UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

MOHAWK GAMING ENTERPRISES, LLC Plaintiff, v. AFFILIATED FM INSURANCE CO. Defendant.	))))))))))	Case No.: 8:20-cv-00701-DNH-DJS

PLAINTIFF MOHAWK GAMING ENTERPRISES' REPLY TO DEFENDANT'S COMBINED MEMORANDUM OF LAW IN OPPOSITION TO MOTION FOR PARTIAL SUMMARY JUDGMENT AND MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S CROSS-MOTION FOR JUDGMENT ON THE PLEADINGS

Marsha K. Schmidt
(NDNY Bar No. 512364)
Attorney-at-Law
14928 Perrywood Drive
Burtonsville, MD 20866
301-949-5176
marsha@mkschmidtlaw.com
Lead Counsel for Plaintiff Mohawk Gaming Enterprises, LLC

THE COPPOLA FIRM

Lisa A. Coppola
(NDNY Bar No. 513450)
3960 Harlem Road
Buffalo, NY 14226
716-839-9700
lcoppola@coppola-firm.com
Co-counsel for Plaintiff Mohawk Gaming Enterprises, LLC

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INTRODUCTION

In 2016, Defendant Affiliated FM Insurance Co. (AFM) added to its proVision Policy communicable disease coverage as an "additional coverage." P.Ex. 16, P0164. This coverage was described by AFM as "core coverage" and as "an overall expansion of coverage." P.Ex. 17, P0169. At the time of its addition to the Policy, the virus exclusion was already part of the Policy. P.Ex. 16, P0164. But no changes were made to the virus exclusion language to reference or even mention the communicable disease coverage. Nor did the communicable disease coverage mention or refer to the virus exclusion. They were treated as separate provisions with no seeming interconnection. Deductible language was added to Declarations to carry out the coverage. It defined communicable disease coverage as causing "physical damage." P.Ex.1, P0007. It seemed clear from the Policy purchased by Plaintiff Mohawk Gaming Enterprises (MGE) that it would cover communicable diseases and, as a policy that was intended to cover

physical damage to property, it was not unreasonable for MGE to interpret the communicable disease coverage as meaning that such diseases caused physical damage.

Now that a communicable disease is ransacking the country, AFM seeks to rewrite the terms of the Policy to avoid liability. It argues the "additional coverage" is actually an exception to an exclusion. It argues that the communicable disease coverage does not actually require "physical damage." It seeks to interpret the contamination exclusion to encompass communicable diseases despite their different treatment in the Policy. It seeks to apply the communicable disease location requirement in contradiction to the five-mile coverage allowance in the Civil Authority section. All of this despite not one word in the Policy supporting this rewrite.

Knowing that the communicable disease coverage can expose it to significant liability AFM has also settled on a deflection strategy. It seeks to convince this court that the Policy does not say what it says and that other coronavirus rulings—those rulings that hold virus exclusions are applicable to COVID-19 and those that hold COVID-19 does not cause physical damage—control here. But none of these cases deal with a policy that provides communicable disease coverage or that defines a communicable disease, like COVID-19, as causing physical damage.

By placing its bet that this Court will rely on inapplicable court rulings, AFM chose not to respond to the two legal issues presented in MGE's Motion for Partial Summary Judgment.[1] First, MGE has asked the Court to find, as a matter of law, that the Policy distinguishes between a "communicable disease" and a "contaminant" and, as a consequence, a communicable disease

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[1] Plaintiff's Memorandum of Law in Support of Motion for Partial Summary Judgment, Dkt.18-1, will be referred to herein as "MSJ." The Defendant's Combined Memorandum of Law in Opposition to Plaintiff's Motion for Partial Summary Judgment and in Support of its Cross Motion for Judgment on the Pleadings, Dkt. 19-1, will be referred to as "MJP" herein.

is not an excluded contaminant for the purposes of coverage. Plaintiff's motion is based on sound principles of contract interpretation relying on citations to contract language, judicial notice of certain facts such as dictionary definitions, and scientific knowledge.

AFM wholly failed to address the contract analysis. In fact, AFM barely mentions the definition of communicable disease in its brief. Nor does it address the issue of transmissibility except to dismiss the information provided by MGE as hearsay. It ignores all of this and simply asserts that COVID-19 is a virus and therefore is subject to the contamination exclusion, hoping to piggyback onto case law that has applied virus exclusions to claims based on COVID-19. But those cases cannot save AFM from the Policy it wrote and the coverage it agreed to provide.

MGE also seeks a summary declaration from this Court that the presence of COVID-19 is a "physical damage" for the purposes of the Policy. Once again, AFM does not address any of the myriad Policy references to "property damage" or "loss or damage" or other contract language that connects those phrases to communicable disease coverage. Instead, AFM relies on irrelevant case law. None of the cases cited by AFM concerns policies that have coverage for a communicable disease or that tie physical damage to a communicable disease occurrence.

Defendant appears not to have responded to the contract interpretation arguments in the MSJ largely because it seems confident that there are numerous disputes of material fact that prevent the Court from granting the motion. MJP at 2, 23-24. As is shown in the Reply to AFM's Response to the Proposed Material Facts, none of the purported disputes rises to the level of *genuine* disputes of *material* fact, and none impacts the outcome of this motion which relies entirely on contract language and interpretation.

