No.: X07 HHD-CV-21-6140378-S	:	SUPERIOR COURT
MASHANTUCKET PEQUOT TRIBAL NATION, *Plaintiff*,	:	COMPLEX LITIGATION DOCKET
v.	:	JUDICIAL DISTRICT OF HARTFORD AT HARTFORD
FACTORY MUTUAL INSURANCE COMPANY, *Defendant*.	:	JUNE 16, 2021

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION TO STRIKE

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I. INTRODUCTION

This is *not* a typical insurance coverage case involving COVID-19. Defendant Factory Mutual Insurance Company ("FM") is in an unenviable position relative to other insurers concerning coverage for COVID-19 losses because, *unlike* nearly all of its counterparts in the industry, FM issued a unique policy form to the Mashantucket Pequot Tribal Nation ("the Nation") that *expressly* covers communicable disease as "insured physical loss or damage." Policy at 16 and 22. As the court in *Cinemark Holdings, Inc. v. Factory Mutual Insurance Co.*, 500 F. Supp. 3d 565, 569 (E.D. Tex. 2021) recently found in denying a similar motion by FM in another case concerning COVID-19 losses under the same FM policy form, FM's coverage "is much broader" and "expressly covers loss and damage caused by 'communicable disease.'"

Under the FM policy's plain language, a communicable disease like COVID-19 *is* "insured physical loss or damage." The Policy is divided between two coverage sections—"Property Damage" and "Time Element" (*i.e.*, business interruption). Each section contains various coverages that are triggered by "physical loss or damage." *One* of the "Additional Coverages for *insured physical loss or damage*" in the "*Property Damage*" section is for "Communicable Disease Response." Policy at 9, 16, 22. *One* of the "Additional Time Element Coverage Extensions"—which are extensions of the basic coverage for "Time Element" losses "resulting from *physical loss or damage of the type insured*"—is for "Interruption by Communicable Disease." *Id.* at 35, 53. Thus, by its plain terms, the Policy considers communicable disease at property *to be* "physical loss or damage." FM itself confirmed the meaning of this plain language in an internal "Talking Points" memorandum distributed to its claims adjusters for COVID-19 claims recognizing that "communicable disease" is a "trigger of coverage for Property Damage" under the FM policy form.

FM's Motion to Strike ("Motion") asks the Court to ignore FM's expressed underwriting intent in the Policy language, ignore the way the Policy is structured and written, and conclude on the pleadings that the Policy does not consider "communicable disease" to be "physical loss or damage." The motion takes the untenable position that the policy's grant of additional coverage for costs arising from "communicable disease" will pay policy benefits in the absence of "physical loss or damage" to property. FM Mem. at 6–7. FM's position is contradicted by the plain terms and structure of the policy.

The FM policy form is also unique in that it does not contain exclusions common in other policies that specifically exclude losses caused by communicable diseases and pandemics caused by viruses. By contrast, the FM policy contains a different exclusion for "contamination," which does not apply to losses "directly resulting from other physical damage not excluded by this Policy" (*i.e.*, does not apply to losses resulting from communicable disease, which the policy expressly covers as physical loss or damage). Policy at 4. FM's "contamination" exclusion also does not include "anti-concurrent causation" language common in other policies, which typically may apply to exclude "indirect" causes of loss. *See id.* Here, the policy differentiates between communicable disease and virus. Where a loss results from a communicable disease, it is covered; that the communicable disease is caused by a virus is of no moment. Otherwise, under FM's interpretation of the exclusion, the policy's coverage grant for communicable disease as insured physical loss or damage would be nullified. Had FM intended to exclude coverage for communicable disease it could have done so; instead, its policy expressly provides coverage for it and states it is a type of physical loss or damage.

FM now attempts to avoid its obligation to cover insured losses arising from the COVID-19 communicable disease pandemic by hiding behind rulings other courts have entered precluding

claims under *substantively different* policies with less generous language. In its Motion, FM advances theories that contradict the plain terms and structure of its policy, disregards Connecticut's foundational principles of insurance contract interpretation, and relies on rulings involving distinguishable coverage terms, exclusions, and factual allegations. FM's attempt to retroactively re-write its unique policy to align with others in the industry that it deems more favorable should not be permitted. Examination of the actual policy FM issued to the Nation, adherence to Connecticut's principles of contract interpretation, and assuming as true the Nation's well-pleaded factual allegations compel the denial of FM's Motion. At this stage in the proceedings, FM cannot meet its high burden on this Motion. Accordingly, the Court should deny the Motion and require FM to answer the Nation's First Amended Complaint and proceed with discovery on the myriad questions of fact and proof presented.

II. THE NATION'S WELL-PLEADED FACTS

A. The Nation's Tribal Businesses

The Nation is a federally recognized sovereign Indian Tribe with a Reservation located within the geographical boundaries of Connecticut. First Am. Compl. ("Compl.") ¶ 10. The Nation's governing body is the Mashantucket Pequot Tribal Council (the "Tribal Council"). *Id.* ¶ 11. On and around the Reservation, the Nation operates and has an interest in a variety of businesses, including a casino, multiple hotels, spas, health centers, golf courses, restaurants, theaters, and a museum (the "Tribal Businesses"). *Id.* ¶¶ 12, 14–21. One of the businesses is the Mashantucket Pequot Gaming Enterprise, doing business as Foxwoods Resort Casino, a resort and casino complex on the Reservation that includes multiple casinos, hotels, theaters, and restaurants. *Id.* ¶ 14.

B. The COVID-19 Communicable Disease[1]

COVID-19 is a harmful, deadly, and highly contagious communicable disease. *Id.* ¶¶ 44–45. "COVID-19" is not a virus, but rather the name of the *communicable disease* caused by SARS-CoV-2. *Id.* ¶ 44. According to the Centers for Disease Control and Prevention (CDC), COVID-19 can spread in several ways, including from person to person through respiratory droplets, through airborne transmission, and by contact with objects or surfaces. *Id.* ¶ 55.

In March 2020, the World Health Organization (WHO) declared the COVID-19 outbreak a global pandemic and the former President of the United States declared a nationwide emergency due to the public health emergency caused by the COVID-19 outbreak in the United States. *Id.* ¶¶ 47, 50. State and tribal governments, including the Governor of Connecticut and the Tribal Council, issued orders restricting or prohibiting access to premises in response to the actual presence of COVID-19 at properties located at or within 5 miles of the Tribal Businesses. *Id.* ¶¶ 72–85, 87, 89, 91–95, 124. In other instances, the governments issued orders restricting or prohibiting access to premises based on the likelihood of COVID-19 when in large gatherings. *Id.* ¶¶ 87–88, 90.

C. The Nation Incurred Losses Caused By The Presence Of The COVID-19 Communicable Disease At Property Located At Or Within 5 Miles of Its Locations And At Its Customers' And Suppliers' Properties

The Nation's Complaint contains detailed allegations regarding the *actual* presence of the COVID-19 communicable disease at its insured Tribal Businesses' locations. *Id.* ¶¶ 72–85; *id.* at 10 ("COVID-19 [h]as [b]een [p]resent at the Tribal Businesses"); ¶ 132 ("[t]he actual presence of COVID-19 at the Tribal Businesses"); ¶¶ 133, 138 ("[t]he actual presence of COVID-19 has

[1] The Nation appreciates this Court's understanding that "COVID-19 fits any rational definition of a serious disaster." *CT Freedom All., LLC v. Dep't of Educ.*, No. HHDCV206131803S, 2021 WL 1251953, at *9 (Conn. Super. Ct. Mar. 8, 2021).

existed at the Tribal Businesses' locations"). FM's claim that the Nation merely pleaded the "probable" presence of COVID-19 is wrong. FM Mem. at 1, 3, 14, 23. Moreover, FM *cannot* recast, recharacterize, and attempt to dilute the well-pleaded facts in the Nation's Complaint. At this stage, FM must accept them as true.

As additional support for the *actual* presence of COVID-19, the Nation's Complaint alleges that there have been at least 205 confirmed COVID-19 cases among those individuals that work on the premises of the Tribal Businesses, Compl. ¶ 73, and that CDC estimates infection rates were "ten time here than reported", *id.* ¶ 53. The Complaint also alleges additional suspected cases. *Id*., ¶ 73. The Nation's high-traffic Tribal Businesses are visited by hundreds of thousands of individuals monthly from various locations who have just spent hours in a confined location with other individuals because they drove or flew to visit the locations. *Id.* ¶ 10, 76. At the end of March 2020, Connecticut reported that 2,571 people in Connecticut had tested positive for COVID-19, *Id.* ¶ 77, and that number increased dramatically in the subsequent months. Finally, as further evidenced by the ubiquitous nature and scale of the pandemic, COVID-19 has been actually present at the Tribal Businesses. *Id.* ¶ 83.

