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 REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF CROSS-MOTION FOR JUDGMENT ON THE PLEADINGS

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INTRODUCTION

Defendant Affiliated FM Insurance Company ("AFM") submits this Reply Memorandum in support of its Cross-Motion under Rule 12(c) for Judgment on the Pleadings Dismissing the Complaint of Plaintiff Mohawk Gaming Enterprises ("Mohawk"). Dismissal of the Complaint with prejudice is warranted because the Complaint does not and cannot state a cause of action under the Civil or Military Authority provision of Policy No. SS772 (the "Policy").

POINT I

THE ACTUAL OR SUSPECTED PRESENCE OF A COVID-19 CASE AT ST. LAWRENCE COLLEGE DID NOT CAUSE PHYSICAL DAMAGE.

Mohawk's claim is based solely on the Civil Authority provision of the Policy, which states in 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." P. Ex. 1, P0037. As the first element of its claim, Mohawk must allege sufficient facts to demonstrate that property at St. Lawrence College (the "College") suffered "physical damage." Mohawk attempts to meet that requirement by alleging that a student with COVID-19 set foot on campus once for an undetermined period of time. Even accepting that allegation as true, the Complaint fails and should be dismissed because the mere presence of a person with COVID-19 is not sufficient to establish that the College suffered physical damage.

Under New York law, an insured may establish physical loss or damage only by demonstrating "a negative alteration in the tangible condition of property" requiring the property's repair or replacement. Michael Cetta, Inc. v. Admiral Indem. Co., No. 20 CIV 04612 (JPC), 2020 WL 7321405, at *6 (S.D.N.Y. Dec. 11, 2020). Applying essentially the same standard, the vast majority of courts from around the country have found that the novel coronavirus does not cause

"physical damage," even where it was alleged that the virus was present on the insured's property. See Uncork and Create, LLC v. Cincinnati Ins. Co., 2020 WL 6436948, at *4-5 (S.D.W. Va. Nov. 2, 2020) (citing cases from across the country addressing physical loss or damage to property in the context of COVID-19). The virus does not negatively alter the tangible condition of property requiring its repair. Rather, the virus can be removed through cleaning or other maintenance. Id. at *5; R.T.G. Furniture Corp. v. Hallmark Specialty Ins. Co., et al., No. 8:20-cv-2323-T-30AEP (M.D. Fla. Jan. 22, 2021).

Mohawk's argument that the College suffered "physical damage" is even more attenuated than the arguments rejected in these other cases. Mohawk does not even allege that the novel coronavirus was disseminated at the College. Instead, it alleges only that a person having COVID-19, the disease caused by the novel coronavirus, was present at the College. This is equivalent to saying that every home or building is physically damaged whenever a person with COVID-19 is present. Such an interpretation conflicts with the plain meaning of the phrase "physical damage," runs counter to the long line of cases applying that phrase in the context of insurance policies and yields a patently absurd result.

In its opposition, Mohawk suggests "direct damage" should be ascribed a unique meaning in this case. Mohawk argues that because the Policy provides some very specific, limited coverage related to the actual presence of a Communicable Disease at a location owned, rented or leased by the insured, "Communicable Disease" must constitute "physical damage." This argument fails on several grounds.

First, the premise for Mohawk's argument – that the Policy requires physical loss or damage in every case for coverage to apply – is simply wrong. To the contrary, the Policy contains coverages that do not depend upon a showing of physical loss or damage to property. For example,

the Off-Premises Service Interruption - Business Interruption provision affords coverage for business interruption losses resulting from an interruption of utility services (e.g. incoming electricity or steam) caused by an "accidental event" at a service provider. P. Ex. 1, P0026. The coverage applies irrespective of whether "physical damage" occurred at the insured's premises or the provider's premises. The Off-Premises - Data Services Business Interruption provision operates in the same way - coverage is triggered by an "accidental event" at the service provider's facilities and applies irrespective of whether the property of the insured or the service provider suffered physical loss or damage. P. Ex. 1, P0026-27. Other provisions that afford coverage in the absence of physical loss or damage include the Protection and Preservation of Property - Property Damage, Protection and Preservation of Property - Business Interruption, and Computer Systems-Non-Physical Damage provisions.

