No. 21-1307

United States Court of Appeals for the First Circuit

AMERICAN FOOD SYSTEMS, INC.; OLD ANDOVER RESTAURANT, INC., d/b/a Grassfield's Food & Spirit; OLD WALTHAM RESTAURANT, INC., d/b/a Grassfield's Food & Spirit; OLD ARLINGTON RESTAURANT, INC., d/b/a Jimmy's Steer House; OLD SAUGUS RESTAURANT, INC., d/b/a Jimmy's Steer House; OLD SHREWSBURY RESTAURANT, INC., d/b/a Jimmy's Tavern & Grill; OLD LEXINGTON RESTAURANT, INC., d/b/a Mario's Italian Restaurant,
Plaintiffs - Appellants,

v.

FIREMAN'S FUND INSURANCE COMPANY; ALLIANZ GLOBAL RISKS UNITED STATES INSURANCE COMPANY,
Defendants - Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS, BOSTON

BRIEF FOR THE PLAINTIFFS - APPELLANTS

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Dated: June 21, 2021

CORPORATE DISCLOSURE STATEMENTS

American Food Systems, Inc.

Pursuant to Fed. R. App. P. 26.1, American Food Systems, Inc. states: it is a nongovernmental corporation that is a party to this proceeding; it has a parent corporation, Karapatsas Holdings Co., Inc.; there is no publicly held corporation that owns 10% or more of American Food Systems, Inc.'s stock.

Old Andover Restaurant, Inc.

Pursuant to Fed. R. App. P. 26.1, Old Andover Restaurant, Inc. D/B/A Grassfield's Food & Spirit states: it is a nongovernmental corporation that is a party to this proceeding; it has a parent corporation, Karapatsas Holdings Co., Inc.; there is no publicly held corporation that owns 10% or more of Old Andover Restaurant, Inc. D/B/A Grassfield's Food and Spirit's stock.

Old Arlington Restaurant

Pursuant to Fed. R. App. P 26.1, Old Arlington Restaurant, Inc. D/B/A Jimmy's Steer House states: it is a nongovernmental corporation that is a party to this proceeding; it has a parent corporation, Karapatsas Holdings Co., Inc.; there is no publicly held corporation that owns 10% or more of Old Arlington Restaurant, Inc. D/B/A Jimmy's Steer House's stock.

Old Lexington Restaurant, Inc.

Pursuant to Fed. R. App. P. 26.1, Old Lexington Restaurant, Inc. D/B/A Mario's Italian Restaurant states: it is a nongovernmental corporation that is a party

to this proceeding; it has a parent corporation, Karapatsas Holdings Co., Inc.; there is no publicly held corporation that owns 10% or more of Old Lexington Restaurant, Inc. D/B/A Mario's Italian Restaurant's stock.

Old Saugus Restaurant, Inc.

Pursuant to Fed. R. App. P. 26.1, Old Saugus Restaurant, Inc. D/B/A Jimmy's Steer House states: it is a nongovernmental corporation that is a party to this proceeding; it has a parent corporation, Karapatsas Holdings Co., Inc.; there is no publicly held corporation that owns 10% or more of Old Saugus Restaurant, Inc. D/B/A Jimmy's Steer House's stock.

Old Shrewsbury Restaurant, Inc.

Pursuant to Fed. R. Civ. P. 7.1, Old Shrewsbury Restaurant, Inc. D/B/A Jimmy's Tavern & Grill states: it is a nongovernmental corporation that is a party to this proceeding; it has a parent corporation, Karapatsas Holdings Co., Inc.; there is no publicly held corporation that owns 10% or more of Old Shrewsbury Restaurant, Inc. D/B/A Jimmy's Tavern & Grill's stock.

Old Waltham Restaurant, Inc.

Pursuant to Fed. R. App. P. 26.1, Old Waltham Restaurant, Inc. D/B/A Grassfield's Food & Spirit states: it is a nongovernmental corporation that is a party to this proceeding; it has a parent corporation, Karapatsas Holdings Co., Inc.; there is no publicly held corporation that owns 10% or more of Old Waltham Restaurant, Inc. D/B/A Grassfield's Food and Spirit's stock.

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Pursuant to 1st Cir. R. 34.0(a), the Plaintiffs-Appellants submit that this matter should be heard at oral argument. The issues raised implicate complicated issues of state law relating to insurance coverage for the ongoing COVID-19 pandemic. Oral argument will aid in the determination of these issues.

JURISDICTIONAL STATEMENT

The United States District Court for the District of Massachusetts has jurisdiction over American Food Systems, Inc., *et al.*'s (appellants) (referred to collectively in the singular herein as "AFS") claims against Fireman's Fund Insurance Company, *et al.*, (referred to collectively in the singular herein as "Fireman's Fund") pursuant to 18 U.S.C. §1332 because the parties are completely diverse and the amount in controversy exceeded $75,000. This Court has jurisdiction pursuant to 28 U.S.C. §1291 because the District Court's decision was final and this appeal is from the final order by the District Court that disposed of all of the parties' claims. On March 24, 2021, the District Court entered judgment for the Fireman's Fund. *Joint Appendix* ("JA") at 305. In accordance with Fed. R. App. P. 4(a), AFS timely filed its notice of appeal on April 16, 2021. JA 009.

INTRODUCTION

The sole issue before the Court is whether, taking the facts alleged as true with all reasonable inferences drawn in AFS's favor, the District Court erred in dismissing AFS's claims in the Amended Complaint for Covered Causes of Loss under their "all-risk" commercial business owner's insurance policy ("the Policy"), read as a whole under Massachusetts law.

The unprecedented global COVID-19 pandemic ravaged the world at whirlwind speed. JA 018, ¶27. SARS-CoV-2 is a highly infectious virus that causes

a potentially deadly acute respiratory syndrome – COVID-19 – that spreads rapidly and easily, especially indoors where it alters buildings, including turning them into potential disease incubators and super spreaders. JA 020-021, ¶¶36-41. *See South Bay United Pentecostal Church v. Newsom*, 140 S.Ct. 1613 (2020) (Roberts, C.J. concurring) ("Because people may be infected but asymptomatic, they may unwittingly infect others."). The Commonwealth of Massachusetts responded to this disaster, issuing emergency orders to mitigate the real damage being done and to mitigate the imminent risk of additional damage to, *inter alia*, AFS's covered premises. The emergency orders were designed to lessen those actual harms and imminent risks of actual harm to people and property. JA 018-019, ¶¶27-35; 023, ¶53; 025-026, ¶¶68-69, 76; 034, ¶120.

In response to their losses stemming from the pandemic, AFS reasonably sought coverage under the Policy, which was in effect at the onset of the pandemic. JA 028, ¶91. Their claims were denied. JA 028, ¶92.

In the Amended Complaint, AFS plausibly alleges coverage under the plain language of the Policy included coverages including but not limited (1) business interruption and extra expense (a) due to the physical on-site presence of COVID-19 which has contaminated the property creating a loss of use of the property, JA 020, ¶38; 023, ¶52; 025, ¶68; 033, ¶114; 035, ¶125; 037, ¶134; or (b) due to the imminent risk of the on-site presence of COVID-19, JA 020, ¶38; 023, ¶¶52-56; 025,

¶¶68-72; 037, ¶134; or (c) due to emergency orders designed to address the pandemic disaster, which clearly involved actual harm and/or imminent risk of even greater harm to people and property resulting in AFS's inability to use the properties, JA 023, ¶¶53-58; 025-026, ¶¶68-72, 77; 034, ¶119, 037, ¶134; or (2) the Policy's sue and labor provisions, JA 023, ¶55; 026, ¶77, 037, ¶135; or (3) civil authority coverage, JA 023, ¶¶57-58; 025-026, ¶¶68-72, 77; 034, ¶¶119-120; 037, ¶134; or (4) some combination of the foregoing. JA 037, ¶¶134-135.

The District Court granted the Fireman's Fund's Rule 12(b)(6) motion to dismiss these claims and certain subordinate claims.[1] The dismissal of the complaint was entirely based on the lower court's failure to interpret a threshold grant of coverage for property claims under the Policy for "direct physical loss or damage to property."

The District Court ignored the plain meaning of the phrase "direct physical loss or damage to property" and the context of the broader policy. Instead, the lower court ruled that Policy coverage requires that AFS's property must be permanently damaged in order to secure recovery, substantially narrowing coverage contrary to Massachusetts law. None of the Policy terms requires such a showing. This legal

[1] In dismissing the AFS's claims for coverage under the Policy, the District Court also dismissed the AFS's claims for breach of the covenant of good faith and fair dealing and violation of G. L. c. 93A because the Court deemed the Fireman's Fund's denial of coverage was lawful.

error was based in part on the District Court's failure to give effect to both the terms "loss" and "damage," rendering these terms mere surplusage. Despite the disjunctive "or" between them, the District Court chose to equate the terms in error and in violation of Massachusetts law of contract interpretation.

The District Court relied primarily on cases involving distinguishable facts and underlying policy language.[2] The District Court at the same time ignored established precedent from *Essex Ins. Co. v. Bloomsouth Flooring Corp.*, 562 F.3d 399, 406 (1st Cir. 2009)(*relying on Matzner v. Seaco Ins. Co.*, 9 Mass. L. Rptr. 41 (Mass. Super. August 12, 1998))[3] that the coverage language was ambiguous, allowing that on-site contamination is physical and covered under Massachusetts law. Properties with dangerous gases like those with SARS-CoV-2 are distinct from properties unaffected by its presence. The lower court also ignored precedent recognizing that government closure orders directly impact the way businesses use

[2] The Judicial Panel of Multi-District litigation weighed in on the issue of similarities between COVID-19 cases and policies: "these cases involve different insurance policies with different coverages, conditions, exclusions, and policy language, purchased by different businesses in different industries located in different states. These differences will overwhelm any common factual questions . . . While the policy language for business income and civil authority coverages may be very similar among the policies, seemingly minor differences in policy language could have significant impact on the scope of coverage." *In re COVID-19 Bus. Interruption Prot. Ins. Litig.*, No. MDL 2942, 2020 WL 4670700, at *2 (J.P.M.L. (Aug. 12, 2020) (Footnote omitted).

[3] Both decisions have been relied upon by other jurisdictions as discussed herein.

physical space, causing AFS to physically limit the use of its properties and the number of people who could physically inhabit them. Ultimately, the District Court should have recognized AFS's claims for loss of use of the Covered Properties under the Policy and denied the Motion to Dismiss.

STATEMENT OF THE ISSUES

Did the trial court err in holding that AFS had no coverage for business interruption, extra expense, and civil authority losses?

(a) Did the trial court err in holding that the plain language of the Policy's grant of coverage for "direct physical loss or damage" to property could not be satisfied by either (1) contamination by SARS-CoV-2 or (2) emergency government orders in the absence of physical alteration, or (3) both.

(b) Did the trial court err in distinguishing AFS's claimed loss of use of Covered Properties for (1) on-premises contamination by SARS-CoV-2 and (2) emergency government orders, from precedent set in *Matzner* and *Essex* that the ambiguity of the term "direct physical loss or damage" requires coverage for loss of use?

(c) Did the trial court err by engaging in prohibited fact-finding regarding the nature and extent of the contamination of its property by SARS-

CoV-2 for purposes of analyzing AFS's claims under *Essex* and deciding the properties could easily be wiped clean?

(d) Did the trial court err by creating an "enduring" physical damage requirement for coverage into the Policy and does this reading in effect create a *per se* rule requiring "enduring" physical damage in all cases in which the phrase "direct physical loss" is used, regardless of the facts of the case and other provisions of the Policy?

(e) Did the trial court err in creating a virus exclusion by drawing an "inference" from two other inapplicable exclusions?

STATEMENT OF THE CASE

I. Factual Background

A. AFS Purchased All-Risk Policy to Protect Their Business

AFS operates multiple dining establishments throughout the Commonwealth of Massachusetts. JA 014-015, ¶1. To protect its businesses against unexpected loss of business income and other damages, AFS purchased the Policy from Fireman's Fund to cover its business properties ("Covered Properties"). JA 017-018, ¶¶19-20. The Policy was in effect from February 3, 2020 through February 3, 2021. JA 017, ¶19.

Specifically, the Policy provided for blanket all-risk coverage for business income[4] and extra expense caused by business interruption of up to $6,863,000. JA 018, ¶22. This coverage was provided by the Fireman's Fund for:

> the actual loss of business income and necessary extra expense [the insured] sustain[s] due to the necessary suspension of . . . operations during the **period of restoration** arising from direct physical loss or damage to property at a location, or within 1,000 feet of such location, caused by or resulting from a covered cause of loss.

JA 138, ¶50 (emphasis added). For the purposes of such coverage, and other coverages under the Policy, the "period of restoration," is "the period of time that begins immediately after the time of direct physical loss or damage (here, the pandemic and government closure orders) caused by or resulting from a covered cause of loss to property at the location and ends on the earlier of: (1) The date when such property at the location should be repaired, rebuilt, or replaced with reasonable speed and like kind and quality." JA 138, ¶50(a)(1). As pled in the Amended Complaint, at the time of filing, the period of restoration had not ended.

In addition to coverage for loss of business income and extra expense at its own covered properties, the Policy also provides for the following coverages:

[4] Under the Policy, "Business income" is defined, *inter alia*, in relevant parts as . . . [t]he net profit or loss before income taxes from your operations including: (a) the sales of merchandise or services. . ." JA 130, ¶5.

"Civil Authority Coverage" Fireman's Fund:

> will pay for the actual loss of business income and necessary extra expense you sustain due to the necessary suspension of your operations caused by action of civil authority that prohibits access to a location. Such prohibition of access to such location by a civil authority must:
> (1) Arise from direct physical loss or damage to property other than at such location; and
> (2) Be caused by or result from a covered cause of loss; and
> (3) Occur within the number of miles stated in the Declarations from such location [in this case, 1 mile].

JA 098, ¶2.

"Delayed Occupancy Coverage" provides that the Fireman's Fund:

> will pay for the actual loss of business income and necessary extra expenses you sustain due to the necessary suspension of your operations during the period of restoration arising from direct physical loss or damage to property at a location caused by or resulting from a covered cause of loss.

