UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

MOHAWK GAMING ENTERPRISES, LLC 873 State Route 37 Akwesasne, New York 13655 Plaintiffs, v. AFFILIATED FM INSURANCE CO. 270 Central Avenue P.O. Box 7500 Johnston, RI 02919-4949 Defendants.	Case No.: 8:20-cv-00701-DNH-DJS

DEFENDANT AFFILIATED FM INSURANCE COMPANY'S COMBINED MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND IN SUPPORT OF ITS CROSS-MOTION FOR JUDGMENT ON THE PLEADINGS

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PRELIMINARY STATEMENT

Defendant Affiliated FM Insurance Company ("AFM") submits this Memorandum of Law in Opposition to the Motion for Partial Summary Judgment of Plaintiff Mohawk Gaming Enterprises ("Mohawk") and in Support of its Cross-Motion under Rule 12(c) for Judgment on the Pleadings Dismissing the Complaint.

On March 17, 2020, Mohawk closed the Akwesasne Mohawk Casino Resort (the "Casino") to the public after the Tribal Council of the Saint Regis Mohawk Tribe ("Tribe") issued a resolution ordering the temporary closure. The resolution was part of the Tribal Council's effort to stem the spread of the novel coronavirus on the Mohawk Reservation. In this action, Mohawk contends that AFM is liable under Policy No. SS772 (the "Policy") for the loss of business income that allegedly resulted from the closure. Mohawk's Complaint should be dismissed because it fails to state a plausible cause of action for coverage under the Policy.

Subject to its terms, conditions, limitations and exclusions, the Policy provided coverage for "all risks of physical loss or damage" to insured property. Mohawk, however, does not allege that the novel coronavirus caused "physical loss or damage" to any property at the Casino or, even, that the virus was ever present there. Rather, Mohawk's claim is based upon the Civil or Military Authority provision ("Civil Authority" provision) of the Policy, which, when applicable, provides Business Interruption Coverage "if an order of civil or military authority prohibits access to a location provided such order is the direct result of physical loss or damage of the type insured at a location or within five (5) statutory miles of it."

The factual contentions underlying Mohawk's claim are simple. It alleges: (a) at some unspecified date, a student at St. Lawrence College (the "College") visited the campus; (b) at the time of her visit, the student had COVID-19, the disease caused by the novel coronavirus; and (c)

upon learning of the incident, the Tribal Council ordered the closure of the Casino for an unspecified period of time. Mohawk asserts that the loss of income that allegedly resulted from this closure is covered under the Civil Authority provision. Specifically, Mohawk alleges in a conclusory manner that the student's presence at the College constituted "physical loss or damage" to property at the College, that the claimed damage to the College's property constituted "physical loss or damage of the type insured" under the Policy, and that the closure order was a "direct result" of that alleged physical loss or damage.

Mohawk asks the Court to find as a matter of law that the Policy's Contamination Exclusion does not apply to its claim. Mohawk seeks this relief even though, by its plain terms, the Contamination Exclusion encompasses the "actual or suspected presence" of a virus, such as the novel coronavirus, as well as "any cost due to such contamination, including the inability to use or occupy property or any cost of making property safe or suitable for use or occupancy." In effect, Mohawk asks the Court to read and apply the Policy as if it did not contain the Contamination Exclusion.

Mohawk's motion for partial summary judgment, which comes before any discovery has been conducted, is woefully premature and is founded upon factual contentions and inferences that transcend the allegations of the Complaint. Indeed, if Mohawk did not feel the need to try to establish such facts and inferences, it would have moved under Federal Rule 12(c) for partial judgment on the pleadings. Mohawk's motion is also flawed because it is based on inadmissible evidence, including an affidavit of its attorney, which is the subject of a separate motion to strike by AFM.

Beyond the problems with its timing and purported support, more significantly, Mohawk's motion and, ultimately, its entire claim for coverage fail as a matter of law. Even if the factual

allegations of the Complaint were assumed to be true (as opposed to its conclusory legal statements), the Complaint fails in three distinct ways to state a cause of action under the Civil Authority provision.

First, the Complaint does not allege facts sufficient to demonstrate that property at the College suffered "physical loss or damage" which, under the applicable law of New York, means a structural alteration of property requiring its repair or replacement.

Second, the alleged or suspected presence of the novel coronavirus at the College did not constitute "physical loss or damage of the type insured" because, that condition falls within the Contamination Exclusion.

Third, the Tribal Council's resolution temporarily closing the Casino indefinitely did not directly result from the alleged property damage at the College. Rather, it was clearly an effort to impede the spread of the novel coronavirus on the reservation.

These deficiencies are fatal to Mohawk's claim for coverage and each, on its own, justifies the granting of AFM's cross-motion under Rule 12(c) for judgment on the pleadings.

STATEMENT OF FACTS

A. The Closure of the Casino.

Mohawk owns and operates the Casino on the St. Regis Mohawk Indian Tribe reservation, which is located in Franklin County, New York. Compl. ¶ 21. Mohawk is a limited liability corporation created under the laws of the St. Regis Mohawk Tribe. Ibid. The Tribe is the sole shareholder of Mohawk.

According to the Complaint, on March 15, 2020, the president of the College, which is in Cornwall, Ontario, closed the school "due to the presence of a positive coronavirus case on campus." Id. at ¶ 40. The Complaint and attached exhibits do not identify the infected person, the

date of her presence on campus, or the dates on which she contracted COVID-19 or was diagnosed. Instead, the Complaint, references a March 17, 2020 statement in which the president noted: (a) a "confirmed case of COVID-19" had occurred "within the campus community;" (b) the affected person had been diagnosed and treated and was "at home"; and (c) upon learning of the situation, the College undertook "extreme preventive measures to ensure that [the] campus community . . . [was] not exposed." Ibid.; Affidavit Ex. 9, Attach. 2, p. 10. Those measures included "restricting access" to the campus and adopting "elevated infection prevention protocols." Ibid. Even before the president issued his statement, the campus cleaning protocols had been completed. Ibid.

