21-80

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

10012 HOLDINGS, INC. DBA GUY HEPNER,
Plaintiff–Appellant,

v.

SENTINEL INSURANCE COMPANY, LTD.,
Defendant–Appellee,

and

HARTFORD FIRE INSURANCE COMPANY,
Defendant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF DEFENDANT–APPELLEE
SENTINEL INSURANCE COMPANY, LTD.

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CORPORATE DISCLOSURE STATEMENT

Defendant–Appellee Sentinel Insurance Company, Ltd. is wholly owned by The Hartford Financial Services Group, Inc., a Delaware corporation. The Hartford Financial Services Group, Inc. is a publicly traded corporation that has no parent corporation. To the best of Sentinel's knowledge, no publicly held corporation currently owns 10% or more of its common stock.

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STATEMENT OF THE ISSUES

An insurance policy provides Plaintiff with coverage for certain business interruption and related losses that occur when the policyholder must suspend its business operations because of a "direct physical loss of or physical damage to property" at its premises. Did the district court—following the binding authority of *Roundabout Theatre Co., Inc. v. Continental Casualty Co.*, 751 N.Y.S.2d 4 (1st Dep't 2002), and every New York court to have considered the issue—correctly hold that the policy does not provide coverage when there has been no direct physical loss of or damage to property at the premises and the policyholder suspends operations due to a governmental order aimed to slow the spread of COVID-19? (Yes.)

INTRODUCTION

Someone throws a brick through the window of an art gallery, then jumps through the broken glass into the gallery. He tosses a lit cigarette into a corner to free up his hands, then pulls paintings from the wall, jumps back through the broken glass, and runs. The cigarette hits some packing material and ignites. Some of the remaining paintings are damaged by smoke, others burned to a crisp. The art gallery must close for months. It pays for cleanup and loses income while repairs are completed. If the owners purchased the insurance policy at issue in this case, they would have coverage not only for the lost and damaged property, but also for lost income and expenses, because the loss of income and expenses were caused by

"direct physical loss of or physical damage to property" at the gallery. The broken window was directly *physically damaged*. So were the smoke-damaged paintings. The stolen paintings and the paintings burned to a crisp were directly *physically lost*.

At another art gallery—the one involved in this appeal—there has been no break-in, no theft, no fire. The windows are intact. The paintings are not damaged. The gallery is not damaged. Nothing has changed physically at all. But government officials determined that all non-essential businesses statewide, including this gallery, must restrict operations at non-essential workplaces to prevent the spread of a contagious disease. 10012 Holdings, Inc. ("10012 Holdings" or "Plaintiff") could no longer sell paintings at its brick-and-mortar gallery, and could sell them only online, with employees allowed to access the gallery for routine business purposes such as packing and shipping a painting purchased online.

Plaintiff contends that its gallery, no less than the first gallery, suffered "direct physical loss of or physical damage to" property. It did not. It did not suspend in-person operations because of "direct physical loss of or damage to property" at the gallery. It suspended its in-person operations because the government ordered non-essential businesses to reduce in-person workforces to zero, to slow the spread of COVID-19 in New York. But the insurance policy that Plaintiff bought does not cover such pure economic loss. It does not provide coverage for business income lost for any reason whatsoever; it provides coverage for business income lost when

it must close because of a "direct physical loss of or physical damage to property" at the gallery. The district court properly held that the lack of any direct physical loss of or damage to property means that the policy provides no coverage for the income the gallery lost because it could not sell art in person.

New York courts—including appellate courts—have previously interpreted strikingly similar policy language and have found no coverage where businesses have had to suspend or modify operations for reasons not caused by a "direct physical loss of or physical damage to property." In fact, more than a dozen New York courts—state and federal—have over the past year analyzed the policy language in the precise context of COVID-19. Every single one has concluded that there is no coverage.

Interpreting the policy to mean what it says, consistent with New York law, does not minimize the toll that COVID-19 has had on people and businesses in New York and beyond. The gallery owned by 10012 Holdings has no doubt suffered, as so many have during the global pandemic. The federal government responded to the challenges of COVID-19 with a series of relief efforts, including relief for small businesses.[1] Our political branches and their affected constituents have regularly

[1] *See* Coronavirus Aid, Relief, and Economic Security (CARES) Act of 2020, Pub. L. No. 116-136, 134 Stat. 281 (providing large forgivable loans to businesses); *see also* Coronavirus Preparedness and Response Supplemental Appropriations Act, Pub. L. No. 116-123, 134 Stat. 146 (2020); Families First Coronavirus Response

debated whether the federal government has provided too little, too much, or just the right amount of relief and economic stimulus for businesses. Legislation has been proposed and debated, with some passed and some rejected. Those debates and decisions are the appropriate path to relief for businesses affected by the global pandemic—not the re-writing of insurance policies that are not intended or worded to provide coverage for health-related government orders restricting or modifying business operations in the absence of direct physical loss of or damage to property.

STATEMENT OF THE CASE[2]

A. 10012 Holdings and Relevant Provisions of Its Insurance Policy

10012 Holdings owns and operates an art gallery in Manhattan. JA9.[3] In April 2019, it bought a commercial property insurance policy (the "Policy"), with the art gallery described as the "scheduled premises." JA57. Several specific provisions are relevant to this appeal.

Property Coverage. The Policy provides property coverage:

> We will pay for **direct physical loss of or physical damage to Covered Property at the premises** described in the Declarations (also called "scheduled premises" in

Act, Pub. L. No. 116-127, 134 Stat. 177 (2020); American Rescue Plan Act of 2021, Pub. L. No. 117-2, 135 Stat. 4.

[2] Because this appeal comes from a grant of a motion to dismiss, the stated facts are drawn from the Complaint and issues on which the Court can take judicial notice. Sentinel would dispute some allegations if the case were not dismissed.

[3] "JA" refers to the Joint Appendix on appeal. "OB" refers to 10012 Holdings' opening brief. "Dkt." refers to the appellate docket.

> this policy) caused by or resulting from a Covered Cause of Loss.

JA74 (emphasis added); *see generally* JA74-98 (Special Property Coverage Form).

The Policy provides a lengthy definition of "Covered Property," which includes several categories of "Business Personal Property," including "Property you own that is used in your business." JA74. The Policy also explicitly defines "Property Not Covered," which includes "accounts receivable." JA74-75.

"Covered Cause of Loss" means "risks of **direct physical loss**," except where otherwise excluded or limited. JA75 (emphasis added).

The Policy also offers several additional coverages related to the core property coverage for direct physical loss or physical damage. These additional property coverages are provided through Section 5 of the "Special Property Coverage Form," which describes coverages the insured has added to the underlying property coverage. JA83-84.

***Business Income*.** The first is "Business Income" coverage, triggered only if there was business interruption caused by "direct physical loss of or physical damage to property at the 'scheduled premises.'" The Business Income coverage states:

> We will pay for the actual loss of Business Income you sustain due to the necessary suspension of your "operations" during the "period of restoration." **The suspension must be caused by direct physical loss of or physical damage to property at the "scheduled premises"**, including personal property in the open (or in

> a vehicle) within 1,000 feet of the "scheduled premises", caused by or resulting from a Covered Cause of Loss.

JA83 (emphasis added). "Business Income" includes both "Net Income (Net Profit or Loss before income taxes) that would have been earned or incurred **if no direct physical loss or physical damage had occurred**," and "[c]ontinuing normal operating expenses incurred, including payroll." JA83 (emphasis added).

The Policy defines the "Period of Restoration" as "the period of time that":

> a. Begins with the date of **direct physical loss or physical damage caused by or resulting from a Covered Cause of Loss at the "scheduled premises"**, and
>
> b. Ends on the date when:
> (1) **The property at the "scheduled premises" should be repaired, rebuilt or replaced** with reasonable speed and similar quality;
> (2) The date when your business is resumed at a new, permanent location.

