

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

NEW YORK BOTANICAL GARDEN,

Plaintiff,

v.

ALLIED WORLD ASSURANCE COMPANY (U.S.)
INC.,

Defendant.

Index No.:

COMPLAINT

Plaintiff New York Botanical Garden (“NYBG” or “Plaintiff”), by and through its undersigned attorneys, as and for its Complaint against Allied World Assurance Company (U.S.) Inc. (“AWAC” or “Defendant”), alleges as follows:

NATURE OF THE CASE

1. NYBG is a non-profit organization based in the Bronx, New York that is a world leader in plant research and conservation. Established in 1891, NYBG is located on a 250-acre site in the Bronx that contains a landscape with over one million living plants. Today NYBG employs approximately 386 full-time staff and has more than 996 volunteers and approximately 46,000 members. NYBG describes its mission as follows: “The New York Botanical Garden is an advocate for the plant kingdom. The Garden pursues its mission through its role as a museum of living plant collections arranged in gardens and landscapes across its National Historic Landmark site; through its comprehensive education programs in horticulture and plant science; and through the wide-ranging research programs of the International Plant Science Center.”

2. NYBG is also a major educational institution, teaching visitors about plant science, ecology, and healthful eating through NYBG's interactive programming. Nearly 90,000 of the annual visitors are children from underserved neighboring communities. An

additional 3,000 are teachers from New York City's public school system participating in professional development programs that train them to teach science courses at all grade levels.

3. The coronavirus (formally known as “severe acute respiratory syndrome coronavirus 2”) and the coronavirus disease 2019 that it causes (commonly known as “COVID-19”)¹ have had devastating consequences worldwide and in the United States, particularly the State of New York and the City of New York. Through the date of this Complaint, more than 29 million people in the United States have contracted COVID-19, resulting in 527,000 deaths of which more than 48,000 were in New York State. 30,000 of these fatalities were in New York City.

4. Almost 6,000 of those deaths were in Bronx County. The coronavirus and COVID-19 also have been identified at buildings and structures throughout Bronx County, including areas neighboring NYBG’s location. The coronavirus has been actually present on, at or within these properties resulting in multiple confirmed cases of COVID-19.

5. Because of the risks and damage caused by the coronavirus and COVID-19, the State and City of New York each issued multiple governmental orders prohibiting public access to NYBG’s property, necessitating the suspension and restriction of NYBG’s operations.

6. As a result, NYBG’s operations have been impaired and NYBG has sustained various losses, including business income losses and other expenses and costs that NYBG otherwise would not have incurred.

7. To manage the risk of damage to its properties and disruption to its operations, NYBG purchased a Blanket Pollution Legal Liability insurance policy from AWAC for the

¹ In common speech, “coronavirus” and “COVID-19” are terms that are frequently used interchangeably and they are used interchangeably in this Complaint.

policy period July 1, 2019 to July 1, 2022 (“PLLP” or “the Policy”). The Policy includes coverage for claims, damage and response costs, and for business interruption and contingent business interruption, arising out of a “pollution incident.” The Policy broadly defines “pollution incident” to include “microbial matter” and specifically “viruses.” A true and correct copy of the Policy is attached as Exhibit 1.

8. Following the issuance of the governmental orders that necessitated suspension of NYBG’s operations, NYBG submitted a claim to AWAC for its losses. Despite the Policy’s broad scope of coverage and clear evidence that coronavirus and COVID-19 were the reason for the governmental orders, AWAC, without conducting a reasonable investigation and as part of a broader business practice, denied coverage and refused to pay any amounts to NYBG for its losses.

9. NYBG brings this action for declaratory relief, breach of contract and breach of the covenant of good faith and fair dealing, and seeks a ruling that AWAC must provide coverage for NYBG’s losses and pay other damages in an amount to be determined.

THE PARTIES

10. Plaintiff NYBG is a not-for-profit corporation organized and existing under the laws of the State of New York with its principal place of business located at 2900 Southern Boulevard, Bronx, New York, 10458.

