STATE OF CONNECTICUT SUPERIOR COURT
JUDICIAL DISTRICT OF HARTFORD

MASHANTUCKET PEQUOT TRIBAL NATION, *Plaintiff,* *v.* FACTORY MUTUAL INSURANCE COMPANY, *Defendant.*	Docket No. HHD-CV21-6140378-S

DEFENDANT FACTORY MUTUAL INSURANCE COMPANY'S REPLY MEMORANDUM OF LAW
IN SUPPORT OF ITS MOTION TO STRIKE THE COMPLAINT

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Factory Mutual[1] respectfully submits this reply memorandum of law in support of its motion to strike each count of the Amended Complaint (the "Complaint").

PRELIMINARY STATEMENT

Plaintiff's claims must be stricken because the Complaint does not allege facts legally sufficient to state a claim for insurance coverage under the Policy. At least six courts have now rejected substantially identical claims for coverage brought by policyholders against Factory Mutual or its affiliate. This court should do the same.

First, the Policy's express virus exclusion bars Plaintiff's claims for losses caused by COVID-19. Plaintiff's opposition is based on the hairsplitting assertion that COVID-19 is the name of the disease, while SARS-CoV-2 is the name of the virus. This distinction contradicts Plaintiff's own Complaint, which says "SARS-CoV-2 and COVID-19 are collectively referred to in this Complaint as COVID-19." Compl. ¶ 44. The virus (however named) is the direct cause of Plaintiff's loss and loss caused by a virus is excluded from coverage. As reflected in the citations below, numerous courts have so held as a matter of law in virtually identical circumstances.

Second, Connecticut law is clear that the Policy's threshold requirement of "physical" loss or damage requires allegations of an actual, tangible alteration to property. Plaintiff does not plead facts showing that COVID-19 tangibly altered its property. Numerous cases have held it does not as a matter of law. Therefore, no coverage is available for physical loss or damage to property.

Third, the Complaint does not state a claim for Communicable Disease Coverage—which, unlike the other coverages at issue, can apply in the absence of physical loss or damage—because the Complaint does not plead the actual presence of communicable disease on Plaintiff's premises. Plaintiff's argument that it was "more probable than not" that COVID-19 was present at Plaintiff's

[1] Defined terms not otherwise defined herein have the meaning provided in the Moving Brief.

businesses is insufficient because, as multiple courts cited below have held, such allegations merely amount to speculation, not the "actual" presence required by the Policy.

Finally, Plaintiff's claims for bad faith and violations of CUTPA premised on Factory Mutual's response to a claim for insurance coverage cannot stand under Connecticut law because Plaintiff is not entitled to coverage.

ARGUMENT

I. THE COURT SHOULD STRIKE COUNTS I AND II BECAUSE THE POLICY DOES NOT COVER LOSS CAUSED BY A VIRUS

The Policy's contamination exclusion excludes "**contamination**, and any cost due to contamination including the inability to use or occupy property . . ." and bars Plaintiff's claims for coverage. Policy at 14. "[C]ontamination" is defined as "any condition of property due to the actual or suspected presence of any . . . pathogen or pathogenic organism . . . virus, [or] disease causing or illness causing agent . . . . " *Id.* at 66. Plaintiff concedes its alleged losses stem from COVID-19, which is "deadly and highly contagious," Compl. ¶ 45, "can infect individuals," *id.* ¶ 86, and has actually "infected more than 127,000,000 people." *Id.* ¶ 51. As Plaintiff states, the SARS-CoV-2 virus "causes COVID-19," and the two are so intertwined that Plaintiff refers to both together as "COVID-19" throughout its Complaint. *Id.* ¶ 44 ("SARS-CoV-2 and COVID-19 are collectively referred to in this Complaint as COVID-19."). Plainly, COVID-19 is a "pathogen or pathogenic organism," "virus," and "disease causing or illness causing agent." *See Nguyen v. Travelers Cas. Ins. Co. of Am.*, No. 2:20-cv-00597, 2021 WL 2184878, at *10 (W.D. Wash. May 28, 2021) ("COVID-19 hurts people, not property[.]"). This simple fact is enough to resolve Plaintiff's claims under the contamination exclusion's plain meaning.