JA97 (emphasis added). The Period of Restoration "does *not* include any increased period required due to enforcement of any law that . . . [r]egulates the construction, *use* or repair, or required tearing down of any property." JA98 (emphasis added).

Extra Expense. The Special Property Coverage Form also contains "Extra Expense" coverage. Like Business Income coverage, Extra Expense coverage is triggered only if there has been "direct physical loss or physical damage to property" at 10012 Holdings' gallery and if the business interruption was caused by the direct physical loss or physical damage to property. The Extra Expense provision states:

> We will pay reasonable and necessary Extra Expense you incur during the "period of restoration" that you would not have incurred **if there had been no direct physical loss or physical damage to property at the "scheduled premises"**, including personal property in the open (or in a vehicle) within 1,000 feet, caused by or resulting from a Covered Cause of Loss.

JA83 (emphasis added).

Civil Authority. The Special Property Coverage Form also includes the third and last provision at issue in this appeal, titled "Civil Authority." It provides:

> (1) This insurance is extended to apply to the actual loss of Business Income you sustain when access to your "scheduled premises" is specifically prohibited by order of a civil authority **as the direct result of a Covered Cause of Loss to property** in the immediate area of your "scheduled premises".
>
> (2) The coverage for Business Income will begin 72 hours after the order of a civil authority and coverage will end at the earlier of:
>
> (a) When access is permitted to your "scheduled premises"; or
>
> (b) 30 consecutive days after the order of the civil authority.

JA84 (emphasis added). "Covered Cause of Loss" here has the same meaning as in the Business Income provision, namely, "risks of **direct physical** loss," except where otherwise excluded or limited. JA75 (emphasis added).

The Definition of "Property Damage" in the Liability Portion of the Policy. In addition to the property insurance provided above, the Policy also provides

liability coverage through a Business Liability Coverage Form. *See* JA101-24. That form describes coverage for certain damages that the policyholder becomes legally liable to pay *others* (commonly called "third-party" coverage). It uses the term "property damage" over sixty times, and it defines the term to include "[l]oss of use of tangible property that is not physically injured." JA123. Plaintiff invokes that definition in its opening brief. But the term "property damage" does not appear in the Special Property Coverage Form, which is the form containing all three of the coverages at issue on this appeal. *See generally* JA74-98. The Special Property Coverage Form provides what is commonly called "first-party" property coverage, i.e., coverage for losses that the policyholder *itself* suffers.

B. The In-Person Workforce Reduction Orders

Responding to the spread of COVID-19 in early 2020, the Governor of New York declared "a State disaster emergency for the entire State of New York" on March 7, 2020. JA28. Over the next three weeks, seeking to reduce "community contact transmission of COVID-19," JA28, the Governor issued Executive Orders requiring reductions in in-person workforces at non-essential businesses. These culminated with a March 20 order directing all non-essential businesses "to reduce the in-person workforce at any work locations by 100%." JA14, 28.

These orders did not require businesses to cease or suspend operations. In fact, businesses were encouraged to continue conducting operations digitally or from

home, by "utiliz[ing] telecommuting or work from home procedures to the maximum extent possible." JA249. Many businesses continued operating online. (Plaintiff does not allege that its gallery's website, which offered artwork for sale, was shut down by the government orders.) Authorized guidance from the Empire State Development Corporation further clarified that the workforce reduction mandate did not prohibit all access to business locations. Employees were still allowed to visit premises "temporarily to perform a specific task," such as to "pick up the mail or perform a similar routine function each day," provided that they would "not be in contact with other people." JA250.

C. 10012 Holdings' Insurance Claim

The government orders allegedly caused 10012 Holdings to suffer "significant losses" and to "incur significant expenses." JA15. It submitted a claim for what it described as "Business Interruption losses" to Sentinel, JA15, which denied the claim because COVID-19 had not caused direct physical loss of or physical damage to property at or near the gallery. *See* JA15.

D. The Complaint

Plaintiff filed suit in the Southern District of New York, seeking a declaratory judgment that the Policy "provides coverage for the loss of business income sustained" under the Business Income, Extra Expense, and Civil Authority provisions, and bringing a claim for Breach of Contract. *See* JA7-20.

The Complaint does not allege that the virus that causes COVID-19 physically altered any property at Plaintiff's gallery, or that any physical alteration to its property caused its losses. It also does not identify any piece of property that was damaged or suffered a physical loss. Rather, 10012 Holdings alleges that "the proximate cause of [its business] losses were the precautionary measures taken by the New York civil authorities to prevent the spread of COVID-19." JA13. It was these prophylactic measures in "[t]he various suspension orders," JA8, rather than any direct physical loss or physical damage to Plaintiff's property, that allegedly "forced [it] to suspend business operations," and "to suffer significant losses and incur significant expenses." JA15.

E. Sentinel's Motion to Dismiss and the District Court's Decision

Sentinel moved to dismiss the Complaint because 10012 Holdings had not alleged any direct physical loss of, or direct physical damage to, its property.

The district court granted the motion. Judge Schofield noted that New York courts have repeatedly "interpret[ed] substantially identical language" in insurance policies, and have held that the phrase "loss of [or] damage to" is "limited to losses involving *physical damage to the insured's property*." JA290. Based on the New York precedents, Plaintiff's allegations, and a straightforward reading of the Policy language, the district court concluded that the "Policy's plain language unambiguously does not cover business lost due to" the workforce reduction orders.

JA293. Because "the Complaint does not allege a direct physical loss," the court found no coverage under the Business Income or Extra Expense provisions. JA293. As to Civil Authority, the district court likewise found fatal the lack of any allegations of direct physical loss or physical damage, noting that the Complaint did not allege that Plaintiff had to suspend operations due to direct physical loss at neighboring properties, as required under the Policy. JA294-95.

The district court denied leave to amend "because the Policy does not provide coverage for the loss Plaintiff suffered." JA295. 10012 Holdings appealed.

SUMMARY OF THE ARGUMENT

The district court correctly dismissed 10012 Holdings' Complaint because it does not allege facts establishing "direct physical loss of or physical damage to" its property. The gallery was not closed to customers because of any physical loss or physical damage to property there. Rather, as with thousands of other businesses, it was ordered by the government to eliminate its in-person workforce to slow the spread of COVID-19. Every New York court to address these issues in the context of the COVID-19 pandemic—fifteen and counting—has held that there is no coverage in these circumstances.

Plaintiff's central argument is that "physical loss" and "physical damage" must mean different things in the Policy. It contends that "physical loss" must mean loss of *use* of its gallery. But that does not follow. "Physical loss" and "physical

damage" *do* mean different things. A brick through a window physically damages the window; a vandal slashing a painting physically damages a painting; smoke from a fire started by a tossed cigarette physically damages the paintings coated in smoke. By contrast, stolen paintings are physically lost, as are paintings reduced to ash. Something can be lost without being damaged, or damaged without being lost. The terms are not superfluous. But for any loss or damage to trigger coverage, the Policy requires that the loss or damage be "direct" and "physical." Neither the gallery or any covered property in it suffered "direct" and "physical" loss or damage.

This question is settled under New York law. In *Roundabout Theatre Co., Inc. v. Continental Casualty Co.*, 751 N.Y.S.2d 4 (1st Dep't 2002), the First Department held that substantively identical policy language "clearly and unambiguously provides coverage only where the insured's property suffers direct physical damage." *Id.* at 8. *Roundabout Theatre* is the "seminal New York state authority" on business interruption coverage. *Visconti Bus Serv., LLC v. Utica Nat'l Ins. Grp.*, ---N.Y.S.3d---, 2021 WL 609851 at *4 (N.Y. Sup. Ct. Feb. 12, 2021). That decision is binding here and disposes of the issue on appeal. Unsurprisingly, it has been repeatedly cited by New York courts, both state and federal, in the COVID-19 business interruption coverage litigation context. 10012 Holdings does not even address *Roundabout Theatre* until late in its brief, when it ignores the case's holding that business interruption coverage is not available unless there has been a "direct

physical loss of" or "physical damage to" the insured property. Instead, Plaintiff argues that its loss of sales due to the suspension of its brick-and-mortar activity triggers coverage, because revenue from hoped-for sale constitutes "Covered Property." But that term does not appear in any of the coverage provisions Plaintiff invokes, and it is entirely irrelevant. In any event, Plaintiff is wrong: "Covered Property" does not include anticipated revenue like "accounts receivable."