Like AFM did in its motion, MGE set out the background of the case, including contextual facts, so the Court understands the dispute. MGE set forth some of these facts in the

initial Statement of Material Facts, as well, since it had documents to support them or they were subject to judicial notice. Many of the facts which AFM disputes are these contextual facts. Yet these are not facts that go to the heart of the motion on contract interpretation.

For example, AFM disputes whether or not a COVID-19 positive student actually was present at the College and argues the Plaintiff's MSJ is premature because it has not had the opportunity to engage in discovery on the truth of this fact. But MGE did not file a motion for summary judgment on whether a COVID-19 positive student was at the College (although we believe the Court may take judicial notice of that fact). Nor did MGE ask this Court to resolve whether the Tribe's closure order was a direct result of the incident at the College, another disputed fact.[2] The only relevant and material facts for this motion are those going to the meaning of the contract. There are no facts identified by AFM that require discovery to respond to this motion or these legal questions.

AFM also offers an interpretation of the contract intended to prevent the communicable disease coverage from serving as a "type of injury insured" for the purposes of the Civil Authority section based on a "location" requirement in that coverage. MJP at 10, 18. Without any contractual support whatsoever, AFM asserts that the communicable disease coverage is not actually "coverage" per se but rather a limited exception to the contamination exclusion. According to the Defendant, as a virus, COVID-19 is an excluded contaminant when MGE asserts a claim "outside of the Communicable Disease coverages," but it magically transforms into a covered communicable disease when all of the requirements for communicable disease coverage, including that the disease be at a "location," are met. MJP at 18. This position is so

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[2] MGE recognized this outstanding fact in note 1 of its MSJ.

illogical it is almost impossible to articulate. Moreover, there is not one word in the Policy to support this reading, nor is it a common sense reading of the Policy. It directly conflicts with the terms of the Civil Authority coverage and interpreting the Policy to require that the location element of any coverage has to be met to qualify as a type of injury insured would negate the five-mile coverage and eviscerate the Civil Authority provision.

AFM's separate Cross-Motion for Judgment on the Pleadings, interwoven with its opposition to the motion for summary judgment, largely ignores the facts pled in the Complaint but instead relies on the same inapplicable case law it cites in support of its opposition to the summary judgment motion, cases which also will not sustain a motion for judgment on the pleadings. Because AFM's motion does not completely parallel the issues raised in the summary judgment motion, Plaintiff will address arguments in the order presented by AFM.

ARGUMENT

A. The Presence of a Communicable Disease is "Physical Damage."

1. <u>The Policy Defines and Relates Communicable Disease to Physical Damage.</u>

AFM approaches the Civil Authority section's requirement that there be "physical damage" from two directions. In its Motion for Judgment on the Pleadings,[3] AFM maintains that, in light of the many cases that find COVID-19 does not cause physical damage, MGE cannot meet the Civil Authority requirement that there be "physical damage." MJP at 14. AFM also contends that the communicable disease section of the Policy does not mention "physical damage," thereby proving that physical damage need not be shown to cause physical damage to

[3] Under a Fed Civ. Pro. Rule 56(c) motion, the Court must determine if the plaintiff has stated a plausible claim, taking all allegations as true and drawing all reasonable inferences for the nonmoving party. Here, MGE has alleged in its Complaint all of the facts necessary to establish it can meet the criteria for coverage under the Civil Authority Section of the Policy.

trigger coverage. MJP at 15. This would prevent the communicable disease coverage from serving as physical damage for the purposes of the Civil Authority coverage.

AFM is wrong on both counts. First, MGE has asked this court to find that the Policy defines and treats the presence of a communicable disease as physical damage. *See* MSJ at 11-12, 22-23. This same contract interpretation is outlined in the Complaint. Compl. ¶ 30-32, 54, and accompanying documents. Second, the case law relied upon by Defendant, which does not address Policy language similar to that at issue here, cannot negate the Policy terms drafted by Defendant.

For the MJP, the Complaint alleges that the presence of a communicable disease at the College is "physical damage" because the Policy identifies the communicable disease coverage "Communicable Disease-Property Damage," which is the same as physical damage.[4] Compl, ¶ 31. The Complaint further alleges that AFM described "communicable disease" as "Property Damage" in a memorandum to its adjusters. Compl. ¶54.

In addition, many sections of the Policy, which is incorporated by reference into the Complaint, connect communicable disease coverage to coverage for "physical loss or damage." *See* MSJ at 11-13. For example, the communicable disease section "excludes *loss or damage* directly or indirectly caused by or resulting from terrorism. . . ." P.Ex. 1, P0020. The Policy requires physical loss or damage for an event to qualify as an "occurrence." The deductibles "apply per occurrence" for "insured loss or damage" under the Policy. P.Ex. 1, P0006.[5]

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[4] MGE Proposed Material Facts 43 to 46 regarding the definitions related to "property damage" include definitions that define "property damage" as physical injury to property. AFM has admitted these Material Facts.

[5] Contrary to Defendant's Objection to Proposed Material Fact 14, there is nothing in the Deductible Section G.2 that suggests the deductibles are based on an annual aggregate.

"Occurrences means the sum total of all losses or damage of the type insured, including any insured Business Interruption loss, arising out of or caused by one discrete event of physical loss or damage, ..."P.Ex. 1, P0056. The communicable disease property damage and communicable disease business interruption coverages have a deductible of $10,000 to be deducted from "the insured loss or damage." P.Ex.1, P0007. The communicable disease deductible also includes a two-day loss equivalent for business interruption which is based on the value "that would have been earned had no loss occurred at the location where the physical damage happened. . . ." *Id*. All of these references to "loss or damage," "physical loss or damage" or "physical damage," would be superfluous if communicable disease did not cause physical damage.

