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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

TREASURE ISLAND, LLC, *Plaintiff*, vs. AFFILIATED FM INSURANCE COMPANY, *Defendant*.	Case No.: 2:20-cv-00965-JCM-EJY **PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS** **ORAL ARGUMENT REQUESTED**

Nearly six months after Treasure Island, LLC ("Treasure Island") filed its complaint and two months from the scheduled close of discovery, Defendant Affiliated FM Insurance Co. ("AFM") moves to *partially* dismiss this case under Fed. R. Civ. P. 12(c). AFM does so in a memorandum that itself reveals fundamental misunderstandings of (1) Treasure Island's pleading burdens under Fed. R. Civ. p. 8(a), (2) the Complaint's well-pled facts, (3) the terms of the insurance policies at issue, and (4) the law governing interpretation of those provisions.

Treasure Island has more than adequately alleged that the losses it suffered are covered under the AFM Policy. Treasure Island specifically alleged that COVID-19 causes "physical loss or damage" to property because it physically transforms the air and surfaces into dangerous transmission mechanism for the disease, requiring "cleanup, removal and disposal." AFM disagrees with those facts, but they control for purposes of AFM's motion. When those facts are

accepted as true—as they must be under Rule 12(c)—AFM's motion must fail. The Court need go no further than this.

AFM tries to obfuscate matters by making three overarching arguments. Two of those arguments rely on exclusions—a Contamination exclusion and a so-called loss of use exclusion. Neither of these applies. The Contamination exclusion either does not apply or is fundamentally inconsistent with the coverage that AFM granted for communicable diseases. The so-called loss of use exclusion, as AFM construes it, would eviscerate the very purpose of business-interruption coverage and impermissibly make that coverage illusory. AFM drafted these provisions and must face the consequences of having done so poorly. To succeed on this motion, AFM must prove that its construction is not just reasonable but the ***only*** reasonable interpretation of these provisions, and it has not even tried to meet that burden because it cannot. AFM's third overarching argument is that Treasure Island suffered no "physical loss or damage" to its property. Here, AFM ignores its own prior argument—an admission—that loss of functional use *alone* constitutes physical loss or damage and the wide body of law holding that a policyholder can suffer physical loss or damage even where the impact is not visible to the naked eye.

Throughout its brief, AFM also employs a ruse, representing that denial of coverage here is counselled by what it calls the "overwhelming majority" of courts that have considered the issue in the context of COVID-19. This is false. None of the cases that AFM cites is applicable. No court has faced a Rule 12(c) or Rule 12(b)(6) motion under facts as alleged in the Complaint. No court has attempted to wrestle with conflicting provisions of the type in the Policy that AFM issued to Treasure Island. This case presents facts and policy language materially different from any other case before today. The Policy does not contain a virus exclusion as present in many other cases. The Policy does contain communicable-disease coverage, absent in many other cases.

1 This case should be decided on its own merits. AFM's motion should be denied.

2 **I. STATEMENT OF FACTS**

3 The following facts, as alleged in the Complaint, are taken as true under Rule 12(c).

4 **A. Treasure Island's Claim**

5 Treasure Island is a sprawling, 2.1 million square-foot casino and resort on 20 acres of
6 land. ECF 1 at ¶ 8. It has more than 2,000 gaming attractions and 3,000 rooms and employs 2,000
7 people. *Id*. On an average day, more than 7,000 people visit Treasure Island. *Id*. During the period
8 January 1 through March 18, 2020, Treasure Island had more than 329,000 registered guests from
9 all over the world. *Id.* at ¶34.
10
11 COVID-19 is a deadly communicable disease that has become a world-wide pandemic. *Id.*
12 at ¶¶ 16-17. It has caused physical loss and damage to Treasure Island's property and other
13 property, causing Treasure Island to incur more than $40 million in covered loss. *Id.* at ¶¶ 15, 20-
14 22, 33-34, 45, 50, 52, 54, 56-57. Treasure Island purchased an insurance policy ("Policy") from
15 AFM, as described below, and sought coverage from AFM. Sensing significant financial exposure
16 to Treasure Island and its other similarly damaged policyholders, AFM devised a scheme to
17 systematically avoid the most substantial portions of its contractual indemnity obligations by
18 issuing blanket denials of coverage. *Id.* at ¶¶ 97-123.
19
20 Treasure Island brought this lawsuit to enforce the Policy that AFM wrote and issued and
21 to recover what it is rightfully due. *Id.* at ¶¶ 47, 134, 144, 154. These amounts include lost revenue
22 from Treasure Island's closure, extraordinary expenses including personal protective equipment
23 purchased for employees and guests, and engineering and administrative controls to limit the
24 physical loss and damage caused by COVID-19. *Id.* at ¶¶ 52, 56-57. These amounts also include
25 losses due to damage to other property that has adversely affected Treasure Island's operations.
26 *Id.* at ¶¶ 43, 45-46.
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B. The Policy

The Policy broadly covers "ALL RISKS OF PHYSICAL LOSS OR DAMAGE except as [] excluded." ECF 2-1 at p. 17. COVID-19 causes "physical loss or damage" to property because it physically transforms the air and surfaces into dangerous transmission mechanism for the disease, requiring "cleanup, removal and disposal." ECF 1 at ¶¶ 20-22, 45. Two provisions expressly recognize that communicable diseases physically transform air and surfaces into dangerous instrumentalities (and there is no question that COVID-19 is a communicable disease, as defined in the Policy):[1]

- "Communicable Disease – Property Damage" expressly covers the physical removal of communicable disease when present at the insured location. ECF 2-1 at p. 23. The sublimit for this coverage is $100,000. *Id.* at p. 6.
- "Communicable Disease – Business Interruption" covers business interruption losses incurred while communicable disease is being removed pursuant to the Communicable Disease – Property Damage coverage. *Id.* at p. 41. This coverage is subject to a separate $100,000 sublimit. *Id.* at p. 7.

Critically, however, nowhere does the Policy say that these two "Communicable Disease" coverages are the only coverages applicable to physical loss or damage caused by communicable disease.

Once either Communicable Disease coverage is triggered by physical loss or damage caused by communicable disease, other coverages are also implicated by the Policy's plain terms. For instance, the Policy's Business Interruption coverage is triggered when Treasure Island's operations are disrupted by "physical loss or damage of the type insured." *Id.* at p. 35. This coverage provides up to $327 million for Treasure Island's choice of either its Gross Earnings

[1] The Policy defines "communicable disease" to mean in pertinent part, a disease that is "transmissible from human to human by direct or indirect contact with an affected individual or the individual's discharges …." ECF 2-1 at p. 58. COVID-19 squarely fits this definition.