The Nation also alleges the "presence of COVID-19 at the locations of the Tribal Businesses' direct and indirect customers, suppliers, contract manufacturers, or contract service providers [that] has caused physical loss or damage to property at those locations." *Id.* ¶ 126. The Nation further asserts that COVID-19 has caused physical loss or damage to "property located within one statute mile of the Tribal Businesses that attracts business to the Tribal Businesses." *Id.* ¶ 130.

Not only does the policy recognize that COVID-19 itself constitutes physical loss or damage to property for coverage purposes, but the Nation's Complaint contains detailed

allegations explaining how the actual presence of COVID-19 has caused physical loss or damage at the locations and properties insured under the Policy, including how COVID-19 harmed both the air and surfaces of such properties. *Id.* ¶¶ 54–71. The presence of COVID-19 physically alters property, and its existence on objects or surfaces renders them unsafe or unusable. *Id.* ¶ 68. The presence of COVID-19 in the air at a property also renders the property unusable, uninhabitable, and unfit for its normal occupancy or use. *Id.* ¶ 70. Because of the physical loss or damage caused by COVID-19, the Tribal Businesses shut down or appropriately limited operations. *Id.* ¶ 85.

D. The Nation Is Entitled To All The Property Damage And Time Element Coverages Under FM's Unique Policy Resulting From Physical Loss Or Damage Caused By The COVID-19 Communicable Disease

To protect its business from unexpected and unprecedented circumstances like these, the Nation purchased from FM policy number 1053126 (the "Policy" or the "FM Policy") for the annual period beginning June 28, 2019. *Id.* ¶ 96, Exhibit A[2]. The Policy covers "property, as described in this Policy, against ALL RISKS OF PHYSICAL LOSS OR DAMAGE, except as hereinafter excluded, while located as described in this Policy." Policy at 1. The term "PHYSICAL LOSS OR DAMAGE" is *not* defined in the Policy. *See id.* at 65–70, Definitions.

The Policy provides two predominant types of coverages—"PROPERTY DAMAGE" (*id.* at 9–34) and "TIME ELEMENT" (*id.* at 35–55)—which, by their specific terms and consistent with "all-risks" coverages, are triggered when physical loss or damage is established. FM attempts to create a *third*, *stand-alone* type of coverage for "Communicable Disease," which, according to FM, is unlike *all* the other coverages provided under its "all-risks" Policy in that it does *not* require physical loss or damage. *See* FM Memo. at 4–7 (discussing "Relevant Property Damage Additional

[2] The Policy is attached to the Amended Complaint as Exhibit A. All citations to Exhibit A of the Complaint are referred to herein as citations to the "Policy" or the "FM Policy."

Coverages" ("C.1.") and "Relevant Time Element Coverages" ("C.2.") *separately* from so-called "Communicable Disease Coverages" ("C.4.")). But FM did *not* draft or structure its actual Policy that way. Rather, as alleged in the Complaint, the Policy, by its terms and structure, expressly acknowledges that communicable disease, such as COVID-19, *is* "physical loss or damage." Compl. ¶¶ 100–105. And FM's internal "talking points" (prepared after insureds started submitting COVID-19 insurance claims) confirm this understanding. *Id.* ¶¶ 193–219. Thus, the Policy was specifically designed to cover, among other things, the Nation's losses resulting from communicable disease.

1. <u>Property Damage</u>

The Policy's "PROPERTY DAMAGE" coverage insures the Nation's real and personal property, as well as the space within 1,000 feet of the Nation's property. Policy at 9. The Policy's "PROPERTY DAMAGE" coverage also provides a series of "*Additional* Coverages *for insured physical loss or damage*" (*id.* at 16–34) (emphasis added), including the following at issue in the Nation's complaint. Compl. ¶¶ 138–46.

- **COMMUNICABLE DISEASE RESPONSE**: *One* of the "*Property Damage*" "Additional Coverages *for insured physical loss or damage*" is for "Communicable Disease Response." Policy at 22–23 (emphasis added). The Policy thus expressly acknowledges that communicable disease *is* physical loss or damage. Compl. ¶ 104. It insures "the reasonable and necessary costs incurred . . . for the: 1) cleanup, removal and disposal of the actual and not suspected presence of communicable diseases from insured property." Policy at 22. The coverage is afforded when access to insured property is "limited, restricted or prohibited by: 1) an order of an authorized governmental agency regulating the actual not suspected presence of communicable disease; or 2) a decision of an Officer of the Insured as a result of the actual not suspected presence of communicable disease." *Id.* at 22. The Policy defines "communicable disease" as "disease which is A) transmissible from human to human by direct or indirect contact with an affected individual or the individual's discharges, or B) Legionellosis." *Id.* at 66.

- **PROTECTION AND PRESERVATION OF PROPERTY**: The Policy affords this coverage to insure property "due to actual, or to prevent immediately

impending, insured physical loss or damage to such insured property." *Id.* at 29. It similarly requires "physical loss or damage" to property.

- **CLAIMS PREPARATION COSTS**: The Policy affords this coverage for the actual costs incurred by the Insured "for producing and certifying any particulars or details contained in the Insured's books or documents, or such other proofs, information or evidence required by the Company resulting from insured loss payable under this Policy for which the Company has accepted liability." *Id.* at 21–22. It similarly requires that insured physical loss or damage be established.

2. Time Element

The Policy also provides coverage for "TIME ELEMENT" losses "directly resulting from physical loss or damage of the type insured." Policy at 35. The "TIME ELEMENT" coverages are divided between several different parts. Some are available when the Nation suffers business loss due to "physical loss or damage" to *its* property, while others are available when the Nation suffers a business loss due to "physical loss or damage" to referenced *third-party* property. The *amount* of recoverable loss, under this coverage part, depends on "time," such as how long it takes "to restore the [Nation's] business to the condition that would have existed had no loss happened." *Id*. at 53.

The Policy's "Time Element" coverage part identifies basic "business interruption" coverage first. This covers the Nation for either its lost "Gross Earnings" or "Gross Profit," at the Nation's option, along with the "Extra Expense" the Nation incurs when there is "physical loss or damage" to its property. *Id.* at 36–40. The Policy then provides several "TIME ELEMENT COVERAGE EXTENSIONS," which are *extensions* of the basic time element coverage and *additional* policy benefits available to the Nation when it establishes "physical loss or damage" to property. *Id.* at 45–51. The following coverage extensions provided under the heading "SUPPLY CHAIN TIME ELEMENT COVERAGE EXTENSIONS," are at issue here. Compl. ¶¶ 124–29.

- **CIVIL OR MILITARY AUTHORITY**: The Policy affords this coverage if an order of civil or military authority "limits, restricts or prohibits partial or total

access to an insured location provided such order is the direct result of physical damage of the type insured at the insured location or within five statute miles" of an insured location. Policy at 47.

- **CONTINGENT TIME ELEMENT EXTENDED**: The Policy extends a number of "Time Element" coverages to losses "directly resulting from physical loss or damage of the type insured to property of the type insured at contingent time element locations." *Id.* at 48. The Policy defines "contingent time element location" as (i) any location "of a direct customer, supplier, contract manufacturer or contract service provider to the Insured," (ii) any location "of a company that is a direct or indirect customer, supplier, contract manufacturer or contract service provider to" a "contingent time element location," and (iii) any location "of any company under a royalty, licensing fee or commission agreement with the Insured." *Id.* at 66.

- **INGRESS/EGRESS**: The Policy affords this coverage when there is a "necessary interruption of the Insured's business due to a partial or total physical prevention of ingress to or egress from an insured location, whether or not the premises or property of the Insured is damaged, provided that such prevention is a direct result of physical damage of the type insured to property of the type insured." *Id.* at 48.

The Policy then provides further benefits under "ADDITIONAL TIME ELEMENT COVERAGE EXTENSIONS," of which the following are at issue. Compl. ¶¶ 130–37.

- **ATTRACTION PROPERTY**: The Policy extends coverage to losses "directly resulting from physical loss or damage of the type insured to property of the type insured that attracts business to an insured location and is within 1 statute mile" an insured location." Policy at 51–52.