10012 Holdings also argues that a definition of "property damage" in the commercial general liability portion of the Policy that includes "loss of use of tangible property" establishes coverage here. Plaintiff did not raise this argument below and has waived it. In any event, it offers Plaintiff no help. The commercial general liability portion of the Policy contains its own list of definitions and applies to certain claims made by other parties against 10012 Holdings (third party claims); those definitions do not apply to the first-party coverage provisions at issue here, which protect Plaintiff's own property. Courts in New York and nationwide have roundly rejected this argument for this reason.

Finally, Plaintiff argues that the district court decision conflicts with "recent COVID-19 related authority from around the country." The several pages it devotes to cites from jurisdictions far and wide is nothing but an exercise in misdirection. The overwhelming majority of courts nationwide has found no coverage in similar

circumstances. That overwhelming majority includes *every New York court* to address the issue.

Plaintiff also asks this Court to certify the question to the New York Court of Appeals. This is not an appropriate candidate for certification. *Roundabout Theatre* settled the meaning of "direct physical loss" in New York, and every New York court—state or federal—to later address the question has followed that "seminal" case. New York law is settled, and this Court should affirm based on that settled law.

ARGUMENT

I. The Policy Does Not Provide for Business Income or Extra Expense Coverage Because Plaintiff Does Not Allege Direct Physical Loss of, or Physical Damage To, Property at Its Art Gallery.

10012 Holdings' Policy does not cover the alleged losses it incurred when it suspended operations following the workforce reduction orders. The Business Income and Extra Expense provisions it invokes are only triggered where there has been some "direct physical loss of, or physical damage to" property at its art gallery. There is no such allegation in the Complaint.

Under New York law, 10012 Holdings "bears the burden of showing that the insurance contract covers the loss." *Morgan Stanley Grp. Inc. v. New England Ins. Co.*, 225 F.3d 270, 276 (2d Cir. 2000). As with any contract, "an insurance contract is interpreted to give effect to the intent of the parties as expressed in the clear language of the contract." *Village of Sylvan Beach v. Travelers Indem. Co.*, 55 F.3d

114, 115 (2d Cir. 1995). To be sure, where a policy provision is "ambiguous," i.e., "susceptible of two reasonable interpretations," it "must be construed in favor of the insured." *Wai Kun Lee v. Ostego Mut. Fire Ins. Co.*, 854 N.Y.S.2d 211, 212 (2d Dep't 2008). But "unambiguous provisions of an insurance contract," such as those at issue in this case, "must be given their plain and ordinary meaning." *White v. Continental Cas. Co.*, 9 N.Y.3d 264, 267 (2007).

Effectuating the plain meaning of an insurance contract is especially important because insurers are in the business of pricing and spreading risk. An insurer can only do that if it can rely on courts not to "bind the insurer to a risk that it did not contemplate and for which it has not been paid." *Dae Assocs., LLC v. AXA Art Ins. Corp.*, 70 N.Y.S.3d 500, 501 (1st Dep't 2018) (quotation omitted). That is why the New York Court of Appeals has repeatedly admonished courts "not to make or vary the contract of insurance to accomplish [their] notions of abstract justice or moral obligation," as opposed to what the policy language actually says. *Keyspan Gas E. Corp. v. Munich Reinsurance Am., Inc.*, 31 N.Y.3d 51, 63 (2019) (quoting *Breed v. Ins. Co. of N. Am.*, 46 N.Y.2d 351, 355 (1978)).[4]

[4] Plaintiff repeatedly cites cases involving coverage *exclusions*, and the interpretive rules that govern them. But the district court did not decide the case based on an exclusion, and Sentinel does not make any exclusion-based arguments. This appeal turns on the plain meaning of the clauses providing coverage in certain defined circumstances. *Amicus* Mario Badescu Skin Care, Inc. goes further than Plaintiff, arguing that losses resulting from the COVID-19 pandemic must be covered because the Policy does not include a specific virus exclusion. Dkt. 59 at 8-9. But New York

In this case, the Policy is straightforward. 10012 Holdings is covered for certain losses and expenses if forced to suspend operations due to *direct physical loss* of, or *physical damage* to, property at its gallery. If, as here, the gallery closes for reasons other than direct physical loss of or physical damage to property at the gallery, then there is no coverage.

A. Settled New York Law Precludes Coverage.

When considering the meaning of "direct physical loss" and "damage" in business interruption insurance provisions, the analysis begins with *Roundabout Theatre Co., Inc. v. Continental Cas. Co.*, 751 N.Y.S.2d 4 (1st Dep't 2002), the "seminal New York state authority" on these issues. *Visconti Bus Serv.*, 2021 WL 609851 at *4. *Roundabout Theatre* is binding on this Court and dispositive of this case.

In *Roundabout Theatre*, the New York Appellate Division First Department "determine[d] whether the business interruption clause of an insurance policy issued to plaintiff theatre company covers losses occasioned by an order of the City of New York closing the street and denying access to the insured's theatre due to a

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law is clear that the "absence of an exclusion cannot create coverage; the words used in the policy must themselves express an intention to provide coverage . . . ." *Comm'l Union Ins. Co. v. Flagship Marine Services, Inc.*, 190 F.3d 26, 33 (2d Cir. 1999) (citation omitted); *see also Raymond Corp. v. Nat'l Union Fire Ins. Co.*, 800 N.Y.S.2d 89, 92 (2005) (exclusions only "*subtract* from coverage" and "cannot create coverage" by "negative inferences") (emphasis in original; citation omitted).

construction accident in the area, notwithstanding the absence of any physical damage to the theatre premises." 751 N.Y.S.2d at 5. An external elevator at a construction site near the theatre had collapsed, causing substantial damage in the neighborhood. Concerned that a greater collapse could occur, authorities shut down nearby roads, making the theatre inaccessible and forcing it to cancel 35 performances of *Cabaret*. The theatre sustained "substantial monetary losses" as a result. *Id*.

The theatre's insurance policy contained a business interruption provision very similar to the one here. It covered losses "incur[red] in the event of interruption, postponement, or cancellation . . . *as a direct result of loss of, damage to or destruction of property* or facilities [] including the theatre building being occupied . . . caused by the perils insured against." *Id.* The policy defined "Perils Insured" to mean "*all risks of direct physical loss or damage to the property*." *Id.* In other words, just as in this case, the theatre was covered for business interruption losses that resulted from any "loss of" or "damage to" property at the theatre (or the theatre itself), provided that those losses were caused by a risk of "direct physical loss or damage."

The trial court held that the theatre was entitled to coverage for its business income losses sustained after the closures for the same reasons that 10012 Holdings argues it is entitled to coverage here: it held that "loss" and "damage" cannot mean

the same thing, so "loss" must include loss of *use* of the insured's premises. *Id.* at 7-8.

The First Department reversed, squarely rejecting those arguments. It held that "the language in the instant policy clearly and unambiguously provides coverage **only where the insured's property suffers direct physical damage**." *Id.* at 8 (emphasis added). The First Department found that the "plain meaning" of "direct" and "physical"—the same words at issue here—"narrow[s] the scope of coverage" to "instances where the insured's property suffered direct physical damage." *Id.* That did not make "loss" into a superfluous synonym for "damage": after all, the "loss of" property can include "the theft or misplacement of theatre property that is neither damaged nor destroyed, yet still requires the cancellation of performances." *Id. Roundabout Theatre* thus addressed precisely the same arguments 10012 Holdings makes here in remarkably similar circumstances—and rejected them.

