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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

TREASURE ISLAND, LLC,

Plaintiff,

vs.

AFFILIATED FM INSURANCE COMPANY,

Defendant.

CASE NO.: 2:20-cv-00965-JCM-EJY

AFFILIATED FM INSURANCE COMPANY'S MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT

ORAL ARGUMENT REQUESTED

Complaint filed: May 28, 2020

Defendant Affiliated FM Insurance Company, by and through its counsel of record, respectfully moves this Court for partial judgment on the pleadings. This Motion is based on the following Memorandum of Points and Authorities, the Request for Judicial Notice, the pleadings on file herein, and any oral argument this Court may permit at the time of hearing.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Treasure Island, which describes itself as a "sprawling 2.1 million square foot casino and resort occupying over 21 acres of land," brought this action against its property insurer Affiliated FM Insurance Company ("AFM"), seeking millions in coverage for economic losses stemming from the novel Coronavirus pandemic and "shut down" orders issued by Governor Sisolak in response.

Treasure Island's policy, however, excludes from coverage "contamination, and any cost due to contamination including the inability to use or occupy property or any cost of making property safe or suitable for use or occupancy. . . ." (Policy No. GS417 (the "Policy"), Complaint Ex. A, Dkt. 2-1, p. 21). Contamination is defined in the Policy to include "virus, disease causing or illness causing agent," a definition that clearly encompasses SARS-COv-2, the novel Coronavirus that causes COVID-19 (hereafter referred to as the "Coronavirus")[1]. In addition, the Policy excludes coverage for "loss of use." The policy further insures against "all risks of physical loss or damage," subject to the terms and conditions of the policy. The Coronavirus does not constitute or cause physical loss or damage.

That said, Treasure Island is not wholly without coverage. The Policy contains an exception to these exclusions that provides limited coverage for Communicable Disease in the amount of $100,000 for cleanup, removal and disposal and reputation management, and another $100,000 for business interruption losses. The Communicable Disease coverage applies where a described location has the "actual not suspected presence of communicable disease," and access to that location is limited, restricted or prohibited by an order of an authorized governmental agency or by the decision of a company officer. This coverage has no requirement of physical loss or damage. Yet, Treasure Island conveniently glosses over this fact in its Complaint, likely because it is seeking many, many times the amount available under the Communicable Disease coverage in this lawsuit.

[1] As the Court is aware, despite the scientific definitions of disease versus the virus that causes the disease, the general public frequently uses the terms "COVID-19" and "Coronavirus" interchangeably.

In filing this Motion, AFM seeks a determination that the Policy's unambiguous contamination and loss of use exclusions each apply to Treasure Island's losses, and, even if not excluded, the Coronavirus does not constitute physical loss or damage. There are no material factual disputes at issue, only the legal interpretation of the AFM Policy. As such, AFM submits this Motion for Partial Judgment on the Pleadings.

II. UNDISPUTED FACTS[2]

A. Treasure Island's Claim.

AFM provided property insurance to Treasure Island for property damage and business interruption losses as a result of physical loss or damage, except as excluded, effective March 20, 2019 through March 20, 2020. (Complaint, Para. 11 and Exhibit A, Dkt. 2-1). On March 19, 2020, Treasure Island submitted a claim, stating that, "[t]he Governor of the State of Nevada issued a 'civil Authority' (sic) to close ALL gaming establishments, hotels and non-essential business, thus causing a Business Interruption loss." (Ex. F to Compl., Dkt 2-6, p.1). On April 9, 2020, AFM sent Treasure Island a letter recapping Treasure Island's statements that it was not aware whether the Coronavirus was present at its locations, and that there was no physical loss or damage to insured property. (Ex. G to Compl., Dkt. 2-7).

On April 16, 2020, AFM sent Treasure Island another letter advising that "coverage is not available absent physical loss or damage" and "COVID-19 is a form of contamination as defined in the Policy and is therefore excluded." (Ex. J to Compl., Dkt. 2-10, p.1). As such, "the only coverage potentially available for losses arising from COVID-19 is found in our Communicable Disease coverages, assuming the conditions of those coverages are satisfied." On May 7, Treasure Island responded, asserting that "Treasure Island's claim was based on the physical loss of property and the physical damage to property caused by the presence of COVID-19, as well as related government orders mandating, among other things, that Treasure Island close its doors." (Ex. I to Compl., Dkt. 2-9, p.1). The letter did not, however, provide information establishing actual presence of the Coronavirus on Treasure Island's property. (*Id.*) The letter further asserted

[2] As required by the Federal Rules of Civil Procedure, Treasure Island's Complaint allegations are taken as true solely for the purposes of this Motion.

that, in essence, the Policy could not both exclude contamination and provide coverage for communicable disease. (*Id.*, p. 2).

Instead of providing information to establish that the conditions of the Communicable Disease coverages were satisfied, on May 28, 2020, Treasure Island filed this action for declaratory relief, breach of contract and bad faith, alleging the presence of COVID-19 triggered numerous business interruption coverage extensions under the Policy.[3]

The Complaint alleges, for the first time, without providing any detail, that "[p]ersons infected with COVID-19 were present at Treasure Island prior to March 18, 2020 [when Treasure Island closed its doors]" (Compl., para. 33), and "[t]he actual presence of COVID-19 at Treasure Island Locations has triggered coverage under the Policy." (Compl., para. 43). Although Treasure Island has not submitted a Proof of Loss or any other information to support these claims, it alleges losses under a number of provisions in the Policy in addition to the Communicable Disease coverage, and further alleges that the Contamination exclusion does not apply, and the Communicable Disease Sublimit does not cap its losses. (Compl., paras 48-79). Finally, the Complaint alleges that Treasure Island "has suffered and continues to suffer significant damages." (Compl., paras 132, 142, 152).

