

No. 24-7428

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**United States Court of Appeals  
For the Ninth Circuit**

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TREASURE ISLAND, LLC,  
Plaintiff-Appellant,

v.

AFFILIATED FM INSURANCE CO.,  
Defendant-Appellee.

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ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEVADA, NO. 2:20-CV-00965-CDS-EJY [SILVA, J.]

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**REPLY BRIEF OF APPELLANT  
TREASURE ISLAND, LLC**

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Harry L. Manion  
Christopher J. Cunio  
Nicholas D. Stellakis  
Hunton Andrews Kurth LLP  
60 State Street, Suite 2400  
Boston, Massachusetts 02109  
(617) 648-2800  
hmanion@huntonAK.com  
ccunio@huntonAK.com  
nstellakis@huntonAK.com

Michael S. Levine  
Hunton Andrews Kurth LLP  
2200 Pennsylvania Ave. NW  
Washington, DC 20037  
(202) 955-1500  
mlevine@huntonAK.com

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## TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
INTRODUCTION .....	1
ARGUMENT .....	2
I.    The record shows that Treasure Island suffered physical loss or damage from COVID-19.....	2
A.    AFM appears to agree that context can impart a broader meaning to policy terms.....	4
B.    AFM also concedes that its Business Interruption coverage applies to physical loss or damage from a Communicable Disease. ....	5
C.    The sanctions order binds AFM from disputing that a Communicable Disease can cause physical loss or damage under the AFM Policy. ....	8
D.    None of the other cases concerning AFM’s policy involved the facts of <i>this</i> case. ....	10
E.    Indoor air is insured property.....	11
F.    Treasure Island proved causation. ....	11
II.   No exclusion applies. ....	14
A.    The Contamination Exclusion does not apply .....	14
B.    The Loss of Use Exclusion does not apply.....	17
III.  The Communicable Disease coverage claims must be reinstated.....	17
A.    Treasure Island proved actual presence of COVID-19 on-site during the Policy period. ....	17
B.    Treasure Island proved it closed because of the actual presence of COVID-19.....	21
IV.  The common-law and statutory bad-faith claims should be reinstated.....	21
CONCLUSION .....	22
CERTIFICATE OF SERVICE .....	24

**TABLE OF AUTHORITIES**

	<b>Page(s)</b>
<b>Cases</b>	
<i>7th Inning Stretch LLC v. Arch Ins. Co.</i> , No. CV 20-8161 (SDW) (LDW), 2021 WL 1153147 (D.N.J. Mar. 26, 2021) .....	20, 21
<i>Another Planet Ent., LLC v. Vigilant Ins. Co.</i> , 15 Cal. 5th 1106 (2024) .....	16
<i>Band's Visit Nat'l Tour LLC v. Hartford Fire Ins. Co.</i> , 307 A.3d 387 (Del. Super. Ct. 2023), .....	21
<i>Blue Coral, LLC v. W. Bend Mut. Ins. Co.</i> , 533 F. Supp. 3d 279 (E.D.N.C. 2021) .....	20
<i>Broadwall Mgmt. Corp. v. Affiliated FM Ins. Co.</i> , No. 21 CIV. 10247 (PAE), 2022 WL 3030315 (S.D.N.Y. Aug. 1, 2022) .....	18, 19
<i>Butler v. Lovoll</i> , 620 P.2d 1251 (Nev. 1980).....	7
<i>C.J. Segerstrom &amp; Sons v. Lexington Ins. Co.</i> , 724 F. Supp. 3d 1052 (C.D. Cal. Feb. 27, 2023) .....	14
<i>Cinemark Holdings, Inc. v. Factory Mut. Ins. Co.</i> , No. 4:21-CV-00011, 2023 WL 4406021 (E.D. Tex. July 7, 2023).....	6, 7
<i>Cinemark Holdings, Inc. v. Factory Mut. Ins. Co.</i> , No. 4:21-CV-00011, 2023 WL 5431317 (E.D. Tex. Apr. 18, 2023) .....	6
<i>Circus Circus LV, LP v. AIG Specialty Ins. Co.</i> , No. 21-15367, 2022 WL 1125663 (9th Cir. Apr. 15, 2022).....	13
<i>Dakota Girls. Dakota Girls, LLC v. Philadelphia Indemnity Insurance Co.</i> , 17 F.4th 645 (6th Cir. 2021) .....	19