Roundabout Theatre is binding authority here. "[T]he decision of an intermediate state court on a question of state law is binding on [this Court] unless [this Court] find[s] persuasive evidence that the highest state court would reach a different conclusion." *Entron, Inc. v. Affiliated FM Ins. Co.*,749 F.2d 127, 132 (2d Cir. 1984). In the twenty years since *Roundabout Theatre*, no New York court has called its analysis or holding into question. To the contrary, later New York appellate precedent provides further support. *See Wal-Mart Stores, Inc. v. U.S. Fid. & Guar.*

Co., 816 N.Y.S.2d 17, 18 (1st Dep't 2006) (analyzing substantively identical policy language and holding that if a business were closed "out of concern for the safety of the store and its occupants," rather than physical damage to the premises, "there would not be coverage"); *RSVT Holdings, LLC v. Main St. Am. Assur. Co.*, 25 N.Y.S.3d 712, 714 (3d Dep't 2016) (the "direct physical loss of or damage to" requirement provides coverage "for direct damage to plaintiffs' property"). This Court has also cited approvingly to *Roundabout Theatre*, albeit in a different context. *See Duane Reade, Inc. v. St. Paul Fire & Marine Ins. Co.*, 411 F.3d 384, 396 (2d Cir. 2005) (citing analysis of the term "Restoration Period"). 10012 Holdings does not even try to argue that the New York Court of Appeals would see things differently. There is no reason to think it would.

New York courts have faithfully followed *Roundabout Theatre*'s rule in similar circumstances. In *Newman Myers Kreines Gross Harris, P.C. v. Great Northern Insurance Co.*, 17 F.Supp.3d 323 (S.D.N.Y. 2014), for example, the plaintiff law firm was forced to close its office due to power outages implemented by Con Edison in anticipation of flooding from Hurricane Sandy. *Id.* at 324-25. The law firm conceded that its office was not physically harmed, but nevertheless sought coverage for its loss of business income and extra expenses. The "decisive question" in *Newman* was thus the same question before this Court: "whether the insured premises experienced 'direct physical loss or damage.'" *Id.* at 328. Relying on

Roundabout Theatre, Judge Engelmayer explained that "[t]he words 'direct' and 'physical,' which modify the phrase 'loss or damage,' ordinarily connote actual, demonstrable harm of some form to the premises itself, rather than forced closure of the premises for reasons exogenous to the premises themselves, or the adverse business consequences that flow from such closure." *Id.* at 331 (citing *Roundabout Theatre*, 751 N.Y.S.2d at 4; Couch on Insurance § 167:15 (3d ed. 2009) ("[B]usiness interruption policies generally require some physical damage to the insured's business in order to invoke coverage.")). Accordingly, "[t]he critical policy language here—'direct physical loss or damage'—. . . unambiguously requires some form of actual, physical damage to the insured premises to trigger loss of business income and extra expense coverage." *Newman*, 17 F.Supp.3d at 331.[5] The same is true here.

[5] *Pepsico v. Winterthur Int'l Am. Ins. Co.*, 806 N.Y.S.2d 709 (2d Dep't 2005), cited by *Amici* Restaurant Law Center et al., does not change the consistent precedent. In *Pepsico*, a soda company had to destroy soda because bad raw ingredients made it "unmerchantable," and the court asked if the destruction fell within the coverage for "all risks of physical loss of or damage to property," including "personal property" such as the soda. *Pepsico v. Winterthur Int'l Am. Ins. Co.*, 788 N.Y.S.2d 142, 143 (2d Dep't 2004); *Pepsico v. Winterthur Int'l Am. Ins. Co.*, No. 17053/01, 2004 WL 3092342 at *1 (N.Y. Sup. Ct. Dec. 10, 2004) (earlier decisions from the same case providing the factual background and policy language). The Second Department found the loss covered because a "physical event" occurred that "seriously impaired" the "function" of the soda, so that it could not be sold. 806 N.Y.S.2d at 711. 10012 Holdings does not allege any "physical event" at its premises or affecting its personal property. It does not allege, for example, that the virus damaged its paintings or the computer it used to list artwork for sale online.

Given the straightforward application of *Roundabout Theatre*'s holding to the circumstances presented in COVID-19 business interruption cases like this one, it is unsurprising that *every single district court in New York* addressing such a claim has held that there is no coverage. *See Rye Ridge Corp. v. Cincinnati Ins. Co.*, No. 20 Civ. 7132 (LGS), 2021 WL 1600475 (S.D.N.Y. Apr. 23, 2021); *Kim-Chee LLC v. Philadelphia Indemnity Ins. Co.*, No. 1:20-cv-1136, 2021 WL 1600831 (W.D.N.Y. Apr. 23, 2021); *Mohawk Gaming Enterprises, LLC v. Affiliated FM Ins. Co.*, No. 8:20-CV-701, 2021 WL 1419782 (N.D.N.Y. Apr. 15, 2021); *Jeffrey M. Dressel, D.D.S., v. Hartford Ins. Co. of the Midwest, Inc.*, No. 20-CV-2777(KAM)(VMS), 2021 WL 1091711 (E.D.N.Y. Mar. 22, 2021); *Sharde Harvey DDS, PLLC v. Sentinel Ins. Co., Ltd.*, No. 20-CV-3350 (PGG) (RWL), 2021WL 1034259 (S.D.N.Y. Mar. 18, 2021); *Food for Thought Caterers Corp. v. Sentinel Ins. Co., Ltd.*, No. 20-cv-3418 (JGK), 2021 WL 860345 (S.D.N.Y. Mar. 6, 2021); *DeMoura v. Cont'l Cas. Co.*, No. 20-CV-2912 (NGG) (SIL), 2021 WL 848840 (E.D.N.Y. Mar. 5, 2021); *Tappo of Buffalo, LLC v. Eerie Ins. Co.*, No. 20-CV-754V(Sr), 2020 WL 7867553 (W.D.N.Y. Dec. 29, 2020); *Michael Cetta, Inc. v. Admiral Indem. Co.*, No. 20 Civ. 4612 (JPC), 2020 WL 7321405 (S.D.N.Y. Dec. 11, 2020); *Social Life*

Magazine, Inc. v. Sentinel Ins. Co., No. 20 Civ. 3311(VEC), 2020 WL 2904834 (S.D.N.Y. May 14, 2020).[6]

The same is true of *every single New York Supreme Court case* addressing the issue. *See 6593 Weighlock Drive, LLC v. Springhill SMC Corp.*, 2021 WL 1419049 (N.Y. Sup. Ct. Apr. 13, 2021); *Mangia Restaurant Corp. v. Utica First Ins. Co.*, No. 713847/2020, 2021 WL 1705760 (N.Y. Sup. Ct., Qns. Cnty. March 30, 2021); *Visconti Bus Serv., LLC v. Utica Natl. Ins. Group*, 2021 WL 609851 (N.Y. Sup. Ct. Feb. 12, 2021); *Soundview Cinemas Inc. v. Great Am. Ins. Co.*, 2021 WL 561854 (N.Y. Sup. Ct. Feb. 10, 2021).[7] 10012 Holdings makes no effort to distinguish this wall of precedent.

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[6] In *Social Life Magazine*, the first case to consider COVID-19 business interruption claims under New York law, Judge Caproni summarized the essential analysis in two sentences: "It damages lungs. It doesn't damage printing presses." *Social Life Magazine, Inc. v. Sentinel Insurance. Co. Ltd.*, No. 20 Civ. 3311(VEC), 2020 WL 2904834, at *5:3-4 (S.D.N.Y. May 14, 2020). Because the virus that causes COVID-19 hurts people, not property, it cannot be said to cause "direct physical loss of or physical damage to Covered Property at the premises." In the most recently decided New York case (at the time of filing), Judge Crawford noted similarly that while the virus that causes COVID-19 is a "mortal hazard to *humans*," it does not damage *property*, which remains "intact and available for use once the human occupants no longer present a health risk to one another." *Kim-Chee*, 2021 WL 1600831, at *6 (emphasis original).