11. As alleged above, NYBG stewards numerous living plant collections arranged in gardens and landscapes across its 250-acre National Historic Landmark site. NYBG charges fees for public access to, *inter alia*, its botanical collections, exhibitions, and events.

12. Upon information and belief, Defendant AWAC is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business in the State of New York, and is duly authorized to conduct insurance business in the State of New York.

JURISDICTION AND VENUE

13. This Court has jurisdiction pursuant to N.Y. C.P.L.R. §§ 301 and 302.

14. The Policy provides that “[i]n the event of failure of us [AWAC] to pay any amount claimed to be due hereunder, we, at the request of the insured [NYBG], will submit to the jurisdiction of a court of competent jurisdiction within the United States.” Ex. 1, PLLP, at p.60 of 67.

15. Venue in this Court is proper pursuant to N.Y. C.P.L.R. § 503.

FACTUAL ALLEGATIONS

I. The AWAC Policy

16. NYBG, in consideration of substantial premiums, purchased from AWAC the PLLP, Policy No. 0310-2297, with a Policy Period of July 1, 2019 to July 1, 2022. Ex. 1, PLLP, at p.1 of 67.

17. NYBG is the named insured under the Policy. *Id.*

18. The Policy contains limits of liability in the amount of \$5,000,000 per incident/\$5,000,000 aggregate. The Policy also contains a deductible of \$50,000 each incident. *Id.* at p.1 of 67.

19. The Policy covers claims, environmental damage and emergency response costs arising out of a “pollution incident.” The Policy’s Insuring Agreement states as follows:

SECTION I – COVERAGES

1. Insuring Agreement

- a. We will pay **claims for loss** arising out of a **pollution incident** but only if:
 - (1) The **pollution incident** takes place in the **coverage territory**; and
 - (2) The **claim** is first made against the insured during the **policy period**; and
 - (3) You report the **claim** to us as soon as practicable during the **policy period** or extended reporting period if applicable.
- b. We will pay **environmental damage** or **emergency response expense** to which this insurance applies arising out of a **pollution incident** but only if:
 - (1) The **pollution incident** takes place in the **coverage territory**; and
 - (2) The **pollution incident** is discovered by you during the **policy period** and reported to us as soon as practicable during the **policy period** or extended reporting period, if applicable.

Id. at p.47 of 67.

20. The Policy was endorsed to include coverage for business interruption and contingent business interruption. Endorsement No. 15 of the Policy adds this coverage to the Insuring Agreement, stating, *inter alia*:

BUSINESS INTERRUPTION AND CONTINGENT BUSINESS INTERRUPTION

1. It is hereby agreed that the following is added to **SECTION I – COVERAGES**

1., Insuring Agreements:

Business Interruption Coverage

c. We will pay **business interruption costs** resulting from **business interruption** caused solely and directly by a **pollution incident** on, at or under a **location** owned by, or leased to you provided that:

a. The **pollution incident** takes place in the **coverage territory**;

b. The **pollution incident** is first discovered during the **policy period**; and

c. You report the **business interruption** to us, in writing, during the **policy period**.

2. Solely with regard to insurance afforded in connection with **Business Interruption Coverage**, the following is added to Item 3. of the Declarations:

Coverage:

Waiting Period	Each Incident Sub Limit	Business Interruption Policy Aggregate Sub Limit
\$50,000	\$5,000,000	\$5,000,000

Business Interruption

3 Days

Id. at p.33 of 67.

21. Endorsement No. 15 defines “business interruption” and “contingent business interruption” as follows:

Business interruption means:

a. The necessary suspension of your operations at a **location** owned by or leased to you, provided that such suspension of your operations first commenced during the **policy period** and is caused solely and directly by a **pollution incident** on, at or under a **location** owned by or leased to you; or

b. Contingent business interruption.

...

Contingent business interruption means the necessary suspension of your operations at a **location** owned by or leased to you as a result of an order by a government body or authority denying access to the **location** owned by or leased to you, provided that:

a. Such suspension first commenced during the **policy period** and is caused solely and directly by a **pollution incident** on, at or under an **independent location**;

b. Such order is solely and directly the result of a **pollution incident** at the **independent location**; and

c. An **insured** is not legally liable for such **pollution incident**.

