

STATE OF MINNESOTA**IN DISTRICT COURT****COUNTY OF SCOTT****FIRST JUDICIAL DISTRICT**

Case Type: Contract/Other Civil

Jury Trial Demanded

The Shakopee Mdewakanton Sioux

Court File No.: _____

Community,

Plaintiff

COMPLAINT

v.

Factory Mutual Insurance Company,

Defendant

COMPLAINT

Plaintiff, the Shakopee Mdewakanton Sioux Community (“SMSC”) sues Defendant Factory Mutual Insurance Company (“FMIC”) for failing to honor its contractual obligations under a commercial property insurance policy and alleges as follows:

INTRODUCTION

1. The global COVID-19 pandemic is both a public health and an economic catastrophe. The novel coronavirus has spread throughout the United States with alarming speed, not only infecting millions, but also forcing the most significant economic downturn this country has seen in decades. Its rapid spread forced hotels, casinos, restaurants, bars, gyms, and other “non-essential” businesses to close, both because consumers have been encouraged to “socially distance,” and by order of state and local governments. The resulting financial losses have been severe; many businesses have closed their doors for good, while others hang in the balance.

2. The novel coronavirus is everywhere. It has infected citizens of each of the fifty states, and in every county in Minnesota. As of May 7, 2021, according to official reports, at least 584,227 of Minnesota residents have been infected with COVID-19, and 16,980—or 11.1%—of Scott County’s residents have been infected,¹ and this number does not include asymptomatic and other residents who are infected but have not been tested. Because the virus is airborne and can remain infectious for up to nine days on some surfaces, resuming “normal” daily activities remains unsafe. Shopping, going to the gym, attending entertainment venues and dining in restaurants have all been deemed “super-spreader” activities.²

3. Simply stated, the COVID-19 pandemic is a force of nature which has altered the physical condition of property throughout the nation. It cannot be avoided, nor its effects mitigated, so long as infected individuals leave their homes and interact with the general population.

4. Commercial establishments have been forced to close their doors, severely limit their operations, and reconfigure their spaces to avoid the contamination of individuals, air particles, and surfaces on their premises.

¹ Minnesota Coronavirus Map and Case Count, N.Y. TIMES, available at <https://www.nytimes.com/interactive/2020/us/florida-coronavirus-cases.html> (last visited 5/7/2021); COVID-19 United States Cases by County, Johns Hopkins University of Medicine Coronavirus Resource Center, available at <https://coronavirus.jhu.edu/us-map> (last visited 5/7/2021).

² Rachael Rettner, Restaurants and Gyms Drove COVID-19 Transmission This Spring, LIVE SCIENCE, Nov. 11, 2020, available at <https://www.livescience.com/covid-19-superspreading-venues-restaurants.html>; Jen Christensen, About 20% of Grocery Store Workers Had COVID-19, and Most Didn’t Have Symptoms, Study Found, CNN, Oct. 29, 2020, available at <https://www.cnn.com/2020/10/29/health/grocery-workers-increased-covid-19-risk-wellness/index.html>.

5. As a result, over the course of the past fourteen months, businesses nationwide, including in Scott County, have suffered interruption of business due to the pandemic resulting in severe loss of earnings.

6. SMSC was forced to completely close its casino and business operations for sixty-nine days - from March 18, 2020, to May 29, 2020. When the casinos were able to reopen, capacity was severely limited so that infected patrons would be less likely to spread the virus. The casinos are still not back to full capacity.

7. In addition to the significant revenue losses it has incurred from the closure, SMSC has incurred great expenses to alter the physical structure of its properties to protect its employees and patrons from contracting the virus.

8. SMSC contracted with FMIC to protect it from the type of losses it sustained during the pandemic. As explained in more detail below, the commercial insurance policy provided to SMSC by FMIC provides coverage for the presence of a communicable disease on SMSC's property, including coverage for the costs of its communicable disease response and for lost earnings or profits and extra expenses due to interruption of its business by communicable disease. The policy also covers "time element" loss of earnings or profits and extra expense resulting from the pandemic.

9. FMIC has refused to honor its contract with SMSC. On April 30, 2020 under a contrived and distorted reading of the policy's plain language, FMIC denied SMSC's claim for coverage.

10. This action seeks a declaratory judgment that affirms that the coronavirus is a covered cause of loss under SMSC's policy.

11. This action also seeks damages for FMIC's breach of its contractual obligations to indemnify SMSC for its business operations losses and expenses resulting from the spread of the coronavirus pandemic.

JURISDICTION, PARTIES AND VENUE

12. This is a civil action for breach of an insurance contract, costs, and attorneys' fees in excess of Fifteen Thousand Dollars (\$15,000.00).

13. SMSC is a federally recognized, sovereign Indian tribe of the Mdewakanton Dakota people (Mdewakanton is pronounced Mid-ah-wah-kah-ton), and is headquartered at 2400 Mystic Lake Blvd., Prior Lake, Minnesota. SMSC's tribal land is located southwest of Minneapolis and Saint Paul, within parts of the cities of Prior Lake and Shakopee in Scott County, Minnesota (the "Reservation").

14. SMSC has for many years operated governmental programs on its tribal land to protect and advance the economic and social welfare of SMSC's tribal members and to protect the health and security of the public who are on or near the Reservation.

