACKGROUND

A. Plaintiff's planned trip

Plaintiff resides in Naples, Florida. Compl. ¶ 10. On February 13, 2020, Plaintiff and his wife booked an eleven-day cruise with Seabourn to travel from Rome to Greece between April 29 and May 9, 2020. *Id.* Plaintiff paid $12,600 for the trip. Compl. Ex. 1 at ECF pp. 2, 9. The same day, Plaintiff purchased the Policy for $1,298. *Id.*

B. Key Policy terms

According to its terms, the Policy provides "single pay, single term … insurance coverage." Compl. Ex. 1 at ECF p. 14. Plaintiff concedes, as he must, that he paid a single, undivided insurance premium for a "package" of Policy coverages. Compl. ¶ 3. As part of the package, the Policy provides pre-departure trip cancellation coverage if certain covered events prevent the insured from taking the trip. *Id.* at ECF pp. 2, 21. The Policy also provides post-departure

coverages for certain events that might occur during a trip (*e.g.*, interruptions, delays, lost baggage, medical and other emergencies, accidental death, etc.). *Id.* at ECF pp. 2, 9.

The Policy provided Plaintiff a "10-Day Right to Examine Your Description of Coverage." Compl. Ex. 1 at ECF p. 10. The Policy explained that "[i]f you are not satisfied for any reason, you may cancel coverage under the policy within 10 days after receipt" and "[y]our premium payment will be refunded." *Id.* The Policy specifies, however, that "[a]fter this 10-day period, ***the payment for this coverage is nonrefundable***." *Id.* (emphasis added).

The Policy Confirmation Letter extended the examination period to 15 days. It explained that "[y]our 15-day free look period expires on Feb. 28, 2020. If you decide to cancel this plan during your free look period ..., simply contact us to request a full refund." Compl. Ex. 1 at ECF p. 1. Plaintiff does not allege that he requested a refund during the examination period.

C. Plaintiffs' trip is cancelled

In late March or early April 2020, Plaintiff's trip allegedly was cancelled by Seabourn due to the COVID-19 pandemic. Compl. ¶ 11. Plaintiff does not contend that he has any losses that are covered by the Policy. Rather, Plaintiff alleges that he contacted Generali seeking a partial refund of the single, undivided premium that he claims is attributable to post-departure coverage and that Generali failed to provide the requested partial refund. *Id.* ¶¶ 12-13. Plaintiff does not seek a refund of any premium for pre-departure coverage.

ARGUMENT

To survive a motion to dismiss under Rule 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "A claim has facial plausibility" only "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* Courts insist upon "'specificity in pleading' … to avoid the

potentially enormous expense of discovery in cases with 'no reasonably founded hope'" of success. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558-59 (2007).

As shown below, the complaint does not state a claim for unjust enrichment or conversion. Accordingly, it should be dismissed with prejudice. *See Danis v. Moody's Corp.*, 627 Fed. App'x 31, 32 (2d Cir. 2016) (affirming dismissal with prejudice because leave to amend would have been futile); *Brady v. Associated Press Telecom*, 2017 WL 532405, at *2 (S.D.N.Y. Feb. 3, 2017) (dismissing complaint with prejudice because leave to amend would have been futile).

I. THE COMPLAINT FAILS TO STATE A CLAIM FOR UNJUST ENRICHMENT.

Under New York law, "'a valid contract defines the obligations of the parties as to matters within its scope, displacing to that extent any inquiry into unjust enrichment.'" *Allianz Global Inv'rs GmbH v. Bank of Am. Corp.*, 2020 WL 2765693, *16 (S.D.N.Y. May 28, 2020) (emphasis omitted). Thus, "'a party may not recover in … unjust enrichment where the parties have entered into a contract that governs the subject matter.'" *Pappas v. Tzolis*, 982 N.E.2d 576, 580 (N.Y. 2012); *see Clark-Fitzpatrick, Inc. v. Long Island R.R. Co.*, 516 N.E.2d 190, 193 (N.Y. 1987) ("The existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contact for events arising out of the same subject matter.").