Second, Mohawk's interpretation would provide insureds with less coverage than the Policy otherwise affords. If Mohawk were correct that every provision of the Policy required "physical loss or damage," the logical conclusion would be that the Communicable Disease provisions would not apply unless the insured could show that the presence of a Communicable Disease caused a negative change in the tangible condition of property. As a consequence, in most, if not all, cases, there would be no coverage. By contrast, under AFM's construction, the insured simply needs to show that a person with a Communicable Disease was present at an owned, rented or leased location.

Third, Mohawk's construction obviates the distinction between cause and effect. Subject to its other terms, limitations, conditions and exclusions, the Policy provides coverage for "all risks of physical loss or damage" to insured property. The "risks" referenced in that phrase are fortuitous causes of loss, such as fires or hurricanes. When those risks come to fruition, the consequence is

physical loss or damage. Mohawk's attempt to equate the presence of a Communicable Disease with physical damage reverses these concepts. For example, one would certainly not say that the mere happening of a hurricane in and by itself is physical damage. Rather, the physical damage would be any alteration to the affected property caused by the hurricane. Mohawk's argument attempts to turn that relationship on its head by equating the presence of a COVID-19 infected person with physical loss or damage, and, in the process, does violence to the common understanding of the phrase "physical damage."

Fourth, Mohawk ignores that the Policy specifically defines "physical loss or damage" where the intent is to ascribe that phrase a meaning other than its plain meaning. Specifically, in the context of the Data, Programs or Software provision, the Policy defines "physical loss or damage to electronic data, programs or software" as "the destruction, distortion or corruption of electronic data programs, or software." P. Ex. 1, P0056. By contrast, the Communicable Disease provisions neither contain such a separate definition of "physical damage" nor even refer to that phrase. Thus, there is no textual support for Mohawk's contention that the Communicable Disease provisions implicitly alter the plain meaning of "physical damage" in the Civil Authority provision and elsewhere throughout the Policy.

Finally, Mohawk points to extrinsic evidence in an attempt to redefine or alter the meaning of the term "physical damage." As an initial matter, the contract terms as written are unambiguous and extrinsic evidence cannot be used to create an ambiguity where none exists. See CVS Pharmacy, Inc. v. Press America, Inc., 377 F. Supp. 3d 359, 374 (S.D.N.Y. 2019). Moreover, the evidence Mohawk points to does not support its assertion that the term "physical damage" should take a different meaning. For example, there is nothing in the "Talking Points," that even suggests that the presence of Communicable Disease is a form of "physical damage." To the contrary, in

discussing why the presence of a Communicable disease does not trigger coverage under the Civil Authority provision, the Talking Points state: "[T]he presence of a communicable disease does not constitute physical damage and is not of the of the type insured against as a virus falls within the definition of **contamination**[.]" P. Ex. 2, P0073.

POINT II

THE ALLEGED COVID-19 CASE AT THE COLLEGE DID NOT CONSTITUTE "PHYSICAL DAMAGE OF THE TYPE INSURED" BECAUSE MOHAWK'S CLAIM IS SUBJECT TO THE CONTAMINATION EXCLUSION.

As to the second element of its claim, Mohawk must allege facts sufficient to demonstrate that physical damage at the College was "of the type insured." The Complaint fails in this respect because the Contamination Exclusion applies to Mohawk's claim.

As discussed more fully in AFM's moving brief, the Policy excludes "**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." P. Ex. 1, P0018. The exclusion defines "contaminant" as "anything that causes **contamination**" and "**contamination**" as "any condition of property due to the actual or suspected presence of any foreign substance, impurity, pollutant, hazardous material, poison, toxin, pathogens or pathogenic organism, bacteria, virus, disease causing or illness causing agent, fungus, mold or mildew." P. Ex. 1, P0055. The novel coronavirus is unquestionably a virus. Accordingly, the Policy excludes any condition of property due to the actual or suspected presence of the novel coronavirus and any cost due to such condition, "including the inability to use or occupy property or any cost of making property safe or suitable for use or occupancy." As a consequence, contamination related to the virus does not constitute "physical damage of the type insured" and, therefore, cannot be the basis of a claim under the Civil Authority provision.