On March 16, the Tribal Council declared a state of emergency on the reservation. Compl. ¶ 43; Affidavit Ex. 9, Attach. 5. The declaration explained that the pandemic threatened the safety of the community, COVID-19 is a respiratory disease that can result in serious illness or death, and health officials had encouraged "COVID-19 prevention, response plans, and declaration of public health emergencies." Ibid. The state of emergency was to remain in effect "until the COVID-19 Pandemic no longer pose[d] a threat to the health, safety, and welfare of the Akwesasne community." Ibid. Even before learning of the reported COVID-19 case at the College, the Tribe was concerned by the spread of the novel coronavirus and was considering the possibility of issuing an emergency declaration. Affidavit Ex. 9, Attach. 4. However, the reported case "focused the Tribe to act" and "expedited" the issuance of the declaration. Ibid.

On March 16, the Tribal Council also issued a resolution ordering the closure of the Casino as of March 17. Compl. ¶ 47. The order was effective "until future notice," and cited the same types of public safety and health concerns that were cited in the declaration of emergency. Affidavit Ex. 9, Attach. 9.

B. Mohawk's Claim.

The Policy was in effect from July 1, 2019 to July 1, 2020. Compl. Ex. 1 at P0003.

On March 19, 2020, Mohawk notified AFM of a claim related to the Casino closure. Compl. ¶ 57. The next day, AFM acknowledged receipt of Mohawk's notice. Compl. ¶ 58; Affidavit Ex. 5. On March 23, Mohawk advised AFM that its claim was based on the Civil Authority provision of the Policy. Compl, ¶ 59.

On April 9, after Mohawk received a request for information from AFM, Mohawk's lawyer sent AFM an email explaining that Mohawk was not pursuing a claim under the Policy's Communicable Diseases coverages and requesting that AFM issue a request for information for a claim under the Civil Authority provision. Compl. ¶ 60; Affidavit Ex. 8.

On May 4, AFM sent a letter to Mohawk discussing various Policy provisions, including the Civil Authority provision, the Contamination Exclusion, and the definition of "contamination.'' Compl. ¶ 61; Affidavit Ex. 2. AFM also advised Mohawk: "The presence of COVID-19 at an insured location would not constitute 'physical loss or damage of the type insured' as required under the Civil or Military Authority provision. Accordingly, the Policy's Civil or Military Authority provision (and any other Policy requiring physical loss or damage of the type insured) do not respond based on the limited information presented to AFM to date." Ibid. AFM's letter also discussed the Policy's Communicable Disease provisions, stating in part: "[t]o obtain coverage under the Communicable Disease coverages set forth above, a described location owned, leased or rented by the Insured must have the actual not suspected presence of communicable disease." Ibid.

On May 12, Mohawk sent a "Sworn Statement in Proof of Loss letter" to AFM. Compl. ¶ 64; Affidavit Ex. 9. In that document, Mohawk stated that it was pursuing its claim "under Section

E. 2 Civil or Military Authority and Section E. 7 Extended Period of Liability." Affidavit Ex. 9. Mohawk also submitted a "Proof of Loss Statement of Todd Papineau", which stated, among other things: "Had it not been for the active case and closure of the College in Cornwall, which led to the Tribal Council ordering a closure, MGE [Mohawk] had the intention of remaining open with a reduced schedule at least through March." Affidavit Ex. 9, Attach. 8. Papineau also described the method used to calculate Mohawk's claim of loss of Gross Earnings of $10,827,566 through April 15, 2020. Ibid. On May 27, AFM acknowledged receipt of Mohawk's May 4 communications. Compl. ¶ 65; Affidavit Ex. 10. On June 15, Mohawk supplemented its Sworn Statement in Proof of Loss "to add additional months of damages." Compl. ¶ 66.

On June 23, Mohawk filed its Complaint seeking a declaratory judgment (Count I) and damages for breach of contract (Count II), violation of the New York General Business Law § 349 (Count III), and fraud (Count IV). On August 24, Affiliated FM filed its Answer, denying liability for Mohawk's claim and asserting various affirmative defenses.

C. The Policy.

1. General Framework of the Policy.

The Policy insures property "against ALL RISKS OF PHYSICAL LOSS OR DAMAGE, **except as hereinafter excluded**[.]" Compl. ¶ 37; Ex. 1, Dkt. 2-1, p. 6 (emphasis added). To the extent there is physical loss or damage to insured property, such loss or damage will be covered (assuming all other Policy requirements are met) **unless** an exclusion applies. The exclusions, in turn, are subject to exceptions specified in the Policy. As the preamble to the section entitled "EXCLUSIONS" in the Property Damage section notes, "[i]n addition to the exclusions elsewhere in this Policy, the following **exclusions apply unless otherwise stated**[.]" Compl. Ex. 1, Dkt. 2-1, p.18 (emphasis added). Therefore, the basic functioning of the Policy is

as follows: an event of physical loss or damage to insured property will be covered unless an exclusion applies. Ibid. Moreover, an exclusion applies unless an exception to that exclusion is "otherwise stated" elsewhere in the Policy. Ibid.

The Policy details coverages, including for business interruption from physical loss or damage, and the requirements to trigger those coverages, which are subject to any applicable exclusions, and specified limits and sublimits. The Policy also includes two unambiguous exclusions that apply here: the Contamination Exclusion and the Loss of Use Exclusion.

