

THE HONORABLE CATHERINE SHAFFER  
Noted August 27, 2021 at 9:00 am  
With Oral Argument

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF KING

SNOQUALMIE ENTERTAINMENT  
AUTHORITY d/b/a SNOQUALMIE CASINO  
and SACRED FALLS LLC d/b/a SALISH  
LODGE & SPA,

Plaintiff,

v.

AFFILIATED FM INSURANCE COMPANY,

Defendant.

No.: 21-2-03194-0 SEA

DEFENDANT’S MOTION FOR PARTIAL  
SUMMARY JUDGMENT

**I. INTRODUCTION & RELIEF REQUESTED**

Plaintiffs assert breach-of-contract and declaratory-relief claims against Defendant Affiliated FM Insurance Company (“AFM”). These claims concern AFM’s purported failure to pay additional benefits under an insurance policy (the “Policy”) for alleged COVID-19 related losses at the Snoqualmie Casino (the “Casino”) and the Salish Lodge & Spa (the “Lodge”).

AFM concluded correctly that neither the Casino nor the Lodge suffered physical loss or damage. And, therefore, Plaintiffs’ alleged losses do not trigger coverage under the applicable Policy’s primary grant of coverage, additional coverages, and its coverage extensions that require physical loss or damage. Under an additional coverage and a coverage extension specifically for “communicable disease,” the Policy does provide coverage in the absence of physical loss or damage, assuming certain conditions are satisfied. Indeed, AFM accepted coverage under the

1 extension for “communicable disease” and issued payment in the amount of \$100,000—the full  
2 limits under the Policy. And, as AFM already advised Plaintiffs, it stands ready to provide  
3 coverage, up to the \$100,000 annual aggregate limit, under the additional coverage for  
4 “communicable disease” as soon as Plaintiffs submit sufficient information to substantiate a loss  
5 under that coverage in excess of the applicable deductible.

6 Plaintiffs, however, seek more than the potential \$200,000 available under the two  
7 communicable disease coverages. They contend that alleged COVID-19 exposures at the Casino  
8 and the Lodge trigger coverage under the Policy’s primary grant of coverage, additional  
9 coverages, and its extensions that require physical loss or damage. But the law and the Policy do  
10 not support Plaintiffs’ theories of coverage. AFM therefore brings this motion for partial  
11 summary judgment (the “Motion”). In doing so, AFM respectfully moves the Court to make the  
12 following determinations:

- 13 (1) Neither the reported COVID-19 exposures for the Casino and Lodge, nor any  
14 orders or directives promulgated by the Snoqualmie Indian Tribe, the Snoqualmie  
15 Tribal Council, or Washington’s Governor caused “physical loss or damage” at  
16 the Casino or Lodge as that phrase is used under the Policy;
- 17 (2) The Policy’s contamination exclusion applies and precludes coverage under the  
18 Policy;
- 19 (3) The loss of use exclusion applies and precludes coverage under the Policy; and
- 20 (4) The sole source of coverage for Plaintiff’s alleged COVID-19 related losses is  
21 found in the Policy’s distinct “communicable disease” coverages, subject to their  
22 terms and conditions, which act as limited exceptions to the exclusions.

23 Accordingly, AFM further respectfully requests that the Court dismiss Plaintiffs’ breach-of-  
24 contract and declaratory-relief claims with prejudice.

1 **II. INTRODUCTION TO POLICY**

2 To give context for the facts and allegations, AFM first provides the following synopsis  
3 of the Policy’s framework and the provisions at issue:

4 **A. The General Framework**

5 The Policy insures property “against ALL RISKS OF PHYSICAL LOSS OR DAMAGE,  
6 except as hereinafter excluded . . . .”<sup>1</sup> So, to the extent covered property suffers physical loss or  
7 damage during the Policy period, the loss is generally covered (assuming all other Policy  
8 requirements are met), unless an exclusion or limitation applies. Physical loss or damage caused  
9 by an excluded peril is not covered under the Policy. But some exclusions are subject to  
10 exceptions, which may operate to allow coverage.

11 In addition, the Policy includes “ADDITIONAL COVERAGES,” “BUSINESS  
12 INTERRUPTION COVERAGE,” and “BUSINESS INTERRUPTION COVERAGE  
13 EXTENSIONS.”<sup>2</sup> And there are specific coverage provisions addressing particular types of  
14 losses, including an additional coverage for “communicable disease,” and a business interruption  
15 coverage extension for “communicable disease.”<sup>3</sup>

16 Generally stated, then, the basic functioning of the Policy is as follows: if the factual  
17 requirements are met, an event of physical loss or damage to covered property will be covered  
18 unless an exclusion or limitation applies, and an exclusion applies unless an insured can satisfy  
19 an exception to that exclusion under the Policy.

20 **B. The Exclusions Relevant to this Motion**

21 The Policy contains exclusions for contamination and loss of use, which bar coverage  
22 under the Policy. The contamination exclusion includes the following relevant provisions:

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24 <sup>1</sup> Policy (pp. 9, 20 of **Exhibit 1** to Declaration of R. Sunny in Support of Defendant Affiliated FM  
Insurance Company’s Motion for Partial Summary Judgment (“Sunny Decl.”)).

25 <sup>2</sup> Policy (pp. 24, 39, 43 of **Exhibit 1** to Sunny Decl.).

26 <sup>3</sup> Policy (pp. 26, 44 of **Exhibit 1** to Sunny Decl.).

1           **GROUP II** This policy excludes loss or damage caused by  
2 any of the following excluded events . . . . Loss or  
3 damage will be considered to have been caused by an  
4 excluded event if that event:

- 5           i.       Directly and solely results in loss or damage; or
- 6           ii.       Initiates a sequence of events that results in loss  
7 or damage, regardless of the nature of any  
8 intermediate or final event in that sequence.

9           . . . .

10          **10. Contamination**, and any cost due to  
11 **contamination** including the inability to use or  
12 occupy property or any cost of making property  
13 safe or suitable for use or occupancy . . . .<sup>4</sup>

14 The Policy defines “contamination” as:

15           any condition of property due to the actual or suspected  
16 presence of any foreign substance, impurity, pollutant,  
17 hazardous material, poison, toxin, pathogen or  
18 pathogenic organism, bacteria, virus, disease causing or  
19 illness causing agent, . . . .<sup>5</sup>

20 There is no genuine dispute that the virus causing the COVID-19 disease, namely SARS-CoV-2,  
21 clearly falls within the scope of this definition.

22  
23 **C. Business Interruption**

24           Following the exclusions, the Policy has a distinct section for “BUSINESS  
25 INTERRUPTION.”<sup>6</sup> For purposes of this section, the “LOSS INSURED” is defined as follows:

26 “The Policy insures Business Interruption loss, as provided in the Business Interruption  
Coverage, as a direct result of physical loss or damage of the type insured . . . .”<sup>7</sup> In addition, the

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27 <sup>4</sup> Policy (pp. 72-73 of **Exhibit 1** to Sunny Decl.).

28 <sup>5</sup> Policy (p. 61 of **Exhibit 1** to Sunny Decl.).

29 <sup>6</sup> Policy (p. 38 of **Exhibit 1** to Sunny Decl.).

30 <sup>7</sup> Policy (p. 38 of **Exhibit 1** to Sunny Decl.).

1 “BUSINESS INTERRUPTION EXCLUSIONS” section notes that the exclusions apply “[i]n  
2 addition to the exclusions elsewhere in this Policy, . . . .”<sup>8</sup> Accordingly, the contamination and  
3 loss of use exclusions also apply to this section of the Policy.