AFM also recognized communicable disease is property damage in an undated memorandum prepared by AFM for its adjusters and agents entitled "Talking Points on the 2019 Novel Coronavirus (2019 nCo-V)" which explained the Policy in a question-and-answer format. Exhibit 3, attached to the Complaint.[6] The relevant question and answers regarding the communicable disease are as follows:

> Q. What is the trigger of coverage for Property Damage?
>
> A. Under each policy there must be the actual presence of a communicable disease at a location owned, leased or rented by the Insured and the access must be limited by either 1) or 2) under the Advantage, or a) or b) under proVision. . . .

P.Ex. 3, P0072 (emph. added). The memorandum does not say, as AFM argues here, that the communicable disease coverage does not require physical damage, nor does it remind its adjusters that communicable disease does not cause physical damage under the Policy. Instead,

[6] AFM admits this document is a true and correct copy. *See* Answer at ¶ 12.

it cites to the communicable disease coverage to explain how property damage due to COVID-19 is covered.

In its MJP, AFM does not address either the Policy language or the allegations of the Complaint, which must be taken as true for the purposes of its motion. AFM offers nothing other than an unsupported assertion that, because the communicable disease coverage provision does not expressly refer to physical loss or damage, then, by implication, physical loss or damage is not required trigger coverage. MJP at 14. First, it does refer to physical damage. The very *title* of the coverage is "Communicable Disease-Property Damage." Second, the absence of such language in the coverage provision is not adequate to support its interpretation, particularly where the interpretation contradicts not just the clear terms of the Policy in other sections, as quoted above, but it contradicts the purpose of the Policy itself, which is to cover "ALL RISKS OF PHYSICAL LOSS OR DAMAGE." P.Ex. 1, P0014 (emphasis in original). AFM would have this Court believe that, out of the goodness of its heart, it provided coverage in an All-Risk Property Damage Policy for an occurrence that does not require physical loss or damage at all. That seems unlikely.

All of the Policy information is set forth in the Complaint, and therefore the motion for judgment on the pleadings should be denied. This contract language, as well as detailed arguments regarding the phrase "property damage" as being identical to "physical damage" are all set forth in the MSJ and supports MGE's motion for summary judgment asking this Court to find a communicable disease the Policy itself defines the presence of a communicable disease as physical damage for the purposes of coverage.

2. Case Law Cannot Change the Terms of the Policy.

To support its contention that MGE will not be able to prove the physical damage element of coverage, AFM ignores the terms of the Policy and instead relies on cases that hold physical alteration of property must be shown in order to establish physical damage. MJP at 12-13. But none of those cases concerns a Policy that, on its face, defines the presence of a communicable disease as physical damage. The fact that other cases have concluded that the coronavirus does not cause physical damage cannot negate AFM's own contract language which clearly states that the presence of a communicable disease is property damage, *i.e.,* physical damage. AFM drafted the Policy, and it is free to agree by contract to terms that may be contrary to some case law. The terms of other insurers' policies does not give AFM a "get out of jail free" card. It is the language of AFM's Policy that matters.

For the same reason, MGE is not required to separately allege that COVID-19 causes structural damage or physical alteration of property so as to meet New York case law that interprets the meaning of physical loss or damage. MJP at 12-14. MGE is only required to establish that it meets the terms of the AFM Policy for physical loss or damage, and it can do so because the Policy provides the answer—the presence of a communicable disease is physical damage under the Policy terms.

The cases relied upon by AFM are factually distinguishable since they involve the resolution of whether a claim for loss of use meets the general policy requirement that the injury be "direct physical damage." In *Roundabout Theater Company, Inc. v. Continental Casualty Co*., 302 A.D.2d 1, 751 N.Y.S.2d 4 (1st Dept. 2002), a theater made a business interruption claim for loss of use due to a closure order. The closure was the result of damage and danger presented

by the collapse of a scaffold at an adjacent building. The court found that a loss of use claim did not fit the policy requirement that there be direct physical loss or damage. 302 A.D.2d at 7-8.

In *Newman Meyer Kreines Gross Harris P.C. v. Great Northern Ins. Co*., 17 F.Supp.3d 323 (S.D.N.Y. 2014), the court considered a loss of income claim when electricity to the plaintiff's building had been preemptively turned off before Hurricane Sandy. The policy provided coverage for "direct physical loss or damage of a covered peril." *Id.* at 328. The plaintiff argued that the loss of use was a physical loss, relying on cases that broadly construe physical loss or damage to include inhabitability and useability due to toxic fumes, odors and other contamination. *Id.* at 329.[7] The court recognized these cases but held that all of them still required something physical to have occurred to the covered property, even if intangible. *Id.* at 330. The closure of a building due to loss of power did rise to that level. *Id.*

Similarly, the coronavirus cases cited by Defendant involve loss of use claims due to closure orders under policies that required physical damage to support coverage. In each case, the court rejected the plaintiff's claim that the closure order itself caused the physical damage. In all of these cases the Policy did not cover communicable disease and was silent as to whether such a disease causes physical damage. Therefore, they are inapposite. *See, e.g., Michael Cetta, Inc. v. Admiral Indemnity Co.*, Dkt. No. 20-cv-4612, 2020 U.S. Dist. LEXIS 233419 (S.D.N.Y. Dec. 11, 2020)(complaint alleged losses due to closure order that was issued to stop the spread of the coronavirus; inability to use the property does not satisfy the loss or damage requirement); *10012 Holdings, Inc. v. Sentinel Ins. Co. Ltd.*, Dkt. No. 20-cv-4471, 2020 U.S. Dist. LEXIS 235565 (S.D.N.Y. Dec. 15, 2020) (loss of use based on closure order is not direct physical loss