The law of Florida—where Plaintiff resides—is the same. *See, e.g., Diamond "S" Dev. Corp. v. Mercantile Bank*, 989 So. 2d 696, 697 (Fla. Dist. Ct. App. 2008) ("Florida courts have held that a plaintiff cannot pursue a quasi-contract claim for unjust enrichment if an express contract exists concerning the same subject matter."); *Carrera v. UPS Supply Chain Sols., Inc.*, 2012 WL 12860910, at *7 (S.D. Fla. Sept. 21, 2012) ("The principle that unjust enrichment is

preempted by contract has been described as 'settled law' and is 'followed universally in both federal and state courts.'").[2]

Tellingly, Plaintiff does not assert a breach of contract claim. That is because the Policy expressly addresses Plaintiff's right to a refund and makes clear that Plaintiff is not entitled to a partial refund of his single, undivided premium that he claims is attributable to post-departure coverage. The Policy provides a package of pre- and post-departure coverages (Compl. Ex. 1 at ECF p. 8) and confirms that Plaintiff purchased "single pay, single term … insurance coverage." *Id.* at ECF p. 14. The Policy allowed Plaintiff 10 days to examine the coverage and request a refund, but provided that after the examination period expired, "***the payment for this coverage is non-refundable***." Compl. Ex. 1 at ECF pp. 1, 10 (emphasis added). Thus, after Plaintiff chose to keep the Policy, Plaintiff's premium was non-refundable. Plaintiff may not use an unjust enrichment claim to circumvent the parties' obligations under the Policy.

Plaintiff nonetheless seeks to apportion his $1,298 premium into purported "pro rata share[s]" for pre- and post-departure coverages. Compl. ¶ 4. In doing so, Plaintiff implicitly concedes that at least some risk to Generali attached under the Policy because he does not seek a refund of the portion of the premium that he asserts is attributable to pre-departure coverage; Plaintiff apparently agrees that premiums for pre-departure coverage were earned. Instead, Plaintiff contends that Generali is required to return the portion of the premium that he claims is attributable to post-departure coverage and is purportedly "unearned" because the cruise was cancelled. Compl. ¶¶ 2, 5, 7. But Plaintiff's concession that ***some*** risk to Generali attached under the Policy defeats his claim.

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[2] Defendants are not aware of any material difference between New York and Florida law relevant to this motion that would require a choice of law analysis.

It is well settled that "an insured may not have ***any*** part of his premium returned once the risk attaches, even if it eventually turns out that the premium was ***in part unearned***, unless there is an agreement to that effect." *Fleetwood Acres, Inc. v. Fed. Hous. Admin.*, 171 F.2d 440, 442 (2d Cir. 1948) (emphasis added); *accord Bolden v. Blue Cross & Blue Shield Ass'n*, 848 F.2d 201, 209 (D.C. Cir. 1988); *Euclid Nat'l Bank v. Fed. Home Loan Bank*, 396 F.2d 950, 951 (6th Cir. 1968); 5 COUCH ON INSURANCE § 79:7 (3d ed.). Specifically, "the premium is ***not apportionable***, and the insured is not entitled to a return of any part of the premium paid"; "'although the rule may result in profit to the insurer, it is just compensation for the dangers or perils assumed, … and it would be difficult, to say the least, to fairly apportion the risk.'" *James R. Soda, Inc. v. United Liberty Life Ins. Co.*, 494 N.E.2d 1099, 1100 (Ohio 1986) (emphasis added); *accord* 44 AM. JUR. 2D INSURANCE § 909 (collecting cases); *see also* 14 WILLISTON ON CONTRACTS § 41:21 ("If the risk has attached, the insured has received consideration for the premium, and if by the insured's own fault, or by chance, the conditional promise of the insurer need not be performed, still, no part of the premium can be recovered.").

There is no question that risk attached here. After the examination period expired, Generali was subject to the insured risk—it was at risk that the trip would be cancelled pre-departure for a covered reason (as Plaintiff implicitly concedes), and it also was at risk that the trip would go forward and Plaintiff would suffer a covered loss. That the trip was later cancelled does not mean that the risk did not attach. As the First Department held in a similar context, a plaintiff "was not entitled to a refund of the *portion* of its bond premiums that corresponded to the contract value of the work remaining under its prematurely terminated construction contract. *The risk attached at the inception of the coverage* and the bond documents did not provide for a refund in the event of such termination. Under the circumstances, the premiums are deemed fully earned." *Bullard-*

Lindsay Constr. Co. v. Universal Bonding Ins. Co., 303 A.D.2d 317 (N.Y. App. Div. 2003) (citing, *inter alia*, *Fleetwood Acres*, 171 F.2d at 442) (emphasis added); *see also Crestdale Assocs., Ltd. v. Everest Indemn. Ins. Co.*, 2011 WL 3297042, at *4 (D. Nev. Aug. 1, 2011) ("While [the insurer's] exposure to the risk of liability was reduced by [the insured's] failure to build and eventual conveyance of the property, this does not mean that risk never attached to the policy…. Thus, while the probability of actual loss was reduced …., the policy is not invalid for want of consideration.").