III. THE POLICY

A. General Framework of the Policy.

As Treasure Island concedes, the Policy insures property "against ALL RISKS OF PHYSICAL LOSS OR DAMAGE, ***except as hereinafter excluded*** . . . ." (Compl., para. 37 and Ex. A, Dkt. 2-1, p. 6 (italics added)). That is, to the extent there is physical loss or damage to property that is covered by the Policy, such loss or damage will be covered (assuming all other Policy requirements are met) ***unless*** a specified exclusion applies to bar coverage. The exclusions, in turn, are subject to exceptions specified in the Policy. As the preamble to the "EXCLUSIONS" provisions of the Property Damage section notes, "[i]n addition to the exclusions elsewhere in this

[3] Treasure Island is seeking coverage under the Policy provisions for Protection and Preservation of Property, Business Interruption Coverage, Extra Expense Coverage, Attraction Property, Civil Authority, Ingress/Egress, and Supply Chain Coverages. Compl., at paras 49-67 (the text of these provisions can be found at Exh. A to the Compl., Dkt. 2-1, pp. 30, 35, 38, 40, 43, 46, and 47). Each of these provisions in some manner requires physical loss or damage to property.

Policy, the following ***exclusions apply unless otherwise stated***[.]" (Compl., Ex. A, Dkt. 2-1, p. 18 (emphasis added)). Therefore, the basic functioning of the Policy is as follows: an event of physical loss or damage to a covered property will be covered if the factual predicate is met, unless an exclusion applies, and an exclusion applies unless an exception to that exclusion is "otherwise stated" elsewhere in the Policy. (*Id.*)

The Policy details specific coverages (including coverage for business interruption stemming from an event of physical loss or damage) and the requirements to trigger those coverages, which are subject to any applicable exclusions, and specified limits and sublimits. The Policy also includes two unambiguous exclusions that apply here: the contamination exclusion, and the "loss of use" exclusion.

B. Relevant Policy Exclusions.

The contamination exclusion and the loss of use exclusion appear under Section C of the Property Damage section of the Policy, but apply to the entire Policy, including coverages provided under the Business Interruption section. The preamble to the Business Interruption section provides that:

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

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

1. The Contamination Exclusion.

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

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

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

With contamination defined, the Policy specifies the following exclusion relating to contamination (the "Contamination Exclusion"):

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

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

2. The Loss of Use Exclusion.

In addition to the Contamination Exclusion, the Policy contains another exclusion that is relevant here. The Policy provides that it "excludes: . . . 3) loss of market or loss of use." (*Id.* at Dkt. 2-1. p. 20). Treasure Island's claimed losses stem from its inability to use its properties due to governmental orders or the Coronavirus (Compl. at paras 26-26, 31-32, and Exhs. F, Dkt. 2-6, and I thereto, Dkt. 2-9), and therefore directly implicate this "loss of use" exclusion, which applies to bar coverage unless an exception is "otherwise stated" in the Policy.

C. The Policy's Communicable Disease Coverages: Narrow Exceptions to the Contamination and Loss of Use Exclusions.

While the Contamination Exclusion and Loss of Use Exclusion are implicated by Treasure Island's claimed losses, the Policy provides that exclusions "apply unless otherwise stated[.]" (Compl., Ex. A, Dkt 2-1, p.18). To the extent a particular coverage is carved out from applicable exclusions, that coverage could apply to Treasure Island's claimed losses. The Policy's

Communicable Disease coverages are two potentially applicable narrow exceptions to the Contamination and Loss of Use exclusions.

The Policy defines "communicable disease," in relevant part, as "disease which is transmissible from human to human by direct or indirect contact with an affected individual or the individual's discharges . . . ." (Compl., Ex. A, Dkt. 2-1, p. 58.) It then provides coverages specific to communicable disease:

> [i]f a **described location** owned, leased or rented by the Insured has the actual not suspected presence of **communicable disease** and access to such **described location** is limited, restricted or prohibited by:
>
> 1) An order of an authorized governmental agency regulating or as result of such presence of **communicable disease**; or
>
> 2) A decision of an Officer of the Insured as a result of such presence of communicable disease.

(Compl., Ex. A, Dkt. 2-1, p. 23, 41).

> If those requirements are met, the Policy also:
>
> covers the reasonable and necessary costs incurred by the Insured at such **described location** for the:
>
> 1) Cleanup, removal and disposal of the such presence of communicable diseases from insured property; and
>
> 2) Actual costs or fees payable to public relations services or actual costs of using the Insured's employees for reputation management resulting from such presence of **communicable diseases** on insured property.

(*Id.* at p. 23). In addition, if the above-quoted conditions are met, the Policy "covers the Business Interruption Coverage losses incurred by the Insured during the Period of Liability at such **described location** with such presence of **communicable disease**." (*Id.* at p. 41). "Business Interruption Coverage" loss under the Policy is measured either by the insured's "Gross Earnings" or "Gross Profit" during the Period of Liability, subject to the terms of the Policy. (*Id.* at p. 36). The Policy's two Communicable Disease coverages are each subject to an annual aggregate sublimit of $100,000, meaning that a total of $200,000 in coverage is potentially available to Treasure Island, if all Policy requirements for those coverages are met.

Per their plain terms, although these coverages do not require physical loss or damage, they are triggered upon "the actual not suspected" presence of communicable disease along with the requisite "order of an authorized government agency" or "a decision of an Officer of the Insured" relating to "such" presence of communicable disease. Whether the conditions of coverage under the Communicable Disease provisions have been met is a factual issue that may be resolved during discovery and is not before the Court in this motion. The only issues before the Court in this motion are 1) whether the contamination and loss of use exclusions apply to Treasure Island's losses; and 2) whether the Coronavirus constitutes "physical loss or damage" under the Policy.

