UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ROCHESTER DRUG CO-OPERATIVE, INC.,

PLAINTIFF,

6:20-CV-6025 (EAW)

v.

HISCOX INSURANCE COMPANY, INC.,

DEFENDANT.

MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

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Plaintiff Rochester Drug Co-Operative, Inc. ("Rochester Drug Co-Op" or "the Company") respectfully submits this memorandum of law in opposition to defendant Hiscox Insurance Company, Inc.'s ("Hiscox") Motion to Dismiss the Complaint. For the reasons set forth below, and those outlined in Rochester Drug Co-Op's preliminary-injunction briefs, the Company requests that the Court deny Hiscox's motion.

PRELIMINARY STATEMENT

Rochester Drug Co-Op paid Hiscox nearly $36,000 for an insurance policy, the purpose of which was to protect the Company from bet-the-company litigations like the NY Opioid Litigations. When the Company first reported the NY Opioid Litigations, Hiscox represented that the Policy provided coverage for those litigations. And for a year-and-a-half, Hiscox maintained that position—issuing further coverage correspondence reiterating that the Policy provided coverage, approving defense counsel, approving billing rates, and even reviewing and commenting on defense counsel's invoices. Then, after the Company paid Hiscox yet an additional $36,000 to renew the Policy on the promise of coverage, Hiscox yanked the rug out from underneath the Company. It disclaimed coverage based on a single, clearly inapplicable Policy exclusion—the Final Adjudication Exclusion. Now, Hiscox is scrambling to justify its decision by arguing the applicability of other equally-inapplicable exclusions. But the answer is clear from the plain text of the Policy—Hiscox is obligated to provide coverage for the NY Opioid Litigations.

FACTS

Rochester Drug Co-Op is a pharmaceutical wholesaler that has been in business for over one hundred years. The Company—one of the few remaining drug-distribution cooperatives remaining in the United States—supplies products to thousands of independent pharmacies in health-care stores. During the relevant time period, those products included opioids.

Rochester Drug Co-Op maintains fulsome insurance coverage in order to protect its operations. As part of that coverage, Rochester Drug Co-Op paid Hiscox $35,873 to secure a Private Company Management Liability Insurance Policy for the period of March 8, 2017 to March 8, 2018 (the "Policy"). Dkt. No. 38-1, p. 4. That Policy provides broad coverage for Rochester Drug Co-Op's operations, including its sale of opioids. Specifically, the coverage-grant language states Hiscox "shall pay the Loss of a Company arising from a Claim first made against a Company during the Policy Period . . . for any actual or alleged Wrongful Act of a Company." Dkt. No. 38-1, p. 15. "Wrongful Act" is also defined broadly to encompass "any breach of duty, neglect, error, misstatement, misleading statement, omission or act by" the Company. Dkt. No. 38-1, p. 21.

Over the last two years, Rochester Drug Co-Op has been sued for its distribution of opioids to facilities within New York. Rochester Drug Co-Op promptly provided notice of these lawsuits to its insurer, Hiscox, and requested coverage. *See* Dkt. No. 11-1, p. 7.

Hiscox first responded by letter dated March 22, 2018. Dkt. No. 11-3, p. 8-15. In that correspondence, Hiscox stated it would provide coverage for *County of Nassau v. Purdue Pharma, L.P.* Index No. 400008/2017 (Suffolk County Supreme Court) and *County of Niagara v. Purdue Pharma, L.P.*, Index No. E162958/2017 (Niagara County Supreme Court). *Id.* By letter on August 24, 2018, Hiscox acknowledged receipt and coverage for an additional twenty-five complaints filed by various municipalities. Dkt. No. 11-3, p. 17-22. Six months later, by letter dated February 19, 2019, Hiscox acknowledged receipt of two additional complaints filed by the Counties of Otsego and Cattaraugus. Dkt. No. 11-1, p. 338-44. Hiscox again confirmed coverage for the additional matters. *Id.* Lastly, in its September 13, 2019 letter, Hiscox acknowledged receipt of: (1) *County of Albany v. Cardinal Health*, No. 1:19-cv-00273, filed on February 29, 2019 in the United States District Court for the Northern District of New York, and (2) *New York v. Purdue*

Pharma L.P., No. 400016/2018 filed in the Supreme Court of the State of New York, Suffolk County (the "NY AG Action"). Dkt. No. 11-3, p. 24-34. In the present litigation, Rochester Drug Co-Op refers to these thirty-one matters as the "NY Opioid Litigations."

During that time, Hiscox also approved defense counsel's rates and litigation budgets for the NY Opioid Litigations. Dkt. No. 11-2, p. 2. Counsel for Hiscox had telephone calls with Rochester Drug Co-Op's coverage counsel and broker to discuss a protocol for reimbursement of attorneys' fees. Dkt. No. 38-1, p. 1-2. Hiscox received, reviewed, discussed, and negotiated invoices from the Company's counsel. *See* Dkt. No. 38-2, p. 157-239. But in practice, Hiscox never paid any of counsel's attorneys' fees. Dkt. No. 11-2, p. 2.

