Filed Under the Electronic Briefing Rules
State of Connecticut
Appellate Court

A.C. No. AC 45600

MASHANTUCKET PEQUOT TRIBAL NATION,

Plaintiff -Appellant,

v.

FACTORY MUTUAL INSURANCE COMPANY,

Defendant-Appellee.

BRIEF OF THE PLAINTIFF-APPELLANT

To be argued by:
Michael C. D'Agostino

Morgan, Lewis & Bockius LLP
Michael C. D'Agostino [ct #413077]
One State Street
Hartford, CT 06103
Tel.: 860-240-2700
Fax: 860-240-2701
michael.dagostino@morganlewis.com

Sergio F. Oehninger [*pro hac vice*]
1111 Pennsylvania Ave., NW, 8th Fl.
Washington, D.C. 20004-2541
Tel: (202) 739-5521
Fax: (202) 739-3001
sergio.oehninger@morganlewis.com

Attorneys for Plaintiff-Appellant
Mashantucket Pequot Tribal Nation

CERTIFICATE OF INTERESTED ENTITIES OR INDIVIDUALS

Pursuant to Conn. Practice Book Sec. 67-4(i) and Sec. 60-4, Mashantucket Pequot Tribal Nation ("MPTN") respectfully states, by and through its undersigned counsel:

MPTN does not have any parent entity, and no entity or individual owns or controls an interest of 10 percent or more of MPTN. There are no other interested entities or individuals for MPTN. MPTN is not aware of any direct or indirect ownership, controlling or legal interest for MPTN that could reasonably require a judge to disqualify himself or herself under Rule 2.11 of the Code of Judicial Conduct.

TABLE OF CONTENTS

Page

STATEMENT OF ISSUES

1. Whether Plaintiff sufficiently alleged that COVID-19 constitutes a risk or cause of "physical loss or damage" covered under an insurance policy issued to Plaintiff, where the policy at issue explicitly covers communicable disease as a risk or cause of physical loss or damage. Pages 15–20, 23–32.

2. Whether an exclusion for "contamination" in the policy bars coverage for loss caused by the COVID-19 communicable disease where the policy at issue explicitly covers communicable disease as a risk or cause of physical loss or damage. Pages 21–23.

TABLE OF AUTHORITIES

Page(s)

CONNECTICUT CASES

OTHER CASES

A. PRELIMINARY STATEMENT

This case is unique. The FM Policy explicitly provides that losses from communicable diseases, such as COVID-19, constitute insured physical loss or damage of the type insured. This was a contractually agreed upon term between Defendant, Federal Mutual Insurance Company ("FM"), and Plaintiff, Mashantucket Pequot Tribal Nation ("MPTN"). Unlike other policyholders, MPTN specifically and sufficiently alleged that COVID-19 physically altered its property, requiring disposal and remediation of impacted property. Connecticut's liberal pleading standards required the trial court to afford MPTN the opportunity to prove this factual issue.

The trial court, however, "passed" on the question of whether MPTN alleged physical loss or damage under the unique FM Policy and "jumped" straight to whether an exclusion applied. But under the rules of policy interpretation, the trial court only could have reached the exclusion if it *first found* there is physical loss or damage. MPTN sufficiently alleged that COVID-19 constitutes a risk or cause of "physical loss or damage" covered under the unique FM Policy language, and that it physically altered property requiring its repair or replacement. The trial court should have permitted MPTN discovery to prove its case.

The Supreme Court's holdings in *Moda* and *Connecticut Dermatology* do not alter that conclusion. The unique FM Policy, by its plain terms, distinct from the policies at issue in those two cases, expressly recognizes "communicable disease" at a property to be "physical loss or damage" or a covered cause of loss and *does not* contain a standard "virus" exclusion. Unlike the plaintiffs in *Moda* and *Connecticut Dermatology*, MPTN here actually alleged that COVID-19 physically altered its property.

This Court should reverse the trial court's decision granting FM's motion to strike and remand to the trial court for further proceedings.

B. STATEMENT OF FACTS

1. The FM Policy

Plaintiff MPTN is a federally recognized sovereign Indian Tribe with a Reservation located within the geographical boundaries of Connecticut. Clerk Appendix at 8 (this Brief hereinafter cites to the Clerk Appendix and its pages as "CA[page number]"). MPTN operates and has an interest in a variety of businesses, including a casino, multiple hotels, spas, health centers, golf courses, restaurants, theaters, and a museum (the "Tribal Businesses"). CA9–CA10. One of the businesses is the Mashantucket Pequot Gaming Enterprise, doing business as Foxwoods Resort Casino, a resort and casino complex on the Reservation that includes multiple casinos, hotels, theaters, and restaurants. CA9. The Tribal Businesses are high-traffic locations, visited by hundreds of thousands of individuals monthly from various locations. CA16.

In exchange for millions of dollars in premiums, Defendant FM sold MPTN a high-end insurance policy, policy number 1053126 ("FM Policy"), that "covers property, as described in this Policy, against ALL RISKS OF PHYSICAL LOSS OR DAMAGE, except as hereinafter excluded, while located as described in this Policy." CA52. The FM Policy provides a wide range of coverages, with FM agreeing to a "maximum limit of liability in an occurrence, including any insured TIME ELEMENT loss" of "USD 1,655,000,000." CA53.

