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9
10 **UNITED STATES DISTRICT COURT**
11 **DISTRICT OF NEVADA**

12 TREASURE ISLAND, LLC,
13 *Plaintiff,*

14 vs.

15 AFFILIATED FM INSURANCE CO.,
16 *Defendant.*

Case No.: 2:20-cv-00965-JCM-EJY

**TREASURE ISLAND, LLC’S MOTION
FOR SANCTIONS AND
MEMORANDUM IN SUPPORT**

17
18 Treasure Island, LLC (“Treasure Island”) moves for sanctions and a preclusive order
19 against Affiliated FM Insurance Co. (“AFM”) for misconduct. Treasure Island does not bring this
20 motion lightly but after deep consideration of the gravity and impact of AFM’s misbehavior.
21 AFM’s untruthfulness includes false statements of material fact made directly to the Court, on
22 which the Court relied and which the Court embodied in discovery orders.
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1 The severity of AFM’s misconduct should result in sanctions, including an order barring
2 AFM from arguing that COVID-19 does not cause physical loss or damage (because that assertion
3 is in direct conflict with their own improperly withheld documents), as discussed below.

4 **I. FACTUAL BACKGROUND**

5 Treasure Island, a resort and casino in Las Vegas, Nevada, seeks recovery for business
6 interruption due to physical loss and damage to its facilities under the uniquely broad all-risk
7 insurance policy issued by AFM.

8 AFM told the Court that evidence did not exist when that evidence not only did exist but
9 directly contradicted AFM’s central positions in this case. AFM asserts that a communicable
10 disease cannot cause physical loss or damage. *See, e.g.*, ECF 210 at 23; ECF 225 at 7-9; ECF 226
11 at 7-8. This cannot be squared with AFM’s claims manual, which includes Loss Code 60, covering
12 “Physical loss or damage which results from the actual presence of a communicable disease and
13 the associated business interruption as defined in the policy.” Email of Jason Wing to Richard
14 Sunny (Mar. 4, 2020) (FM Global 30210), attached as Exh. 1.¹ AFM assigned Loss Code 60 to
15 Treasure Island’s claim. The text of Loss Code 60 is not privileged and is undeniably relevant to
16 the claims and defenses in this case. Fed. R. Civ. P. 26(b)(1).

17 AFM avoided producing this portion of its claims manual by misrepresenting to the Court
18 that it was not relevant. AFM made these statements in the context of two motions to compel that
19 Treasure Island brought, and AFM did so with the apparent intent to deceive the Court.

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23 ¹ As discussed below, the text of Loss Code 60 quoted above was contained in an email from
24 AFM’s employee Jason Wing that was produced in another case without any confidentiality
25 designation.

1 **A. AFM misrepresented to the Court the relevance of the claims manual.**

2 AFM made material misrepresentations to the Court about the contents of the claims
3 manual, which the Court accepted and embodied in discovery rulings. Through these
4 misrepresentations, AFM cut off that avenue for discovery of the truth.

5 Treasure Island sought production of the entire claims manual. ECF 40 at 12 (RPD No. 6)
6 (Treasure Island’s first motion to compel). AFM refused the request and said it would produce
7 “sections from the Claims Procedures which are applicable to the Claim.” ECF 40 at 12. AFM
8 produced 35 pages and told the Court that “[t]he only relevant portions of AFM’s claims manual
9 were already produced.” ECF 43 at 7 n.4 (AFM’s opposition to first motion to compel); *see* ECF
10 43-4 at 3, ¶ 9 (Declaration of Brian Cook) (“There are no procedures specific to Communicable
11 Disease [or] physical loss or damage There are only a limited number of claims procedures
12 guidelines that conceivably relate to the Policy . . . which AFM has already produced”).

13 The Court accepted these representations. It ordered that AFM produce a table of contents
14 “as well as the relevant sections of any hyperlinks or other sections referenced in the 35 pages
15 that have . . . already been produced by Defendants.” ECF 82, Transcript of Hearing (Feb. 25,
16 2021), at 40-43. When Treasure Island reviewed that table of contents, it asked for production of
17 the section that contained Loss Code 60. AFM again refused. ECF 122 & Exh. D, Item No. 5
18 (“Assignment of Loss and Claim Codes”). This is what AFM wrote:

19 This provision lists the codes to be assigned to different perils. AFM’s claim
20 handling witnesses testified, and the documents confirm, that Treasure Island’s
21 claim was treated as a Communicable Disease (“CD”) claim. Any other codes are
22 irrelevant and the burden of producing this provision is not proportional to the
23 potential benefit to Treasure Island.
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1 ECF 157, Exh E, p.2. AFM represented that this portion of the claims manual had “no relevance
2 to this action.”² ECF 157 at 4-5. The Court accepted this false representation, too.