On September 13, 2019, Hiscox issued correspondence declining coverage based on the Policy's Final Adjudication Exclusion. Dkt. No. 11-3, p. 24-34. The Final Adjudication Exclusion states that Hiscox "shall not be liable to make any payment for Loss in connection with any Claim made against any Insured arising out of, based upon or attributable to . . . the committing of any deliberate criminal or deliberate fraudulent act, or any willful violation of any statute, rule or law, if any final adjudication establishes that such deliberate criminal or deliberate fraudulent act, or willful violation of statute, rule or law was committed." Dkt. No. 38-1, p. 22. According to Hiscox, it was disclaiming coverage because the Company entered into a "Stipulation and Order of Settlement and Dismissal" (the "Stipulation") in a civil case brought against Rochester Drug Co-Op by the United States Attorney for the Southern District of New York ("the Government") ("the Civil Action") and a Deferred Prosecution Agreement entered into by the Company and the Government in a parallel criminal action ("the Criminal Action"). *See* Dkt. No. 11-3, p. 30-34. The Civil and Criminal Actions, for which the Company is not seeking coverage, were separate and apart from the NY Opioid Litigations. *See* Dkt. No. 11-1, p. 149-151

(providing the list of thirty-one matters for which Rochester Drug Co-Op seeks coverage). Hiscox did not state any other grounds other than the Final Adjudication Exclusion as the reason for its declination. *Id.*

Notably, neither the Civil Action, nor the Criminal Action, resulted in any judgment or other adjudication of criminality or wrongdoing. Through the Deferred Prosecution Agreement, the Company waived indictment and consented to the *filing* of criminal charges. *See* Dkt. No. 11-1, p. 171. The Company then *pleaded not guilty* to all those charges. Dkt. No. 11-1, p. 303. Under the terms of the Deferred Prosecution Agreement, prosecution was deferred—not completed—and if Rochester Drug Co-Op complies with the terms of the agreement, then the Government will move to dismiss the charges with prejudice. Dkt. No. 11-1, p. 174. Unlike a criminal matter following a conviction or plea deal, the deferred prosecution agreement triggered no judgment. Dkt. No. 11-1, p. 301-04.

The Civil Action brought in parallel to the Criminal Action also resulted in no judgment. In fact, the Stipulation states that the Government may, "at its option, (a) rescind this Stipulation and reinstate the claims asserted against RDC in the Complaint." Dkt. No. 11-1, p. 312. It also states that, if Rochester Drug Co-Op complies with the terms of the Stipulation, then the Government will "release [Rochester Drug Co-Op] from any civil claim for penalties that the United States has for the Covered Conduct." Dkt. No. 11-1, p. 313-14. A judgment will only be entered "[i]n the event of an Uncured Default." Dkt. No. 11-1, p. 311. The Company entered into these agreements nearly five months before Hiscox issued its declination letter. *See* Dkt. No. 11-1, p. 301-04 (showing entry of the Deferred Prosecution Agreement in April 2019); Dkt. No. 11-1, p. 327-39 (showing entry of the Stipulation in April 2019); Dkt. No. 11-3, p. 24-34 (showing Hiscox declination letter dated September 13, 2019).

Rochester Drug Co-Op has spent over one million dollars defending itself in the NY Opioid Litigations. Dkt. No. 11-2, p. 11. Hiscox has not paid out any money under the Policy. *See* Dkt. No. 11-2, p. 2.

ARGUMENT

A. The Motion to Dismiss Standard

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks and citation omitted). A claim has facial plausibility when "the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* Generally, the Court must accept as true all of the allegations contained in the complaint. *Id.*

B. The Contra-Insurer Rule

"[W]henever an insurer wishes to exclude certain coverage from its policy obligations, it must do so in 'clear and unmistakable' language. Any such exclusions or exceptions from policy coverage must be specific and clear in order to be enforced. They are not to be extended by interpretation or implication, but are to be accorded a strict and narrow construction. Indeed, before an insurance company is permitted to avoid policy coverage, it must satisfy the burden which it bears of establishing that the exclusions or exemptions apply in the particular case, and that they are subject to no other reasonable interpretation." *Seaboard Surety Co. v. Gillette Co.*, 64 N.Y.2d 304, 311 (N.Y. 1984) (internal quotations and citations omitted). Even more, any ambiguity "must be construed against the insurer." *Yale Club of New York City, Inc. v. Reliance Ins. Co. in Liquidation*, 55 A.D.3d 43, 44 (1st Dep't 2008), *aff'd* 12 N.Y.3d 725 (N.Y. 2009). An

insurance provision is ambiguous if it "may be reasonably interpreted in two conflicting manners." *Mostow v. State Farm Ins. Co.*, 88 N.Y.2d 321, 326 (N.Y. 1996).

C. The Final Adjudication Exclusion

1. The Final Adjudication Exclusion cannot apply to bar coverage to Rochester Drug Co-Op because there has been no "final adjudication."

The plain meaning of "final adjudication," which is not otherwise defined by the Policy, requires a final judgment of criminality or fraud. Black's Law Dictionary defines "final" as "not requiring any further judicial action by the court that rendered the judgment to determine the matter litigated." *Black's Law Dictionary* (10th ed. 2014). "Adjudication" is defined as "[t]he legal process of resolving a dispute; the process of judicially deciding a case." *Id.*; *see also Pendergest-Holt v. Certain Underwriters at Lloyd's of London*, 600 F.3d 562, 572 (5th Cir. 2010) ("[C]ourts have interpreted both 'final adjudication' and 'in fact' to require a judicial decisionmaker."); *First Mercury Ins. Co. v. Law Office of Kenneth B. Schwartz*, No. CV 17-1763, 2019 U.S. Dist. LEXIS 35210, at *45 (E.D.N.Y. Mar. 1, 2019) (conditional guilty plea was not "final adjudication" because party could withdraw it); *Wojtunik v. Kealy*, No. CV-03-2161-PHX-PGR, 2011 U.S. Dist. LEXIS 36229, at *26 (D. Az. Mar. 31, 2011) (settlement is not a "final adjudication" for purposes of insurance policy exclusion); *United States v. Weissman*, 94-cr-760, 1997 U.S. Dist. LEXIS 8540, at 40 (S.D.N.Y. June 13, 1997) (no "final adjudication" in criminal matter until court decides post-trial motions). By ordinary definition then, the Final Adjudication Exclusion requires a *judgment* of criminality or fraud.