<i>Dana Inc. v. Zurich Am. Ins. Co.</i> , No. 21-4150, 2022 WL 2452381 (6th Cir. July 6, 2022) .....	15
<i>Firebirds Int’l, LLC v. Zurich Am. Ins. Co.</i> , 208 N.E.3d 1187 (Ill. Ct. App. 2022) .....	15
<i>Hilao v. Est. of Marcos</i> , 393 F.3d 987 (9th Cir. 2004) .....	5
<i>Inns-by-the-Sea v. California Mut. Ins. Co.</i> , 286 Cal. Rptr. 3d 576 (Cal. App. Ct. 2021).....	13
<i>Josephson, LLC v. Affiliated FM Ins. Co.</i> , 314 A.3d 954 (R.I. 2024) .....	15
<i>Kaldi v. Farmers Insurance Exchange</i> , 21 P.3d 16 (Nev. 2001).....	8
<i>Machowski v. 333 N. Placentia Prop., LLC</i> , 38 F.4th 837 (9th Cir. 2022) .....	17
<i>Mashantucket Pequot Tribal Nation v. Factory Mut. Ins. Co.</i> , 313 A.3d 1219 (Conn. App. Ct. 2024) .....	10
<i>Menominee Indian Tribe of Wisconsin v. Lexington Ins. Co.</i> , 556 F. Supp. 3d 1084 (N.D. Cal. 2021).....	20
<i>Monarch Casino &amp; Resort, Inc. v. Affiliated FM Ins. Co.</i> , 85 F.4th 1034 (10th Cir. 2023) .....	10
<i>O’Connor v. Boeing N. Am., Inc.</i> , 311 F.3d 1139 (9th Cir. 2002) .....	13
<i>Phillips v. Clark Cnty. Sch. Dist.</i> , No. 2:10-CV-02068-GMN, 2012 WL 135705 (D. Nev. Jan. 18, 2012) .....	8
<i>Powell v. Liberty Mut. Fire Ins. Co.</i> , 252 P.3d 668 (Nev. 2011).....	14
<i>San Jose Sharks, LLC v. Superior Ct.</i> , 98 Cal. App. 5th 158 (Cal. Ct. App. 2023), <i>review denied</i> (Apr. 10, 2024) .....	16

<i>Sandy Point Dental, P.C. v. Cincinnati Ins. Co.</i> , 20 F.4th 327 (7th Cir. 2021) .....	11
<i>Santos v. Nansay Micronesia, Inc.</i> , 76 F.3d 299 (9th Cir. 1996) .....	22
<i>Self-Realization Fellowship Church v. Ananda Church of Self- Realization</i> , 59 F.3d 902 (9th Cir. 1995) .....	22
<i>Starr Surplus Lines Insurance Co. v. Eighth Judicial District Court</i> , 535 P.3d 254 (Nev. 2023) .....	<i>passim</i>
<i>Tapestry, Inc. v. Factory Mut. Ins. Co.</i> , 286 A.3d 1044 (Md. 2022) .....	10
<i>Washington State Convention Ctr. Pub. Facilities Dist. v. Emps. Ins. Co. of Wausau</i> , No. 24-1889, 2024 WL 4879756 (9th Cir. Nov. 25, 2024).....	16
<b>Other Authorities</b>	
Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak, 85 Fed. Reg. 15337, 15337 (Mar. 13, 2020) .....	12
Fed. R. Civ. P. 60(a).....	17
Federal Judicial Center, Reference Manual on Scientific Evidence 214 (3d ed. 2011) .....	20

## INTRODUCTION

Affiliated FM Insurance Co. (“AFM”) now appears to publicly concede that a Communicable Disease *can* cause “physical loss or damage” within the meaning of its Policy, thus triggering Business Interruption coverage. AFM Br. at 21-22. And it concedes that Treasure Island, LLC (“Treasure Island”) has presented evidence that “*some* communicable diseases may cause ‘physical loss or damage’ within the meaning of the AFM Policy.” *Id.* at 26. These concessions, which AFM makes in this case seemingly for the first time ever, distinguishes this case from *Starr Surplus Lines Insurance Co. v. Eighth Judicial District Court*, 535 P.3d 254 (Nev. 2023) (“*JGB Vegas Retail*”), from all the other COVID-19 coverage cases this Court has considered, and from all other such cases involving AFM’s unique Policy. That is because AFM has now admitted that its Policy is broader than standard policy forms and covers what courts have held those other forms do not cover: physical loss or damage from a Communicable Disease.

AFM tries to dodge the sanctions order. It calls that order the result of a mere “discovery dispute” even though it went to the very core of AFM’s duties to the court and to Treasure Island. Moreover, AFM offers an interpretation of that order that nullifies it. The sanctions order governs and precludes the arguments AFM makes on appeal.

AFM offers no justification for the district court's sua sponte, no-notice order dismissing Treasure Island's claims under the presence-based Communicable Disease coverages. Those claims were not before her because AFM expressly did not challenge those rulings, and the evidence at least establishes disputes of material fact that preclude summary judgment (as the district court correctly held in its initial summary-judgment decision). TI Br. at 21-22, 41-44.

Finally, AFM's arguments about Treasure Island's common-law and statutory bad-faith claims miss the point. Treasure Island's arguments are fully preserved. They present pure questions of law that this Court should reach or, alternatively, should remand for determination by the district court.

In the alternative, the Court should certify three questions of law to the Nevada Supreme Court.