[7] These are the same cases that AFM relied upon in another case to argue that it should be given the opportunity to prove mold infestation caused physical damage without having to prove structural damage. *See* discussion *infra.*

of premises); *Sandy Point Dental, PC v. The Cincinnati Ins. Co.*, 2020 WL 5630465 (N.D.Ill. Sept. 21, 2020)(same); *Uncork and Create, LLC v. Cincinnati Ins. Co.*, 2020 WL 6436948, (S.D.W.Va. Nov. 2, 2020)(in a claim for loss of use, plaintiff did not plead coronavirus caused physical damage, and cases holding coronavirus does not cause physical damage control).

Here, MGE is not claiming the closure order itself caused physical damage. MGE is relying on AFM's own coverage terms. MGE's has pled a claim for civil authority coverage based on the physical damage that occurred at the College, as defined in the Policy.

3. Any Ambiguity Can be Resolved with Reference to Extrinsic Evidence.

In its MSJ, MGE argued that if the Policy is ambiguous, the Court should look to external documents to discern AFM's interpretation of the Policy in regard to whether a communicable disease caused physical damage. MSJ at 23. MGE cited to a regulatory filing in which AFM expressly recognized that a communicable disease causes physical damage. MSJ at 13.

AFM has now offered its own interpretation of its regulatory filing, theorizing, without an affidavit or other evidence, that the sentence inserted into the communicable disease coverage in the Healthcare Endorsement "served a salutary purpose" because the Healthcare Endorsement was being added to policies that "tied their other coverages to physical loss or damage," and it wanted to make it clear that communicable disease would be covered. MJP at 15. Then AFM posits, without any evidence, that the language was later removed when it was inserted into the proVision Policy because the communicable disease coverage "never required physical loss or damage to be triggered. . ." so there was no need for the sentence. *See* MJP at 15. Since every all-risk property damage policy ties coverage to physical loss or damage, that reasoning is a contradiction. Does that mean the original sentence in the Health Care Endorsement was not

true? Does it mean communicable disease is physical damage for the purposes of the Healthcare Endorsement but not for any other Policy?

It is much more likely that the sentence was inserted because case law is mixed on whether something like a communicable disease can cause physical damage, and AFM sought to clarify that it was property damage for the purposes of its policy. That AFM construed physical damage broadly enough to include communicable disease makes much more sense when viewed in light of Defendant's own legal position set out in a motion filed in *Factory Mutual Ins. Co. v. Federal Insurance Co.*, 17-cv-00760 (D.N.M. 2019). P.Ex. 18, P0176. Seeking to argue that mold infestation caused physical damage, FM Global filed a motion *in limine* asking the court to exclude any evidence that would show mold infestation is *not* physical loss or damage. FM argued it should not be required to "prove demonstrable structural damage or alteration to property" because "it is inconsistent with the law." P.Ex. 18, P0181. That case law, now disavowed by AFM here, "broadly interprets the term 'physical loss or damage' in property insurance policies" to include the loss of functionality, inhabitability and reliability. *Id.* at P0178.

This legal position dovetails with AFM's regulatory filings—AFM wanted to be clear that a communicable disease could cause physical loss or damage, a position supported by the broader case law. While AFM may have removed from its core coverage the sentence confirming communicable disease is property damage, it assured regulators the removal did not change the substance of the Policy. It also kept the coverage in the Property Damage section of the Policy, and it titled it "Property Damage" coverage, all consistent with their legal position in *Factory Mutual.*

AFM cannot have it both ways. It cannot take the position that MGE is required to show physical damage with the alteration to the structure of property while at the same time arguing in another case that such a position is "inconsistent with the law."[8] Nor can AFM argue that it did not interpret communicable disease as physical damage when it was also asserting the broader reading of physical damage in its own defense.

The numerous references connecting communicable disease with physical loss or damage throughout the Policy as outlined above, AFM's regulatory filing, and its adoption of a broad legal interpretation of physical damage, supports MGE's reading of the Policy that the presence of a communicable disease is physical damage. The motion for judgment on the pleadings should be denied.

B. Communicable Disease Coverage is a "Type of Injury Insured."

MGE relies on the incident at the College, where the school was closed by the College