Mohawk argues that the Contamination Exclusion does not apply in this case because it suffered a "loss" of business income and is not seeking "costs" related to contamination. This distinction should be rejected because the Contamination Exclusion is not limited to "costs" due to contamination; rather, it also includes "any condition of property" attributable to the actual or suspected presence of the novel coronavirus. Moreover, contrary to Mohawk's contention, the Contamination Exclusion encompasses the "inability to use property," precisely what is at issue in this case. If the exclusion were limited to expenditures related to the inability to use or occupy property, the exclusion would say "costs of contamination, including any cost incurred as a result of an inability to use or occupy property." Indeed, the only other example of "costs" cited in the exclusion is constructed in precisely that manner ("any cost of making property safe or suitable for use or occupancy"). Mohawk's attempt to rewrite the exclusion should be rejected.

Mohawk's argument that the Contamination Exclusion is effectively neutered by the Communicable Disease provisions is also unavailing. Mohawk argues that the Communicable Disease provisions are not exceptions to the Contamination Exclusion because the exclusion does not expressly reference those provisions. Mohawk asserts that this conclusion must be correct because, in every other situation, the Policy identifies exceptions as such. But the premise of Mohawk's argument is mistaken. The Communicable Disease provisions are not the only exceptions that exist in the Policy that are not expressly labeled or identified as "exceptions."

For example, the "Property Excluded" section of the Policy states in part: "This Policy excludes the following except as otherwise stated in this Policy: 1. Land, water or any substance in or on land[.]" P. Ex. 1, P0014. Despite this exclusion, the Land and Water Clean Up Expense provision covers "the reasonable and necessary cost to remove, dispose of or clean up the actual but not suspected presence of **contaminant(s)** from uninsured land or water or any substance in

or on land, at a **location**, when such property is contaminated as a direct of insured physical loss or damage to insured property." P. Ex. 1, P0025. This coverage plainly operates as a limited exception to the land and soil exclusion, even though the exclusion contains no explicit reference to the Land and Water Clean Up provision and the provision does not expressly refer to the exclusion. Rather, the exception arises from the introductory language that states that the land and water exclusion applies "except as otherwise stated in this Policy." P. Ex. 1, P0014

The Communicable Disease provisions create exceptions to the Contamination Exclusion in the same manner. The Contamination Exclusion applies broadly to contamination and the costs due to contamination, such as the actual or suspected presence of the novel coronavirus. The Communicable Disease provisions create exceptions to the exclusion that apply in the specific situation in which a person with COVID-19 is actually present at a location "owned, leased or rented" by the insured and a closure order or decision ensues. The Policy recognizes that exceptions are created in just this manner through the introductory language to EXCLUSIONS, which states: "[T]he following exclusions apply unless otherwise stated[.]" P. Ex. 1, P0015. Like the exception to the land and water exclusion created by the Land or Water Clean Up provision, the Communicable Disease provisions create limited, specific exceptions to the Contamination Exclusion, even though the Contamination Exclusion contains no expressed reference to them.

An essential aspect of the Communicable Disease provisions is that the actual presence of the Communicable Disease occur at a location "owned, leased or rented" by the insured. Because of this limitation, the exception to the Contamination Exclusion does not apply in this case because the alleged COVID-19 case occurred at the College, not the casino or another location that Mohawk owned, leased or rented. Mohawk attempts to avoid this conclusion by arguing that AFM bears the burden of showing that the exception does not apply. This argument confuses the

applicable legal standard because the insured, not the insurer, bears the burden of establishing an exception to an exclusion. Northville Industries Corp. v. National Union Fire Ins. Co. of Pittsburgh, Pa, 89 N.Y.2d 621 (1997). Moreover, regardless of which party bears that burden, there is no question that the alleged COVID-19 case occurred at the College.

POINT III

THE CLOSURE ORDER, WHICH WAS DESIGNED TO PREVENT THE SPREAD OF COVID-19, DID NOT DIRECTLY RESULT FROM ANY ALLEGED PHYSICAL DAMAGE AT THE COLLEGE.

As the third element of its claim for coverage, Mohawk was required to allege sufficient facts to demonstrate that the Tribal Council's Order closing the casino was a "direct result" of the alleged "physical damage" at the College. In its opposition, Mohawk argues that the Complaint establishes such a direct causal connection because (1) the closure order was designed to "prevent" the spread of COVID-19, and (2) the order came after the report of a COVID-19 case at the campus. However, even if true, these assertions fail to establish the requisite causal nexus between the presence of the infected student at the College and the closure order.