In an attempt to support his position, Plaintiff cites (Compl. ¶ 7 & n.2) a report from the American Academy of Actuaries Travel Insurance Task Force. But that report in fact supports Generali. As Plaintiff alleges, the report explains that "when policies are ***exclusively*** covering post-departure risks … no premiums are earned during the pre-departure period." Compl. ¶ 7 n.2 (citing report) (emphasis added). But this Policy did not "exclusively" cover post-departure risks. Instead, it combined pre- and post-departure coverage and charged a single, undivided premium, which Plaintiff is not permitted to apportion after risk under the Policy attached. And because the Policy included pre-departure coverage, risk indisputably attached at its inception.

Plaintiff also may attempt to rely on an unpublished Nebraska opinion that allowed a claim seeking a partial refund for post-departure coverage to survive a motion to dismiss. *See Anderson v. Travelex Ins. Servs.*, 2019 WL 1932763 (D. Neb. May 1, 2019). *Anderson* is inapposite because the policy terms were materially different. While the policy in *Anderson* allowed the insured to request a refund within ten days (*id.* at *3), the *Anderson* policy—unlike the Policy at issue here—did not expressly provide that thereafter, "the payment for this coverage is nonrefundable." Compl. Ex. 1 at ECF p. 10; *see Anderson*, No. 8:18-cv-00362, Dkt. 28-1 at ECF p. 7. The policy in *Anderson* also did not provide that the insured had "purchased single pay, single term … insurance

coverage." Compl. Ex. 1 at ECF p. 14. Moreover, *Anderson* acknowledged that a refund is required only if "no risk" attached, not "if it turns out part of the premium was unearned." 2019 WL 1932763, at *3. Here, Plaintiff does not allege that Generali took on "no risk," only that it did not earn the "part of the premium" that he attributes to post-departure coverage. *Anderson* therefore does not support Plaintiff's unfounded attempt to apportion his single, undivided premium for a partial refund.

Finally, Plaintiff's attempt to apportion his single, undivided $1,298 premium into "pro rata share[s]" readily illustrates that "it would be difficult, to say the least, to fairly apportion the risk'" to each coverage. *James R. Soda,* 494 N.E.2d at 1100. Plaintiff alleges that he can "readily determine" pro rata shares simply by looking at the Policy's maximum coverage limits. Compl. ¶¶ 4, 31-32. Using those limits, Plaintiff remarkably claims that ***99.23%*** of the "total risk covered by the policy" is related to post-departure coverage. *Id.* ¶ 33. According to Plaintiff, that is because the pre-departure trip cancellation coverage had a maximum limit of $12,600 (the cost of the trip) while the post-departure coverages had maximum limits as high as $1,000,000 for emergency assistance and transportation, $250,000 for medical and dental coverage, and $200,000 for accidental death and dismemberment. *Id.* ¶ 31 & Ex. 1 at ECF p. 2.

That naive methodology is deeply flawed. In calculating the "total risk covered by the policy," Plaintiff does not even attempt to take into account the ***probabilities*** of those payouts actually happening—a central factor in evaluating risk in an insurance policy. As common sense would suggest, the "expected loss"—that is, the value of the risk—is based on the compound probability of two variables: (1) the number of losses that will occur across policies, and (2) the monetary amount of loss once it occurs. Judy Feldman Anderson & Robert L. Brown, *Risk and Insurance*, Education and Examination Committee of the Society of Actuaries, P-21-05, at 3-4.