- **INTERRUPTION BY COMMUNICABLE DISEASE**: The Policy affords this coverage when communicable disease Property Damage occurs at any property of the Nation. The Policy affords this coverage if property "owned, leased or rented by the Insured has the actual not suspected presence of communicable disease and access to such location is limited, restricted or prohibited by: 1) an order or an authorized governmental agency regulating the actual not suspected presence of communicable disease; or 2) a decision of an Officer of the Insured as a result of the actual not suspected presence of communicable disease." *Id.* at 53.

3. "Contamination" Exclusion

The Policy includes in the "Property Damage" section an exclusion that excludes "contamination, and any cost due to contamination including the inability to use or occupy property or any cost of making property safe or suitable for use or occupancy." *Id.* at 14.

"Contamination" 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." *Id.* at 66.

By its terms, this exclusion does not apply to losses "directly resulting from other physical damage not excluded by this Policy." *Id.* at 14. Communicable disease *is* "physical damage *not* excluded by this Policy." *Id*. at 9, 16, 22, and 35 (emphasis added). Thus, the Policy's "contamination" exclusion does *not* exclude coverage for loss caused by "communicable disease." Compl. ¶ 152. In fact, the Policy expressly states that losses from communicable disease are covered. *Id*. ¶ 156. *Other* exclusions, commonly used in the insurance industry, exclude losses caused by communicable disease without also covering such risks in the policy. *Id.* ¶ 155. Thus, if FM intended to exclude losses caused by communicable diseases, it could have – but it did not. *Id*. ¶¶ 155-156.[3]

III. LEGAL STANDARDS

On a motion to strike, the court assumes the truth of all well-pleaded facts *and* those facts necessarily implied from the allegations, which are taken as admitted, *Gazo v. Stamford*, 255 Conn. 245, 260 (2001), and construes the facts in the complaint "most favorably" to the plaintiff. *Faulkner v. United Technologies Corp.*, 240 Conn. 576, 580 (1997). The pleading must be

[3] Moreover, FM's "contamination" exclusion does not contain "anti-concurrent causation" language common in other policies, which FM could have included to exclude "indirect" causes of loss, but did not. Finally, the exclusion applies to "costs" for remediating contamination to make property safe use, not business interruption losses resulting from covered loss or damage to property, such as from the COVID-19 communicable disease. At a minimum, the exclusion is reasonably susceptible to different interpretations and must therefore be read in the Nation's favor under Connecticut's insurance policy interpretation rules. *Id.* ¶ 159.

construed "broadly and realistically, rather than narrowly and technically." *Trimm v. Kasir*, No. CV116009059, 2011 WL 6413807, at *1 (Conn. Super. Ct. Nov. 30, 2011).

"Construction of a contract of insurance presents a question of law for the court." *Lexington Ins. Co. v. Lexington Healthcare Grp.*, 311 Conn. 29, 37 (2014). In construing an insurance policy, the "determinative question is the intent of the parties, that is, what coverage the . . . [insured] expected to receive and what the [insurer] was to provide, as disclosed by the provisions of the policy." *Liberty Mut. Ins. Co. v. Lone Star Indus., Inc.*, 290 Conn. 767, 795 (2009). Connecticut courts give words their "natural and ordinary meaning," often by consulting "the dictionary definition of the term." *Lexington*, 311 Conn. at 38, 42 n.8.

Connecticut adheres to the "firm foundational rule" of insurance contract interpretation:

> that the expressed intent of the parties is to be ascertained by examining the contract or policy as a whole." 2 S. Plitt et al., Couch on Insurance (3d Ed. Rev.2010) § 21:19, p. 21–76. "[T]he policy must be construed in its entirety, with each clause interpreted in relation to others contained therein. All its words, parts, and provisions must be construed together as one entire contract, each part interpreted in the light of all the other parts in connection with the risk or subject matter." Id., pp. 21–77 through 21–82.

Id. at 58–59.

When the insurance contract's terms are "susceptible of two [equally reasonable] interpretations," however, "that which will sustain the claim and cover the loss must, in preference, be adopted." *Liberty Mut. Ins. Co.*, 290 Conn. at 796. Where each party "has a reasonable but different interpretation of the phrases supported by dictionaries and case law," this confirms that "the phrases are ambiguous" and "must be construed against the insurer." *Karas v. Liberty Ins. Corp.*, 33 F. Supp. 3d 110, 115 (D. Conn. 2014). *See also* 16 WILLISTON ON CONTRACTS § 49:15 (4th ed. May 2021 Update).

This rule of construction "favorable to the insured extends to exclusion clauses." 16 WILLISTON ON CONTRACTS § 49:15. When confronted with a policy exclusion, the court "must conclude that the language should be construed in favor of the insured unless it has a high degree of certainty that the policy language clearly and unambiguously excludes the claim." *Liberty Mutual Ins. Co.*, 290 Conn. at 795–96*; see also* 16 WILLISTON ON CONTRACTS § 49:15. Overall, Connecticut's principles of policy construction "embody the rule of contra proferentem." *Connecticut Ins. Guar. Ass'n v. Drown*, 314 Conn. 161, 188 (2014).

IV. ARGUMENT

A. The Nation Sufficiently Pleaded "Physical Loss Or Damage" To Property Caused By The COVID-19 Communicable Disease

FM argues that the Nation's Complaint fails to allege that the communicable disease, COVID-19, causes physical loss or damage, which would trigger several coverages under the Policy, based on the following flawed premises:

First, the Complaint, according to FM, merely pleads the "probable," as opposed to "actual," presence of COVID-19—an improper mischaracterization and dilution of the Nation's well-pleaded facts, which must be accepted as true at this stage in the proceedings.

Second, the presence of COVID-19, per FM, does not cause physical loss or damage—a theory that contradicts the actual terms and structure of FM's Policy, which expressly recognize that communicable disease *is* "physical loss or damage." It also contradicts FM's own internal "talking points" memo, as alleged in the Complaint.

Third, the "overwhelming majority" of courts have concluded that COVID-19 does not cause property loss or damage—a point that is irrelevant because other courts have considered other facts, other policy language that does not equate communicable disease with "physical loss

or damage", and other exclusions, as the court in *Cinemark* recently found in rejecting FM's same arguments and denying FM's motion to dismiss under the same FM policy form.

Fourth, all losses caused by COVID-19, per FM, are restricted to the Policy's sublimit for its "Communicable Disease Coverages," which under FM's apparent theory, are *unlike every other coverage part* in the Policy that requires physical loss or damage—an illogical position that contradicts the terms and structure of the Policy, the principles of contract interpretation, the reasonable expectations of the insured, and the settled understanding that coverage under "all-risk" policies is triggered by damage to or loss of covered property.

1. The Nation Sufficiently Pleaded The "Actual," Not "Probable," Presence Of COVID-19 At Its Insured Properties

The Nation alleges, throughout its Complaint, the *actual* presence of the COVID-19 communicable disease at its insured Tribal Businesses' locations. Compl. ¶¶ 72–85; *id.* at 10 ("COVID-19 [h]as [b]een [p]resent at the Tribal Businesses"); ¶ 132 ("[t]he actual presence of COVID-19 at the Tribal Businesses"); ¶¶ 133, 138 ("[t]he actual presence of COVID-19 has existed at the Tribal Businesses' locations"). Far from "mere conjecture," the Nation's Complaint also contains detailed allegations, supported by scientific studies, explaining how COVID-19 has caused physical loss or damage at the locations and properties insured under the Policy, including how COVID-19 harmed both the air and surfaces of such properties. *Id.* at ¶¶ 54–71. *See supra* Section II. C. Apparently recognizing the weakness of its argument and that all well-pleaded allegations must be accepted as true, FM essentially abandons its own argument—concluding, early in its Motion, that "even assuming Plaintiff had sufficiently pleaded COVID-19's presence on its property, the Complaint fails to allege 'physical loss or damage' under Connecticut law." *See* FM Mem. at 14.

2. The Nation Sufficiently Pleaded That Communicable Disease *Is* "Physical Loss Or Damage" And A Trigger Of Coverage For Property Damage Under FM's "All-Risk" Policy

FM argues that the presence of COVID-19 does not cause physical loss or damage. FM's analysis, however, conflicts with the actual terms and structure of the Policy and the principles of contract interpretation. It is based on the flawed assumption that the Policy is like every other property policy issued by other insurers and considered by courts in other COVID-19 coverage cases. But FM's form presents a very different case. Unlike nearly all its counterparts in the insurance industry, FM issued the Policy to the Nation on a unique form that, by its specific terms and structure, *expressly* considers communicable disease at property *to be* "physical loss or damage" and a trigger of coverage for property damage. Applying the foundational principles of contract interpretation, including that a policy must be read as a whole, confirms this intent.