Independent location means a **location** that is not and was not at any time a **location** owned, leased, managed, operated or used by an insured.

Id. at p.33-34 of 67.

22. The Policy defines “location” as: “[P]remises involving the same or connecting lots, or premises whose connection is interrupted only by a street, roadway, waterway or right-of-way of a railroad.” *Id.* at 63 or 67.

23. The Policy broadly defines “pollution incident” to include the presence of “microbial matter” on, at or within buildings or other structures. Endorsement No. 11 states that “pollution incident” means:

[T]he discharge, emission, seepage, migration, dispersal, **misdelivery**, release, escape or illicit abandonment by a third party without an insured’s consent of:

- a. any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapors, soot, fumes, acids, alkalis, chemicals, hazardous substances, petroleum hydrocarbons;
- b. low level radioactive materials or waste;
- c. legionella pneumophila;
- d. medical, infectious and pathological waste;
- e. a bioterrorism agent;
- f. waste materials; and
- g. electromagnetic fields;

into or upon land, or any structure on land, the atmosphere or any watercourse or body of water including groundwater, provided such conditions are not naturally present in the environment in the concentration or amounts discovered.

Pollution incident also means the presence of **microbial matter** or methamphetamines on, at or within buildings or other structures.

Id. at p.27 of 67.

24. The Policy defines “microbial matter” as “fungi, mold, bacteria or viruses which reproduce through the splitting of cells, the release of spores or by any other means, whether or not such microbial matter is living.” *Id.* at p.64 of 67.

25. Endorsement No. 15 of the Policy also defines “business interruption costs” as:

[A]ctual loss of **business income** and **extra expense** you incur during the **business interruption period**. **Business interruption costs** will be reduced to the extent that the **insured** can resume operations, in whole or in part, at the **location** owned by or leased to you, or by making use of other locations. **Business interruption costs** shall not include any amounts that do not directly result from a covered **pollution incident**.

Id. at 34 of 67.

26. Endorsement No. 15 further defines “business income” as:

- a Your net profit or loss before income taxes that would have been earned or incurred had there been no **business interruption**;
- b Your continuing normal operating and payroll expenses, except for payroll expenses of officers, executives, department managers and employees under contract;
- c Costs you are required to pay to rent temporary premises when that portion of the **location** owned by or leased to you cannot be occupied, leased or rented. Such costs shall not exceed the fair rental value of such portion of the **location** owned by or leased to you that cannot be occupied, leased or rented; and
- d Charges you incur which are the legal obligations of your tenant under the terms of a written lease that would have otherwise been your obligations but for the written lease.

Id. at 33 of 67.

27. The Policy defines “coverage territory” as:

[A]nywhere in the world, provided the insured’s responsibility to pay damages for **bodily injury, property damage, environmental damage or emergency response expense** is determined in a suit on the merits in the United States of America (including its territories and possessions), Puerto Rico and Canada.

Id. at 62 of 67.

II. Coronavirus, COVID-19 and NYBG’s Necessary Suspension of Operations

Outbreak and Spread of Coronavirus and COVID-19

28. According to the Centers for Disease Control (“CDC”), COVID-19 was caused by a new coronavirus first identified in December, 2019, in Wuhan, China. *See* <https://www.cdc.gov/coronavirus/2019-ncov/cdcresponse/about-COVID-19.html>.

29. COVID-19 quickly expanded internationally, including reaching the United States.

30. On January 31, 2020, the United States Secretary of Health and Human Services announced a nationwide public health emergency to respond to COVID-19.

31. On March 11, 2020, the World Health Organization declared COVID-19 as a pandemic, the first ever pandemic caused by a coronavirus.

32. Public reports of the release and spread of COVID-19 began to emerge in New York State on or about March 1, 2020. COVID-19 cases thereafter emerged in New York City, including the Bronx County neighborhoods adjacent to NYBG.