4 **D. Communicable Disease Coverage**

5 An additional coverage or coverage extension for a particular loss may operate as an  
6 exception to an exclusion and may permit coverage as stated, depending on the insurance policy,  
7 its structure, its language, and its meaning.<sup>9</sup> The Policy has two coverage provisions for  
8 communicable disease that operate as exceptions in this fashion. Both coverages have an annual  
9 aggregate sub-limit of \$100,000.<sup>10</sup>

10 The Policy defines the term “communicable disease,” in part, as a “disease which is . . .  
11 [t]ransmissible from human to human by direct or indirect contact with an affected individual or  
12 the individual’s discharges . . . .”<sup>11</sup> In a section titled “ADDITIONAL COVERAGES,” the  
13 Policy includes a specific coverage for a communicable disease, for the actual presence of a  
14 communicable disease and impaired access to covered property in certain circumstances:

15 **5. Communicable Disease – Property Damage**

16 If a **described location** owned, leased or rented by  
17 the Insured has the actual not suspected presence  
18 of **communicable disease** and access to such  
19 **described location** is limited, restricted or  
20 prohibited by:

21 <sup>8</sup> Policy (p. 42 of **Exhibit 1** to Sunny Decl.).

22 <sup>9</sup> See *McDonald v. State Farm Fire & Casualty Co.*, 119 Wn.2d 724, 734, 837 P.2d 1000, 1005  
23 (1992) (acknowledging structure as an “important objective source of meaning and intent”); *Munn v.*  
24 *Mut. of Enumclaw Ins. Co.*, 73 Wn. App. 321, 325, 869 P.2d 99, 101 (1994) (“An exclusionary  
25 clause is to be harmonized with coverage provisions, . . . .”); *Nguyen v. Travelers Cas. Ins. Co. of*  
26 *Am.*, 2021 WL 2184878, at \*20, n. 32 (W.D. Wash. May 28, 2021) (“The structure of the Policies  
leads to the conclusion that the Communicable Disease provisions are meant as an exception . . . .”),  
*appeals filed, including* No. 21-35472 (9th Cir. June 22, 2021).

<sup>10</sup> Policy (pp. 9-11 of **Exhibit 1** to Sunny Decl.).

<sup>11</sup> Policy (p. 61 of **Exhibit 1** to Sunny Decl.).

- a) An order of an authorized governmental agency regulating or as result of such presence of **communicable disease**; or
- b) A decision of an Officer of the Insured as a result of such presence of **communicable disease**,

This Policy covers the reasonable and necessary costs incurred by the Insured at such described location for the:

- a) Cleanup, removal and disposal of such presence of **communicable disease** from insured property . . . .<sup>12</sup>

In addition, if a loss satisfies these requirements, another section of the Policy, the “BUSINESS INTERRUPTION COVERAGE EXTENSIONS,” includes an extension of coverage for “Communicable Disease – Business Interruption” that “covers the Business Interruption Coverage loss incurred by the Insured during the Period of Liability at such **described location** with such presence of **communicable disease**.”<sup>13</sup>

In contrast with the Policy’s other provisions, these limited coverages for “communicable disease” do *not* require physical loss or damage to trigger coverage. Instead, these limited coverages require “the actual not suspected presence” of a “communicable disease,” along with the requisite “order of an authorized government agency” or “decision of an Officer of the Insured . . . .”

### **III. STATEMENT OF FACTS**

At issue in this Motion is alleged coverage under the Policy for reported losses at two locations in the Policy’s location schedule, namely (1) the Casino and (2) the Lodge.<sup>14</sup> The

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<sup>12</sup> Policy (p. 26 of **Exhibit 1** to Sunny Decl.).

<sup>13</sup> Policy (p. 44 of **Exhibit 1** to Sunny Decl.).

<sup>14</sup> Policy (p. 9 of **Exhibit 1** to Sunny Decl.).

1 Casino is located within King County;<sup>15</sup> it allegedly sits on a reservation of the Snoqualmie  
2 Indian Tribe.<sup>16</sup> The Lodge is approximately a ten-minute drive away from the Casino; the  
3 Lodge, however, is allegedly located off the reservation.<sup>17</sup>

4 **A. Early in the COVID-19 pandemic, the Snoqualmie Tribal Council issued a**  
5 **resolution to temporarily close the Casino.**

6 The SEA handles the Casino’s affairs.<sup>18</sup> Its members are the elected members of the  
7 Snoqualmie Indian Tribe’s governing body, the Snoqualmie Tribal Council (the “Council”).<sup>19</sup>

8 Early in the COVID-19 pandemic, the Council issued a resolution in March 2020.<sup>20</sup> In it,  
9 the Council “direct[ed] the temporary closure” of the Casino.<sup>21</sup> The Council believed it was in  
10 “the best interests of the health and safety of guests and team members” to temporarily close the  
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14 <sup>15</sup> First Amended Complaint at ¶ 1.1; Defendant Affiliated FM Insurance Company’s Answer to  
15 Plaintiffs’ First Amended Complaint at ¶ 1.1.

16 <sup>16</sup> First Amended Complaint at ¶ 1.1.

17 <sup>17</sup> First Amended Complaint at ¶ 1.2.

18 <sup>18</sup> Snoqualmie Entertainment Authority Act of 2006, §§ 5, 8 (available at  
19 <https://snoqualmietribe.us/wp-content/uploads/TribalCodes/act8-2.pdf>); Snoqualmie Casino’s  
20 Response to Order to Show Cause, No. 2:19-cv-01953-JLR (W.D. Wash. May 14, 2020), Dkt No.  
21 16, at p. 5:7-10 of 10 (“The SEA Act places the power over affairs of the Casino in the hands of the  
22 Snoqualmie Entertainment Authority, whose members are the elected members of the Snoqualmie  
23 Tribal Council.”).

24 <sup>19</sup> *Id.*; Section 1., Snoq. Tribal Const. Art. IV, § 1 (“The governing Body of the Snoqualmie Indian  
25 Tribe shall be known as the Snoqualmie Tribal Council.”) (available at  
26 [https://snoqualmietribe.us/wp-content/uploads/TribalCodes/The-Snoqualmie-Tribe-2006-  
Constitution.pdf](https://snoqualmietribe.us/wp-content/uploads/TribalCodes/The-Snoqualmie-Tribe-2006-Constitution.pdf)); Snoqualmie Casino’s Response to Order to Show Cause, No. 2:19-cv-01953-JLR  
(W.D. Wash. May 14, 2020), Dkt No. 16, at p. 5:7-10 of 10 (“The SEA Act places the power over  
affairs of the Casino in the hands of the Snoqualmie Entertainment Authority, whose members are  
the elected members of the Snoqualmie Tribal Council.”).

<sup>20</sup> Resolution No. 44-2020, dated March 16, 2020 (**Exhibit 2** to Sunny Decl.).

<sup>21</sup> *Id.* (p. 1 of **Exhibit 2** to Sunny Decl.).

1 Casino “to address the public health emergency created by the COVID-19 pandemic . . . .”<sup>22</sup>

2 According to the SEA, the Casino did not reopen to its guests until some point in June 2020.<sup>23</sup>

3 **B. The SEA notified AFM of alleged losses at the Casino, and AFM promptly**  
4 **investigated.**

5 Shortly after the Council’s initial closure of the Casino, the SEA—again, whose members  
6 make up the Council that closed the Casino—sought insurance benefits under the Policy. The  
7 SEA initially presented information in support of its insurance claim to AFM through a third-  
8 party claim consultant. That consultant reported to AFM that the Casino had a “team member”  
9 who allegedly: quit in late February 2020; came back to the Casino in early March 2020 to return  
10 a uniform and pick up a paycheck without “enter[ing] the premises”; and, later, posted on social  
11 media that he tested positive for COVID-19.<sup>24</sup> According to the consultant, these circumstances  
12 triggered coverage under the Policy.<sup>25</sup>

13 AFM asked the SEA for additional information relevant to its insurance claim, including  
14 more information about the circumstances surrounding the Casino’s closure and the alleged  
15 COVID-19 exposure.<sup>26</sup> Then, AFM received notice of representation from the SEA’s outside  
16 counsel.<sup>27</sup> In the notice, the SEA’s attorney asserted that coverage existed under the Policy for  
17 alleged “substantial economic loss” resulting from the Casino’s closure.<sup>28</sup>

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20 <sup>22</sup> *Id.*

21 <sup>23</sup> E-mail from R. Smith to D. Webber, dated June 1, 2020 (**Exhibit 3** to Sunny Decl.). *See also*  
22 Resolution Nos. 44-2020, 48-2020, 54-2020, 68-2020 (**Exhibits 2, 4-6** to Sunny Decl.).