1 loss or Gross Profits loss."[2] *Id.* at p. 63. Because "communicable disease" is a "loss of the type
2 insured," physical loss or damage caused by communicable disease triggers the Business
3 Interruption coverage. *Id.* at pp. 23, 41.
4 No exclusion applies to Treasure Island's claimed loss. Neither the Contamination
5 exclusion nor the so-called loss of use exclusion applies to communicable disease, for the reasons
6 discussed below. To the extent that any exclusion does apply, that exclusion is unenforceable.
7 ECF 1 at ¶ 68.
8
9 **C. AFM's Bad Faith Claims Handling**
10 Even before Treasure Island submitted its Claim, AFM decided it would deny coverage
11 except for a mere fraction of any sustained loss. *Id.* at ¶¶ 97-123. Treasure Island notified AFM
12 of its Claim on March 19, 2020. *Id.* at ¶ 82. Consistent with AFM's preconceived scheme, AFM's
13 adjuster responded aggressively, shoe-horning Treasure Island's claim into the communicable
14 disease coverages that have severely reduced sub-limits. *Id.* at ¶¶ 112-114. AFM's adjuster used
15 self-serving letters that misrepresented the facts reported by Treasure Island, forcing Treasure
16 Island to correct the misleading record that AFM tried to create. *Id.* at ¶¶ 84-95. Specifically,
17 AFM's adjuster ignored Treasure Island's report that COVID-19 and the resulting governmental
18 orders caused "physical loss" and that COVID-19 in the air and on surfaces caused "damage" to
19 property. *Id.* at ¶¶ 85, 95.
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21 **II. LEGAL STANDARD**
22 A Rule 12(c) motion must be denied if the complaint states (1) a cognizable legal theory
23 and (2) sufficient facts to support that theory. *Dworkin v. Hustler Magazine Inc.*, 867 F.2d 1188,
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26 [2] Business Interruption coverage is discussed as one example; Treasure Island does not intend to otherwise limit or forgo any other applicable and triggered coverages alleged in its Complaint. Because all of Treasure Island's claimed losses are covered under the Policy's Business Interruption coverage, discussion here of the Policy's other implicated coverages is unnecessary.
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1192 (9th Cir. 1989) (equating Rule 12(b)(6) and Rule 12(c) motions); *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990) (articulating Rule 12(b)(6) standard). Treasure Island's Complaint does both.[3]

III. ARGUMENT

A. Treasure Island Adequately Pled How COVID-19 Triggers Multiple Policy Coverages

By alleging the presence of COVID-19 and the physical loss or damage it caused to property, Treasure Island satisfied its burden of showing a cognizable legal theory for why its claim falls within the Policy's broad "all risks" coverage grant.

Under Nevada law, the insured bears the initial burden of proving that the claim is "within the terms of the policy." *Zurich Am. Ins. Co. v. Ironshore Specialty Ins. Co.*, 964 F.3d 804, 810 (9th Cir. 2020) (citing *Nat'l Auto. & Cas. Ins. Co. v. Havas*, 339 P.2d 767, 768 (Nev. 1959)). Clauses providing coverage are interpreted broadly "so as to afford the greatest possible coverage to the insured." *Nat'l Union Fire Ins. v. Reno's Exec. Air*, 682 P.2d 1380, 1383 (Nev. 1984). If the insured satisfies this standard, then the heavier burden shifts to the insurer to show that an exclusion applies. *Zurich Am. Ins.*, 964 F.3d at 810 (9th Cir. 2020). The insurer must show that the exclusion it drafted "clearly and distinctly communicates to the insured the nature of the limitation, and specifically delineates what is and is not covered." *Griffin v. Old Republic Ins. Co.*, 133 P.3d 251, 255 (Nev. 2006).

Here, Treasure Island alleged that COVID-19, a communicable disease, was present on its

[3] While it is, of course, also permissible for a Court to interpret insurance contracts when deciding a motion under Rule 12(c), it is *never* appropriate to resolve factual disputes under this rule. *Brown v. Mt. Grant Gen. Hosp.*, No. 3:12-CV-00461-LRH, 2013 WL 129406, at *2 (D. Nev. Jan. 9, 2013) ("Judgment on the pleadings is inappropriate if the complaint raises issues of fact"); *see also James River Ins. Co. v. Ace Cab, Inc.*, No. 2:11-CV-01879-MMD, 2012 WL 5381524, at *2 (D. Nev. Oct. 31, 2012).

property. ECF 1 at ¶¶ 33-34, 43, 49-50. Treasure Island alleged that the presence of COVID-19 can cause physical loss or damage to property generally and that it specifically did so to Treasure Island's property:

- "COVID-19 is a deadly communicable disease that has already infected over 1.6 million people in the United States and caused more than 100,000 deaths. There is no vaccine for COVID-19." *Id.* at ¶ 15.
- "According to a study documented in *The New England Journal of Medicine*, COVID-19 was detectable in aerosols for up to three hours, up to four hours on copper, up to 24 hours on cardboard, and up to three days on plastic and stainless steel." *Id.* 1 at ¶ 20.
- "All of these materials are used by Treasure Island throughout its facilities and operations." *Id.* 1 at ¶ 21.
- "The study's results suggest that individuals could become infected with COVID-19 through indirect contact with surfaces or objects used by an infected person, whether they were symptomatic or not." *Id.* 1 at ¶ 22.
- "Persons infected with COVID-19 were present at Treasure Island prior to March 18, 2020." *Id.* 1 at ¶ 33.
- "In fact, during the period January 1, 2020 to March 18, 2020, Treasure Island employees recorded more than 1,500 sick days. During that same period, Treasure Island had more than 329,000 registered guests from all over the world." *Id.* 1 at ¶ 34.
- "COVID-19 has caused (and continues to cause) physical loss and physical damage to property, including Treasure Island's property." *Id.* 1 at ¶ 45.
- "Upon information and belief the actual presence of COVID-19 continues to exist at Treasure Island Locations." *Id.* 1 at ¶ 50.
- "This actual and threatened physical loss and damage to insured property has prompted Treasure Island to take action to temporarily protect or preserve its property, thereby triggering the Policy's Protection and Preservation of Property – Property Damage coverage." *Id.* 1 at ¶ 52.
- "COVID-19 has caused Treasure Island to suffer business interruption loss as a direct result of physical loss and damage of the type insured under the Policy." *Id.* 1 at ¶ 54.
- "The expenses incurred by Treasure Island beyond those necessary in the normal operation of its business solely as a result of the physical loss and damage caused by COVID-19 trigger coverage under the Policy's Extra Expense coverage." *Id.* 1 at ¶ 57.