The Policy broadly covers "all risks of physical loss or damage," unless specifically excluded. It provides two types of coverages when physical loss or damage is established—"Property Damage" and "Time Element." Each type of coverage has several different components, including "Additional Coverages" or "Extensions," which are not "exclusive" of each other, but rather, "inclusive" and *expand* existing coverage. The Nation is entitled to recover under *each* coverage that is proven; however, these are questions of proof at trial.

Under the coverage part of the Policy labeled "Property Damage," the Policy provides a series of "Additional Coverages for insured physical loss or damage." *One* of the "*Property Damage*" "Additional Coverages for *insured physical loss or damage*" is for "Communicable Disease Response." The Policy, therefore, considers communicable disease at property *to be* "physical loss or damage." That this "Additional" policy benefit is limited to the costs the Nation

incurs in remediating its own properties does not eliminate the communicable disease trigger of property damage with respect to other coverages in the Policy.

The other coverage part, labeled "Time Element," also recognizes the communicable disease trigger. The Policy's "Time Element" coverage, by its terms, covers losses "directly resulting from *physical loss or damage of the type insured*" to the Nation's property or other referenced third-party property. *One* of the "Additional Time Element Coverage Extensions" is called "Interruption by Communicable Disease," which affords coverage when communicable disease Property Damage occurs at a Nation's property. Again, the Policy explicitly acknowledges that communicable disease at property *is* "physical loss or damage."

Recognizing that its theory contradicts the plain terms and structure of the Policy, FM imports a pleading rule that requires an insured to plead "tangible alteration" to property resulting from COVID-19 because, per FM, it can be "remediated with standard cleaning products." FM Mem. at 14–15. First, nothing in the Policy says that the insured must *also* plead and prove "*tangible*" alteration to property due to a communicable disease, like COVID-19, to recover its losses. Insureds in other COVID-19 coverage cases may have done so but that is irrelevant here. Unlike the policies at issue in those cases, the FM Policy expressly considers the presence of communicable disease at property *to be* "physical loss or damage."

Moreover, FM's argument misconstrues the Complaint it seeks to strike. The Nation does not seek coverage from FM because of a "virus" affixed to surfaces. It seeks coverage from FM because of the presence of *communicable disease* at property, a covered cause of loss under the Policy. Communicable disease is, as the Policy defines it, a "disease which is . . . transmissible from human to human by direct or indirect contact with an affected individual or the individual's discharges." Policy at 66. Communicable disease cannot be removed just by cleaning with

"standard cleaning products." At most, it is a disputed fact unripe for determination at this stage of the pleadings.

Nevertheless, even applying FM's imported standard, the Nation's Complaint sufficiently alleges "tangible" alteration to property. *See, e.g.*, Compl. ¶ 54 ("COVID-19 causes a physical, tangible alteration to property"), ¶ 67 ("COVID-19 causes a physical, tangible alteration to property and seriously and detrimentally affects, impairs, damages, and alters its value, usefulness, or normal function, rendering the property nonfunctional"). Moreover, communicable diseases, like COVID-19, spread from person to person through physical, tangible agents capable of transmitting the disease, such as respiratory droplets containing a virus. *Id.* ¶¶ 54–55. The disease-causing agents, while small or microscopic, are physical or tangible and exist in the air and on surfaces. *Id.*

Finally, FM's attempt to compare a communicable disease at a property to the seepage of carbon monoxide into a premises is equally unavailing. FM Mem. at 15. FM, while attempting to analogize the case, actually distinguishes it—concluding that, in that case, *Capstone Building*, the "Court found that the seepage of carbon monoxide was not 'physical,' as it 'caused no physical, tangible alteration to any property or any physical injury to the homeowners.'" FM Mem. at 15 (citing *Capstone Bldg. Corp. v. Am. Motorists Ins. Co.*, 308 Conn. 760, 782 (2013)). By contrast, the Nation sufficiently alleges that communicable disease at a property *is* tangibly present, and by FM's own definition, is a physical disease or illness spread physically from person to person or through the discharges on objects and surfaces.

3. Case Law Holding That COVID-19 Is Not Physical Loss Or Damage Under *Different* Policies, Providing *Different* Coverages And *Different* Exclusions, And Involving *Different* Facts Is Irrelevant

FM's reliance on case law holding that COVID-19 does not cause physical loss or damage under different policies, providing different coverages and different exclusions, as well as different allegations is irrelevant. As correctly recognized by another court, FM's policy form is not like other forms in the insurance industry—the FM coverage "is much broader" and "expressly covers loss and damage caused by 'communicable disease.'" *Cinemark Holdings, Inc.*, 500 F. Supp. 3d at 569.

In *Cinemark*, the Eastern District of Texas examined the FM policy form and denied FM's motion for judgment on the pleadings in its entirety. *Id.* The court recognized that "COVID-19 is a deadly communicable disease that spreads in several ways, including changing the content of air and the character of surfaces." *Id.* at 567. The court acknowledged that "[t]he [FM] Policy expressly includes coverage for physical loss or damage by a communicable disease." *Id.* at 566. Moreover, like FM's Motion here, FM attempted to rely on case law that the court ultimately distinguished because it involved different harm and different policy terms. *Id.* at 568–69. The court held that FM failed to meet its burden on a motion to dismiss, finding:

> Here, Cinemark alleges a *different* harm and is governed by *different* contract terms. Unlike [the purportedly analogous case law cited by FM], Cinemark alleges that COVID-19 was actually present and actually damaged the property by changing the content of the air. Cinemark's [FM] Policy is much broader than the one in [the distinguishable case] and expressly covers loss and damage caused by "communicable disease." Both parties agree "communicable disease" encompasses COVID-19.

Id. at 569.

True, other courts have concluded that COVID-19 does not cause physical loss or damage. *See, e.g.*, FM Mem. at 16, n. 4 (FM citing to seven cases). These cases, however, involve courts

interpreting different policies that do not expressly provide communicable disease coverage, with different exclusions, and applied to different facts. These decisions provide no guidance about how *this* Policy should be interpreted. As the *Cinemark* court warned, the string of cases that FM cites involving cases with different allegations and different policy terms can readily be distinguished from the Nation's well-pleaded allegations and the broad coverage under the unique FM form.[4]

Unlike FM's cases, the Nation alleges that COVID-19 was actually present and actually damaged the Nation's property by changing the content of the air and surfaces. *See* Compl. ¶¶ 54–71. The Nation's Policy is much broader than the ones cited in FM's cases, expressly covers loss or damage caused by "communicable disease," and explicitly provides that "communicable disease" is a form of "physical loss or damage" covered by the Policy. FM, moreover, concedes that COVID-19 is a "communicable disease."

Moreover, as one court recently recognized "that it is, at the very least, reasonable to interpret the phrase 'direct physical loss of . . . property' to encompass the loss of use of Plaintiff's property due to the spread of COVID-19 absent any actual damage to property." Memorandum and Order of Court, *Macmiles v. Erie Insurance Exchange*, No. GD-20-007753 (Allegheny County, PA May 25, 2021). The court noted that "[w]hile some courts have interpreted 'direct

[4] *None* of these cases cited by FM on this issue expressly provide "communicable disease" coverage. *See, e.g., Capstone Bldg. Corp. v. Am. Motorists Ins. Co.*, 308 Conn. 760 (2013); *Mazzarella v. Amica Mut. Ins. Co.*, No. 3:17-cv-598, 2018 WL 780217 (D. Conn. Feb. 8, 2018); *England v. Amica Mut. Ins. Co.*, No. 3:16-cv-1951, 2017 WL 3996394 (D. Conn. Sept. 11, 2017); *Zamichiei v. CSAA Fire & Cas. Ins. Co.*, No. 3:16-cv-739, 2018 WL 950116 (D. Conn. Feb. 20, 2018); *Legal Sea Foods, LLC v. Strathmore Ins. Co.*, No. 20-cv-10850, 2021 WL 858378 (D. Mass. Mar. 5, 2021); *DeMoura v. Cont'l Cas. Co.*, No. 20-cv-2912, 2021 WL 848840 (E.D.N.Y. Mar. 5, 2021); *SAS Int'l, Ltd. v. Gen. Star Indem. Co.*, No. 20-cv-11864, 2021 WL 664043 (D. Mass. Feb. 19, 2021); *Wellness Eatery La Jolla LLC v. Hanover Ins. Grp.*, No. 20-cv1277, 2021 WL 389215 (S.D. Cal. Feb. 3, 2021); *Moody v. Hartford Fin. Grp., Inc.*, No. 20-cv-2856, 2021 WL 135897 (E.D. Pa. Jan. 14, 2021); *Uncork & Create LLC v. Cincinnati Ins. Co.*, 498 F. Supp. 3d 878 (S.D. W. Va. 2020); *Social Life Magazine, Inc. v. Sentinel Ins. Co.*, No. 20-cv-3311, 2020 WL 2904834 (S.D.N.Y. May 14, 2020).

physical loss of or damage to' property as requiring some form of physical altercation and/or harm to property in order for the insured to be entitled to coverage, this Court reasonably determined that any such interpretation improperly conflates 'direct physical loss of' with 'direct physical . . . damage to' and ignores the fact that these two phrases are separated in the contract by the disjunctive 'or.'" *Id.*

Finally, FM discusses and relies on only two COVID-19 coverage decisions involving policies issued by an FM affiliate. FM Mem. at 15-17. Both cases are distinguishable.