## ARGUMENT

### **I. The record shows that Treasure Island suffered physical loss or damage from COVID-19.**

This case presents the question whether the phrase "physical loss or damage" in AFM's Policy encompasses a broader scope of physical harm than the non-AFM policy in *JGB Vegas Retail* and, specifically, whether Treasure Island's evidence satisfied that broader meaning. Treasure Island showed (1) that under Nevada law, the very same words "physical loss or damage" can carry a broader meaning

depending on *context*, (2) that the context internal to the four corners of the Policy (the Communicable Disease coverages) and admissible evidence from AFM's own binding claims manual (the Loss Code 60 evidence) demonstrate that "physical loss or damage" in the AFM Policy extends to harms to property from a Communicable Disease, (3) that a sanctions order for serious misconduct precludes AFM from disputing that a Communicable Disease can cause physical loss or damage, and (4) that Treasure Island's scientific evidence satisfies its summary-judgment burden of showing physical loss or damage from COVID-19 in the context of the AFM Policy. TI Br. at 26-41.

AFM's advances a slick argument to steer around the evidence and the sanctions order, an argument that rests on an error and a fiction. The error is relying on *JGB Vegas Retail* while at the same time appearing to concede that its Policy is broader. AFM does not disagree that, under Nevada law, "physical loss or damage" can have a broader meaning under the AFM Policy than under the policy in *JGB Vegas Retail*. Treasure Island showed that Nevada law, reflected explicitly in *JGB Vegas Retail*, requires policy terms to be interpreted more broadly depending on context, even when the exact same language would have a narrower meaning in a different context. TI Br. at 27-30. AFM nowhere disagrees with this. And AFM seems to concede that its Business Interruption coverages apply to the physical loss or damage caused by a Communicable Disease. AFM Br. 21-22. But it nonetheless

urges the Court to impose the *narrower* scope of the phrase “physical loss or damage” applied by *JGB Vegas Retail*. This makes no sense. *JGB Vegas Retail*’s interpretation does not apply *because* the AFM Policy is broader.

The fiction in AFM’s brief are the imaginary circumstances when, under AFM’s view, its Policy would apply to physical loss or damage from a Communicable Disease. There is no Communicable Disease that could possibly cause physical loss or damage to Treasure Island’s property under AFM’s interpretation. So AFM invents one: a mythical Communicable Disease, undiscovered or perhaps non-existent, that might, theoretically, cause physical loss or damage to property in AFM’s view. AFM cannot describe, and does not even try to describe, the qualities and characteristics of such a “hypothetical [C]ommunicable [D]isease.” AFM Br. at 22.

AFM’s argument—that the additional breadth in AFM’s Policy applies only to a *different* Communicable Disease that is not COVID-19 (and unlike any other Communicable Disease known to science)—is an argument for phantom coverage. It has no merit whatsoever.

**A. AFM appears to agree that context can impart a broader meaning to policy terms.**

Treasure Island showed that, under Nevada law, a term in an insurance policy may carry a broader meaning than even the identical language in a different

policy, depending on context. TI Br. at 27-30. AFM does not disagree with this, effectively conceding the point.

**B. AFM also concedes that its Business Interruption coverage applies to physical loss or damage from a Communicable Disease.**

Because of the sanctions order, AFM now concedes (at least for purposes of this case) that a Communicable Disease can cause physical loss or damage within the meaning of its Policy. AFM Br. at 20, 22. Time and again in its brief, AFM says that it is not disputing this part of Treasure Island’s argument. *Id.* For purposes of this appeal, at least, this fact should be taken as true. *Hilao v. Est. of Marcos*, 393 F.3d 987, 993 (9th Cir. 2004) (“A party . . . is bound by concessions made in its brief or at oral argument.”).

This is an important factual concession, and it refutes AFM’s argument that this case is just like other cases. That is because it imparts a different, broader meaning of “physical loss or damage” than that ascribed to the phrase in the context of another policy, as in *JGB Vegas Retail*. The court there, in determining that the effects of COVID-19 and SARS-CoV-2 did not “fall within the *ordinary meaning*” of the phrase “physical loss or damage,” wrote that it was not enough for a virus to physically land on or “attach[] to” property because there was no alteration of the “appearance, shape, color, structure, or other material dimension of the property.” *JGB Vegas Retail*, 535 P.3d at 264 (emphasis added). The virus

and disease, the court said, “pos[es] health risk to humans, as opposed to property.” *Id.* (quotation marks and citation omitted). The “ordinary” meaning of physical loss or damage, under the *JGB Vegas Retail* formulation, would appear to exclude the effects on property of a Communicable Disease. By conceding that “physical loss or damage” in its Policy encompasses the effects on property of a Communicable Disease, AFM effectively agrees that that phrase has a broader meaning in the AFM Policy than in the *JGB Vegas Retail* policy. Therefore, this is not the “ordinary” case.