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[8] While relying on the Policy to define communicable disease as property damage, MGE agrees with the broader rulings. *See Pepsico, Inc. v. Winterthur Int. American Ins. Co.,* 24 A.D.3d 743, 744; 806 N.Y.S.2d 709 (2d Dep't 2005)(citing to numerous cases, New York State appellate court held physical alteration was not required in a contamination-like injury which rendered a product unmerchantable; physical damage could be shown without proving a change in the physical structure). Similar physical loss or damage cases include: *Gregory Packaging, Inc. v. Travelers Property and Casualty Company of America*, 2014 WL 6675934 (D.N.J. Nov. 25, 2014) (ammonia in the air); *Western Fire Insurance Co. v. First Presbyterian Church*, 437 P.2d 52 (Colo. 1968) (church made uninhabitable and dangerous due to gasoline under the building); *Port Authority of N.Y. and N.J. v. Affiliated FM Ins. Co*., 311 F.3d 226, 236 (3d Cir. 2002) (asbestos fibers); *Essex v. BloomSouth Flooring Corp*., 562 F.3d 399, 406 (1st Cir. 2009) (unpleasant odor); *TRAVCO Ins. Co. v. Ward*, 715 F. Supp.2d 699, 709 (E.D.Va. 2010), *aff'd*, 504 F. App'x. 251 (4th Cir. 2013) ("toxic gases" released by defective drywall); *Motorists Mutual Ins. Co. v. Hardinger*, 131 F.Appx. 823 (3d Cir. 2005)(E.coli in water well). These cases are among those favorably cited in COVID-19 cases where the court found an allegation of physical loss from the coronavirus was plausible. *See Studio 417, Inc. v. Cincinnati Ins. Co.*, 2020 WL 4692385, *4 (W.D.Mo. Aug. 12, 2020); *Elegant Massage, LLC v. State Farm Mutual Auto. Ins. Co.,* 2020 WL 7249624, *9 (E.D. Va. Dec. 9, 2020)(describing case law in detail).

President because of the actual presence of a COVID-positive student, to establish "physical damage of the type insured," under the Civil Authority coverage.

According to Defendant, MGE cannot establish a communicable disease is a type of injury insured for two reasons. First, AFM argues that MGE cannot base its claim on the College incident because the Communicable Disease section is not coverage at all, but a limited exception to the Contamination Exclusion.[9] As an exception, the precise terms of the Policy require the communicable disease to be at a location, *i.e.,* an insured property. MJP at 18. Absent meeting that exact criteria, including the location requirement, a communicable disease is an excluded contaminant and cannot qualify as a "type of injury insured" under the Civil Authority section. In other words, a communicable disease is always an excluded contaminant except when it occurs at a Policy-insured location. This reading is intended to avoid rendering the communicable disease coverage illusory. AFM does not explain why the contamination exclusion is rendered inapplicable to a communicable disease just because it is at a location. It is still a virus or a bacteria or other pathogen. Yet somehow a communicable disease that is a virus, becomes a covered communicable disease, not based on whether the virus is transmissible as the definition of communicable disease requires, but based on whether the communicable disease, is at a location "owned, leased or rented" by MGE. Unfortunately, AFM fails to explain or cite to any language in the Policy to support this fanciful reading.

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[9] Contrary to AFM's contention, MGE has not conceded that communicable disease coverage is a Policy "exception." MJP at 18. The allegation in the Complaint at ¶ 35 does not allege as fact that the communicable disease coverage is a contractual Policy "exception." Whether it is an exception to the exclusion is a legal question. Therefore, the allegation is not binding on the parties or the Court. *Stichting Ter Behartiging Van de Belangen Van Oudaandeelhouders In Het v. Schreiber*, 407 F.3d 34, 45 (2d Cir. 2005); *In re Teleglobe Comm. Corp. v. BCE, Inc.*, 493 F.3d 345, 377 (3d Cir. 2007).

Second, AFM brings in case law to argue COVID-19 is subject to the contamination exclusion as a virus, thereby preventing MGE from establishing a physical injury. As will be shown, neither of these reasons substantiate a judgment on the pleadings. There is no language in the Policy to support AFM's contention that the communicable disease coverage is an exception to the contamination exclusions. The location requirement as interpreted by AFM would nullify Civil Authority coverage, and the cases relied upon by AFM are not relevant to the Policy interpretation at issue here.

1. The Communicable Disease Coverage is Not an Exception to the Exclusion.

The Policy presents the Communicable Disease provision under "Additional Coverages." There is no reference to the Contamination Exclusion in the Communicable Disease provisions. The Communicable Disease provisions do not mention contaminants. The Contamination Exclusion makes no reference to Communicable Disease as defined in the Policy or to the Communicable Disease coverage provision. Each operates independently, setting forth its own exclusions and exceptions.

"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." Compl. ¶34, P.Ex. 1, P0055. The definition of "contamination" does not include the Policy-defined term "communicable disease." The definition of communicable disease does not refer to contaminants but relies on transmissibility as the defining characteristic. P.Ex. 1, P0055, Compl. ¶33.

The Contamination Exclusion has two exceptions: 1) "exclusion does not apply to radioactive contamination which is excluded elsewhere in the Policy," and 2) "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." P.Ex. 1, P0018 (emph. added).[10]

If AFM had wanted the Communicable Disease Coverage to be an exception to the exclusion it could have said so expressly through cross references as it did in other exclusions. For example, Exclusion Group III. 6 excludes "Loss from enforcement of any law or ordinance...*Except as provided* by the Decontamination Costs and Demolition and Increased Costs of Construction coverages in this Policy." P.Ex. 1 at P0017-18 (emph added). The coverages for Decontamination Cost (Sec D.8) and Demolition and Increased Costs of Construction (Sec. D.10) are both in the "Additional Coverages" section of the Policy. P0021-P0022. Similarly, Exclusion Group II.4 excludes "loss or damages caused by or resulting from changes of temperature...All whether atmospheric or not, *except as provided* by the Change of Temperature and Off-Premises Service Interruption coverages in this Policy." P0017. Change of Temperature (D.4) and Off-Premises Interruption (D.21) are Additional Coverages under the Policy.

The Contamination Exclusion does not provide similar exception language for Communicable Disease Coverage. Similarly, the Communicable Disease Coverage has its own exclusions and references to other sections of the Policy, such as terrorism. There is no reference to the Contamination Exclusion. *See* P.Ex. 1, P0020.