[7] The unanimity of the roughly dozen judges who have considered the application of New York law to this issue underscores the persuasiveness of these precedents. So does the careful and extensive analysis provided in many of the decisions, such as *Food for Thought Caterers Corp.*

Plaintiff has not alleged any "direct" and "physical" loss or damage to property at its gallery. Instead, it alleges that COVID-19 was spreading in New York and that the government required it to close to brick-and-mortar customers. Neither the spread of the respiratory disease nor the government orders aiming to stem that spread created any "direct" and "physical" loss or damage to the gallery, its artwork, or any other property.[8]

B. Plaintiff Cannot Distinguish *Roundabout Theatre*.

Plaintiff ignores *Roundabout Theatre* until late in its brief, when it tries to distinguish the case by arguing that the Policy here defines "Covered Property" more broadly than the policy in *Roundabout*. OB25-27. That is both irrelevant and wrong.

The defined term "Covered Property" is a red herring: it has no bearing on the coverage provisions at issue here. The term does not appear in any of the Business Income, Extra Expense, or Civil Authority provisions. The Policy provides coverage for such losses if they are caused by a direct physical loss of or physical damage to *any* property at the gallery—not just the more limited "Covered Property." But the central holding of *Roundabout Theatre* is that mere loss of use of the insured premises is not "loss" of or "damage" to *property* (not "Covered Property"), because those terms require direct physical harm to property. *Roundabout Theatre*, 751 N.Y.S.2d at 8 (the language "unambiguously provides coverage only where the

[8] Plaintiff does not even allege that COVID-19 was present at its gallery.

insured's property suffers direct physical damage" and finding that the "plain meaning" of "direct" and "physical" "narrow[s] the scope of coverage" "to instances where the insured's property suffered direct physical damage"). The term "Covered Property" as it is used elsewhere in the Policy does not affect that dispositive holding or its application to this case. 10012 Holdings has alleged no direct physical loss of or damage to *any* property at its gallery, so there is no coverage.

In any event, Plaintiff is also wrong about the definition of "Covered Property." The Policy describes what "Covered Property" includes and what it excludes. It includes certain types of owned property ("Property you own that is used in your business"), borrowed property ("Property of others that is in your care, custody or control") and leased property ("Leased personal property for which you have contractual responsibility to insure"). JA74. 10012 Holdings argues in passing that "[p]roperty you own that is used in your business" "obviously includes [its] business income." OB25. Because that supposedly covered property was "lost" by virtue of the workforce reduction orders, 10012 Holdings argues, it experienced a "covered loss." *Id.* But anticipated business income—*i.e.*, income from hoped-for sales that did not occur—is not "covered property" under the Policy. 10012 Holdings cites nothing to support its assertion; it simply says the assertion is "obvious[]." It is not. The phrase "property you *own*" does not mean "property you thought you would receive but never did." Hoping is not the same as owning. 10012 Holdings never

owned the income that it would have gotten if it had sold art that it never sold. Moreover, the definition of "Covered Property" plainly excludes income the policyholder anticipates receiving, such as "accounts receivable." JA74-75.

In short, 10012 Holdings misconstrues the term "Covered Property" in an attempt to distinguish *Roundabout Theatre*. But even if Plaintiff correctly described what Covered Property means, it still would not matter, because that term is irrelevant to the coverage provisions at issue in this case and has no bearing on the central holding in *Roundabout Theatre*. That holding is binding on this Court and dispositive of Plaintiff's claims.

C. Plaintiff's Proposed Interpretation of Direct Physical Loss Cannot Be Squared with the Policy Language.

In addition to contravening binding New York precedent, interpreting direct physical loss to include loss of use of the premises would run afoul of the relevant Policy language.

Consider the "physical" qualifier in "direct physical loss." "Physical" means "[o]f, relating to, or involving material things; pertaining to real, tangible objects." *Physical*, BLACK'S LAW DICTIONARY (11th ed. 2019). Accordingly, the "requirement that the loss be 'physical,' given the ordinary definition of that term, is widely held to exclude alleged losses that are intangible or incorporeal," such as purely economic losses. Couch on Ins. § 148:46 (3d ed. 2009); *see also Newman*, 17 F. Supp. 3d at 331(same); *Michael Cetta*, 2020 WL 7321405, at *6 ("The plain

meaning of the phrase 'direct physical loss of or damage to' therefore connotes a negative alteration in the tangible condition of the property."); *United Airlines, Inc. v. Ins. Co. of State of Pa.*, 385 F. Supp. 2d 343, 349 (S.D.N.Y. 2005), *aff'd* 439 F.3d 128 (2d Cir. 2006) ("The inclusion of the modifier 'physical' before 'damages' . . . supports [defendant's] position that physical damage is required before business interruption coverage is paid.").

Several New York courts have unsurprisingly focused on the word "physical" when rejecting the arguments 10012 Holdings makes here in the context of COVID-19 business interruption claims. *See, e.g.*, *Dressel*, 2021 WL 1091711 at *3 ("A 'physical loss' means that physical property suffered a loss."); *Tappo*, 2020 WL 7867553, at *4 ("Purely economic loss due to temporary loss of use . . . does not suffice."); *DeMoura*, 2021 WL 848840, at *5 ("[T]he plain meaning of 'direct physical loss or damage' includes loss or damage that is 'immediate,' 'real,' and 'tangible.'"); *Cetta*, 2020 WL 7321405, at *6; *Newman*, 17 F. Supp. 3d at 331. This Court should do the same.

The word "physical" is not the only obstacle for 10012 Holdings' proposed interpretation. The definition of "Period of Restoration" also shows why "direct physical loss" cannot mean loss of use. The "period of restoration" ends when the lost or damaged property at the premises is "repaired, rebuilt, or replaced with reasonable speed and similar quality." JA97. It expressly does *not* include "any

increased period required due to enforcement of any law that . . . [r]egulates the construction, *use* or repair" of the gallery. JA98 (emphasis added). This language plainly "contemplate[s] physical damage to the insured premises," because otherwise there is nothing to repair, rebuild, or replace. *Newman*, 17 F. Supp. 3d at 332; *see also DeMoura*, 2021 WL 848840, at *5; *Cetta*, 2020 WL 7321405, at *7; *Visconti*, 2021 WL 609851, at *6 n. 3; *Food for Thought*, 2021 WL 860345, at *4.

There is no potential Period of Restoration here. 10012 Holdings does not allege that its gallery requires any repair, that it needs to be rebuilt, or that anything within it needs to be replaced. Nothing at the gallery needs fixing. Interpreting the Policy to provide coverage when there is a "loss of use" that does not require anything to be repaired, rebuilt, or replaced would negate the "Period of Restoration" clause in the Policy.[9]

[9] New York courts have unanimously agreed that the definition of "Period of Restoration" precludes a definition of "direct physical loss" that includes loss of use. Some outliers elsewhere, applying other states' law, have disagreed. For example, *In re Society Ins. Co. COVID-19 Bus. Interruption Protection Ins. Litig*, MDL No. 2964, 2021 WL 679109, at *9 (N.D. Ill. Feb. 22, 2021), found that the if "the coronavirus risk could be minimized by the installation of partitions and a particular ventilation system, then the [plaintiffs'] restaurants would be expected to 'repair' the space by installing those safety features." *Amici* Restaurant Law Center et al. endorse this erroneous out-of-state view. In reality, "erecting Plexiglass barriers or otherwise enhancing space between patrons" is "more accurately characterized as alterations to the property," and calling those changes "repairs" or replacements" would "strain[] the words beyond 'their natural, plain, and ordinary sense.'" *Zagafen Bala, LLC v. Twin City Fire Ins. Co.*, No. 20-3033, 2021 WL 131657, at *6 (E.D. Pa. Jan. 14, 2021); *see also Crescent Plaza Hotel Owner L.P. v. Zurich Am. Ins. Co.*, No. 20 C 3463, 2021 WL 633356, at *3 (N.D. Ill. Feb. 18, 2021) (rejecting argument that

D. Plaintiff's Superfluity Argument Has Been Rejected and Is Wrong.

Plaintiff argues that "loss" must mean something different than "damage," or else it would be superfluous. That is true. But it then goes further, arguing that "direct physical loss" must mean "loss of physical possession and/or direct physical deprivation," *i.e.* loss of *use*. OB13-15. That does not follow.