3 AFM got away with not producing the obviously relevant evidence by making false
4 statements to the Court.

5 **B. AFM’s deception was revealed through discovery in *another* case.**

6 We know now that AFM was not being truthful to the Court. We know this not from AFM’s
7 disclosures but because AFM was caught in its deceit. This happened when AFM’s sister company
8 Factory Mutual produced those documents in another case, *Cinemark Holdings, Inc. v. Factory*
9 *Mut. Ins. Co.*, No. 4:21-cv-11-ALM (E.D. Tex.). Treasure Island promptly brought to this Court’s
10 attention the documents that it could, i.e., those not governed by any protective order in *Cinemark*
11 (ECF 244), but the case was stayed before there could be further development (ECF 250).³ The
12 time for that development has arrived.

13 It is inconceivable that AFM’s deception was anything except intentional. AFM’s statement
14 to the Court (ECF 157), quoted above, is particularly inculpatory. AFM writes that Treasure
15 Island’s claim was treated as one for communicable disease, and it writes that any other claim
16 code is irrelevant. What AFM intentionally omits—and what neither Treasure Island nor the Court
17 had any ability to know at the time—was that the claim code being referenced was not *just* for
18 communicable disease but for “*Physical loss or damage* which results from the actual presence
19 of a communicable disease and the associated business interruption as defined in the policy.” *See*

21 ² *See also* ECF 157 at 4 (AFM represents that it has produced all portions of claims manual
22 “arguably relevant”).

23 ³ Factory Mutual produced the Wing Email without designating it confidential. ECF 248 at 3.
24 Factory Mutual later indicated it considered the Wing Email to be confidential, and so Treasure
25 Island moved to seal it. *Id.* The Court ordered it sealed temporarily. ECF 249 at 2. Factory Mutual
has since removed any confidentiality designation as to the Wing Email, and it therefore need not
be filed under seal.

1 Exh. 1, Wing Email. AFM's cleverly worded statement reveals an intent to deceive because it
2 shows knowledge of what was being hidden.

3 **C. Treasure Island is limited in what it can now bring to this Court's attention.**

4 Other documents produced in *Cinemark* that are relevant to this motion are governed by a
5 protective order. ECF 69, *Cinemark Holdings, Inc. v. Factory Mut. Ins. Co.*, No. 4:21-cv-11-ALM
6 (E.D. Tex. June 22, 2021), attached as Exhibit 2. This motion cannot use or describe the contents
7 of these documents.

8 **II. ARGUMENT**

9 AFM made false statements to the Court in an effort to hide discoverable evidence.
10 Treasure Island was prejudiced, but AFM's conduct should be sanctioned independent of
11 prejudice. AFM's subterfuge is a direct affront that undermines the civil justice system.

12 The Court should sanction AFM under Rule 37 and its inherent powers for its false
13 statements to the Court and hiding of relevant evidence. It should preclude AFM from arguing
14 that COVID-19 cannot cause physical loss or damage to property and inform the jury of AFM's
15 misconduct. The Court should also order AFM to provide the Court with the further documents,
16 referenced in Section I(C) above, for consideration of additional sanctions.

17 **A. AFM made repeated false statements to the Court and withheld discoverable
18 information.**

19 AFM made repeated and false assertions to Treasure Island and the Court that certain
20 evidence did not exist when that evidence did exist. AFM said it had produced all relevant portions
21 of its claims manual. That was patently, demonstrably, absolutely false. When required to give
22 further information about the contents of the claims manual, it represented that the code assigned
23 to Treasure Island's claim was for "Communicable Disease" and that further disclosure would
24 have "no relevance to the action." In fact, Treasure Island's claim was coded not just for
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1 “Communicable Disease” but for “Physical loss or damage which results from the actual presence
2 of a communicable disease and the associated business interruption as defined in the policy.”