AFM’s concession makes this case different even from other cases under the AFM Policy form (or that of its parent company, Factory Mutual). AFM underscores this when it relies on the *Cinemark* case. AFM Br. at 27. There, the policyholder argued that Loss Code 60—which states that the Policy covers “[p]hysical loss or damage which results from the actual presence of a communicable disease and the associated business interruption as defined in the policy,” 6-ER1216—demonstrates “that physical loss or damage caused by a [C]ommunicable [D]isease . . . is a peril covered under the Policies.” Mot. Reconsider. at 2, *Cinemark Holdings, Inc. v. Factory Mut. Ins. Co.*, No. 4:21-CV-00011, 2023 WL 5431317 (E.D. Tex. Apr. 18, 2023). The district judge wrote that this was “nonsensical.” *Cinemark Holdings, Inc. v. Factory Mut. Ins. Co.*, No. 4:21-CV-00011, 2023 WL 4406021, at \*2 (E.D. Tex. July 7, 2023). What the judge

wrote was “nonsensical,” then, is precisely what AFM now *concedes* is correct: that its Policies *do* cover physical loss or damage from a Communicable Disease—as they must because otherwise Loss Code 60 has no meaning. All cases, like *Cinemark*, holding to the contrary are inapplicable on the facts of this case.<sup>1</sup>

Oddly, despite conceding the underlying fact, AFM spends pages arguing that the Court should not consider the Loss Code 60 evidence. AFM Br. at 25-28. AFM is wrong here, too. The evidence is relevant. As the district court observed, Loss Code 60 “links the concepts of ‘[p]hysical loss or damage’ and ‘the actual presence of a communicable disease’ to ‘the associated business interruption as defined in the policy’” and it “allows for the possibility that ‘[p]hysical loss or damage’ may ‘result[] from the actual presence of a communicable disease.’” 1-ER032, 1-ER034. The evidence is also admissible. AFM gets the law wrong. “Ambiguity of the writing and supplementary details of an agreement may be shown by parol evidence.” *Butler v. Lovoll*, 620 P.2d 1251, 1253 (Nev. 1980). AFM’s assertion that this reflects California law, but not Nevada law, is incorrect.

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<sup>1</sup> To be clear, Treasure Island disagrees with the Fifth Circuit’s summary and unpublished affirmance. The briefing was sealed at the request of AFM’s parent, Factory Mutual Insurance Co.

*Phillips v. Clark Cnty. Sch. Dist.*, No. 2:10-CV-02068-GMN, 2012 WL 135705, at \*5 (D. Nev. Jan. 18, 2012) (applying Nevada law); *see* TI Br. at 33.<sup>2</sup>

**C. The sanctions order binds AFM from disputing that a Communicable Disease can cause physical loss or damage under the AFM Policy.**

AFM next strikes low and falsely accuses Treasure Island of misrepresenting the sanctions order. AFM Br. at 19-20. Treasure Island’s interpretation is accurate. AFM never appealed or sought clarification, obviously because its interpretation renders the order toothless.

The sanctions order necessarily means that the phrase “physical loss or damage” within the meaning of the AFM Policy encompasses what a Communicable Disease can do to property. The court ordered that AFM “is precluded from arguing physical loss or damages cannot be caused by a communicable disease or that there is no circumstance under which [AFM] may find coverage reaches physical loss or damage arising from a communicable disease.” *See* TI Br. at 34 (quoting 1-ER035). AFM now concedes that a

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<sup>2</sup> *Kaldi v. Farmers Insurance Exchange*, 21 P.3d 16, 22 (Nev. 2001), did *not* hold as AFM asserts, that Nevada “has not adopted the California rule.” AFM Br. at 26 n.6. Instead, the court held that the rule did not extend as broadly as the plaintiff there urged, “to allow parol evidence to substitute for the language of a complete section of an agreement.” *Kaldi*, 21 P.3d at 22. As argued above, Nevada permits parol evidence to expose a latent ambiguity.

Communicable Disease *can* cause physical loss or damage within the meaning of its Policy, as noted above.

COVID-19 is the only Communicable Disease that has ever been at issue in this case. If, as AFM says, COVID-19 cannot cause physical loss or damage within the meaning of AFM's Policy, then it is difficult to imagine what Communicable Disease *could* do so. Notably, AFM does not identify any such Communicable Disease or describe the characteristics or properties of one that would satisfy its construction of "physical loss or damage." Its fictional, mythical Communicable Disease that can do so does not exist. AFM's interpretation robs the sanction order of any effect. The judge did not intend to issue a meaningless order.

Nor is AFM correct when it writes that the district court already rejected this interpretation of the sanctions order. AFM Br. at 19. The district court said it was unwilling to order an "instruction" that AFM be precluded from asserting that COVID-19 cannot cause physical loss or damage and held that no adverse jury instruction was appropriate. 1-ER034. That is not the issue here.