Roundabout Theatre rejected this argument. 751 N.Y.S.2d at 8 (holding that the "loss of" property can include "the theft or misplacement of theatre property that is neither damaged nor destroyed, yet still requires the cancellation of performances"). And while Plaintiff asserts that "[t]he district court accepted Sentinel's argument that 'loss' and 'damage' are synonymous," OB13, the district court said no such thing, and Sentinel has never argued that "loss" and "damage" are synonymous. *See, e.g.*, JA262 (Sentinel noting in its Reply in support of its Motion to Dismiss that "'loss' of property" is "distinct from physical 'damage.'"). "Physical loss" and "physical damage" do mean different things. Something can be lost without being damaged, and it can be damaged without being lost. If someone broke into the gallery one night and stole its stock of paintings, those paintings would be "physically lost." If someone broke into the gallery at night and slashed the

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"installing special air filters, plexiglass partitions and protection shields" in response to COVID-19 constituted "repairs").

paintings, those paintings would be "physically damaged." The words have different meanings. And if either of those events required the gallery to suspend operations, Plaintiff would have coverage for lost business income (subject to other provisions in the Policy).

In short, "physical loss" and "physical damage" mean different things in the phrase "direct physical loss of or physical damage to property." But giving them their ordinary separate meanings does not require transforming the phrase "direct physical loss" into an indirect and non-physical "loss of use." The Policy requires "physical" and "direct" loss or damage to trigger coverage.

E. Interpreting "Direct Physical Loss" to Mean Loss of Use Would Undermine the Policy's Basic Structure and Render Entire Provisions Meaningless.

It is a "well-settled principle that provisions of an insurance policy are to be harmonized." *Hudson v. Allstate Ins. Co.*, 809 N.Y.S.2d 124, 126 (2d Dep't 2006). Interpreting "direct physical loss" to mean "loss of use" does not just contravene the Policy's plain meaning and binding New York appellate authority—it also cannot be harmonized with the Policy's structure or language.

10012 Holdings' proposed interpretation would destroy the Policy's structure. The Policy provides no coverage for lost business income unless there has been a "necessary suspension of your 'operations.'" JA83. But while the business interruption coverage always requires a suspension of operations, it does not provide

coverage *every time* a business must suspend operations. That is the whole point of the provisions: to define *which* suspensions of operations trigger coverage. For business income and extra expense coverage, that trigger is a direct physical loss of or physical damage to property at the premises. For civil authority coverage, the trigger is direct physical loss (i.e. a "Covered Cause of Loss") *near* the premises. But if "direct physical loss" means *any* loss of use, then there would be no reason for the three provisions at issue here to specify *when* coverage is available for suspended operations.

For example, the civil authority coverage "extend[s]" the coverage provided under the business interruption and extra expense provisions. JA84. It provides reimbursement of business income lost when the policyholder must close due to governmental orders resulting directly from direct physical loss to property in the immediate area around the insured premises, rather than direct physical loss or damage at the insured premises itself. JA84. But if 10012 Holdings were correct that the business income provision provides coverage for *any* loss of use (because "physical loss" means any loss of use), then the specific requirements of the civil authority coverage would be superfluous—because the coverage for lost use of premises from a governmental order would already be covered under the business income provision. There would be no reason for a civil authority coverage "extension."

F. The Cases Plaintiff Cites Are Inapposite.

10012 Holdings attempts to bolster its unreasonable interpretation of "direct physical loss" by citing one New York case and several cases from outside New York applying other states' law. None help it.

The one case that 10012 Holdings cites applying New York law on "direct physical loss" is *Newman*, but that case undermines its position. *See supra* at 19-20. Citing *Roundabout Theatre*, Judge Engelmayer held that there was *no coverage* in that case precisely because "direct physical loss or damage" does *not* "extend to mere loss of use of a premises, where there has been no physical damage to such premises." 17 F. Supp. 3d at 331. Indeed, *Newman* expressly distinguished several of the out-of-state cases that Plaintiff later cites, because in those cases "there was some [actual] compromise to the physical integrity of the workplace." *Id.* at 330; *see also id.* at 329-30 (distinguishing *TRAVCO Ins. Co. v. Ward*, 715 F. Supp. 2d 699 (E.D. Va. 2010) (sulfuric gas on premises); *Essex v. BloomSouth Flooring Corp.*, 562 F. 3d 399 (1st Cir. 2009) (unbearable odor); *Motorists Mut. Ins. Co. v. Hardinger*, 131 F. App'x 823 (3d Cir. 2005) (contaminated well water); OB16 (relying on these cases).[10]

[10] Moreover, *Newman* explicitly takes no position on "[w]hether or not these cases were each correctly decided." 17 F. Supp. 3d at 330. Tellingly, none come from the high court of its relevant jurisdiction. Similarly, only one of the six other out-of-state cases cited by Plaintiff comes from a high court, and that one is more than half a century old. *See Western Fire Ins. Co. v. First Presbyterian Church*, 165 Colo. 34,

The other out-of-state cases Plaintiff cites stand for the same propositions as those that *Newman* addressed, and they are distinguishable for the same reason: in each, the insured's business had to shut down because of something *direct* and *physical* at the property. *See Port Auth. of New York & New Jersey v. Affiliated FM Ins. Co.*, 311 F. 3d 226 (3d Cir. 2002) (asbestos); *Sentinel Mgmt. Co. v. New Hampshire Ins. Co.*, 563 N.W.2d 296 (Minn. Ct. App. 1997) (asbestos); *Prudential Prop. & Cas. Ins. Co. v. Lillard- Roberts*, No. CV-01-1362-ST, 2002 WL 31495830, at *1 (D. Or. June 18, 2002) (mold and water damage); *Western Fire Ins. Co. v. First Presbyterian Church*, 165 Colo. 34 (1968) (gasoline); *Matzner v. Seaco Ins. Co.*, 9 Mass. L. Rptr. 41 (Mass. Super. 1998) (carbon monoxide); *Farmers Ins. Co. of Oregon v. Trutanich*, 858 P.2d 1332 (Or. Ct. App. 1993) (methamphetamine fumes).

Unlike those cases, 10012 Holdings does not allege that it closed its gallery because of something direct and physical that caused harm to its property. It alleges that it closed its business—or at least the brick-and-mortar portion of it—because of the workforce reduction orders. Such "reasons exogenous to the premises

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38-39 (1968), (holding that it is "quite true that the so-called 'loss of use' of the [insured's] premises, standing alone, does not in and of itself constitute a 'direct physical loss,'" but that in that particular case a direct physical loss occurred when "the accumulation of gasoline around and under the … premises became so infiltrated and saturated as to be uninhabitable, making further use of the building highly dangerous.").

themselves" do not trigger coverage under New York law. *Newman*, 17 F.Supp.3d at 331.

In any event, Plaintiff's out-of-state cases applying other states' laws offer no guidance on New York law. *Roundabout Theatre* provides that dispositive guidance.

G. The Label "All-Risk" and the Definition of "Property Damage" Elsewhere in the Policy Do Not Help Plaintiff.

Plaintiff seeks to evade the Policy language in two ways. Neither works.