33. At NYBG's neighboring property, the Bronx Zoo, located at 2300 Southern Boulevard, Bronx, New York 10460, several tigers and lions tested positive for COVID-19. The United States Department of Agriculture's National Veterinary Services Laboratories confirmed these results. <https://abcnews.go.com/US/big-cats-test-positive-covid-19-zookeeper-accidentally/story?id=70303070>.

34. At present, the COVID-19 case count in NYBG's Bronx zip code 10458 is 6,939, and the percent positive (of people tested) is 6.88%. Deaths per 100,000 track at 211. The case count in the Bronx zip code for the area adjacent to NYBG, 10460, is currently 5,191 and the percent positive (of people tested) is 7.32%. Deaths per 100,000 track at 307.

Government Action in Response to the Presence of Coronavirus and COVID-19

35. The continued spread and presence of the virus led to national, state, and local declarations of emergency and escalating constraints on businesses, including but not limited to the below-described government orders which culminated in denial of access to NYBG's facilities and the necessary suspension of NYBG's operations.

36. On March 7, 2020, pursuant to Executive Order 202, New York State Governor Andrew Cuomo declared a State disaster emergency for the entire State of New York to address the spread and presence of COVID-19.

37. Executive Order 202 stated that "both travel-related cases and community contact transmission of COVID-19 have been documented in New York State and more are expected to continue[.]"

38. On March 11, 2020, Governor Cuomo implemented an exclusion zone in and about New Rochelle in Westchester County and deployed the National Guard to disinfect surfaces in this zone.

39. On March 12, 2020, pursuant to New York City Emergency Executive Order No. 98, a state of emergency was declared in New York City. The order cited, *inter alia*, CDC guidance on disinfection and cleaning.

40. Emergency Executive Order No. 98 stated that New York City had “confirmed its first case of COVID-19” on March 1, 2020.

41. On March 16, 2020, New York City Emergency Executive Order No. 100, which ordered the closure of various establishments and venues, stated that “this order is given because of the propensity of the virus to spread person to person and also because the virus physically is causing property loss and damage[.]”

42. NYBG was closed to the public as a place of outdoor public amusement as of March 19, 2020 by order of the Governor of New York. The order is memorialized in Executive Order 202.5 dated March 18, 2020, and has been updated and extended from time to time.

43. NYBG was also closed pursuant to New York City Emergency Executive Order No. 102 dated March 20, 2020.

44. In addition, NYBG was subject to Executive Order 202.8 preventing any non-essential employee from reporting to work on site after 8 p.m. on March 22, 2020.

45. The coronavirus that causes the disease COVID-19 is a “virus” that meets the Policy’s definition of “microbial matter,” and its presence on, at or within buildings or other structures at independent locations qualifies as a “pollution incident” which took place in the “coverage territory” as those terms are defined under the Policy.

46. Due to government orders denying access to NYBG, issued solely and directly in response to the presence of coronavirus and COVID-19 at independent locations throughout the State of New York that were not at any time owned, leased, managed, operated, or used by NYBG, NYBG needed to suspend its operations at its location including its business income-generating operations pursuant to which it charged fees for public access to NYBG.

47. NYBG first suspended its operations during the Policy Period and the suspension was solely and directly the result of a pollution incident at an independent location.

48. NYBG is not liable for such pollution incident and it suspended its operations as a result of the government orders denying access to NYBG issued in response to the pollution incident.

49. As a result of the government-mandated denial of access to NYBG and consequent suspension of operations, NYBG sustained business interruption costs, losses and expenses exceeding \$7,000,000 as of the present date. This amount is well in excess of any Policy deductible or waiting period.

50. To date, NYBG has not yet been able to fully resume its normal business operations due to ongoing restrictions relating to coronavirus and COVID-19.

III. NYBG's Business Interruption Claim and AWAC's Disclaimer

51. NYBG first discovered and timely reported the coronavirus-related pollution incident to AWAC within the Policy Period. NYBG sent its notice of claim to AWAC on April 13, 2020.

52. In a letter dated April 14, 2020, AWAC acknowledged receipt of NYBG's claim.

53. In a May 5, 2020 letter, AWAC further responded that “it appears unlikely that NYBG is entitled to Business Interruption Coverage, including contingent business interruption.” AWAC claimed a full reservation of its rights but requested additional information from NYBG.