JA 098, ¶3.

"Dependent Property Coverage" provides that Fireman's Fund:

> will pay for the actual loss of business income and necessary extra expense you sustain due to the necessary suspension of operations during the period of restoration at a location." Policy at 18 (bolded emphasis in original). The provision further states that "[t]he suspension must be due to direct physical loss or damage at the location of a dependent property, situated inside or outside of the Coverage Territory, caused by or resulting from a covered cause of loss.

JA 098, ¶4.

B. AFS Suffered Loss of Business Income and Extra Expense Which Fireman's Fund Denied Based on Their Finding of No "Direct Physical Loss or Damage" to the AFS's Covered Property

As this Court is aware, the world has been afflicted since March 2020, by the COVID-19 pandemic caused by the SARS-CoV-2 virus. JA 020-021, ¶¶36-41. SARS-CoV-2 has been ubiquitous in all parts of the Commonwealth of Massachusetts. JA 020, ¶¶37-38. AFS *specifically alleges* that the virus was, at all times relevant to the operative complaint, present on their Covered Properties. JA 020, ¶38.

SARS-CoV-2 is a highly transmissible coronavirus capable of causing serious respiratory illness, leading to death in a substantial number of cases. JA 020, ¶39.[5] The transmission of this deadly virus is facilitated by its physical nature, and its capability of being "active on surfaces or materials in buildings for extended periods." JA 021, ¶40. In addition to its ability to persist on physical property and in the air, SARS-CoV-2 is also readily spread because of its "aerosol transport in and throughout buildings and their airways." JA 021, ¶40. This is significant for a

[5] At the time of the filing of AFS's Amended Complaint, more than 22,300,000 had confirmed cases of COVID-19 with more than 370,000 deaths. Since the filing of the Amended Complaint, the death toll from COVID-19 has approached 600,000. https://covid.cdc.gov/covid-data-tracker/#datatracker-home (last visited June 18, 2021). As of the filing of the Amended Complaint, more than 433,000 cases had been reported, resulting in at least 13,500 deaths.

number of reasons, including the lower court's finding of fact that one could simply wipe down surfaces and be done with the virus – an indefensible assumption of fact.

AFS owns and operates dining establishments that "are highly susceptible to being or becoming affected by the virus, as both respiratory droplets and fomites . . . [which] are . . . retained on the Covered Properties or in their air, remaining viable for an extended period of time." JA 021, ¶43. AFS's dining establishments are susceptible to virus contamination "because of the nature of the property and their use as highly social venues placing patrons and staff in close proximity to the property, one another, and the existing load of the COVID-19 virus's presence on surfaces or in the air." JA 021, ¶41. People not exhibiting symptoms are the most effective spreaders of the virus. JA 022, ¶47. Because of this, and upon information and belief, at all times relevant to the Amended Complaint, SARS-CoV-2 was present on AFS's Covered Properties. JA 020, ¶38.

After a person with COVID-19 entered a building, "the building would be altered by the direct physical presence of the virus on the surfaces or the air . . . and . . . thus physically damaged, and . . . may potentially be transformed into a superspreading viral incubator" – creating potentially "deadly results." JA 022, ¶45.

The most effective way to "decontaminate a building or mitigate its level of contamination is to keep COVID-19 virus carriers out by depopulating or by lowering the overall number of people allowed in at one time." JA 022, ¶46. As a

result, on March 13, 2020, Massachusetts Governor Charlie Baker issued a series of Executive Orders designed to prevent and limit the spread and contamination in the Commonwealth of the [SARS-CoV-2].” JA 019, ¶28. The Governor subsequently banned all on-premises consumption of food or drink, also limiting all gatherings to no more than 25 people on March 15, 2020. JA 019, ¶29. Subsequently, the Governor ordered that “[a]ll businesses and other organizations that do not provide COVID-19 Essential Services shall close their physical workplaces and facilities (“brick-and-mortar premises”) to workers, customers, and the public as of 12:00 noon on March 24, 2020. JA 019, ¶30.

These Orders effectively banned the physical operation of AFS’s restaurant businesses and placed restrictions on physical access to their Covered Properties. Prior to the pandemic, the vast majority of AFS’s business was provided on-premises. JA 024, ¶61. The dining experience was their product.[6]

Because of the government orders, as well as AFS’s own choices to take precautions against the risk of contamination by SARS-CoV-2 the AFS was forced to severely restrict their services. JA 025, ¶68. These concerns eventually led to the full closure of their restaurants. JA 025, ¶69. Though easing of restrictions during the summer of 2020 allowed some continuation of AFS’s business, physical

[6]AFS’s businesses depend on the Covered Properties themselves as they require actual physical presence of people for dine-in experience and alcohol purchases. JA 024, ¶¶64-66.

restrictions on the presence of customers and staff at the covered properties remained. JA 025, ¶71. AFS was unable to provide dine-in or alcohol service to customers, relying solely on the diminished business of take-out and delivery dining. JA 025, ¶61. In addition to the direct loss of revenue, the AFS incurred substantial expense to decontaminate their Covered Properties by, *inter alia*, "add[ing] . . . plexiglass . . . reconfigur[ing] the interior of [their] business, and other actions. . ." JA, 025, ¶73.

As a result of the loss of business income and extra expense caused by the contamination of their properties, forced closure in order to protect their business, and government orders – AFS submitted a notice of loss to the Fireman's Fund on or about March 16, 2020. JA 028 at ¶91. Fireman's Fund denied AFS's claims on July 23, 2020 without, as alleged in AFS's Amended Complaint, any meaningful investigation of said claims. JA 028 at ¶92. This suit followed.

II. District Court Dismisses AFS's Amended Complaint

AFS commenced this action on August 10, 2020 and later amended their complaint on January 14, 2021. The Court dismissed AFS's Amended Complaint on March 24, 2021. The Court held that the threshold requirement of "direct physical loss or damage"[7] to property had not been met by AFS's allegations of contamination

[7] Though the District Court in its decision analyzed policy language of "direct physical loss of or damage" to property the essential analysis should be unaffected.

and government action restricting physical access to their Covered Properties. The District Court initially made this finding that "direct physical loss of or damage [sic]" could not be established by "transient phenomena of no lasting effect" and that this grant of coverage requires "some enduring impact to the actual integrity of the property at issue." JA 298. There is no exclusion or limitation in the policy relative to transient phenomena and no lay person would think that about the Policy. Likewise, no reasonable lay person would imagine their coverage was predicated on "some enduring impact to the actual integrity of any covered property. In making its determination, the District Court did not address AFS's argument that the disjunctive "or" between "loss" and "damage" requires a finding that the terms mean different things. JA 299. Rather, the court held only that "physical" referred to both "loss" and "damage" despite the presence of the "or" – a proposition that AFS does not dispute. *Id.* However, as a result of this analysis, the court found that SARS-CoV-2 was incapable of causing direct physical loss or damage to property because "[u]nlike an unpleasant odor [it] is imperceptible; it does not endure beyond a brief passage of time or a proper cleaning, let alone render the property permanently uninhabitable or unusable." JA 301. To further support its holding that the Policy did not cover loss due to virus, the court pointed to the Fungi or Bacteria exclusion, stating that "[a] construction of the Policy that covers losses related to COVID-19 yet excludes losses arising from substances of similar nature – e.g., biological

microscopic particles – is unreasonable." JA 303. Finding that neither loss of use for any reason or presence of a virus, such as SARS-CoV-2, could not establish direct physical loss or damage, the court concluded that none of the other coverages claimed by AFS could be sustained. As such, AFS's Amended Complaint was dismissed in its entirety.

STANDARD OF REVIEW

The review of a District Court's dismissal for failure to state a claim under Rule 12(b)(6) is *de novo*. *Rodriguez-Reyes v. Molina-Rodriguez*, 711 F.3d 49, 52–53 (1st Cir. 2013)(citing *Santiago v. Puerto Rico*, 655 F.3d 61, 72 (1st Cir. 2011). In conducting this appraisal, the Court "accept[s] as true all well-pleaded facts alleged in the complaint and draw[s] all reasonable inferences therefrom in the pleader's favor." *Id.* The lower court failed to do this.

ARGUMENT

I. The Policy, Read as a Whole, Unambiguously Provides Coverage for Loss of Use in the Absence of Enduring Physical Alteration, Contrary to the District Court Ruling

An insurance policy is "construe[d] . . . under the general rules of contract interpretation[,] . . . beginning with the actual language of the [policy], given its plain and ordinary meaning." *AIG Property Cas. Co. v. Cosby*, 892 F.3d 25, 27 (1st Cir. 2018). Policy words must be read in the context of the entire policy before deciding the meaning of such terms or if any specific terms are unclear. *See Lumbermens Mut.*

Cas. Co. v. Offs. Unlimited, Inc., 419 Mass. 462, 466-467, 645 N.E.2d 1165 (1995) (context and language of policy may be used to clarify undefined term). The trial court did not read the Policy as a whole; it ignored the "or," equating "loss" and "damage" and rendering the "or" surplusage.

To interpret the policy as a whole the inquiry must determine "what an objectively reasonable insured, reading the relevant policy language, would expect to be covered." *Atlantic Mutual Ins. Co. v. McFadden*, 413 Mass. 90, 92, 595 N.E.2d (1992). The court's abstract notions of justice should not be brought to bear in interpreting the contract. *See, e.g., Mt. Vernon Fire Ins. Co. v. Visionaid, Inc.*, 477 Mass. 343, 350, 76 N.E.3d 204 (2017). The lower court's analysis was deeply flawed in this regard because it did not read coverage broadly and construe exclusions narrowly as required. *See, e.g., Hakim v. Massachusetts Insurers' Insolvency Fund*, 424 Mass. 275, 282, 675 N.E.2d 1161 (1997).

Dismissal of a complaint based on contract interpretation is disfavored when discovery concerning the interpretation of policies, custom and usage, and internal claims guidance may be relevant to determining whether terms are ambiguous and if a particular construction is reasonable, as these concerns are better suited for summary judgment. *See O'Hara v. Stand. Fire Ins. Co.*, 16-CV-12378-GAO, 2017 WL 8315886, at *5 (D. Mass. Sept. 8, 2017)("Understanding that discovery may yield additional information bearing on [the meaning of within the insurance policy],

the better course would be to allow the claim to go forward and address this issue later when the record is more developed."); *Iron Mountain Inc. v. Carr*, No. 05-10890-RCL, 2006 WL 6602266, at * 4-5 (D. Mass. 2006) (denying motion to dismiss breach of contract claim as "premature" where discovery needed to interpret terms); *Grant v. Target Corporation*, 126 F. Supp. 3d 183, 189 (D. Mass. 2015)(dismissal of contract claim denied where discovery needed to resolve meaning). This is particularly relevant in the instant case where national COVID-19 coverage litigation has revealed general awareness in the insurance industry of the threat posed by pandemics under commercial all-risk insurance policies. *See, e.g.*, *Blue Springs Dental v. Owners Ins. Co.*, 488 F. Supp. 3d 867 (W.D. Mo. 2020); *Urogynecology Specialist v. Sentinel Ins. Co.*, 6:20-cv-1174-Orl-22 EJK (M.D. Fla. 9/24/20). Here, no exclusion to coverage mentions "virus" or "pandemic." Fireman's Fund's choice to forego such exclusion is relevant to whether AFS's claims satisfy the threshold determination of "direct physical loss or damage" under the Policy. Information on this determination would only be available through discovery

through, claims manuals,[8] Fireman's Fund's internal practices,[9] drafting history,[10] or explanatory memoranda from the Insurance Services Office (ISO).[11]

A. The District Court Erred In Reading the Plain Language of the Policy to Exclude Loss of Use and Require Physical Alteration of the Covered Properties

The plain meaning of the Policy's grant of coverage– "direct physical loss or damage" to property – encompasses loss of use as pled in the Amended Complaint. In determining such meaning, Massachusetts courts look to ordinary dictionary definitions and precedent. *Dorchester Mut. Ins. Co. v. Krusell*, 485 Mass. 431, 438, 150 N.E.3d 731 (2020); *Easthampton Congregational Church v. Church Mut. Ins. Co*., 916 F.3d 86, 92 (1st Cir. 2019).

When given its plain meaning, and when reviewed in the context of interpretive case law, the Policy provides coverage for "direct physical loss or damage" caused by contamination like that caused by SARS-CoV-2 and by loss of use caused by government orders. None of the operative terms - "direct," "physical," "loss," or "damage" - is defined in the Policy. Accordingly, such terms must be given

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[8] *Certain Underwriters at Lloyd's v. Nat'l R.R. Passenger Corp.*, No. 14-CV-4717 (FB), 2016 WL 2858815, at *11 (E.D.N.Y. May 16, 2016).

[9] *Holden v. Farmers Ins. Co. of Washington*, 169 Wash. 2d 750, 756, 239 P.3d 344 (2010).

[10] *Queen City Farms, Inc. v. Cent. Nat. Ins. Co. of Omaha*, 126 Wash.2d 50, 86, 882 P.2d 703 (1994) (drafting history).

[11] *Am. Star Ins. Co. v. Grice*, 121 Wash. 2d 869, 879-880, 854 P.2d 622 (1993).

their ordinary meaning according to dictionary definitions available to the average insured.[12] *See Krusell*, 485 Mass. at 438; *McLaughlin v. Berkshire Life Ins. Co. of Am.*, 82 Mass. App. Ct. 351, 356, 973 N.E.2d 685 (2012).