Plaintiff attempts to avoid this inevitable result by raising a series of flawed arguments. *First*, Plaintiff attempts to differentiate the "communicable disease" COVID-19 from the SARS-

CoV-2 virus that causes it. Treating COVID-19 as independent from the virus is both contrary to logic and irreconcilable with Plaintiff's express allegations that COVID-19 "infect[s] individuals" and "can remain viable on objects or surfaces," Compl. ¶¶ 56, 58, and the Complaint's consistent references to the virus and the disease as one and the same. *Id.* ¶ 44. Courts have rejected efforts to differentiate the virus from the disease for purposes of similar exclusions, including one recent decision construing Factory Mutual's policy language. *See Ralph Lauren Corp. v. Factory Mut. Ins. Co.*, No. 20-cv-10167, 2021 WL 1904739, at *4 n.8 (D.N.J. May 12, 2021) (rejecting the argument that "a 'virus' must be different from a 'communicable disease' as defined by the Policy" because such argument cannot be squared with "the undisputed fact that 'SARS-CoV-2 is a virus that causes the COVID-19 disease'"); *RDS Vending LLC v. Union Ins. Co.*, No. 20-cv-3928, 2021 WL 1923024, at *6 (E.D. Pa. May 13, 2021) ("Under [the exclusion's] unambiguous language, the policy does not cover losses or damage caused by SARS-CoV-2, the novel coronavirus that causes COVID-19. Because all of Plaintiff's claims for coverage are due to COVID-19, this exclusion is fatal to Plaintiff's claims.").

Second, Plaintiff argues that the lack of an "anti-concurrent causation" clause—language stating that a loss remains within the scope of an exclusion where the excluded cause of law was an "indirect" rather than "direct" cause—warrants denial of this motion. But Connecticut law requires the Court to apply the language that is in the Policy, rather than look to language that is not in the Policy. *Dumas v. USAA Gen. Indem. Co.*, No. 3:17-cv-01083, 2019 WL 3574920, at *2 (D. Conn. Aug. 6, 2019); *Conn. Ins. Guar. Ass'n v. Drown*, 101 A.3d 200, 215 (Conn. 2014). Questions of concurrent and indirect causation are irrelevant here because the virus was a direct cause of Plaintiff's loss; any assertion that the virus did not cause, or only indirectly caused, Plaintiff's loss is implausible and contrary to the facts alleged in the Complaint. Accordingly,

many courts (including the Connecticut Superior Court) have enforced a variety of exclusions without anti-concurrent causation language in the COVID-19 coverage context. *Hartford Fire Ins. Co. v. Moda, LLC*, No. X06-UWY-CV-20-6056095-S, 2021 WL 2474216, at *4 (Conn. Super. Ct. June 15, 2021) (enforcing such exclusion because "[t]here can be no doubt that the cause of the [policyholders'] damages is the COVID-19 virus as opposed to any of the other extraneous factors noted"); *Nguyen*, 2021 WL 2184878, at *20 n.32 (holding in consolidated action involving a Factory Mutual subsidiary that contamination exclusion bars claims for loss caused by COVID-19); *Causeway Auto., LLC v. Zurich Am. Ins. Co.*, 2021 WL 486917, at *6 (D.N.J. Feb. 10, 2021) (enforcing such exclusion because "[t]he Executive Orders [shutting down plaintiff's business] were issued for the sole reason of reducing the spread of the virus that causes COVID-19 and would not have been issued but for the presence of the virus"); *Mashallah, Inc. v. West Bend Mut. Ins. Co.*, No. 20-cv-5472, 2021 WL 679227, at *3–4 (N.D. Ill. Feb. 22, 2021) ("'[T]here is no genuine dispute that the activity of a virus, namely COVID-19, set government restrictions in motion, and is therefore the efficient proximate cause of Plaintiffs' claimed losses.'"); *cf. LJ New Haven LLC v. AmGUARD Ins. Co.*, No. 3:20-cv-00751, 2020 WL 7495622, at *5 (D. Conn. Dec. 21, 2020) (applying policy with anti-concurrent causation language, but stating "***remoteness is not an issue here***" because "[t]he causal links represented by the virus and the Order [shutting down plaintiff's business] are interlocking—even intertwined") (emphasis added).