IV. ARGUMENT

A. Rule 12 (c) Standards.

Judgment on the pleadings pursuant to Rule 12(c) is appropriate when, even if all material facts in the pleading under attack are true, the moving party is entitled to judgment as a matter of law. *Hal Roach Studios v. Richard Feiner & Co.*, 883 F.2d 1429, 1436 (9th Cir. 1989); *General Conference Corp. of Seventh-Day Adventists v. Seventh Day Adventist Congregation Church*, 887 F.2d 228, 230 (9th Cir. 1989). A court may properly grant a Rule 12(c) motion when the non-movant can plead no facts that would support his claim for relief. *See United States v. Wood*, 925 F.2d 1580, 1581 (7th Cir 1991) (affirming a district court's grant of a 12(c) motion). Dismissal is proper if there is either a "lack of a cognizable legal theory" or "the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1990).

Where, as here, documents referred to are attached to the complaint, they are considered as part of the complaint for purposes of a motion for judgment on the pleadings. *Hal Roach Studios*, 896 F.2d at 1555. The court may consider the full text of documents referred to in the complaint, provided that the document is central to the plaintiff's claim and no party questions the authenticity of the document. *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994). Thus, where the contract is attached to the complaint, the action is "amenable to a judgment on the pleadings because it only requires the court to interpret the effect of the contract's undisputed terms." *JMP Sec. LLP v. Altair Nanotechnologies, Inc.*, 850 F. Supp. 2d 1029, 1038 (N.D. Cal. 2012), citing

Hal Roach Studios, 896 F.2d at 1550; and Wright & Miller, 5C Fed. Prac. & Proc. Civ. § 1367 (3d ed.).

B. General Principles Governing Interpretation of Insurance Policies.

It is well established that the interpretation of an insurance policy, like all contracts, is an issue of law, not fact. *Fed. Ins. Co. v. Coast Converters, Inc.*, 130 Nev. 960, 965-966, 339 P.3d 1281 (2014). The court interpreting the contract endeavors to ascertain the parties' intent when they entered into the contract. *See, e.g., Sheehan & Sheehan v. Nelson Malley & Co.*, 121 Nev. 481, 488, 117 P.3d 219, 224 (2005). An insurance policy is interpreted "'from the perspective of one not trained in law or in insurance, with the terms of the contract viewed in their plain, ordinary and popular sense.'" *Century Sur. Co. v. Casino W., Inc.*, 130 Nev. 395, 329 P.3d 614, 616 (2014), quoting *Siggelkow v. Phoenix Ins. Co.*, 109 Nev. 42, 44, 846 P.2d 303, 304 (1993). The policy is to be considered "as a whole 'to give reasonable and harmonious meaning to the entire policy.'" *Id; see also, Farmers Ins. Group v. Stonik*, 110 Nev. 64, 867 P.2d 389, 391 (1994).

Where, as here, the policy provisions at issue are clear and unambiguous, the policy is to be interpreted and enforced according to the plain and ordinary meaning of its terms. *Fed. Ins. Co. v. Coast Converters, Inc.*, 130 Nev. 960, 965-966, 339 P.3d 1281 (2014), citing, *Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 162, 252 P.3d 668, 672 (2011). The court should not "rewrite contract provisions that are otherwise unambiguous . . . [or] increase an obligation to the insured where such was intentionally and unambiguously limited by the parties." *Farmers Ins. Grp. v. Stonik ex rel. Stonik*, 110 Nev. 64, 67, 867 P.2d 389, 391 (1994).

In general, the insured has the burden to prove that the claim falls within the policy's coverage grant. *See, e.g., National Auto. & Cas. Co. v. Havas*, 75 Nev. 301, 339 P. 2d 767, 768 (1959). Whereas, the insurer has the burden of proving an exclusion precludes coverage. *Id.*

C. The Contamination Exclusion Expressly Precludes Coverage for Treasure Island's Claims.

As discussed, the AFM Policy expressly excludes coverage for claims due to "contamination," which is defined to include "virus, disease causing or illness causing agent." (Compl., Ex. A at Dkt. 2-1, pp. 35 and 58). The Policy clearly and unambiguously excludes any

condition of property due to the actual or suspected presence of any virus, and "any cost" due to such condition, including costs associated with the inability to use or occupy the property. (*Id.*) It cannot be disputed that SARS-CoV-2 (short for ""Severe Acute Respiratory Syndrome Coronavirus 2"), which causes COVID-19, is a virus. According to the Centers for Disease Control, "SARS-CoV-2 virus is a beta coronavirus, like MERS-CoV and SARS-CoV. In COVID-19, 'CO' stands for 'corona,' 'VI' for 'virus,' and 'D' for disease." https://www.cdc.gov/coronavirus/2019-ncov/cdcresponse/about-COVID-19.html.[4] The AFM Policy specifically excludes loss caused by viruses, including the Corona*virus*, from coverage. Where, as here, the language of an exclusion is clear and explicit, the contractual language controls. *Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 162, 252 P.3d 668, 672 (2011); *Foster-Gardner, Inc. v. National Union Fire Ins. Co.*, 18 Cal.4th 857, 868 (1998); *Montrose v. Admiral*, 10 Cal.4th 645, 666-667 (1995); *Borg v. Transamerica*, 47 Cal.App.4th 448, 456 (1996). Thus, there is no need for the Court to consider evidence as to the meaning of the term "contaminant" in the Policy -- the exclusion itself specifically defines "virus" as a contaminant. *E.g., United Nat'l Ins. Co. v. Frontier Ins. Co.*, 99 P.3d 1153, 1157 (Nev. 2004) (holding that the courts may not rewrite unambiguous insurance contract provisions); *Westoil Terminals Co. v. Industrial Indemnity Co.* (2003) 110 Cal.App.4th 139, 146 (when an exclusion is unambiguous, it is given literal effect). Indeed, this Court and the Ninth Circuit have already concluded that a similar Contamination exclusion was unambiguous. *Polo Towers Master Owners Ass'n v. Factory Mutual Ins. Co.*, 185 Fed.Appx. 636 (9th Cir. 2006).