The term "direct" means, as relevant here, "characterized by close logical, causal, or consequential relationship" or "stemming immediately from a source." *Direct*, Merriam-Webster Dictionary https://www.merriam-webster.com/dictionary/direct. Both the pandemic and resulting government orders are direct causes of AFS's losses. *See Kingray Inc. v. Farmers Group Inc.*, EDCV20963JGBSPX, 2021 WL 837622 (C.D. Cal. Mar. 4, 2021) "Physical" means "having material existence: perceptible especially through the senses and subject to the laws of nature" and "of or relating to material things." *Physical*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/physical (last reviewed June 18, 2021). A pandemic is itself physical as are the physical limitations on the use of property stemming from government closure orders. *See, e.g.*, *Elegant Massage, LLC v. State Farm Mutual Automobile Insurance Company*, No. 2:20-cv-265, 2020 WL 7249624 (E.D. Va. Dec. 9, 2020)("plausible that Plaintiff's

[12] In aid of interpreting the "ordinary" meaning of such a phrase, a source such as Merriam Webster, which is widely known by the general public and readily available on the internet, is preferable to the District Court's use of Black's Law Dictionary – a source that is not regularly consulted outside the legal profession and though available online is limited to the second edition from 1910, which is the most recent in the public domain. *See* JA 297.

experienced a direct physical loss when the property was deemed uninhabitable, inaccessible, and dangerous to use by the Executive Orders because of its high risk for spreading COVID-19, an invisible but highly lethal virus"). "Loss" means "the act of losing possession: DEPRIVATION." *Loss*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/loss (last reviewed June 18, 2021), AFS was physically *deprived* of its Covered Properties. *See Hill and Stout PLLC v. Mutual of Enumclaw Insurance Co.*, No. 20-2-07925-1, 2020 WL 6784271 (Wash. Super. Ct. Nov. 13, 2020)("Plaintiff's position that [it had] a 'direct physical deprivation' of its property when they were unable to see patients and practice dentistry is a reasonable interpretation by the average lay person"). Webster's definition of "damage" includes any harm to "person, property, or reputation" without mention or requirement of total destruction or structural alteration. https://www.merriam-webster.com/dictionary/damage (last reviewed June 18, 2021).

In light of these definitions, the Policy covers loss or damage caused by the type of contamination property injury alleged in the Amended Complaint from the actual physical presence of SARS-CoV-2 and the government's emergency orders. In the ordinary and scientific sense, SARS-CoV-2 is a physical substance that has material existence, its microscopic size notwithstanding. It is a pathogen existing and occurring in nature that has the capacity to interact with, affect, and infect the

atmosphere, physical property, and living things. JA 021, ¶40. These consequences of the virus are the property injuries that AFS has suffered and the Policy covers. Moreover, the emergency government orders also directly caused AFS to be physically "deprived" of its Covered Properties resulting in a loss of use. This too is covered under the Policy.

i. Contamination by SARS-CoV-2 is Covered Property Loss Under the Plain Language of the Policy and Under Period of Restoration

In addition to the plain meaning of the grant of coverage, interpretive jurisprudence establishing the capacity of microscopic particles to cause property damage and the context of the broader policy make this conclusion inescapable. When given their "usual and ordinary sense" in the context of the policy as a whole, these terms must be found to grant coverage.

First, the Policy imposes a limit through the "period of restoration" during which claims for loss of business income and extra expense will be paid. This provision sets forth a period of time from the initial onset of a loss until "[t]he date when such property at the location should be repaired, rebuilt, or replaced with reasonable speed and like kind and quality." JA 138, ¶50(a)(1)(emphasis added).

The term "repair," is not defined in the Policy, so it is thus appropriate to review its common and everyday meaning as revealed by its dictionary definition. The common meaning of the verb "repair" includes "to restore to a sound or healthy

state." *Repair*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/repair (last reviewed June 18, 2021). *Derek Scott Williams PLLC v. Cincinnati Insurance Co.*, No. 20C2806, 2021 WL 767617, *9 (N.D. Ill. Feb. 28, 2021)("[r]epair . . . is not inherently physical . . . in a situation [like a pandemic] . . . the 'loss' would be 'repaired' if and when orders by governmental authorities permitted full use of the property"); *In re Society Ins. Co. COVID-19 Bus. Interruption Protec. Ins. Litig.*, 20 C 02005, 2021 WL 679109, at *9 (N.D. Ill. Feb. 22, 2021). By including the time to "repair" covered property until it reaches a "healthy" state, the Policy specifically recognizes the types of ongoing remedies taken by the AFS during the period of restoration. These remedies include (1) decontaminating and detoxifying the property, and (2) depopulating or otherwise preventing infection and contamination of the Covered Properties. JA 024, ¶46.

Moreover, the Policy sets forth certain limited circumstances, inapplicable to the present circumstances, where such types of "repairs" are specifically not covered by the "period of restoration." The Policy only excludes acts by an insured to "test for, clean up, remove, contain, treat, detoxify, or neutralize pollutants[13] in compliance with an ordinance or law." JA 138, ¶50(a)(2)(emphasis added). Under this provision, "an ordinance or law," is defined as "any ordinance, law, regulation,

[13] which while being defined as "any solid, gaseous or thermal irritant or contaminant including smoke, vapor, soot, fumes, acids, alkalis, chemicals, asbestos, and waste" does not contain a reference to virus. JA 139.

or rule that is in force at the time of the covered loss or damage." JA 138, ¶47 (emphasis added). Typically, this language refers to zoning or building codes preceding a loss.

Such an exclusion would be unnecessary if under no circumstance could contamination by a virus or other contaminant cause "direct physical loss or damage" to property.[14] Because the initial contamination would not be covered, neither would any of the remedies taken to clean it up. Therefore, because the Policy acknowledges decontamination as a type of repair covered by the "period of restoration" – needing limiting in certain circumstances – it necessarily covers the underlying contamination requiring such restoration.

This exclusion is not applicable to the present case as it refers only to such measures taken pursuant to prospective laws for the remediation of pollutants other than viruses. All of AFS's claimed losses leading to the need for decontamination occurred because of the actual threat posed by SARS-CoV-2 and government orders that were imposed after the onset of the loss or damage. So, while wishing to limit its liability for losses from contamination in certain circumstances, Fireman's Fund did not do so under the present circumstances. Therefore, AFS's claims are covered.

[14] *See Metro. Life Ins. Co. v. Cotter*, 464 Mass. 623, 635, 984 N.E.2d 835 (2013)("Every word in an insurance contract must be presumed to have been employed with a purpose and must be given meaning and effect whenever practicable")(internal quotations omitted).

ii. Loss of Use of Covered Properties by Government Orders is Covered

In addition to coverage for contamination, the Policy's plain language supports finding coverage for losses caused by emergency government orders that physically impaired the use of restaurant properties because the Policy provides coverage, as discussed herein, if the policyholder shows physical loss **or** damage to property. The word "or" is important. Its disjunctive use in this phrase requires a construction of "loss" different from "damage." *See, e.g., In re Socy. Ins. Co.*, 2021 WL 679109, at *8-10. Such distinction is required by Massachusetts law to avoid rendering either term superfluous. The dictionary definition of "loss," including "deprivation" does just this. *See*, *supra*, *Loss*, MERRIAM-WEBSTER DICTIONARY. Such definition of "loss," is distinct from "damage" and includes deprivation of the ability to make use of property.

This conclusion is further bolstered by the definition of "property damage" contained in the Policy. The policy **twice** defines "property damage" to mean "**[l]oss of use of tangible property that is not physically injured.**" JA 204, ¶17; 243, ¶9 (emphasis added). Though these definitions are contained in disparate Policy sections (the Commercial General Liability Coverage and Commercial Liability Insurance Coverage Forms), the layperson's understanding that "damage to property" includes "loss of use" is completely reasonable -- especially with such compelling language in the Policy itself.

In *Cont'l Cas. Co. v. Gilbane Bldg. Co.*, 391 Mass. 143, 151 n.9, 461 N.E.2d 209 (1984), the Massachusetts Supreme Judicial Court held that just such an "[allegation] of loss of access to the [plaintiff's property] is, in itself, one of injury to tangible property").[15] Much in the same way that the government orders prevent physical use of AFS's properties, the falling glass in *Cont'l Cas.* physically prevented the insured from accessing its property due to an ongoing hazard. There was no claim for structural damage, only of limited physical access. In this sense, the Supreme Judicial Court had already recognized coverage for loss of use under circumstances like those created by the various governments' responses to SARS-CoV-2.

But more than just remediating already contaminated property, the government orders also served to respond to the imminent *risk* of such

[15] Loss of access to or use of property is also recognized in other states. *See Wakefern Food Corp. v. Liberty Mutual Fire Ins. Co.*, 406 N.J. Super. 524 (App. Div. 2009); *Southeast Mental Health Center v. Pacific Ins. Co.*, 439 F. Supp. 2d 831, 833, 834 (W.D. Tenn. 2006) ("loss of access, loss of use and loss of functionality" fall within the definition of direct physical damage); *National Ink and Stitch, LLC v. State Auto Prop. and Cas. Ins. Co.*, 435 F. Supp. 3d 679 (D. Md. 2020) (finding loss of use, loss of accessibility, or impaired functionality demonstrate the necessary physical loss or damage to property, even though property was not completely dysfunctional); In *Manpower, Inc. v. Ins. Co. of the State of PA*, No. 08C0085, 2009 WL 3738099, at *5 (E.D. Wisc., Nov. 3, 2009) where collapse of adjacent building rendered property physically inaccessible and insurer denied coverage, the Court stated, "if a physical loss could not occur without physical damage, then the policy would contain surplus language. . . . Thus, 'direct physical loss' must mean something other than 'direct physical damage."

contamination. Unfortunately for AFS and many others, mitigating these risks led to the physical loss of their properties as described herein. However, these losses are covered under the Policy because it defines "Covered cause of loss" as one derived from "*risks* of direct physical loss or damage not excluded or limited." JA 132, ¶13. (emphasis added). Thus, since SARS-CoV-2's on-site presence triggers coverage, the imminent *risk* of on-site viral contamination due to the ubiquitous nature of the pandemic is also covered. The risk of physical harm to property at insured premises constitutes a direct physical loss to property—even where that risk is posed by a substance or event that does not structurally alter the physical composition of the premises. *See Port Authority of New York & New Jersey v. Affiliated FM Ins. Co.*, 311 F.3d 226, 236 (3rd Cir. 2002) (applying New Jersey and New York law, found coverage for physical loss or damage the release of microscopic asbestos fibers in a building "such that its function is nearly eliminated or destroyed, or the structure is made useless or uninhabitable, or if *there exists an imminent threat of the release of a quantity of asbestos fibers that would cause such loss of utility*") (emphasis added); *Motorists Mutual Ins. Co. v. Hardinger*, 131 Fed. App'x 823, 826 (3rd Cir. 2005) (quoting *Port Authority* regarding imminent threat rendering property useless by the presence of contaminants). COVID-19 likewise can cause physical loss if a continuing *threat* or imminent risk to health and safety exists. *Blue Springs Dental*, 488 F. Supp. 3d at 877 (a "common sense meaning of [the policy provision] is that

any loss or damage due to the danger of direct physical loss is covered.") (*citing Hampton Foods, Inc. v. Aetna Cas. & Surety Co*., 787 F.2d 349, 352 (8th Cir. 1986)).

The lower court recognized that *imminent risks* are covered but ruled that there was no coverage because of its erroneous conclusion that the presence of SARS-CoV-2 cannot constitute physical loss or damage. JA 300 ("Although the Policy extends to imminent risks of "physical loss of [sic] or damage," it does not cover a mere threat to the insured property if no actual physical damage would occur should that threat materialize."); *see also* JA 303 ("Having found that the phrase 'direct physical loss' does not encompass a viral infestation, plaintiffs cannot establish coverage under any part of the Policy.")

As discussed further herein, because Massachusetts jurisprudence holds that the presence of the virus constitutes physical loss or damage, it follows that the imminent risk is also covered. AFS plausibly alleged in the Amended Complaint in the alternative to the actual presence of the SARS-CoV-2 that at all relevant times, their Covered Properties were at imminent risk of such presence, or both at different times. JA 023, ¶52; 025, ¶68; 026, ¶77.

Only two opinions at the trial level have rejected coverage for imminent risk, and in those cases, the courts failed to address the interplay of imminent risk to covered property and the insured's obligations to preserve property under the Policy's sue and labor provisions. Under these provisions, the Policy expressly

contemplates coverage for remediation and prevention of loss in the face of a threat. Ignoring this fails to give effect to the full Policy and instead gets lost in only ~~five~~ three words of the Policy, *i.e.*, "direct physical ~~loss or~~ damage."

Specifically, AFS's Policy requires compliance with government orders and reasonable action by the insured in the face of actual or imminent risk of harm. JA 124, ¶(C)(1)(d) (insureds must "take all reasonable steps to protect the Covered Property from further damage. . ."); JA 134, ¶(21)(a)(Extra Expense includes cost "to avoid or minimize the suspension of business and to continue operations"); JA 174 ("the [insurer] shall not be liable for loss occurring while the hazard is increased by any means within the control or knowledge of the insured"); JA 178 ("[Plaintiffs must] protect the property from further damage"); JA 120 (rewards action to restore or resume business quickly). These "sue and labor" clauses are sometimes called "preservation of property," and "duties in the event of loss," or other names.

"Sue and labor" coverage is implied in every contract under a common law implied duty to mitigate a covered loss or damage. *See Slay Warehousing Co., Inc. v. Reliance Ins. Co.*, 471 F.2d 1364, 1367-1368 (8th Cir. 1973) ("[T]he obligation to pay the expenses of protecting the exposed property may arise from either the insurance agreement itself or an implied duty under the policy contract based upon general principles of law and equity."); *Am. Home Assurance Co. v. Five River Dock*

& Dredge, Inc., 321 F. Supp. 2d 209 (D. Mass. 2004) ("This standard sue and labor clause, with origins tracing back to the seventeenth century, is founded on the basic premise that an assured has a legal duty toward the assurer to prevent or to minimize loss"). Public policy requires the insured to mitigate damages. *Id*. In turn, the insurer will provide reimbursement for the insured's expenses under appropriate circumstances. *See Blue Springs Dental Care LLC*, 488 F. Supp. 3d at 877 (denying COVID-19 motion to dismiss and discussing sue and labor provision, noting that it was triggered by "actual or imminent loss" that plaintiff is entitled to sue for losses that it suffered, and that it survived a motion to dismiss); *see also Studio 417, Inc. v. Cincinnati Ins. Co.*, No. 20-CV-03127-SRB, 2020 WL 4692385 (W.D. Mo. Aug. 12, 2020) (same result in another COVID-19 case).