These facts, as alleged in the Complaint, are in alignment with the Policy's express communicable disease coverages and consequential business interruption losses triggered by loss of the type insured under the Policy. Treasure Island has therefore alleged a cognizable legal

1 theory as to how its claim triggers coverage under the Policy.

2 **B. AFM Fails to Prove, as It Must, that Its Interpretation of the Policy Is**
3 **the *Only* Reasonable Interpretation.**

4 In response to Treasure Island's well-pled claim, AFM pretzels itself in an unsuccessful
5 attempt to reconcile the Policy's Contamination exclusion with the Policy's express coverage for
6 communicable disease losses. AFM fails to prove, as it must, however, that the Contamination
7 exclusion can have any application to loss caused by communicable disease *and* that AFM's
8 interpretation is the *only* reasonable interpretation.

9 **1. Treasure Island's Burden Is Not Whether Its Interpretation Is**
10 ***Correct*, But Whether Its Interpretation Is *Reasonable*; on the**
11 **Other Hand, AFM's Burden Is to Establish that Its**
Interpretation is the *Only* Reasonable One

12 It is not enough for AFM to show any reasonable interpretation of its policy. Nevada law
13 requires that AFM, the drafter, prove that its interpretation is the ***only*** reasonable one; otherwise,
14 the Policy is ambiguous. *Century Sur. Co. v. Casino W., Inc.*, 329 P.3d 614, 616 (Nev. 2014) ("To
15 preclude coverage under an insurance policy's exclusion provision, an insurer must (1) draft the
16 exclusion in 'obvious and unambiguous language,' (2) demonstrate that the interpretation
17 excluding coverage is the only reasonable interpretation of the exclusionary provision, and (3)
18 establish that the exclusion plainly applies to the particular case before the court."); *see Crosby*
19 *Estate at Rancho Santa Fe Master Ass'n v. Ironshore Spec. Ins. Co.*, No. 19-2369-WQH-NLS,
20 2020 WL 6449202, at *10 (S.D. Cal. Nov. 3, 2020) (denying summary judgment where carrier
21 failed to prove that its interpretation was the only reasonable interpretation). Where AFM cannot
22 meet this burden, the Policy must be construed in favor of coverage.[4]

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26 [4] AFM correctly states one goal of policy interpretation: to give a reasonable and harmonious meaning to the policy as a whole. ECF 42 at p. 9. But in some instances, this goal simply cannot
27 be achieved. This is one of those instances and, AFM, as the drafter of the Policy, is at fault. ECF 26 at ¶ 39.

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2. AFM Fails to Prove Clear Application of Any Exclusion

AFM contends that two exclusions operate to bar or limit coverage. AFM is wrong on both accounts. First, the Contamination exclusion does not apply because it is directly in conflict with the Policy's affirmative coverage for communicable disease losses. Second, the "Loss of Market or Loss of Use" exclusion does not apply because it only applies to consequential losses, not expressly covered business interruption losses.

a. The Contamination Exclusion Does Not Apply

Consistent with its burden of proof, to benefit from the Policy's Contamination exclusion, AFM must prove that its interpretation and application of that exclusion is the only reasonable interpretation. For multiple reasons, AFM cannot possibly meet that burden.

First, on its face, the Contamination exclusion does not apply to disease, much less communicable disease. For that reason alone, AFM's motion should fail. But AFM asserts that the Contamination exclusion applies because it bars all losses from a virus. This cannot be squared with the communicable disease coverages. The Policy cannot both cover property damage and business interruption caused by communicable disease and also exclude coverage for COVID-19, a communicable disease.[5] The Policy defines "contamination." ECF 2-1 at p. 58. Nowhere does that definition include or reference "communicable disease." Separately, the Policy defines "communicable disease." *Id.* at p. 58. Nowhere does that definition say that communicable disease is contamination. Indeed, it would defy logic and all common sense for an exclusion to negate an expressly covered type of loss. Yet, AFM would have this Court read the Policy's

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[5] AFM admits that laypeople use the terms COVID-19 and Corona***virus*** interchangeably. ECF 42 at p. 2, n. 1. This begs the question of how a reasonable insured is meant to distinguish between its COVID-19 (covered) and Coronavirus (purportedly not covered) losses. The two are inextricably intertwined even by the CDC's definition, which AFM quotes: "In COVID-19, 'CO' stands for 'corona,' 'VI' for 'virus,' and 'D' for disease." *Id.* at p. 10.

Contamination exclusion to do just that.

Under Nevada law, the policy must be read as a whole to give a reasonable and harmonious meaning and effect to all its provisions. *Nevada VTN v. Gen. Ins. Co. of Am.*, 834 F.2d 770, 773 (9th Cir. 1987). Where the policy language is unambiguous, its plain meaning applies. *Id.* But where ambiguities arise, those ambiguities must be resolved in the insured's favor. *Id.* Words or clauses alone may be ambiguous. *Id.* Yet, even clauses that, standing alone, do not appear ambiguous might in fact be rendered ambiguous when the policy is read as a whole. *Reno's Exec. Air*, 682 P.2d at 1383.

Second, AFM's citation to *Polo*, a four-sentence, non-precedential decision, for the premise that "this Court and the Ninth Circuit have already concluded that a similar Contamination exclusion was unambiguous" is not only unavailing but borders on outright misrepresentation.[6] *Polo Towers Master Owners Ass'n, Inc. v. Factory Mut. Ins. Co.*, 185 F. App'x 636, 637 (9th Cir. 2006). First, that case involved Legionella, not COVID-19. Second, the policy in *Polo* contained no affirmative coverage for communicable disease, *i.e.*, the provision that creates the ambiguity here.[7] Third, the *Polo* policy did not define "contamination." *See* Brief of Appellant, 2002 WL 32725357, at *17 (C.A.9) ("the policy does not define the terms 'physical loss,' 'damage,' 'contamination,' 'pollution'…"). In other words, neither this Court nor the Ninth Circuit ever considered, much less ruled upon, a contamination exclusion like the one at issue here, nor has this Court or the Ninth Circuit been asked to rule upon the direct conflict that exists between the

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[6] That AFM's current counsel was also record counsel in *Polo* indicates counsel knew as much.