54. In a letter dated May 21, 2020, NYBG disputed AWAC’s response and provided the information requested by AWAC, detailing the government orders that denied public access to NYBG and led to the suspension of its income-generating business operations, and noted that at that time a date for the lifting of restrictions in New York City was not currently available.

55. In a letter dated July 6, 2020, AWAC disclaimed “any obligation to pay business interruption costs or other losses in connection with” NYBG’s claim. AWAC’s disclaimer letter ignored the facts and circumstances necessitating suspension of NYBG’s operations as well as the terms of the Policy. Instead, AWAC wrongfully mischaracterized the government orders as mere “prophylactic measures” that cannot support a business interruption claim, a position devoid of support under the Policy. The Policy requires that government orders be solely and directly the result of a “pollution incident,” including viruses. The orders clearly resulted from the presence of the coronavirus at independent locations nearby NYBG.

56. AWAC’s July 6, 2020 letter set forth additional grounds for its disclaimer that also had no reasonable basis under the Policy. AWAC questioned the rationale and duration of the government orders that resulted in NYBG’s necessary suspension of its business operations, rather than applying Policy terms to determine whether such orders resulted from a “pollution incident” that would trigger coverage.

57. In a letter dated July 23, 2020, NYBG disputed AWAC’s wrongful disclaimer of coverage. NYBG explained why AWAC’s coverage position was mistaken and reiterated

the facts and circumstances triggering coverage under the Policy for business interruption, including contingent business interruption. NYBG specifically explained why the government orders that led to the necessary suspension of NYBG's operations were the result of a "pollution incident" under the Policy, and that the coronavirus was the only reason for these orders. NYBG requested AWAC to reconsider its coverage position.

58. AWAC did not respond to NYBG's July 23, 2020 letter and improperly continues to disclaim coverage under the Policy.

59. Notwithstanding AWAC's improper disclaimer, coverage is available for NYBG's claim for business interruption under the Policy and no Policy exclusions apply to bar coverage.

60. On information and belief, AWAC did not perform a reasonable investigation of NYBG's claim for coverage under the Policy and its disclaimer instead is part of a broader business practice to deny its policyholders' business interruption coverage claims for losses relating to coronavirus and COVID-19.

61. Due to AWAC's failure to promptly pay NYBG amounts due under the terms of the Policy, NYBG has suffered consequences including, but not limited to, implementation of budget cuts, reduction in programmatic activity, lack of funds for hiring new scientists and fulfilling facility maintenance objectives, lost opportunities for expansion of its botanical collections and depletion of its endowment fund, all of which have negatively impacted NYBG's ability to fulfill its institutional mission relating to plant science and public education.

62. Moreover, NYBG's full-time staff dropped from approximately 418 to 386; its volunteer base dropped from over 2,035 to about 996; and its membership from approximately 56,000 to 46,000. NYBG's ability to return to its pre-pandemic level of operations has thereby been impeded.

63. NYBG has paid all policy premiums and fully satisfied all policy conditions relating to coverage under the Policy.

64. AWAC is therefore obligated to pay NYBG for its business interruption costs and losses under the terms of the Policy.

FIRST CAUSE OF ACTION
(Declaratory Judgment)

65. Plaintiff NYBG repeats and realleges the allegations set forth in the foregoing paragraphs of this Complaint as if fully set forth herein.

66. Pursuant to the terms of the Policy, AWAC is obligated to pay NYBG up to \$5,000,000 per pollution incident, subject to the additional terms and conditions of the Policy.

67. As detailed above, NYBG's business interruption and other losses are covered under the Policy and are not excluded from coverage.

68. AWAC disclaimed its legal obligation to pay NYBG's coverage claim.

69. An actual and justiciable controversy presently exists between NYBG and AWAC concerning the proper construction of the Policy, and the rights and obligations of the parties thereto, with respect to NYBG's coverage claim for business interruption, including contingent business interruption, and other losses.