By its terms and structure, the FM Policy covers physical loss or damage resulting from "communicable disease." CA73, CA104. *See infra*, Argument, D.1.

The FM Policy also excludes "contamination, and any cost due to contamination", "***unless directly resulting from other physical damage not excluded by this Policy***"—meaning if the loss is otherwise covered under the FM Policy, the exclusion does not apply. CA65 (emphasis added). The term "contamination" is defined as "any condition of property due to the actual or suspected presence of any foreign substance, impurity, pollutant, hazardous material, poison, toxin, pathogen or pathogenic organism, bacteria, virus, disease causing or illness causing agent, fungus, mold or mildew." CA117. "Contamination" does not include "communicable disease", another defined term and which is another cause or risk of physical loss or damage expressly not excluded by the Policy. CA73, CA104.

2. MPTN's Allegations of Physical Loss or Damage To Property, Including Tangible Alteration, Requiring Disposal and Remediation

As alleged in MPTN's First Amended Complaint ("Complaint"), the precise risk that FM agreed to cover under its unique policy came to fruition: the COVID-19 communicable disease caused physical loss or damage, including physical, tangible alteration, requiring disposal, replacement, remediation, and repair of MPTN's property.

MPTN alleged that COVID-19 is a harmful, deadly, and highly contagious communicable disease. CA12, CA15. "COVID-19" is the name of the communicable disease caused by the SARS-CoV-2 virus. CA12. According to the Centers for Disease Control and Prevention (CDC), COVID-19 can spread in several ways, including through respiratory droplets, through airborne transmission, and by contact with objects or surfaces. CA13.

MPTN alleged that COVID-19 can remain viable on objects or surfaces, which, once infected with COVID-19, are sometimes referred

to as fomites. CA14. During and after illness, COVID-19 particles are shed in large numbers in bodily secretions, including, for example, saliva, oral fluid, nasal fluid, and respiratory droplets, and COVID-19 can be introduced and reintroduced to surfaces by, for example, direct physical contact with such surfaces. *Id.* Multiple studies, including studies from the National Institute of Health and various academic, scientific journals, have concluded that COVID-19 can remain viable on various objects, surfaces, or materials for a period of up to 28 days. *Id*. Studies have also reported that COVID-19 was detectable up to four hours on copper, up to twenty-four hours on cardboard, and up to three days on plastic and stainless steel. *Id*. MPTN therefore specifically alleged that COVID-19 physically and tangibly alters property, and its existence on objects or surfaces renders them unsafe or unusable. CA15

COVID-19 was actually present at MPTN's insured Tribal Businesses' locations and caused tangible physical loss or damage to property. CA16–CA17. MPTN alleged that specific objects on its property were physically damaged and had to be disposed of or remediated. CA15–CA16 (allegations of physical, tangible alteration, damage, and impairment to specific items), CA15–CA16, CA29 (allegations of remediation and disposal). MPTN provided many examples of the specific property, including property at its restaurants, retail outlets, casinos, spas, and hotels, that was physically altered, damaged, and impaired by COVID-19 at its Tribal Businesses. CA15–CA16.

MPTN also alleged that its Tribal Businesses contain the sorts of surfaces, objects, and materials in which studies have reported that COVID-19 was detectable for hours to multiple days. CA14, CA16. There were at least 205 confirmed or suspected COVID-19 cases among those individuals that work on the premises of the Tribal

Businesses, CA16, not including any cases among the hundreds of thousands of individuals that visit the Tribal Businesses on a monthly basis. *Id*.

MPTN therefore alleged that COVID-19—actually present at MPTN's properties—caused tangible physical loss or damage at the locations and properties insured under the FM Policy. CA13–CA16. Because of the physical loss or damage caused by COVID-19, MPTN was forced to shut down or appropriately limit operations. CA17–CA18.

3. Procedural History

In its Complaint, MPTN asserted separate causes of action for declaratory judgment, breach of contract, common law bad faith, and a violation of the Connecticut Unfair Trade Practices Act. CA37–CA40. FM moved to strike all counts. CA133. On August 18, 2021, the trial court granted in part and denied in part FM's motion (the "August 18 2021 Decision"). CA142–CA143. The trial court held that MPTN could only recover under the policy's Property Damage – Communicable Disease Response coverage and the Time Element – Interruption by Communicable Disease coverage. CA143. To the extent that MPTN's claims sought coverage under any other policy provisions, the Court found that such claims failed "as a matter of law" and struck them from all counts of the Complaint. CA142.

On June 2, 2022, the parties filed a Stipulated Withdrawal whereby MPTN withdrew, with prejudice, its remaining claims that the Court did not strike. CA150–CA151. On June 3, 2022, the trial court granted the parties' motion for an Order of Judgment pursuant to Practice Book 10-44, entering final judgment as to MPTN's stricken claims, consistent with the August 18, 2021 Decision. CA153–CA154. MPTN appeals the trial court's August 18, 2021 Decision insofar as it granted FM's motion to strike.