But neither the Deferred Prosecution Agreement nor the Stipulation is a "final adjudication," because neither included any adjudication of criminality or wrongdoing. Start with the Deferred Prosecution Agreement, entered on April 22, 2019. A deferred prosecution agreement is a mechanism for *avoiding* any adverse adjudication in a criminal case. Through a

deferred prosecution agreement, "the government agrees to defer prosecution and *ultimately seek dismissal* of all charges if the defendant complies with the DPA." *United States v. HSBC USA, N.A.*, 863 F.3d 125, 129 (2d Cir. 2017) (emphasis added). As long as the defendant complies with a deferred prosecution agreement, no adjudication of criminality is ever made. *See id*. No judgment is entered with the deferred prosecution agreement. "[T]he entire object of a DPA is to enable the defendant to *avoid* criminal conviction" so that the "court never exercises its coercive power by entering a judgment of conviction." *United States v. Fokker Servs. BV,* 818 F.3d 733, 746 (D.C. Cir. 2016) (emphasis in original). Moreover, under a deferred prosecution agreement, "if the defendant were to fulfill the agreement's conditions, the prosecution would move to dismiss all charges with prejudice at the end of the specified period." *Id.* at 739; *see also id.* at 743 ("dismissal under a DPA follows from a defendant's adherence to agreed-upon conditions over a specified period"). At that point, the Government enters a *nolle prosequi* with the court. *See, e.g.*, *United States v. Toyota Motor Corp.*, 278 F. Supp. 3d 811, 814 (S.D.N.Y. 2017). "A *nolle prosequi* is a unilateral act by a prosecutor, which ends the pending proceedings . . . without placing the defendant in jeopardy." *Roberts v. Babkiewicz*, 582 F.3d 418, 420 (2d Cir. 2009). "Whereas a district court enters a judgment of conviction . . . in the case of a plea agreement, the court takes no such action in the case of a DPA." *Fokker Servs. B.V.*, 818 F.3d at 746. "The key point" of a deferred prosecution agreement "is that, although charges remain pending on the court's docket under a DPA, the court plays no role . . . and defendants who violate the conditions of the DPA face no court-ordered repercussions." *Fokker Servs. B.V.*, 818 F.3d at 744.

This is how Rochester Drug Co-Op's Deferred Prosecution Agreement works. Rochester Drug Co-Op waived indictment and consented to the *filing* of criminal charges. Dkt. No. 11-1, p. 171. The Company then *pleaded not guilty* to all those charges. Dkt. No. 11-1, p. 303. Under the

terms of the Deferred Prosecution Agreement, prosecution was deferred—not completed—and if Rochester Drug Co-Op complies with the terms of the Agreement, then the Government will move to dismiss the charges with prejudice. *See id.* Dkt. No. 11-1, p. 174 ("[I]f RDC is in compliance with all of its obligations under this Agreement, the Office will, within thirty (30) days after the expiration of the period of deferral . . . seek dismissal with prejudice as to RDC of the Information filed against RDC pursuant to this Agreement."). Unlike a criminal matter following a conviction or plea deal, this deferred prosecution agreement triggered no judgment. *See* Dkt. No. 11-1, p. 301-04. Simply put, there has been no adjudication, and certainly no final adjudication.

The Civil Case brought in parallel to the criminal case also resulted in no judgment. Rochester Drug Co-Op and the Government entered into the "Stipulation and Order of Settlement and Dismissal." *See* Dkt. No. 11-1, p. 306-25. That Stipulation is also not a "final adjudication." In fact, the Stipulation states that the United States may, "at its option, (a) rescind this Stipulation and reinstate the claims asserted against RDC in the Complaint." *See* Dkt. No. 11-1, p. 312. It is clear from this provision alone that the Stipulation is not a final adjudication. But the Stipulation goes further: it also states that, if Rochester Drug Co-Op complies with the terms of the Stipulation, then the United States will "release[Rochester Drug Co-Op] from any civil claim for penalties that the United States has for the Covered Conduct." *See* Dkt. No. 11-1, p. 313-14. Even more, the Stipulation provides for the only circumstance in which a judgment would, in fact, be filed—"[i]n the event of an Uncured Default" of the Company's settlement payments. *See* Dkt. No. 11-1, p. 311. Moreover, the parties attached a consent judgment to be entered if and only if a default occurred. *See id*. That judgment has never been docketed. *See* Dkt. No. 11-1, p. 327-29. So, as with the Criminal Case, no judgment has been entered in the Civil Case. *See id*.

Consequently, neither the Deferred Prosecution Agreement nor the Civil Stipulation is a "final adjudication." While both contain factual admissions, they were never adopted by any court in any adjudication. Moreover, even if they had been incorporated by a court—and, again, they were not—no judgment was ever entered, final or otherwise. *See, e.g.*, *Lifespan Corp. v. Nat'l Union Fire Ins. Co.*, 59 F. Supp. 3d 427, 445 (D.R.I. 2014) (holding that, even where court had made factual findings of fraud, there was no "final adjudication" in the absence of "*a judgment* establishing deliberate fraudulent conduct") (emphasis added). It bears emphasis that the very purpose of the Deferred Prosecution Agreement and Stipulation was to *avoid* such a judgment. *See, e.g.*, *Fokker Servs. B.V.*, 818 F.3d at 746 ("the entire object of a DPA is to enable the defendant to *avoid* criminal conviction" such that no "judgment of conviction" is ever entered). There has therefore been no "final adjudication."