15. As a sovereign nation, SMSC developed gaming as one of its governmental programs to provide employment, to foster and promote economic development on the Reservation, and to generate revenues which fund the operations of SMSC's other programs. In 2016, SMSC created a department within SMSC's government to operate SMSC's gaming operations named the Shakopee Mdewakanton Sioux Community Gaming Enterprise ("Gaming Enterprise"), along with a Board of Directors that governs the Gaming Enterprise.

16. SMSC, through its Gaming Enterprise, owns, operates, manages, and controls the Mystic Lake Casino & Hotel and the Little Six Casino located on tribal land in Prior Lake, Minnesota. The casinos provide Las Vegas style gaming and other games of chance for money.

The casino properties are equipped with gaming tables, slot machines, a bingo hall, and other gaming facilities, and include hotel accommodations, a wellness spa, indoor and outdoor entertainment venues, an event and conference center, a café, multiple restaurants, lounges, and gift shops.

17. FMIC is a Rhode Island insurance company with its principal place of business in Johnston, Rhode Island. FMIC is authorized to conduct business as an insurance company in Minnesota.

18. Jurisdiction is proper in Minnesota pursuant to Minn. Stat. § 543.19 because FMIC sells insurance in the State of Minnesota and regularly transacts business, underwrites coverage, and insures property in this state, including SMSC's property which is the subject of this lawsuit.

19. Further, jurisdiction is proper in Minnesota state court, rather than the federal District of Minnesota because SMSC is an Indian tribe not covered by any of the sources of diversity jurisdiction set forth in 28 U.S.C. § 1332(a) as it is neither a foreign state nor a citizen of a U.S. or foreign state.

20. Venue is proper in Minnesota and specifically in Scott County, pursuant to Minn. Stat. § 542.09, because the cause of action arose in Scott County, the policy was delivered to SMSC in Scott County, SMSC is located in Scott County, and the properties insured under the policy are located in Scott County.

21. In addition, under Chapter 555 of the Minnesota Statutes and Rule 57 of the Minnesota Rules of Civil Procedure, this Court may declare the rights and other legal relations of the parties in dispute, whether or not further relief is or could be sought.

22. All conditions precedent to this action have occurred, been performed, or have been waived.

FACTUAL ALLEGATIONS

The Global COVID-19 Pandemic

23. Coronaviruses are a type of virus that often cause respiratory diseases in humans. In the fall of 2019, a new mutation of coronavirus was detected in China and thought to have originated in a “wet market” in Wuhan, China that sells exotic animals for food consumption.

24. The new virus variation has biological similarities to a coronavirus known as Severe Acute Respiratory Syndrome, more commonly referred to by the acronym SARS. The World Health Organization named the new virus SARS-CoV-2, which although different, has been used synonymously with COVID-19, short for the respiratory disease that developed in 2019 in humans exposed to the virus.

25. Within months of COVID-19 being identified and named, the coronavirus quickly spread from China to other parts of the world, including the United States. On March 11, 2020, the World Health Organization declared the COVID-19 outbreak a worldwide epidemic of a virus for which humans have no natural immunity. In other words, a global pandemic.³

26. Unlike influenza, at the outbreak of this new virus, there was no vaccine or other preventive substance to stimulate the production of antibodies in humans and provide immunity against developing COVID-19. To date, it has been reported that more than three million people infected with the coronavirus have died worldwide. In the United States alone, over 580,000 people have died from COVID-19 and there are millions more confirmed infected with the

³ See <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-COVID-19---11-march-2020>.

coronavirus who can transmit it to others.⁴ The virus continued to spin out of control for many months, as the numbers of the infected and dead increased exponentially on a weekly basis—on January 13, 2021, the United States reached its peak in daily deaths from COVID-19, with 4,327 Americans dying from a COVID-19 infection.⁵

27. These numbers continued to grow because the coronavirus is omnipresent and pervasive, exists in humans, in the air, and on surfaces and objects, and is highly contagious. While all viruses are physical, infectious, microscopic agents that multiply in living cells, most do not develop into a physical force of nature, that sweeps through an entire nation causing the severe loss of life, loss of property, and damage to property like this coronavirus has. Nor do most viruses force governmental authorities to mandate businesses closures where the coronavirus exists or may exist ready to infect people who enter or gather in those locations. Despite being microscopic in size the coronavirus cannot be disputed as real, physical, dangerous, and lethal. Only since vaccines have been more widely distributed has the rate of infection declined.⁶

28. The coronavirus infects people by way of human-to-human transmission, breathing air that contains viral particles, and contact with surfaces or objects to which the coronavirus attaches. Anyone infected with the coronavirus, especially those who are infected but are pre-symptomatic, asymptomatic, and untested, spread it unknowingly to other people through tiny respiratory droplets expelled from the body when the infected person speaks, coughs, or sneezes. These droplets are then inhaled by others or land on surfaces and objects where the coronavirus can remain active for hours, days or weeks. A person can easily become

⁴ See <https://www.worldometers.info/coronavirus/> (last visited May 7, 2021).

⁵ See <https://www.wsj.com/livecoverage/covid-2021-01-13/card/tbgrhDniVxI1UMIQXRLg>.