[7] Treasure Island seeks to explore the source of the conflict between the Communicable Disease coverages and the Contamination exclusion further in discovery, but AFM's public regulatory filings indicate that it added the Communicable Disease provisions to policy forms without reconciling them with the existing Contamination exclusion. Regardless of its genesis, the result is a patent ambiguity within the Policy.

Contamination exclusion and the communicable disease coverages that AFM included in the Policy it sold to Treasure Island. AFM fails to present a reasonable interpretation of the Policy.

Third, apparently cognizant of the inability to harmonize the Contamination exclusion and the Policy's coverage for communicable disease losses, AFM argues that coverage for communicable disease exists as an ***exception*** to the Contamination exclusion, ECF 42 at pp. 2, 6-8. AFM's argument is belied by the plain terms of the Policy it drafted. The Policy contains no exception whatsoever or any language that can even be construed as an exception. Indeed, AFM points to none.

Tellingly, AFM ***did*** include exceptions to other exclusions in the Policy. For example, the Policy provides coverage for loss due to "changes of temperature or changes in relative humidity," ECF 2-1 at p. 22, and losses caused by the interruption of certain utilities. ECF 2-1 at p. 30. However, the Policy ***excludes*** coverage for "loss or damage caused by or resulting from changes of temperature [and] changes in relative humidity…***except as provided by the Change of Temperature and Off-Premises Service Interruption coverages in this Policy***." ECF 2-1 at p. 20 (emphasis added).[8] This is an example of where the Policy might provide coverage for a subset of losses within a broader exclusion. In other words, where AFM intended to provide an exception to an exclusion, it did so. [9]

[8] This is not the only example. The Policy also excludes coverage for losses due to the enforcement of any law or ordinance, but the exclusion provides an exception for the Decontamination Costs and Demolition and Increased Cost of Construction coverages. ECF 2-1 at p. 21.

[9] Taking AFM at its word, for argument's sake, confirms that communicable disease has always been covered under the "all risks" Policy. It is fundamental that exceptions to exclusions do not *add* coverage; they merely carve-out from an exclusion loss that would have been covered but for the exclusion. Here, the Policy broadly and specifically provides that communicable disease is covered. Nothing in the contamination exclusion says otherwise. The Policy even defines the risk of communicable disease *separate and apart* from the definition of contamination. Thus, coverage for communicable disease is not an exception, it has been broadly covered all along.

1 ***Fourth***, even if, despite all of these drafting shortcomings, AFM still could prove its
2 interpretation of the Policy was reasonable, AFM has not, and cannot, prove that its interpretation
3 is the ***only*** reasonable one. Yet, AFM ***must***, as a matter of settled Nevada law, carry that burden,
4 because exclusions must be interpreted in favor of coverage where there is any reasonable
5 interpretation of an exclusion that would not bar coverage. This is so because an exclusion cannot
6 be said to "plainly and clearly" exclude coverage when it can be interpreted in more than one
7 reasonable way. *Crosby Estate at Rancho Santa Fe*, *supra* at *10.
8
9 Treasure Island has demonstrated a reasonable interpretation of the Policy. AFM has failed
10 to prove otherwise.
11 ***Fifth***, AFM's statement that "the overwhelming majority of courts that have examined
12 contamination exclusions similar to the one at issue have held that they preclude recovery of
13 losses related to the pandemic and government shut down orders" is patently inaccurate. ECF 42
14 at pp. 10-11. In fact, each of the eight cases discussed by AFM is materially different in two
15 fundamental ways. First, ***all*** of the policies contained explicit "Virus" exclusions (not a
16 "Contamination" exclusion). Second, ***none*** of the policies in those cases had conflicting
17 affirmative communicable disease coverage. *See W. Coast Hotel Mgmt., LLC v. Berkshire*
18 *Hathaway Guard Ins. Cos.*, No. 220CV05663VAPDFMX, 2020 WL 6440037, at *5 (C.D. Cal.
19 Oct. 27, 2020) (examining "Virus Exclusion"); *Boxed Foods Co., LLC v. Cal. Cap. Ins. Co.*, No.
20 20-CV-04571-CRB, 2020 WL 6271021, at *3 (N.D. Cal. Oct. 26, 2020), as amended (Oct. 27,
21 2020) (examining "Pathogenic Organisms Exclusion," referred to by the parties and the court as
22 the "Virus Exclusion"); *Mark's Engine Co. No. 28 Rest., LLC v. Travelers Indem. Co. of Conn.*,
23 No. 2:20-CV-04423-AB-SK, 2020 WL 5938689, at *2 (C.D. Cal. Oct. 2, 2020) (examining
24 "Exclusion of Loss Due to Virus or Bacteria"); *Diesel Barbershop, LLC v. State Farm Lloyds*,
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No. 5:20-CV-461-DAE, 2020 WL 4724305, at *2 (W.D. Tex. Aug. 13, 2020) (examining "Fungi, Virus, or Bacteria Exclusion"); *Turek Enter., Inc. v. State Farm Mut. Auto. Ins. Co.*, No. 20-11655, 2020 WL 5258484, at *2 (E.D. Mich. Sept. 3, 2020) (examining "Fungi, Virus, or Bacteria" exclusion); *Mauricio Martinez, DMD, P.A. v. Allied Ins. Co. of Am.*, No. 220CV00401FTM66NPM, 2020 WL 5240218, at *2 (M.D. Fla. Sept. 2, 2020)) (examining exclusion for loss caused by "virus, bacterium or other microorganism"); *Franklin EWC, Inc. v. Hartford Fin. Servs. Grp., Inc.*, No. 20-CV-04434 JSC, 2020 WL 5642483, at *2 (N.D. Cal. Sept. 22, 2020) (examining "Fungi, Wet Rot, Dry Rot, Bacteria and Virus" exclusion); *Wilson v. Hartford Cas. Co.*, No. CV 20-3384, 2020 WL 5820800, at *7 (E.D. Pa. Sept. 30, 2020) (examining "Limited Fungi, Bacteria, or Virus" exclusion).[10]

Moreover, COVID-19 decisions issued thus far have limited application, because they involve different policies, allegations,[11] jurisdiction, and applicable law and, at times, reach seemingly inconsistent results. Two cases cited by AFM are illustrative: in *Turek* (cited at ECF 42 at p. 11) the court found that the Virus exclusion barred coverage under Michigan law (2020 WL

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[10] AFM contends in footnote 5 that the exclusion in *Optical* (where the court denied a motion to dismiss) is somehow materially different from its own, but AFM fails to explain any material differences. In fact, the decision (which consists of only a transcript) and the complaint in that case make clear that the exclusion was in fact a "contamination" exclusion—which, of course, is the same type of exclusion used in the AFM policy. *See Optical Servs. USA/JCI v. Franklin Mut. Ins. Co*., No. BER-L-3681-20, 2020 WL 5806576 (N.J.Super.L. Aug. 13, 2020).