First, 10012 Holdings repeatedly characterizes the Policy as "an all-risk policy," implying that this shorthand label alters the plain meaning of the Policy provisions it seeks to invoke. *See* OB12-13. It does not. Commercial property insurance policies[11] can either be "all-risk" (also known as "open peril") or "named perils." *Parks Real Estate Purchasing Grp. v. St. Paul Fire & Marine Ins. Co.*, 472 F. 3d 33, 41 (2d Cir. 2006). A named-perils policy "covers only losses suffered from an enumerated peril," whereas an open peril policy does not list specific covered perils, but rather identifies perils that are *excluded* from the policy. *Id.* But whatever

[11] Plaintiff erroneously asserts that it "could have purchased property damage insurance, which would have covered structural or physical damage to the art gallery and losses stemming from same. It did not do so." OB18. Plaintiff bought a policy that covers physical property damage. *See* JA74 ("We will pay for direct physical loss of or physical damage to Covered Property at the premises described in the Declarations…caused by or resulting from a Covered Cause of Loss."); *see generally* JA74-98 (special property coverage form); *see also* JA101-24 (providing liability coverage).

the nomenclature, "an 'all risk' policy is not an 'all loss' policy"; it "does not extend coverage for every conceivable loss." *Emerald Coast Rests., Inc. v. Aspen Spec. Ins. Co.*, No. 3:20cv5898-TKW-HTC, 2020 WL 7889061, at *1 (N.D. Fla. Dec. 18, 2020); *see also Real Hosp., LLC v. Travelers Cas. Inc. Co. of Am.*, No. 2:20-cv-00087-KS-MTP, 2020 WL 6503405, at *5 n. 9 (S.D. Miss. Nov. 4, 2020). New York law is clear that "[l]abeling the policy as 'all-risk' does not relieve the insured of its initial burden of demonstrating a covered loss under the terms of the policy." *Roundabout Theatre*, 751 N.Y.S.2d at 7. As always, the scope of coverage is governed by the Policy's plain meaning. *See, e.g.*, *Dressel*, 2021 WL 1091711, at *4 (applying New York law and noting that "Plaintiff's argument dramatically overstates the scope of coverage provided under such a policy" and explaining that the peril at issue "must still relate to property damage" to constitute a direct physical loss or physical damage"); *Sharde Harvey*, 2021 WL 1034259, at *12 n. 13 (applying New York law); *Sylvan Beach*, 55 F.3d at 115 (applying New York law); *White*, 9 N.Y.3d at 267 (applying New York law).

Second, 10012 Holdings argues that a definition of the phrase "property damage" that appears in the Business Liability Coverage Form in the Policy detailing coverage for damages 10012 Holdings becomes legally obligated to pay third parties supports its contention that "direct physical loss" includes loss of use, because

"property damage" is defined there to include, among other things, "[l]oss of use of tangible property that is not physically injured." OB15.

This argument is misleading at best. As noted above (at 7-8), the portion of the Policy at issue on this appeal is *not* the Business Liability section (addressing coverage that is provided when claims are asserted against the policyholder), but the section that details coverages for losses the policyholder itself suffers. The relevant section includes the Special Property Coverage Form that contains all the Policy provisions that Plaintiff invokes. These two sections are entirely separate and protect "wholly different interests." *Great N. Ins. Co. v. Mt. Vernon Fire Ins. Co.*, 92 N.Y.2d 682, 688 (1999). Each contains its own list of defined terms. "Property damage" is *not* a term used even once in the Special Property Coverage Form, which contains the coverage provisions that 10012 Holdings invokes. Rather, the definition that 10012 Holdings points to comes from an entirely different (third-party liability) coverage part of the Policy, in the list of definitions used exclusively for that section. It has no bearing whatsoever on the coverage provisions at issue here.

If anything, the fact that "property damage" is expressly defined to include loss of use in the third-party liability section of the Policy, but not in the first-party property section of the Policy under which Plaintiff claims coverage, supports Sentinel's position. Where the Policy covers loss of use untethered from direct physical loss or damage, it does so expressly. *See Novella v. Westchester Cty.*, 661

F.3d 128, 142 (2d Cir. 2011) ("following both the presumption of consistent usage and meaningful variation, and the textual canon of *expressio unius est exclusio alterius*, … the presence of that provision applicable to one type of pension makes clear that the omission of that provision in the part of the Plan governing another type of plan was deliberate. To permit the defendants to pick and choose language from disparate sections of the Plan would subvert the intention of the Plan's drafters….") (internal quotation omitted); *Salerno v. Coach, Inc.*, 39 N.Y.S.3d 791, 792 (1st Dep't 2016) (holding that "the doctrine of expressio unius est exclusio alterius appropriately applies as a tool of contract construction" in New York).

Moreover, Plaintiff's argument proves too much. It would mean that the word *damage* includes loss of use. Plaintiff argues that the word *loss* in the phrase "direct physical loss" includes loss of use. If that were true, then *both* "damage" and "loss" in the phrase "direct physical loss of or physical damage to" would mean loss of use. That would render the word "loss" superfluous. Thus, marrying the definition of "property damage" used elsewhere in the Policy with Plaintiff's proposed interpretation of "direct physical loss" would create the very problem that Plaintiff says it is trying to fix—the supposed redundancy of the word "loss."

In any event, this argument is waived: 10012 Holdings never raised it below, which is why the district court did not address it. *See* JA252-71. But other courts in this Circuit and elsewhere have addressed this argument in the context of COVID-

19. Plaintiff ignores them. They all resoundingly reject the argument for the reasons explained above. *See, e.g., Cetta*, 2020 WL 7321405, at *9 (applying New York law); *Mortar & Pestle Corp. v. Atain Spec. Ins. Co.*, No. 20-cv-03461-MMC, 2020 WL 7495180, at *4 n. 7 (N.D. Cal. Dec. 21, 2020); *Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.*, 487 F. Supp. 3d 834, 843 n.8 (N.D. Cal. 2020); *BBMS, LLC v. Cont'l Cas. Co.*, No. 20-0353-CV-W-BP, 2020 WL 7260035, at *5 (W.D. Mo. Nov. 30, 2020); *Brunswick Panini's, LLC v. Zurich Am. Ins. Co.*, No. 1:20CV1895, 2021 WL 663675, at *8 (N.D. Ohio Feb. 19, 2021).

II. The Policy Does Not Provide for Civil Authority Coverage Because Plaintiff Does Not Allege Direct Physical Loss of, or Physical Damage To, Property in The Immediate Area.

The Policy provides for Civil Authority coverage when access to the premises "is specifically prohibited by order of a civil authority as the direct result of a Covered Cause of Loss to property in the immediate area." JA84. "Covered Cause of Loss," in turn, means "risks of **direct physical loss**." JA75 (emphasis added). In other words, Civil Authority coverage exists when a government order "specifically prohibit[s]" access to the premises as "the direct result of" a "direct physical loss to property" "in the immediate area." The loss must be "direct" and "physical," just as with the Business Income and Extra Expense coverage. The difference is that the focus now turns to "the immediate area" instead of the scheduled premises (the gallery). There is no coverage here because 10012 Holdings has not alleged any

direct physical loss to property in the immediate area. *See United*, 439 F. 3d at 134 (no civil authority coverage for losses caused by temporary shutdown of airport following 9/11 attacks, because the government order "was based on fears of future attacks," not because there was damage near the premises).