23 <sup>24</sup> E-mail from M. Watts to D. Webber, dated March 21, 2020 (**Exhibit 7** to Sunny Decl.).

24 <sup>25</sup> *Id.*

25 <sup>26</sup> Letter from D. Webber to M. Patterson, dated March 27, 2020 (**Exhibit 8** to Sunny Decl.).

26 <sup>27</sup> Letter from R. Smith to D. Webber, dated March 31, 2020 (**Exhibit 9** to Sunny Decl.).

<sup>28</sup> *Id.* (p. 4 of **Exhibit 9** to Sunny Decl.).



1 During its claim investigation, AFM shared its preliminary positions on coverage with  
2 the SEA. AFM reminded the SEA that the Policy has an exclusion for “contamination,” which  
3 extends to a virus or disease-causing agent—like the COVID-19 virus.<sup>29</sup> It further explained that  
4 the presence of COVID-19 did not constitute physical loss or damage of the type insured and,  
5 thus, it could not trigger any coverages under the Policy that required the same.<sup>30</sup> AFM  
6 indicated, however, that coverage may potentially exist under the two distinct coverages in the  
7 Policy for “communicable disease”<sup>31</sup>—specifically, (1) the additional coverage for  
8 “communicable disease,” and (2) a business interruption coverage extension for “communicable  
9 disease.”<sup>32</sup> The SEA wanted more than the benefits available for loss caused by a  
10 communicable disease and expressed its disagreement with AFM’s preliminary positions.<sup>33</sup>

11 **C. The SEA reported alleged COVID-19 exposures for the Lodge and sought coverage**  
12 **for purported losses there as well.**

13 While AFM continued to investigate the insurance claim for the alleged losses at the  
14 Casino, the SEA’s third-party claim consultant reported alleged COVID-19 exposures at the  
15 Lodge.<sup>34</sup> This notice to AFM regarding the Lodge occurred in October 2020—at the tail end of  
16 the Policy’s effective term, which expired on November 1, 2020.<sup>35</sup>

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19 <sup>29</sup> Letter from D. Webber to R. Smith, dated June 5, 2020 (pp. 2-3 of **Exhibit 10** to Sunny Decl.).

20 <sup>30</sup> *Id.* (p. 3 of **Exhibit 10** to Sunny Decl.).

21 <sup>31</sup> Letter from D. Webber to R. Smith, dated June 5, 2020 (p. 3 of **Exhibit 10** to Sunny Decl.); Letter  
22 from D. Webber to R. Smith, dated April 28, 2020 (pp. 1-2 of **Exhibit 11** to Sunny Decl.).

23 <sup>32</sup> Letter from D. Webber to R. Smith, dated April 28, 2020 (p. 2 of **Exhibit 11** to Sunny Decl.).

24 <sup>33</sup> Letter from R. Smith to D. Webber, dated June 19, 2020, at pp. 4-7 (pp. 4-7 of **Exhibit 12** to  
Sunny Decl.)

25 <sup>34</sup> E-mail from M. Watts, dated Oct. 1, 2020 (**Exhibit 13** to Sunny Decl.).

26 <sup>35</sup> Policy (pp. 7, 9 of **Exhibit 1** to Sunny Decl.).

1 Given the circumstances at the Lodge, according to the SEA, the “Snoqualmie Indian  
2 Tribe ... directed the temporary cessation of activities at the Lodge on September 30, 2020,” and  
3 the Lodge “reopened on October 8, 2020 . . . .”<sup>36</sup> Through its attorney, the SEA further alleged  
4 that limitations, or proclamations, by Washington’s Governor for indoor dining and other  
5 activities had impacted the Lodge.<sup>37</sup> AFM promptly acknowledged the newly reported loss.<sup>38</sup>  
6 And it sought additional information from the SEA.<sup>39</sup>

7 **D. AFM issued a \$100,000 payment to the SEA under the Policy’s business**  
8 **interruption coverage extension for “communicable disease.”**

9 After reviewing information that the SEA provided about the reported losses at the  
10 Casino, AFM informed the SEA that it would issue a payment under the Policy’s business  
11 interruption coverage extension for “communicable disease.”<sup>40</sup> That payment would total  
12 \$100,000<sup>41</sup>—the amount of the annual aggregate sub-limit for that coverage in the Policy.<sup>42</sup> In  
13 addition, AFM again explained to the SEA its positions on the key coverage issues, including  
14 that the presence of COVID-19 did not constitute physical loss or damage under the Policy and  
15 would trigger the Policy’s exclusion for contamination.<sup>43</sup>

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19 <sup>36</sup> Letter from R. Smith to D. Webber, dated Nov. 18, 2020 (p. 3 of **Exhibit 14** to Sunny Decl.).

20 <sup>37</sup> *Id.*

21 <sup>38</sup> E-mail from D. Webber to M. Watts, dated Oct. 2, 2020 (**Exhibit 15** to Sunny Decl.).

22 <sup>39</sup> Letter from D. Webber to R. Smith, dated Oct. 21, 2020, at p. 1 (p. 1 of **Exhibit 16** to Sunny  
Decl.).

23 <sup>40</sup> *Id.*

24 <sup>41</sup> *Id.*

25 <sup>42</sup> Policy (p. 11 of **Exhibit 1** to Sunny Decl.).

26 <sup>43</sup> Letter from D. Webber to R. Smith, dated Oct. 21, 2020 (pp. 1-4 of **Exhibit 16** to Sunny Decl.).

1 With respect to the additional coverage for “communicable disease” in the Policy, a  
2 \$50,000 deductible applies to it.<sup>44</sup> In reviewing the information that the SEA provided for its  
3 insurance claim, AFM did not find that this deductible was met for that coverage.<sup>45</sup> It, however,  
4 invited the SEA to provide more information for consideration.<sup>46</sup> To date, AFM has not received  
5 information to establish that SEA’s loss exceeds the applicable deductible.

6 **E. The SEA disagreed with AFM’s coverage determinations and filed this lawsuit with**  
7 **another named Plaintiff.**

8 The SEA disagreed with AFM’s coverage determinations. It wanted more than the  
9 distinct coverages available under the Policy for loss caused by a communicable disease.<sup>47</sup>

10 For instance, in writing to AFM, the SEA’s attorney asserted that an alleged “loss of  
11 functionality” for a property from a “closure order constitutes direct physical loss of or damage  
12 to property.”<sup>48</sup> That is, according to the SEA, more coverage than what AFM provided should  
13 follow from the Council’s “closure order” for the Casino.

14 Ultimately, the SEA filed this lawsuit with another named Plaintiff: Sacred Falls LLC,  
15 which allegedly owns, operates, and does business as the Lodge.<sup>49</sup> In the operative Amended  
16 Complaint, Plaintiffs raise a dispute over insurance coverage under the Policy. Based upon a  
17 non-binding, unpublished, and unpersuasive court order from another matter, they advance the  
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20 <sup>44</sup> Policy (p. 11 of **Exhibit 1** to Sunny Decl.).

21 <sup>45</sup> Letter from D. Webber to R. Smith, dated Jan. 27, 2021, at p. 1 (p. 1 of **Exhibit 17** to Sunny  
Decl.).

22 <sup>46</sup> *Id.*

23 <sup>47</sup> Letter from R. Smith to D. Webber, dated Nov. 16, 2020 (**Exhibit 18** to Sunny Decl.).

24 <sup>48</sup> *Id.* (p. 2 of **Exhibit 18** to Sunny Decl.); Letter from K. Huebner to OIC, dated March 10, 2021  
25 (**Exhibit 1** to Declaration of Daniel R. Benston in Support of Defendant’s Motion for Partial  
Summary Judgment (“Bentson Decl.”)).