[11] The vast majority of dismissals in COVID-19 insurance coverage decisions (approximately 37 out of 46 decisions counsel is currently aware of) involve cases where the plaintiff ***did not*** allege COVID-19 on site (or, affirmatively pled that COVID-19 was ***not*** present). Where, as here, the insured alleged that COVID-19 was present on site and physically altered and tangibly impacted the property by transforming the air and surfaces on the property into dangerous transmission mechanisms for the disease, summary dismissal has been denied. *See Studio 417, Inc. v. Cincinnati Ins. Co.,* No. 20-CV-03127-SRB, 2020 WL 4692385, at **2-8 (W.D. Mo. Aug. 12, 2020); *K.C. Hopps, Ltd. v. Cincinnati Ins. Co.*, No. 20-CV-00437-SRB, 2020 WL 6483108,at *1 (W.D. Mo. Aug. 12, 2020); *Blue Springs Dental Care, LLC v. Owners Ins. Co.*, No. 20-CV-00383-SRB, 2020 WL 5637963, at *4 (W.D. Mo. Sep. 21, 2020).

5258484, at *8); however, in *Urogynecology* (cited at ECF 41 at n. 12) the court found that another Virus exclusion did not bar coverage under Florida law. *Urogynecology Specialist of Fla. LLC v. Sentinel Ins. Co.*, No. 620CV1174ORL22EJK, 2020 WL 5939172, at *4 (M.D. Fla. Sept. 24, 2020). Of course, AFM likens its exclusion to the one in *Turek* and not *Urogynecology*, but the point is clear—the actual policy language and controlling law determine the outcome. Here, the Policy and Nevada law favor Treasure Island.

b. <u>The So-Called Loss of Use Exclusion Does Not Apply</u>

Just as AFM fails to reconcile the Contamination exclusion with the Policy's affirmative coverage for communicable disease losses, AFM fails to demonstrate how its so-called loss of use exclusion can have any application here.

The "Loss of Market or Loss of Use" exclusion limits coverage to losses flowing from covered causes and excludes losses caused by remote factors unrelated to the original cause, *i.e.*, it excludes consequential losses. As another federal court explained, "to the extent any loss claimed to be a loss of business income by [the insured] was not lost as a direct result of [the covered cause of loss] but rather as a consequence of any other reason, then such loss is excluded from coverage and there can be no recovery … for such loss." *Dictiomatic, Inc. v. U.S. Fid. & Guar. Co.*, 958 F. Supp. 594, 604 (S.D. Fla. 1997).

AFM's attempt to apply the "Loss of Market or Loss of Use" exclusion here, ECF 42 at pp. 13-14, turns the exclusion on its head. It would render Treasure Island's business-income coverage illusory, because the entire point of business-income coverage is to cover business losses while the insured cannot use its property for its intended purpose. Clearly, therefore, the "Loss of Market or Loss of Use" exclusion cannot reasonably be read literally to exclude coverage whenever an insured loses the ability to use its property. Treasure Island's business-income loss was caused by physical loss or damage to its property, not loss of use based on some other,

uncovered cause. The Policy plainly covers losses directly resulting from loss of use caused by the covered physical loss or damage. The "Loss of Market or Loss of Use" exclusion has no application here. Not surprisingly, AFM offers no authority whatsoever suggesting otherwise.

3. AFM Fails to Prove that Its Policy Requires Tangible Alteration of Property

AFM cuts hard to avoid acknowledging that its Policy repeatedly concedes that communicable disease causes physical loss or damage to property. [12] ECF 42 at p.15. Instead, AFM argues that the Policy's coverage for communicable disease losses is yet another "exception" to the Policy's requirement that all coverages be predicated on physical loss or damage, and that communicable disease does not meet that requirement. *Id*. AFM's argument is belied by its own admissions as well as decisions from this Circuit and across the country.

a. AFM Admits that Functional Loss of Use Satisfies Any Physical Loss or Damage Requirement

Despite its own Policy clearly stating otherwise, AFM argues that the presence of communicable disease "does not constitute physical loss or damage." AFM's position is remarkable given that the insurer has argued the exact opposite when it was the party pursuing recovery.

In *Factory Mutual Insurance Co. v. Federal Insurance Co.*, Factory Mutual, sister company to AFM, represented by the same lead lawyer representing AFM here, argued under facts strikingly similar to those here, that "physical loss or damage" existed from the mere "loss of functionality or reliability" of property. *See* Plaintiff Factory Mutual Ins. Co.'s Motion in Limine

[12] The Policy expressly associates "physical loss or damage" with communicable disease. *See, e.g.,* ECF 2-1 at p. 8 (tying the Policy's communicable disease coverage deductible to "the location where the ***physical damage*** happened."); *Id.* at p. 22 (excluding from the Communicable Disease – Property Damage coverage "***loss or damage*** . . . resulting from terrorism"); *Id.* at p. 46 (excepting from the Communicable Disease – Business Interruption coverage "loss sustained . . . from . . . ***physical loss or damage*** covered by Terrorism coverage") (emphasis added).