2. Relevant Policy Exclusions.

The Contamination Exclusion appears under Section C of the Property Damage section, but applies to the entire Policy, including coverages provided under the Business Interruption section. The preamble to the Business Interruption section provides that:

> The Business Interruption loss, as provided in the Business Interruption Coverage and Business Interruption Coverage Extensions of this section, is subject to all the terms and conditions of this Policy including, but not limited to, the limits of liability, deductibles and exclusions shown in the Declarations section.

Compl. Ex. 1, Dkt. 2-1, p.35. Section A of the Business Interruption section further notes that the "Policy insures Business Interruption loss . . . as a direct result of physical loss or damage of the type insured: 1. To property described elsewhere in this Policy **and not otherwise excluded by this Policy**[.]" Id. at p. 35 (emphasis added). The "BUSINESS INTERRUPTION EXCLUSIONS" section similarly notes that the exclusions detailed therein apply "**[i]n addition to the exclusions elsewhere** in this Policy[.]" Id. at p. 39 (emphasis added).

The Policy specifically excludes "contamination," which is defined as:

> any condition of property due to the actual or suspected presence of any foreign substance, impurity, pollutant, hazardous material, poison, toxin, pathogen or pathogenic organism, bacteria, **virus**, disease causing or illness causing agent, fungus, mold or mildew.

Compl. Ex. 1, Dkt. 2-1 p. 58 (emphasis added). "Contaminant" is defined as: "anything that causes **contamination**." Ibid. The definition of "contamination," and its reference to "virus" and "disease causing or illness causing agent" clearly encompass the novel coronavirus.

With contamination defined, the Policy specifies the following exclusion relating to contamination (the "Contamination Exclusion"). The Policy provides that it excludes:

> **8. Contamination**, and any cost due to **contamination** including the inability to use or occupy property or any cost of making property safe or suitable for use or occupancy. If **contamination** due only to the actual not suspected presence of **contaminant**(s) directly results from other physical damage not excluded by this Policy, then only physical damage caused by such **contamination** may be insured. This exclusion does not apply to radioactive contamination which is excluded elsewhere in the Policy.

Compl. Ex. 1 at Dkt. 2-1, p. 35 (emphasis added).

The Policy also contains a Loss of Use Exclusion, which applies to " [l]oss of market or loss of use." Compl. Ex. 1 at Dkt. 2-1, p. 34.

3. The Policy's Communicable Disease Coverages: Narrow Exceptions to the Contamination Exclusion.

The Policy states that exclusions "apply unless otherwise stated[.]" Compl. Ex. 1, Dkt. 2-1, p. 18. When applicable, the Policy's Communicable Disease coverages constitute two narrow exceptions to the Contamination Exclusion.

The Policy defines "communicable disease" to include "disease" that is "[t]ransmissible from human to human by direct or indirect contact with an affected individual or the individual's discharges[.]" Compl. Ex. 1, Dkt. 2-1, p. 58. It then provides the following coverages specific to communicable disease:

> [i]f a **described location** owned, leased or rented by the Insured has the actual not suspected presence of **communicable disease** and access to such **described location** is limited, restricted or prohibited

> by:
>
> a) An order of an authorized governmental agency regulating or as a result of such presence of **communicable disease**; or
>
> b) A decision of an Officer of the Insured as a result of such presence of **communicable disease**,
> This Policy covers the reasonable and necessary costs incurred by the Insured at such **described location** for the:
>
> a) Cleanup, removal and disposal of such presence of **communicable diseases** from insured property; and
>
> b) Actual costs or fees payable to public relations services or actual costs of using the Insured's employees for reputation management resulting from such presence of **communicable disease** on insured property.

Compl. Ex. 1 at p. 23. If the quoted conditions are met, the Policy "covers the Business Interruption Coverage loss incurred by the Insured during the Period of Liability at such **described location** with such presence of **communicable disease**." Compl. Ex. 1 at p. 41.

The Communicable Disease coverages are each subject to an annual aggregate sublimit of $100,000, meaning that a total of $200,000 in coverage would be available if the requirements for coverage were met. Additionally, the Communicable Disease coverages do not require physical loss or damage to property. Rather, they are triggered upon "the actual not suspected" presence of communicable disease, along with the requisite "order of an authorized governmental agency" or "a decision of an Officer of the Insured" relating to "such" presence of communicable disease.

POINT I

MOHAWK'S MOTION SHOULD BE DENIED AND AFM'S CROSS MOTION DISMISSING THE COMPLAINT SHOULD BE GRANTED BECAUSE MOHAWK CAN NOT ESTABLISH THE PRIMA FACIE ELEMENTS OF A CLAIM UNDER THE CIVIL AUTHORITY PROVISION

Mohawk does not allege that its claimed loss of business income was caused by or resulted in physical loss or damage to its own property. Mohawk does not even allege that the novel

coronavirus was ever present on its premises. Rather, Mohawk's claim is predicated solely upon the Policy's Civil Authority provision which, in the limited circumstances where it applies, provides coverage for business interruption losses suffered by an insured as a result of physical loss or damage to non-insured property in proximity to an insured location.

The Civil Authority provision is contained within the "Business Interruption Coverage Extensions" of the Policy, and states, in pertinent part:

> This Policy covers the Business Interruption Coverage loss incurred by the Insured during the Period of Liability if an order of civil or military authority prohibits access to a **location** provided such order is the direct result of physical damage of the type insured at a location or within five (5) statute miles of it.

The Civil Authority provision applies only where the insured can establish three elements: (1) property within five miles of an insured location suffered "physical loss or damage"; (2) the "physical loss or damage" was "of the type insured" by the Policy; and (3) the physical loss or damage resulted directly in an order by a civil or military authority prohibiting access to the insured location. For example, if a fire occurred at a property adjoining the Casino and local officials prohibited access to the Casino as means of aiding the firefighting effort at the neighboring property, the Civil Authority provision would provide coverage to Mohawk for the loss of business income caused by the prohibition of access, subject to applicable deductibles and limits of liability.