C. STANDARD OF REVIEW

This Court reviews *de novo* a trial court's grant of a motion to strike, assuming the truth of all well-pleaded facts and those facts necessarily implied from the allegations, which are taken as admitted, *Gazo v. Stamford*, 255 Conn. 245, 260 (2001), and construing the facts in the complaint "most favorably" to the plaintiff. *Faulkner v. United Technologies Corp.*, 240 Conn. 576, 580 (1997). The pleading must be construed "broadly and realistically, rather than narrowly and technically." *Trimm v. Kasir*, 2011 WL 6413807, at *1 (Conn. Super. Ct. Nov. 30, 2011). Connecticut appellate courts have repeatedly reversed lower courts' decisions that failed to adhere to the standards for a motion to strike under Connecticut law. *See, e.g., Comm'r of Lab. v. C.J.M. Servs., Inc.*, 268 Conn. 283, 292 (2004) ("Because a motion to strike challenges the legal sufficiency of a pleading and, consequently, requires no factual findings by the trial court, our review of the court's ruling on the [motion] is plenary.").

This Court reviews *de novo* a trial court's interpretation of an insurance contract. *See, e.g., Nat'l Grange Mut. Ins. Co. v. Santaniello*, 290 Conn. 81, 88 (2009). "[C]onstruction of a contract of insurance presents a question of law for the court . . . ." *Lexington Ins. Co. v. Lexington Healthcare Grp.*, 311 Conn. 29, 37 (2014) (alteration in original). In construing an insurance policy, the "determinative question is the intent of the parties, that is, what coverage the . . . [insured] expected to receive and what the [insurer] was to provide, as disclosed by the provisions of the policy." *Liberty Mut. Ins. Co. v. Lone Star Indus., Inc.*, 290 Conn. 767, 795 (2009). Connecticut courts give words their "natural and ordinary meaning," often by consulting "the dictionary definition of the term." *Lexington*, 311 Conn. at 38, 42 n.8.

D. ARGUMENT

1. FM Sold MPTN A High-Premium Policy That Explicitly Covers Losses Caused by "Communicable Disease" as "Insured Physical Loss or Damage" or "Physical Loss or Damage of the Type Insured"

We begin, as we must under Connecticut's rules on insurance policy interpretation, with the unique contractual language of the FM Policy. The FM Policy is different than most policies on the market in that it explicitly recognizes that communicable diseases may cause physical loss or damage. That this was contractually agreed upon between FM and MPTN is evident by the FM Policy's terms and structure.

The FM Policy covers MPTN property "against ALL RISKS OF PHYSICAL LOSS OR DAMAGE, except as hereinafter excluded." CA52. The Policy provides two predominant types of coverages—"PROPERTY DAMAGE" (CA60–CA85) and "TIME ELEMENT" (CA86–CA106)—which are triggered when physical loss or damage is established. "PHYSICAL LOSS OR DAMAGE," is not explicitly defined in the Policy. CA116–CA121.

In two sections of the FM Policy, it expressly recognizes that "communicable disease" at a property is a type of "physical loss or damage" insured under the Policy. CA 60, CA67, CA73, CA86, CA102, CA104.

FM agreed to provide certain "Additional Coverages *for insured physical loss or damage*" in the "Property Damage" section of the FM Policy. CA67 (emphasis added) ("This Policy includes the following Additional Coverages for insured physical loss or damage."). One of those "Additional Coverages for insured physical loss or damage" is for "Communicable Disease Response." CA73. "Communicable disease" is

defined as "disease which is . . . (A) transmissible from human to human by direct or indirect contact with an affected individual or the individual's discharges, or (B) Legionellosis." CA117.

This additional coverage applies when MPTN's insured property "has the actual not suspected presence of communicable disease and access to such location is limited, restricted or prohibited by: 1) an order of an authorized government agency regulating the actual not suspected presence of communicable disease; or 2) a decision of an Officer of the Insured as a result of the actual not suspected presence of communicable disease." CA73. This additional coverage has a "sublimit" of $1 million—that is, the coverage covers costs, up to $1 million, of "cleanup, removal and disposal of the actual not suspected presence of communicable diseases from insured property," as well as certain resulting public relations and reputation management costs.

FM also agreed to provide certain "Additional Time Element Coverage Extensions," in the section of the FM Policy covering "Time Element" losses "resulting from physical loss or damage of the type insured," one of which is for "Interruption by Communicable Disease." CA86, CA102, CA104. "Interruption by Communicable Disease" coverage covers certain business income losses and expenses, also up to a $1,000,000 sublimit, when insured property "has the actual not suspected presence of communicable disease and access to such location is limited, restricted or prohibited" by "order of an authorized governmental agency" or "an Officer of the Insured." CA104–CA105.

Accordingly, as MPTN alleged, the FM Policy, by its terms and structure, expressly acknowledges that communicable disease is a risk or cause of "***insured*** physical loss or damage" or "physical loss or damage of the type ***insured***." *See e.g.*, CA67, CA73 (emphasis added). The additional coverage provisions for "Communicable Disease

Response" and "Interruption by Communicable Disease" further support this interpretation of the FM Policy.[1]

2. The Trial Court Erred by Refusing to Decide Whether the COVID-19 Communicable Disease Constitutes a Risk or Cause of "Physical Loss or Damage" to Property Under the FM Policy

The trial court should have interpreted the FM Policy as set forth above: beginning with the basic insuring agreement, which covers property "against ALL RISKS OF PHYSICAL LOSS OR DAMAGE, except as hereinafter excluded," finding that communicable disease constitutes a risk or cause of "insured physical loss or damage" or "physical loss or damage of the type insured" under the FM Policy (which is therefore not excluded) and concluding that MPTN properly alleged that COVID-19 is such a communicable disease. The trial court, however, effectively *started its interpretation* of the FM Policy with the contamination exclusion and concluded that the "additional coverages" for "Communicable Disease Response" and "Interruption by Communicable Disease" constituted "buybacks" in coverage, thereby limiting the all-risk coverage for communicable disease to the two sublimited "Communicable Disease" coverages. CA136–CA137. This was error.