⁶ See <https://www.nytimes.com/live/2021/03/19/world/covid-vaccine-coronavirus-cases>.

infected with the coronavirus when touching a surface or thing where the coronavirus exists and then touching their mouth, eye, or nose.⁷

29. The coronavirus damages property because it can also spread through the air circulation of a property's ventilation system after infected persons have been present on the property. The CDC has estimated that approximately 40% of people infected with the coronavirus are asymptomatic and have unknowingly left the virus in places they have visited. The CDC reports that these people have contributed to the virus' spread, and that the rate of infection is much higher than reported.⁸

30. Because of new variants of the coronavirus are more transmissible, experts now believe that herd immunity will not be reached until eighty percent of the entire national population are vaccinated against contracting COVID-19. They also believe the United States will never reach that threshold. Hence, effective control of the coronavirus outbreak still will rely on measures designed to reduce human-to-human, airborne, and surface-to-human exposure.⁹

31. Transmission of the coronavirus is particularly acute in places the public normally gathers to socialize, eat, drink, shop, be entertained, and visit for recreation. Accordingly, the

⁷ See *Persistence of coronaviruses on inanimate surfaces and their inactivation with biocidal agents*, Vol. 104, Kemp., G., et al., *Journal of Hospital Infection*, No. 3, March 2020, pages 246-251 (remains infectious from 2 hours to 28 days depending on conditions); see also <https://www.ucsf.edu/news/2020/02/416671/how-new-coronavirus-spreads-and-progresses-and-why-one-test-may-not-be-enough> (doorknobs and table tops can contain the virus); <https://www.nytimes.com/2020/03/02/health/coronavirus-how-it-spreads.html> (virus can remain on metal, glass and plastic for several days).

⁸ See Erika Edwards, *CDC says COVID-19 cases in U.S. may be 10 times higher than reported*, NBC News (June 25, 2020) (<https://www.nbcnews.com/health/health-news/cdc-says-covid-19-cases-u-s-may-be-10-n1232134>); Ellen Cranley, *40% of people infected with COVID-19 are asymptomatic, a new CDC estimate says*, BUSINESS INSIDER (Jul 12, 2020) (<https://www.businessinsider.com/cdc-estimate-40-percent-infected-with-covid-19-asymptomatic-2020-7>).

⁹ <https://www.nytimes.com/2021/05/03/health/covid-herd-immunity-vaccine.html>.

CDC recommends that in viral outbreaks, individuals who are infected stay at home and those who are not sick engage in preventative measures. Some such measures include constant hand washing and avoiding activities that might bring individuals into close proximity with people infected with the virus, or surfaces where the virus resides.

32. SMSC commissioned its own report concerning the presence of the coronavirus on its casino property titled, “The Epidemiology of Severe Acute Respiratory Syndrome Coronavirus-2 (SARSCoV-2) Viral Infection in Relation to Probability of Infectious Cases in the Shakopee Mdewakanton Sioux Community Gaming Enterprise Casinos from March 5th — March 18th, 2020,” by Ryan T. Demmer, PhD MPH FAHA. Dr. Demmer is an Associate Professor of Epidemiology, Division of Epidemiology and Community Health, University of Minnesota, School of Public Health Minneapolis, Minnesota and an Adjunct Associate Professor of Epidemiology at the Department of Epidemiology Columbia University, Mailman School of Public Health, New York, New York. **Exhibit A.**

33. Dr. Demmer reports that beginning March 13, 2020 and continuing through March 17, 2020, there was a 100% scientific and statistical certainty that the coronavirus was present on the premises of SMSC’s casino properties. Dr. Demmer’s findings confirm that the presence of the coronavirus was actually present and not merely suspected at the time the SMSC closed its casinos.

The Shutdown

34. On March 16, 2020, President Donald J. Trump, the Centers for Disease Control and Prevention (“CDC”), and members of the White House Coronavirus Task Force issued guidance to the American public to slow the spread of COVID-19. This guidance advised individuals to adopt far-reaching social distancing measures such as working from home,

avoiding shopping trips, discretionary travel, and gatherings of more than ten people, and staying away from casinos, hotels, bars, and restaurants. The federal guidelines also advised officials in states and municipalities with evidence of transmission to close schools, hotels, restaurants, bars, food courts, and other establishments where groups of people congregate.¹⁰

35. Following this advice, many governmental authorities nationwide enacted unprecedented emergency measures to protect the health and safety of the population from spread of this new virus and control the number of individuals who may succumb to COVID-19. These measures sought to protect local communities from exposure to the highly contagious coronavirus, which could be transmitted from person to person, from surfaces to people, and through particles suspended in the air.

36. On March 16, 2020, State of Minnesota's Governor, Tim Walz, ordered the closure of all commercial public accommodation establishments in Minnesota. Then, on March 25, 2020, Governor Walz issued Executive Order 20-20 which with limited exceptions, ordered Minnesotans to stay home.

37. SMSC Gaming Enterprise Board of Directors, in keeping with its long-standing obligations to protect the health and welfare of its tribal members and the public who come on SMSC tribal property, adopted a resolution on March 17, 2020, closing the Mystic Lake Casino & Hotel and the Little Six Casino, and suspending all commercial businesses activity therein effective March 18, 2020.

38. SMSC's decision was made in an effort to prevent further damage to the casino properties due to the presence of the virus and to prevent its spread and transmission to tribal members, employees, the public, and its vendors who supply and service its casino businesses.

¹⁰ See <https://www.nytimes.com/2020/03/16/world/live-coronavirus-news-updates.html>.

39. The pandemic has been catastrophic for SMSC as it has been for all businesses in the hospitality and entertainment industries. Nationally the American Property Casualty Insurance Association estimates these small business earnings losses in the billions per month during the pandemic.¹¹

40. The widespread presence of the deadly coronavirus and resulting COVID-19 pandemic is tantamount to a nationwide “natural disaster.” Like other specific disasters, such as hurricanes or earthquakes, it involves substantial damage to property, hardship, suffering, and loss of life.