Even if the district court left AFM a narrow window to prove that COVID-19 is not the type of Communicable Disease that can cause physical loss or damage within the meaning of AFM's Policy, AFM failed to do so. It offered no evidence, just the legal argument that the district court plainly foreclosed.

AFM’s crafty interpretation, rendering the sanctions order a dead letter, should be rejected.

**D. None of the other cases concerning AFM’s policy involved the facts of *this* case.**

As Treasure Island predicted (TI Br. at 35 n.8), AFM relies on other decisions from other courts under the AFM Policy form. AFM Br. at 22-24. Even if those courts were correct (and, for the reasons already argued, Treasure Island asserts that they were not), a decision in favor of Treasure Island in *this* case does not call those decisions into question. That is because the term “physical loss or damage” in the AFM Policy, per AFM’s concessions and the sanctions order, encompasses the physical effects on property that a Communicable Disease can cause. AFM has essentially conceded that its Policy is *broader* than standard forms, a concession absent from the other cases.<sup>3</sup> Treasure Island’s scientific

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<sup>3</sup> The cases AFM cites also do not support its argument. One expressly left open the question whether COVID-19 can cause physical loss or damage. *Tapestry, Inc. v. Factory Mut. Ins. Co.*, 286 A.3d 1044, 1061 (Md. 2022). Another addressed a different argument entirely (whether “property damage” was the same as “physical loss or damage”). *Monarch Casino & Resort, Inc. v. Affiliated FM Ins. Co.*, 85 F.4th 1034, 1043 (10th Cir. 2023). Another addressed a different argument as well (whether lead-in language, stating that the policy included additional coverages for physical loss or damage, defined loss from a Communicable Disease as “physical loss or damage”). *Mashantucket Pequot Tribal Nation v. Factory Mut. Ins. Co.*, 313 A.3d 1219, 1241 (Conn. App. Ct. 2024). (*Mashantucket* is also inapt as contrary to AFM’s concession that a Communicable Disease *can* cause physical loss or damage as that phrase is used in the Policy.)

evidence shows that COVID-19 *did* cause just such effects on its property. No other case has been decided on such facts.

**E. Indoor air is insured property.**

Air is insured property. AFM presents no convincing argument to the contrary, not even addressing the Nevada precedent *Treasure Island* cited that holds indoor air to be within the scope of real property. TI Br. at 40. The only authority AFM cites ruled in the context of a waived argument, one raised for the first time during oral argument on appeal. *Sandy Point Dental, P.C. v. Cincinnati Ins. Co.*, 20 F.4th 327, 336 (7th Cir. 2021). It does not reflect Nevada law.

In reality, this is just another attempt by AFM to get out from under the sanctions order. Just like its argument that only a mythical Communicable Disease can cause physical loss or damage within the meaning of its Policy, AFM's argument that the loss or damage it causes is not really to "insured" property is a transparent attempt to nullify that sanctions order.

**F. Treasure Island proved causation.**

Treasure Island established on the summary-judgment record that it suffered physical loss or damage because of COVID-19. The jury could find that COVID-19 and SARS-CoV-2 were the efficient proximate cause of the physical loss or damage. TI Br. at 17, 39.

AFM's gloss on the facts, which depends on inferences, does not compel summary judgment because those inferences themselves are not compelled. AFM asserts that the jury could infer that Treasure Island closed solely because of governmental orders because Treasure Island remained open from January through March despite the fact that COVID-19 was on-site during that time. AFM Br. at 32. Apparently, AFM would argue to the jury that Treasure Island remained indifferent to COVID-19 until the government forced it to close. What AFM forgets is that every other business and government office remained open during this time because awareness of the danger in this country from COVID-19 was not apparent until the week in March 2020 when Treasure Island decided to close, when a national emergency was declared. Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak, 85 Fed. Reg. 15337, 15337 (Mar. 13, 2020); 4-ER778, 791, 819-821, 874-877. Treasure Island closed because of the physical loss and damage from COVID-19, and would have done so even if there had been no governmental closure order. TI Br. at 17 (and evidence cited). The jury is not compelled to find, from Treasure Island's remaining open in January through March 17, 2020, that it would not have closed without a governmental

order.<sup>4</sup> Because the jury could draw an inference contrary to the one AFM urges, the court was required to draw the inference in favor of Treasure Island as the nonmoving party. Summary judgment was improper. *O'Connor v. Boeing N. Am., Inc.*, 311 F.3d 1139, 1150 (9th Cir. 2002).

AFM says that a California decision, *Inns by the Sea*, is “illustrative.” It is not. The policyholder there alleged that it closed *not* because of physical loss and damage but explicitly “as a direct and proximate result of the Closure Orders.” *Inns-by-the-Sea v. California Mut. Ins. Co.*, 286 Cal. Rptr. 3d 576, 589 (Cal. App. Ct. 2021) (“[The policyholder] does not make the proximate cause allegation based on the particular presence of the virus on its premises.”). Nor is this Court’s unpublished decision in *Circus Circus* on point. This Court wrote that “the allegations surrounding Circus Circus’s closure are based on the [governmental orders].” *Circus Circus LV, LP v. AIG Specialty Ins. Co.*, No. 21-15367, 2022 WL 1125663, at \*1 (9th Cir. Apr. 15, 2022).