No. 5 Re Physical Loss or Damage, No. 1:17-cv-00760-GJF-LF (D. N.M.) (ECF No. 127, filed Nov. 19, 2019). In *Factory Mutual,* the physical loss or damage was caused by mold infestation which, like COVID-19, existed on the surface of property and in the air, but did not cause a structural alteration of the property. What obviously mattered to AFM's sister company in *Factory Mutual* was that the property lost its functional use when rendered "unfit for its intended use—manufacturing injectable pharmaceutical products." *Id.* at 3. In support, Factory Mutual relied heavily on the very same authority discussed by Treasure Island in Section III.B.3.b., *infra*, explaining that "[n]umerous courts have concluded that loss of functionality or reliability under similar circumstances constitutes physical loss or damage." *Id.*[13]

But Factory Mutual did not stop there. It went on to argue that "physical loss or damage" included not just loss of functional use but also the value of the lost use and the costs necessary to restore the property to functional condition. *Id.* at 4. Perhaps most remarkable was Factory Mutual's concession that ***at worst***, its reasonable interpretation of "physical loss or damage" rendered the insurance policy at issue (issued by the defendant, Federal Insurance Company) ambiguous. *Id.* at 3, n.1 ("At best for Federal, 'physical loss or damage,' which is undefined, is susceptible of more than one reasonable interpretation and is therefore ambiguous and must be construed against Federal.") (citations omitted).

[13] Discussing, among others, *W. Fire Ins. Co. v. First Presbyterian Church*, 437 P.2d 52 (Colo. 1968) (church building sustained physical loss or damage when it was rendered uninhabitable and dangerous due to gasoline under the building); *Gregory Packaging, Inc. v. Travelers Prop. & Cas. Co. of Am.*, Civ. No. 2:12-cv-04418 2014 U.S. Dist. LEXIS 165232**,** 2014 WL 6675934 (D. N.J. 2014) (unsafe levels of ammonia in the air inflicted "direct physical loss of or damage to" the juice packing facility "because the ammonia physically rendered the facility unusable for a period of time."); *Port Auth. of N.Y. & 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 in home); *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).

1 What is good for the goose, it is said, is good for the gander. *Heffernan v. Paterson, N.J.*,
2 136 S. Ct. 1412, 1418 (2016) ("in the law, what is sauce for the goose is normally sauce for the
3 gander"). Language cannot mean one thing when it suits AFM and something quite different when
4 it doesn't. *Sierra Packaging & Converting, LLC v. Chief Admin. Officer of Occupational Safety*
5 *& Health Admin. of Div. of Indus. Relations of Dep't of Bus. & Indus.*, 406 P.3d 522, 530 (Nev.
6 App. 2017) (Tao, J., concurring) ("Law isn't a looking-glass world where words mean whatever
7 happens to be most convenient in one moment and something very different in the next.").
8
9 It is disingenuous for AFM to now claim that "[c]ourts across the country have held for
10 years that economic losses without some tangible injury to property simply do not trigger business
11 interruption coverage under a first party property policy." ECF 42 at p. 17 (collecting and
12 discussing cases, none of which involve any allegation or evidence that there was ***any*** physical
13 impact to the relevant property ***whatsoever***, and certainly no claim that an agent unseen to the
14 naked eye rendered the property unusable or unfit for its intended purpose).
15
16 In fact, the very authority that AFM now cites ***supports*** Treasure Island because it
17 ***distinguishes*** cases involving unseen agents that render property unusable. In *Newman Myers*
18 *Kreines Gross Harris, P.C. v. Great N. Ins. Co.*, 17 F. Supp. 3d 323, 330 (S.D.N.Y. 2014), for
19 example, the court held that the plaintiff law firm suffered no physical loss or damage from having
20 its electricity shut off in advance of Hurricane Sandy. *Newman Myers*, 17 F. Supp. at 330. In doing
21 so, it ***agreed*** with the authority that Treasure Island has cited indicating that physical loss or
22 damage need ***not*** be visible: "In each [of the cited cases] there was some compromise to the
23 physical integrity of the workplace. To be sure, the cases involving odors, noxious fumes, and
24 water contamination did not involve tangible, structural damage to the architecture of the
25 premises. But the critical policy term at issue, requiring 'physical loss or damage,' does not
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require that the physical loss or damage be tangible, structural or even visible." *Id*.

Regardless of how "physical loss or damage" is interpreted, Treasure Island pled it to the highest standard—physical transformation of property. Whether or not it occurred is a question of fact not appropriate for resolution at this stage. Accordingly, AFM's Motion must be denied.

b. <u>AFM's Argument Has Been Accepted by Other Courts in This Circuit and Elsewhere</u>

Whether COVID-19 constitutes "physical loss or damage" is a novel question that may present factual issues inappropriate for determination on a motion to dismiss. Nonetheless, analogous precedent from this Circuit and nationwide shows that the mere fact that the impact is not visible to the naked eye does not mean that it is not "direct physical loss or damage" within the meaning of the policy so long as it makes the property unfit for its intended purpose.

For example, in *Oregon Shakespeare Festival Association*, the court held that smoke from a nearby wildfire that caused the performance company to cancel outdoor performances constituted "direct physical loss of or damage to" covered property. *Oregon Shakespeare Festival Ass'n v. Great Am. Ins. Co*., No. 1:15-CV-01932-CL, 2016 WL 3267247, at *6 (D. Or. June 7, 2016), vacated by stipulation of parties, 2017 WL 1034203 (D. Or. Mar. 6, 2017). The smoke itself had no visible effects; it only caused performers and the audience to have itchy throats and eyes and difficulty breathing. *Id*. at 3. There was no structural damage to the property, which could be restored by cleaning, but the court easily determined that the smoke caused direct physical loss or damage. "[P]hysical damage can occur at the molecular level and can be undetectable in a cursory inspection." *Id*. at *7 (quoting *Columbiaknit, Inc. v. Affiliated FM Ins. Co*., No. Civ. 98–434–HU, 1999 WL 619100, at *6 (D. Or. Aug. 4, 1999)). It need only be distinct and demonstrable, and courts must take into consideration the nature and intended use of the property. *Id*. As long as the damage renders the property unusable for its intended purpose, that it was not

structural is not significant. *Id*. at 9. *See also Farmers Ins. Co. of Ore. v. Trutanich*, 858 P.2d 1332, 1336 (Or. App. 1993) (strong and pervasive odor of methamphetamine); *Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am*., No. 2:12-CV-04418 WHW, 2014 WL 6675934, at *7 (D.N.J. Nov. 25, 2014) (ammonia); *Mellin v. N. Sec. Ins. Co., Inc*., 167 N.H. 544, 550, 115 A.3d 799, 805 (2015) (odor of cat urine); *Pepsico, Inc. v. Winterthur Int'l Am. Ins. Co*., 806 N.Y.S.2d 709, 711 (2005) (bad taste); *Cooper v. Travelers Indem. Co. of Ill.*, No. C-01-2400-VRW, 2002 WL 32775680, at *5 (N.D. Cal. Nov. 4, 2002) (bacteria in well); *Sentinel Mgt. Co. v. N.H. Ins. Co.*, 563 N.W.2d 296, 300 (Minn. Ct. App. 1997) (asbestos in building); *W. Fire Ins. Co. v. First Presbyterian Church*, 165 Colo. 34, 39 (1968) (gasoline fumes); *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) (offgassing of toxic gasses from drywall); *Matzner v. Seaco Ins. Co*., No. CIV. A. 96-0498-B, 1998 WL 566658, at *3 (Mass. Super. Aug. 12, 1998) (carbon monoxide).