3 AFM’s false statements and misdirection misled both Treasure Island and the Court.

4 The evidence that AFM hid plainly meets the relevance standard of Fed. R. Civ. P. 26(b)(1)
5 because it is relevant to Treasure Island’s claim. AFM asserts that a communicable disease cannot
6 cause physical loss or damage, but its claims manual contradicts that assertion. Loss Code 60
7 explicitly states that a communicable disease can cause physical loss or damage. That is exactly
8 what Treasure Island has asserted. Some communicable diseases, such as AIDS, do not cause
9 physical loss or damage to property because they do not use property as a transmission
10 mechanism. Others, such as COVID-19, can cause physical loss or damage to property because
11 they do use property as a transmission mechanism. Whether a communicable disease in the latter
12 category does cause physical loss or damage to property is a question of science, depending on
13 whether the severity of the virus in the transmission medium (insured property) makes that
14 property unfit for its insured use. COVID-19 did exactly this, distinguishing it from the common
15 cold. The extent and duration of the impact and damage is a matter of the quantum of damages,
16 not the trigger of coverage. Treasure Island’s expert Dr. Joseph Lewnard will testify to exactly
17 this.

18 It will not do for AFM to claim, as it will, that the hidden evidence is simply inadmissible
19 parol evidence. This is for at least three reasons. *First*, as shown above, Treasure Island is not
20 seeking to use the evidence to “change the . . . terms” of the AFM Policy. *In re Cay Clubs*, 130
21 Nev. 920, 936, 340 P.3d 563, 574 (2014). Instead, the evidence shows that, consistent with
22 Treasure Island’s experts, AFM understood that a virus, and COVID-19 in particular, can be
23 capable of causing physical loss or damage to property. *Second*, admissibility is not the standard
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1 governing the scope of discovery. Fed. R. Civ. P. 26(b)(1). Treasure Island was entitled to discover
2 this evidence whether or not admissible. *Third*, this is evidence that AFM affirmatively said did
3 not exist. A party is not permitted to make false and misleading statements to the Court just
4 because it thinks it will win the case in the end and all will be forgiven.

5 **B. AFM's misconduct is sanctionable under Rule 37.**

6 Federal R. Civ. P. 37(c)(1) provides for sanctions against a party who "fails to provide
7 information" as required by the rules. Because "[p]reclusion of evidence is not an effective
8 incentive to compel disclosure of information that, being supportive of the position of the
9 opposing party, might advantageously be concealed by the disclosing party," the rule "provides
10 the court with a wide range of other sanctions" Fed. R. Civ. P. 37, Advisory Committee Notes
11 (1993). These other sanctions include "payment of the reasonable expenses, including attorney's
12 fees, caused by the failure," informing the jury of the party's failure, ordering that certain "facts
13 be taken as established for purposes of the action," and "prohibiting the disobedient party from
14 supporting or opposing designated claims or defenses, or from introducing designated matters in
15 evidence." Fed. R. Civ. P. 37(c)(1)(A-C) & 37(b)(2)(A)(i) & (ii).

16 As described above, there is no question that the evidence that AFM failed to disclose was
17 required to be disclosed under the Rules of Civil Procedure. The evidence was the subject of valid
18 discovery requests and was the subject of two motions to compel. AFM simply and inaccurately
19 represented that the evidence did not exist. AFM's bad intention is revealed in its half-truth
20 statement that Treasure Island's claim was coded as one for "Communicable Disease," without
21 informing the Court or Treasure Island that the claim was coded as one for "Physical loss or
22 damage which results from the actual presence of a communicable disease and the associated
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1 business interruption as defined in the policy.” *See In re Weiss*, 111 F.3d 1159, 1172 (4th Cir. 1997)
2 (“deceptions, half-truths, and misrepresentations” are sanctionable offenses).

3 **C. AFM’s misconduct is sanctionable under the Court’s inherent powers.**

4 This Court has inherent authority “to fashion an appropriate sanction for conduct which
5 abuses the judicial process.” *Am. Unites for Kids v. Rousseau*, 985 F.3d 1075, 1088 (9th Cir.
6 2021), quoting *Goodyear Tire & Rubber Co. v. Haeger*, 581 U.S. 101, 107 (2017). This includes
7 the power “to punish conduct before the court as well as actions beyond the court’s confines,
8 regardless of whether that conduct interfered with courtroom proceedings.” *Id.* This power is
9 independent of rules and statutes. *Id.* The Court’s inherent power is vast and includes barring
10 witnesses, excluding evidence, awarding attorney’s fees, and assessing fines. *Id.* Civil procedures
11 apply to sanctions that are compensatory or remedial. *Id.* at 1089. Additional procedural
12 guarantees apply to sanctions imposed as a penalty or for punishment. *Id.*

13 This Court has inherent authority to apply the compensatory sanctions that Treasure Island
14 seeks on an explicit finding that AFM acted in bad faith in the conduct of the litigation, i.e., with
15 bad intent or an improper purpose. *Id.* at 1090. AFM’s bad faith is glaring on the existing record.
16 AFM withheld relevant and discoverable portions of its claims manual, with knowledge that they
17 were relevant and discoverable. It then obtained multiple rulings from the Court by
18 misrepresenting material facts to the Court on many different occasions and in writing. This is
19 egregious and warrant the sanctions requested below.