By closing its on-premises dining, AFS materially limited Fireman's Fund's overall exposure under the Policy, including to third parties. The Policy mandates mitigation by the insured of avoidable harms. Under common law and the Policy an insured who incurs costs to mitigate is entitled to reimbursement from the insurer for expenses and costs in abating such harms. Thus, if COVID-19 could transform AFS's buildings into super-spreading incubators, then under the Policy, the insurer must pay for all "reasonable steps" taken by AFS, including compliance with government orders limiting the use of their property.

Indeed, actions taken to mitigate an imminent risk of harm are covered, regardless if due to compliance with government orders or due to a policyholder discharging its duty to mitigate harms. "Common sense dictates that the Policy cannot require the insured to demonstrate physical alteration to the property while also promising coverage for anticipated loss as well." *Choctaw Nation of Oklahoma v. Lexington Ins. Co*., No. CV-2020-00042, slip op. at 8 (Okla. Dist. Ct., Bryan Cty. Feb. 15, 2021). Had the lower court properly applied Massachusetts policy interpretation principles to the Policy as a whole, including its sue and labor provisions and provisions obligating AFS to mitigate *risk*, the lower court should have determined that the Amended Complaint sufficiently alleged direct physical loss *or* damage to the Covered Properties because of AFS's compliance with government orders. Its failure to do so constituted reversible error.

II. The Policy Term "Physical Loss or Damage to" Property on Its Own Is Ambiguous Under Massachusetts Law and the District Court Erred in Failing to Construe it in Favor of Coverage

Even if the broader policy did not require coverage for losses not involving physical alteration to property, the ambiguity of the phrase "direct physical loss or damage to" property contained in the grant of coverage would still compel that result. Where "a term is susceptible of more than one meaning and reasonably intelligent persons would differ as to which meaning is the proper one, the term is ambiguous." *Citation Ins. Co. v. Gomez*, 426 Mass. 379, 381, 688 N.E.2d 951

(1998); *Jefferson Ins. Co. of New York v. City of Holyoke*, 23 Mass. App. Ct. 472, 474-475, 503 N.E.2d 474 (1987).

B. Massachusetts Authority Pursuant to *Matzner v. Seaco* Holds that Ambiguity of "Direct Physical Loss or Damage Requires Coverage for Loss of Use

Massachusetts courts have consistently held that direct physical loss or damage to property covered under an all-risk insurance policy can be caused by loss of use of property. *Matzner v. Seaco Ins. Co.* is on point. The *Matzner* court ruled that the phrase "physical loss or damage" is ambiguous and allowed a loss of use claim associated with on-site carbon monoxide contamination. *Matzner* held that such language can be read either to include just structural damage or be read broadly to include loss of use. *Id*. at *2. Because ambiguous policy terms must be construed in favor of the insured, coverage was found. *Id*.

In reaching this conclusion, the court in *Matzner* relied on *Western Fire Ins. Co. v. First Presbyterian Church*, 165 Colo. 34, 437 P.2d 52 (1968). There, the court had found that the loss of use of the covered church caused by noxious fumes from infiltration of gas into subsurface soils required coverage. In reaching this conclusion, the court reasoned that the accumulation of gas had caused the property to become "uninhabitable, making further use of the building highly dangerous." *Id.* at 36-37. In adopting this definition of "direct physical loss," the court in *Matzner* recognized that it was this danger caused by the presence of gas and its emitted fumes

that caused the loss. Or to put it another way, the loss, in the case of *Matzner*, was occasioned by "the *risk* of carbon monoxide contamination." *Matzner*, 9 Mass. L. Rptr. at *3 (emphasis in original). Such a holding required a finding that direct physical loss could exist "in the absence of structural damage to the insured property." *Id.* (*quoting Sentinel Mgt. Co. v. New Hampshire Ins. Co.*, 563 N.W.2d 296 (Ct. App. Minn. 1997).

Prior to *Matzner*, but following similar logic, the Massachusetts Superior Court in *Arbeiter v. Cambridge Mut. Fire Ins. Co.*, No. 9400837, 1996 WL 1250616, at *2 (Mass. Super. Mar. 15, 1996) held that oil fumes "are a physical loss which attaches to the property" in interpreting an all-risk policy. In making this determination, the court relied on the case of *Farmers Ins. Co. of Oregon v. Trutanich*, 123 Or. App. 8, 858 P.2d 1332, 1335 (Or. App. 1993), which had determined that a "pervasive odor [that] persists" is physical just like the fumes at issue in *Arbeiter*. These odors, made up of microscopic particles, were deemed to be physical – as should the microscopic pathogen.

And this construction of the term "direct physical loss" has not been confined only to the Commonwealth's trial courts. In *Essex*, 562 F.3d at 406, this Court approved of the analysis undertaken by the court in *Matzner*. The Court recognized that microscopic contaminants had the ability to cause direct physical loss or damage to property in the absence of physical destruction. *Id.* at 405. Thus, the Court in

Essex reversed the trial court's entry of summary judgment in favor of the insurer based on the insured's allegation that the presence of such contaminants "permeated the building." *Id.*

Similar to damage caused by an invisible odor, property can be equally damaged by contamination by a virus. In *Verveine v. Strathmore Ins. Co.*, No. 2020-01378 , 2020 WL 8482752 (Mass. Super. December 21, 2020), the court dismissed the plaintiff's complaint, noting that "[a]lthough . . . contaminants do not actually damage the physical structure, some courts have held that this may constitute a "physical loss" within the meaning of the insurance policy." *Id.* at *4 (citing *Matzner* and *Arbeiter*). The plaintiff in *Verveine* failed to allege actual presence of the virus on its premises, a deficiency the court identified as "[t]he problem with [making a claim under cases like *Matzner* and *Arbeiter*]." (emphasis added). The necessary implication in *Verveine* is that such an allegation would be sufficient for property damage or at minimum be deemed plausible. *See id.*

Under this line of cases, it was necessary that the lower court recognize a claim for contamination of the property that "permeated" the property. *See Essex*. Instead, the District Court imposed additional requirements that the contamination have "enduring impact to the actual integrity of the property." JA 297. It ignored AFS's allegations that SARS-CoV-2 "permeated" the property, causing a dangerous situation. This constitutes reversible error.

i. The Massachusetts Authority Relied on by the District Court is Distinguishable and Must be Disregarded

Since *Matzner*, Massachusetts has recognized loss of use as a covered cause of loss under an all-risk commercial insurance policy. None of the cases cited by the District Court requires a showing of structural alteration or "some enduring impact to the actual integrity of the property" for coverage under such a policy. JA 297.

In *Crestview Country Club, Inc. v. St. Paul Guardian Ins. Co.*, 321 F. Supp. 2d 260, 265 (D. Mass. 2004), the Plaintiff sought coverage for "intangible changes to the character of a hole on a golf course."[16] The court in *Crestview* ruled that diminution of property value from changes to the character of the hole was not a covered physical loss. *Crestview*, 321 F. Supp. 2d at 264-265. In most cases, including for AFS, loss of business income is defined in the Policy in terms of "but for" loss of revenues, not property value. Business income coverage evolved to provide coverage for a specific species of consequential damages, and no more. In the present case, AFS sought recovery for such covered consequential damages, specifically bargained for through its insurance contract with Fireman's Fund. More troubling, the lower court viewed *Crestview* as stating a *per se* rule trumping the

[16] Coverage in this case was sought for the cost of the damage to the property rather than the consequential damages covered under a Business Income or Extra Expense Policy unlike the Policy.

language of any particular policy, while the proper approach was to read each contract thoroughly.

The other cases, cited by the lower court in support of its decision are also distinguishable. The court in *Harvard St. Neighborhood Health Ctr., Inc. v. Hartford Fire Ins. Co.*, No. 14-13649-JCB, 2015 WL 13234578, at *8 (D. Mass. Sept. 22, 2015) did find that an all-risk policy did not cover an "intangible" loss. However, there the policy was invoked to cover electronically stored funds rather than real property. Indeed, once "deposited into a bank account [funds] do not have a physical or material existence and thus, are not susceptible to "physical loss or damage." *Id.* Such a circumstance is readily distinguishable from the case at hand. While AFS does seek to recover lost income, it was directly caused by tangible physical deprivation of access to its buildings.

Further, in relying on *Pirie v. Fed Ins. Co.*, 45 Mass. App. Ct. 907, 908, 696 N.E.2d 553 (1998) and *HRG Dev. Corp. v. Graphic Arts Mut. Ins. Co.*, 26 Mass. App. Ct. 374, 527 N.E.2d 1179 (1988), the lower court exaggerated their reach. The court in *Pirie*, based its decision heavily on *HRG Dev. Corp.* in holding that pre-existing lead contamination could not constitute direct physical loss or damage to property. In both cases, the courts declined to find coverage because the effect to the insured's property was not "physical" in nature. The same cannot be said of the present case. In *Pirie*, the insured sought coverage for a defect in title to a boat. The

loss suffered was purely of ownership – a legal concept.[17] It was not a fortuitous loss that occurred during the term of the subject insurance coverage since problem with the legal title had predated the commencement of the policy.[18]

Similarly, *HRG* is readily distinguishable as it involved the discovery of lead that was used in the construction of the insured's home. There was no physical loss or damage to the property; the claimed loss was for the nature of the property itself. There was no physical force or restriction acting on property. The property had simply continued to exist, composed of materials that the insureds – rightly so – found objectionable. In stark contrast, AFS has suffered physical restrictions by local governments to the access to their property as well as contamination by SARS-CoV-2 – a physical substance – on its properties. These fortuitous events that occurred after the purchase of the Policy were external forces that physically deprived AFS of access to its Covered Properties. The District Court never explained why AFS's claims are intangible, yet remedied by cleaning. Without that connection, the cited

[17] Moreover, once again the insured did not seek coverage under a provision for Business Income or Extra Expense.

[18] Also, as the court noted, all-risk insurance is contemplated to cover insurable losses not otherwise covered by ordinary insurance. The prevalence of title insurance for real property and chattels such as that lost by the insured in *Pirie*, mitigated against a finding that the defect in title was covered. Such a concern is not at play in the present instance as no readily available insurance covers such a situation.

line of authority is readily distinguishable and does not preclude coverage in this case.

C. Jurisdictions Aligning with Massachusetts Have Found Coverage for Loss of Use Prior to and in the Midst of the COVID-19 Pandemic

Prior to the onset of the COVID-19 pandemic, courts in other states have specifically relied upon *Matzner* to read "physical loss" to include loss of use. *E.g.*, *Gregory Packaging, Inc. v. Travelers Property Casualty Co. of Am.*, No. 2:12-CV-04418 WHW, 2014 WL 6675934, at *5 (D.N.J. Nov. 25, 2014)(*citing Essex* for central rationale set forth in *Matzner*) held that the accidental release of ammonia inflicted physical loss of or damage to covered property, noting that "[w]hile structural alteration provides the most obvious signs of physical damage . . . property can sustain physical loss or damage without experiencing structural alteration."); *see*, *TRAVCO Ins. Co. v. Ward*, 715 F. Supp. 2d 699, 709 (E.D. Va. 2010), *aff'd*, 504 Fed. Appx. 251 (4th Cir. 2013) (same result, also relying on Massachusetts cases).

Other courts conclude (as do Massachusetts courts) that structural damage is not required, and that loss of use or habitability of the property is covered. This *loss of use* jurisprudence evolved well before the COVID-19 pandemic cases in

disease-causing substances or obnoxious odors cases, such as *Matzner*.[19] Other jurisdictions whose *loss of use* jurisprudence is similar to that of the Commonwealth recognize loss of use in COVID-19 cases because SARS-CoV-2 is another disease-causing substance. *E.g.*, *Blue Springs Dental*, 488 F. Supp. 3d at 877 (Plaintiff alleges it "suffered actual contamination by COVID-19, and related government shut down orders "or" that the imminent threat of loss or harm posed by the spread of COVID-19 is sufficient to constitute a physical loss . . . The Court finds Plaintiffs have satisfied their burden at this stage of the proceedings and plausibly alleged that COVID-19 caused their alleged physical loss."). In *Studio 417, Inc.*, 2020 WL 4692385 and *K.C. Hopps, Ltd. v. The Cincinnati Ins. Co., Inc.*, 20-CV-00437-SRB, 2020 WL 6483108 (W.D. Mo. Aug. 12, 2020), the federal court found a plausible claim for coverage based on the allegation of physical loss caused by the presence of the SARS-CoV-2 on plaintiff's property that led to a loss of use. Plaintiffs in *Studio 417* purchased insurance policies which provided coverage for physical losses

[19] *See, In re: Chinese Manufactured Drywall Products Liability Litigation*, 759 F. Supp. 2d 822, 832 (E.D. La. 2010); *Mellin v. Northern Security Insurance Company, Inc.*, 167 N.H. 544, 115 A.3d 799, 803 (N.H. 2015) (holding that physical loss includes "not only tangible changes to the property that can be seen or touched," but also "changes that are perceived by the sense of smell and that exist in the absence of structural damage"); *Yale Univ. v. Cigna Ins. Co.*, 224 F. Supp. 2d 402 (D. Conn. 2002)(acknowledging "substantial body of case law in which a variety of contaminating conditions have been held to constitute 'physical loss of or damage to property'"); *Or. Shakespeare Festival Association v. Great Am. Ins. Co.,* No. 1:15-cv-01932-CL2016 WL 3267247, at *6 (D. Or. June 7, 2016), at *6 (smoke).