Since the onset of the novel Coronavirus pandemic, the overwhelming majority of courts that have examined contamination exclusions similar to the one at issue have held that they preclude recovery of losses related to the pandemic and government shut down orders. *See, e.g., West Coast Hotel Mgmt. v. Berkshire Hathaway Guard Ins. Cos.*, 2020 LEXIS 201161, **15-16 (C.D. Cal. Oct. 27, 2020) (exclusion precludes coverage for "losses caused directly or indirectly by

[4] The Court may take judicial notice of the CDC's definition of the Coronavirus and COVID-19 in support of AFM's 12(c) Motion. *See, e.g., Menominee Indian Tribe v. Thompson*, 161 F.3d 449, 456 (7th Cir. 1998), cert. denied, 526 U.S. 1066 (1999); also, *Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998-99 (9th Cir. 2010) (noting that a court may judicially notice public records available from reliable sources on the Internet, including websites run by a government agency).

a virus capable of inducing disease."); *Boxed Foods Co., LLC v. California Capital Ins. Co.*, 2020 U.S. Dist. LEXIS 198859 (N.D. Cal. Oct. 26, 2020) (business interruption losses due to COVID-19 excluded by policy's "Pathogenic Organisms Exclusion"); *Mark's Engine Co. No. 28 Rest., LLC v. Travelers Indem. Co.*, 2020 U.S. Dist. LEXIS 188463 at *13-14 (C.D. Cal. Oct. 2, 2020) (granting insurer's motion to dismiss because even if losses from inability to use property amounted to direct physical loss or damage to property, coverage would be precluded under the virus exclusion). Similarly, the court in *Diesel Barbershop LLC v. State Farm Lloyds*, 2020 U.S. Dist. LEXIS 147276. *17-20 (W.D. Tex. Aug. 13, 2020) rejected plaintiffs' effort to secure coverage for interruption to their barbershop businesses based on both the absence of "direct physical loss" due to the pandemic and government orders, and, alternatively, a contamination exclusion in the policies. The court held that:

> [w]hile there is no doubt that the COVID-19 crisis severely affected Plaintiffs' businesses, State Farm cannot be held liable to pay business interruption insurance on these claims as there was no direct physical loss, ***and even if there were direct physical loss, the Virus Exclusion applies to bar Plaintiffs' claims***. Given the plain language of the insurance contract between the parties, the Court cannot deviate from this finding without in effect re-writing the Policies in question. That this Court may not do.

Id. at *21-22 (emphasis added). *See also Turek Enterprises, Inc. v. State Farm Mut. Aut. Ins. Co.*, 2020 U.S. Dist. LEXIS 161198, *21 (E.D. Mich. Sept. 3, 2020) ("By its plain terms**,** the Virus Exclusion bars coverage for any loss that would not have occurred but for some "'[v]irus, bacteria or other microorganism that induces or is capable of inducing physical distress, illness, or disease.'"); *Martinez v. Allied Ins. Co. of America*, U.S. Dist. LEXIS 165140, *6 (M.D. Fla. Sept. 2, 2020) (COVID-19 was "clearly a virus . . . under the plain language of the policy's exclusion"); *Franklin EWC, Inc. v. Hartford Fin. Servs. Grp., Inc.*, 2020 U.S. Dist. LEXIS 174010, *4-6 (N.D. Cal. Sept. 22, 2020) (COVID-19 fell within exclusion for "fungi, wet rot, dry rot, bacteria and virus"); *Wilson v. Hartford Casualty Co.*, 2020 U.S. Dist. LEXIS 179896, *17-19 (E.D. Penn. Sept. 30, 2020).[5]

[5] While some courts have declined to dismiss actions at the pleading stage based on a virus exclusion (none of which uses the same language of the AFM Policy), neither of the two opinions available on LEXIS appear to support an argument that the exclusion in the Policy does not apply to Treasure Island's claim.

So, too, here. The Policy's unambiguous Contamination Exclusion clearly applies to the Coronavirus and Treasure Island's claimed losses stemming from the pandemic.

Treasure Island alleges that the Contamination Exclusion does not preclude coverage for its claims because the definition of "contamination" does not specifically identify "communicable disease" as a contaminant. (Compl., paras 68-75.) As such, Treasure Island alleges the exclusion is ambiguous and must be construed in favor of coverage. (*Id*. para. 75) But the definition of contamination does not need to identify "communicable disease" in order for it to apply to the Coronavirus because it explicitly identifies "virus." Whether there might be some other communicable disease that is not encompassed by the definition of contamination (which frankly seems unlikely given the descriptors "disease causing or illness causing agent") is not an issue before the Court.[6] The exclusion, which applies to "virus," is unambiguous as applied to the Coronavirus.

Treasure Island also alleges that the Contamination Exclusion is rendered ambiguous because it conflicts with the Communicable Disease coverage. (Compl., paras 69-75). This allegation ignores the well-settled rule that "'[a]n insurance policy may exclude coverage for particular injuries or damages in certain specified circumstances while providing coverage in other circumstances.'" *Julian v. Hartford Underwriters Ins. Co*., 35 Cal.4th 747, 759 (2005), quoting *Frank and Freedus v. Allstate Ins. Co.*, 45 Cal.App.4th 461, 471 (1996). The fact that AFM provides limited coverage for Communicable Disease (if the relevant Policy requirements are met) does not preclude application of the Contamination Exclusion in other circumstances. As the

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See, e.g., *Urogynecology Specialist of Fls. LLC v. Sentinel Ins. Co*., 2020 U.S. Dist. LEXIS 184774 (M.D. Fla. September 24, 2020) (finding policy as a whole ambiguous because the relevant endorsements and exclusions were not provided to the court); *Optical Services USA/JCI v. Franklin Mut. Ins. Co.*, 2020 N.J. Super. Unpub. LEXIS 1782, *11 (although unclear from the record, it appears the defendant insurer withdrew its argument that the exclusion applies). A summary of all the rulings on motions to dismiss complaints seeking coverage for COVID losses may be found at https://cclt.law.upenn.edu/judicial-rulings/.