10012 Holdings is also not entitled to Civil Authority coverage because access to its gallery is not "specifically prohibited" by the COVID-19 government orders. The "civil authority coverage provision only provides coverage to the extent that access to Plaintiff's physical premises is prohibited." *Pappy's Barber Shops, Inc. v. Farmers Grp., Inc.*, 487 F. Supp. 3d 937, 945 (S.D. Cal. 2020) (holding no coverage in COVID-19 context). It does not provide coverage where, as here, "the owner of the property could continue to access the property despite the total reduction in the workforce." *Food for Thought*, 2021 WL 860345, at *6 (COVID-19 case applying New York law). Although the "coronavirus orders have limited plaintiff's *operations*, no order issued . . . prohibits *access* to plaintiff's premises." *Sandy Point Dental, PC v. Cincinnati Ins. Co.*, 488 F. Supp. 3d 690, 694 (N.D. Ill. 2020) (emphasis added) (also a COVID-19 case). In fact, access to the gallery to perform routine business functions has always been expressly *permitted*. JA250. Like other retailers, Plaintiff's gallery could continue to sell its products online, and the express permission of access to the premises for routine business functions meant Plaintiff's employees could physically go to the gallery to pack and ship artwork sold online.

At most, the government orders *limit* access to the gallery. That is not enough to trigger coverage. *See, e.g., S. Hosp., Inc. v. Zurich Am. Ins. Co.*, 393 F.3d 1137, 1139-41 (10th Cir. 2004) (grounding of flights that made it more difficult for customers to reach insured's hotels did not "prohibit access"); *St. Paul Mercury Ins. Co. v. Magnolia Lady, Inc.*, No. CIV.A. 297CV153BB, 1999 WL 33537191, at *3 (N.D. Miss. Nov. 4, 1999) (civil authority coverage not triggered by bridge closure that limited access to insured's casino); *Syufy Enters. v. Home Ins. Co. of Ind.*, No. 94-0756 FMS, 1995 WL 129229, at *2 (N.D. Cal. Mar. 21, 1995) (curfews did not specifically prohibit access to movie theaters).

Finally, the workforce reduction orders were not a "direct result" of "direct physical loss or direct physical damage to property" in the immediate area. They aimed to keep people distanced from one another to slow "community contact transmission of COVID-19," JA32, and do not identify any damaged property for New Yorkers to avoid. *See* Executive Order, 9 NYCRR 8.202.8 (Mar. 20, 2020); *see also Food for Thought*, 2021 WL 860345, at *6 (no Civil Authority coverage because New York orders were issued "to limit the risk of spreading the Covid-19 virus") (citation omitted); *Sharde Harvey*, 2021 WL 1034259, at *14 ("The Complaint does not name any specific business 'in the immediate area' that reported a case of COVID-19, let alone one that led to the government shutdown orders."); *Dressel*, 2021 WL 1091711, at *5 ("Plaintiff has not alleged that any executive order

issued by the Governor of New York was the 'direct result' of a loss to any property in Plaintiff's immediate area."); *Visconti*, 2021 WL 609851, at *12 (rejecting civil authority coverage because alleged damage to neighboring property was "not the cause of any restriction imposed by civil authority," and concluding that the New York orders were issued "to limit the risk of spreading the Covid-19 virus"). COVID-19 harms people, not property, and the orders aimed to reduce that harm to people.

10012 Holdings does not address the fatal flaws in its claim. It asserts that the "civil authority coverage applie[s] to [its gallery's] loss of business income due to prohibitions issued by a civil authority due to risks of direct physical loss to property in the immediate area of [the] gallery," OB27-28, but it does not point to any "direct" and "physical" loss in "the immediate area" that "directly" caused a government order "specifically prohibiting" access to the gallery.

III. The District Court's Decision Comports with Every New York Court to Address These Issues and The Overwhelming Majority of Cases Nationwide.

10012 Holdings paints a false picture when it contends that "the district court's decision is in conflict with recent COVID-19 related authority from around the country." OB19; *see also id. at* 19-23. It cites nine COVID-19 business interruption trial court decisions supporting its views. These cases (and a few others not cited) are extreme outliers. As of the date of this brief, counsel knows of nearly 250 district court decisions on motions to dismiss in cases where policyholders have

claimed business interruption coverage due to COVID-19. District courts granted the insurer's motion to dismiss in *93%* of those cases.[12]

More importantly, *none* of the cases 10012 Holdings cites are from New York or applied New York law. That is because there are no New York cases holding that an insured is entitled to business interruption coverage due to COVID-19. *See supra* at 30-31. The district court decision here comports with all New York authority and with the overwhelming weight of authority nationwide.

IV. Certification to The New York Court of Appeals Is Inappropriate Because This Case Involves the Straightforward Application of Settled New York Law.

10012 Holdings briefly argues that this Court should certify a question to the New York Court of Appeals, asking what "direct physical loss of or damage to" means, and whether that phrase can be "reasonably interpreted to cover losses of business property and income caused" by the COVID-19 government orders. Neither this question, nor any other presented by this appeal, is appropriate for certification to the Court of Appeals.

This Court has cautioned that certification is appropriate only "where there is a split of authority on the issue, where [a] statute's plain language does not indicate the answer, or when presented with a complex question of New York common law

[12] *See* University of Pennsylvania Carey Law School, *Judicial Rulings on the Merits in Business Interruption Cases*, Covid Coverage Litigation Tracker, *available at* https://cclt.law.upenn.edu/ (last visited May 7, 2021).

for which no New York authority can be found." *New York v. Nat'l Serv. Indus., Inc.*, 460 F.3d 201, 211 (2d Cir. 2006). After all, it is this Court's "job to predict how the forum state's highest court would decide the issue before [it]," so certification is inappropriate "where sufficient precedents exist for [this Court] to make this determination." *McCarthy v. Olin Corp.*, 119 F.3d 148, 154 (2d Cir. 1997); *see also Elliott Assocs., L.P. v. Banco de la Nacion*, 194 F.3d 363, 370 (2d Cir. 1999) (same); *Schoenfeld v. New York*, 748 F.3d 464, 470 n.5 (2d Cir. 2014) (same). In short, where "the resolution of [a] question is sufficiently clear" based on policy language and existing precedents, such that this Court can determine the issue based on well-settled principles of New York law, then "certification to the New York Court of Appeals is inappropriate." *E.R. Squibb & Sons, Inc. v. Lloyd's & Co.*, 241 F.3d 154, 171–72 (2d Cir. 2001); *see also Best Van Lines, Inc. v. Walker*, 490 F.3d 239, 242 n.3 (2d Cir. 2007). And in gauging whether certification is appropriate, this Court recognizes that "certification can effectively defeat a litigant's constitutionally endorsed entitlement to have its case adjudicated by a federal court rather than a state court, as certification will often effectively empower the state court to determine the outcome." *Valls v. Allstate Ins. Co.*, 919 F.3d 739, 743 (2d Cir. 2019).

The issue here is clear enough for this Court to resolve based on well-settled principles of New York law. This case presents no novel question of law. It presents the same question that the First Department addressed in *Roundabout Theatre*:

whether "physical loss" in a business interruption policy includes mere loss of use of the premises even when there has been no physical harm to property there. *Roundabout Theatre* said no, and there has been no New York decision since then calling any aspect of it into question. There has certainly been no "split of authority." *Nat'l Serv. Indus.*, 460 F. 3d at 211. The so-far unanimous view of courts in New York applying *Roundabout Theatre* to COVID-19 business interruption claims reinforces the clarity of the law. *See supra*, at 30-31. To resolve this appeal, this Court need only apply "well-settled principle[s] of New York law" to the *factual* circumstances of the COVID-19 pandemic. If this Court certified questions to the Court of Appeals every time it had to apply settled state legal rules to new facts, there would be no end to certification.

10012 Holdings notes that "[a]t least eight cases in New York, including this one, have hinged on the interpretation of the 'direct physical loss of or damage to' language at issue here." OB29. That is true; in fact, there are over a dozen. But *every single one* has held there was no coverage, precisely because binding appellate precedent in New York dictates the outcome of this case. It is hard to imagine a circumstance less suited for certification.

CONCLUSION

This Court should affirm the district court's dismissal of the case.

Respectfully submitted,

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Dated: May 7, 2021

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By: /s/ *Jonathan M. Freiman*
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