26 <sup>49</sup> First Amended Complaint at ¶ 1.2.

1 theory that a “closure order[ ]” can generate physical loss or damage for triggering coverage.<sup>50</sup>  
2 And they argue that physical loss or damage existed under the Policy for which AFM allegedly  
3 owes benefits,<sup>51</sup> beyond what AFM already provided. In doing so, Plaintiffs ignore the vast  
4 majority of decisions addressing these issues in which the courts have reached conclusions  
5 contrary to Plaintiffs.<sup>52</sup>

#### 6 **IV. STATEMENT OF ISSUES**

7 **1. Physical Loss or Damage:** The Policy has coverages that require physical loss  
8 or physical damage. Physical damage requires actual damage. Physical loss requires that the  
9 property be physically lost; this does not mean detrimental economic impact or lost use of  
10 property. Can coverage requiring physical loss or damage exist because of the reported COVID-  
11 19 exposures at the Casino and Lodge, or because of orders or directives by the Council, the  
12 Tribe, or the Governor, which reportedly impacted Plaintiffs’ use of the properties? **No.**

13 **2. Contamination Exclusion:** The Policy has an exclusion for loss or damage from  
14 “[c]ontamination” and “any cost due to such contamination including the inability to use or  
15 occupy property or any cost of making property safe or suitable for use or occupancy.” The term  
16 “contamination” extends to “any condition of property due to the actual or suspected presence of  
17 any . . . pathogen or pathogenic organism, . . . virus, disease causing or illness causing agent . . .  
18 .” Plaintiffs seek coverage because of the reported COVID-19 exposures at the Casino and  
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20 <sup>50</sup> First Amended Complaint at ¶ 3.22 (relying on *Hill and Stout PLLC v. Mut. of Enumclaw Ins. Co.*,  
21 No. 20-2-07925-1 SEA, 2020 WL 6784271 (Wash. Super. Ct. Nov. 13, 2020); Letter from K.  
22 Huebner to OIC, dated March 10, 2021 (**Exhibit 1** to Bentson Decl.). *See also Nguyen v. Travelers*  
*Cas. Ins. Co. of Am.*, 2021 WL 2184878, at \*12 (W.D. Wash. May 28, 2021) (finding as  
unpersuasive the reasoning in *Hill and Stout*).

23 <sup>51</sup> First Amended Complaint at ¶ 5.2.

24 <sup>52</sup> *See, e.g., Glacial Cryotherapy LLC v. Evanston Ins. Co.*, 2021 WL 2223706 (W.D. Wash. June 2,  
25 2021), *appeal filed*, No. 21-35505 (9th Cir. Jun. 25, 2021); *Cadecus LLC v. Scottsdale Ins. Co.*, 2021  
26 WL 2206468 (W.D. Wash. June 1, 2021), *appeal filed*, No. 21-35506 (9th Cir. Jun. 25, 2021); *B&F*  
*Enters. Nw., LLC v. Amco Ins. Co.*, 2021 WL 2206469 (W.D. Wash. June 1, 2021), *appeal filed*, No.  
21-35501 (9th Cir. Jun. 25, 2021); *HT-Seattle Owner LLC v. Am. Guar. & Liab. Ins. Co.*, 2021 WL  
2206480 (W.D. Wash. June 1, 2021).

1 Lodge, and because of directives or orders issued regarding the COVID-19 virus. Does the  
2 contamination exclusion apply here? *Yes*.

3 3. **Loss of Use Exclusion:** The Policy includes an exclusion for “loss of use.”  
4 Absent physical loss or damage of the type insured, Plaintiffs seek coverage for a loss of use of  
5 the Casino and the Lodge. Does the loss of use exclusion apply here? *Yes*.

6 4. **Communicable Disease Coverages:** The Policy includes two distinct coverages  
7 for communicable disease. In contrast with other coverages, these communicable disease  
8 coverages do not require physical loss or damage. They are subject to their own annual  
9 aggregate sub-limit. Do the Policy’s language, structure, and distinct communicable disease  
10 coverages demonstrate that the sole source of coverage for the reported COVID-19 exposures are  
11 to be found only in those “communicable disease” coverages, subject to their terms? *Yes*.

## 12 **V. EVIDENCE RELIED UPON**

13 This motion is based on: the Declaration of Richard A. Sunny in Support of Defendants’  
14 Motion for Partial Summary Judgment, and the exhibits attached to the same; the Declaration of  
15 Daniel R. Bentson in Support of Defendants’ Motion for Partial Summary Judgment, and the  
16 exhibits attached to the same; the Declaration of Charles Gerba, Ph. D., and the exhibit attached  
17 to the same; and the materials already on file with the Court.

## 18 **VI. AUTHORITY & ARGUMENT**

19 An insured has the burden to prove that a loss falls within an insurance policy’s coverage  
20 grant.<sup>53</sup> If a party lacks the evidence to support a part of the case on which it has the burden, that  
21 warrants a summary judgment against them.<sup>54</sup> Likewise, if a plaintiff brings a claim based on an  
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24 <sup>53</sup> *Whitney Equip. Co., Inc. v. Travelers Cas. & Sur. Co. of Am.*, 431 F. Supp. 3d 1223, 1226 (W.D.  
Wash. 2020).

25 <sup>54</sup> *See id*; CR 56(e); *Guile v. Ballard Cmty. Hosp.*, 70 Wn. App. 18, 21, 851 P.2d 689, 691 (1993)  
26 (“[A] party moving for summary judgment can meet its burden by pointing out to the trial court that  
the nonmoving party lacks sufficient evidence to support its case.”).

1 incorrect legal theory and lacks a cognizable basis for its claim, that too warrants summary  
2 judgment.<sup>55</sup>

3 If the insured proves a loss falls within a policy’s coverage grant, then the insurer has the  
4 burden to show that policy language applies to exclude coverage.<sup>56</sup> That said, depending on the  
5 policy language and its meaning, an additional coverage or coverage extension for a particular  
6 loss may operate as an exception to a policy’s exclusion and may only permit coverage as  
7 stated.<sup>57</sup> The insured has the burden of proving that an exception to a policy exclusion applies.<sup>58</sup>

8 Determining coverage involves interpreting the insurance policy.<sup>59</sup> In doing that, the  
9 court must: consider the policy as a whole<sup>60</sup>; give effect to every clause,<sup>61</sup> without rendering  
10 language meaningless<sup>62</sup>; acknowledge the intended meaning shown by the policy’s structure<sup>63</sup>;  
11 enforce unambiguous policy language as written,<sup>64</sup> and give the policy language a reasonable  
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14 <sup>55</sup> See *Kilgore v. Shriners Hosps. For Child.*, 190 Wn. App. 429, 435–36, 360 P.3d 55, 59 (2015)  
15 (“[The party] does not have a cognizable legal claim . . . and summary judgment was appropriate.”);  
16 *U.S. ex rel. Yannacopoulos v. Gen. Dynamics*, 652 F.3d 818, 835 (7th Cir. 2011) (“Because  
17 Yannacopoulos' claim regarding the depot program rests on an incorrect interpretation of Article  
18 8.11, the claim fails as a matter of law.”).

19 <sup>56</sup> *Whitney*, 431 F. Supp. 3d at 1226.

20 <sup>57</sup> See *McDonald*, 119 Wn.2d at 734 (acknowledging structure as an “important objective source of  
21 meaning and intent”); *Munn*, 73 Wn. App. at 325, 869 P.2d at 101 (1994) (“An exclusionary clause is  
22 to be harmonized with coverage provisions . . .”).

23 <sup>58</sup> *MKB Constructors v. Am. Zurich Ins. Co.*, 49 F. Supp. 3d 814, 836 (W.D. Wash. 2014).

24 <sup>59</sup> *Servco Pac. Ins. v. Axis Ins.*, 129 F. Supp. 3d 1143, 1145 (W.D. Wash. 2015) (“The court examines  
25 the policy to determine whether, under the plain meaning of the contract, there is coverage.”).