41. Unsurprisingly, already, at least one state supreme court has already recognized, in *Friends of DeVito v. Wolf*, that policyholders’ business losses resulting from the pandemic are indistinguishable from those caused by earthquakes, fires and the other casualty events for which property-based insurance coverage has always been intended to provide coverage:

We agree with Respondents that the COVID-19 pandemic qualifies as a “natural disaster” under the Emergency Code...

227 A.3d 872, 888-89 (Pa. 2020).

SMSC’s Insurance Policy

42. Many businesses insure against such unforeseen catastrophic disasters through all-risk commercial property insurance policies. These policies promise to indemnify the policyholder for actual business earnings losses incurred when business operations are involuntarily suspended, interrupted, or curtailed by a covered cause of loss. This coverage is commonly known as “business interruption coverage,” “time element,” or “business earnings loss and extra expense coverage,” and is regularly included in all-risk commercial property

¹¹ See Eileen Gilligan, *APCIA Releases New Business Interruption Analysis*, AM. PROP. CAS. INS. ASS’N (Apr. 6, 2020), <http://www.pciaa.net/pciwebsite/cms/content/viewpage?sitePageId=60052>

insurance policies either within the body of the coverage provisions or by way of separate form or endorsement.

43. To protect its casino properties and the earning derived from them in the event of a disaster, on or about September 27, 2019, SMSC purchased commercial property insurance policy number 1057541 from FMIC providing over a billion dollars in coverage for SMSC's benefit in exchange for significant premiums paid annually. The policy explicitly protects against losses from communicable diseases including lost earnings and extra expense due to interruption by communicable disease. In addition, the policy contains "all risk" provisions providing broad coverage for "time element" losses, extra expense, loss of ingress and egress, and other coverages that result from an interruption of business by a covered cause of loss not expressly excluded. The policy is attached to this complaint as **Exhibit B**.

44. SMSC's policy is a specialty policy, tailored to SMSC's unique needs. It includes a specific set of coverages for just the kind of viral and disease outbreak the nation suffered. It provides coverage for the costs of its response to a communicable disease and coverage for its lost earnings and extra expense from an interruption of business by a communicable disease. By the plain and unambiguous language of the policy, neither of these coverages requires any showing of physical loss or damage and no suggestion that they require some structural alteration to the SMSC's property.

45. The policy is a hybrid policy because, not only does it include the coverages for the named peril of the presence of a communicable disease on the SMSC's property, but it also includes aspects of an "all risk" commercial property insurance policy, including coverage for the SMSC's loss of earnings, extra expenses, and loss of ingress and egress resulting from physical loss or damage to the property caused by any and all perils not expressly excluded, such

as a pandemic. These time element coverages cover all risks other than those expressly excluded in the policy or by endorsement.

46. The policy does not exclude losses from a pandemic and does not contain a general exclusion for losses directly or indirectly related to a “virus.” The “all risk” provisions, by common definition and plain meaning of the terms within the policy (or lack of definition in the policy) include coverage for loss of use, functionality, and occupancy of the insured premises, despite the absence of structural damage to the insured premises.

47. The policy provides three applicable coverage triggers: presence of a communicable disease; property loss; and damage to the property.

48. The policy provides two types of coverage for the presence of a communicable disease.

49. The policy provides coverage for the SMSC’s costs for responding to a communicable disease [p. 21]:

G. COMMUNICABLE DISEASE RESPONSE

If a location owned, leased, or rented by the Insured 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 governmental 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,

this Policy covers the reasonable and necessary costs incurred by the Insured at such location with the actual not suspected presence of communicable disease for the:

- 1) cleanup, removal, and disposal of the actual not suspected presence of communicable diseases from insured property; and

- 2) actual costs of fees payable to public relations services or actual costs of using the Insured's employees for reputation management resulting from the actual not suspected presence of communicable diseases on insured property.

This Additional Coverage will apply when access to such location is limited, restricted, or prohibited in excess of 48 hours.

and the policy explicitly provides coverage for loss of earnings and extra expenses stemming from a communicable disease [p. 55]:

E. INTERRUPTION BY COMMUNICABLE DISEASE

If a location owned, leased, or rented by the Insured 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 governmental 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,

this Policy covers the Actual Loss Sustained and EXTRA EXPENSE incurred by the Insured during the PERIOD OF LIABILITY at such location with the actual not suspected presence of communicable disease.

This Extension will apply when access to such location is limited, restricted, or prohibited in excess of 48 hours.

50. This provision of the policy plainly and unambiguously provides coverage irrespective of whether structural damage has occurred. As shown by the report of Dr. Demmer to a 100% scientific and statistical certainty, the coronavirus was “actually present” on the property – and not merely suspected – on and before March 17, 2020, when SMSC closed its casino operations.

51. The policy defines "communicable disease" [p. 66] as follows:

communicable disease: disease which is:

- A. transmissible from human to human by direct or indirect contact with an affected individual or the individual's discharges...