Hiscox's contrary construction would expand "final adjudication" into "final adjudication *or admission*." That more expansive version—adding the "or admission" provision—is, in fact, a common (but broader) exclusion. *See, e.g.*, *Am. Guar. Liab. Ins. Co. v. Hoeffner*, Civil Action No. H-08-1181, 2009 U.S. Dist. LEXIS 3047, at *8-9 (S.D. Tex. Jan. 16, 2009) (quoting an exclusion extending to "a final adjudication or admission by an Insured"); *Phila. Indemn. Ins. Co. v. Stazac Mgmt., Inc.*, 3:16-cv-369-J-34MCR, 2017 U.S. Dist. LEXIS 45397, at * 3 (M.D. Fla. Jan. 31, 2017) (quoting an exclusion extending to "final adjudication [or] adverse admission"); *B&R Consol. L.L.C. v. Zurich Am. Ins. Co.*, 2011 N.Y. Misc. LEXIS 3014, *12-13 (N.Y. Supt. Ct. June 22, 2011) (quoting an exclusion extending to "a final adjudication or admission"); *Sony Computer Entm't Am., Inc. v. Am. Home Assur. Co.*, 532 F.3d 1007, 1010 (9th Cir. 2008) (quoting an exclusion extending to "final adjudication [or] adverse admission"); *Xtreme Prot. Servs., LLC v. Steadfast Ins. Co.*, 2019 Ill. App. LEXIS 301, at **4 (Ill. App. Ct. May 3, 2019) (quoting an

exclusion extending to "a final adjudication or admission"); *Am. Auto. Ins. Co. v. Advest, Inc.*, 08 Civ. 6488, 2009 U.S. Dist. LEXIS 101572, at *6-7 (S.D.N.Y. Oct. 28, 2009) (quoting an exclusion extending to "final adjudication or admission"); *Am. Guar. & Liab. Ins. Co. v. Moskowitz*, 19 Misc. 3d 548, n.* (N.Y. Sup. Ct. Feb. 28, 2009) (quoting an exclusion extending to "a final adjudication or admission"); *Fidelity Nat'l Title Ins. Co. v. Maxum Indem. Co.*, Civil Action No. 16-1360, 2017 U.S. Dist. LEXIS 147133, at *14 n.9 (E.D. Pa. Sept. 12, 2017) (quoting an exclusion extending to "final adjudication, adverse finding of fact, or adverse admission").

But unlike the common policy exclusions quoted parenthetically above, which exclude *both* "final adjudications" and "admissions," Hiscox's Final Adjudication Exclusion here is clearly limited to "final adjudications" alone. Coverage under the Policy that Hiscox sold Rochester Drug Co-Op is more robust than the policies quoted above because Hiscox chose not to exclude coverage following a mere "admission." If Hiscox wants admissions to trigger its exclusions, it can write that policy next time. But that is not the Policy the Company bought. And right now, when Rochester Drug Co-Op needs the coverage it purchased, Hiscox should not be permitted to shirk its obligations by wishing it had drafted its exclusion to specifically include "admissions." Simply put, the Company's admissions do not implicate the Final Adjudication Exclusion.

The case law cited by Hiscox does not suggest otherwise. Hiscox relies on only three authorities for the purported principle that court-ordered settlements are final adjudications. The first merely held that a settlement was final insofar as its court-ordered release of claims was enforceable, *see Ho v. Martin Marietta Corp.*, 845 F.2d 545, 548 (5th Cir. 1988), and the second was interpreting the term "finality" in the context of collateral estoppel, *see Zapata v. HSBC Holdings PLC*, No. 17-CV-6645 (NGG) (CLP), 2019 U.S. Dist. LEXIS 173087, at *11 (E.D.N.Y. Sep. 30, 2019). The third simply construed a policy not to cover claims of unlawful profit when it

said "Nor will we cover claims relating to any unlawful profit," *IACP v. St. Paul Fire and Marine Ins. Co.*, 686 F. Supp. 115, 117 (D. Md. 1988). More applicable to the current dispute would be cases such as *Pendergest-Holt v. Certain Underwriters at Lloyd's of London*, 600 F.3d 562 (5th Cir. 2010)—which found in the context of an insurance-coverage dispute that "a final adjudication exclusion limits the insurer's recourse if the parties settle" because courts have interpreted "final adjudication" to "require a judicial decisionmaker"—as well as *U.S. Bank N.A. v. Indian Harbor Ins. Co.*, 2014 U.S. Dist. LEXIS 91335, at *9 (D. Minn. July 3, 2014) and *Wojtunik v. Kealy*, 2011 U.S. Dist. LEXIS 36229, at *26 (D. Az. Mar. 31, 2011), which held that a settlement before trial does not constitute a "final adjudication" for purposes of interpreting an insurance exclusion. Because there has been no final adjudication here, the exclusion does not apply.[2]

2. The Final Adjudication Exclusion also cannot apply because the NY Opioid Litigations would arise with or without deliberate criminal or fraudulent acts.