In one case, *Mohawk Gaming Enterprise, LLC v. Affiliated FM Insurance Co.*, the Northern District of New York granted the FM affiliate's motion for judgment on the pleadings on the grounds that the presence of an unidentified student that had tested positive for COVID-19 at a college near, but not at, the insured property did not trigger the policy's civil authority coverage. No. 8:20-CV-701, 2021 WL 1419782, at *6 (N.D.N.Y. Apr. 15, 2021) ("Mohawk Gaming has only alleged 'actual not suspected' exposure at the College, not at the Casino or at another 'described location' listed as insured under the Policy."). However, in that case, the plaintiff's complaint did not contain any specific allegations about the presence of the communicable disease harming the casino property. *See* Compl., *Mohawk Gaming*, 2020 WL 3467893, at ¶ 49 (N.D.N.Y. June 23, 2020). Here, by contrast, the Nation's Complaint contains detailed allegations regarding the presence of COVID-19 at its insured locations as well as relevant third-party locations and sufficiently alleged how the presence of COVID-19 harms the property, as cited above. The court also found that the plaintiff only alleged "actual not suspected" exposure at a nearby location, but not at the insured property itself or another described location listed in the policy—yet another factual difference from this case.

In the other case, *Out West Restaurant Group, Inc. v. Affiliated FM Insurance Co.,* the Northern District of California granted the insurer's motion for judgment on the pleadings. No. 20-cv-06786, 2021 WL 1056627 (N.D. Cal. Mar. 19, 2021). Although it referred to the existence of "Communicable Disease" coverage under that policy, the court expressly stated that it did *not* consider such coverage for its decision. *Id.* at *6 ("this Order does not address any pending claims Plaintiffs may have with AFM regarding Communicable Disease coverage under the Policy, as AFM admits those remain under consideration")[5]. Here, FM's proposed, alternative interpretation of the "Communicable Disease Coverages" is at issue in this Motion. As a result, *Out West* is inapposite.

4. FM's Theory That All Losses Caused By COVID-19 Are Restricted To The Policy's "Communicable Disease Coverages" Contradicts The Policy's Terms And Structure

In its Motion, FM argues that *all* losses caused by COVID-19 are restricted to the Policy's sublimit for its "Communicable Disease Coverages," which under FM's apparent theory, are *unlike every other coverage part* in the Policy, in that these coverages do not require physical loss or damage. *See, e.g.*, FM Mem. at 6 ("Unlike the other coverage provisions at issue, the communicable disease coverages do not require physical loss or damage to trigger coverage."). FM's theory contains *no* support in the Policy language and conflicts with the terms and structure of the "all risks" Policy, the principles of contract interpretation, and the reasonable expectations of the Nation.

[5] Indeed, FM has conceded in another matter that coverage exists for COVID-19 losses under the Communicable Disease provisions of the FM policy. *See* FM's Reply in Support of Motion to Dismiss, *ITT, Inc. v. Factory Mutual Insurance Company*, No. 3:21-cv-00156-SRU, ECF No. 49, at 10 (May 7, 2021 D. Conn.) ("FM Global expressly acknowledges and represents to this Court that . . . ITT will remain free to pursue coverage under the Communicable Disease Provisions up to the full sublimit for same. Indeed, there ultimately may end up being no dispute as to this coverage.")

Even in the way it describes the coverages provided under the Policy in its Motion, FM deceptively separates out the so-called "Communicable Disease Coverages" ("Communicable Disease Response" and "Interruption by Communicable Disease") from the "Property Damage" and "Time Element" coverages. *See* FM Mem. at 6–7 ("Background" discussing "Relevant Property Damage Additional Coverages" ("C.1.") and "Relevant Time Element Coverages" ("C.2.") *separately* from so-called "Communicable Disease Coverages" ("C.4.")). FM, however, did *not* draft or structure its actual Policy that way. *See supra* Section II. D. These coverages fall under the over-arching "Property Damage" and "Time Element" coverages, all of which require, like any "all-risk" policy, that an insured establish physical loss or damage. *Id.*

FM cannot, with any reasonable basis, suggest that its so-called "Communicable Disease Coverages" are unique or isolated from the rest of the Policy. Here, the Policy expressly provides that the presence of communicable disease *is* physical loss or damage and a trigger of coverage for property damage. While the sublimit may apply to two specific coverages, it does *not* limit *all other coverages* that are triggered as a result of the communicable disease covered cause of loss. The Policy certainly does not say that, and no insured would be reasonably expected to have that understanding. *See, e.g., Northrop Grumman Corp. v. Factory Mut. Ins. Co.*, 805 F. Supp. 2d 945, 949, 953 (C.D. Cal. 2011) (rejecting FM's similar argument that its policy's specific flood sublimit applied to all of the insured's coverage following Hurricane Katrina, and concluding that "time element damages related to or arising from flood are not included in the Flood Sublimit"); *Hewlett-Packard Co. v. Factory Mut. Ins. Co.*, No. 04 Civ. 2791(TPG) (DCF), 2007 WL 983990, at *3, *8 (S.D.N.Y. Mar. 30, 2007) (rejecting FM's same argument that specific sublimit applies to all coverages of insured's claim under policy).

B. The Nation Sufficiently Pleaded Its Claims To All The Property Damage And Time Element Coverages Under The Policy Resulting From "Physical Loss Or Damage" And "Physical Damage Of The Type Insured" Caused By The COVID-19 Communicable Disease

The Nation's Complaint suffciently alleges entitlement to several coverages triggered by "physical loss or damage" and "physical damage of the type insured" resulting from the presence of COVID-19 at either an insured location or another location specified in the Policy including: *under the "Property Damage" coverages*: (a) Communicable Disease Response, (b) Protection and Preservation of Property, (c) Claim Preparation; and *under the "Time Element" coverages*: (a) Civil or Military Authority; (b) Contingent Time Element, (c) Ingress/Egress, (d) Attraction Property, and (e) Interruption by Communicable Disease.

The Policy does not say that "Communicable Disease Response" and "Interruption by Communicable Disease" are the *only* two coverages applicable to physical loss or damage caused by a communicable disease. FM could have done so—for example, by stating in the policy that coverage provided under these two coverages is excluded from coverage elsewhere in the policy—but it did not.

Rather, coverages are triggered because of physical loss or damage at the Nation's locations, and other coverages, such as the Policy's Time Element coverages, are triggered when the Nation's operations are disrupted by "physical loss or damage of the type insured." Physical loss or damage caused by communicable disease *is* "loss or damage of the type insured;" therefore, such loss or damage triggers the Policy's Time Element coverage.

The Nation sufficiently pleaded entitlement to all the Property Damage and Time Element coverage flowing from "physical loss or damage" and "physical damage of the type insured" caused by communicable disease or any other type of property damage or loss. Recovery of "communicable disease response" costs and "communicable disease business interruption" losses

are only two of many. The Nation's Complaint invokes at least *eight* separate types of coverage afforded under the Policy it purchased from FM.