Third, Plaintiff argues that, because the Policy provides a limited Communicable Disease Coverage extension for the "actual not suspected" presence of communicable disease at Plaintiff's premises, the contamination exclusion cannot possibly apply to bar coverage in other sections of the Policy. As many courts have held, including in the context of Factory Mutual policies, this assertion is wrong: the Communicable Disease Coverage extension is a limited exception to the

contamination exclusion. *See* Mov. Br. at 24–27; *Nguyen*, 2021 WL 2184878, at *20 n.32 ("The structure of the Policies leads to the conclusion that the Communicable Disease provisions are meant as an exception to the Policy's exclusions. In other words, as to both the Property Insured and Business Interruption extensions, the pattern is (1) losses insured through the Insurance Provided provision, including a physical loss or damage trigger; (2) exclusions, including the Contamination exclusion; and (3) extensions, including the Communicable Disease provisions."). Indeed, such a reading of the Policy is the only reasonable one under Connecticut law; Plaintiff's proposed approach would read the exclusion for actual or suspected contamination by virus out of the Policy entirely, violating the principle that courts must "give operative effect to every provision" of an insurance policy. *Conn. Med. Ins. Co. v. Kulikowski*, 942 Ad.2d 334, 338 (Conn. 2008).

Finally, Plaintiff argues that enforcing the contamination exclusion would "effectively extinguish other coverages under the Policy and lead to absurd results." However, Plaintiff only cites Claims Preparation Coverage, which merely provides for reimbursement of certain costs incurred when making a valid claim under the Policy. *See* Policy at 22 (providing coverage for costs "***resulting from insured loss payable under this Policy for which the Company has accepted liability***.") (emphasis added). Plaintiff's contention that the contamination exclusion would preclude recovery of claims preparation costs incurred in connection with a valid claim is meritless. Such claims necessarily involve an "insured loss payable under this Policy," Policy at 22, which is all that is required for claims preparation costs to be covered. Plaintiff strains to manufacture ambiguity where none exists.

II. THE COURT SHOULD STRIKE COUNTS I AND II BECAUSE NO "PHYSICAL LOSS OR DAMAGE" IS ALLEGED IN THE COMPLAINT

Plaintiff has failed to allege any "physical loss or damage" to its property, a prerequisite for coverage under all provisions of the Policy at issue here other than the Communicable Disease Coverages. *See* Mov. Br. at 14–24. Even assuming Plaintiff properly alleged that COVID-19 was actually present at its premises (which it has not), and that this prompted government and tribal council orders which shut down its businesses, Plaintiff has failed to show any "physical, tangible alteration to any property," as is required under well-established Connecticut law. *Capstone Bldg. Corp. v. Am. Motorists Ins. Co.*, 67 A.3d 961 (Conn. 2013).

Plaintiff argues that Factory Mutual "imports a pleading rule that requires an insured to plead 'tangible alteration'" to show "physical loss or damage." Not so. A long list of Connecticut cases—and COVID-coverage cases around the country—establishes a plaintiff seeking coverage for alleged "physical" loss or damage must allege "observable, tangible effects" to the property. *England v. Amica Mut. Ins. Co.*, No. 3:16-cv-1951, 2017 WL 3996394, at *7 (D. Conn. Sept. 11, 2017); *see also* Mov. Br. at 14–17. Plaintiff cites to no contrary law indicating that merely reciting the words "physical loss or damage" without alleging tangible alteration can suffice under Connecticut law.

Despite Plaintiff's contrary suggestions, a growing number of courts have rejected claims made by policyholders of Factory Mutual and its affiliates under virtually identical contract language because even the actual presence of COVID-19 does not constitute physical loss or damage. *See Ralph Lauren*, 2021 WL 1904739, at *3 ("Nor does the alleged 'presence' of the Virus in or around Plaintiff's stores equate to actual or imminent physical loss or damage of any sort."); *Nguyen*, 2021 WL 2184878, at *10 ("As numerous courts have recognized, 'COVID-19 hurts people, not property,' as 'the pandemic impacts human health and human behavior, not

physical structures[.]' Thus, all that is needed to decontaminate is to 'wipe[ ] [the virus] off the surface with disinfectant,' attesting to the fact that there is no underlying damage.") (internal citations omitted); *Mohawk Gaming Enters., LLC v. Affiliated FM Ins. Co.*, No. 8:20-cv-701, 2021 WL 1419782, at *5 (N.D.N.Y. Apr. 15, 2021) ("[T]he inclusion of the modifier 'physical' . . . clearly imposes a requirement that the damage actually be tangible in nature; *i.e.*, this language unambiguously requires some form of physical harm to the location . . . ."); *Islands Rests., LP v. Affiliated FM Ins. Co.*, No. 3:20-cv-02013, 2021 WL 1238872, at *3 (S.D. Cal. Apr. 2, 2021) ("The loss of use or functionality of the covered property alone is not sufficient to trigger coverage."); *Out West Rest. Grp. v. Affiliated FM Ins. Co.*, No. 20-cv-06786, 2021 WL 1056627, at *4 (N.D. Cal. Mar. 19, 2021) ("[T]he virus fails to cause physical alteration of property because temporary loss of use of property (if any) during a pandemic and while government orders are in effect does not qualify as physical loss or damage.").