Mohawk has not and cannot allege facts sufficient to establish the prima facie elements of a claim under the Civil Authority provision. Accordingly, its motion for partial summary judgment should be denied, and AFM's cross-motion for judgment on the pleadings should be granted.

A. Standard Applicable to AFM's Rule 12(c) Cross Motion.

Judgment pursuant to Rule 12(c) is appropriate where there exists no issue of material fact such that the moving party is entitled to judgment as a matter of law. See Burns Int'l Sec. Servs.

Inc. v. Int'l Union, 47 F.3d 14, 16 (2d Cir. 1995). In reviewing Rule 12(c) motions, courts utilize the same standard used under Rule 12(b)(6). Patel v. Contemporary Classics of Beverly Hills, 259 F.3d 123, 125-26 (2d Cir. 2001). Thus, to survive a motion for judgment on the pleadings, "a complaint must contain sufficient factual matter . . . to state a claim to relief that is plausible on its face." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).

In evaluating the sufficiency of a complaint, courts employ a "two-pronged approach." Id. at 679. First, they discard any factual pleadings that are nothing more than threadbare legal conclusions. L-7 Designs, Inc v. Old Navy, LLC, 647 F.3d 419, 430 (2d Cir. 2011). Courts limit their review to facts stated in the complaint, attached documents, and documents incorporated by reference. Dangler v. New York City Off Track Betting Corp., 193 F.3d 130, 138 (2d Cir. 1999). Second, after accepting all remaining allegations as true and drawing all reasonable inferences in favor of the non-moving party, they consider whether the complaint states a plausible claim for relief, which "requires the reviewing court to draw on its judicial experience and common sense." Id. The plausibility standard requires more than "sheer possibility that a defendant has acted unlawfully." Iqbal, 556 U.S. at 678. Dismissal is appropriate where a plaintiff has "not nudged [its] claims across the line from conceivable to plausible[.]" Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007).

In deciding AFM's motion, the Court's task is to determine whether, based upon the facts alleged, which are taken as true, and disregarding legal contentions and conclusory assertions, the Complaint states a plausible claim for relief under the Civil Authority provision.

B. Neither the Actual or Suspected Presence of the Novel Coronavirus at the College Nor the Closure of the College Constituted "Physical Loss or Damage" to Property.

To establish a prima facie case under the Civil Authority provision, Mohawk was required to allege facts that would establish that property at the College suffered "physical loss or damage."

The adjective "physical" in this operative phrase modifies both "loss" and "damage". See Newman Myers Kreines Gross Harris, P.C. v. Great Northern Ins. Co., 17 F. Supp. 3d 323, 331 (S.D.N.Y. 2014). Consequently, Mohawk was required to plead facts sufficient to demonstrate either "physical loss" or "physical damage" to property at the College. The Complaint does neither.

Courts have repeatedly dismissed complaints seeking recovery for COVID-19 losses on the basis that they failed to allege facts sufficient to establish "physical loss or damage" to property.[1] See Sandy Point Dental, PC v. The Cincinnati Insurance Company, 2020 WL 5630465, at *2-3 (N.D. Ill. Sept. 21, 2020) ("The coronavirus does not physically alter the appearance, shape, color, structure, or other material dimension of the property."); Uncork and Create, LLC v. Cincinnati Insurance Company, 2020 WL 6436948 (S.D.W. Va. Nov. 2, 2020) ("even the actual presence of the virus would not be sufficient to trigger coverage for physical damage or physical loss to the property").

These cases are consistent with New York law, which governs this matter. For example, in Roundabout Theatre Company, Inc. v. Continental Casualty Co., 302 A.D.2d 1, 2 (1st Dept. 2002), the court held that the inability of the plaintiff-insured to use or access its theatre because of a crane accident on a nearby property did not constitute "physical loss or damage" to the theatre.

[1] A sampling of cases across jurisdictions includes: Robert W. Fountain, Inc., v. Citizens Insurance Company of America, No. 3:20-cv-05441, *5 (N.D. Cal. Dec. 9, 2020) (holding no plausible basis for business income coverage as loss of use of property was not "direct physical loss of or damage to" property); 4431, Inc. v. Cincinnati Ins. Companies, 2020 WL 7075318, at *12 (E.D. Pa. Dec. 3, 2020) (holding insureds' "loss of business income as a result of COVID-19 and the . . . Orders [did] not constitute direct "physical loss" as there was "no physical component" to insureds' loss); Zwillo V, Corp. v. Lexington Insurance Co., 2020 WL 7137110, at *4 (W.D. Mo. Dec. 2, 2020) ("Plaintiff's allegations concerning the impact of the COVID-19 virus and stay-at-home orders do not plausibly allege 'direct physical loss of or damage to' property . . . [which] requires physical alteration of property, or, . . . a tangible impact that physically alters property."). A summary of all the rulings in COVID-19 coverage cases may be found at https://cclt.law.upenn.edu/judicial-rulings/.

The First Department emphasized that the policy limited a covered business interruption loss to the time required to repair, replace or rebuild the physically damaged property. Id. at 7-8. It reasoned that this limitation would be meaningless if, as was the case with the theatre, the property did not suffer some form of physical damage requiring repair, rebuilding or replacement. Id. at 8. In Newman, the court reached a similar conclusion, finding: "The words 'direct' and 'physical,' which modify the phrase 'loss or damage,' ordinarily connote actual, demonstrable harm of some form to the premises itself, rather than the forced closure of the premises for reasons exogenous to the premises themselves, or the adverse business consequences that flow from such closure." Id. at 331. Like the First Department in Roundabout Theatre, it reasoned that the phrase "physical loss or damage" should be interpreted in terms of the repair or replacement of the property at issue. Id. at 332.