Even if the Deferred Prosecution Agreement and Stipulation were final adjudications (which they are not), there is a second, independent reason the exclusion would not apply—the NY Opioid Litigations are not "arising out of, based upon or attributable to the . . . committing of any deliberate criminal or deliberate fraudulent act, or any willful violation of any statute, rule or law." Dkt. No. 38-1, p. 22. It does not matter that the Company admitted to engaging in criminal or fraudulent conduct. By precedent, the Final Adjudication Exclusion does not apply, as explained below, unless a cause of action *requires* that underlying crime or fraud. Because that is not the case here, the exclusion does not apply.

[2] Even if the Stipulation were a "final adjudication," Hiscox has also failed to provide any proof—as is its burden—that the Stipulation "establishes that such deliberate criminal or deliberate fraudulent act, or willful violation of statute, rule or law was committed."

Courts apply a "but-for" test when determining whether a claim arises out of or is based upon excluded conduct. *Beazley Ins. Co. v. Ace Am. Am. Ins. Co.*, 197 F. Supp. 3d 616, 627-28 (S.D.N.Y. 2016) ("Under New York law, whether a given claim arises out of or is based upon excluded conduct in a policy exclusion . . . turns on whether the claim could succeed but for the excluded conduct."), *aff'd* 880 F.3d 64 (2d Cir. 2018); *Scottsdale Indem. Co. v. Beckerman*, 120 A.D.3d 1215, 1219 (2d Dep't 2014) (holding that a "but-for test applies to determine the applicability of an arising out of exclusion" such that if "none of the causes of action that [the underlying plaintiff] asserts could exist but for the existence of the excluded activity or state of affairs, the insurer is under no obligation to defend the action"). Under this case law, the exclusion applies only if a crime or fraud is the "but for" cause of the litigated claim.

That's not the case here. Every single action in the NY Opioid Litigations alleges claims—such as negligence and public nuisance claims—that may exist without allegations that Rochester Drug Co-Op committed "any deliberate criminal or deliberate fraudulent act, or any willful violation of any statute, rule or law." For a public nuisance claim, for example, a plaintiff must prove that the defendant engaged in conduct that "offend[s], interfere[s] with or cause[s] damage to the public in the exercise of rights common to law in a manner such as to offend public morals, interfere with use by the public of a public place or endanger or injure the property, health, safety or comfort of a considerable number of persons." *Copart Indus., Inc. v. Consolidated Edison Co.*, 41 N.Y.2d 564, 568 (N.Y. 1977). A public nuisance claim can therefore exist without (i.e., "but-for") any allegation of deliberate criminal or fraudulent conduct or a willful violation of any statute. The same is true of negligence claims. *Elmaliach v. Bank of China Ltd.*, 110 A.D.3d 192, 199 (1st Dept 2013) (stating that elements of negligence are duty, breach, damages, causation, and foreseeability). But even more, the operative complaints do not rely on the concessions in the

Stipulation and Deferred Prosecution Agreement to state their claims. For example, the NY Counties complaint alleges that Rochester Drug Co-Op created a public nuisance through a "deceptive marketing campaign." Dkt. 17-2, p. 22, ¶ 44. The Stipulation and Deferred Prosecution Agreement do not discuss or contain admissions about any deceptive marketing campaign. *See* Dkt. 11-1, p. 170-299; Dkt. 11-1, p. 305-25. It is also instructive that a court coordinating some of the NY Opioid Litigations, when denying a motion to dismiss the public-nuisance claims, stated that "it is alleged that the plaintiffs have been damaged not only by the illegal use of opioids *but by their legal use*." Order at 14, *In re Opioid Litig.*, No. 400000/2017 (N.Y. Sup. Ct. July 17, 2018), NYSCEF No. 468. Similarly, the New York Attorney General's complaint alleges that Rochester Drug Co-Op created a public nuisance by interfering with the common rights of New York residents to "an honest and effective marketplace for healthcare treatment." Compl. ¶ 815, *New York v. Purdue Pharma L.P.*, No. 400016/2018 (N.Y. Sup. Ct. June 18, 2019), NYSCEF 101. The Deferred Prosecution Agreement and Stipulation does not contain the word "marketplace" at all. *See* Dkt. 11-1, p. 170-299; Dkt. 11-1, p. 305-25.

Because the NY Opioid Litigation causes of actions would be actionable regardless of whether the Company engaged in a fraud or crime, those claims are not claims "arising out of, based upon or attributable to the . . . committing of any deliberate criminal or deliberate fraudulent act, or any willful violation of any statute, rule or law." For this reason too, then, the Final Adjudication Exclusion does not apply.

D. Prior Knowledge Exclusion and Fortuity

Hiscox argues that it can deny coverage for thirty-one NY Opioid Litigations because, three years ago, Rochester Drug Co-Op failed to report a [redacted] in the weeks between the date the Company's insurance application was submitted and the date

the Policy was issued.[4] This view is inconsistent with the plain text of the Policy, New York law, and common sense.

Hiscox cannot be permitted to disclaim coverage for the NY Opioid Litigations unless it proves, among other things, that the Company's failure to disclose the investigation was "material." But it clearly was not.

The insurance application contains language stating that the Policy will not provide coverage for any loss in connection with a known claim, prior action, or potential exposure "unless the resulting insurance policy expressly provides otherwise." Dkt. No. 17-4, p. 12. The "resulting insurance policy" requires an omission to be material in order for Hiscox to disclaim coverage on that basis.

Specifically, the Policy states that "in the event that the particulars and statements contained in the Application are not accurate and complete and *materially affect* either the acceptance of the risk or the hazard assumed by the Insurer under the Policy, then this Policy shall be void *ab initio*." Dkt. No. 38-1, p. 75 (emphasis added). Restated, the Policy language is explicit in how it incorporates the language from the insurance application and adds a requirement—that any omission must be material—in order for Hiscox to disclaim coverage on that basis.