If FM intended to limit its coverage for the risk or cause of loss, communicable disease, to *only* these two, so-called "communicable disease" coverages, then FM should clearly have stated so. FM stated so with respect to another "additional" coverage—stating that a

---

[1] As MPTN alleged, FM's internal "talking points" (prepared after insureds started submitting COVID-19 insurance claims) further confirm this understanding. CA33–CA36.

particular "additional" coverage was the *exclusive* coverage afforded by the FM Policy for that risk or cause of loss. *See, e.g.*, CA97 (the FM Policy's "Off Premises Data Services Time Element" coverage provides that the "Coverage provided in this *Extension is excluded from coverage elsewhere in this Policy*.") (emphasis added). FM knew how to say this and chose not to with respect to the two, so-called "communicable disease" coverages. The trial court's reading summed up in its statement—"no coverage for the virus beyond the two exceptions"—ignores this, and by no means is the "only rational way to read the policy." CA139.

Upon undertaking a complete policy interpretation, this Court should interpret the FM Policy as providing multiple coverages for the same risk or cause of loss, here the COVID-19 communicable disease. *See Lexington*, 311 Conn. at 58–59 ("[T]he policy must be construed in its entirety, with each clause interpreted in relation to others contained therein."); *Conn. Ins. Guar. Ass'n v. Drown*, 314 Conn. 161, 187 (2014) (When an insurance contract's terms are "susceptible of two equally reasonable interpretations," "that which will sustain the claim and cover the loss must, in preference, be adopted.").

In sum, MPTN's Complaint alleged entitlement to several coverages triggered by "insured physical loss or damage" and "physical damage of the type insured" resulting from COVID-19 at either an insured location or another location. The Trial Court never reached these issues. It should have. This Court should reverse the trial court's decision granting FM's motion to strike and remand to the trial court for further proceedings.

3. The Trial Court Erred by Holding that MPTN's Claim Is Limited to Coverages for Communicable Disease Response and Time Element Interruption By Communicable Disease

While the trial court correctly found that MPTN's Complaint triggered property damage and time element coverages under the FM Policy, the trial court incorrectly held that MPTN's claim under the FM Policy is limited to "costs under the provisions granting coverage for communicable disease response and time element costs . . . limited to: 1. $1 million the aggregate during any policy year for communicable disease response, and 2. $1 million in the aggregate during any policy year for interruption by communicable disease." CA143.

As noted above, one of the FM Policy's "Additional Coverages for insured physical loss or damage" is for "Communicable Disease Response." CA73. Another of the FM's Policy's additional coverages is for "Interruption by Communicable Disease." CA86, CA102, CA104. The trial court found that each has an aggregate sublimit of up to a $1,000,000. As the trial court found, FM itself has taken the position that neither of those additional coverages require a showing of physical loss or damage. CA141 ("Factory Mutual maintains that these claims don't require proof of physical property damage."). Rather, they only require a much lower showing of actual presence of Communicable Disease on the property followed by a closure due to governmental order or decision by an officer of MPTN. *See id.*, at 140-41 (finding that MPTN sufficiently alleged actual presence of COVID-19 on MPTN property).

That these two "Additional" policy benefits are "sublimited" to certain costs ($1 million) does not eliminate the communicable disease

trigger for property damage and time element losses with respect to *other coverages in the FM Policy*. Put another way, the various coverages afforded under the FM Policy *are not exclusive*. CA67, CA73, CA102, CA104–CA105. Instead, multiple coverages are available for a risk or cause of loss, unless otherwise stated explicitly in the text of the Policy. *See* CA56.

An example where an additional coverage afforded by the FM Policy is the exclusive coverage for a particular risk or cause of loss is the "Off Premises Data Services Time Element" coverage, which states that the "Coverage provided in this Extension *is excluded from coverage elsewhere in this Policy*." CA97 (emphasis added). In contrast, the "additional coverage" for "Communicable Disease Response" and "coverage extension" for "Interruption by Communicable Disease" do not abrogate or eliminate applicable coverage available under the other types of coverage afforded by the FM Policy for the same risk or cause of loss. CA73, CA104–CA105.

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

Thus, although the trial court correctly found that MPTN's Complaint triggered property damage and time element coverage under the FM Policy, the trial court erred in holding that coverage was limited to the Communicable Disease Response and Interruption by Communicable Disease coverages.

4. The Trial Court Erred By Ruling that the FM Policy's "Contamination" Exclusion Unambiguously Bars All Coverages for "Physical Loss or Damage" Caused by the COVID-19 Communicable Disease

The "contamination" exclusion excludes "contamination, and any cost due to contamination" unless "directly result[ing] from other physical damage not excluded by this Policy[.]" CA65. The definition of "contamination" does not include "communicable disease," which is a separate risk or cause of physical loss or damage insured under the FM Policy. CA117. "Communicable disease" includes "disease which is . . . transmissible from human to human by direct or indirect contact with an affected individual or the individual's discharges" and is *not* defined to include "contamination." *Id.* COVID-19 indisputably qualifies as a "communicable disease" and any "virus" contamination at property results from the presence of communicable disease at that property, *i.e.*, "from other physical damage not excluded by this Policy[.]" CA65.