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<sup>4</sup> AFM also notes that Treasure Island opened when the government permitted reopening. AFM Br. at 22. Once businesses such as Treasure Island implemented detailed and extraordinary repair and mitigation protocols, the danger from COVID-19 was mitigated even though physical loss and damage was ongoing. TI Br. at 13-14.

In contrast to these cases, in *this* case there is direct evidence from which the jury could conclude that Treasure Island closed because of physical loss and damage on site.

## **II. No exclusion applies.**

### **A. The Contamination Exclusion does not apply**

The Contamination Exclusion does not apply because AFM cannot sustain its burden of showing that its interpretation is the *only* reasonable interpretation. *Powell v. Liberty Mut. Fire Ins. Co.*, 252 P.3d 668, 672 (Nev. 2011).

AFM first argues that the Contamination Exclusion is “similar” to the “contamination exclusion” in *JGB Vegas Retail*. AFM Br. at 33. This is not true. To start, there was no express coverage for Communicable Disease in *JGB Vegas Retail* and, as noted above, and as AFM finally agrees, the AFM Policy covers the physical loss or damage to property from a Communicable Disease. In addition, as Treasure Island has argued (and AFM ignores), *JGB Vegas Retail* expressly distinguished another case that came to the opposite conclusion on identical language. *JGB Vegas Retail*, 535 P.3d at 268 (citing *C.J. Segerstrom & Sons v. Lexington Ins. Co.*, 724 F. Supp. 3d 1052 (C.D. Cal. Feb. 27, 2023)).<sup>5</sup> The court observed that *C.J. Segerstrom* was “‘guided’ by an express coverage grant for

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<sup>5</sup> AFM does not even cite *C.J. Segerstrom* or attempt to address this in any way.

outbreaks of communicable diseases.” *Id.* This required interpreting the exclusion’s mention of “virus” so as not to vitiate the coverage granted. *Id.* The same applies here: interpreting “virus” in the Contamination Exclusion to encompass a Communicable Disease would nullify the coverage that AFM *admits* its Policy provides: coverage for physical loss or damage from a Communicable Disease.<sup>6</sup>

AFM next (again, as Treasure Island predicted) string cites other decisions on its Policy form. AFM Br. at 34-41. The short answer to this is that in none of these cases was there an admission and sanctions order establishing that the Policy covers physical loss or damage from a Communicable Disease. Moreover, AFM relies on cases that reached their conclusions based on the *absence* of communicable disease coverage,<sup>7</sup> or on the policyholder’s concession that the Contamination Exclusion applies,<sup>8</sup> or the absence of any claim that COVID-19 was

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<sup>6</sup> AFM writes in a footnote that the Contamination Exclusion “renders entirely moot” the Loss Code 60 evidence. AFM Br. at 33 n.10. This does not follow, nor does AFM explain why it does. Surely AFM would not have a binding Loss Code (which it applied to Treasure Island) for a risk that was always excluded.

<sup>7</sup> *Firebirds Int’l, LLC v. Zurich Am. Ins. Co.*, 208 N.E.3d 1187, 1196 (Ill. Ct. App. 2022) (“Zurich’s policies do not contain a provision for loss or damages caused by communicable disease.”); *see Dana Inc. v. Zurich Am. Ins. Co.*, No. 21-4150, 2022 WL 2452381, at \*2 (6th Cir. July 6, 2022) (no communicable disease coverage).

<sup>8</sup> *Josephson, LLC v. Affiliated FM Ins. Co.*, 314 A.3d 954, 960 (R.I. 2024) (“there is no dispute that the Contamination Exclusion applies in these circumstances”).

present on-site causing physical loss or damage,<sup>9</sup> or that were decided based on completely different arguments presented.<sup>10</sup>

But there are even more fundamental problems with AFM’s argument. As Treasure Island argued, presence-based Communicable Disease coverages are just that, coverage grants. They are not exceptions to any exclusion. AFM says that Treasure Island’s argument is not supported by any case law (AFM Br. at 41), when it plainly was. TI Br. at 47. In addition, AFM does not and cannot explain how its “exceptions to exclusions” argument works when, as here, there is coverage for physical loss or damage from a Communicable Disease.

Incredibly, AFM argues that Treasure Island’s interpretation “gives no meaning to” the words “virus, disease causing or illness causing agent” in the definition of Contamination. AFM Br. at 41. This is patently false. As Treasure Island showed, its argument simply means that “contamination” cannot include a Communicable Disease. TI Br. at 46. Thus, “contamination” *includes* any disease- or illness-causing agent, including a virus, as long as it is *not* one that causes a

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<sup>9</sup> *Washington State Convention Ctr. Pub. Facilities Dist. v. Emps. Ins. Co. of Wausau*, No. 24-1889, 2024 WL 4879756, at \*1 (9th Cir. Nov. 25, 2024).