52. The coronavirus is a communicable disease under the terms of the policy.

53. The measuring period applicable to coverage for an interruption by communicable disease is “the Period of Liability,” which is defined as [p. 62]:

The period of time:

- 1) Starting at the time of the order of the authorized governmental agency or Officer of the Insured; and
- 2) Ending not later than the number of consecutive days shown in the LIMITS OF LIABILITY clause in the DECLARATIONS section [here 365 days],

this period of time is part of and not in addition to any PERIOD OF LIABILITY applying to any coverage provided in the TIME ELEMENT section.

54. In addition to the coverages for the presence of a communicable disease, and separate and apart from property “damage” coverage, the policy also contains time element coverages stemming from the physical loss of the property.

55. The policy's Time Element provisions provide [p. 35]:

A. This Policy insures TIME ELEMENT loss, as provided in the TIME ELEMENT COVERAGES, directly resulting from physical loss or damage of the type insured:

- 1) to property described elsewhere in this Policy and not otherwise excluded by this Policy or otherwise limited in the TIME ELEMENT COVERAGES below;
- 2) used by the Insured, or for which the Insured has contracted use;
- 3) while located as described in the INSURANCE PROVIDED provision or within 1,000 feet/300 meters thereof, or as described in the TEMPORARY REMOVAL OF PROPERTY provision; or
- 4) while in transit as provided by this Policy, and
- 5) during the Periods of Liability described in this section, provided such loss or damage is not at a contingent time element location.

56. As written, the term “physical loss” is independent of the term “damage” and has a different meaning. The policy does not define the words physical, physical loss, damage, or the phrase “physical, loss or damage to property.”

57. Time Element coverage is triggered by “physical loss or damage of the type insured.” Communicable disease is a type of physical loss or damage insured by the policy. The coronavirus is a communicable disease that was present on SMSC’s property. Therefore, Time Element coverage is also triggered by SMSC’s loss.

58. The policy also provides coverage for SMSC’s loss of ingress and egress to and from its property from the pandemic. The policy provides:

C. INGRESS/EGRESS

This Policy covers the Actual Loss Sustained and EXTRA EXPENSE incurred by the Insured during the PERIOD OF LIABILITY due to the necessary interruption of the Insured's business due to partial or total physical prevention of ingress to or egress from an insured location, **whether or not the premises or property of the Insured is damaged**, provided that such prevention is a direct result of physical damage of the type insured to property of the type insured.

59. The policy also provides that for the coverages for Interruption by Communicable Disease, Time Element Loss, and Loss of Ingress/Egress, at the insured’s election, it may recover its lost gross earnings or gross profits. The policy provides:

B. GROSS EARNINGS

Measurement of Loss:

- 1) The recoverable GROSS EARNINGS loss is the Actual Loss Sustained by the Insured of the following during the PERIOD OF LIABILITY:
 - a) Gross Earnings;
 - b) less all charges and expenses that do not necessarily continue during the interruption of production or suspension of business operations or services;
 - c) less ordinary payroll; and
 - d) plus all other earnings derived from the operation of the business.

60. The language of other provisions of the policy demonstrate that a showing of structural alteration is not required to obtain coverage.

61. For instance, coverage for the costs of Protection and Preservation of Property, states that it will cover “reasonable and necessary costs incurred for actions to temporarily protect or preserve insured property; provided such actions are necessary **due to actual, or to prevent immediately impending, insured physical loss or damage to such insured property.**” [p. 35]. The coverage applies even when there has been no physical loss or damage to property.

62. The policy includes coverage for Service Interruption Property Damage. The provision provides:

This Policy covers insured physical loss or damage to insured property at an insured location when such physical loss or damage results from the interruption of incoming services consisting of electricity, gas, fuel, steam, water, refrigeration or from the lack of outgoing sewerage service by reason of any accidental event at the facilities of the supplier of such service located within this Policy’s TERRITORY, **that immediately prevents in whole or in part the delivery of such usable service.**

* * *

The period of service interruption is the period **starting with the time when an interruption of specified services happens; and ending when with due diligence and dispatch the service could be wholly restored.**
[p. 36]

Although the provision refers to physical loss and damage, a reading of the mechanics of the provision show clearly that it is the loss and damages flowing from an interruption – and not structural alteration of the insured’s property – that triggers the coverage.

63. Although the language of time element coverages for “physical loss or damage to property” show that no destruction or structural alteration is required, FMIC demonstrates that it knows what words to use when it is referring to property that has been destroyed or structurally altered. Under the provisions for the alternative measure of recovery for Gross Profit, the policy provides:

- 4) The Insured will act with due diligence and dispatch in repairing or replacing **physically damaged** buildings and equipment to the same or equivalent physical and operating conditions that existed prior to the damage; and take whatever actions are necessary and reasonable to minimize the loss payable hereunder. [p. 46]

Reading the policy in its totality yields the conclusion that “physical loss or damage to property” means something else.

64. The provision of the policy for Leasehold Interest shows that coverage can be triggered by a loss of usability. The policy states:

- 1) If the lease agreement requires continuation of rent; and if the property is wholly untenable or **unusable**, the actual rent payable for the unexpired term of the lease; or if the property is partially untenable or **unusable**, the proportion of the rent payable for the unexpired term of the lease. [p. 47]

65. The coverage for Data Provider Time Element loss requires only the occurrence of an accidental event for coverage to apply. That provision states:

This Policy covers the Actual Loss Sustained and EXTRA EXPENSE incurred by the Insured during the period of interruption at an insured location of off-premises data processing or data transmission services, **when the interruption is caused by any accidental event at the facilities of the provider of such services that immediately prevents in whole or in part the delivery of such provided services.** [p. 52]

66. The coverage for actions of a Civil or Military Authority apply to a loss of access to covered property. That provision states:

This Policy covers the Actual Loss Sustained and EXTRA EXPENSE incurred by the Insured during the PERIOD OF LIABILITY if an order of civil or military authority limits, **restricts or prohibits partial or total access to an insured location** provided such order is the direct result of physical damage of the type insured at the insured **location** or within five statute miles/eight kilometers of it. [p.54]

Property Damage Coverage

67. As the cause of a declared pandemic, the coronavirus is globally, nationally, and locally omnipresent, including in, on, and around SMSC's casino property.