26 <sup>60</sup> *Quadrant Corp. v. Am. States Ins. Co.*, 154 Wn. 2d 165, 171, 110 P.3d 733, 737 (2005).

<sup>61</sup> *Kitsap Cty. v. Allstate Ins. Co.*, 136 Wn. 2d 567, 575, 964 P.2d 1173, 1177 (1998).

<sup>62</sup> *Id.* at 591, 964 P.2d at 1185.

<sup>63</sup> See *McDonald*, 119 Wn. 2d at 734, 837 P.2d at 1005.

<sup>64</sup> *City of Bremerton v. Harbor Ins. Co.*, 92 Wn. App. 17, 22, 963 P.2d 194, 196–97 (1998).

1 interpretation, not a strained reading that extends coverage beyond what is fairly within its  
2 terms.<sup>65</sup>

3 Given these and related interpretive rules, as well as the relevant caselaw, coverage  
4 requiring physical loss or damage of the type insured does not follow from the presence of  
5 SARS-CoV-2 or directives or orders that closed or reduced the use of property during the  
6 COVID-19 pandemic. The Policy affords only limited coverage under the communicable  
7 disease provisions subject to their terms and conditions.

8 **A. Neither the Casino nor the Lodge suffered physical loss or damage.**

9 The Policy insures property “against ALL RISKS OF PHYSICAL LOSS OR DAMAGE,  
10 except as hereinafter excluded . . . .”<sup>66</sup> And it also includes specific coverages that likewise  
11 require physical loss or damage, such as: the business interruption coverage extension for civil or  
12 military authority, conditioned on “physical damage of the type insured” at certain locations;<sup>67</sup> or  
13 the business interruption coverage extensions for attraction property and ingress/egress,  
14 conditioned on “physical loss or damage of the type insured” to certain property.<sup>68</sup> That is, with  
15 the exception of the communicable disease coverages, all of the Policy’s other potentially  
16 applicable coverages require physical loss or damage.

17 Here, the Casino and the Lodge did not suffer physical loss or damage. The mere  
18 presence of SARS-CoV-2 at the Casino or the Lodge does not satisfy the physical-loss-or-  
19 damage requirement. And the orders or directives issued by the Council, the Tribe, and  
20 Washington’s Governor likewise did not cause physical loss or damage. Accordingly, with the  
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23 <sup>65</sup> *Morgan v. Prudential Ins. Co. of Am.*, 86 Wn. 2d 432, 434–35, 545 P.2d 1193, 1195 (1976).

24 <sup>66</sup> Policy (pp. 9, 20 of **Exhibit 1** to Sunny Decl.).

25 <sup>67</sup> Policy (p. 43 of **Exhibit 1** to Sunny Decl.).

26 <sup>68</sup> Policy (pp. 43, 46 of **Exhibit 1** to Sunny Decl.).

1 sole exception of the communicable disease provisions, the Policy does not provide coverage for  
2 Plaintiffs’ alleged losses.

3 **1. Under Washington law “physical loss or damage” requires that property**  
4 **sustain actual damage or be physically lost.**

5 Prior to the COVID-19 pandemic, Washington courts addressed the appropriate standard  
6 to evaluate whether an insured’s alleged loss constitutes physical loss or damage. In *Wolstein v.*  
7 *Yorkshire*, for example, a Washington Court of Appeals interpreted a nearly identical phrase—  
8 “physical loss of or damage to” property.<sup>69</sup> There, the Washington court held that “the insured  
9 object must sustain *actual damage*,”<sup>70</sup> or the insured object must “be *physically lost*.”<sup>71</sup> In  
10 reaching this decision, the *Wolstein* court cited with approval a case from the Fifth Circuit, which  
11 explained that “‘physical loss or damage’ strongly implies that there was an initial satisfactory  
12 state that was changed by some external event into an unsatisfactory state”<sup>72</sup>—that is, a distinct,  
13 demonstrable, physical alteration of the property.<sup>73</sup>

14 Likewise, in *Fujii v. State Farm Fire & Cas. Co.*, the Washington Court of Appeals  
15 addressed whether an “accidental direct physical loss” occurred at a dwelling.<sup>74</sup> It found that this  
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17 <sup>69</sup> *Wolstein v. Yorkshire Ins. Co.*, 97 Wn. App. 201, 211-12, 985 P.2d 400, 407 (1999).

18 <sup>70</sup> *Id.* at 212, 985 P.2d at 407 (emphasis added).

19 <sup>71</sup> *Id.* (emphasis added).

20 <sup>72</sup> *Wolstein*, 97 Wn. App. at 213, 985 P.2d at 408 (quoting *Trinity Indus., Inc. v. Ins. Co. of North*  
21 *Am.*, 916 F.2d 267, 270-71 (5th Cir.1990)).

22 <sup>73</sup> See *Terry Black's Barbecue, LLC v. State Auto. Mut. Ins. Co.*, 2020 WL 7351246, at \*5 (W.D.  
23 Tex. Dec. 14, 2020) (relying, in part, on *Trinity* in stating the requirement of a distinct, demonstrable  
24 physical alteration); *Nguyen v. Travelers Cas. Ins. Co. of Am.*, 2021 WL 2184878, at \*10-11 (W.D.  
25 Wash. May 28, 2021) (“The requirement that the loss be “physical,” given the ordinary definition of  
26 that term, is widely held to exclude alleged losses that are intangible or incorporeal and, thereby, to  
preclude any claim against the property insurer when the insured merely suffers a detrimental  
economic impact unaccompanied by a distinct, demonstrable, physical alteration of the property.”  
(quoting *Generally*; “Physical” loss or damage, 10A Couch on Ins. § 148:46 (3d ed. 2020)).

<sup>74</sup> *Fujii v. State Farm Fire & Cas. Co.*, 71 Wn. App. 248, 250–51, 857 P.2d 1051, 1052 (1993).



1 could not take place absent “*discernible* physical damage . . . .”<sup>75</sup>

2       The clear implications of *Wolstein* and *Fuji* have been evidenced by the federal district  
3 court sitting in Washington, which has addressed several COVID-19 related claims. In *Nguyen*  
4 *v. Travelers*,<sup>76</sup> the seminal decision addressing COVID-19 related claims brought against  
5 insurers in Washington—including claims brought against AFM—the court found *Fujii* and  
6 *Wolstein* to be “useful indicators” on how the Washington Supreme Court would read “the term  
7 ‘physical loss.’”<sup>77</sup> According to the court, the Washington Supreme Court would interpret that  
8 phrase as requiring a “dispossession of property.”<sup>78</sup> In reaching this determination, the court  
9 looked to Washington case law, dictionary definitions, and persuasive authorities in finding that  
10 there must be an “inability to physically own or manipulate the property, such as theft or total  
11 destruction,” given an “alteration to its physical status.”<sup>79</sup> The court further found that the  
12 presence of COVID-19 did not trigger the physical-loss-or-damage language in insurance  
13 policies that AFM issued, which are virtually identical to the Policy at issue here.<sup>80</sup>

14       Since *Nguyen*, other federal district court orders have issued addressing COVID-19  
15 related insurance claims. In each case, the U.S. District Court for the Western District of  
16 Washington has consistently found that alleged losses caused by COVID-19 do not satisfy the  
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21 <sup>75</sup> *Id.* (emphasis added).

22 <sup>76</sup> *Nguyen v. Travelers Cas. Ins. Co. of Am.*, 2021 WL 2184878 (W.D. Wash. May 28, 2021).

23 <sup>77</sup> *Id.* at \*13.

24 <sup>78</sup> *Id.*

25 <sup>79</sup> *Id.* at \*10-11.

26 <sup>80</sup> *Nguyen*, 2021 WL 2184878, at \*20.