or physical damages, and the plaintiffs argued that they should recover the insurance proceeds as a result of the COVID-19 pandemic. The defendants moved to dismiss arguing that the plaintiffs could not recover unless there was an actual, tangible, permanent, or physical alteration to the insured properties. The district court rejected defendants' argument because "loss" and "damage" could not be conflated with the "or" separating them. Instead, the court had to "give meaning to both terms," to avoid the other from being superfluous. *Studio 417, Inc.*, 2020 WL 4692385 at *5 (citing *Nautilus Group, Inc. v. Allianz Global Risks US*, No. C11–5281BHS, 2012 WL 760940, at * 7 (W.D. Wash. Mar. 8, 2012) (stating that "**if** 'physical loss' was interpreted to mean 'damage,' then one or the other would be superfluous")); *S&S Hotels, LLC v. Starr Surplus Lines Insurance Companies*, No. 217-2020-cv-00309 (N.H. Sup. Ct., June 15, 2021)("loss or damage" . . . is met where property is contaminated by SARS-CoV-2"); *Scott Craven DDS v. Cameron Mutual Ins. Co*., No. 20CY-CV06381, 2021 WL 1115247 (Clay Cty., MO, Mar. 9, 2021) (Finding that the presence of COVID-19 and direct physical loss of was sufficiently pled with allegation that losses were "**[a]s a result of the Coronavirus and COVID-19 pandemic**").[20]

[20] Cases where property is stolen or lost, impairing functionality without physical damage also allow loss of use damages. *Total Intermodal Servs. Inc. v. Travelers Prop. Cas. Co. of Am.*, CV 17-04908 AB (KSx), 2018 WL 3829767, at *3 (C.D. Cal. July 11, 2018) ("[T]o interpret 'physical loss of' as requiring 'damage to' would render meaningless the "or damage to" portion of the same clause, thereby

Just as the Policy allows for loss of use driven by on-site presence of virus or imminent risk thereof, the Policy covers losses caused by government orders with limited exclusion.[21] *Seifert et al. v. IMT Insurance Company*, No. 0:20-cv-01102-JRT-DTS, at *9, 11 (D. Min. June 2, 2021)(finding coverage for "direct physical loss of property [from] executive orders forc[ing] a business to close because the property was deemed dangerous to use and its owner was thereby deprived of lawfully occupying and controlling the premises to provide services within it"); *Susan Spath Hegedus v. Ace Fire Underwriters*, No. 20-cv-2832, 2021 WL 1837479 (E.D. Pa. May 7, 2021) (closure by government order "plausible within the scope of the policy"); *Derek Scott Williams PLLC v. Cincinnati Ins. Co.*, 2021 WL 767617 at *2 ("[T]he Court is persuaded that a reasonable factfinder could find that the term 'physical loss' is broad enough to cover . . . a deprivation of the use of its business premises"; *Elegant Massage*, 2020 WL 7249624 (holding claim for loss of use from executive orders responding to COVID-19 cognizable); *North State Deli, LLC v. Cincinnati Ins. Co.*, No. 20-CVS-02569, 2020 WL 6281507 (N.C. Super. Ct. Oct. 9, 2020)(granting summary judgment for plaintiffs, holding "[t]he ordinary meaning of the phrase 'direct physical loss' includes the inability to utilize or possess

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violating a black letter canon of contract interpretation — that every word be given a meaning.").

[21] As noted previously in ¶I.A.i, the Policy excludes coverage for prospective ordinances mandating remediation of contamination while not specifically excluding any others.

something in the real, material, or bodily world, resulting from a given cause without the intervention of other conditions. In the context of the Policies, therefore, 'direct physical loss' describes the scenario where business owners and their employees, customers, vendors, suppliers, and others lose the full range of rights and advantages of using or accessing their business property. This is precisely the loss caused by the Government Orders. Plaintiffs were expressly forbidden by government decree from accessing and putting their property to use for the income-generating purposes for which the property was insured. These decrees resulted in the immediate loss of use and access without any intervening conditions. In ordinary terms, this loss is unambiguously a 'direct physical loss,' and the Policies afford coverage."); *Henderson Rd. Rest. Sys., Inc. v. Zurich Am. Ins. Co.*, 1:20 CV 1239, 2021 WL 168422, at *2 (N.D. Ohio Jan. 19, 2021)("physical loss of the real property means something different than damage to the real property, and this is a valid argument. Otherwise, why would both phrases appear side-by-side separated by the disjunctive conjunction 'or'?"); *In re Socy. Ins. Co.*, 2021 WL 679109 at *2 ("It would be one thing if coverage were limited to direct physical 'damage.' But coverage extends to direct physical 'loss of' property as well. So the Plaintiffs need not plead or show a change to the property's physical characteristics." The Court further rejected the insurance company's argument that the plaintiffs' loss was not "physical," observing that "a reasonable jury can find that the Plaintiffs did suffer a direct 'physical' loss

of property on their premises." *Id.*); *McKinley Dev. Leasing Co. Ltd. v. Westfield Ins. Co.*, No. 2020 CV 00815, 2021 WL 506266 (Ohio Ct. C.P. Feb. 9, 2021)("Both sides provided reasonable interpretations of the policy language. . . . However, [the insurer] had the benefit of writing the policy with the ability to consider consequences in this ever-changing world. They had an obligation to use terminology easily understood by laypersons."); *Perry Street Brewing Company, LLC v. Mutual of Enumclaw Insurance Co.*, No. 20-2-02212-32, 2020 WL 7258116 (Wash. Super. Ct. Nov. 23, 2020)(dictionary definitions of "loss" included "deprivation"); *Hill and Stout PLLC,* 2020 WL 6784271 at *4 ("In applying the ordinary meaning of 'deprivation,' the Court finds that the Plaintiff's position that the dental practice had a 'direct physical deprivation' of its property when they were unable to see patients and practice dentistry is a reasonable interpretation by the average lay person."; *Cherokee Nation v. Lexington Ins.*, No. CV-2020-150, 2021 WL 214214 (Cherokee Cnty., Okla. Jan. 14, 2021)("direct physical loss" includes deprivation of insured's use of covered property); *Johansing Family Enters., LLC v. Cincinnati Specialty Underwriters Ins.*, No. A 2002349, 2021 WL 145416 (Ohio Ct. C.P. Jan. 8, 2021)(plaintiff sufficiently pled direct physical loss from executive orders); *Blarney, Inc. v. Cincinnati Ins. Co.*, No. A2001974, 2021 WL 1745905 (Ohio Ct. C.P. Hamilton Cty. Mar. 23, 2021)("construing the facts of the complaint in favor of [plaintiff] . . . there is reasonable question of fact whether (1) property

damage existed; and (2) access to the [property] was prohibited by orders of a civil authority"); *Serendipitous, LLC/Melt, et al. v. The Cincinnati Ins. Co.*, No. 2:20-cv-00873-MHHH, at *12 (N.D. Ala. May 6, 2021)(recognizing loss of use from "civil order [that] deprived the restaurants of the use of their property").

In affirming Fireman's Fund's denial of AFS's insurance claims, the lower court relied on inapposite cases from jurisdictions that do not recognize Massachusetts's conception of property loss caused by loss of use in the absence of structural damage.[22] These cases are not on point. Grounded in completely different and contrary law, they are unpersuasive because they do not follow *Matzner* and *Essex* as Massachusetts does and other states do. Indeed, even the cases cited by the lower court come from jurisdictions with contradictory decisions.[23] At most, the

[22] *W. Coast Hotel Mgmt., LLC v. Berkshire Hathaway Guard Ins. Cos.*, 498 F. Supp. 3d 1233, 1239 (C.D. Cal. 2020)(requiring physical alteration for coverage); *Plan Check Downtown III, LLC v. AmGuard Ins. Co*., 485 F. Supp. 3d 1225, 1232 (C.D. Cal. 2020)(requiring physical alteration); *Frank Van's Auto Tag, LLC v. Selective Ins. Co. of the S.E.*, No. 20-2740, 2021 WL 289547, at *6 n.5 (E.D. Pa. Jan. 28, 2021)(finding that structure that continues to "function" precludes finding of "loss"; *Zwillo V, Corp. v. Lexington Ins. Co*., 4:20-00339-CV-RK, 2020 WL 7137110, *8 (W.D. Mo. Dec. 2, 2020)(finding no coverage for COVID-19 relying on cases requiring physical alteration); *Terry Black's Barbecue, LLC v. State Auto. Mut. Ins. Co*., 1:20-CV-665-RP, 2020 WL 7351246, at *6 n.9 (W.D. Tex. Dec. 14, 2020)("Plaintiffs have not pled any facts showing that the coronavirus caused physical loss, harm, alteration, or structural degradation to their property"); *Kirsch v. Aspen Am. Ins. Co.*, 20-11930, 2020 WL 7338570, at *5 n.2 (E.D. Mich. Dec. 14, 2020)(differentiating jurisdictions that have recognized "physical loss" occurs when real property becomes "uninhabitable" or substantially "unusable").

[23] *See, e.g., Boardwalk Ventures CA LLC v. Century-National Ins. Co.*, 2021 WL 1215892 (California); *Derek Scott Williams PLLC v. Cincinnati Insurance Co.*,

District Court's cited cases highlight the conflicting interpretations of policy language, hinting at its ambiguity. While conflicting interpretations of contract language between different courts are not conclusive proof of ambiguity, they are indicative that reasonable people could disagree as to its meaning. The lower court's reliance on these cases while ignoring more persuasive authority was prejudicial error.

III. The District Court Committed Error by Discrediting AFS's Plausibly Alleged Actual Presence of Contamination of Covered Properties by SARS-CoV-2

AFS clearly alleged the physical use of its Covered Properties was limited because of the physical presence of a dangerous or odious substance, as in *Essex* and *Matzner*. The District Court committed error by finding to the contrary. To survive a motion to dismiss on this claim, as with any other, a complaint need only contain "a short and plain statement of the claim showing that the pleader is entitled to relief." *Ocasio-Hernandez v. Fortuno-Burset*, 640 F.3d 1, 11 (1st Cir. 2011) (*quoting* Fed. R. Civ. P. 8(a)(2)); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). To "show" an entitlement to relief, the complaint "must contain enough factual material 'to raise a right to relief above the speculative level.'" *Id*. (*quoting Twombly*,

No. 2021 WL 767617 (Texas); *Studio 417, Inc.*, WL 4692385 (Missouri); *Susan Spath Hegedus v. Ace Fire Underwriters*, WL 1837479 (Pennsylvania).

550 U.S. at 555). There is no need to argue evidence or present trial proof at this stage.

Ruling on a motion to dismiss, the Court must accept the facts alleged as true regardless of whether the Court believes them, finds them incredible, or believes that proof of the facts is improbable. *Id.* "Rule 12(b)(6) does not countenance . . . dismissals based on a judge's disbelief of a complaint's factual allegations." *Id.* (*quoting Neitzke v. Williams*, 490 U.S. 319, 327 (1989)). The Court may not engage in fact finding on a motion to dismiss. The facts alleged and all reasonable inferences derived therefrom must be construed in favor of the plaintiff. *Id*. at 7; *In re Fin. Oversight & Mgmt. Bd. for Puerto Rico*, 919 F.3d 121, 127 (1st Cir. 2019). It may not choose between two plausible inferences that may be drawn from factual allegations, because it is not the Court's role at the pleading stage. *Evergreen Partnering Grp., Inc. v. Pactiv Corp*., 720 F.3d 33, 45 (1st Cir. 2013).

Here, AFS alleged that SARS-CoV-2 "was present on all [its] [Covered Properties]" during all "relevant times." JA 020 at ¶38. That is in keeping with the ruling in *Verveine*. AFS further alleged that "the COVID-19 virus is a physical substance that directly lives on and is active on surfaces of objects or materials in a building for extended periods." JA 021 at ¶40. AFS goes one step further to allege that SARS-CoV-2 is "airborne, directly emitted, and permeates the insured property and premises." JA 021 at ¶40 (emphasis added). This permeation of the premises by

a physical substance – SARS-CoV-2 – is precisely the alleged loss held covered by this court in *Essex*. By pleading that SARS-CoV-2 permeated the covered properties, the Plaintiffs stated a claim for property loss or damage under the terms of the Policy. *See id.* at 405. AFS's allegations of their Covered Properties being "transformed into . . . superspreading viral incubator[s]" further implicate the intense and lasting nature of the contamination. JA 022 at ¶45. These allegations are sufficient to state a plausible claim pursuant to *Essex* and all of its foundational authority.

Committing reversible error, the District Court found that SARS-CoV-2 does not "endure beyond a brief passage of time." JA 301. This finding ignored or discredited the allegations of the complaint to the contrary as forbidden at this stage of the proceedings.

The lower court continued its prohibited fact-finding to support dismissal of the Amended Complaint, by delving into the nature of SARS-CoV-2. Its decision was based on improper speculation and inference against AFS. For example, in attempting to differentiate the case at hand from *Essex*, the District Court stated that "COVID-19 is imperceptible; it does not endure beyond a brief passage of time or proper cleaning." JA 301. The fact that SARS-CoV-2 is imperceptible without the aid of artificial means like a microscope, is of no legal moment in Massachusetts or under a policy that does not limit physical loss to perceivable physical loss. Moreover, the lower court erred in finding factually (from information outside the

record) that the virus "does not endure beyond a brief passage of time or proper cleaning." This finding, even if true, is not dispositive of the issue of whether AFS suffered insured losses. Imperceptibility is unimportant. In *Matzner*, the court recognized that property damage could be caused by carbon monoxide – a colorless, odorless gas – despite the fact that it could not be detected absent specialized carbon monoxide detectors.[24] *See Matzner*, 9 Mass. L. Rptr. 41 at *3. To establish property injury there is no express requirement that an invisible contaminant be immediately offensive to the senses; it is sufficient to show that its presence causes illness or bodily injury so as to physically change the property.

Additionally, the lower court's findings are contrary to the Amended Complaint, which alleges that SARS-CoV-2 has the capacity, in places like restaurants, to persist, propagate, and be renewed through continued presence of the virus's vector, namely people:

> Many COVID-19 viral carriers (people) can infect others even though these carriers are asymptomatic. These carriers can transmit the virus directly or indirectly. Since the virus travels in aerosols or remains active on surfaces after being emitted by the carriers when they speak,

[24] In *Matzner*, on summary judgment, the court noted that "[a]lthough defendant does not expressly dispute the fact that the Fire Department confirmed that the unit contained an unacceptably high level of carbon monoxide, the summary-judgment record indicates that [defendant] personnel had doubts about, or at least considered raising the issue of the accuracy of the tenants' detector." *Matzner*, 9 Mass. L. Rptr. 41 at *1 n.2 (relying on *Western Fire Ins. Co. v. First Presbyterian Church* for proposition that loss could stem from condition that made property "uninhabitable, making further use of the building highly dangerous").