[6] *Century Surety Co. v. Casino West, Inc*., 130 Nev. 395, 398 (2014), cited in the Complaint, is inapposite. The issue in *Century Surety* was whether a pollution exclusion that precluded coverage for bodily injury "arising out of, caused by, or alleging to be contributed to in any way by any toxic, hazardous, noxious, irritating, pathogenic or allergen qualities or characteristics of indoor air regardless of cause," was ambiguous as applied to guests at the insured's hotel who died from carbon monoxide poisoning. In contrast, here, the issue is whether a contamination exclusion that precludes coverage for "virus" applies to a virus. There is no similar ambiguity.

Julian Court stated, an insurer is not prohibited from "drafting and enforcing policy provisions that provide or leave intact coverage for some, but not all, manifestations of a particular peril." *Id.* This is, in fact, an everyday practice. In addition, "[a] reasonable insured would readily understand from the policy language which perils are covered and which are not." *Id*. Thus, AFM is free to exclude contamination, including all viruses, disease causing or illness causing agents, *except* for Communicable Disease, provided the conditions of the Communicable Disease coverage are met. In addition, the AFM Policy clearly delineates that the Communicable Disease Coverage is an Additional or Extension of Coverage. (Compl., Ex. A, Dkt. 2-1, p. 6).

Moreover, provisions in an insurance policy are to be construed together for the purpose of giving force and effect to each clause. *E.g., Totten v. Underwriters at Lloyd's London,* 176 Cal.App.2d 440 (1959); *Hellman v. Great American Ins. Co*., 66 Cal. App. 3d 298 (1977). The Contamination Exclusion and the Communicable Disease provisions are easily reconciled and in fact are complementary. The exclusion applies to the Coronavirus, except to the extent the Communicable Disease coverage requirements are met, in which case Treasure Island may recover up to a total of $200,000 under the terms of those provisions. *Julian v. Hartford,* 35 Cal. 4th at 756 (exclusions, even those in conflict with statute, are still applied "in such a manner as will make them 'lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties,' and to give effect to every part of the contract).

Treasure Island's suggestion that the Contamination Exclusion cannot apply to a "communicable disease" would read the words "virus, disease causing or illness causing agent" in the definition of contamination out of the Policy, a result that does not give effect to the clear intention of the parties. The Court should not "rewrite contract provisions that are otherwise unambiguous . . . [or] increase an obligation to the insured where such was intentionally and unambiguously limited by the parties." *Farmers Ins. Grp. v. Stonik ex rel. Stonik*, 110 Nev. 64, 67, 867 P.2d 389, 391 (1994); *Smyth v. USAA*, 5 Cal.App.4th 1470, 1474 (1992) (courts do not rewrite policies to bind the insurer to a risk that it did not contemplate).

D. The Loss of Use Exclusion Also Expressly Bars Treasure Island's Claimed Losses.

The Policy's separate "loss of use" exclusion is a further bar to Treasure Island's claim. "The Policy clearly "excludes: . . . 3) loss of market or loss of use." (Compl., Ex. A, Dkt. 2-1 p. 20). Treasure Island's claimed losses stem from its inability to use its properties due to governmental orders or the Coronavirus, and they therefore directly implicate the "loss of use" exclusion, which applies to bar coverage unless specific exceptions are "otherwise stated" in the Policy. (*Id.*, p. 18, "In addition to the exclusions elsewhere in this Policy, the following exclusions apply unless otherwise stated").

Although not defined in the Policy, the exclusion is unambiguous. As the magistrate in *Malaube v. Greenwich Insurance Company*, 2020 U.S. Dist. 156027 (S.D. Fla. Aug. 26, 2020), noted in recommending that the court grant the insured's motion to dismiss claims seeking coverage related to the Coronavirus and shut down orders:

> the mere failure to provide a definition of a term involving coverage [or exclusion] does not render the term ambiguous. . . . When a policy does not define a term, the plain and generally accepted meaning should be applied.

Id. at *13 (internal citations omitted); *see also*, *Fed. Ins. Co. v. Coast Converters, Inc.*, 130 Nev. 960, 965-966, 339 P.3d 1281 (2014), citing, *Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 162, 252 P.3d 668, 672 (2011) (policy provisions that are clear and unambiguous are to be interpreted and enforced according to the plain and ordinary meaning of the terms); *Bhd. Mut. Ins. Co. v. Ludwigsen*, 2018 U.S. Dist. LEXIS 150186, at *37 (S.D.N.Y. Sept. 4, 2018) (holding that although the policy did not define certain terms, "unambiguous provisions of an insurance contract must be given their plain and ordinary meaning").

"Loss of use" – a standard phrase that regularly appears in insurance policies – can hardly be considered an ambiguous term, particularly in the context of property. *See, e.g., Travelers Prop. Cas. Co. v. Mixt Greens, Inc.*, 2014 U.S. Dist. LEXIS 39548, at *16 (N.D. Cal. March 25, 2014) ("Under the plain meaning of 'loss of use,' the insured must have been deprived of the use of its tangible property."); *see also* Compl., Ex. A, Dkt. 2-1, p. 21 (Policy's Contamination Exclusion also precludes the "inability to use or occupy property"). Because it is not an ambiguous term, "loss of use" should be accorded its plain meaning.