<sup>10</sup> *San Jose Sharks, LLC v. Superior Ct.*, 98 Cal. App. 5th 158, 173 (Cal. Ct. App. 2023), *review denied* (Apr. 10, 2024), and *disapproved of by Another Planet Ent., LLC v. Vigilant Ins. Co.*, 15 Cal. 5th 1106 (2024) (rejecting argument that Contamination Exclusion applies only “to a type of loss, as opposed to a type of ‘risk’”).

Communicable Disease (defined as one “[t]ransmissible from human to human” (or Legionellosis)). *Id.*

**B. The Loss of Use Exclusion does not apply.**

For the reasons Treasure Island already stated, the Loss of Use Exclusion does not apply. TI Br. at 48.

**III. The Communicable Disease coverage claims must be reinstated.**

The Communicable Disease coverage claims were not before the judge who improperly dismissed them. TI Br. at 23, 41. Contrary to AFM’s assertion (AFM Br. at 13), there is no requirement that Treasure Island have moved for reconsideration or for relief under Fed. R. Civ. P. 60(a). *Machowski v. 333 N. Placentia Prop., LLC*, 38 F.4th 837, 843 (9th Cir. 2022).

**A. Treasure Island proved actual presence of COVID-19 on-site during the Policy period.**

Treasure Island presented ample evidence that COVID-19 was actually present on-site during the term of the Policy. TI Br. at 9-12. As Treasure Island stated in its opening brief, this evidence, while in some respects dependent on inferences, was more than sufficient to meet the preponderance-of-the-evidence standard. *Id.* at 42-43.

AFM advocates a far higher standard, requiring virtual certainty that COVID-19 was present and that Treasure Island “rule out the possibility” that

those on-site were infected by some other contagion. AFM Br. at 49. AFM's impossible standard would eliminate *any* coverage for emerging diseases: just like there is no dispute that tests specific to COVID-19 were not available even in March 2020, any other policyholder seeking Communicable Disease coverage would be unable to prove "actual" presence of any other disease that takes the country by surprise and for which tests are not commercially available. So, too, would AFM's test write circumstantial proof out of the law. To be clear, it is AFM's position that Treasure Island has not proved actual presence even where (1) employees were on-site during the Policy period with COVID-19 symptoms of loss of smell and taste, breathing difficulty, fever, fatigue, body aches, nausea, and dry cough, (2) when tests later became available these employees tested positive for past COVID-19 infection, and (3) the employees experienced no other COVID-19 symptoms after the Policy expired. A jury could find from this evidence that such employees were actually present, on-site, with COVID-19 during the Policy period.

Not surprisingly, AFM's citations contradict, rather than support, the draconian standard it urges. The very first case AFM cites, *Broadwall Mgmt. Corp. v. Affiliated FM Ins. Co.*, No. 21 CIV. 10247 (PAE), 2022 WL 3030315 (S.D.N.Y. Aug. 1, 2022), expressly notes that the plaintiff did not "specifically allege the presence of sick employees and customers" on-site, but relied instead on the

general spread of the virus in the community. *Id.* at \*8-9. The court thus did not require genetic testing, but permitted reliance on inferences that made it more likely than not that persons with COVID-19 were on-site. So, too, did the Sixth Circuit in *Dakota Girls. Dakota Girls, LLC v. Philadelphia Indemnity Insurance Co.*, 17 F.4th 645, 651-52 (6th Cir. 2021). The plaintiff preschool “never alleged that someone in the preschools actually had COVID-19.” It only alleged symptoms “consistent with COVID-19.” *Id.* (emphasis deleted). This, the court said, was not enough to allege “actual illness.” *Id.*

Treasure Island’s proof goes beyond merely reporting that individuals had symptoms “consistent with” COVID-19. The constellation of symptoms reported, including lack of taste and smell, were the signature of COVID-19. And there were positive COVID-19 tests. True, these tests, given as soon as they became available, could only indicate past infection. A positive test indicating past infection, together with signature symptoms during the Policy period and the absence of any symptoms after the Policy period, make it more likely than not that these individuals were on-site with COVID-19 during that Policy period. AFM has not, and cannot, cite a single case holding to the contrary.

AFM strays far from reality when it takes issue with Treasure Island’s statistical evidence. Treasure Island’s scientific expert, using quantitative scientific modeling, found that with *more than 99.99% certainty*, at least 100 COVID-19-

infected individuals were on-site during the Policy period. TI Br. at 11. But AFM asserts that testing is necessary to establish “actual” presence. Nothing in the Policy requires testing. “Statistical studies suitably designed to address a material issue generally will be admissible under the Federal Rules of Evidence.” Federal Judicial Center, Reference Manual on Scientific Evidence 214 (3d ed. 2011).