> shout, or sing, viral aerosols often end up on surfaces, in the air, and air circulation equipment of buildings.

JA 022, ¶47. This method of transmission is particularly problematic for AFS's businesses since restaurants are "highly susceptible to being affected by the rapid transmission of the virus because of the nature of the property and their use as highly social venues placing patrons and staff in close proximity to the property, to one another, and to the existing load of [SARS-CoV-2] on surfaces or in the air." JA 022-023, ¶44.

Continued occupancy of AFS's properties by staff and customers would inevitably extend and intensify the virus contamination on their properties. Although the trial court is correct that a single virus may soon become inviable, it ignored the allegation that new virus is added all the time without mitigation. This fact directly contradicts the District Court's contrary factual finding that airborne and other contamination from SARS-CoV-2 can be remediated by "proper cleaning." JA 301. Quite to the contrary, such contamination cannot be solely remediated by cleaning. As alleged the physical property must be depopulated. In order to decontaminate property, AFS had to follow government closure orders, and take the necessary steps of "decontaminat[ing] [their properties] or mitigat[ing] [their] level of contamination [by keeping] COVID-19 virus carriers out by depopulating it or by lowering the overall number of people allowed in at one time." JA 022, ¶46. Whether it is fixing a gas leak or keeping contagious patrons out of one's establishment, the remedy is

prevention. The measures taken to this end were much more substantial than the simple "proper cleaning" suggested by the District Court - a phrase that evinces scrubbing with soap and water rather than more extensive disinfection needed for a deadly virus. To reach this conclusion, the District Court assumed facts extraneous to the record and engaged in impermissible speculation. Had the District Court taken AFS's allegations as true, it would have been compelled to deny Fireman's Fund's motion to dismiss.

IV. The District Court Committed Reversible Error by Effectively Implying a Virus Exclusion Where None Exists

The District Court committed reversible error by concluding, contrary to precedent to construe exclusions narrowly, that the Policy's Fungi or Bacteria Exclusion contained in §A(2)(b) implicitly excludes virus coverage. The District Court held that "a construction of the Policy that covers losses related to COVID-19 [a virus] yet excludes losses arising from substances of a similar nature – e.g. biological, microscopic particles is unreasonable." JA 303. This aspect of the lower court's ruling is at odds with established precedent. In Massachusetts, "[t]he insurer bears the burden of demonstrating that an exclusion exists that precludes coverage . . . and any ambiguities in the exclusion provision are strictly construed against the insurer." *AIG Prop. Cas. Co. v. Cosby*, 892 F.3d at 27 (quoting *Valley Forge Ins. Co. v. Field*, 670 F.3d 93, 97 (1st Cir. 2012) (internal quotation marks omitted). "Indeed, the general interpretive rule that "[a]mbiguous policy terms are construed

in favor of the insured," *Scottsdale Ins. Co. v. Torres*, 561 F.3d 74, 77 (1st Cir. 2009), "applies with particular force to exclusionary provisions," *U.S. Liab. Ins. Co. v. Benchmark Const. Servs., Inc.*, 797 F.3d 116, 120 (1st Cir. 2015) (internal quotation marks omitted).

In so ruling, the lower court cited *Given v. Com. Ins. Co.*, 440 Mass. 207, 212, 796 N.E.2d 1275 (2003)). However, the ruling of the District Court runs afoul of the main proposition of *Given*; namely, that "[a]lthough insurance provisions that are plainly expressed must be enforced . . . those that are conspicuously absent should not be implied." (citations omitted). *Id.* at 212 (citing *Massachusetts Insurers Insolvency Fund v. Premier Ins. Co.*, 439 Mass. 318, 323, 787 N.E.2d 550 (2003). Here, the District Court improperly implied a virus exclusion to the bacteria and fungus exclusion that made no mention of it. By construing the fungi and bacteria exclusion to implicitly exclude coverage for viral contamination, the District Court improperly expanded the exclusion's reach beyond its express terms and plain meaning. This was error.

V. Plaintiffs' Pled Legally Sufficient Claim for Civil Authority Coverage Under the Policy

In dismissing the Plaintiffs' claims for Civil Authority coverage under the Policy, the District Court employed the same rationale used in rejecting the AFS's other claims for coverage – that no physical loss or damage had occurred as a result of SARS-CoV-2. The Policy's Civil Authority Coverage provides compensation for

losses stemming from government orders restricting access to one's covered property based on loss or damage at a property, not owned by the insured, within one mile of covered property. JA 076. Here, the lower court found that no such loss or damage could have occurred at other properties in close proximity to AFS's Covered Properties resulting in the government orders that led to the physical restriction of AFS's Covered Properties. JA 303. As discussed herein, the presence of SARS-CoV-2, the imminent risk thereof, and the government orders in response thereto, all are capable of causing "direct physical loss or damage" to property under the Policy. In its Amended Complaint, AFS makes several allegations that the virus was "ubiquitous" in Massachusetts. JA 020-023, ¶¶36-58. Drawing all inferences therefrom in AFS's favor, as required, it is reasonable to conclude that the virus was present on properties within one mile of AFS's Covered Properties. This contamination was "direct physical loss or damage" to property that led to the government's emergency orders, which are precisely the type of governmental action covered by Civil Authority Coverage.[25] JA 025, ¶¶68-72. AFS respectfully submits that they have adequately pled "direct physical loss or damage" to properties

[25] Commonwealth of Massachusetts has entered varying orders, prohibiting access to properties, restricting hours, and mandating social distancing. Occupancy restrictions and social distancing orders have the effect of significantly prohibiting access to additional customers while orders restricting certain activities, like in-house dining, prohibit the insured access to the functionality of the premises. The orders in question restricted the occupancy of the Plaintiffs' businesses – prohibiting access to no more than a specified number of people.

surrounding their own Covered Properties so as to trigger Civil Authority Coverage under the Policy.

VI. AFS Pled Cognizable Claim Under G. L. c. 93A

Because the District Court erroneously ruled that there was no coverage for the AFS's losses, it also erroneously ruled that Fireman's Fund had not committed an unfair trade practice by neglecting to conduct any meaningful investigation. Accepting the AFS's allegations establishing coverage as true, the Amended Complaint sets forth a cognizable claim under Chapter 93A for failure to investigate coverage as well.

The Amended Complaint alleges that AFS's claims were never seriously investigated by Fireman's Fund, and that failing is actionable under G. L. c. 93A. It is "well-established law that a violation of [the Massachusetts Unfair Claims settlement statute – c. 176D] may constitute actionable conduct under [Chapter 93A]." *FundQuest Inc. v. Travelers Cas. & Sur. Co.*, 715 F. Supp. 2d 202, 211 (D. Mass. 2010). An insurer violates G. L. c. 176D by "refusing to pay claims without conducting a reasonable investigation based upon all available information." G. L. c. 176D, § 3. "In other words, insurers must investigate claims thoroughly before making a determination [of its] liability." *Capitol Specialty Ins. Corp. v. Higgins*, 375 F. Supp. 3d 124, 131 (D. Mass. 2019), *aff'd in part, rev'd on alternate grounds in part and remanded*, 953 F.3d 95 (1st Cir. 2020). As alleged in the Amended

Complaint, Fireman's Fund never conducted a meaningful investigation of AFS's insurance claims. JA 027-030, ¶¶82-104. Pursuant to a broader practice of uniformly denying COVID-19 claims without investigation, Fireman's Fund's conduct is precisely the unscrupulous and oppressive conduct c. 93A aims to remedy. *Id*. As such, the Amended Complaint plausibly states a G. L. c. 93A claim. Dismissal by the lower court was error.

CONCLUSION

AFS respectfully submits that the Order of the District Court dismissing the Amended Complaint must be reversed.

Respectfully submitted,

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ADDENDUM

ADDENDUM
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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 20-11497-RGS

AMERICAN FOOD SYSTEMS, INC. et al.

v.

FIREMAN'S FUND INSURANCE COMPANY and
ALLIANZ GLOBAL RISKS UNITED STATES INSURANCE COMPANY

MEMORANDUM AND ORDER ON
DEFENDANTS' MOTION TO DISMISS

March 24, 2021

STEARNS, D.J.

Plaintiffs[1] bring this diversity action against their commercial insurers, defendants Fireman's Fund Insurance Company and Allianz Global Risks United States Insurance Company based on defendants' denial of property insurance coverage for losses arising from the COVID-19 pandemic. Defendants move to dismiss the case for failure to state a claim. *See* Fed. R. Civ. P. 12(b)(6). For the following reasons, the court will allow the motion.

[1] Plaintiffs include American Food Systems, Inc.; Old Andover Restaurant, Inc. d/b/a Grassfield's Food & Spirit; Old Waltham Restaurant, Inc. d/b/a Grassfield's Food & Spirit; Old Arlington Restaurant, Inc. d/b/a Jimmy's Steer House; Old Saugus Restaurant Inc. d/b/a Jimmy's Steer House; Old Shrewsbury Restaurant, Inc. d/b/a Jimmy's Tavern & Grill; and Old Lexington Restaurant, Inc. d/b/a Mario's Italian Restaurant.

BACKGROUND

Plaintiffs operate restaurant and retail sales businesses throughout Massachusetts, including family-style and upscale restaurants and an affiliated production and distribution office. *See* Am. Compl. (Dkt # 22) ¶¶ 1, 2-8, 59, 60-67. Starting in March of 2020, "state and local authorities intervened [in the COVID-19 pandemic] through a series of emergency [o]rders." *Id.* ¶ 27. "To comply with the emergency [o]rders, [p]laintiffs were required to slow down and eventually cease their business activities, most importantly the provision of on-premises dining and alcohol service." *Id.* ¶ 69. Operating with these restrictions caused plaintiffs to "suffer[] substantial losses of food and perishable inventories" and to incur further expense through "additional cleaning and decontamination at the Covered Properties, the addition of plexiglass, the reconfiguration of the interior of its business, and other actions such as paper menus and other modifications." *Id.* ¶¶ 71-73.

Prior to the onset of the COVID-19 pandemic, plaintiffs had purchased an all-risk commercial property insurance policy from defendants. *Id.* ¶ 20; *see generally* Ex. A to Am. Compl. (Policy) (Dkt # 22-1).[2] The Policy includes

[2] "[I]n reviewing a Rule 12(b)(6) motion, [a court] may consider documents the authenticity of which are not disputed, documents central to the plaintiff's claim, and documents sufficiently referred to in the

various forms of coverage,[3] all of which are, as relevant here, limited to a "covered cause of loss," defined as "risks of *direct physical loss or damage* complaint." *Curran v. Cousins*, 509 F.3d 36, 44 (1st Cir. 2007). As plaintiffs attach the Policy as an exhibit to the Amended Complaint and cite to it within their allegations, the court will consider it here.

[3] Under "Business Income and Extra Expense Coverage" and "Delayed Occupancy Coverage," defendants agree to "pay for the actual loss of **business income** and necessary **extra expense** [plaintiffs] sustain due to the necessary **suspension** of . . . **operations** . . . arising from *direct physical loss or damage to* property . . . resulting from a ***covered cause of loss***." Policy §§ II(A), (V)(E)(3)(a) (italicized emphases added).

"Dependent Property Coverage" further provides that defendants will pay for such a suspension of operations "due to *direct physical loss or damages* at the **location** of a **dependent property** . . . caused by or resulting from a ***covered cause of loss***." *Id.* § (V)(4)(a) (italicized emphases added).

"Civil Authority Coverage" states that defendants

> will pay for the actual loss of **business** income and necessary **extra expense** [plaintiffs] sustain due to the necessary **suspension** of . . . **operations** caused by action of civil authority that prohibits access to a **location**. Such prohibition of access to such **location** by a civil authority must: (1) Arise from *direct physical loss or damage to* property other than at such **location**; and (2) Be caused by or result from a ***covered cause of loss*** . . . .

Id. § (V)(E)(2)(a) (italicized emphases added).

Finally, under "Loss Adjustment Expense Coverage," defendants stipulate: "If a *covered loss or damage* occurs under this Coverage Form, then we will pay the necessary loss adjustment expenses you incur that would not have been incurred had there not been a *covered loss*." Am. Compl. ¶ 127 (emphases added).

not excluded or limited" in the Policy. Policy § (XIV)(A)(13) (emphasis added).

"On March 16, 2020, Plaintiffs provided their first notice of loss to Defendants and showed they had incurred business income losses during the policy term." Am. Compl. ¶ 91. Defendants denied the claim on July 23, 2020, without, according to plaintiffs, "any meaningful or honest investigation of the facts or contractual terms." *Id.* ¶ 92. Plaintiffs allege that "[d]efendants summarily and arbitrarily asserted that the . . . losses were not caused from direct physical loss of or damage to covered property, but provided no basis therefore." *Id.* ¶ 93.

This lawsuit ensued. By way of the Amended Complaint, dated January 14, 2021, plaintiffs bring state-law claims for breach of contract for failure to provide coverage under the Policy for pandemic-related losses (Count I), breach of the implied covenant of good faith and fair dealing (Count II), and violation of the Massachusetts Unfair Trade and Practices Act, Mass. Gen. Laws ch. 93A, § 11 (Count III). Defendants moved to dismiss on February 8, 2021.

DISCUSSION

To survive a motion to dismiss, a complaint must allege "a plausible entitlement to relief." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559 (2007).