1 physical-loss-or-damage-requirement under Washington law.<sup>81</sup>

2           **2. The reported COVID-19 exposures did not cause physical loss or damage to**  
3           **covered property.**

4           Like other viruses, the virus that causes COVID-19, namely SARS-CoV-2, cannot be  
5 detected by any of our human senses unaided by specialized equipment.<sup>82</sup> In any building  
6 inhabited by humans, there will be numerous viruses within that building.<sup>83</sup> Viruses, including  
7 SARS-CoV-2, harm only living organisms.<sup>84</sup> Outside of a human or animal host cell, SARS-  
8 CoV-2 cannot grow or reproduce.<sup>85</sup> Once the virus is expelled, it will die off between a few  
9 seconds to several hours later, depending on numerous factors, including when cleaning  
10 occurs.<sup>86</sup> Indeed, common disinfectants easily neutralize the virus.<sup>87</sup>

11           Not surprisingly, then, courts have recognized that SARS-CoV-2 hurts people, not  
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18 <sup>81</sup> See, e.g., *HT-Seattle Owner LLC v. Am. Guarantee & Liab. Ins. Co.*, 2021 WL 2206480, at \*1  
19 (W.D. Wash. June 1, 2021); *Cadeceus LLC v. Scottsdale Ins. Co.*, 2021 WL 2206468, at \*1 (W.D.  
20 Wash. June 1, 2021), *appeal filed*, No. 21-35506 (9th Cir. Jun 25, 2021); *Seven, LLC v. ACE Prop. &*  
*Cas. Ins. Co.*, 2021 WL 2711655, at \*1 (W.D. Wash. July 1, 2021), *appeal filed*, No. 21-35588 (9th  
Cir. Jul. 22, 2021).

21 <sup>82</sup> Declaration of Charles Gerba, Ph. D. at ¶ 8.

22 <sup>83</sup> *Id.* at ¶ 7.

23 <sup>84</sup> *Id.* at ¶ 4, 5.

24 <sup>85</sup> *Id.* at ¶ 5.

25 <sup>86</sup> *Id.* at ¶ 6.

26 <sup>87</sup> *Id.*

1 property.<sup>88</sup> That is, SARS-CoV-2 does not physically damage property.<sup>89</sup> So, assuming the  
2 presence of SARS-CoV-2 at the Casino, Lodge, or any location required for coverage, it cannot  
3 cause physical loss or damage at those locations. Thus, its presence does not trigger any  
4 coverages under the Policy requiring physical loss or damage.

5 **3. Directives or orders that temporarily closed or altered the use of property do**  
6 **not cause physical loss or damage to covered property.**

7 “Physical” modifies “loss” and “damage,” requiring “physicality” of both the loss and the  
8 damage. A mere loss of use, then, does not constitute physical loss or damage, nor does an  
9 economic loss.<sup>90</sup> Consistent with these principles, in addressing disputes regarding insurance

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11 <sup>88</sup> See, e.g., *Uncork & Create LLC v. The Cincinnati Ins. Co.*, 2020 WL 6436948, at \*5 (S.D. WV  
12 Nov. 2, 2020) (“[T]he pandemic impacts human health and human behavior, not physical  
13 structures.”); *Nguyen v. Travelers Cas. Ins. Co. of Am.*, 2021 WL 2184878, at \*10 (W.D. Wash. May  
14 28, 2021).

15 <sup>89</sup> See *Terry Black’s Barbecue, LLC*, 2020 WL 7351246, at \*7 (“The virus does not threaten the  
16 structures covered by property insurance policies, and can be removed from surfaces with routine  
17 cleaning and disinfectant.”); *Edison Kennedy, LLC v. Scottsdale Ins. Co.*, 2021 WL 22314, at \*7  
18 (M.D. Fla. Jan. 4, 2021) (“[T]he necessity of cleaning the property to remove particles resting on the  
19 property does not mean the property suffered direct physical damage or loss.”); *The Woolworth LLC*  
20 *v. The Cincinnati Ins. Co.*, 2021 WL 1424356, at \*4 (N.D. Ala. Apr. 15, 2021) (“A virus can simply  
21 be wiped off the surface with disinfectant, so there is no ‘physical damage,’ no ‘physical loss,’  
22 . . . .”), *appeal filed*, No. 21-11847 (11th Cir. May 28, 2021); *SAS Int’l, Ltd. v. Gen. Star Indem. Co.*,  
23 2021 WL 664043, at \*4 (D. Mass. Feb. 19, 2021) (“COVID-19 . . . does not endure beyond a brief  
24 passage of time or a proper cleaning . . . .”), *appeal filed*, 2021 WL 664043 (1st Cir. Mar. 24, 2021).

25 <sup>90</sup> See *Nguyen*, 2021 WL 2184878, at \*10-11 (“The requirement that the loss be “physical,” given  
26 the ordinary definition of that term, is widely held to exclude alleged losses that are intangible or  
incorporeal and, thereby, to preclude any claim against the property insurer when the insured merely  
suffers a detrimental economic impact unaccompanied by a distinct, demonstrable, physical  
alteration of the property.” (quoting *Generally; “Physical” loss or damage*, 10A Couch on Ins. §  
148:46 (3d ed. 2020); *id.* at \*11 (“[I]n arguing that direct physical loss covers loss of income in these  
circumstances, Plaintiffs conflate *physical* loss with non-physical loss of use. Detrimental economic  
impact, however, does not trigger coverage under the property insurance here at issue.” (emphasis in  
original)); *Wolstein*, 97 Wn. App. at 212, 985 P.2d at 407 (“[F]inancial difficulties, while prolonging  
completion of the Lady Iris and increasing the costs of her completion, did not inflict physical  
damage to the Lady Iris or result in the physical loss of the yacht.”). See also *Out W. Rest. Grp. Inc.*  
*v. Affiliated FM Ins. Co.*, 2021 WL 1056627, at \*4 (N.D. Cal. Mar. 19, 2021) (“[T]emporary 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.”), *appeal filed*, No. 21-15585 (9<sup>th</sup> Circ. April 01, 2021); *Islands*  
*Restaurants, LP v. Affiliated FM Ins. Co.*, 2021 WL 1238872, at \*4–5 (S.D. Cal. Apr. 2, 2021) (the  
temporary lost use of dining facilities because of on-site dining restrictions imposed by COVID-19

1 coverage and COVID-19, “a majority of courts to address the issue . . . have found that COVID-  
2 19 and governmental orders closing businesses to slow the spread of the virus do not cause  
3 physical damage or physical loss . . . .”<sup>91</sup> Although such orders may temporarily impact the use  
4 of one’s property, they do not physically alter the property and no physical loss or damage  
5 results.<sup>92</sup>

6 Here, Plaintiffs try to open the doors to coverages under the Policy that require physical  
7 loss or damage by advancing the theory that physical loss or damage can result from a  
8 governmental order that temporarily alters the use of an insured’s property.<sup>93</sup> They seek  
9 coverage for alleged losses stemming from the temporary closure or altered use of the Casino  
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11 related closures did not constitute physical loss or damage), *appeal filed*, No. 21-55409 (9<sup>th</sup> Cir.  
12 April 27, 2021); *Cafe Int’l Holding Co. LLC, v. Westchester Surplus Lines Ins. Co.*, 2021 WL  
13 1803805, at \*1 (S.D. Fla. May 4, 2021) (“[A] decline in restaurant revenue or profits is merely an  
14 economic loss, not a loss covered by the policy.”), *appeal filed*, No. 21-11930 (11<sup>th</sup> Cir. Jun 04,  
15 2021); *Terry Black’s*, 2020 WL 7351246, at \*6 n.9 (“Most courts that have addressed this issue have  
16 found that loss of use does not constitute direct physical loss”); *Digital Age Mktg. Grp., Inc. v.*  
*Sentinel Ins. Co. Ltd.*, 2021 WL 80535, at (S.D. Fla. Jan. 8, 2021) (indicating that mere economic  
17 losses do not demonstrate “direct physical loss”); *Family Tacos, LLC v. Auto Owners Ins. Co.*, 2021  
18 WL 615307, at \*6 (N.D. Ohio Feb. 17, 2021) (“‘[P]hysical loss or damage’ does not include mere  
19 loss of use.”), *appeal filed*, No. 21-3224 (6th Cir. Mar. 09, 2021).