Once again, AFM’s citations do not support its argument. The very first case it cites said *nothing* about statistical proof. *Menominee Indian Tribe of Wisconsin v. Lexington Ins. Co.*, 556 F. Supp. 3d 1084, 1099 (N.D. Cal. 2021). In fact, the court there held that *allegations* that persons with COVID-19 were present sufficed to state a claim. *Id.* The next case simply says that allegations that COVID-19 must have been present because it was present generally in the community are not enough. *Blue Coral, LLC v. W. Bend Mut. Ins. Co.*, 533 F. Supp. 3d 279, 284 (E.D.N.C. 2021). That is not Treasure Island’s argument, either. Treasure Island has scientific modeling going far beyond “COVID-19 must have been here because it was everywhere.” For the same reason, the *7th Inning Stretch* case is inapt. *7th Inning Stretch LLC v. Arch Ins. Co.*, No. CV 20-8161 (SDW) (LDW), 2021 WL 1153147 (D.N.J. Mar. 26, 2021). The plaintiff there generally alleged that it was

statistically certain the virus was present. *Id.* at \*2. Treasure Island has statistical evidence tailored to this case, not just a general averment from lawyers.<sup>11</sup>

**B. Treasure Island proved it closed because of the actual presence of COVID-19.**

AFM waived any argument that Treasure Island failed to show that it closed because of the actual presence of COVID-19. In contrast to its pages-long argument on appeal, AFM's argument below was literally two conclusory sentences. 6-ER1364.

AFM is also wrong. AFM has not shown that there is one and only one reasonable inference to be drawn from the facts. The jury could find causation, for the reasons discussed above. *Supra* at 11.

**IV. The common-law and statutory bad-faith claims should be reinstated.**

Treasure Island's bad-faith claims should be reinstated for the reasons already argued. AFM argues that Treasure Island waived the arguments, but AFM itself refers to Treasure Island's summary-judgment opposition where it asked the district court not to dismiss the bad-faith claims. The claims are preserved. TI Br. at

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<sup>11</sup> The unappealed Delaware state-court decision AFM cites, *Band's Visit Nat'l Tour LLC v. Hartford Fire Ins. Co.*, 307 A.3d 387 (Del. Super. Ct. 2023), held that COVID-19 did not cause "direct physical loss" within the meaning of a policy that had no communicable-disease coverage. *Id.* at 408. Its statements regarding statistical evidence were dicta and, moreover, were unsupported by any citation or reasoning. The decision is an outlier and unpersuasive.

50 n.13. Even if waived, the issues present pure questions of law, appropriate for this Court's consideration. *Self-Realization Fellowship Church v. Ananda Church of Self-Realization*, 59 F.3d 902, 912 (9th Cir. 1995).

Alternatively, those should be remanded to the district court for determination. The rule that this Court generally does not consider arguments raised below for the first time in a motion for reconsideration applies only when the district court refuses to address the issues when it denies a motion for reconsideration. *Santos v. Nansay Micronesia, Inc.*, 76 F.3d 299, 301 (9th Cir. 1996) (court will review issues even if not properly raised if court below passes on them). The district court never addressed the substance of Treasure Island's motion and, therefore, never decided whether to pass upon the issues raised therein. It denied that motion as moot. 1-ER0010. If this Court determines that Treasure Island did not sufficiently raise these arguments in its summary-judgment opposition, it should remand with instructions that the district court decide Treasure Island's motion for reconsideration on the merits.

## CONCLUSION

The decision of the district court should be reversed. Alternatively, the Court should refer the three questions to the Nevada Supreme Court as stated in Treasure Island's opening brief.

Dated: May 20, 2025

Respectfully submitted,

TREASURE ISLAND, LLC,  
By its attorneys,

s/ Nicholas D. Stellakis

Harry L. Manion

Christopher J. Cunio

Nicholas D. Stellakis

Hunton Andrews Kurth LLP

60 State Street, Suite 2400

Boston, Massachusetts 02109

(617) 648-2800

[hmanion@huntonAK.com](mailto:hmanion@huntonAK.com)

[ccunio@huntonAK.com](mailto:ccunio@huntonAK.com)

[nstellakis@huntonAK.com](mailto:nstellakis@huntonAK.com)

Michael S. Levine

Hunton Andrews Kurth LLP

2200 Pennsylvania Ave. NW

Washington, DC 20037

(202) 955-1500

[mlevine@huntonAK.com](mailto:mlevine@huntonAK.com)

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I hereby certify that on May 20, 2025 this document was filed through the Electronic Case Filing system, and that copies will be sent electronically to the registered participants identified on the Notice of Electronic Filing.

*s/ Nicholas D. Stellakis*  
Nicholas D. Stellakis

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FOR THE NINTH CIRCUIT

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