Two conclusions flow from this policy language. First, "communicable disease" cannot be "contamination" under the FM Policy, because the definition of "contamination" does not include "communicable disease." CA117. Second, the "contamination" exclusion cannot encompass "communicable disease," because the FM Policy explicitly covers "communicable disease." The "contamination" exclusion therefore does not apply to loss or damage from communicable disease.

As described above, the FM Policy here expressly covers communicable disease as a risk or cause of "physical loss or damage" to property. *Other* exclusions, commonly used in the insurance industry—like a specific virus exclusion—exclude losses caused by communicable disease *without* also covering such risks in the policy. CA28. If FM

intended to exclude losses caused by communicable diseases, it could have—but it did not.

The trial court concluded that the two, so-called "communicable disease coverages" are exceptions to the "contamination" exclusion meant to provide to insureds limited coverage in situations, where other coverages do not apply. CA137, CA139. This argument is textually wrong. When the FM Policy intends to except coverages from the scope of exclusions, it does so explicitly. *See, e.g.*, CA62 (in exclusion for "loss from enforcement of any law or ordinance," the exclusion bars coverage "*except as* provided by the DECONTAMINATION COSTS and LAW AND ORDINANCE coverages of the Policy.") (emphasis added). There is no such "except as" language in the FM Policy or other textual support for the trial court's conclusion that the FM Policy's "communicable disease coverages" are exceptions to coverage that is otherwise "impliedly" excluded under the Policy. Insurance policy exclusions are read narrowly and take away coverage only when they explicitly and clearly so provide. *See Liberty Mut. Ins. Co.*, 290 Conn. at 796 (holding that, when confronted with a policy exclusion, the court "must conclude that the language should be construed in favor of the insured unless it has a high degree of certainty that the policy language clearly and unambiguously excludes the claim" (internal quotation marks omitted)).

Indeed, FM's Contamination Exclusion has been held to be ambiguous on this exact point in *Thor Equities, LLC v. Factory Mutual Insurance Co.*, 531 F. Supp. 3d 802, 808 (S.D.N.Y. 2021). The *Thor* court found that it "cannot be said that the [Contamination Exclusion] unambiguously forecloses recovery on Thor's [COVID-19-related] losses due to contamination, and thus the Court cannot conclude that 'there

is no reasonable basis for a difference of opinion.'" *Id*. The Court should follow that sound ruling here.

5. The Connecticut Supreme Court's Recent Decisions, *Moda* and *Connecticut Dermatology*, Do Not Preclude Coverage

a. *Moda* and *Connecticut Dermatology* Are Inapposite and Thus Do Not Dictate the Interpretation of the Materially Different Provisions of the FM Policy

The unique FM Policy at issue here is distinct from the policies at issue in the *Moda* and *Connecticut Dermatology* cases in two pertinent ways.

First, the FM Policy, unlike the policies at issue in *Moda* and *Connecticut Dermatology*, by its plain terms, expressly recognizes "communicable disease" at a property to be a risk or cause of "physical loss or damage." *See* CA67, CA73. As discussed above, one of the "Additional Coverages for insured physical loss or damage" in the "Property Damage" section of the FM Policy is for "Communicable Disease Response," CA60, CA67, CA73, and one of the "Additional Time Element Coverage Extensions" for business interruption "resulting from physical loss or damage of the type insured," is for "Interruption by Communicable Disease." CA86, CA102, CA104. The presence of the language in the FM Policy shows that one reasonable interpretation of the FM Policy is that communicable disease may cause physical loss or damage insured under the FM Policy.

This was the conclusion of one court evaluating the same policy issued by FM to another policyholder. *See Sacramento Downtown Arena LLC v. Factory Mut. Ins. Co.*, 2022 WL 16529547 at *4 (E.D. Cal. Oct. 28, 2022) (holding that "the [FM] policy at the center of this case can reasonably be interpreted as defining the presence of a

communicable disease as physical loss or damage." (internal quotation marks omitted)).

Other courts evaluating the FM Policy form have found that the question of whether COVID-19, for example, physically altered property is a question of fact that is subject to expert discovery and testimony and cannot be determined as a matter of law. *See Live Nation Ent., Inc. v. Factory Mut. Ins. Co.*, 2022 WL 390712, at *7 (C.D. Cal. Feb. 3, 2022) ("Accepting the allegations in the Complaint as true, it cannot be determined as a matter of law that the presence of COVID-19 in Plaintiff's properties could not cause 'physical loss or damage' to property."); *Regents of the Univ. of Colo. v. Factory Mut. Ins. Co.*, 2022 WL 245327, at *4 (Colo. Dist. Ct. Jan. 26, 2022) (denying FM's dispositive motion and finding that "physical loss or damage" is susceptible to more than one reasonable interpretation and that the policyholder sufficiently alleged it was entitled to coverage by alleging that COVID-19 altered its property); *Snoqualmie Entm't Auth. v. Affiliated FM Ins. Co.*, 2021 WL 4098938, at *5 (Wash. Super. Ct. Sep. 3, 2021) (denying FM's dispositive motion and finding that the phrase all risks of physical loss or damage is susceptible to more than one reasonable interpretation); *Nevada Property 1 LLC v. Factory Mutual Ins. Co.*, 2021 Nev. Dist. LEXIS 268, *5 (Nev. Dist. Ct. for Clark Cnty. Sept. 1, 2021) (denying FM's motion to dismiss, holding that whether COVID-19 physically damaged property "is reserved for another day").[2]