Recently, in Michael Cetta, Inc. v. Admiral Indem. Co., No. 1:20-cv-04612-JPC, at *9-22 (S.D.N.Y. Dec. 11, 2020), Judge Cronin relied on Roundabout Theater and Newman to dismiss the plaintiff's COVID-19 coverage action with prejudice on the basis that the loss of use of its restaurant did not constitute physical loss or damage. The court found that the complaint failed because it did not allege facts sufficient to establish a "negative alteration in the tangible condition" of the property. Id. at *11-12. In reaching this conclusion, the court observed that coverages afforded for business interruption losses were necessarily tied to the time required to repair or replace physically lost or damaged property. Id. at *13. Similarly, in 10012 Holdings Inc. v. Hartford Fire Insurance Co., No. 1:20-cv-04471 (S.D.N.Y. Dec. 16, 2020), Judge Schofield dismissed the insured-art gallery's COVID-19 claims for business interruption losses with prejudice on the basis that its forced closure due to stay-at-home orders did not constute physical loss to plaintiff's property. Id. *5.

Mohawk's Complaint alleges in sum that a student with COVID-19 visited the College campus and that, as a consequence, "[t]he disease was actually present at the college." Compl. ¶ 49. Assuming that allegation to be true for the limited purposes of AFM's motion, the Complaint fails to state a plausible claim for relief under the Civil Authority provision because it does not allege facts demonstrating physical loss or damage to property at the College. Specifically, the Complaint does not allege that the presence of the novel coronavirus at the College caused property there to be physically altered or changed in a manner requiring its repair or replacement. Similarly, the allegation that the College was closed for some time is not sufficient to establish physical loss or damage. These inherent deficiencies are not rectified by the conclusory allegation that "[t]he presence of COVID-19 is a 'physical damage of the type insured.'" Compl. ¶ 49.

Mohawk argues that, because COVID-19 constitutes a communicable disease within the Communicable Disease provisions, the presence of COVID-19 at the College must have been "physical loss or damage of the type insured" for purposes of the other coverages. However, the Communicable Disease provisions do not require physical loss or damage. Rather, the conditions to those coverages are: (1) the actual, not suspected presence of a communicable disease at a location owned, leased or rented by the insured; (2) access to the location is limited, restricted, or prohibited; and (3) by an an order of a governmental authority regulating such presence of the disease or an Officer of the insured made as a result of such presence. Thus, coverage for COVID-19 under the Communicable Disease provisions does not equate to physical loss or damage under the other Policy provisions.

AFM's prior endorsements and regulatory filings do not alter this conclusion. The documents cannot be used to contradict or alter the clear terms of the Policy. See Sher v. Allstate Ins. Co., 947 F. Supp. 2d 370, 389–90 (S.D.N.Y. 2013) (observing that the parol evidence rule

bars consideration of extrinsic evidence and forecloses claims of regulatory estoppel). These documents indicate that AFM originally offered Communicable Disease coverage to certain insureds in the healthcare industry through a "Healthcare Endorsement" that stated in part: "For the purposes of this coverage, the presence or spread of communicable disease will be considered direct physical damage and the expenses listed above will be considered expenses to repair such damage." This sentence served a salutary purpose because the Healthcare Endorsement was being added to policies that tied their other coverages to "physical loss or damage." The sentence eliminated the potential of an insured mistakenly concluding that the coverage applied only if it could show that the presence of communicable disease had caused physical loss or damage to property at its premises. As also reflected in the filings, AFM later incorporated the Communicable Disease coverages into the body of its policy. In the process, it removed the sentence as it was unnecessary – the Communicable Disease coverage never required physical loss or damage to be triggered – and the elimination of the sentence changed nothing with respect to the coverage, just as AFM told the regulators in the filings. Hence, the Healthcare Endorsement and AFM's regulatory filings do not advance Mohawk's argument that the presence of a person with a communicable disease constitutes "physical loss or damage."

To the contrary, the Healthcare Endorsement and the related regulatory filings bolster the conclusion that the actual presence of a person with COVID-19 at the College (or elsewhere) does not constitute "physical loss or damage." The endorsement clearly stated that the presence of a communicable disease would be "considered" to be physical loss or damage solely "for the purposes" of the Communicable Disease coverage. If, as Mohawk contends, the presence of a communicable disease constituted physical loss or damage with respect to all coverages, it would have been unnecessary for the Healthcare Endorsement to state that the presumption of physical

loss or damage was for the "purpose of coverage." The fact that the endorsement included that limiting language is compelling proof that neither it nor the Communicable Disease provisions later incorporated into the AFM policies treat the presence of a communicable disease as "physical loss or damage" with respect to other coverages.

C. The Actual or Suspected Presence of the Novel Coronavirus at the College does not Constitute "Physical Loss or Damage of the Type Insured".

1. The Contamination Exclusion and Loss of Use Exclusion Apply.

As the second element of its claim for coverage, Mohawk must plead facts which, if true, would establish that property at the College suffered physical loss or damage "of the type insured." To the extent that the Complaint may be read to allege that the closure of the College was itself a form of "physical damage of the type insured", both the Contamination Exclusion and Loss of Use Exclusion apply to Mohawk's claim.

The Policy expressly excludes coverage for claims due to "contamination," which is defined to include "virus," and "disease causing or illness causing agent." Compl. Ex. 1 at Dkt. 2-1, pp. 35 and 58. The Policy clearly and unambiguously excludes any condition of property due to the actual or suspected presence of any virus, and "any cost" due to such condition, including the inability to use or occupy the property. Ibid. Mohawk does not dispute that the novel coronavirus is a "virus." Thus, the Policy specifically excludes loss caused by the novel coronavirus.