Indeed, Plaintiff's attempt to attribute only ***0.77% (or $10)*** of the $1,298 premium to pre-departure coverage (Compl. ¶ 33) for a $12,600 cruise is not consistent with common sense and therefore is not plausible. *Iqbal*, 556 U.S. at 678-79 ("Determining whether a complaint states a plausible claim for relief will … be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense."). Plaintiff's concocted methodology underscores the folly of attempting to apportion the premium for a bundle of coverages. In any event, in light of the express terms of the Policy, which make clear that the premium was a single, undivided one for a package of risks, Plaintiff is not entitled to a partial refund after risk attached under the Policy.

In short, the Policy provided that all premiums were nonrefundable after the examination period ended; that is when risk to Generali attached. The Court should apply the "ordinary rule" that "an insured may not have any part of his premium returned once the risk attaches." *Fleetwood Acres*, 171 F.2d at 442.

II. THE COMPLAINT FAILS TO STATE A CLAIM FOR CONVERSION.

Plaintiff's conversion claim fares no better. Plaintiff cannot use a conversion claim to seek a partial refund of money that is not specifically identifiable. Moreover, even if Plaintiff could seek a partial refund through a conversion claim, Plaintiff is not entitled to a refund for the same reasons set forth in Part I above. The Policy provided that the single, undivided premium was nonrefundable after 10 days and risk attached under the Policy.

Under New York law, "[t]he tort of conversion is established when one who owns and has a right to possession of personal property proves that the property is in the unauthorized possession of another who has acted to exclude the rights of the owner." *Republic of Haiti v. Duvalier*, 211 A.D.2d 379, 384 (N.Y. App. Div. 1995). Where the property is money, the money "'must be specifically identifiable and be subject to an obligation to be returned or to be otherwise treated in a particular manner.'" *McBride v. KPMG Int'l*, 135 A.D.3d 576, 580 (N.Y. App. Div. 2016)

(dismissing conversion claim because money was not specifically identifiable in segregated account).

Florida law is similar. To state a claim for conversion of money, Plaintiff must allege: "(1) specific and identifiable money; (2) possession or an immediate right to possess that money; (3) an unauthorized act which deprives plaintiff of that money; and (4) a demand for return of the money and a refusal to do so." *United States v. Bailey*, 288 F. Supp. 2d 1261, 1264 (M.D. Fla. 2003). The money must be "specific and identifiable"; "[a] mere obligation to pay money may not be enforced by a conversion action." *Belford Trucking Co. v. Zagar*, 243 So.2d 646, 648 (Fla. Dist. Ct. App. 1970); *see Gambolati v. Sarkisian*, 622 So.2d 47, 50 (Fla. Dist. Ct. App. 1993) (holding that "[a] debt which may be discharged by the payment of money in general cannot form the basis for conversion" because the money owed is "not clearly identifiable").

The complaint does not even attempt to allege that the money sought to be refunded by Plaintiff is specifically identifiable. Plaintiff simply alleges that Generali owes him a $1,288 refund in fungible money. Plaintiff's conversion claim should be dismissed for this reason alone.

Even if Plaintiff could seek a partial refund through a conversion claim, Plaintiff has no right to a refund. The Policy provided that "the payment for this coverage is non-refundable" after the expiration of the examination period. Compl. Ex. 1 at ECF p. 10. Moreover, after risk attached, the single, undivided premium is not apportionable to different coverages. *Supra* Part I. Plaintiff's conversion claim therefore fails for the same reasons as his unjust enrichment claim.

III. AGG SHOULD BE DISMISSED.

Even if Plaintiff otherwise stated a claim, the complaint does not identify any basis for including AGG in this case. As shown below, the Court lacks personal jurisdiction over AGG, and the complaint does not allege any facts to state a plausible claim against AGG.

A. The Court lacks personal jurisdiction over AGG.

The complaint does not identify any basis for asserting personal jurisdiction over defendant AGG, the Italian parent company. The complaint concedes that the Policy was underwritten by Generali US Branch and allegedly administered by Generali Global Assistance. Compl. ¶ 10; *id.* Ex. 1 at ECF pp. 1, 5. Nonetheless, Plaintiff also sued AGG, even though the complaint admits it "is an Italian corporation with its principal place of business located in Trieste, Italy." Compl. ¶ 14. The only allegation against AGG is that it "underwrites insurance policies in the United States *through Defendant Generali US Branch*." *Id.* ¶ 15 (emphasis added).