[2] We acknowledge that other courts have held that no coverage is available under FM's form. *See, e.g., Ralph Lauren Corp. v. Factory Mut. Ins.Co.*, 2021 WL 1904739 (D.N.J. May 12, 2021); *Tumi, Inc. v. Factory Mut. Ins. Co.*, 2022 WL 2666950 (D.N.J. July 11, 2022). *See Cinemark Holdings, Inc. v. Factory Mut. Ins. Co.*, 2023 WL 2588548 (E.D. Texas, March 21, 2023) (after initially denying FM's motion to

The *Moda* and *Connecticut Dermatology* policies do not contain these provisions recognizing that "communicable disease" constitutes insured physical loss or damage under the policy. Rather, *Moda* and *Connecticut Dermatology* focus on whether losses resulting from the COVID-19 pandemic are precluded by the "virus" exclusions contained in the policies at issue in those cases, or whether the insureds' claims sufficiently alleged "physical loss or damage" as those terms are construed under policies that do not expressly include "communicable disease" as a type of "insured physical loss or damage" to property like the FM Policy at issue here. *See Connecticut Dermatology*, Case No. SC 20695, Docket No. 2, Br. at 24–53; *Moda*, SC 20678, Docket No. 2 Brief at 10–31.

Second, the FM Policy does not contain the "virus" exclusions contained in the *Moda* and *Connecticut Dermatology* policies. The FM Policy contains a "contamination" exclusion, and that exclusion is substantially different from the "virus" exclusions in the *Moda* and *Connecticut Dermatology* policies. CA65. The exclusion in the FM Policy expressly states that it does not apply to losses "directly resulting from other physical damage not excluded by" the FM Policy. *Id*. The term "communicable disease" is not defined in the FM Policy to include "contamination," and the term "contamination" is not defined to include "communicable disease." CA117. Finally, the "contamination" exclusion applies only to "contamination, and any cost due to contamination," but does not bar coverage for losses otherwise covered by the FM Policy. CA65.

---

dismiss, finding that the policyholder's complaint survived a pleadings challenge and permitting discovery, the court ultimately entered summary judgment in favor of FM).

In contrast, the *Moda* and *Connecticut Dermatology* policies contain different exclusions for "virus." For example, the *Connecticut Dermatology* policy contains "Fungi, Bacteria or Virus Exclusions," including a "'Fungi,' Wet Rot, Dry Rot, Bacteria and Virus" exclusion, which includes the word "virus" in its title as well as language whereby "[s]uch loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss." *Connecticut Dermatology*, Docket No. 2 Appendix at 73. That language is, importantly, absent from the "contamination" exclusion in the FM Policy. CA65.

The *Moda* "Package Policy" likewise contains multiple "virus" exclusions. For property in New York, the Package Policy precludes coverage "for loss or damage caused by or resulting from any virus . . . that induces or is capable of inducing physical distress, illness or disease." *Moda* Docket No. 2 Appendix at 556. For properties outside New York, a "virus" exclusion in the *Moda* Package Policy precludes coverage "for loss or damage caused directly or indirectly by . . . [the p]resence, growth, proliferation, spread or any activity of 'fungus,' wet rot, dry rot, bacteria or virus," "regardless of any other cause or event that contributes concurrently or in any sequence to the loss or damage." *Id.* at 579–80. Again, there is no such exclusion in the FM Policy.

These differences between the FM Policy and the *Moda* and *Connecticut Dermatology* policies require a different analysis. *See Jemiola Tr. of Edith R. Jemiola Living Tr. v. Hartford Cas. Ins. Co.*, 335 Conn. 117, 134 (2019) ("Language in an insurance contract, therefore, must be construed in the circumstances of [a particular] case, and cannot be found to be ambiguous or unambiguous in the abstract."); *Russbach v. Yanez-Ventura*, 213 Conn. App. 77, 108 (2022) ("There is a fundamental distinction between deciding what policy

language means, on the one hand, and deciding, on the other hand, whether a particular policy option was bought.") (*citing Fiallo v. Allstate Ins. Co.*, 138 Conn. App. 325, 341–41 (2012)); *see also Am. Int'l Specialty Lines Ins. Co. v. Canal Indem. Co.*, 352 F.3d 254, 267 (5th Cir. 2003) (noting that, in cases involving the interpretation of insurance policies, courts "stress the importance of resolving insurance coverage disputes by analyzing the particular and pertinent policy language presented in each case").

b. Unlike the Plaintiffs in *Moda* and *Connecticut Dermatology*, MPTN Actually Alleged that COVID-19 Physically Altered Specific Property

Although nothing in the FM Policy says that the insured must plead and prove "tangible" alteration to property due to a communicable disease, like COVID-19, to recover its losses, MPTN's complaint contained such allegations. Unlike the policies at issue in *Connecticut Dermatology* and *Moda*, the FM Policy expressly considers the presence of communicable disease at property to be "physical loss or damage." Put another way, MPTN seeks coverage because communicable disease at its property, which is a covered cause of physical loss or damage under the FM Policy, physically altered specific property.