Insurance policies are to be accorded their "plain and ordinary meaning." See Allianz Ins. Co. v. Lerner, 416 F.3d 109, 116 (2d Cir. 2005). "When the provisions are unambiguous and understandable, courts are to enforce them as written." Parks Real Estate Purchasing Grp. v. St. Paul Fire & Marine Ins. Co., 472 F.3d 33, 42 (2d Cir. 2006). Policy terms are unambiguous where they provide "a definite and precise meaning, unattended by danger of misconception in the purport of the contract itself, and concerning which there is no reasonable basis for a difference of opinion." Olin Corp. v. Am. Home Assurance Co., 704 F.3d 89, 98 (2d Cir. 2012). Ambiguity

does not exist merely because the parties interpret policy provisions differently. Albany Airport HIE, LLC v. Hanover Ins. Group, 391 F. Supp. 3d 193, 198 (N.D.N.Y. 2019).

Since the onset of the pandemic, numerous courts have examined exclusions similar to the Contamination Exclusion. The overwhelming majority have held that the exclusions preclude recovery of losses related to the virus and the related government shut down orders.[2] For example, the court in Zwillo, 2020 WL 7137110, at *6, found that the policy's "Pollution and Contamination Exclusion," which included "virus" as a contaminant, "expressly" and by its "plain terms" excluded coverage for the plaintiffs' COVID-19-related income losses. The court found that the policy "expressly exclude[d] from coverage damages caused by virus," which COVID-19 "plainly" was. Id. at *7. Similarly, in Diesel Barbershop, LLC v. State Farm Lloyds, 2020 WL 4724305, at *5-7 (W.D. Tex. Aug. 13, 2020), the court rejected the plaintiffs' claim for business interruptions losses based on both the absence of "direct physical loss" and the policy's contamination exclusion, explaining that any other result would have required it to re-write the policy. Id. at * 7. The same result applies here.

The Policy's separate Loss of Use Exclusion is a further bar to Mohawk's claims. The exclusion is unambiguous and, like the Contamination Exclusion, should be accorded its "ordinary meaning." See Allianz, 416 F.3d at 116. Mohawk's claimed losses stem from its loss of use of the Casino, and therefore also directly implicates the Loss of Use Exclusion.

[2] These cases include: Brian Handel D.M.D., P.C. v. Allstate Ins. Co., 2020 WL 6545893, at *4 (E.D. Pa. Nov. 6, 2020) (finding "even if plaintiff had pleaded sufficient facts for physical damage or loss as a result of COVID-19, plaintiff's claim [was] still excluded by the virus exclusion"); N&S Rest. LLC v. Cumberland Mut. Fire Ins. Co., 2020 WL 6501722, at *5 (D.N.J. Nov. 5, 2020) ("[B]ased on the Court's independent evaluation of the Policy's Virus Exclusion and the wealth of well-reasoned opinions from other districts holding similarly, the Court finds that the Virus Exceptions bars coverage."); Real Hosp., LLC v. Travelers Cas. Ins. Co. of Am., 2020 WL 6503405, at *8 (S.D. Miss. Nov. 4, 2020) ("[T]he virus exclusion 'clearly and unequivocally' exempts 'loss or damage caused by or resulting from any virus.'").

2. The Communicable Disease Coverages Operate as Limited, Specific Exceptions to the Contamination Exclusion and are Inapplicable Here.

Mohawk argues that the Contamination Exclusion is ambiguous because it conflicts with the Communicable Disease coverage. Compl. ¶¶ 69-75. Mohawk's current argument is contrary to the allegation in the Complaint where Mohawk conceded that "the more specific 'communicable disease' provision is an exception to the more general contamination-by-a-virus exclusion." Compl. ¶ 35. Mohawk's allegation also ignores the well-settled rule that a policy may exclude coverage for particular injuries or damages in certain circumstances while providing coverage in other circumstances." Julian v. Hartford Underwriters Ins. Co., 35 Cal. 4th 747, 759 (2005). The fact that AFM provides limited coverage for Communicable Disease (if the relevant Policy requirements are met) does not preclude application of the Contamination Exclusion in other circumstances. In addition, the Policy clearly delineates that the Communicable Disease coverage is an Additional or Extension of Coverage. Compl. Ex. 1, Dkt. 2-1, p. 6.

The terms of an insurance policy are to be construed together for the purpose of giving force and effect to each clause. See Olin Corp., 704 F.3d at 99. The Contamination Exclusion and the Communicable Disease provisions are easily reconciled and, in fact, are complementary. The exclusion applies to the Coronavirus, except where the requirements of the Communicable Disease Coverage are met.

For example, if a person with COVID-19 visited the Casino and government authorities responded by closing the building, Mohawk could recover up to a total of $200,000 under the Communicable Disease coverages. If Mohawk asserted different claims outside of the Communicable Disease coverages, those claims would be subject to the Contamination Exclusion. In this example, the Communicable Disease coverages operate as specific, limited exceptions to the Contamination Exclusion. AFM's reading, which is the only reasonable interpretation, does

not render the Communicable Disease coverages "illusory." Rather, it affords Mohawk the full range of coverage described in those coverages. See Spandex House, Inc. v. Hartford Fire Ins. Co., 407 F. Supp. 3d 242, 262 (S.D.N.Y. 2019) (recognizing that even when exclusion is "exceedingly broad" and an exception "exceedingly narrow", coverage is not illusory if it extends to some claims.). Moreover, AFM's construction gives effect to all of the terms of both the Contamination Exclusion and the Communicable Disease provisions and avoids Mohawk's tortured analysis that the exclusion applies only to "non-transmissible diseases."