These cases show that covered physical loss or damage (1) need not be visible to the naked eye, (2) need not be permanent or even particularly difficult to remediate, and (3) need ***only*** be distinct and demonstrable, taking account the nature and intended use of the property, that is, the nature of the interest that the carrier agreed to insure. This is exactly why courts have begun to recognize that where, as here, the plaintiff has sufficiently pled that COVID-19 and SARS-CoV-2 harmed its property, dismissal is inappropriate. For example, in *Studio 417, Inc. v. Cincinnati Ins. Co*., No. 20-CV-03127-SRB, 2020 WL 4692385, at *5 (W.D. Mo. Aug. 12, 2020), the court denied a motion to dismiss claims by hair salons and restaurants for coverage under policies that covered direct physical loss and damage. The plaintiffs there alleged that the virus is a physical substance that lives on and is active on inert physical surfaces and is emitted into the air, and its presence rendered their physical property unsafe and unusable, forcing them to suspend or reduce

their operations. *Id*. at *2. This was sufficient to defeat a vigorous motion to dismiss.

It did not matter at all that the virus caused no physical alteration of the property. "[A] physical loss may occur when the property is uninhabitable or unusable for its intended purpose." Id. at *5. So too here. AFM agreed to insure a large casino. The virus has invaded that space, rendering it unusable for its intended purpose as a casino. AFM knew that purpose when it agreed to insure the property. Accordingly, the Complaint more than adequately alleges direct physical loss or damage.

c. The Other COVID-19 Rulings Cited by AFM Are Factually Distinguishable

In any event, the cases AFM cites fail to support its position. Contrary to AFM's contention, the "overwhelming majority of courts" have ***not*** affirmed, much less even decided on the merits, whether the presence of COVID-19 causes physical change or alteration to the property. ECF 42 at p. 15. In fact, in the "overwhelming majority" of those cases, the courts could not have reached that issue since the plaintiffs in those cases did not even allege the presence of COVID-19.

Rather, most of the cases referenced by AFM involve insurance policies with robust "virus" exclusions, which required the plaintiffs to ***plead around*** the exclusion, relying instead ***solely*** on governmental orders as the basis for their alleged "physical loss or damage."[14] *West Coast Hotel Mgmt., LLC v. Berkshire Hathaway Guard Ins. Cos.*, No. 220CV05663VAPDFMX, 2020 WL 6440037, at *4 (C.D. Cal. Oct. 27, 2020) (dismissed because plaintiffs ***did not allege*** in complaint physical damage to property as a result of coronavirus); *Mark's Engine Co. No. 28 Rest., LLC*, 2020 WL 5938689, at *3 (***did not allege presence***; plaintiffs alleged that governmental orders caused damage, not coronavirus); *Sandy Point Dental, PC v. Cincinnati Ins. Co.*, No. 20 CV 2160,

[14] As shown in Section III.A., *supra*, Treasure Island has pled a cognizable claim based on (1) actual presence of COVID-19; (2) demonstrable tangible alteration of air and surfaces; and (3) a resulting loss of functional use because of the foregoing.

2020 WL 5630465, at *2 (N.D. Ill. Sept. 21, 2020) (plaintiff ***did not allege presence***, did not allege physical alteration or damage to property); *Pappy's Barber Shops, Inc. v. Farmers Grp., Inc.*, No. 20-CV-907-CAB-BLM, 2020 WL 5500221, at *2 (S.D. Cal. Sept. 11, 2020) (plaintiffs ***did not allege presence*** of coronavirus, court held that "government orders did not constitute direct physical loss or damage to property"); *Turek Enter., Inc.*, 2020 WL 5258484, at *5 ("Importantly, Plaintiff is adamant that ***COVID-19 never entered*** its premises. According to Plaintiff, its loss of income and extra expense arise only from its suspension of operations in compliance with the Order."); *Malaube, LLC v. Greenwich Ins. Co.*, No. 20-22615-CIV, 2020 WL 5051581, at *4 (S.D. Fla. Aug. 26, 2020) (***did not allege presence***, did not allege physical loss or damage to property); *10E, LLC v. Travelers Indem. Co. of Conn.*, No. 2:20-CV-04418-SVW-AS, 2020 WL 5359653, at *4 (C.D. Cal. Sept. 2, 2020) (***did not allege presence***, alleged loss and damage was caused by public healthy restrictions); *Diesel Barbershop, LLC*, 2020 WL 4724305, at *5 (***did not allege presence***, alleged that governmental orders caused direct physical loss); *Rose's 1, LLC v. Erie Ins. Exch.*, No. 2020 CA 002424 B, 2020 WL 4589206, at *5 (D.C. Super. Ct. Aug. 06, 2020) (***did not allege presence***, alleged loss stemming from governmental orders).