Plaintiff argues that because the Policy offers Communicable Disease Coverages, the Policy therefore considers the possible or actual presence of a communicable disease to be "physical loss or damage." However, as pointed out in the Moving Brief (without response in Plaintiff's Opposition), those coverages are subject to a $1 million sublimit. Under Plaintiff's interpretation, the inclusion in the Policy of up to $1 million in coverage for "actual not suspected presence of communicable disease" would itself have created coverage under numerous other Policy sections not subject to the $1 million sublimit—therefore rendering the sublimited coverages functionally superfluous. *See* Mov. Br. at 25–26. Such an interpretation of the Policy would not "give operative effect to every provision" and therefore is unreasonable under Connecticut law. *See Conn. Med.*, 942 A.2d at 338.

Plaintiff's reliance on a single line of lead-in language in the Policy pages away from the Communicable Disease Coverages, *see* Policy at 16, 22, 54, to support the claim that "communicable disease *is* 'physical loss or damage'" is contrary to the plain meaning of the Communicable Disease Coverages, adds language to the Policy where it does not exist, makes language meaningless where it does exist, and is contrary to the legal authority cited above on this exact issue. The Communicable Disease Coverages simply do not include the phrase "physical loss or damage" anywhere. *See* Policy at 22, 54; *see also Nguyen*, 2021 WL 2184878, at *20 ("The Communicable Disease provisions apply when the disease is present, making it distinct from the Insurance Provided provision, which requires physical loss or damage. Thus, the fact that the Communicable Disease Provisions are applicable does not reverse-activate the Insurance Provided provision."); *Ralph Lauren*, 2021 WL 1904739 (concluding the presence of the coronavirus did not constitute "physical loss or damage" within the meaning of a policy that included Communicable Disease coverage identical to that here). These provisions do not require "physical loss or damage" to extend coverage subject to the $1 million sublimit, do not indicate in any fashion that the presence of a communicable disease is considered "physical loss or damage" for *other* coverages in the Policy, and do not otherwise use the phrase at all. *See* Policy at 22, 54. Further, to read a "physical loss or damage" requirement into the Communicable Disease Coverages would make the express use of such language superfluous in other Policy provisions, including other "Additional Coverages" and all the other provisions at issue here. *Compare* Communicable Disease Coverages, Policy at 22, 54, *with* Accounts Receivable Coverage, *id.* at 20 ("[C]overs the following directly resulting from insured ***physical loss or damage*** to accounts receivable records") (emphasis added), *and* Debris Removal Coverage, *id.* at 23 (coverage where debris "remains as a direct result of insured ***physical loss or damage***"). Finally, the Policy's Time

Element coverages apply during the period when the policyholder is repairing or replacing the physically lost or damaged property, *see, e.g.*, *id.* at 42. The Communicable Disease Coverages do not because the presence of coronavirus requires neither replacement nor repair of any part of Plaintiff's property—further illustrating that the presence of coronavirus cannot constitute "physical loss or damage" within the meaning of such Policy provisions.

Cinemark Holdings, Inc. v. Factory Mut. Ins. Co., 500 F. Supp. 3d 565 (E.D. Tex. 2021) does not change this analysis. *Cinemark* found, with minimal substantive analysis, that allegations of the actual presence of COVID-19 plausibly stated a claim for communicable disease coverage. *Id.* at 569. It did not analyze other policy provisions, including the contamination exclusion, and did not address the physical loss or damage requirement. While *Cinemark* stated that the policy "expressly cover[ed] loss and damage caused by 'communicable disease,'" it did not conclude such loss or damage was "physical." *Id.*