The limited exception to the Contamination Exclusion created by the Communicable Disease coverages does not apply where the presence of a communicable disease occurs at a location not "owned, leased or rented" by Mohawk. Consequently, the alleged presence of a student with COVID-19 at the College is subject to the Contamination Exclusion and cannot constitute physical loss or damage "of the type insured."

The fallacy in Mohawk's position is apparent in another way. Mohawk argues that the Contamination Exclusion cannot be applicable to viruses, such as the coronavirus, that are transmissible from human to human. It contends that this construction is the only way to reconcile the Contamination Exclusion and the Communicable Disease provisions and thereby to preserve the Communicable Disease coverages. Under that construction, however, the other terms of the Communicable Disease coverages would become meaningless. For example, if the mere presence of the virus at a location constituted physical loss or damage (as Mohawk contends) and the Contamination Exclusion did not apply because the virus causes a "transmissible disease" (as Mohawk also contends), the resulting loss of business income would be covered irrespective of the requirements of the Communicable Disease coverage that (a) the communicable disease be "actually present" at a location "owned, leased or rented" by the insured, (b) "a decision of an

officer of the insured" or the "order of a governmental authority" resulted from the presence of COVID-19 at the location, and (c) access to the location was "limited, restricted, or prohibited" by such decision or order. Even the aggregate sub-limits for the Communicable Disease coverages would be rendered meaningless. This would be the case because, if Mohawk had its way, the coverage for "transmissible diseases" would not be restricted to the specific grants of coverage contained in the Communicable Disease provisions. Rather, the Communicable Disease provisions would function only to block the application of the Contamination Exclusion to claims related to "transmissible diseases." Yet the coverage for such claims would not be defined or limited in any way by the Communicable Disease provisions, and no insured would ever make a claim under those coverages. Such results are both absurd and violate the basic principle that a policy should be interpreted so as to give effect to all of its terms. See Allianz, 416 F.3d at 116.

3. The Contamination Exclusion is Not Limited to "Costs".

Mohawk's argument that the Contamination Exclusion applies only to "costs" and not its "loss" of gross earnings is also unavailing. First, Mohawk's argument fails to account for the full text of the exclusion, which applies not only to any "cost due to contamination," but also the "contamination" itself. The Policy defines "contamination" as "any condition of property due to the actual or suspected presence of any . . virus, disease causing or illness causing agent[.]" The alleged presence of the virus at the College constituted a "condition" of property due to the actual or suspected presence of the virus, triggering the exclusion. See, e.g., Compl. ¶ 50. Second, Mohawk's argument incorrectly presumes that the word "costs" is limited to out-of-pocket expenditures. However, "costs" in the context of the Contamination Exclusion include "the inability to use or occupy the property." Such an inability does not entail only expenditures. Moreover, the inability to use or occupy property is at the center of Mohawk's claim.

4. The Contamination Exclusion is not Applicable Only to Property.

Mohawk argues that it applies only to property and not losses of income. This argument simply fails to conform to the terms of the Policy. The Civil Authority provision provides coverage only where property has suffered "physical loss or damage of the type insured." Because the conditions at the College fell within the Contamination Exclusion, they did not constitute "physical loss or damage of the type insured." Moreover, the "BUSINESS INTERRUPTION" section of the Policy states unequivocally that the Business Interruption Coverage and Business Interruption Extensions are "subject to all the terms and conditions of this Policy including, but not limited to, the . . . exclusions[.]" Mohawk's argument cannot be squared with that language.

D. The Order Closing The Casino Was Not a Direct Result of Physical Loss or Damage at the College.

As the third element of its claim, Mohawk must plead facts establishing that the order closing the Casino was the direct result of physical loss or damage at the College. The Complaint fails this requirement because the only plausible conclusion is that the closure order resulted directly from the Tribal Council's effort to prevent the spread of the virus and not from the condition of buildings at the College.

United Airlines, Inc. v. Ins. Co. of State of Pa, 385 F. Supp. 2d 343 (S.D.N.Y. 2005) aff'd 439 F.3d 128 (2d Cir. 2005), illustrates how the "direct result" requirement operates in circumstances analogous to the present case. Following the September 11, attacks, the FAA imposed a "ground stop" on flights and ordered the closure of Reagan Airport. United Airlines claimed that its resulting loss of income was covered under the civil authority provision of its policy because damage to the nearby Pentagon was the cause of the FAA orders. Id. at 344. Applying New York law, the district court granted summary judgment for the defendant on the ground, among others, that the closure was related to "security measures" rather than the damage

to the Pentagon. Id. at 354. The Second Circuit affirmed, holding that the government's decision to halt operations at the Airport indefinitely was based on "fears of future attacks," not damage at the Pentagon. 439 F.3d at 134. It reasoned that the timetable for reopening of the airport was tied to adoption of safety standards at the airport, not the repair or mitigation of damage at the Pentagon and, therefore, the closure order was not the direct result of that damage. Ibid.

Recently, in 10012 Holdings Inc. v. Hartford Fire Insurance Co., No. 1:20-cv-04471, (S.D.N.Y. Dec. 16, 2020), the court relied on the United Airlines decision to dismiss plaintiff's COVID-19 coverage claim under the Civil Authority provision, reasoning that the complaint did "not plausibly allege that the potential presence of COVID-19 in neighboring properties directly resulted in the closure of [p]laintiff's properties; rather, it alleges that closure was the direct result of the risk of COVID-19 at Plaintiff's property." Id. at *8. Stated differently, the court found that plaintiff was forced to close its gallery because of "the risk of harm to individuals on its own premises due to the pandemic, " and not because of physical loss or damage to neighboring properties as the Civil Authority provisions require. Ibid. See also Whiskey River on Vintage, Inc. v. Illinois Casualty Co., No. 4:20-cv-185-JAJ, at *18 (S.D. Iowa Nov. 30, 2020) (granting insurer's motion to dismiss, finding the closure proclamation issued was to limit the spread of COVID-19, and not to respond to the condition of any property).