20 <sup>91</sup> *Uncork*, 2020 WL 6436948, at \*4. *See also Pappy’s Barber Shops, Inc. v. Farmers Grp., Inc.*, 487  
21 F.Supp.3d 937, 943 (S.D. Cal. 2020) (“Most courts have rejected these claims, finding that the  
22 government orders did not constitute direct physical loss or damage to property.”); *Mohawk Gaming*  
23 *Enterprises, LLC v. Affiliated FM Ins. Co.*, 2021 WL 1419782, at \*6 (N.D.N.Y. Apr. 15, 2021)  
24 (“[T]he great majority of courts that have addressed this issue of insurance coverage for business  
25 losses sustained as a result of COVID-19 restrictions have held that a complaint which only alleges  
26 loss of use of the insured property fails to satisfy the requirement for physical damage or loss.”  
(internal quotations and citation omitted)). *See also Islands*, 2021 WL 1238872, at \*3-5 (rejecting  
theory that partial inability to use restaurants because of restrictions imposed by “COVID-19 related  
orders” is “physical loss or damage”), *appeal filed* No. 21-55409 (9<sup>th</sup> Cir. Apr. 27, 2021); *MGA*  
*Ent., Inc. v. Affiliated FM Ins. Co.*, 2021 WL 2840456, at \*2 (C.D. Cal. July 2, 2021) (dismissing  
action of plaintiff that “contend[ed] that the ordinary meaning of ‘physical loss’ encompasses a  
business owner’s loss of the full range of rights and advantages of using or accessing its business  
property because of COVID-related government restrictions”).

<sup>92</sup> *See Nguyen*, 2021 WL 2184878, \*11. *See also Islands*, 2021 WL 1238872, at \*3-5; *MGA*, 2021  
WL 2840456, at \*2.

<sup>93</sup> *See, e.g.*, Letter from K. Huebner to OIC, dated March 10, 2021 (**Exhibit 1** to Benston Decl.); First  
Amended Complaint at ¶¶ 3.13-3.25.

1 resulting from resolutions issued by the Council, an alleged temporary cessation of activities at  
2 the Lodge directed by the Tribe, and proclamations by Washington’s Governor that allegedly  
3 impacted the Lodge.<sup>94</sup> But most courts, including *Nguyen*, have rejected such theories based  
4 upon alleged physical loss or damage purportedly caused by COVID-19 safety orders and the  
5 like.<sup>95</sup> Rightly so. To read “physical loss or damage” or similar phrases as extending to the  
6 altered use of property from a governmental order or directive would be an unreasonable stretch  
7 of coverage, without any “manageable bounds.”<sup>96</sup> Such an expansion is contrary to the Policy’s  
8 plain language and Washington law.<sup>97</sup>

9       Simply put, no directive or order—be it from the Council, the Tribe, or the Governor—  
10 caused physical loss or damage here. Plaintiffs, then, are not entitled to coverages under the  
11 Policy that require physical loss or damage.

12 **B. With the sole exception of the Policy’s limited communicable disease coverages, the**  
13 **contamination exclusion bars coverage for any cost due to SARS-CoV-2.**

14       Even if the presence of SARS-CoV-2 or governmental orders following the pandemic’s  
15 start could cause physical loss or damage, the Policy has a contamination exclusion.<sup>98</sup> Under the

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16 <sup>94</sup> See, e.g., First Amended Complaint at ¶¶ 3.13-3.25; Letter from R. Smith to D. Webber, dated  
17 Nov. 18, 2020 (p. 3 of **Exhibit 14** to Sunny Decl.); Letter from K. Huebner to OIC, dated March 10,  
18 2021 (**Exhibit 1** to Benston Decl.).

19 <sup>95</sup> *Nguyen*, 2021 WL 2184878, at \*11 (“As numerous courts have held, economic business  
20 impairments caused by COVID-19 safety orders do not fall within the scope of coverage. . . . [T]he  
21 property did not change. The world around it did. (internal quotations and citations omitted)

22 <sup>96</sup> See *Plan Check Downtown III, LLC v. AmGuard Ins. Co.*, 2020 WL 5742712, at \*6 (C.D. Cal.  
23 Sept. 10, 2020) (“[I]t would mean that potentially any regulation that limits a business’s operations  
24 would trigger coverage.”).

25 <sup>97</sup> See *Morgan*, 86 Wn. 2d ta 434, 545 P.2d at 1195 (“[An insurance contract] should not be given a  
26 strained or forced construction which would lead to an extension or restriction of the policy beyond  
what is fairly within its terms . . .”).

27 <sup>98</sup> *Nguyen*, 2021 WL 2184878, at \*20 n. 32 (“(1) COVID-19 does not trigger coverage because of a  
28 lack of physical loss or damage; (2) even if it did, the Contamination exclusion would exclude  
29 coverage . . .”). See also *id.* at \*15-16 (“COVID-19 caused the Governor to issue the  
30 Proclamations, which forced Plaintiffs to curtail their business operations. Under such circumstances,  
the exclusion barring coverage resulting from the virus applies.”).

1 Policy, the term “contamination” extends to “any condition of property due to the actual or  
2 suspected presence of any . . . pathogen or pathogenic organism, . . . virus, disease causing or  
3 illness causing agent”; clearly, this extends to SARS-CoV-2.<sup>99</sup> And the contamination exclusion  
4 defeats coverage for loss or damage caused by “[c]ontamination” and “any cost due to such  
5 contamination including the inability to use or occupy property or any cost of making property  
6 safe or suitable for use or occupancy. . . .”<sup>100</sup>

7 The overwhelming majority of courts which have examined exclusions like this one have  
8 concluded that they prohibit recovery of losses associated with the COVID-19 virus and related  
9 government orders.<sup>101</sup> These courts include *Nguyen*, which found that the contamination  
10 exclusion and similar exclusions for viruses applied,<sup>102</sup> explaining that an “average insured  
11 would *not* be surprised to learn that a Virus exclusion excludes coverage based on measures  
12 taken to prevent a pandemic caused by a virus.”<sup>103</sup>

13 Here, Plaintiffs seek coverage because of reported COVID-19 exposures for the Casino  
14 and Lodge, and because of directives or governmental orders issued during the pandemic, which  
15 allegedly impacted the use of their properties. But their alleged losses stemming from the  
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17 <sup>99</sup> Policy (p. 61 of **Exhibit 1** of Sunny Decl.).

18 <sup>100</sup> Policy (p. 72-73 of **Exhibit 1** of Sunny Decl.).

19 <sup>101</sup> See, e.g., *West Coast Hotel Mgmt. v. Berkshire Hathaway Guard Ins. Cos.*, 2020 WL 6440037, at  
20 \*5 (C.D. Cal. Oct. 27, 2020) (finding exclusion for “loss or damage caused directly or indirectly by  
21 ... [a]ny virus . . . that induces or is capable of inducing physical distress, illness or disease” applied  
22 to insured’s alleged losses because of the COVID-19 outbreak and related governmental orders);  
23 *Manhattan Partners, LLC v. Am. Guarantee & Liab. Ins. Co.*, 2021 WL 1016113, n. 3 (D.N.J. Mar.  
24 17, 2021) (“A final bar to Plaintiffs’ claims can be found in the Policy’s Contamination exclusion,  
which clearly and explicitly excludes coverage for damage, loss or expense arising from a virus.”),  
*appeal filed*, No. 21-2089 (3rd Cir. Jun. 7, 2021); *Ralph Lauren Corp. v. Factory Mut. Ins. Co.*, 2021  
25 WL 1904739, at \*4 (D.N.J. May 12, 2021) (“[E]ven if Plaintiff did plead the existence of actual or  
26 imminent ‘physical loss or damage,’ its claim fails under the Contamination Exclusion.”), *appeal*  
*filed*, No. 21-2008 (3rd Cir. May 26, 2021), *appeal filed* No. 21-2008 (3rd Cir. May 26, 2021).