The language of the Policy clearly delineates and defines two different occurrences, contamination and communicable disease. If a disease is transmissible by human-to-human

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[10] Notably, this language equates the presence of a contaminant as causing physical damage, also reflecting AFM's regulatory and legal position that physical damage can be caused by things like contamination without structural alteration to a property.

contact, virus or not, it is a communicable disease as defined in the Policy. Furthermore, whether or not there is coverage for the actual presence of a communicable disease depends, not on the invocation of a purported exception to the contamination exclusion, but on the elements of the communicable disease coverage being met—the disease is transmissible, actually present, and the subject of a closure order at a location. Any other reading requires so many leaps of logic that it cannot be sustained.

It is up to AFM to prove the exclusion applies. Policy exclusions are subject to strict construction. *U.S. Underwriters Ins. Co. v. Kum Gang, Inc.*, 443 F.Supp.2d 348, 356 (E.D.N.Y. 2006). In this instance, since it is relying on a purported exception to support its interpretation of the exclusion, it is also up to AFM to prove its interpretation that the communicable disease provision is an exception to the exclusion.[11] It must show its reading is the only possible construction and that the interpretation it is offering is based on clear and unmistakable language and that it is subject to no other reasonable interpretation. MSJ at 16.

AFM has not met its burden. It has not addressed any of the cases cited by Plaintiff, it has not addressed the definitions, the terms of the Policy, or the rules governing specific over general terms. Instead, it throws out unsupported interpretations, hoping that something will stick. That will not suffice when AFM is required to establish that the exclusion and its claim that communicable disease coverage is an exception are subject to no other reasonable interpretation and that its interpretation is the only fair one. *Id*.

[11] Normally an insured would have the burden of showing an exception applies. *RSUI Indem. Co. v. RCG Group*, 890 F.Supp.2d 315, 325 (S.D.N.Y. 2012). But here, AFM is arguing about when the exception applies. It should therefore be required to meet that burden as well.

2. The Location Requirement Does Not Prevent the Communicable Disease Coverage from Being a "Type of Injury Insured."

The Policy says the communicable disease coverage applies to a "described location" that is owned, rented, or leased. "Described locations" means "the locations described in the Insurance Provided clause of the Declarations section of the Policy." P.Ex. 1, P0055. The list of locations for MGE appears at P0004. Because all coverage under the Policy is at "described locations" per the Declarations, if AFM's reading of the Policy were followed to its logical conclusion, no coverage would qualify as a type of injury insured under the Civil Authority section.

AFM admits that if a fire at an adjacent property caused local officials to limit access to the casino, the Civil Authority coverage would be triggered. MJP at 10. However, AFM glosses over why the fire at an off-premises location can trigger coverage. The answer is simple. The Civil Authority section expands coverage to encompass situations where the type of injury insured against occurs within five miles of a location – the exact interpretation urged by MGE and supported by the Policy language.

The Defendant appears to deny that the reasoning applied in the fire example also applies to communicable disease coverage but does not explain why. It is not clear if AFM is relying on its argument that the communicable disease provision is an exception (which it is not) or whether it is just ignoring a simple fact--all coverage in the Policy requires the physical loss or damage occur at "locations." AFM makes it seem as if the requirement that the damage or loss insured occur at a location is unique to communicable disease coverage. As just explained, it is not. The "described location" requirement is listed in the Declarations and applies to all coverages (unless otherwise stated as it is in the Civil Authority section).

Applying AFM's interpretation of the communicable disease coverage to the fire example, the illogic of AFM's position becomes apparent. Under AFM's reading of the location requirement, if a fire were to occur at a building located within five miles of the casino location and the casino were closed by civil order due to the physical injury to the neighboring building, the Civil Authority coverage could not be triggered, because the Policy only covers fires at policy "locations." Yet AFM admits that the Policy would cover a civil authority order based on a fire that occurred, not on "location" property, but on adjacent property. The only reason that is possible is that the Civil Authority coverage expands the injury location to within five miles. Brought to its logical conclusion, AFM's reading would eviscerate the Civil Authority coverage. AFM's unsupported interpretation of the Policy should be rejected.

3. <u>Cases Applying Virus Exclusions Cannot Override the Policy Terms.</u>

We have exhaustively explained why the contamination exclusion is not applicable to communicable diseases. AFM has asked the Court to forget the specific terms of the Policy and look to cases that have held COVID-19 claims are subject to virus exclusions. On this basis, AFM argues, MGE cannot meet the second element of coverage under Civil Authority because COVID-19 is an excluded contaminant and therefore not a type of injury insured. MJP at 16-17. AFM asserts that these cases have exclusions "similar" to the contamination exclusions. MJP at 17. To the contrary, while each case addresses a virus exclusion, the similarity ends there. None address how communicable disease coverage would be interpreted in relation to that exclusion. In fact, AFM does not explain how its Policy fits within those cases because it can't. The Communicable Disease-Property Damage Coverage is unique to AFM's Policy and the cases

cited give no direction as to how to interpret the AFM Policy and are neither persuasive nor binding authority.[12] Reliance on those cases to support the MJP should be rejected.

C. The Limitations of the Contamination Exclusion Preclude its Application.

MGE argued that the Contamination Exclusion was limited, on its face, to claims for "cost" and not claims for losses. It also argued the exclusion is limited to claims at "the property." MSJ at 23-24.[13] Defendant responds that the Contamination Exclusion covers more than costs for two reasons: 1) it also covers not only "any cost due to contamination" but also contamination itself, a condition of property; and 2) it covers more than costs because it covers "the inability to use or occupy the property...." MJP at 20.