E. Absence of Physical Loss or Damage.

Although the Court need not reach the issue of physical loss or damage because Plaintiff's claimed losses are excluded by the Contamination Exclusion, the fact that the presence of the Coronavirus does not constitute physical loss or damage provides an additional, independent basis for judgment on the pleadings.[7]

1. The Presence of COVID-19 Is Not Physical Loss or Damage.

Other than the Communicable Disease coverages which are not at issue in this motion, the provisions of the Policy under which Treasure Island seeks coverage require physical loss or damage in some manner to apply. The presence of the Coronavirus does not constitute physical loss or damage, as has been affirmed by the overwhelming majority of courts to have addressed the issue, on the grounds that it does not cause any physical change or alteration to the property. *See, e.g., West Coast Hotel Mgmt. v. Berkshire Hathaway Guard Ins. Cos.*, 2020 LEXIS 201161, **11-12 (C.D. Cal. Oct. 27, 2020); *Mark's Engine Co. No. 28 Rest., LLC v. Travelers Indem. Co.*, 2020 U.S. Dist. LEXIS 188463 at *7-13 (C.D. Cal. Oct. 2, 2020); *Sandy Point Dental, PC v. The Cincinnati Insurance Company*, 2020 U.S. Dist. LEXIS 171979 at *4-7 (N.D. Ill. Sept. 21, 2020); *Pappy's Barbershops, Inc. v. Farmers Group, Inc.*, 2020 U.S. Dist. LEXIS166808, *11-13 (C.D.Cal. September 2, 2020); *Turek Enterprises, Inc. v. State Farm Mut. Aut. Ins. Co.*, 2020 U.S. Dist. LEXIS 161198, *14-19 (E.D. Mich. Sept. 3, 2020); *Martinez v. Allied Ins. Co. of America*, 2020 U.S. Dist. LEXIS 165140, *5-6 (M.D. Fla. Sept. 2, 2020)*; Malaube LLC v. Greenwich Ins. Co.*, 2020 U.S. Dist. 156027, *17-25 (S.D. Fl. Aug. 26, 2020); *10E, LLC v. Travelers Indemnity Co. of Connecticut*,2020 U.S. Dist. LEXIS 165252, *13-15 (C.D. Cal. Sept. 2, 2020); *Diesel Barbershop, LLC v. State Farm Lloyds*, 2020 U.S. Dist. LEXIS 147276, *3 (W.D. Tex. Aug. 13, 2020); *Rose's 1, LLC v. Erie Ins. Exchange*, 2020 D.C. Super. LEXIS 10, *11-13 (Superior Court of D.C. Aug. 6, 2020).

For example, in *Mark's Engine Co. No. 28 Rest., LLC v. Travelers Indem. Co.*, the court dismissed the plaintiff's business interruption claim for alleged losses caused by closures due to the COVID-19 pandemic on the grounds that losses from "inability to use property do not amount

[7] *See, e.g. Wilson v. Hartford Casualty Co.*, 2020 U.S. Dist. 179896, **17-21 (E.D. Penn. Sept. 30, 2020).

to 'direct physical loss of or damage to property' within the ordinary and popular meaning of that phrase" and an insured cannot escape this truth through "artful pleading." *Id.* at *9, citing *10E, LLC v. Travelers Indemnity Co., supra, MRI Healthcare Ctr. of Glendale, Inc. v. State Farm Gen. Ins. Co.,* 187 Cal.App.4th 766, 779 (2010) (physical loss or damage occurs only when property undergoes a "distinct, demonstrable, physical alteration"), *Doyle v. Fireman's Fund Ins. Co.,* 21 Cal.App.5th 33, 39 (2018) (diminution in value is not covered by property insurance), and *Ward General Ins. Servs., Inc. v. Employers Fire Ins. Co.,* 114 Cal.App.4th 548 (2003) (loss of electronic data did not qualify as direct physical loss or damage absent physical alteration to the storage media).[8] Similarly, in *Rose's 1, LLC v. Erie Ins. Exchange*, the court concluded that "a natural reading of the term 'direct physical loss'" requires that any claimed loss be caused by "a direct physical intrusion on to the insured property" and result in "some form of direct physical change". *Id.* at *5. *See, also Diesel Barbershop v. State Farm* at *14 (requirement of "direct physical loss" to property demands a "distinct, demonstrable physical alteration of the property."); *10E, LLC v. Travelers Indemnity Co. of Connecticut,* 2020 U.S. Dist. LEXIS 156827, at *13-13 (C.D. Cal. Aug. 28, 2020) (same, noting that, while plaintiff alleged the Coronavirus infects and stays on surfaces and objects up to twenty-eight days, it did not allege that the virus physically altered plaintiff's property, nor could it plausibly do so); *Pappy's Barbershops, Inc. v. Farmers Group, Inc.,* 2020 U.S. Dist. LEXIS166808, at *12 (S.D.Cal., September 2, 2020) (temporary closure of business to mitigate the spread of the virus is not a physical loss).

As in the above cases, Treasure Island has not alleged facts to support any physical impact or alteration to its property as a result of COVID-19. It does not allege that anything about the property has changed since March 2020. Nor does it allege the need to make repairs or change the buildings in order to continue its business. Based on these authorities, it has not, and cannot, allege physical loss or damage to trigger coverage under the provisions of the Policy it cites.