III. PLAINTIFF HAS NOT ALLEGED THE "ACTUAL NOT SUSPECTED PRESENCE" OF COMMUNICABLE DISEASE

Finally, Plaintiff's claims for coverage under the Policy's limited Communicable Disease Coverages fail, because such coverages require "*actual not suspected presence*" of communicable disease. Policy at 22, 53–54. Plaintiff has failed to allege any more than the "suspected" or "probable" presence of COVID-19, *see* Compl. ¶¶ 73–83, and several courts have reached the common-sense conclusion that such allegations fail to plead the "actual not suspected presence" of the virus as required by the Communicable Disease Coverages. *See Ralph Lauren*, 2021 WL 1904739, at *4 ("Notably, Plaintiff does not allege that any of its ***on-site*** customers or employees had COVID-19; nor does it provide any other basis to conclude that COVID-19 was present at one or more of its covered locations.") (emphasis added); *Nguyen*, 2021 WL 2184878, at *22

("[Plaintiff] is not entitled to coverage under the Communicable Disease Provisions because it did not plead that the COVID-19 virus was found at any of its locations . . . . ").

In response, Plaintiff does not point to well-pled factual allegations of any "actual not suspected" cases of communicable disease on its premises, but to conclusory allegations that recite the contractual requirement of actual not suspected presence. Connecticut law is unequivocal that the Court need not accept such allegations: "[t]he motion [to strike] admits well pleaded facts but does not admit any legal conclusions or the truth or accuracy of opinions stated in the pleadings." *City of Bridgeport v. C.R. Klewin Ne., LLC*, 971 A.2d 864, 867 (Conn. Super. Ct. 2007).

IV. THE COURT SHOULD STRIKE COUNTS 3 AND 4 BECAUSE PLAINTIFF IS NOT ENTITLED TO COVERAGE UNDER THE POLICY

Because the Complaint does not establish that Plaintiff is entitled to coverage, Plaintiff's allegations are legally insufficient to state claims for (1) common law bad faith or (2) violations of CUTPA. *Capstone Bldg.*, 67 A.3d at 988; *Fortin v. Ins. Co. of State of Pa.*, No. CV176011987S, 2018 WL 2138001, at *9 (Conn. Super. Ct. Apr. 19, 2018) (quoting *Zulick v. Patrons Mutual Ins. Co.*, 949 A.2d 1084, 1091-1092 (Conn. 2008)).

Plaintiff does not, in fact, contend otherwise and none of the cases it cites support such a proposition. *See Kowalchuk v. Travelers Pers. Sec. Ins. Co.*, No. CV116012608, 2014 WL 3397940, at *1–2 (Conn. Super. Ct. June 4, 2014) (insurer did not move to strike claim of breach of contract for failure to provide coverage on the basis that policy did not cover alleged loss); *Urban Apparel Plus, LLC v. Sentinel Ins. Co.*, No. CV136035293S, 2013 WL 6171114, at *1 (Conn. Super. Ct. Oct. 31, 2013) (same); *Opin v. Ohio Cas. Ins. Co.*, No. NNHCV106011625, 2013 WL 4734766, at *11 (Conn. Super. Ct. Aug. 8, 2013) (same). Accordingly, Counts 3 and 4 of Plaintiff's Complaint should be stricken.

CONCLUSION

Based on the foregoing, the allegations of Plaintiff's Complaint are legally insufficient and fail to state a claim upon which relief can be granted. Factory Mutual respectfully requests that the Court grant its motion to strike each count of the Complaint.

Dated: July 14, 2021

Respectfully submitted,

/s/ Chase Rogers

Chase T. Rogers
Andraya P. Brunau
DAY PITNEY LLP
242 Trumbull Street
Hartford, CT 06103
(860) 275-0343
ctrogers@daypitney.com
abrunau@daypitney.com

SIMPSON THACHER & BARTLETT LLP
Bryce L. Friedman (*pro hac vice*)
Isaac Rethy (*pro hac vice*)
425 Lexington Avenue
New York, NY 10017
(212) 455-2000
bfriedman@stblaw.com
irethy@stblaw.com

Attorneys for Defendant Factory Mutual Insurance Company

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was mailed or electronically delivered on July 14, 2021, to all counsel and self-represented parties of record and that written consent for electronic delivery was received from all counsel and self-represented parties of record who were electronically served:

Michael Christopher D'Agostino
MORGAN LEWIS
One State Street
Hartford, CT 06103
Michael.dagostino@morganlewis.com

/s/ Chase Rogers
Chase T. Rogers