This materiality language tracks the requirements set forth in New York Insurance Law 3105(b). Section 3105(b)(1) states that "no misrepresentation shall avoid any contract of insurance

[4] [redacted]

or defeat recovery thereunder unless such misrepresentation was material. No misrepresentation shall be deemed material unless knowledge by the insurer of the facts misrepresented would have led to a refusal by the insurer to make such contract."[5] In other words, in order to disclaim coverage on this basis, Hiscox must prove that it would not have issued an insurance policy to Rochester Drug Co-Op if it had known about the investigation.

But Hiscox cannot provide this proof because it did, in fact, issue a substantively-identical policy months after the Company informed it about both the investigation and a number of the NY Opioid Litigations. *See* New York Insurance Law 3105(c) ("In determining the question of materiality, evidence of the practice of the insurer which made such contract with respect to the acceptance or rejection of similar risks shall be admissible."). Simply put, Hiscox cannot now argue that the omission was material when it is clear that such a disclosure would not, and did not, alter its decision to provide coverage.

This is further reinforced by the fact that the premiums charged for the Policy and subsequent policy were similar—i.e., Hiscox did not use its discovery of the investigation to alter the coverage provided, exclude coverage for the NY Opioid Litigations, or dramatically raise premiums.[6] It is also reinforced by the fact that—even though Hiscox knew about the investigation for more than two years—it has still never issued a declination letter to the Company disclaiming coverage on the basis that Rochester Drug Co-Op failed to disclose the investigation earlier. It is

[5] Contrary to Hiscox's position at oral arguments, it is clear from the plain text of the statute that materiality is required for both avoiding the insurance policy entirely and declining coverage ("or defeating recovery thereunder"). *See Home Ins. Co. v. Spectrum Info Techs.*, 930 F. Supp. 825, 840-41 (E.D.N.Y. 1996) (using N.Y. Ins. Law 3105(b) to find that an omission to a director and officers policy application was not material).

[6] Rochester Drug Co-Op paid a $35,873.00 premium for its March 8, 2017-March 8, 2018 policy, of which it paid a $21,108.00 premium for the Directors & Officers Liability Coverage Part. Dkt. No. 38-1, p. 4. Similarly, Rochester Drug Co-Op paid a $36,086.00 premium for its March 8, 2018-March 8, 2019 policy, of which it paid a $21,710.00 premium for the Directors & Officers Liability Coverage Part. Dkt. No. 38-1, p. 133.

thus clear from Hiscox's own behavior that the investigation was not "material" as required by the Policy and New York Insurance Law 3105(b).[7]

But lack of materiality is not the only issue with Hiscox's argument that it has met its burden of proving the applicability of the so-called "Prior Knowledge Exclusion." Courts have consistently held an insurer's "unproven rescission claim does not affect its present obligation to . . . pay [an insured's] defense costs under" an insurance policy. *Fed. Ins. Co. v. Tyco Int'l*, 784 N.Y.S.2d 920 (N.Y. Sup. Ct. 2004); *see Fed. Ins. Co. v. Kozlowski*, 18 A.D.3d 33, 42 (N.Y. App. Div. 2005); *Gon v. First State Ins. Co.*, 871 F.2d 863, 864-65, 868 (9th Cir. 1989) (affirming district court's order that insurer pay insured's defense costs after the district court had held insurer's rescission action "in abeyance"); *Natl. Union Fire Ins. Co. of Pitt. v. Brown*, 787 F. Supp. 1424, 1427 n.8 (S.D. Fla. 1991) (refusing to declare directors and officers policy void *ab initio* until the insurer's rescission action was "fully litigated;" until then, policy remained in effect and defense costs payable at time incurred); *U.S. Fid. & Guaranty Co. v. Thomas Solvent Co.*, 683 F. Supp. 1139, 1151-52 (W.D. Mich. 1988) (when insurer's motion for summary judgment on rescission claim was denied, due to genuine dispute as to whether the insured obtained the policy by fraud and misrepresentation, the insurer had a duty to defend).

[7] The fact that Hiscox issued a subsequent policy providing substantively-identical coverage—and with full knowledge of the investigation—also precludes Hiscox from relying on "fortuity" to disclaim coverage under the subsequent 2018-2019 policy because "[g]iven the underlying basis of the doctrine, and the right of the parties to agree to cover existing losses, it has been recognized that the known loss doctrine does not apply if the insurer also knew of the circumstances on which it bases the defense." *Chase Manhattan Bank v. N.H. Ins. Co.*, 193 Misc. 2d 580, 589 (Sup. Ct. 2002), *aff'd*, 304 A.D.2d 423 (1st Dep't 2003), *appeal denied*, 100 N.Y.2d 509 (2003). New York Insurance Law § 1101(a) defines "fortuitous event" to mean "any occurrence . . . which is, or is assumed by the parties to be, to a substantial extent beyond the control of either party." The NY Opioid Litigations were outside the control of Rochester Drug Co-Op and Hiscox; they were litigations brought by third-parties and the Company had no control over their initiation or the claims asserted therein. The fortuity defense—acknowledged by New York courts to be seldomly-successful—would also be inapplicable to the public nuisance and negligence claims in the NY Opioid Litigation complaints, which are clearly unrelated to any investigation. *Id.* ("[d]espite the age of the fortuity doctrine and its relatively universal acceptance by the courts . . . there are few cases which hold that a particular loss is, indeed, nonfortuity and, therefore, excluded from coverage for that reason").