68. The coronavirus is highly contagious, deadly, and spreads rapidly in several ways.¹² The most common transmission is direct human-to-human transmission, where someone directly inhales respiratory droplets expelled by an infected person. The second most common is airborne transmission, where respiratory excretions are expelled by an infected person into the air through coughing, sneezing, talking, yelling, or singing, and then inhaled by others who come into contact with the airborne viral particles. These tiny viral particles, which are expelled in the droplets known as RNA, can linger in the air for hours and invade heating and air ventilation systems where they alter the air on the property and remain in circulation for longer periods of time.¹³ This is why experts suggest that business property owners, schools, and other organizations upgrade HVAC systems to limit the limit the circulation of viral particles that may exist within the system.¹⁴

69. The novel coronavirus is also transmitted from surfaces to humans. This occurs when respiratory droplets of an infected person land on and alter surfaces or objects which

¹² World Health Organization, *How does COVID-19 spread between people?*, available at <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/question-and-answers-hub/q-a-detail/coronavirus-disease-covid-19-how-is-it-transmitted>.

¹³ Neeltje van Doremalen, *et al.*, *Aerosol and Surface Stability of SARS-CoV-2 as Compared with SARS-CoV-1*, N. ENGL. J. MED. (Mar. 17, 2020), available at <https://www.nejm.org/doi/full/10.1056/NEJMc2004973>.

¹⁴ Zeynep Tufekci, *We Need to Talk About Ventilation*, THE ATLANTIC (July 30, 2020), available at <https://www.theatlantic.com/health/archive/2020/07/why-arent-we-talking-more-aboutairbornetransmission/614737/>.

become a contaminated “formit” of transmission.¹⁵ Once a formit is touched by an uninfected person, the coronavirus may be transmitted into the body by hand contact with the mouth, nose, or eye. The more frequently an altered surface or object is touched, the higher the likelihood it will become a source of transmission. Cleaning or disinfecting surfaces provides only a temporary solution. Surfaces that have been disinfected after a restaurant or other business closes for the night will become re-infected the next day as soon as the business opens to the public.

70. As reported by *The New England Journal of Medicine*, the coronavirus is detectable in the air for up to three hours, on copper up to four hours, on cardboard up to twenty-four hours, and on plastic and stainless steel up to three days.¹⁶ Other scientific sources report that the coronavirus can remain on polystyrene plastic, aluminum, and glass for as long as eight days, and can remain infectious on surfaces and objects at normal room temperatures for up to nine days.¹⁷ All of these materials alter and are present in SMSC’s casino property and used by SMSC in providing its casino and hotel operations and its food and beverage services. SMSC’s property became a dangerous incubator for the coronavirus by being a business where people come and go in large numbers.

71. The report of Dr. Demmer confirms the omnipresence of the coronavirus using statistics that show the positivity rate among the population and admissions into hospitals of

¹⁵ Stephanie A. Boone and Charles P. Gerba, *Significance of Fomites in the Spread of Respiratory and Enteric Viral Disease*, 73 APPLIED AND ENVIRONMENTAL MICROBIOLOGY 6 (Mar. 13, 2007) available at https://www.researchgate.net/publication/6581941_Significance_of_Fomites_in_the_Spread_of_Respiratory_and_Enteric_Viral_Disease.

¹⁶ Neeltje van Doremalen, *et al.*, *Aerosol and Surface Stability of SARS-CoV-2 as Compared with SARS-CoV-1*, N. ENGL. J. MED. (Mar. 17, 2020), available at <https://www.nejm.org/doi/full/10.1056/NEJMc2004973>.

¹⁷ Boris Pastorino, *et al.*, *Prolonged Infectivity of SARS-CoV-2 in Fomites*, 26 EMERGING INFECTIOUS DISEASES 9 (Sept. 2020) (https://wwwnc.cdc.gov/eid/article/26/9/20-1788_article)

people who have developed COVID-19. Because the coronavirus is statistically proven to be carried by millions of people within the population surrounding SMSC's casino property, Dr. Demmer shows the coronavirus was physically present in, on, and around SMSC's casino properties on and before March 17, 2020.

72. The pervasive and constant movement of the coronavirus is an external force and event that impacted and damaged SMSC's property by altering the property from a satisfactory state to an unsatisfactory and highly dangerous state for humans unless structural alterations were made. The coronavirus altered the air particles and surfaces in SMSC's properties and changed the condition of SMSC's properties from usable and inhabitable to unusable, uninhabitable, unfit to its intended purposes and dangerous and unsafe for human occupation due to the ability of the coronavirus to attach to and survive on surfaces, travel through the ventilation system, and contact people, including employees, who are on the premises and may be infected.