That is insufficient. For starters, the complaint's personal jurisdiction allegations focus on Generali US Branch and Generali Global Assistance, glossing over AGG entirely. Compl. ¶ 21.

And it is clear that the personal jurisdiction allegations in the complaint cannot be properly applied to AGG consistent with due process. The complaint asserts that the Court has general jurisdiction over "Defendants" because the defendants allegedly "continuously and systematically" conduct business in New York. Compl. ¶ 21. That is not the standard, however. The Supreme Court has held that, for a court to exercise general personal jurisdiction over a defendant, the inquiry "is not whether a foreign corporation's in-forum contacts can be said to be in some sense 'continuous and systematic,' it is whether that corporation's 'affiliations with the State are so 'continuous and systematic' as to render it *essentially at home* in the forum State.'" *Daimler AG v. Bauman*, 571 U.S. 117, 138-39 (2014) (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011)) (emphasis added). And "*Daimler* established that, except in a truly 'exceptional' case, a corporate defendant may be treated as 'essentially at home' only where it is incorporated or maintains its principal place of business—the 'paradigm' cases." *Brown v. Lockheed Martin Corp.*, 814 F.3d 619, 627 (2d Cir. 2016).

Here, Plaintiff acknowledges that AGG is an Italian corporation with its principal place of business in Italy. Compl. ¶ 14. Under *Daimler* and *Brown*, AGG is not "essentially at home" in New York. It accordingly is not subject to general personal jurisdiction in this Court.

That leaves specific jurisdiction. Specific jurisdiction "depends on an 'affiliatio[n] between the forum and the underlying controversy,' principally, activity or an occurrence that takes place in the forum State." *Goodyear*, 564 U.S. at 919. At bottom, the exercise of specific jurisdiction requires that "the defendant's suit-related conduct" have "create[d] a substantial connection with the forum State." *Walden v. Fiore*, 571 U.S. 277, 283-84 (2014).

Here, the complaint does not even attempt to allege that the Court has specific jurisdiction over AGG. The complaint does not allege that *AGG* transacted any business with Plaintiff in New York or otherwise itself engaged in suit-related contacts that would subject itself to jurisdiction here. To the contrary, the complaint concedes that the Policy was underwritten and administered by U.S. subsidiaries. Compl. ¶ 10. Accordingly, the allegations in the complaint do not satisfy the due process requirements for specific personal jurisdiction.

B. The Complaint does not state a plausible claim against AGG.

Even if the Court did have jurisdiction over AGG, the complaint does not allege any facts to state a claim against AGG. The complaint does not allege that AGG had any involvement in issuing the Policy or denying Plaintiff's partial refund request, that it received or converted any property, or that it was unjustly enriched. Indeed, the Policy shows that the only parties involved in the Policy were U.S. subsidiaries.

Nor does Plaintiff attempt to allege a basis for veil-piercing. Courts repeatedly have held that attempts to pierce the corporate veil must satisfy *Iqbal* and *Twombly* at the pleading stage by alleging sufficient facts that, if true, would demonstrate that corporate formalities should not be respected. *See, e.g., Garmedia v. Bd. of Managers of 255 Cabrini Blvd. Condo. Assoc.*, 2016 WL

751015, at *3 (S.D.N.Y. Feb. 24, 2016) ("Since this is a motion to dismiss, under *Twombly/Iqbal*, the question is whether the well pleaded allegations of the complaint allege facts that, if true, would admit of the inference that the corporate veil can be pierced. They do not.") (internal citations omitted); *MM Ariz. Holdings LLC v. Bonnano*, 2008 WL 5203691, at *2 (S.D.N.Y. Dec. 10, 2008) ("[Counter-Plaintiffs] fail to allege any facts tending to show why the normal presumption of corporate separateness between a parent and its subsidiary should not be respected. All they allege is that plaintiff is a subsidiary of [its parent]. Even before [*Twombly*], that was far from enough to warrant piercing the corporate veil."). Because the complaint fails to state a plausible claim against AGG, Plaintiff's claims against AGG should be dismissed.

CONCLUSION

For the foregoing reasons, the Complaint should be dismissed with prejudice.

Dated: August 24, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned attorney certifies that a true and correct copy of the foregoing was served upon all parties of record via the U.S. District Court for the Southern District of New York's Electronic Filing System on August 24, 2020.

/s/ Ilana D. Cohen