Hiscox may argue that this principle is inapplicable because Hiscox is seeking to exclude a claim, rather than void the Policy *ab initio*. But the Policy outlines Hiscox's recourse in this situation, and the Policy language is clear—"in the event that the particulars and statements contained in the **Application** are not accurate and complete and materially affect either the acceptance of the risk or the hazard assumed by the **Insurer** under the Policy, then this Policy shall be void *ab initio*." If Hiscox wants to argue that there is no coverage, it must go through the proper protocol by bringing a rescission action and, if successful, returning the premium that Rochester Drug Co-Op paid for the Policy. Hiscox cannot, as it seeks to here, both keep the premium and exclude coverage based on an allegedly-material omission in the application.

Hiscox also may owe an obligation to defend Rochester Drug Co-Op under a subsequent insurance policy. Hiscox does not dispute that Rochester Drug Co-Op reported the investigation in November 2017—three months prior to Hiscox's issuance of the 2018-2019 policy. *See also*, Dkt. No. 24-3, p. 2. Hiscox could not, therefore, deny coverage under the subsequent policy based on Rochester Drug Co-Op's lack of disclosure. Twelve of the NY Opioid Litigations were filed within the 2018-2019 policy period. *See, e.g.*, Complaint, *New York v. Purdue Pharma L.P.*, No. 400016/2018 (N.Y. Sup. Ct. Aug. 14, 2018). Hiscox would thus be required to advance defense costs for at least twelve litigations under the 2018-2019 policy.

But it is clear from the plain text that coverage exists under the Policy for all of the NY Opioid Litigations. Hiscox relies on a provision from the 2017-2018 insurance application which states that, "It is agreed that if any such known claim, prior action or potential exposure exists, then, unless the resulting insurance policy expressly provides otherwise, such policy shall not provide coverage for *any loss in connection with such known claim, prior action or potential exposure*." Dkt. No. 17-4, p. 12.

That provision, however, refers to the immediately preceding question on the application. That preceding question asks whether Rochester Drug Co-Op has information about any Potential Exposure which might give rise to a claim. Dkt. No. 17-4, p. 10, 12. And significantly, that question did not apply to Rochester Drug Co-Op. The application explicitly states that the Company should "Answer the following question only if the Applicant does not currently maintain Private Directors and Officers Liability insurance." Dkt. 17-4, p. 10. The Company did maintain Private Directors and Officers Liability insurance at the time. Dkt. No. 38-3, p. 2, 7-101. The disclaimer language is therefore inapplicable.

Even if it were applicable though, it clearly only allows Hiscox to disclaim coverage for "any loss in connection with such known claim, prior action or potential exposure." Dkt. No. 17-4, p. 12. Rochester Drug Co-Op is not requesting coverage for the Department of Justice investigation, the Civil Action, or the Criminal Action (i.e., the "potential exposure"). Instead, this action seeks the advancement and repayment of defense costs for cases brought by non-Department of Justice plaintiffs who did not conduct the investigation.

As for Hiscox's argument that the "Related Wrongful Acts" exclusion bars coverage, this is again incorrect. This exclusion—which Hiscox has the burden of proving unequivocally applies here—states that Hiscox will not be liable for loss in connection with any claim made against Rochester Drug Co-Op "alleging, arising out of, based upon or attributable to the facts alleged, or the same or Related Wrongful Act(s) alleged or contained in any claim or demand which has been reported, or in any circumstances of which notice has been given, under any prior insurer's policy or policy of which this D&O Coverage Part is a renewal or replacement." Dkt. No. 38-1, p. 22.

Hiscox cannot have it both ways. Hiscox could have attempted to void or disclaim coverage under the 2017-2018 Policy, in which case it could not argue that Rochester Drug Co-

Op sought coverage and provided notice pursuant to that Policy. Or—as Hiscox did for months—Hiscox could agree to provide coverage under the Policy and relate back all of the NY Opioid Litigations filed during the subsequent policy period in order to apply a single policy limit to all of the NY Opioid Litigations. Hiscox cannot, however, use this provision to disclaim coverage under all policies. This interpretation is supported by common sense. It would be illogical to allow Hiscox to deny claims that in any way related to, or mentioned, the Department of Justice investigation even though Hiscox issued a subsequent policy with full knowledge of the investigation and did not carve out coverage for the NY Opioid Litigations.[9] *See* Dkt. No. 38-1, p. 131-266; Dkt. No. 24-3, p. 2.

Finally, this Court has already determined that more facts and discovery are necessary to assess the applicability of the Prior Knowledge Exclusion. In its February 25, 2020 decision in this action, the Court stated that, while it views the Prior Knowledge Exclusion as Defendant's most meritorious argument, "based on the record before it, the Court is not able to conclude that Plaintiff failed to disclose a 'known claim' in connection with the Application." Decision, Dkt. No. 44, at 5. The Court then continued, "The Court requested further briefing from the parties on this issue, and yet still the record is unclear and ambiguities exist. With the burden ultimately falling on Defendant to prove applicability of the exclusion, and in view of the requirement that the Court construe any ambiguities in the prior knowledge exclusion in Plaintiff's favor, the Court concludes that there are sufficiently serious questions going to the merits to make them a fair ground for litigation." *Id.* Hiscox has presented no additional facts which would alter this Court's decision. This alone is reason to deny Hiscox the relief it requests.

[9] The "Related Acts Exclusion" also requires that there be a "claim or demand which has been reported." Dkt. No. 38-1, p. 22. Hiscox has not proven that the investigation constitutes a "claim or demand" and such a position would be inconsistent with Hiscox's refusal to provide coverage under the Policy for the investigation.