AFM's quotations are not entirely contextual. The full sentence reads: "This Policy excludes...**contamination,** and any cost due to **contamination** including the inability to use or

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[12] The Defendant asserts that the Loss of Use Exclusion also bars MGE's claim. Defendant makes no effort to substantiate the application of this exclusion. *See* MJP at 17. The prefatory sentence to the Group III exclusions states that "the following exclusions apply unless otherwise stated." P.Ex. 1, P0015. The Policy provides coverage for Business Interruption losses, which includes additional coverages related to losses due to the inability to use covered property, like the Civil Authority closure coverage. P.Ex. 1, P0037-P0040. If AFM is correct, then the cited exclusion would completely negate that coverage. The Court should deny the motion as it relates to this contention.

AFM's citation, p. 8, is to "Compl. Ex. 1 at Dkt. 2-1, p. 34." This citation appears to be erroneous since the Insurance Policy is at Dkt. 1-1, and it has also been provided as part of this MSJ at Dkt. 18-4. This error in citation to the record is repeated throughout the MJP. There is no mention of a Loss of Use Exclusion on any page numbered 34. Plaintiff placed Bates numbering on the Exhibits attached to the Complaint and to the MSJ. We believe the language in question is at Dkt. 18-4, Pl. Ex. 1, P0017: "This Policy excludes Loss of market or loss of use."

[13] AFM's response to MGE's argument that the exclusion applies only to "property" completely misstates MGE's point. Plaintiff argues that the contamination has to be on "a property," which is to say on an insured location. MGE is not arguing that COVID-19, what AFM deems a contaminant, was at the property. Instead, MGE is arguing the presence of a communicable disease was at a location 4.5 miles from the casino, i.e, not at the property, rendering the contamination exclusion inapplicable.

occupy property or any cost of making property safe or suitable or use or occupancy." P.Ex. 1, P0018 (emph. in orig.). AFM argues that because the exclusion covers contamination and the definition of contamination means "any condition of the property," the exclusion is for more than costs. But as Plaintiff explains in its brief, AFM knew how to include losses in its exclusions when it intended to do so, and the reference to the condition of property does not imply, let alone prove, that those words means "loss." MSJ at 24 In addition, the sentence reads "and cost due to contamination *including* the inability to use or occupy property" thus tying the inability to use the property to costs, not to losses. For example, a cost due to the inability to use property may include the need to rent another space. Defendant's contract analysis does not hold up.

D. The Complaint Alleges Sufficient Facts to Establish the Third Element for Coverage—that the Closure Order was Issued as a Direct Result of the Physical Damage to the College.

AFM argues, without any support other than its own conjecture, that the closure order was issued not because of physical damage to properties within five miles, but to prevent the spread of COVID-19. MJP at 21-22. Therefore, AFM contends, MGE cannot meet the third element of the Civil Authority coverage that the order be a "direct result" of the physical damage, and judgment on the pleadings is appropriate. To the contrary, MGE alleges in the Complaint in great detail that the closure of the Casino was a direct result of the prior positive COVID-19 case at the College.

The Closure Order, quoted at Compl. ¶ 47, states that closure was ordered "in the interest of the preservation of life and property" because "in cases of buildings that may have had positive coronavirus visitors, such buildings must be fully disinfected and placed off limits." Further it recognizes the cases in Quebec and Ontario (which is the location of the College) and that the Tribe "hosts" visitors from those areas.

The Complaint alleges, paragraphs 42-47, that after the members of the Tribal Council learned of the positive case at the College, they immediately began expressing their concerns to MGE that the casino should not remain open. Compl. ¶44. The Tribal Council was concerned that the casino was not going to close. Compl. ¶¶45-46. The Closure Order indicates that the Council intended "to protect its employees, guests to the territory, and its property and assets" and considered that if there were a positive case at the casino, the casino property would have to be closed and disinfected. Compl. ¶47. In addition, remaining open could be a potential threat to the customers who frequented the casino, employees, and the local community. *Id.* The Complaint alleges that "COVID-19 is inherently noxious, and its presence renders business and buildings unusable and unsafe." Compl. ¶47.

Cases that have interpreted the causal relationship between a Civil Closure Order and nearby property damages make it clear that the party must show the order was triggered *after* the property damage has occurred, *i.e.,* there has to be a causal nexus. In *Assurance Co. of America v. BBB Service Co. Inc.*, 265 Ga.App. 35 (Ga. 2003), BBB sought loss of business income coverage due to an evacuation order issued prior to a hurricane landfall, which required BBB to close its restaurants. In order to show the order was a direct result of physical damage, BBB presented testimony from the members of the County team responsible for issuing the evacuation order. The testimony established that the team had been aware of damage caused in the path of the hurricane and that factor was one of which led them to issue the evacuation order. *Id*. at 36. Similarly, in *Jones, Walker, Waechter, Poitevent, Carrere & Denegre, LLP. v. Chubb Corp.*, 2010 WL 4026375 (E.D. La. Oct. 12, 2010), the court distinguished between two evacuation orders issued by the Mayor of New Orleans in response to a hurricane. One order was issued in anticipation of the hurricane's landfall and prior to any damage having occurred in the City. The

second order was issued in response to damages that had been sustained throughout the city including within one mile of the insured property. *Id.* at *3 and n. 5. The court noted that the Insurer did not challenge the nexus requirement for the second order, and the court agreed that the second order could arguably trigger the coverage. *Id.* The court then went on to examine other issues in coverage assuming the closure order met the nexus requirement.