C. The Nation Sufficiently Pleaded That Government Orders Concerning The COVID-19 Communicable Disease Are A "Risk Of Physical Loss or Damage" That Triggers Coverages Under The Policy, Including "Civil or Military Authority" Coverage

The Nation alleges that various government orders concerning the COVID-19 communicable disease are a "risk of physical loss or damage" that is not excluded or limited, and that they trigger the Policy's Property Damage coverage. Compl. ¶ 115. Because those government orders resulted in loss of utility of that property, they are a "risk of physical loss or damage." *Id.* ¶ 116; 134-135. The Nation further asserts that the State of Connecticut and the Tribal Council issued government orders concerning the COVID-19 communicable disease that restricted or prohibited access to the Tribal Businesses, and such orders trigger the Policy's "Civil or Military Authority" coverage under the Policy. *Id.* ¶¶ 124–25.

FM has previously acknowledged that loss of use, functionality, or reliability of property constitutes physical loss or damage for the purposes of coverage under a commercial property policy such as this Policy. Specifically, FM has argued in court filings that the presence of mold in a laboratory caused physical loss or damage and was a covered loss, despite not causing structural alteration of the property. *See* Motion *in Limine*, *Factory Mut. Ins. Co. v. Fed. Ins. Co.*, Case No. 1:17-cv-00760 (D.N.M. Nov. 11, 2019), ECF No. 127, at 3 (FM asserting that "numerous courts have concluded that loss of functionality or reliability under similar circumstances constitutes physical loss or damage" and arguing that insurer's failure to define "physical loss or damage" made that phrase "susceptible of more than one reasonable interpretation," rendered the policy "ambiguous" as to what constituted "physical loss or damage," and "must be construed

against" the insurer that drafted that policy); *see also* Compl. ¶ 117. FM's attempt to distance itself from its admission is unconvincing.

FM's argument that the Policy's "loss of market or loss of use" exclusion bars coverage is without merit. The exclusion does *not* apply when the loss of use results from physical loss or damage. Any argument otherwise would gut the "all-risk" Policy, which provides a range of coverages for loss of use *resulting from* physical loss or damage. *See, e.g.*, Policy at 47–49 (providing coverage for loss of use resulting from civil or military authority and physical prevention of ingress or egress); *id.* at 40–41 (providing leasehold interest coverage where the property is "partially untenable or unusable"). Reading this exclusion to bar coverage where the loss of use results from physical loss or damage would render these coverages illusory. Rather, the exclusion prevents coverage where the loss of use of property does *not* result from any physical loss or damage. The exclusion simply reinforces the point that if there is no physical loss or damage to property, there is no coverage under the Policy.

Here, however, there *is* direct physical loss or damage here, and thus this exclusion does not apply. The Policy expressly considers "communicable disease" to be physical loss or damage to property. The Nation alleges the actual presence of the COVID-19 communicable disease at its insured locations and resulting direct physical loss or damage. It alleges damage to its properties and relevant third-party properties. All of this resulted from the communicable disease trigger of property damage coverage under the Policy. FM's reliance on an exclusion for "loss from enforcement of any law or ordinance . . . regulating the . . . use . . . of any property" is unavailing for these same reasons.

FM's reliance on an exclusion for "interruption of business" fails for one obvious reason—there is a clear *exception* to this exclusion. The Policy excludes "interruption of business, *except*

to the extent provided by this Policy." Policy at 10–11 (emphasis added). For all the reasons articulated, the Policy provides various coverages for business interruption losses under the "Time Element" coverage section "directly resulting from physical loss or damage of the type insured." *Id.* at 35.

D. FM Failed To Satisfy Its High Burden of Showing That The "Contamination" Exclusion Clearly Excludes The Nation's Claims

Perhaps recognizing the futility of its argument that the Nation's Complaint failed to sufficiently allege an affirmative case for coverage, FM oddly *begins* its motion by arguing that an exclusion applies and re-visits it later in a different section of its brief. *See* FM Mem. at 9–14. FM asserts that the Court should strike Counts I and II because the Policy excludes contamination by virus, which it argues is "fatal" to the Nation's "contention" that its COVID-19 losses constitute or result from physical loss or damage of the type insured. *Id.* at 9–10.

As the alleged support for its reading, FM dedicates nearly six pages to a discussion of various cases involving other policy forms, other so-called "virus" exclusions, and *importantly*, policies that do *not*, like FM's, expressly cover communicable disease. According to FM, with the "contamination" exclusion, "there is no coverage under the Property Damage or Time Element Coverages." FM Mem. at 10. Yet, FM at the same time asserts that "Communicable Disease Coverages are intended to be and are properly construed as limited exceptions to the contamination exclusion as a matter of law." *Id.* at 25.

FM's proposed interpretation of the Policy's "contamination" exclusion has several flaws.

First, FM's reading, in multiple ways, conflicts with Connecticut's foundational principles of insurance contract interpretation. For example, "when construing exclusion clauses, 'the language should be construed in favor of the insured unless it has a high degree of certainty that the policy language clearly and unambiguously excludes the claim.'" *Nationwide Mut. Ins. Co. v.*

Pasiak, 327 Conn. 225, 239 (2017) (internal citation omitted). The Policy nowhere states "clearly and unambiguously" that communicable disease coverage is a limited exception to the contamination exclusion. FM's reading inverts the applicable interpretation principles—FM's reading would read affirmative coverage narrowly and the contamination exclusion broadly.

Second, FM's proposed interpretation ignores the plain language of the exclusion itself. The exclusionary provision, which must be construed narrowly, states that it applies when the Nation's losses are "due to" contamination and that "contamination" is "any condition of property *due to* the actual or suspected presence of . . . virus." "Due to" causation in "all risks" policies has a long understood meaning, *particularly* in relationship to policy exclusions:

> The all risk policies exclude ["]loss or damage due to or resulting from["] the various enumerated perils, a phrase that clearly refers to the proximate cause of the loss. Remote causes . . . are not relevant to the characterization of an insurance loss. In the context of this commercial litigation, the causation inquiry stops at the efficient physical cause of the loss; it does not trace events back to their metaphysical beginnings. The words ["]due to or resulting from["] limit the inquiry to the *facts immediately surrounding the loss*.

Pan Am. World Airways, Inc. v. Aetna Cas. & Sur. Co., 505 F.2d 989, 1006 (2d Cir. 1974) (emphasis added). Here, the "facts immediately surrounding the loss" must be determined by the trier of fact, not on the pleadings. For instance, while COVID-19 is a communicable disease that arises from the SARS-CoV-2 virus, the FM Policy does not treat these two distinct concepts interchangeably. *See, e.g., Independence Barbershop LLC v. Twin City*, 499 F. Supp. 3d 331, 336 (W.D. Tex. 2020) (drawing the distinction between SARS-CoV-2 and the disease it causes, COVID-19, and noting that the insurer improperly conflates the two). Communicable disease is a covered cause of loss under the FM Policy. It is not mentioned in the "contamination" exclusion because, among other things, this would eliminate coverage for an affirmative trigger of coverage for physical loss or damage under the Policy.

Third, FM's reliance on case law discussing "virus" exclusions in other policies is misplaced. Unlike FM's policy language, the "virus" exclusions in those cases contain "anti-concurrent causation" "lead-ins," which state that the insurer will not pay any "loss or damage caused directly or indirectly by . . . any virus" and that such "loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss." Courts construing policies with such language have held that these exclusions are not "limited to circumstances in which the virus is a 'direct' cause of loss; it also includes those in which it is an indirect cause, no matter the sequence in which it combines with other factors to bring about the loss." *LJ New Haven LLC v. AmGUARD Ins. Co.*, No. 3:20-cv-00751, 2020 WL 7495622, at *7 (D. Conn. Dec. 21, 2020) (relied upon by FM in its Motion). FM's "contamination" exclusion *lacks* this "anti-concurrent causation" language. The "due to" "contamination" exclusion in the Policy applies *only if* a "virus" is the direct and immediate cause of the Nation's loss. As noted above, the Policy treats the virus separately from communicable disease, which is covered. The contamination exclusion does not mention or exclude coverage for loss resulting from communicable disease. Thus, not only do factual questions surround these issues, but the cases FM cites concerning virus exclusions are inapposite.

The cases relied on by FM are inapplicable to an assessment of the direct and immediate "due to" causation requirements in FM's "contamination" exclusion. Rather, they contain the "anti-concurrent causation" verbiage absent from FM's exclusion:

- *LJ New Haven LLC v. AmGUARD Insurance Co.*, No. 3:20-cv-00751, 2020 WL 7495622 (D. Conn. Dec. 21, 2020): The policy's "virus" exclusion contained "anti-concurrent causation" verbiage stating that the insurer "will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss." *Id.* at *3.