"[A] plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of a cause of action's elements will not do." *Id.* at 555 (internal citations omitted). A claim is facially plausible if the factual allegations in the complaint "allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

The interpretation of an insurance policy is a question of law for the court. *See Ruggerio Ambulance Serv. v. Nat'l Grange Mut. Ins. Co.*, 430 Mass. 794, 797 (2000). Under Massachusetts law, the court "construe[s] an insurance policy under the general rules of contract interpretation, beginning with the actual language of the polic[y], given its plain and ordinary meaning." *Easthampton Congregational Church v. Church Mut. Ins. Co.*, 916 F.3d 86, 91 (1st Cir. 2019), quoting *AIG Prop. Cas. Co. v. Cosby*, 892 F.3d 25, 27 (1st Cir. 2018). Although "ambiguous words or provisions are to be resolved against the insurer," *City Fuel Corp. v. Nat'l Fire Ins. Co. of Hartford*, 446 Mass. 638, 640 (2006), "provisions [that] are plainly and definitely expressed in appropriate language must be enforced in accordance with [the policy's] terms," *High Voltage Eng'g Corp. v. Fed. Ins. Co.*, 981

F.2d 596, 600 (1st Cir. 1992), quoting *Stankus v. N.Y. Life Ins. Co.*, 312 Mass. 366, 369 (1942).[4]

This dispute turns on the meaning of the phrase "direct physical loss of or damage" to property, which cabins the Policy's scope of coverage. Plaintiffs allege in the Amended Complaint that, because COVID-19 "was ubiquitous in all parts of . . . Massachusetts where Plaintiffs' properties are located," it "was present on all of [their] insured properties" or "there was an imminent risk of on-site viral presence at all . . . times," which altered "[t]he material dimensions of [their] property . . . through microscopic changes." Am. Compl. ¶¶ 38, 45, 52.[5] In moving to dismiss, defendants argue that

[4] Contrary to plaintiffs' argument that "[c]ontract interpretation is more suited for summary judgment than on a motion to dismiss because discovery concerning the interpretation . . . may be relevant to determining whether terms are ambiguous," Opp'n to Mot. (Opp'n) (Dkt # 32) at 4 n.6, contractual language is only ambiguous "where an agreement's terms are inconsistent on their face or where the phraseology can support reasonable difference of opinion as to the meaning of the words employed and the obligations undertaken," *Fashion House, Inc. v. K Mart Corp.*, 892 F.2d 1076, 1083 (1st Cir. 1989); *see also Basis Tech. Corp. v. Amazon.com, Inc.*, 71 Mass. App. Ct. 29, 36 (2008) (the preliminary question of the existence of an ambiguity is one of law for the court to determine).

[5] For purposes of this motion, the court need not determine whether this theory proffers more than mere "labels and conclusions" or "naked assertions devoid of further factual enhancement." *Ashcroft*, 556 U.S. at 678. *But see Promotional Headwear Int'l v. Cincinnati Ins. Co.*, 2020 WL 7078735, at *8 (D. Kan. Dec. 3, 2020) (finding similar allegations concerning the presence of COVID-19 speculative and granting the motion to dismiss).

"[p]laintiffs take a kitchen sink approach, reciting a litany of potential causes of loss or damage that are entirely speculative and conclusory . . . yet still [are] unable to demonstrate direct physical loss or damage necessary to establish coverage." Mem. of Law in Supp. of Mot. to Dismiss (Mot.) (Dkt # 30) at 3. Plaintiffs respond that "[o]n-site contamination is physical and covered under Massachusetts law." Opp'n at 2.

The court starts with the plain meaning of the Policy's relevant language: "direct physical loss of or damage."[6] Here, the term "physical," which "involv[es] the *material* universe and its phenomena" and "pertain[s] to real, *tangible* objects," is an adjective modifying "loss," defined as, *inter alia*, "the disappearance or diminution of value." Black's Law Dictionary (11th ed. 2019) (emphases added). The term "damage" also entails "[l]oss or injury to person or property; esp., physical harm that is done to something or to part of someone's body." *Id.* Taken together, these terms require some enduring impact to the actual integrity of the property at issue. In other words, the phrase "direct physical loss of or damage" does not encompass

[6] Plaintiffs also allege that the Policy defines "property damage" as "[p]hysical injury to tangible property, including all resulting loss of use of tangible property that is not physically injured." Opp'n at 8. The court's analysis is consistent with, and applies with equal force to, this language as well.

transient phenomena of no lasting effect, much less real or imagined reputational harm.

This interpretation aligns with Massachusetts law. *See Harvard St. Neighborhood Health Ctr., Inc. v. Hartford Fire Ins. Co.*, 2015 WL 13234578, at *8 (D. Mass. Sept. 22, 2015) ("Intangible losses do not fit within th[e] definition [of 'direct physical loss'] . . . ."); *Crestview Country Club, Inc. v. St. Paul Guardian Ins. Co.*, 321 F. Supp. 2d 260, 264 (D. Mass. 2004) (collecting cases holding that diminution in value is not a "direct physical loss"); *Pirie v. Fed. Ins. Co.*, 45 Mass. App. Ct. 907, 908 (1998) (holding that an internal defect in a structure, such as the presence of lead paint, is not a "direct physical loss"). In *Verveine Corp. v. Strathmore Ins. Co,* No. 2020-01378 (Mass. Super. Ct. Dec. 21, 2020), the Bristol Superior Court considered whether the same insurance policy language at issue here covered losses arising from COVID-19 and concluded that it could not "be construed to cover physical loss in the absence of some physical damage to the insured's property." *Id.* at 5, citing *HRG Dev. Corp. v. Graphic Arts Mut. Ins. Co.*, 26 Mass. App. Ct. 374, 377 (1988); *accord SAS Int'l, Ltd. v. Gen. Star Indem. Co.*, 2021 WL 664043, at *2-3 (D. Mass. Feb. 19, 2021); *Legal Sea Foods, LLC v. Strathmore Ins. Co.*, 2021 WL 858378, at *3 (D. Mass. Mar. 5, 2021). A leading insurance treatise offers the following guidance.

> 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 and, thereby, to preclude any claim against the property insurer when the insured merely suffers a detrimental economic impact unaccompanied by a distinct, demonstrable, physical alteration of the property.

10A Couch on Ins. § 148:46 (3d ed. 2020) (footnotes omitted).

In the face of established precedent, plaintiffs strive for an interpretation of the Policy's relevant language that gives rise to coverage broader than that supported by its plain meaning. Attempting to differentiate "physical loss" from "damage to," plaintiffs reason that the preposition "or" separating these terms in the Policy broadens the reach of the phrase "physical loss," otherwise it would be void as surplusage of the term "damage to." Opp'n at 2, 10. The court disagrees. Because the phrase at issue consists of a sequence of related terms, a proper grammatical reading gives a parallel construction to the adjective "physical," meaning that it modifies both "loss of" and "damage to." *Accord Roche Bros. Supermarkets, LLC v. Cont'l Cas. Co.*, 2018 WL 3404061, at *4 (Mass. Super. Mar. 16, 2018) ("[T]he coverage clause . . . insur[ing] 'against risks of direct physical loss of or damage to property,' is unambiguous. The risks being covered are physical loss of property and physical damage to property.").

Regardless, construing the language "physical loss of" to cover the deprivation of a property's business *use* absent any tangible damage distorts

the plain meaning of the Policy.[7] Although the Policy extends to imminent risks of "physical loss of or damage," it does not cover a mere threat to the insured property if no actual physical damage would occur should that threat materialize. Moreover, plaintiffs' argument that the "Policy's Business Income and Extra Expense Coverage . . . has no real or personal property claim prerequisite," Opp'n at 2, overlooks the plain meaning of that provision's requirement of "direct physical loss of or damage." Nor does the court credit the argument that defendants "treated [these] five words . . . as a standalone phrase," Opp'n at 6; *see also id.* at 13 (arguing that defendants "get[] lost in only five words of the Policy"), where that phrase establishes a

[7] The case law that plaintiffs cite for this proposition does not support their "loss of use" interpretation. *See* Opp'n at 10. In *Total Intermodal Servs. Inc. v. Travelers Prop. Cas. Co. of Am.*, 2018 WL 3829767 (C.D. Cal. July 11, 2018), the court applied the language "loss of" not to property that lost its intended use, but rather to property that was "misplaced and unrecoverable" – there, a lost and mislabeled shipping container. *Id.*, at *3. Additionally, courts have either tiptoed around the holding in *Studio 417, Inc. v. Cincinnati Ins. Co.*, 478 F. Supp. 3d 794 (W.D. Mo. 2020), criticized it, or treated it as the minority position. *See, e.g., W. Coast Hotel Mgmt., LLC v. Berkshire Hathaway Guard Ins. Cos.*, 2020 WL 6440037, at *4 (C.D. Cal. Oct. 27, 2020); *Plan Check Downtown III, LLC v. AmGuard Ins. Co.*, 2020 WL 5742712, at *7 (C.D. Cal. Sept. 10, 2020); *Frank Van's Auto Tag, LLC v. Selective Ins. Co. of the S.E.*, 2021 WL 289547, at *6 n.5 (E.D. Pa. Jan. 28, 2021); *Zwillo V, Corp. v. Lexington Ins. Co.*, 2020 WL 7137110, at *8 (W.D. Mo. Dec. 2, 2020); *Terry Black's Barbecue, LLC v. State Auto. Mut. Ins. Co.*, 2020 WL 7351246, at *6 n.9 (W.D. Tex. Dec. 14, 2020); *Kirsch v. Aspen Am. Ins. Co.*, 2020 WL 7338570, at *5 n.2 (E.D. Mich. Dec. 14, 2020).

threshold condition for coverage. The analysis that SAS presents, by contrast, would require the court to read this language *out* of the Policy.

To establish that COVID-19 caused "direct physical loss" to its insured premises, plaintiffs also analogize the virus to the type of contaminant that the First Circuit and Massachusetts state courts have found "reasonably susceptible to an interpretation [of causing] physical injury to property." *Essex Ins. Co. v. BloomSouth Flooring Corp.*, 562 F.3d 399, 406 (1st Cir. 2009); *see also Matzner v. Seaco Ins. Co.*, 1998 WL 566658, at *3 (Mass. Super. Aug. 12, 1998).[8] Unlike an unpleasant odor, however, COVID-19 is imperceptible; it does not endure beyond a brief passage of time or a proper cleaning, let alone render the property permanently uninhabitable or unusable. *See Diesel Barbershop, LLC v. State Farm Lloyds*, 2020 WL 4724305, at *5 (W.D. Tex. Aug. 13, 2020). Plaintiffs' argument that "none of the cases [like *Essex*] required . . . that the contaminant originate from a physical feature of the property" strays from the point. Opp'n at 7. The

[8] The Massachusetts Supreme Judicial Court has not determined whether the phrase "physical loss" covers a property's loss of use stemming from an intangible substance. *See Essex*, 562 F.3d at 404; *Matzner*, 1998 WL 566658, at *3 ("'[D]irect physical loss or damage' is . . . susceptible of at least two different interpretations. One includes only tangible damage . . . . The second includes a wider array of losses."). The court need not grapple with this unsettled issue because no reasonable construction of the phrase "direct physical loss," however broad, would cover the presence of a virus.

characteristic determining whether a substance causes physical loss under the Policy is not its origin, but rather its effect on property. The *Essex* comparison is also unconvincing because the Policy excludes from its definition of a "Period of restoration" acts by an insured to "test for, clean up, remove, contain, treat, detoxify, or neutralize . . . pollutants" in compliance with an ordinance or law. Policy § XIV(A)(50)(b); *see also id.* § XIV(A)(53) (defining "Pollutants" as "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals, asbestos, and waste").[9]

Moreover, reading the phrase "direct physical loss" in the context of the Policy underscores the lack of coverage for losses arising from a virus. *See Allamerica Fin. Cory, v. Certain Underwriters at Lloyd's London*, 449 Mass. 621, 628 (2007) ("Every word in an insurance contract must be presumed to have been employed with a purpose and must be given meaning

[9] Putting aside the Policy's exclusion for remedying the effects of gaseous contaminants, a more sympathetic case for an insured might be made in the instance of smoke taint of the kind that ruined much of the Napa, California grape harvest in 2020 in the wake of devastating wildfires. Burning wood releases volatile phenols that bind with organic sugars in grapes. The result is to infuse wine distilled from the grapes with a medicinal, ashen taste that consumers find unpalatable. In the smoke taint instance, because the damage is a physical and irreparable alteration of the chemical structure of the grape, a claim for damage "to or of" property might stand on firmer ground than in the case of COVID-19.

and effect whenever practicable.") (internal quotations and citations omitted). The Policy excludes from coverage not only remediation of pollutant vapors, as described above, but also "[a]ny loss, cost or expense arising out of the abating . . . remediating or disposing of, or in any way responding to . . . fungi or bacteria." Policy, Fungi or Bacteria Exclusion § A(2)(b). A construction of the Policy that covers losses related to COVID-19 yet excludes losses arising from substances of a similar nature – e.g., biological, microscopic particles – is unreasonable. Contrary to plaintiffs' assertion that "in the interest of not rendering . . . exception[s] superfluous, other types of cleaning, quarantine, and detoxification must be included" as covered, Opp'n at 11-12, the "absence of an express [virus] exclusion does not operate to create coverage" for pandemic-related losses, *Given v. Com. Ins. Co.*, 440 Mass. 207, 212 (2003).

Having found that the phrase "direct physical loss" does not encompass a viral infestation, plaintiffs cannot establish coverage under any part of the Policy[10] – and, thus, cannot maintain any of their claims. A breach of the implied covenant of good faith and fair dealing still requires the

[10] For example, while plaintiffs argue that Civil Authority Coverage provides an avenue to relief as a "standalone covered loss under this Policy," Opp'n at 14, the Policy limits Civil Authority Coverage to a "covered cause of loss" – namely, a "direct physical loss."

existence of a contractual duty. *See Uno Rests., Inc. v. Bos. Kenmore Realty Corp.*, 441 Mass. 376, 385 (2004) ("The covenant may not . . . be invoked to create rights and duties not otherwise provided for in the existing contractual relationship."). Likewise, although "refusing to pay claims without conducting a reasonable investigation based upon all available information" in violation of Mass. Gen. Laws ch. 176D, § 3 can establish a Chapter 93A violation, *see R.W. Granger & Sons, Inc. v. J & S Insulation, Inc.*, 435 Mass. 66, 78 (2001), that defendants "never investigated the presence of COVID-19 on [p]laintiffs' premises" is irrelevant where its presence does not establish coverage under the Policy, Opp'n at 19. Consequently, the court will join the many other courts that across the country have reached the same result. *See* App'x to Mot. (Dkt # 31) (collecting cases).