20 **D. The Court should order AFM to pay Treasure Island’s costs and fees**
21 **incurred to bring its two motions to compel and this motion, preclude AFM**
22 **from asserting that COVID-19 cannot cause physical loss or damage to**
property, and inform the jury about AFM’s misconduct.

23 Treasure Island seeks three forms of compensatory and remedial relief: (1) that AFM be
24 ordered to pay Treasure Island for the costs and attorney’s fees to bring the two motions to compel
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1 and this motion, (2) that AFM be precluded from arguing that COVID-19 cannot cause physical
2 loss or damage to property (Treasure Island retaining the burden to prove that it did cause physical
3 loss or damage to Treasure Island's property during the policy period), and (3) that the jury be
4 informed about AFM's misconduct.

5 All forms of relief are well within the Court's authority to order and are appropriate in this
6 case. Treasure Island litigated two motions to compel and now this motion as a result of AFM's
7 misconduct, incurring significant costs and attorney's fees to do so. Sanctions in the form of
8 reasonable expenses, including attorney's fees, are expressly permitted by Rule 37 in these
9 circumstances. Fed. R. Civ. P. 37(c)(1)(A); *see Australian Gold, Inc. v. Hatfield*, 436 F.3d 1228,
10 1244 (10th Cir. 2006) (affirming award of sanctions in form of fees and costs to prosecute two
11 motions to compel where defendants failed to produce documents that plaintiffs later found in
12 dumpster); *Tom v. S.B., Inc.*, 280 F.R.D. 603, 621, 2012 WL 541699 (D.N.M. 2012) (ordering
13 payment of costs and fees of motion to compel). Treasure Island should be awarded its expenses
14 for bringing the two motions to compel as well as this motion. *See Nike, Inc. v. Top Brand Co.*,
15 216 F.R.D. 259, 274 (S.D.N.Y. 2003) (ordering sanctions in the form of reasonable attorney's fees
16 to plaintiffs for defendants' failure to disclose).

17 Also appropriate is an order precluding AFM from arguing that COVID-19 cannot cause
18 physical loss or damage. *See Nike, Inc.*, 216 F.R.D. at 274 (ordering that defendants be precluded
19 from introducing evidence on damages and that plaintiffs be given all reasonable adverse
20 inferences against defendants).

21 Finally, the jury should be informed of AFM's discovery misconduct. *Tom*, 280 F.R.D. at
22 619 (ordering that at any trial the jury be informed "that evidence was withheld in violation of
23 discovery rules").

1 **E. The Court should order AFM to produce in this case the other pertinent**
2 **documents.**

3 As noted above, Treasure Island is limited in what it is permitted to bring to this Court's
4 attention by a protective order in the *Cinemark* case. AFM should be ordered to produce, in this
5 case, certain other documents. AFM surely knows what these are, but counsel for Treasure Island
6 will identify them with specificity should AFM so request. The Court should consider these
7 documents when making its sanctions decision.

8 **III. CONCLUSION**

9 The Court should grant this motion for sanctions and order the following:

10 *First*, that AFM be ordered to pay the reasonable costs and fees that Treasure Island
11 incurred to bring the first and third motions to compel (ECF 40 & 89) and this motion for
12 sanctions.

13 *Second*, that AFM be precluded from asserting that COVID-19 is incapable of causing
14 physical loss or damage to property.

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1 *Third*, that the jury be informed of AFM’s misconduct.

2 *Fourth*, that AFM produce the *Cinemark* documents referred to above.

3
4 Date: June 26, 2023

Respectfully submitted,

5 /s/ Renee M. Finch

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CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that on June 26, 2023, a true and correct copy of Treasure Island, LLC's Motion for Sanctions and Memorandum in Support was electronically filed with the Clerk of the Court via the Court's CM/EMF system and will be sent electronically to all registered participants as identified on the Notice of Electronic Filing.

This 26th day of June, 2023.

/s/ Renee M. Finch

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INDEX OF EXHIBITS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
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Exhibit 1	Email from Jason Wing, AFM’s Operations Vice President & Senior General Adjuster, sent March 4, 2020, subject “Communicable Disease loss code”.
Exhibit 2	Agreed Protective Order, filed at ECF 69, <i>Cinemark Holdings, Inc. v. Factory Mut. Ins. Co.</i> , No. 4:21-cv-11-ALM (E.D. Tex. June 22, 2021)