The same result applies here. The Complaint fails to allege a plausible causal nexus between physical damage to the property at the College and the order closing the Casino. Rather, as the declaration of emergency and closure order both indicate, the Tribal Council acted to inhibit infections on the reservation. The reported COVID-19 case may have heightened the Tribal Council's awareness of health issues posed by the virus, but the resolution was not a direct result of any physical loss or damage at the College or anywhere else. This point is underscored by the

fact that the closure order did not tie the Casino's reopening to the repair or replacement of property at the College.

POINT II

MOHAWK'S MOTION SHOULD BE DENIED BECAUSE THE FACTS THAT IT CONTENDS ARE MATERIAL TO THE MOTION ARE NOT ESTABLISHED BEYOND DISPUTE AND ARE NOT BASED UPON ADMISSIBLE EVIDENCE

A. Standard Applicable to Mohawk's Motion for Partial Summary Judgment.

The entry of summary judgment is proper only if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A fact is "material" if it "might affect the outcome of the suit under the governing law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A material fact is genuinely in dispute "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Ibid. The moving party bears the initial burden of showing that there is no genuine issue of material fact with respect to any essential element of its claim. Id. at 250 n.4. A failure to meet that burden warrants the denial of the motion. Ibid. If the movant meets its initial burden, the opposing party must then show, through affidavits or otherwise, that there is a material issue of fact for trial. Id. at 250. Courts must resolve all ambiguities, and draw all inferences, in a light most favorable to the non-moving party. Anderson, 477 U.S. at 255. The entry of summary judgment is unwarranted where there is "sufficient evidence for a rational trier of fact to find in the non-movant's favor." Treglia v. Town of Manlius, 313 F.3d 713, 719 (2d Cir. 2002).

Mohawk asks the Court to find as a matter of law that the Contamination Exclusion does not apply to its claim. Mohawk is proceeding under Rule 56 rather than Rule 12 because there is a long list of facts that it deems to be material to its motion. Moreover, by submitting the affidavit of its attorney and asking the Court to take judicial notice of various factual assertions, Mohawk

attempts to establish that the litany of material facts upon which its motion is predicated are also undisputed, even though AFM has admitted few of them in its Answer.

Mohawk's motion fails to meet the standard established by Rule 56 because it comes before AFM has had an opportunity to conduct discovery into any of the facts that Mohawk asserts are material to its motion and many of those supposedly undisputed facts are not supported by admissible evidence as required by Rule 56 (c)(2) and (4).

B. AFM Has Not Been Afforded the Opportunity to Conduct Any Discovery.

In Hellstrom, M.D. v. United States Dept. of Veteran Affairs, 201 F.3d 94, 97 (2d Cir. 2000), the Second Circuit directly addressed the question of whether summary judgment is appropriate where, as here, a party has not had an opportunity to conduct discovery. It directed that a nonmoving party must be afforded the chance to conduct discovery of facts essential to its opposition and, therefore, that prediscovery summary judgment motions should be granted only in the "rarest of cases." Id. The Second Circuit recently reaffirmed that principle in Association of Car Wash Owners, Inc. v. City of New York, 911 F.3d 74, 83 (2018).

Mohawk's motion should be denied because no discovery has been conducted with respect to the "facts" that Mohawk asserts are material to the motion. For example, Mohawk contends the facts relating to the alleged presence of a student with COVID-19 at the College are material. If that were the case, as Mohawk has stated, it would be fundamentally unfair to treat those facts as "undisputed" even before AFM has had a chance to conduct discovery. The same applies to the other material facts upon which Mohawk's motion is premised.

C. The Motion is Based Upon Inadmissible Evidence.

In conjunction with its motion for partial summary judgment, Mohawk has submitted an affidavit by its attorney, Ms. Schmidt, containing numerous factual assertions and legal arguments

clothed as facts, and asks the court to take judicial notice of many of these "facts." It is elemental that the material facts underpinning a motion for summary judgment must be based upon admissible evidence. This is reflected in Rule 56(b)(2), which recognizes that a party may object on the basis that "material cited to support or dipute a fact cannot be presented in a form that would be admissible in evidence. AFM has moved to strike Ms. Schmidt's affidavit and opposes the judicial notice motion in part. For the reasons stated by AFM in those submissions, many of the facts that Mohawk asserts are material to its motion are not supported by admissible evidence. The motion should accordingly be denied.

POINT III

MOHAWK'S EXTRA-CONTRACTUAL CLAIMS FAIL AS A MATTER OF LAW

In Counts III and IV of the Complaint, Mohawk asserts claims for fraud and violation of the New York General Business Law Section 349. Those claims are based on the assertion that AFM acted in a deceptive way in interpreting and applying the Policy in connection with Mohawk's claim. Those claims fail as a matter of law because AFM did not act wrongfully by asserting a coverage position that was consistent with the terms of the Policy, and Mohawk was not damaged by AFM's refusal to pay its uncovered claim. See Violet Realty, Inc. v. Affiliated FM Insurance Co., 267 F. Supp. 3d 3841 (W.D.N.Y 2017) (dismissing extra-contractual claims because they were duplicative of breach of contract claims and General Business Law 349 did not apply to the parties' coverage dispute, which did not entail "consumer oriented conduct").

CONCLUSION

For all the foregoing reasons, it is respectfully requested that the Court deny Mohawk's Motion for Partial Summary Judgment and grant AFM's Cross-Motion for Partial Judgment on the Pleadings, with such additional and further relief as may be just and proper.

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