As noted above, Treasure Island plainly alleged the presence of COVID-19 on its property and resulting physical loss or damage. In fact, many of the cases cited by AFM note that, had those plaintiffs made such an allegation, the courts might have drawn a different conclusion.[15]

[15] *See Malaube*, No. 20-22615-Civ-WILLIAMS/TORRES, pp. 15-16 ("This case is materially different [from *Studio 417*] because Plaintiff has not alleged any physical harm. There is no allegation, for example, that COVID-19 was physically present on the premises."); *10E, LLC*, No. 2:20-CV-04418-SWV-AS, p. 7 ("Plaintiff does not allege that the virus 'infect[ed]' or 'stay[ed] on surfaces of' its insured property. Whatever physical alteration the virus may cause to property in general, nothing in the [First Amended Complaint] plausibly supports an inference that the virus physically altered Plaintiff's property, however much the public health response to the virus may have affected business conditions for Plaintiff's restaurant."); *Rose's 1*, No. 2020 CA 002424 B, p. 6: "Plaintiffs argue that their losses were 'physical'… But Plaintiffs offer no evidence [on motions

1 In short, not only do the cases cited by AFM fail to support its position, they actually
2 undermine it. By stark—and critical—contrast to those cases, Treasure Island pled the requisite
3 physical loss or damage caused by COVID-19 and its presence on Treasure Island's property.
4
5 **d. At Worst, AFM's Illogical Arguments Raise Triable Issues of Fact**

6 AFM argues that the presence of Coronavirus and COVID-19[16] does not "constitute"
7 physical loss or damage. ECF 42 at pp. 15-17. Taken literally, AFM's argument makes no sense.
8 COVID-19 is a communicable disease, by Policy definition, CDC designation, and common
9 sense. It *causes* physical loss or damage; it is not physical loss or damage in its own right. To
10 suggest otherwise is illogical. AFM's Policy, as confirmed by AFM's own prior positions, plainly
11 recognizes that the presence of COVID-19 causes physical loss or damage. Accordingly, the Court
12 can rule in favor of Treasure Island on this issue as a matter of law.
13
14 At worst, whether COVID-19 causes physical loss or damage is question of fact. Treasure
15 Island has proffered two experts—a virologist and an industrial hygienist—both of whom opine
16 that COVID-19, in fact, causes physical loss or damage to property.[17] *See, e.g.,* Report of A.
17 Rasmussen, Ph.D. at TI_001463 ("Because COVID-19 is an infectious viral disease that can be
18 transmitted to susceptible people, it causes additive, sustained property damage."); Report of A.
19 LeBeau, Ph.D., MPH, CIH at TI_001509 ("Individuals with COVID-19 at Treasure Island altered
20 the physical characteristics of surfaces and the air of occupied spaces at the location and at
21 facilities in the vicinity with respiratory secretions and aerosols. As a result, the surfaces and air
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25 for summary judgment] that COVID-19 was actually present on their insured properties at the time they were forced to close.")
26 [16] AFM uses both Coronavirus and COVID-19 interchangeably, just like they are used and understood by a layperson.
27 [17] At a bare minimum, Treasure Island should be afforded leave to amend any deficiencies the Court may find in its Complaint, particularly given the evidence developed since the initial filing.
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1 of occupied spaces at Treasure Island became vehicles for COVID-19 transmission.”).[18]

2 **C. Treasure Island Has Pled Cognizable Claims For Bad Faith**

3 AFM seeks dismissal of Treasure Island’s common law and statutory bad faith claims on
4 the basis that Treasure Island’s claim is not covered or, alternatively, that AFM acted reasonably
5 in denying coverage. ECF 42 at p. 20-21. However, the Nevada Supreme Court has held that a
6 plaintiff does ***not*** need to establish success on a contractual claim before proceeding with a bad
7 faith claim. *See Wohlers & Co. v. Bartgis*, 969 P.2d 949, 955 n. 2 (1998). To find otherwise would
8 require a plaintiff to commence two separate lawsuits even if the claims are predicated on the
9 same set of facts. *Drennan v. Maryland Cas. Co*., 366 F. Supp. 2d 1002, 1007 (D. Nev. 2005).

10 All of the cases cited by AFM in support of dismissal were decided at summary judgment.
11 *Pioneer v. Nat’l Union Fire Ins. Co*., 863 F. Supp. 1237, 1238 (D. Nev. 1994) (“This matter comes
12 before the Court on the following documents…collectively referred to as ‘Motion for Partial
13 Summary Judgment’…”); *Am. Excess Ins. Co. v. MGM Grand Hotels, Inc.*, 729 P.2d 1352, 1354
14 (1986) (on appeal from a motion for partial summary judgment); *Zurich Am. Ins. Co. v. Coeur*
15 *Rochester, Inc.*, 720 F. Supp. 2d 1223, 1225 (D. Nev. 2010) (“Both parties have filed motions for
16 summary judgment or partial summary judgment…The motions are ripe, and we now rule on
17 them.”); *Schumacher v. State Farm Fire & Cas. Co.*, 467 F. Supp. 2d 1090, 1091 (D. Nev. 2006).
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21 [18] AFM takes umbrage with Treasure Island’s allegation that Governor Sisolak issued his orders
22 “[i]n an effort to slow the spread of COVID-19 and as a consequence of physical damage caused by COVID-19.” ECF 42 at p. 19 (quoting ECF 1 at ¶ 23). AFM instead believes the orders were
23 intended to slow the spread of the disease—not to protect property. As with AFM’s conflicting factual position on whether the presence of COVID-19 causes tangible alteration to property, this
24 too is a question of fact inappropriate for resolution on a Rule 12(c) motion. Treasure Island notes, however, that should the Court find as a matter of law that the Policy’s Business Interruption
25 coverage has been triggered, a finding that this Court can make in deciding AFM’s motion (*Las Vegas Metro. Police Dep’t v. Coregis Ins. Co.*, 256 P.3d 958, 961062 (Nev. 2011)), it would be
26 unnecessary to determine the basis for the governmental orders since loss covered under the Policy’s Civil Authority coverage (the coverage to which the orders’ purpose is relevant) is
27 subsumed by coverage under the Policy’s Business Interruption provision. ECF 2-1 at pp. 40-41.
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1 But this case is not before the Court on a motion for summary judgment. *See Tracey v. Am. Family*
2 *Mut. Ins. Co.*, No. 2:09-CV-01257-GMN, 2010 WL 3613875 (D. Nev. Sept. 8, 2010).
3 **IV. CONCLUSION**
4 Treasure Island plausibly pled a claim for coverage under the Policy, and AFM has not
5 shown otherwise. AFM's Motion should be denied.[19]
6
7 Date: November 16, 2020

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25 [19] **Exhibit 1** attached hereto is Plaintiff's Response to AFM's Request for Judicial Notice in Support of its Motion for Partial Judgment on the Pleadings. Plaintiff contends that the exhibit
26 attached to the underlying Motion is filed inappropriately and, therefore, should be stricken. However, out of an abundance of caution, Plaintiff mirror's Defendant's form and attaches its
27 response hereto.
28