In *Narricot Industries, Inc. v. Fireman's Fund Ins. Co*., 2002 WL 31247972 (E.D. Pa. Sept. 30, 2002), a hurricane and flooding caused damage to a water system. The local government issued an order closing industrial plants to prevent them from using water that would be rationed for drinking water. The court considered whether the declaration of a state of emergency and closure of the industrial plants was caused by a direct physical loss or damage to property. The court held the closure order was a result of a covered loss of hurricane and flooding. *Id.* at *4. It also rejected an argument that the order was preventative and did not result from a covered loss, holding that even though the order was intended to prevent further damage to the water supply, the order was issued *after* and as a result of the damage from the hurricane and flooding. *Id.* at *5.

These cases establish that MGE should be permitted to present evidence, as outlined in the Complaint, that the Closure Order was a result of the prior physical damage at the College, *i.e.,* the presence of a positive COVID-19 student that caused the College to close. As pled in the Complaint, MGE can plausibly support the element of the claim that the Tribe issued the Order in response to the physical damage at the College.[14] In *Narricot,* the court observed, a civil order that is preventative in nature can be issued as a result of a covered loss. 2002 WL 31247972, *5.

[14] The testimony the Tribe would seek to present on this issue was presented to AFM as sworn declarations in its Sworn Proof of Claim Statement. *See* P.Ex. 9, Att. 6, P0119, Att.7, P0121, Att.8, P0123. AFM made no effort to investigate MGE's claim at the time, so it never sought to

AFM relies on two cases that are factually distinguishable. In *United Airlines v. Insurance Co. of the State of PA,* 439 F.3d 128 (2d Cir 2006), the closure order was issued *before* the Pentagon was struck. 439 F.3d at 134. Based on testimony from witnesses, the court held the shutdown was a result, not of damage to the Pentagon, but of fear of future attacks on the White House and other government facilities which were within the airport's flight path. *Id.* In other words, while the Pentagon was damaged, the fear was that there were other hijackers out there, and they had to be stopped. There was no evidence presented that showed the closure was a result of damage at the Pentagon.

Similarly, in *10021 Holdings, Inc. v. Sentinel Ins. Co.*, Dkt No. 20-cv-04471, 2020 U.S. Dist. LEXIS 235565 (S.D.N.Y Dec. 15, 2020), there was no allegation that the closure was a direct result of damages at an adjacent property. The court stated, "[b]ut the Complaint does not allege that these closures of *neighboring* properties "direct[ly] result[ed]" in closure of Plaintiff's *own* premises, as the Civil Authority provisions require. Instead, the Complaint alleges that Plaintiff was forced to close for the same reason as its neighbors -- the risk of harm to individuals on its own premises due to the pandemic." Slip Op. at 8.

Based on the foregoing, there are more than sufficient facts set forth in the Complaint to show that MGE can meet the third element of the claim and that it has stated a claim for relief that is plausible on its face. As a consequence, the MJP should summarily be denied.

E. Disposition of Other Claims

To conclude its MJP, AFM makes an abbreviated argument that extra contractual claims, Counts III and IV,[15] are also insufficient because AFM did not act wrongfully by asserting a

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speak to these declarants before denying the claim. While Plaintiff understands that this is a motion for judgment on the pleadings, the facts set forth in the Complaint at ¶¶ 42-47 mirror these sworn statements.

[15] We can find no part of the motion that applies to Count II.

position that was consistent with the Policy...." MJP at 25. AFM then cites to a case without any discussion or analysis, that addresses General Business Law §349, Deceptive Acts and Practices Unlawful. Defendant has failed to meet its Rule 12(c) burden. The Complaint alleges in detail that AFM has been carrying out a scheme with its adjusters to deny coverage to all policy holders by obfuscating about coverages, steering insureds to certain coverages that have no payout, or simply denying coverage despite the Policy terms. *See* Compl. ¶¶101-107. AFM's motion as to these Counts should be denied.

CONCLUSION

AFM's Motion for Judgment on the Pleadings cannot be sustained. The Complaint alleges more than sufficient facts to support Plaintiff's claim, and the case law relied upon by AFM is irrelevant to the facts of this case. AFM has failed to establish any genuine disputes of material facts related to the purely legal contract interpretation questions raised in MGE's motion, nor has AFM directly responded to the contract analysis and interpretation presented by MGE which establishes the contamination exclusion does not apply to communicable diseases and which establishes that the presence of a communicable disease is physical damage. On these grounds, AFM's motion should be denied, and MGE's motion should be granted.

Dated: Buffalo, NY
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Respectfully submitted,

/s/ Marsha K. Schmidt
(NDNY Bar No. 512364)
Attorney-at-Law
14928 Perrywood Drive
Burtonsville, MD 20866
301-949-5176
marsha@mkschmidtlaw.com
Lead Counsel for Plaintiff Mohawk Gaming Enterprises, LLC

THE COPPOLA FIRM

/s/ Lisa A. Coppola
(NDNY Bar No. 513450)
3960 Harlem Road
Buffalo, NY 14226
716-839-9700
lcoppola@coppola-firm.com
Co-counsel for Plaintiff Mohawk Gaming Enterprises, LLC