The requirement of showing some actual, demonstrable change to property for coverage is

[8] Nevada courts, including this one, frequently rely on the laws of other jurisdictions, particularly California, regarding insurance coverage issues. *See, e.g., Zurich American Ins. Co. v. Coeur Rochester, Inc.*, 720 F.Supp.2d 1223, 1234, fn. 11 (D. Nev. 2010); *Jackson v. State Farm Fire & Casualty Co.*, 108 Nev. 504, 835 P.2d 786 (1992); *O.P.H. of Las Vegas v. Oregon Mut. Ins. Co.*, 401 P. 3d 218 (Nev. Supreme Court 2017).

not new to losses from COVID-19. Courts across the country have held for years that economic losses without some tangible injury to property simply do not trigger business interruption coverage under a first party property policy. *E.g., Roundabout Theatre Co. v. Continental Casualty Co.*, 302 A.D.2d 1, 6, 751 N.Y.S.2d 4 (1st Dept. 2002) (policy which covers "direct physical loss or damage . . . clearly and unambiguously provides coverage only where the insured's property suffers direct physical damage."); *United Air Lines, Inc. v. Ins. Co. of State of PA*, 439 F.3d 128, 134 (2d Cir. 2006) (airline was unable to show that its lost earnings resulted from physical damage to its property or from physical damage to an adjacent property when the government shut down the airport after the 9/11 terrorist attacks); *Philadelphia Parking Auth. v. Federal Insurance Co.*, 385 F. Supp. 2d 280,287-88 (S.D.N.Y 2005) ("the interruption in business must be caused by some physical problem with the covered property . . . which must be caused by a 'covered cause of loss'"); *Hartford Ins. Co. of Midwest v. Mississippi Valley Gas Co.*,181 F. App'x 465, 470 (5th Cir. 2006) ("The requirement that the loss be "physical," given the ordinary definition of that term is widely held to exclude alleged losses that are intangible or incorporeal, and, thereby, to preclude any claim against the property insurer when the insured merely suffers a detrimental economic impact unaccompanied by a distinct, demonstrable, physical alteration of the property); *Newman Myers Kreines Gross Harris P.C. v. Great N. Ins. Co.*, 17 F.Supp.3d 323, 330 (S.D.N.Y 2014) (mere loss of access does not constitute "direct physical loss or damage" under the policy) ; *County of Clark v. Factory Mutual Insurance Co.*, 2005 U.S. Dist. LEXIS 47574 (D. Nev. March 28, 2005) (airport closures due to FAA ground stop order following 9/11 terrorist attack was not the result of physical loss or damage).

The overwhelming weight of authority is clear that the presence of the Coronavirus cannot constitute physical loss or damage because it does not physically alter the property in anyway, let alone create tangible, structural damage. Thus, other than under the Communicable Disease provisions which do not require physical damage, Plaintiff cannot state a plausible claim for breach of contract under the Policy.

2. The Communicable Disease Provisions Do Not Require the Presence of "Physical Loss or Damage".

Treasure Island alleges that, because COVID-19 constitutes a communicable disease under the Communicable Disease provisions of the Policy, the presence of COVID-19 must be "physical loss or damage of the type insured" for purposes of the other coverages in the Policy. However, the Communicable Disease provisions do not require physical loss or damage. Rather, the conditions to that coverage are:

- the actual, not suspected, presence of a communicable disease at a location owned, leased or rented by the insured;
- access to which has been limited, restricted or prohibited for more than 48 hours;
- by an order of an authorized governmental agency regulating such presence of communicable disease.

(Compl., Ex. A, Dkt. 2-1 at p. 23).

The Communicable Disease provisions do not require physical loss or damage at all. Thus, coverage for COVID-19 under the Communicable Disease provisions does not equate to physical loss or damage under the other provisions of the Policy.

3. The Governor Did Not Order Treasure Island to Close Because of Physical Loss or Damage From COVID-19.

The Policy provides that civil authority orders must be issued as a "direct result of physical loss or damage" to trigger coverage under business interruption policies. (Compl., Ex. A, Dkt. 2-1 at p. 41.) This requirement has been universally upheld and enforced. *E.g., United Air Lines, Inc. v. Ins. Co. of State of PA*, 439 F.3d 128, 134 (2d Cir. 2006) (closure of airport and loss of earnings as a result were not the direct result of physical loss or damage but rather, the government's efforts to suppress terrorism and hence not covered under airline's business interruption policy); *County of Clark v. Factory Mutual Insurance Co.*, 2005 U.S. Dist. LEXIS 47574 (D. Nev. March 28, 2005); *Syufy Enters. v. Home Ins. Co.*, 1995 U.S. Dist. LEXIS 3771, *5-7 (N.D. Cal. March 22, 1995); see *also, 10E, LLC v. Travelers Indemnity Co. of Connecticut*, 2020 U.S. Dist. LEXIS 156827, *15-17 (C.D. Cal. Aug. 28, 2020) (loss of business caused by "public health response to the [corona]virus" is not the direct result of physical loss or damage); *Pappy's Barbershops, Inc. v.*

Farmers Group, Inc., 2020 U.S. Dist. LEXIS166808, *14-15 (S.D.Cal., September 2, 2020) (same).

Plaintiff's Complaint alleges that, "[i]n an effort to slow the spread of COVID-19 and as a consequence of physical damage caused by COVID-19, federal, state and local governments imposed unprecedented directives . . . requiring certain businesses to close . . . ." (Compl. at para. 23). Yet, none of the orders attached to 'the Complaint state that they were implemented as a consequence of physical damage caused by COVID-19. (*See* Exhibits B-F, Dkt. 2-2 – 2-5) At best, the orders include passing references to protecting property. In fact, as the orders confirm, the governor closed casinos to slow the spread of the disease by preventing large groups of people from gathering together and engaging in non-essential activities. *See, e.g., Diesel Barbershop,* No. 20-cv-00461, 2020 WL 4724305 (finding that, while Orders forced properties to close, they came about as a result of COVID-19 spreading rapidly throughout the community); *see also, Sprewell v. Golden State Warriors,* 266 F.3d 979, 988 (9th Cir. 2001) and *Steckman v. Hart Brewing Co., Inc.,* 143 F.3d, 1295-1296 (9th Cir. 1998) (where the allegations of the complaint are contradicted by exhibits, the latter controls).