By its plain terms, the Civil Authority provision requires that the order prohibiting access to an insured location be "the direct result of physical damage of the type insured." P. Ex. 1, P0037. As discussed in AFM's moving brief, the alleged presence of an infected student at the College did not compel the issuance of an order closing the casino. So, for example, it was not necessary for access to the casino to be prohibited so that local officials could respond to any damage at the College. Rather, at most, the report of a COVID-19 case on campus served as a reminder to the Tribal Council of the threat of the novel coronavirus spreading to the Reservation.

Mohawk implicitly acknowledges this point and attempts to shift its argument in a different direction. It now contends that a causal nexus existed because, upon learning of the

presence of an infected student at the College, the Tribal Council acted to protect its property, the casino customers and employees, and the local community from COVID-19. In other words, Mohawk now argues that a direct causal connection exists because, in shuttering the casino, the Tribal Council acted to prevent the spread of the virus.

The Second Circuit has already rejected essentially the same argument in United Airlines v. State of Pa., 439 F. 3d 128 (2d Cir. 2005). Applying New York law, the Second Circuit held that the FAA-ordered closure of Reagan Airport did not trigger coverage under a civil authority provision because the order was designed to prevent future attacks and, as such, was not a result of the physical damage to the Pentagon caused by the September 11 attack. By Mohawk's own admission, the Tribal Council acted to prevent the spread of COVID-19 on the reservation, not because the closure of the casino was necessary to address the alleged damage at the College. This conclusion is evidenced by the fact that the order closing the casino was not tied in any way to the time necessary to repair any damage or other physical condition at the College.

Indeed, the fatally flawed argument for coverage in the United Airlines case was stronger than the one presented by Mohawk because the attack on the Pentagon may at least have been a "but for" cause of the FAA's closure order. In this case, as Mohawk's own papers aver, the Tribal Council was already well aware of the health risk posed by COVID-19 before the report of an infected student at the College was published. To describe the situation in Mohawk's own terms, the Tribal Council knew that the novel coronavirus was "out there" and "had to be stopped" whether or not a COVID-19 case was reported at the College. Thus, Mohawk's contention that the closure order was preventative is sufficient in itself to defeat its Civil Authority claim under the standard articulated in United Airlines and other similar cases. See 10012 Holdings Inc. v. Hartford Fire Insurance Co., No. 20 CIV 4471 (LGS), 2020 WL 7360252 (S.D.N.Y. Dec. 15, 2020); Karmel

Davis and Assocs., Attorneys-at-Law, LLC v. The Hartford Financial Servs. Group, Inc., No. 1:20-cv-02181-WMR, at *15 (N.D. Ga. Jan. 26, 2021).

Mohawk also contends that the closure order "directly resulted" from the alleged COVID-19 case because it came "after" that case was publicized. This argument should be rejected on the basis of fundamental logic. In order for A to be the cause of B, A must precede B; however, the mere fact that A occurred first does not mean that it caused B. This conclusion is reflected in the cases. In United Airlines, the FAA order closing Reagan Airport came after the Pentagon was attacked.[1] Nevertheless, the Second Circuit rejected the conclusion that the attack was the direct cause of the closure order. Instead, it looked to the purpose of the closure order and determined that a direct causal relationship between the damage at the Pentagon and the order did not exist because the order was designed to prevent future attacks, not to respond to physical conditions created by the attack that had occurred.

The same result applies here. The closure order was not a direct result of the COVID-19 case at the College because the order was designed to avoid future infections on the reservation, not to respond to any physical conditions at the College, and the fact that the order came after the COVID-19 case was reported does not create a direct causal relationship between those two events.

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.

[1] Mohawk states that the order in United Airlines came before the Pentagon attack. This is incorrect. The Second Circuit noted that there was "apparently a temporary halt on flights prior to the Pentagon attack." Id. at 134. However, it explained that the "government's subsequent decision to hold operations was based upon fears of future attacks." Thus, United Airlines cannot be distinguished on the basis that the order preceded the physical damage at the Pentagon.

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