73. The physical alteration of the SMSC's insured property from a satisfactory state to an unsatisfactory and physically harmful state forced SMSC to make substantial physical changes to the casino properties, including the reconfiguration of seating, installation of plexiglass shields and sanitizer dispensers, and the enhancement of air filtration systems in response to the threat of transmission of the coronavirus from those coming in and out of the property. To the extent that the policy is read to require structural alteration to its property to trigger coverage such alteration has indeed occurred.

74. FMIC knows that viruses physically alter insured property. Statements made to insurance regulators by the Insurance Services Office in 2006 to clarify the pollution cleanup

exclusion included: “Disease-causing agents may render a product impure or enable the spread of disease *by the presence on the interior building surfaces or surfaces of personal property.*”¹⁸

75. Although a clear physical alteration has occurred, the SMSC’s policy does *not* require physical or structural alteration. Defendant’s “all-risk” policy provisions cover “physical losses or damage to” property. By using the disjunctive “or,” FMIC drafted the policy to ensure that “physical loss” to the property is *not* synonymous with “damage” to the property. While the policy does not define “physical loss of,” the common usage of physical in the context of loss means the actual loss of or separation from something material, or a loss of possession, which encompasses an inability to use the insured property, whether or not the physical structure has suffered visible damage. Construing “physical loss to” to mean the same as “physical damage to” property would render the word “damage” superfluous.

76. The lack of definition of “physical loss” in the policy means the term is ambiguous and must be construed in SMSC’s favor. In fact, courts across the nation confronted with similar policy language cannot agree on the meaning of this contested phrase since the phrase is ambiguous and susceptible to the reasonable meaning given to it by the policyholder. *See Sec. Ins. Co. of Hartford v. Inv’rs Diversified Ltd., Inc.*, 407 So. 2d 314, 316 (Fla. 4th DCA 1981) (“The insurance company contends that the language is not ambiguous, but we cannot agree and offer as proof of that pudding the fact that the Supreme Court of California and the Fifth Circuit in New Orleans have arrived at opposite conclusions from a study of essentially the same language.”).

77. This same approach to ambiguous language in an insurance policy has been adopted in Minnesota as well. *See Minnesota Min. & Mfg. Co. v. Travelers Indem. Co.*, 457

¹⁸ Insurance Services Office, Inc., Circular, LI-CF-2006-175, July 6, 2006.

N.W.2d 175, 180 (Minn. 1990) (“The ambiguity inherent in the term “damages” as used in this context is further exemplified by the sharp division in case authority from other jurisdictions which have ruled on whether costs associated with groundwater cleanup mandated under the federal statute CERCLA are covered under similar CGL policies.”).

78. The same point was made recently by a court in Ohio, where the court denied the insurer’s motion to dismiss, which contended that “direct physical loss of and damage to property” requires structural damage, noting the number of cases across the nation that disagree on the meaning of the phrase. *See Sylvester & Sylvester, Inc. v. State Mut. Auto. Ins. Co.*, No. 2020CV00817, n.7 (Ohio Ct. of Common Pleas Jan. 7, 2021).

79. Other court decisions involving claimed losses from the omnipresence of the coronavirus have found that coverage is not precluded by the lack of tangible structural damage to the insured property, or that “physical loss” plausibly does not require structural damage to trigger coverage, most notably *Studio 417, Inc. v. The Cincinnati Ins. Co.*, No. cv-03127-SRB, 2020 WL 4692385 (W.D. Mo. Aug. 12, 2020) (denying insurer’s motion to dismiss and finding that the plaintiff’s complaint alleged direct physical loss, because it alleged that the virus “is a physical substance”), and *Cherokee Nation v. Lexington Ins. Co.*, No. CV-2020-150 (Okla. Dist. Ct. Jan. 14, 2021) (granting insured’s motion for summary judgment, having stated a “plausible claim for fortuitous ‘direct physical loss’”).

80. Moreover, courts have long held that any non-excluded physical force or peril that renders the physical condition of property dangerous to people or unusable by the policyholder notwithstanding the lack of structural damage to the property equates to a direct physical loss of the property because it causes a physical problem harmful to the property.

81. For example, West Virginia's highest court found coverage for residential property rendered unusable or uninhabitable because of the *threat* that rocks and boulders could come crashing down at any time from an abandoned rock quarry despite the absence of structural damage to the property. *See Murray v State Farm Fire & Cas. Ins., Co.*, 509 S.E. 2d 1 (W. Va. 1998).

82. In other cases, courts have found coverage where insured property became unusable or dangerous due to the presence of asbestos, smoke, fumes and gases, odors, bacteria, and other substances or events which caused no structural damage but diminished the value of the property by rendering it uninhabitable.

CLAIMS

COUNT I

DECLARATORY JUDGMENT, MINN. STAT. CHAPTER 555

83. SMSC incorporates by reference paragraphs 1 – *82 as though fully set forth herein.

84. Under Chapter 555 of the Minnesota Statutes and Rule 57 of the Minnesota Rules of Civil Procedure, this Court may declare the rights and other legal relations of the parties in dispute whether or not further relief is or could be sought.