- *Michael J. Redenburg, Esq. PC v. Midvale Indemnity Co.*, No. 20 Civ. 5818, 2021 WL 276655 (S.D.N.Y. Jan. 27, 2021): The policy's "virus" exclusion contained "anti-

concurrent causation" verbiage stating that the insurer would not pay for: "loss or damage caused directly or indirectly by . . . [a]ny virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or diseases." *Id.* at *7. It adds that "[s]uch loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss." *Id.*

- *Zwillo V, Corp. v. Lexington Insurance Co.*, No. 4:20-00339-CV, 2020 WL 7137110 (W.D. Mo. Dec. 2, 2020): The policy's broad "contamination" exclusion contained "anti-concurrent causation" verbiage stating that the insurer "loss or damage caused by, resulting from, contributed to or made worse by actual, alleged or threatened release, discharge, escape or dispersal of CONTAMINANTS or POLLUTANTS, all whether direct or indirect, proximate or remote or in whole or in part caused by, contributed to or aggravated by any physical damage insured by this Policy . . . ." *Id.* at *6.

- *Circus Circus LV, LP v. AIG Specialty Ins. Co.*, No. 2:20-cv-01240, 2021 WL 769660 (D. Nev. Feb. 26, 2021): The policy's broad "contamination" exclusion contained "anti-concurrent causation" verbiage, excluding coverage for "[t]he actual, alleged[,] or threatened release, discharge, escape[,] or dispersal of Pollutants or Contaminants, all whether direct or indirect, proximate or remote or in whole or in part caused by, contributed to or aggravated by any Covered Cause of Loss under this Policy . . . ." *Id.* at *2.

FM's citations are therefore inapposite.

Fourth, FM's proposed interpretation could effectively extinguish other coverages under the Policy and lead to absurd results. For example, the "Claims Preparation Costs" coverage provides that, once physical loss or damage is established, the policyholder may seek a certain amount from FM that it spent to prepare its claim, up to a sublimit. Policy at 21–22. Applying FM's reading of the "contamination" exclusion, which would apply to exclude "any cost due to" the virus that causes communicable disease, would mean that the Nation would not receive its "Claims Preparation Costs" protection for its communicable disease coverage claims. Such a reading would essentially create another unspoken exception to the Policy like FM attempts to create with respect to "Communicable Disease Coverages." FM's reading would be entirely in conflict with the plain terms of the policy and the reasonable expectations of its insured.

If communicable disease *is* physical damage under the Policy, then the provisions harmonize. The "contamination" exclusion has an express *exception* for covered physical damage:

"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." Policy at 14 (emphasis added). It also contains the lead-in language that the "Policy excludes the following *unless directly resulting from other physical damage not excluded by this Policy*." *Id.* The presence of the COVID-19 communicable disease is physical damage covered under the policy (Compl. ¶¶ 112, 121), therefore, it satisfies this physical damage exception to the "contamination" exclusion.

FM's reliance on two cases involving "contamination" exclusions is misplaced because the policies in those cases, unlike the Policy at issue here, do not expressly cover communicable disease. *See, e.g.*, Ins. Policy as Ex. A, *Manhattan Partners, LLC v. Am. Guarantee & Liab. Ins. Co.*, No. 2:20-CV-14342 (D.N.J. Mar. 17, 2021), ECF No. 12-2 (the policy does not expressly cover communicable disease at property); *see also* Compl., *Firebirds Int'l, LLC v. Zurich Am. Ins. Co.*, No. 2020-CH-05360 (Ill. Cir. Ct., Cook Cnty. Aug. 12, 2020) (the complaint does not allege that the policy expressly covers communicable disease at property).[6]

Moreover, the Nation does not seek coverage "due to the actual or suspected presence" of a "virus" at property. Rather, as alleged in its Complaint, it seeks coverage "due to" the presence of communicable disease at property. "Virus" is not the immediate cause of the loss for which the Nation seeks coverage from FM; communicable disease is. The "contamination" exclusion in the FM Policy does not preclude coverage "due to" the presence of communicable disease at property.

[6] For the same reason, FM's citation to *Karen Trinh, DDS, Inc. v. State Farm Gen. Ins. Co.* is inapposite. Ins. Policy as Ex. A, No. 5:20-cv-04265 (N.D. Cal. Dec. 28, 2020), ECF No. 26-1 (the policy contains a "Fungi, Virus Or Bacteria" exclusion, but does not also expressly cover communicable disease at property).

It could not do so, since the Policy explicitly covers losses "due to" the presence of communicable disease at property.

Other cases relied on by FM are also inapposite because they contain "virus" exclusions with broad application language–specifically stating that they apply to "*all* coverage under *all* forms and endorsements"—language that FM chose not to include in its "contamination" exclusion. FM's exclusion, by contrast, contains an express *exception* for covered physical damage ("unless directly resulting from other physical damage not excluded by this Policy"):

- *Causeway Auto., LLC v. Zurich Am. Ins. Co.*, No. 20-cv-8393, 2021 WL 486917 (D.N.J. Feb. 10, 2021): The policy's "Exclusion of Loss Due To Virus or Bacteria" contained the broad application language, expressly stating that the exclusion "applies to all coverage under all forms and endorsements that comprise this Coverage Part or Policy, including but not limited to forms or endorsements that cover property damage to buildings or personal property and forms or endorsements that cover business income, extra expense or action of civil authority." *Id.* at *2.

- *Edison Kennedy, LLC v. Scottsdale Ins. Co.*, No. 8:20-cv-1416, 2021 WL 22314 (M.D. Fla. Jan. 4, 2021): The policy's "Exclusion of Loss Due To Virus or Bacteria" contained the broad application language, expressly stating that the exclusion "applies to all coverage under all forms and endorsements that comprise this Coverage Part or Policy, including but not limited to forms or endorsements that cover property damage to buildings or personal property and forms or endorsements that *cover business income, extra expense or action of civil authority*." *Id.* at *3 (emphasis in original).

- *AFM Mattress Co., LLC v. Motorists Commercial Mut. Ins. Co.*, No. 20-cv-3556, 2020 WL 6940984 (N.D. Ill. Nov. 25, 2020): The policy's "virus" exclusion contained the broad application language, expressly stating that the exclusion "applied to 'all coverage under all forms and endorsements that comprise this Coverage Part or Policy,' including, but not limited to, business income, extra expense, or action of a civil authority." *Id.* at *2.

- *Newchops Rest. Comcast LLC v. Admiral Indem. Co.*, No. 20-cv1949, 2020 WL 7395153 (E.D. Pa. Dec. 17, 2020): The policy's "virus" exclusion contained the broad application language that "explicitly states that it 'applies to all coverage under all forms and endorsements . . . including . . . business income . . . or action of civil authority.'" *Id.* at *8.

Fifth, and at a minimum, the "contamination" exclusion is susceptible to more than one reasonable interpretation and should be read in favor of the insured. Connecticut's basic rule is that policy exclusions will bar coverage only when there is a "high degree of certainty that the

policy language clearly and unambiguously excludes the claim." *Liberty Mutual Ins. Co.*, 290 Conn. at 795–96. For example, the *Thor Equities* court held that it "cannot be said that the exclusion unambiguously forecloses recovery on Thor's losses due to contamination," and the exclusion language is "susceptible to more than one interpretation, and potentially compatible with either party's interpretation." *Thor Equities LLC v. Factory Mutual Ins. Co.*, No. 20 Civ. 3380, 2021 WL 1226983, at * 4 (S.D.N.Y. Mar. 31, 2021) (finding contamination exclusion "ambiguous" and denying motion to dismiss because policy "distinguishes between 'cost' and 'loss' elsewhere, but no such distinction is present" in the exclusion). That decision supports the conclusion that the exclusion is susceptible to more than one reasonable interpretation. As such, FM cannot satisfy its high burden to show that the "contamination" exclusion in the Policy "clearly and unambiguously" excludes the Nation's claims, and certainly not based on the Nation's well-pleaded allegations.[7]

E. The Nation Sufficiently Alleged Claims For Common Law Bad Faith And Violations Of CUTPA

FM argues that the Nation's allegations are "legally insufficient" to state claims for common law and statutory bad faith. FM Mem. at 28–29. FM is wrong, as the Complaint's allegations of FM's bad faith denial of coverage, delay, and improper adjustment of the Nation's

[7] In addition, FM has not shown that it is unreasonable to interpret the "contamination" exclusion, which groups the term virus with pollutants and hazardous materials, to apply only to instances of traditional environmental and industrial pollution not at issue here, where the Nation's losses are alleged to be the result of a communicable disease for which the Policy expressly grants coverage. *See, e.g., Urogynecology Specialist of Fla. LLC v. Sentinel Ins. Co.*, 489 F. Supp. 3d 1297, 1302 (M.D. Fla. Sept. 24, 2020) ("Denying coverage for losses stemming from COVID-19 . . . does not logically align with the grouping of the virus exclusion with other pollutants" in a contamination exclusion); *JGB Vegas Retail Lesse, LLC v. Starr Surplus Lines Ins. Co.*, No. A-20-816628-B, 2020 WL 7190023, at *3–4 (Nev. Dist. Ct. Nov. 30, 2020) (finding the contamination exclusion ambiguous as insurer failed to show that it was unreasonable to interpret contamination exclusion to a apply only to instances of traditional pollution and denying insurer's motion to dismiss).

claim support its claims for common law bad faith and violations of the Connecticut Unfair Trade Practices Act (CUTPA), Connecticut General Statute § 42-110b, due to FM's specified unfair or deceptive acts in violation of the Connecticut Unfair Insurance Practices Act (CUIPA), Connecticut General Statute § 38a-816. Compl. ¶¶ 235–51.