MPTN recognizes that, while not essential to the Court's holding, the *Connecticut Dermatology* Court stated that it found "persuasive the cases that have held that the virus is not the type of physical contaminant that creates the risk of a direct physical loss because, once a contaminated surface is cleaned or simply left alone for a few days, it no longer poses any physical threat to occupants." *Connecticut Dermatology Grp., PC v. Twin City Fire Ins. Co.*, 346 Conn.

33, 59(2023).[3] *Moda* followed the dicta without citing any additional caselaw. See *Moda*, 346 Conn. 64, 73–74. The FM Policy, as discussed in detail above, presents a different situation because the policy itself recognizes that communicable disease can cause physical loss or damage. In other words, under the unique FM Policy, the parties contractually agreed that communicable disease, such as COVID-19, can cause physical loss or damage. In addition, the definitions of "contamination" and "contaminant" in the FM Policy do not include "communicable disease," which is a separate defined term under the FM Policy.

Furthermore, MPTN respectfully submits that the dicta, stated in *Connecticut Dermatology* and followed by *Moda*, does not apply in this case, for the following additional reasons.

First, as a threshold matter, whether COVID-19 physically altered a property, including its surfaces or air, after it is cleaned or

---

[3] The Court made that statement after noting that the plaintiffs in the case made "no claim that their properties were actually contaminated by the coronavirus or that they closed their businesses during the pandemic because the actual presence of the virus made the buildings in which the businesses were located nonfunctional or inherently dangerous to persons who entered them." *See id*. After observing that plaintiffs focused instead on "the potential for person to person transmission of the virus within the building," the Court then continued: "In any event, even if the plaintiffs had claimed that their properties were actually contaminated by the coronavirus, we find persuasive the cases that have held that the virus is not the type of physical contaminant that creates the risk of a direct physical loss because, once a contaminated surface is cleaned or simply left alone for a few days, it no longer poses any physical threat to occupants." *Id*.

left alone for a few days is a *factual* question, not suitable at the stage of motion to strike. MPTN sufficiently pleaded that COVID-19 physically altered its property, CA15–CA16, and should not be deprived of the opportunity to prove its case.

Second, *Moda* and *Connecticut Dermatology* do not apply here also because both cases are decided on summary judgment motions, rather than motions to strike. *Connecticut Dermatology*, 346 Conn. at 36; *Hartford Fire Ins. Co. v. Moda, LLC*, 346 Conn. 64, 68 (2023). In other words, the plaintiffs in both cases had the opportunity of discovery and proof of their cases—an opportunity the trial court did not give to MPTN.

Third, all but one of the cases relied on by the Court for the proposition that COVID-19 cannot physically alter property (*Connecticut Dermatology*, 346 Conn. at 59 n.24) turn on whether the plaintiff actually made the allegation. *See, e.g.*, *Inns-by-the-Sea v. California Mut. Ins. Co.*, 71 Cal. App. 5th 688, 704, 286 Cal. Rptr. 3d 576, 590 (2021), *review denied* (Mar. 9, 2022) ("[I]t could be possible, in a hypothetical scenario, that an invisible airborne agent would cause a policyholder to suspend operations because of direct physical damage to property. **The complaint here simply does not describe such a circumstance** because it bases its allegations on the situation created by the Orders, which were not directed at a particular business establishment due to the presence of COVID-19 on that specific business's premises.") (emphasis add); *State & 9 St. Corp. v. Soc'y Ins.*, 2022 IL App (1st) 211222-U, ¶ 35 (finding that "plaintiffs were required to allege a 'physical alteration to [their] property,' and more specifically, 'an alteration in appearance, shape, color or in other material dimension,' **but they failed to do so**") (emphasis added); *Kim-Chee LLC v. Philadelphia Indem. Ins. Co.*, 2022 WL 258569, at *2 (2d Cir. Jan. 28, 2022) ("[T]he **complaint does not allege that any**

part of its building or anything within it was damaged—let alone to the point of repair, replacement, or total loss. Nor does Kim-Chee explain how, other than by the denial of access, any of its property could no longer serve its insured function.") (emphasis added); *AC Ocean Walk, LLC v. Am. Guarantee & Liab. Ins. Co.*, 2022 WL 2254864, at *13 (N.J. Super. Ct. App. Div. June 23, 2022) ("[The plaintiff] was forced to close its [business] venues to the public in accordance with Governor Murphy's EO's."). The other case was decided under a different standard. *See Connecticut Children's Med. Ctr. v. Cont'l Cas. Co.*, 581 F. Supp. 3d 385, 388 (D. Conn. 2022) ("a complaint must allege enough facts to state plausible grounds for relief").