Moreover, a statement in a governmental order, assuming there was one, does not require the conclusion that the order was issued as "the direct result of physical damage." In *Paradies Shops, Inc. v. Hartford Fire Is. Co.,* 2004 WL 5704715 (N.D. Ga. Dec. 15, 2004), the court rejected the plaintiff's argument that the Ground Stop Order issued in the wake of September 11 was issued because of property damage, despite statements by Secretary of Transportation Norman Y. Mineta that the order may have "indirectly" been a consequence of terrorist-inflicted property damage. The court concluded that the order was imposed to protect against future terrorist attacks and hence did not qualify as an order of civil authority issued as the "direct result" of covered property damage under business interruption policy. Here, even if the governor had stated that his orders were issued because of physical loss or damage caused by the Coronavirus, his statements would not make it so, nor would it establish any physical loss or damage covered by the AFM Policy.

F. Treasure Island Cannot Allege a Claim for Bad Faith or Statutory Violations.

Because Treasure Island cannot state "a cognizable theory" for breach of the AFM Policy, it follows that it cannot state a cause of action for bad faith or statutory violation. In order to state a claim for "bad faith," an insured must prove that (1) it has been denied policy benefits owed, (2) without any reasonable basis, and (3) the insurer knew or was aware that there was no reasonable basis to deny coverage. *Pioneer v. National Union Fire Ins. Co.*, 863 F.Supp. 1237, 1247 (D. Nev. 1994) (legitimate dispute as to causation precludes finding of bad faith), citing *American Excess Ins. Co. v. MGM Grand Hotels, Inc., et al.,* 102 Nev. 601 (1986) (where insurer's interpretation of coverage was reasonable, there is no basis for finding bad faith). In order to state a cause of action for statutory violation, an insured must prove one of the unfair claims practices delineated in the statute. NRS 686A.310. Without satisfying these elements, a denial of benefits is merely a breach of contract. *See, Pioneer v. National Union,* 863 F. Supp. at 1243. Thus, if the Court finds that AFM's coverage position as set forth above is correct and the allegations of the Complaint as evidenced by the exhibits attached thereto do not an unfair claims practice by AFM, there can be no bad faith or statutory violation of as a matter of law.

Even if the Court were to conclude that it cannot resolve Treasure Island's entitlement to benefits based on the pleadings, the Court can nonetheless grant AFM's motion for judgment on the pleadings on the "bad faith" cause of action, as the allegations fail to support the absence of a reasonable basis to deny coverage. The fact that numerous courts around the country have concluded that property insurance claims arising from the Coronavirus do not allege the requisite physical loss or damage and are excluded under "virus" exclusions alone supports that AFM's position is reasonable as a matter of law.

Similarly, Treasure Island's claim under the Nevada's Unfair Claims Practices Act, NRS 686A.310, also fails. In order to proceed under the Act, Treasure Island must prove that AFM acted unreasonably in violation of one or more provisions of the Act. *See, e.g., Zurich Am. Ins. Co. v. Coeur Rochester, Inc.*, 720 F. Supp. 2d 1223, 1236 (D. Nev. 2010); *Schumacher v. State Farm Fire & Cas. Co.*, 467 F. Supp. 2d 1090, 1095 (D. Nev. 2006). The gist of Treasure Island's allegations is that AFM failed to investigate the claim that COVID-19 caused physical loss or

damage while requesting information that would show coverage under the Communicable Disease coverage provisions. (Compl. paras 171-177). If the Court determines that AFM's coverage position was reasonable, AFM could not have violated the Act by declining to investigate a loss that could not be covered. Moreover, the exhibits attached to the Complaint as Exhibits F, G, I and J (Dkt. 2-6, 2-7, 2-9 and 2-10) reflect that AFM promptly requested information from Treasure Island that would establish coverage under the Communicable Disease provisions as well as clearly explained the available coverage. The fact that Treasure Island disagreed with AFM's coverage determination and chose not to pursue Communicable Disease coverage does not make AFM's actions unreasonable. *See, County of Clark v. Factory Mutual Insurance Co.*, 2005 U.S. Dist. LEXIS 47574 (D. Nev. March 28, 2005) (denial of claim based on a reasonable interpretation of insurance contract did not support cause of action for breach of unfair practices act); *Zurich v. Coeur Rochester*, 720 F.Supp.2d at 1236-1237 (D. Nev. 2010).

Treasure Island cannot establish that AFM lacked a reasonable basis to deny coverage or engaged in an unfair claim practice. As such, AFM is entitled to judgment on the pleadings as to Counts V and VI of the Complaint.

V. CONCLUSION

Like thousands of other businesses, Treasure Island lost income when government officials ordered non-essential businesses to close in response to the COVID-19 pandemic. The loss is not, however, covered by the AFM Policy which expressly excludes claims that are the result of a "virus" or other contamination. Moreover, Treasure Island has failed to allege that the Coronavirus caused physical loss or damage required for coverage under the Policy. Accordingly, for all the reasons set forth above, AFM respectfully requests the Court grant partial judgment on the pleadings that Treasure Island is not entitled to a declaratory judgment (Count I) and cannot state a cause of action for breach of contract (Counts II, III and IV) under any of the Policy coverages, with the possible exception of the Communicable Disease Coverage. In addition, because AFM acted reasonably in correctly interpreting its policy and investigating the claim, Treasure Island cannot state a cause of action for breach of the implied covenant of good faith and fair dealing (Count V) or violation of the Nevada Unfair Claims Practices Act (Count VI).

DATED: November 2, 2020.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that on November 2, 2020, a true and correct copy of **AFFILIATED FM INSURANCE COMPANY'S MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT** was electronically filed with the Clerk of Court via the Court's CM/ECF System and will be sent electronically to all registered participants as identified on the Notice of Electronic Filing.

This 2nd day of November, 2020.

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