85. An actual and bona-fide justiciable controversy exists between SMSC and FMIC as to the rights and obligations under the policy that provides coverage for business earnings loss and extra expense incurred in that:

- a. SMSC has suffered the actual not suspected occurrence of a communicable disease on its premises;
- b. SMSC has incurred physical loss or damage to covered property from the coronavirus and COVID-19 pandemic;

- c. SMSC has incurred time element earnings loss and extra expenses due to the coronavirus and COVID-19 pandemic;
- d. Due to the nature of its business operations, SMSC has suffered an involuntary physical loss or damage to insured property that resulted from the coronavirus and COVID-19 pandemic;
- e. SMSC contends that the March 17, 2020 resolution of the Gaming Enterprise Board of Directors closing the Mystic Lake Casino & Hotel and the Little Six Casino due to the actual not suspected presence of the coronavirus on its property triggers coverage under the communicable disease response provision and the earnings loss and extra expense due to interruption by communicable disease provision of the policy;
- f. SMSC contends that the coronavirus and COVID-19 pandemic trigger coverage under the policy's time element loss provision, which does not include an exclusion for a pandemic;
- g. SMSC further contends that the coronavirus and COVID-19 pandemic trigger "additional coverage" under the policy; and
- h. FMIC denies and disputes that SMSC's costs for communicable disease response, lost earnings, and extra expense from interruption by communicable disease, time element loss, extra expense, ingress/egress and any other coverages provided for in the policy, provide coverage related to the coronavirus and COVID-19 pandemic.

86. SMSC seeks a Declaratory Judgment that SMSC's policy provides coverage for unexpected and unexcluded causes of loss, including communicable disease response, interruption by communicable disease, time element loss, extra expense, and loss of ingress/egress due to the physical presence of the coronavirus and COVID-19 pandemic, where there is no exclusion for a pandemic.

87. Minnesota Rule of Civil Procedure 57 permits the Court to determine the existence or non-existence of any right, duty, power, liability, privilege, or of any fact upon which the parties' legal relations depend.

88. The declaration sought regarding the instant controversy is of a justiciable nature, does not amount to an advisory decree, and will settle the controversy between the parties.

WHEREFORE, SMSC requests that this Court enter a Declaratory Judgment declaring that SMSC's policy provides coverage for communicable disease response, lost earnings and extra expenses due to interruption by communicable disease, time element earnings loss, extra expense, loss of ingress/egress and additional coverages due to the coronavirus and COVID-19 pandemic and for further necessary and proper relief including damages, in accordance with Minn. Stat. § 555.08, and an award of attorney fees under Minn. Stat. § 549.211, subd. 2.

COUNT II
BREACH OF CONTRACT

89. The SMSC incorporates by reference paragraphs 1 – *88 as though fully set forth herein.

90. SMSC has a commercial property insurance policy issued by FMIC.

91. SMSC has performed all its obligations as specified by the policy including the payment of all premiums due.

92. SMSC's policy provides coverage for the costs of its communicable disease response and the earnings loss and extra expense from interruption by communicable disease. SMSC's insurance policy further provides coverage for time element loss, extra expenses, and loss of ingress/egress, for all perils including unexpected and unexcluded causes of loss.

93. The policy provides that FMIC will pay for the actual loss of earnings due to the "interruption" of business during the "period of liability."

94. The policy also provides that FMIC will pay for any necessary expenses that SMSC incurs that it would not have incurred had there been no physical loss or damage to its property.

95. SMSC was forced to close its insured premises to the public and cease or substantially reduce its operations due to the omnipresence of the coronavirus and COVID-19 pandemic, and thus has incurred substantial earnings losses and extra expenses.

96. FMIC has refused performance under the policy. Specifically, FMIC has wrongfully denied coverage for the costs of communicable disease response, loss of earnings and extra expense due to interruption by communicable disease, time element business earnings losses, extra expenses, or loss of ingress/egress incurred related to the coronavirus and COVID-19 pandemic.

97. As a result of FMIC's repudiation and breach of the policy, SMSC has suffered actual damages.

WHEREFORE, SMSC seeks compensatory damages resulting from FMIC's repudiation and breach of contract and further seeks all relief deemed appropriate by this Court, including attorneys' fees and costs.

PRAYER FOR RELIEF

WHEREFORE, SMSC demands judgment against Defendant as follows:

- (1) Issuing a Declaratory Judgment declaring the parties' rights and obligations under SMSC's policy;
- (2) Awarding SMSC "further necessary and proper relief", including damages, in accordance with Minn. Stat. § 555.08;
- (3) Awarding SMSC compensatory damages from FMIC's breach of the insurance contract, in an amount to be determined at trial, together with appropriate prejudgment interest at the maximum rate allowable by law;
- (4) Awarding SMSC costs and disbursements and reasonable allowances for the fees of experts, and reimbursement of expenses;

- (5) Awarding SMSC attorneys' fees pursuant to Minn. Stat. § 549.211, subd. 2;
- (6) Awarding such other and further relief the Court deems just, proper, and equitable.

DEMAND FOR A JURY TRIAL

SMSC requests a jury trial for any and all Counts for which a trial by jury is permitted by law.

Date: May 12, 2021

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ACKNOWLEDGEMENT

The undersigned attorney acknowledges, pursuant to Minn. Stat. §549.211 (2), that the attorney and the attorney's client are aware that upon motion of a party, or upon the court's own motion, the court in its discretion may award to that party costs, disbursements, reasonable

attorney's fees and witness fees if the party or attorney against whom costs, disbursements, reasonable attorney and witness fees are charged acted in bad faith, asserted a claim or defense that is frivolous and that is costly to the other party, asserted on unfounded position solely to delay the ordinary course of the proceedings or to harass, or committed a fraud upon the court.

BENNEROTTE & ASSOCIATES, P.A.

Dated: May 12, 2021

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