70. The issuance of prompt declaratory relief by this Court is desirable and necessary to resolve the existing controversy between the parties.

SECOND CAUSE OF ACTION
(Breach of Contract)

71. Plaintiff NYBG repeats and realleges the allegations set forth in the foregoing paragraphs of this Complaint as if fully set forth within.

72. The Policy constitutes a valid and enforceable contract between NYBG, as the "Named Insured," and AWAC, as the insurer.

73. NYBG has materially complied with the terms and conditions of the Policy.

74. As alleged above, NYBG has sustained business interruption losses and expenses that are covered under the Policy.

75. Despite NYBG's timely reporting of the pollution incident to AWAC, AWAC has wrongfully disclaimed its obligation to pay NYBG's business interruption costs under the terms of the Policy.

76. Specifically, under the terms of the Policy, AWAC is obligated to pay up to \$5,000,000 per pollution incident, subject to the additional terms and conditions of the Policy.

77. AWAC has not paid any amounts to NYBG in connection with its claim. Instead, AWAC has improperly disclaimed coverage and thus is in material breach of its obligations under the Policy.

78. As a direct and proximate result of NYBG's breach of its contractual obligations under the Policy, NYBG has suffered and will continue to suffer damages in an amount to be determined at trial, plus attorneys' fees and pre- and post-judgment interest to the extent permitted by law.

THIRD CAUSE OF ACTION

(Breach of the Implied Covenant of Good Faith and Fair Dealing)

79. Plaintiff repeats and realleges the allegations set forth in the foregoing paragraphs of this Complaint as if fully set forth herein.

80. Under New York law, the Policy contains an implied covenant of good faith and fair dealing.

81. AWAC has delayed payment of the insurance proceeds owed to NYBG under the Policy and failed to perform a timely, fair, and complete investigation and determination of NYBG's claim by relying on baseless reasons to refuse to cover NYBG's claim after

NYBG demonstrated why those reasons are meritless, and by failing to give proper individualized consideration to NYBG's claim.

82. AWAC continues to disclaim payment to NYBG, which has necessitated NYBG's filing of this Complaint.

83. Through these actions, AWAC has breached the implied covenant of good faith and fair dealing in the Policy.

84. AWAC's conduct has also violated the standards for good faith and fair dealing set forth in New York Insurance Law § 2601(a).

85. NYBG has been damaged by AWAC's breach of the implied covenant of good faith and fair dealing in an amount to be determined at trial.

86. NYBG is entitled to consequential damages flowing from AWAC's violation of the implied covenant of good faith and fair dealing, including, without limitation, additional business losses and expenses, pre-judgment interest on the amount owed under the Policy, and the attorneys' fees and costs incurred by NYBG in enforcing its rights and as a consequence of AWAC's bad faith delays in providing coverage for NYBG's claim.

87. Consequential damages were reasonably contemplated and foreseeable by NYBG and AWAC at the time that they entered into the Policy.

PRAYER FOR RELIEF

WHEREFORE, the Plaintiff NYBG prays for relief as follows:

a) On the First Cause of Action, NYBG requests that the Court enter a judgment in favor of NYBG declaring that NYBG's losses are covered under the Policy, and declaring that AWAC is required to pay NYBG, up to the applicable limits of the Policy, for claimed amounts under the Policy;

b) On the Second Cause of Action, NYBG requests that the Court enter judgment against AWAC, awarding NYBG damages in the amount of the Policy limit of \$5,000,000,

plus attorneys' fees and pre- and post-judgment interest to the extent permitted by law and in amounts to be determined at trial as appropriate;

c) On the Third Cause of Action, NYBG requests that the Court enter a judgment against AWAC, awarding NYBG damages in an amount to be determined at trial, plus consequential damages, attorneys' fees, and pre- and post-judgment interest to the extent permitted by law;

d) For all Causes of Action, all pre-judgment and post-judgment interest as allowed by law and all of NYBG's costs incurred as a consequence of having to prosecute this lawsuit, including attorneys' fees; and

e) For such other and further relief as the Court deems just and proper.

Dated: New York, New York
March 19, 2021

Respectfully submitted,



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