The Nation does not merely allege in its Complaint that FM was wrong or negligent in denying coverage for the entirety of the Nation's claim and not paying (it was); rather, the Nation alleges unfair conduct, dishonest purpose, and sinister motive as evidenced by FM's internal talking points and the manner in which it "investigated" the Nation's claim. Such unscrupulous, self-interested conduct reflects a scheme by FM devised to avoid its obligations to its insureds under the Policy. Moreover, as the Nation alleges in its Complaint, FM's wrongs have caused widespread injury to other insureds under the same FM policy form. For example, the Complaint alleges as follows:

- FM engaged in bad faith in its handling and investigation of the Nation's claim, including with respect to its denial of coverage, its delay of any potential resolution, and its adjustment of the claim. Compl. ¶¶ 162–77. After the Nation submitted its initial claim, FM delayed nearly two months to issue its first substantive letter, in which it improperly attempted to restrict the scope of the claim to the heavily sub-limited Policy's "Communicable Disease Coverages" and requested information suggesting that FM considered the presence of COVID-19 at insured property physical loss or damage to property triggering coverage—thereby acknowledging that COVID-19 constitutes covered physical loss or damage under the policy. *Id.* ¶¶ 168–71. Nearly five months later, FM reversed course and stated that the presence of COVID-19 at an insured location does not constitute physical loss or damage, and that none of the provisions that required physical loss or damage applied. *Id.* ¶¶ 173–74. FM denied liability for coverages that required a showing of physical loss or damage, but at the same time, claimed that it was not denying liability and continued to request information. *Id.* ¶¶ 173–77. FM's adjustment of the claim and its various letters were designed to confuse, mislead, or deceive the Nation and to delay the resolution of the claim. *Id*. ¶ 177.

- FM's bad faith conduct extended to its handling of the Nation's Proof of Loss. *Id.* ¶¶ 178–92. FM, on multiple occasions, failed to respond promptly and was otherwise unclear in numerous communications with the Nation with respect to its submission of its proof of loss, waiting at times months before responding. *Id.* This conduct forced the Nation to incur significant time and resources to submit a preliminary proof of loss on October 30, 2020.

Id. ¶¶ 184–85. Nearly two months later, FM stated that the Nation's proof of loss was incomplete but did not explain with any specificity what information FM still needed for its purported investigation. *Id.* ¶¶ 186–87. Rather, FM, contrary to its initial position, stated that the presence of COVID-19 at an insured location does not constitute physical damage, and as a result, none of the Policy's coverages are available except, paradoxically, with the possibility of communicable disease coverages (which constitute loss or damage under the policy), for which FM also refused to confirm coverage. *Id.* ¶ 188. As alleged in the Complaint, "FM's dilatory, unfair, and misleading conduct to date in handling, purportedly investigating, and ultimately denying coverage with no reasonable basis to do so constitutes bad faith." *Id.* ¶ 192.

- FM's bad faith conduct is also part of a systematic claims-handling practice and procedure that it has deployed across all COVID-19 claims, as outlined in a set of "talking points" prepared by FM, causing widespread injury. *Id.* ¶¶ 193–219. The "talking points," for example, steer its adjusters to seek information that pertains only to the On-Site Sublimited Communicable Disease Coverages and not others that may be implicated. *Id.* ¶ 204. FM's "talking points" expressly acknowledge that a trigger of coverage for Property Damage is communicable disease. *Id.* ¶¶ 200–09. "The talking points reflect a self-interested or sinister motive to defraud FM's policyholders from the coverage that each is contractually entitled to for the physical loss and damage to property." *Id.* ¶ 219. As FM's talking points evidence, FM's misconduct involves other insureds. *Id.* ¶¶ 193-219; *see e.g., Cinemark Holdings, Inc. v. Factory Mutual Insurance Company*, 500 F. Supp. 3d 565 (E.D. Tex. 2021); *Thor Equities LLC v. Factory Mutual Ins. Co.*, No. 20 Civ. 3380, 2021 WL 1226983 (S.D.N.Y. Mar. 31, 2021).

- In improperly denying coverage without a reasonable basis, FM put its financial self-interest ahead of the Nation's interests. *Id.* ¶ 221. Due to FM's bad faith, the Nation has suffered ascertainable losses and is continuing to suffer ascertainable losses. *Id.* ¶ 223.

Similar allegations that the defendant failed to conduct a reasonable investigation of an insurance claim, refused to communicate with its insured, and improperly denied coverage to the plaintiff have survived a motion to strike. *See, e.g., Kowalchuk v. Travelers Pers. Sec. Ins. Co.*, No. CV116012608, 2014 WL 3397940, at *5 & *8 (Conn. Super. Ct. June 4, 2014) (finding a bad faith claim legally sufficient to survive a motion to strike where "the allegations, when viewed together and when construed broadly in favor of sustaining their legal sufficiency, are sufficient to draw a reasonable inference that [the insurer] committed misconduct" and finding a CUTPA claim legally sufficient where "viewing the allegations in a manner most favorable to sustaining their sufficiency, [plaintiff] has alleged facts which strongly imply that [insurer] has engaged in unfair

and deceptive acts or practices against insureds . . . with such frequency as to indicate a general business practice"); *Urban Apparel Plus, LLC v. Sentinel Ins. Co.*, No. CV136035293S, 2013 WL 6171114, at *3 (Conn. Super. Ct. Oct. 31, 2013) (finding plaintiff's bad faith claim "legally sufficient under ['the less stringent'] pleading standard, because it alleges that the defendant intentionally engaged in specific behavior from which one can reasonably infer a sinister motive on the part of the defendant" where the alleged behavior involved "ignor[ing] facts that showed that there was no legitimate basis for [the insurer's] delay or denial of the plaintiff's claim, and selectively collected facts in an effort to support its delay and denial of the claim"); *Opin v. Ohio Cas. Ins. Co.*, No. NNHCV106011625, 2013 WL 4734766, at *11 (Conn. Super. Ct. Aug. 8, 2013) (finding that plaintiffs' bad faith counts are legally sufficient where "taken in the light most favorable to sustaining their legal sufficiency, allege that the defendants violated their express contractual duty by failing to respond and refusing to meet or communicate with the plaintiffs" and finding that "[a]lthough a failure by the defendants to respond does not necessarily imply a dishonest purpose, their refusal to meet or communicate with the plaintiffs could create an inference of a sinister motive").

Regarding Count III, FM argues that the Nation's alleged "failure to state a valid claim for coverage means that this claim [for common law bad faith] must be stricken as well." FM Mem. at 28. For all of the reasons above, the Nation has sufficiently alleged a valid claim for coverage; thus, FM's argument is unavailing. On Count IV, FM argues that the CUTPA claim fails because, according to FM, its interpretation of the Policy is "correct." *Id.* at 28–29. For all of the foregoing reasons and as sufficiently alleged in the Nation's Complaint, FM is wrong. In addition, the Nation has plainly stated cognizable claims for insurance bad faith and violations of CUTPA and should be permitted to seek discovery from FM and prove its claims at trial.

V. CONCLUSION

FM's Motion lacks merit and should be denied.

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of June 2021, a copy of the foregoing Plaintiff's Memorandum of Law in Opposition to Defendant's Motion to Strike was or will be filed electronically and served upon all counsel of record as follows:

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