E. Consent to Settlement

Hiscox's reliance on the "Consent to Settle" provision of the Policy is equally unavailing. The Policy states that the Company "shall not admit or assume any liability, enter into any settlement agreement, stipulation to any judgment, . . . without the prior written consent of the Insurer. If the Insured admits or assumes any liability in connection with any Claim without the consent of the Insurer, then the Insurer shall not have any obligation to pay Loss *with respect to such Claim.* Only those settlements, stipulated judgments, Defense Costs and Reputation Loss which have been consented to by the Insurer shall be recoverable as Loss." Dkt. No. 38-1, p. 28 (emphasis added). The purpose of a consent clause in an insurance policy is to give the insurer "an opportunity to determine, before settlement, whether it will grant or withhold consent" for the settlement. *MBIA Inc. v. Fed. Ins. Co.*, 652 F.3d 152, 169 (2d Cir. 2011). Rochester Drug Co-Op is not requesting that Hiscox reimburse it for the settlement amounts reached in the Civil and Criminal Actions. This provision is thus inapplicable. As for any argument that the Company has admitted to any *liability* in the NY Opioid Litigations, that is simply not the case. Rochester Drug Co-Op has vigorously tried to defend itself in those litigations.

Hiscox cites a single case for the proposition that "where liability established by a guilty plea and confession of judgment is coextensive with the same conduct against which an insured must defend in a civil action, absent the insurer's consent this [is] a breach of the policy's conditions, and an insurer then has no further defense obligation." Dkt. No. 21-1, p. 26 (citing *First Mercury Ins. Co. v. Law Office of Kenneth B. Schwartz,* No. CV 17-1763, 2019 U.S. Dist. LEXIS 35210, at **49-50 (E.D.N.Y. Mar. 1, 2019). The facts in that case are readily distinguishable. First, the consent to settle exclusion in that policy contained broad, sweeping language. It states, "[n]o insured shall, without prior written consent of [the insurer], make any payment, admit liability, settle any claim, assume any obligation, agree to arbitration or any similar

means of resolution of any dispute, waive any rights or incur any claims expenses on behalf of [the insurer.]" *First Mercury Ins. Co. v. Law Office of Kenneth B. Schwartz*, No. CV 17-1763, 2019 U.S. Dist. LEXIS 35210, at *5 (E.D.N.Y. Mar. 1, 2019). In contrast, the Consent to Settle exclusion in the Policy limits the consequences of an insured's failure to obtain the insurer's consent to loss "with respect to such Claim." Dkt. No. 38-1, p. 28. Second, in *First Mercury Insurance, Co.*, the insured sought coverage for the same matters where it entered into affidavits of confession and admitted liability. *First Mercury Ins. Co.*, 2019 U.S. Dist. LEXIS 35210, at *14. On this basis, the court determined that the insurer was not required to defend the insured in those civil cases. *Id.* at *50; *First Mercury Ins. Co. v. Law Office of Kenneth B. Schwartz*, No. 17-CV-1763, 2019 U.S. Dist. LEXIS 210071, at *9 (E.D.N.Y. Dec. 5, 2019) (noting that the insurer's duty to defend the defendants in the Johnson civil action remained in effect). But here, Rochester Drug Co-Op is not seeking coverage for the cases in which it entered into the Stipulation and Deferred Prosecution Agreement. Third, in *First Mercury Insurance, Co.* the underlying plaintiffs' damages would be offset by the defendant accepting liability in the affidavits. *First Mercury Ins. Co.*, 2019 U.S. Dist. LEXIS 35210, at *50. Again, and in contrast, any sum of liability Rochester Drug Co-Op agreed to pay as part of the Stipulation and Deferred Prosecution Agreement is separate from any alleged damages the plaintiffs in the NY Opioid Litigations seek to recover.

Arguing that a settlement in one case may be imputed to thirty-one other cases—for purposes of disclaiming coverage under the Consent to Settlement provision—is clearly contrary to the Policy's plain text. The Policy states that "[i]f the Insured admits or assumes any liability *in connection with any Claim* without the consent of the Insurer, then the Insurer shall not have any obligation to pay Loss *with respect to such Claim*." (emphasis added). The italicized clauses only permit Hiscox to disclaim coverage *for the settled Claim*. And "Claim" is defined in the

Policy as "a civil, criminal, administrative, regulatory or arbitration proceeding." In other words, if the Company "admits or assumes any liability in connection with" the Civil Action "without the consent of the Insurer, then the Insurer shall not have any obligation to pay Loss with respect to such" Civil Action. The very next sentence of the Policy re-iterates this point when it states, "Only those settlements…which have been consented to by the Insurer shall be recoverable as Loss." This is exactly the reason Rochester Drug Co-Op is not requesting reimbursement for the Civil Action or Criminal Action settlements. It is requesting the advancement of defense fees in thirty-one separate, ongoing litigations.

In conclusion, the Policy language is clear—Hiscox cannot disclaim coverage for the NY Opioid Litigations based on the Deferred Prosecution Agreement and Stipulation entered into in completely separate actions.

CONCLUSION

Hiscox has failed to establish that its disclaimer of coverage was proper. To the contrary, the Policy provides coverage for the NY Opioid Litigations and the exclusions relied on by Hiscox are clearly inapplicable. Accordingly, Rochester Drug Co-Op respectfully requests that this Court deny Hiscox's motion to dismiss.

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Buffalo, New York

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