<sup>102</sup> *Nguyen*, 2021 WL 2184878, at \*15–16, \* 20 & n. 32.

<sup>103</sup> *Id.* at \*15–16, \* 20 & n. 32.

1 COVID-19 virus trigger the contamination exclusion and, thus, damage caused by contamination  
2 is not “of the type insured” under the Policy.<sup>104</sup> So, even if SARS-CoV-2 could cause physical  
3 loss or damage, the contamination exclusion still precludes any coverage that requires physical  
4 loss or damage “of the type insured”<sup>105</sup>—such as “Business Interruption Coverage,”<sup>106</sup> or the  
5 business interruption coverage extension for “Civil or Military Authority.”<sup>107</sup>

6 **C. The loss-of-use exclusion applies here.**

7 The Policy also includes this loss of use exclusion, quoted in part below:

8 **GROUP I** This policy excludes loss or damage arising  
9 out of:

10 . . . .

11 **6. Loss of market; loss of use; . . . .**<sup>108</sup>

12 The loss of use exclusion precludes coverage for the lost use of property, which is what Plaintiffs  
13 seek coverage for—albeit they erroneously equate lost use with physical loss or damage.<sup>109</sup>  
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16 <sup>104</sup> *See id.*

17 <sup>105</sup> *See id.*; *see also J.L. French Auto. Castings, Inc. v. Factory Mut. Ins. Co.*, 2003 WL 21730127, at  
18 \*2-3 (N.D. Ill. July 23, 2003) (in determining whether “physical loss or damage of the type insured”  
had occurred, considering exclusion).

19 <sup>106</sup> Policy (p. 38 of **Exhibit 1** of Sunny Decl.) (“This Policy insures Business Interruption loss, as  
20 provided in the Business Interruption Coverage, as a direct result of physical loss or damage of the  
type insured . . . .”).

21 <sup>107</sup> Policy (p. 43 of **Exhibit 1** of Sunny Decl.) (“This Policy covers the Business Interruption  
22 Coverage loss incurred by the Insured during the Period of Liability if an order of civil or military  
23 authority prohibits access to a location provided such order is the direct result of physical damage of  
the type insured . . . .”).

24 <sup>108</sup> Policy (p. 72 of **Exhibit 1** of Sunny Decl.).

25 <sup>109</sup> *See, e.g.,* First Amended Complaint at ¶¶ 3.13-3.25. *See also Ballas Nails & Spa, LLC v.*  
26 *Travelers Cas. Ins. Co. of Am.*, 2021 WL 37984, at \*4 (E.D. Mo. Jan. 5, 2021) (“[C]onstruing the  
policy’s requirement of ‘direct physical loss or damage’ to include the mere loss of use of insured  
property with nothing more would negate the ‘loss of use’ exclusion.”).

1 **D. The Policy’s communicable disease coverages provide distinct and limited coverages**  
2 **for COVID-19-related losses—subject to its terms. they are sole source of recovery**  
3 **for the COVID-19 exposures at the Lodge and Casino.**

4 The Policy affords distinct and limited grants of coverage for communicable disease.  
5 They appear in sections entitled “ADDITIONAL COVERAGES” and “BUSINESS  
6 INTERRUPTION COVERAGE EXTENSIONS.” Specifically, the “ADDITIONAL  
7 COVERAGES” section of the Policy has a coverage for the actual presence of a communicable  
8 disease and impaired access to an insured location.<sup>110</sup> And the “BUSINESS INTERRUPTION  
9 COVERAGE EXTENSIONS” has an extension of coverage for “Communicable Disease –  
10 Business Interruption” that “covers the Business Interruption Coverage loss incurred by the  
11 Insured during the Period of Liability at such **described location** with such presence of  
12 **communicable disease.**”<sup>111</sup> The Policy, in turn, defines communicable disease as a “disease  
13 which is . . . [t]ransmissible from human to human . . . .”<sup>112</sup>

14 These communicable disease coverages are demonstrably different from many other  
15 coverages in the Policy; they require the presence of a communicable disease at an insured  
16 location, not physical loss or damage.<sup>113</sup> And they are meant to be an exception to the above-  
17 stated exclusions.<sup>114</sup> Moreover, these two coverages are each subject to a \$100,000 annual  
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21 <sup>110</sup> Policy (p. 26 of **Exhibit 1** of Sunny Decl.).

22 <sup>111</sup> Policy (p. 44 of **Exhibit 1** of Sunny Decl.).

23 <sup>112</sup> Policy (p. 61 of **Exhibit 1** of Sunny Decl.).

24 <sup>113</sup> *Nguyen v. Travelers Cas. Ins. Co. of Am.*, 2021 WL 2184878, at \*18 & n. 32 (W.D. Wash. May  
25 28, 2021) (“[T]he Communicable Disease Provisions do not contain a physical loss trigger . . . .”);

26 <sup>114</sup> *Nguyen*, 2021 WL 2184878, at \*20 n. 32 (“[T]he Communicable Disease provisions are meant as  
an exception . . . .”).



1 aggregate sub-limit each, which is the “maximum amount payable during any policy year.”<sup>115</sup>

2 Thus, regardless of whether the communicable disease was present at one or more insured  
3 locations, the max that can be recovered is \$100,000 under each coverage.<sup>116</sup>

4 Here, absent physical loss or damage of the type insured, the sole source of potential  
5 coverage for the reported losses associated with the reported COVID-19 exposures may be found  
6 in the communicable disease coverages, subject to their terms. Accordingly, AFM paid  
7 \$100,000 to the SEA under the Policy’s business interruption coverage extension for  
8 “communicable disease.”<sup>117</sup>

9 As to the additional coverage for “communicable disease” in the Policy, a \$50,000  
10 deductible applies to it.<sup>118</sup> In reviewing the information that the SEA provided for its insurance  
11 claim, AFM did not find that this deductible was met for that coverage.<sup>119</sup> It, however, invited  
12 the SEA to provide more information for consideration.<sup>120</sup> At this time, the information shared  
13 to date does not satisfy the deductible.

## 14 **VII. CONCLUSION**

15 In this lawsuit, Plaintiffs seek to recover benefits beyond what the Policy, the law, and  
16 the evidence permit. Accordingly, AFM respectfully requests that the Court grant this Motion in  
17 its entirety and award summary judgment against Plaintiffs’ breach-of-contract and declaratory-relief  
18 claims.

19  
20  
21 <sup>115</sup> Policy (p. 60 of **Exhibit 1** of Sunny Decl.).

22 <sup>116</sup> *Nguyen*, 2021 WL 2184878, at \*20–21.

23 <sup>117</sup> Letter from D. Webber to R. Smith, dated Oct. 21, 2020 (p. 1 of **Exhibit 16** to Sunny Decl.).

24 <sup>118</sup> Policy (p. 11 of **Exhibit 1** to Sunny Decl.).

25 <sup>119</sup> Letter from D. Webber to R. Smith, dated Jan. 27, 2021, at p. 1 (p. 1 of **Exhibit 17** to Sunny  
Decl.).

26 <sup>120</sup> *Id.*

1 DATED: July 30, 2021

2 I certify that this memorandum contains 8,285  
3 words, in compliance with the Local Civil Rules.

4  
5 BULLIVANT HOUSER BAILEY PC

6  
7 By s/ Daniel R. Bentson

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1 **CERTIFICATE OF SERVICE**

2 The undersigned certifies that on July 30, 2021, I caused to be served the foregoing  
3 on the following counsel of record via mandatory electronic service through the King County  
4 Superior Court Clerk's eFiling application pursuant to LGR 30:  
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13 I declare under penalty of perjury under the laws of the state of Washington that the  
14 foregoing is true and correct.  
15

16 s/ Genevieve Schmidt  
17 Genevieve Schmidt, Legal Assistant

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