Here, by contrast, MPTN sufficiently pleaded that COVID-19 physically altered its property. CA15–CA16. It also alleged scientific studies to support this allegation. CA14. It further specifically identified the property that was affected. For example, MPTN alleged:

> "The physical alteration, damage, and impairment described herein includes, but is not limited to, damage to:
>
> a. In the restaurants: cooking equipment and appliances, storage equipment, signs, menus, ovens, microwaves, refrigerators, freezers, ice machines, napkins, utensils, measuring cups and spoons, utensils, plates, cups, saucers, scales, thermometers, timers, aprons, soda dispensers, bar, glasses, bottles of alcohol, and containers, among other items.
> b. In the retail outlets: retail merchandise, signs, shelves, displays, counters, clothes hangers, boxes, packaging, and bags, among other items.

c. In the casinos: tables, chairs, lights, displays, cards, chips, dice, cards, cups, containers, slot machines, games, screens, handles, and money, among other items.
d. In the spas: tables, chairs, bottles, packaging, curtains, showers, tubs, cushions, blankets, pillows, towels, linens, cups, glasses, coolers, pitchers, and trays, among other items.
e. In the hotels: beds, linens, key cards, remotes, handles, tables, desks, chairs, lamps, switches, curtains, blinds, cords, luggage racks, irons, ironing boards, shelves, toilet paper, paper towels, cups, soap boxes, shampoo bottles, conditioner bottles, lotion bottles, bells, desks, signs, pillows, pens, paper, cleaning supplies, elevators, bell carts, housekeeping carts, housekeeping supplies, mops, brooms, bottles, rags, and cloths, among other items.
f. At all locations: lighting fixtures, cash registers, computers, tables, chairs, couches, stools, curtains, blinds, doors, door handles, carts, countertops, display cases, shelving, uniforms, floors, windows, fans, mirrors, decorative items, pictures, frames, sinks, faucets, faucet handles, soap dispensers, paper towels, paper towel holders, toilets, urinals, and trash cans, among other items.

CA15–CA16.

Whether COVID-19 can actually physically alter property is a *factual* issue which MPTN should have an opportunity to prove with scientific evidence and expert testimony. Based on the liberal pleading standards, MPTN should not be deprived of such opportunity. *See, e.g.*, *Huntington Ingalls Indus., Inc. v. Ace Am. Ins. Co.*, 287 A.3d 515, 537 (Vt. 2022) (finding that insured sufficiently alleged its property

suffered direct physical damage from COVID-19 to state a claim under Vermont's liberal pleading standards, reversing and remanding for further proceedings).

Finally, both *Moda* and *Connecticut Dermatology* were cited in the Second Circuit's recent decision in *ITT Inc. v. Factory Mut. Ins. Co.*, 2023 WL 1126772, at *1 (2d Cir. Jan. 31, 2023). That decision, however, also does not preclude coverage here because MPTN's Complaint offers specific allegations that specific objects were damaged and had to be remediated. MPTN specified items that required disposal/replacement or remediation/repair. For example, MPTN alleged physical, tangible alteration, damage, and impairment to specific items and specifically alleged that certain items had to be disposed of or replaced and that such physical impacts had to be remediated or otherwise repaired. *See* CA15–CA16, CA29.

MPTN should be afforded the opportunity to proceed with fact and expert discovery and prove its factual allegations through evidence and testimony.

E. CONCLUSION AND STATEMENT OF RELIEF REQUESTED

For all the above reasons, MPTN respectfully requests this Court to reverse the decision of the trial court and remand with direction to deny FM's motion to strike in favor of MPTN on the above issues of policy interpretation under the unique FM Policy and for further proceedings.

PLAINTIFF-APPELLANT,
MASHANTUCKET PEQUOT TRIBAL NATION,

/s/ Michael C. D'Agostino
Michael C. D'Agostino [ct #413077]
Morgan, Lewis & Bockius LLP
One State Street
Hartford, CT 06103
Tel.: 860-240-2700
Fax: 860-240-2701
michael.dagostino@morganlewis.com

Sergio F. Oehninger [*pro hac vice*]
Morgan, Lewis & Bockius LLP
1111 Pennsylvania Ave., NW, 8th Fl.
Washington, D.C. 20004-2541
Tel: (202) 739-5521
Fax: (202) 739-3001
sergio.oehninger@morganlewis.com

Its Attorneys

CERTIFICATION

The undersigned hereby certifies, pursuant to Connecticut Rule of Appellate Procedure § 67-2A, that:

(1) a copy of the brief has been sent electronically to each counsel of record in compliance with Connecticut Rule of Appellate Procedure § 62-7, including the following counsel listed below, and except for counsel of record exempt from electronic filing pursuant to Connecticut Rule of Appellate Procedure § 60-8, to whom a paper copy of the brief must be sent;

(2) the brief being filed with the appellate clerk are true copies of the brief that were submitted electronically pursuant to subsection (f) of Connecticut Rule of Appellate Procedure § 67-2A;

(3) the brief does not contain any names or other personal identifying information that is prohibited from disclosure by rule, statute, court order or case law, unless the brief is filed pursuant to Connecticut Rule of Appellate Procedure § 79a-6;

(4) the brief has 6,497 words;

(5) the brief complies with all provisions of Connecticut Rule of Appellate Procedure § 67-2A; and

(6) no deviations were requested/approved from Connecticut Rule of Appellate Procedure § 67-2A.

Chase T. Rogers
Andraya Pulaski Brunau
Day Pitney LLP
242 Trumbull St.
Hartford, CT 06103
T: 850-275-0100
ctrogers@daypitney.com
abrunau@daypitney.com

Bryce L. Friedman (*pro hac vice*)
Isaac Rethy (*pro hac vice*)
Simpson Thacher & Bartlett LLP
425 Lexington Avenue
New York, NY 10017
T: 212-455-2000
bfriedman@stblaw.com
irethy@stblaw.com

/s/ Michael C. D'Agostino