ORDER

For the foregoing reasons, the motion to dismiss is ALLOWED in its entirety. The Clerk will enter judgment for defendants and close the case.

SO ORDERED.

/s/Richard G. Stearns
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

American Food Systems, Inc. et al.,
Plaintiffs

v. CIVIL ACTION 1:20-11497-RGS

Fireman's Fund Insurance Company and
Allianz Global Risks United States
Insurance Company
Defendants

JUDGMENT

STEARNS, D.J.

In accordance with the court's Memorandum and Order issued on March 24, 2021, granting defendants' Motion to Dismiss, it is hereby ORDERED:

Judgment entered for the defendants.

March 24, 2021
DATE

By the court,
/s/ Timothy Maynard
Courtroom Clerk

IN THE DISTRICT COURT OF BRYAN COUNTY
STATE OF OKLAHOMA

CHOCTAW NATION OF OKLAHOMA Plaintiff, v. LEXINGTON INSURANCE COMPANY, et al. Defendants.	)	Case No. CV-20-42 Hon. Mark R. Campbell

COURT'S ORDER AND OPINION AS TO PLAINTIFF THE CHOCTAW NATION OF OKLAHOMA'S FIRST MOTION FOR PARTIAL SUMMARY JUDGMENT ON BUSINESS INTERRUPTION COVERAGE

On October 27, 2020, this matter came on for consideration of Plaintiff Choctaw Nation of Oklahoma's (the "Nation") First Motion for Partial Summary on Business Interruption Coverage (the "Motion"). The Court reviewed the briefs, heard the argument of counsel, and after taking the matter under advisement, the Court finds and orders:

Since late 2019,[1] the United States has endured the COVID-19 Pandemic (the "Pandemic"). In response, the Nation, like many other businesses in the State of Oklahoma, temporarily closed its business operations on March 16, 2020 to implement mitigation protocols and modifications to allow its businesses to operate safely. In July 2020, the Nation asked the Court to interpret the Tribal Property Insurance Program ("TPIP") Policy that provided business interruption insurance to the Nation's covered properties from July 1, 2019, through July 1, 2020. Defendant Insurers[2] responded in September 2020, arguing that that the Nation did not suffer *direct physical loss or damage* as contemplated by the TPIP Policy and that various exclusions bar coverage. The Court, having read the TPIP Policy to interpret its plain and ordinary meaning, now finds for the Nation, **GRANTS** the Nation's First Motion for Partial Summary Judgment on Business Interruption Coverage and **DENIES** Defendant Insurers' request for Summary Judgment.[3]

FINDINGS OF FACT

[1] *U.S. Covid Cases Found as Early as December 2019, Says Study,* BLOOMBERG NEWS (Dec. 1, 2020) https://www.bloomberg.com/news/articles/2020-12-01/covid-infections-found-in-u-s-in-2019-weeks-before-china-cases.

[2] Defendant Insurers refers to all Defendants in the above-styled case.

[3] Because the question before the Court is the question of coverage provided by the TPIP Policy's business interruption provision, the Court does not make a determination concerning damages and Defendant Insurers' status as excess carriers is not relevant. The TPIP Policy is attached as exhibit 7 to the Nation's Motion.

Both parties request the Court interpret the TPIP Policy and issue summary judgment in their favor.[4] The parties also assert—and the Court agrees—that the interpretation of insurance contracts is a question of law;[5] consequently, there are no facts that would prevent the Court from determining coverage.[6] Based on review of the briefs, the evidence submitted, and the argument of the parties, the Court finds the following undisputed material facts for purposes of summary judgment:

1. The Nation purchased the Tribal Property Insurance Property Policy (Policy No. 017471589 (Dec 17) 9596) with all-risk business interruption coverage from July 1, 2019 through July 1, 2020. The Nation's Motion at 3 (Material Fact No. 1; *Ex.* 7 – the TPIP Policy [hereinafter also simply referenced to as the "TPIP" or "TPIP Policy"]); Defendant Insurers' Opposition to the Motion at 3 (Response to Material Fact No. 1 and Additional Material Fact Nos. 1-7).

2. Defendant Insurers issued several excess policies which incorporated the language of the TPIP Policy but also included various exclusions to coverage provided by the TPIP Policy.[7] Defendant Insurers' Opposition the Nation's Motion at 3 (Response to Material Fact No. 1 and Additional Material Fact No. 1).

3. The Nation closed its covered properties due to the Pandemic. The Nation's Motion at 3, 4, fn. 10 (Material Fact No. 2; *Exs. 4 & 5* – Chief Batton Executive Orders); Defendant

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[4] The Nation's Motion at 4; Defendant Insurers' Opposition to the Nation's Motion at 20.

[5] The Nation's Motion at 3 (*citing Moy v. Mid-Century Ins. Co*, 2006 OK 100, ¶ 22; *Oklahoma Attorneys Mut. Ins. Co. v. Cox*, 2019 OK CIV APP 25, ¶ 8 ("The interpretation of an insurance policy, with its exclusions, is a question of law.")); Defendant Insurers' Opposition to the Nation's Motion at 6-7.

[6] Because this is not a motion to compel, the Court has not seen Defendant Insurers' discovery requests or the Nation's responses, and consequently the Court cannot speak to the substance of Defendant Insurers' discovery dispute claim, except to say they are not relevant to the matter at hand. As a preliminary matter, the Court finds that if Defendant Insurers had specific material facts it could dispute with additional discovery, they should have stated as much and taken advantage of the right to file an affidavit granted to them pursuant to District Court Rule 13(d) and 12 O.S. § 2056(f). *McClain v. Riverview Vill., Inc.*, 2011 OK CIV APP 57, ¶ 7; *Been v. O.K. Indus., Inc.*, 495 F.3d 1217, 1236 (10th Cir. 2007); *Dreiling v. Peugeot Motors of Am., Inc.*, 850 F.2d 1373, 1376 (10th Cir. 1988). Having waived that right—after being advised by the Nation of that procedure and filing a sur-reply where such an affidavit could have been attached—the Court will not do the work for Defendant Insurers to figure out what facts could, in theory, or possibly, be disputed.

[7] For purposes of summary judgment, the Court has taken Defendant Insurers at their word and assumed the various excess policies' exclusions are binding on the TPIP Policy. The Nation asserted that various fact-based defenses, such as the reasonable expectation doctrine and lack of consideration, bar application of the individual excess exclusions to its claim and reserved those arguments. Because the Court grants the Nation's First Motion for Partial Summary Judgment on Business Interruption Coverage for the reasons stated herein, those arguments are now moot.

Insurers' Opposition to the Nation's Motion at 5-6 (Additional Material Fact Nos. 10-13); Choctaw Nation Newsroom, *Choctaw Casinos & Resorts Suspends Operations* (Mar. 16, 2020), https://www.choctawcasinos.com/newsroom/update-on-choctaw-casinos-resorts-event-operations/.[8]

4. While closed, the Nation repaired its covered property by implementing various mitigation protocols and modifications, such as installing acrylic barriers and sanitation stations, staggering seating and gaming machines, replacing air filters, etc. Defendant Insurers' Opposition to the Nation's Motion at 6 (Additional Material Fact Nos. 12 & 13); The Nation's Reply to Defendant Insurers' Opposition to the Nation's Motion for Partial Summary Judgment on Business Interruption Coverage (the "Reply") at 10-11 (*See also Exs.* 3 & 4 – The Nation's Websites).

5. On or about June 1, 2020, the Nation reopened its covered properties. Defendant Insurers' Opposition to the Nation's Motion at 6 (Additional Material Fact No. 13); The Nation's Reply at 10-11 (*See also Exs.* 3 & 4 – The Nation's Websites).

6. The Pandemic is a fortuitous event. The Nation's Motion at 3 (Material Fact No. 3); *Texas E. Transmission Corp Texas E. Transmission Corp. v. Marine Office–Appleton & Cox Corp.*, 579 F.2d 561, 564 (10th Cir. 1978) (interpreting Oklahoma insurance law).[9]

CONCLUSIONS OF LAW

I. THE NATION SUFFERED A COVERED LOSS

The central issue before the Court is whether the Nation's businesses closures due to the Pandemic constitute a covered loss under the TPIP Policy.[10] The TPIP Policy provides coverage

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[8] The Court also takes judicial notice of Findings of Fact Nos. 3-5 provided herein, as it is common knowledge within the territorial jurisdiction of the Court that the Nation closed its businesses due to the Pandemic in March 2020, implemented safety protocols and modifications and has since reopened. 12 O.S. § 2202.

[9] As the Tenth Circuit observed when interpreting Oklahoma law:

> A fortuitous event . . . is an event which so far as the parties to the contract are aware, is dependent on chance. It may be beyond the power of any human being to bring the event to pass; it may be within the control of third persons; it may even be a past event, as the loss of a vessel, provided that the fact is unknown to the parties.

Texas E. Transmission Corp., 579 F.2d at 564 (omission in original). The Pandemic is an event that neither the Nation nor Defendant Insurers were aware would occur in 2020, rendering it a fortuitous event.

[10] Oklahoma law is clear: under an all-risk policy the Nation must only show (1) it suffered a covered loss and (2) the loss was fortuitous. *Oklahoma Sch. Risk Mgmt. Tr. v. McAlester Pub. Sch.*, 2019 OK 3, ¶ 16 ("An 'all-risk' policy [covers] a loss when caused by any fortuitous peril not specifically excluded by the policy."); *Texas E. Transmission Corp. v. Marine Office-Appleton*

for *all risk of direct physical loss or damage*. **Defendant Insurers did not define that important phrase within the TPIP Policy.** The Nation argues that *direct physical loss* occurs when covered property is "rendered unusable for its intended purpose."[11] Defendant Insurers say that *direct physical loss or damage* is a phrase-of-art, which means there must be "distinct, demonstrable, physical alteration to the property."[12] Though this appears to present a first-impression question in Oklahoma, the interpretation of "direct physical loss" is something that courts around the country have struggled with for some time – and that is subject to particularly intense, widespread litigation now in light of the numerous other business closures precipitated by the current Pandemic. Other courts wrestling with this question have come down on both sides.

The Court must the read the TPIP policy "as a whole giving the language its ordinary and plain meaning." *Oklahoma Sch. Risk Mgmt. Tr.*, 2019 OK 3, ¶ 22. But where an insurance provision "is susceptible to two interpretations from the standpoint of a reasonably prudent layperson, then the language is ambiguous." *Id.* In such a circumstance: "the court should construe the terms against the insurer and in favor of the insured." *Oklahoma Attorneys Mut. Ins. Co. v. Cox*, 2019 OK CIV APP 25, ¶ 9; *Serra v. Estate of Broughton*, 2015 OK 82, ¶ 10 (When an insurance term or phrase is ambiguous, "words of inclusion will be construed liberally in the insured's favor, and words of exclusion will be construed strictly.").

With these cannons in mind, the Court agrees with the Nation "the part that's in dispute [is] Direct physical loss or damage." Hearing Tr. 6:23-25 (Oct. 27, 2020) (M. Burrage); *see generally* TPIP Policy. Carriers have utilized the phrase *direct physical loss* for over fifty (50) years and courts have begged carriers to define the phrase to avoid the precise issue before the Court now. *E.g., W. Fire Ins. Co. v. First Presbyterian Church*, 165 Colo. 34, 40–41, 437 P.2d 52, 56 (1968) ("Despite the fact that a 'dwelling building' might be rendered completely useless to its owners, appellant would deny that any loss or damage had occurred unless some tangible injury to the physical structure itself could be detected. Common sense requires that a policy should not be so interpreted in the absence of a provision specifically limiting coverage in this manner."); *TRAVCO Ins. Co. v. Ward*, 715 F. Supp. 2d 699, 709–10 (E.D. Va. 2010), *aff'd*, 504 F. App'x 251 (4th Cir. 2013). Despite these pleas and the known confusion surrounding the phrase "direct physical loss," Defendant Insurers made no attempt to clarify or define that phrase within the TPIP policy to avoid the Nation's interpretation that losses such as the closure of a business in response to the Pandemic would be covered—at least, not until it was too late.

The day after this case was filed Defendant Insurers added a new Communicable Disease exclusion to the TPIP Policy, which preempted coverage due to the fear or threat of viruses. This action on the part of the Defendant Insurers can mean one of two things. Either the exclusion was added to provide clarity for Defendants' interpretation—*i.e.*, that Pandemic-related closures like

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& Cox Corp., 579 F.2d 561, 564 (10th Cir. 1978). It appears the standard for all-risk policies is intentionally a low bar for the Nation to clear because it is "a special type of insurance extending to risks not usually contemplated." *Texas E. Transmission Corp.*, 579 F.2d at 564; *Pillsbury Co. v. Underwriters at Lloyd's, London*, 705 F. Supp. 1396, 1399 (D. Minn. 1989) (All-risk policies were "developed to protect the insured in cases where loss or damage to property is difficult or impossible to explain.").

[11] The Nation's Motion at 8-12.

[12] Defendant Insurers' Opposition to the Nation's Motion at 9-13.

the one at issue here are *not* covered—which underscores the confusion surrounding the existing policy language and the conclusion that the TPIP is ambiguous. Or the exclusion was added because the Nation's interpretation is correct—*i.e.*, that Pandemic-related closures like the one at issue here *are* covered—and Defendant Insurers needed to create a truly new exclusion in order to avoid liability for such claims. In either event—even assuming the Defendant Insurer's interpretation of the existing language is reasonable—Oklahoma law would require the Court to adopt the Nation's interpretation.

This is the same result reached in *Elegant Massage, LLC v. State Farm Mutual Automobile Insurance Company*. No. 2:20-CV-265, 2020 WL 7249624 (E.D. Va. Dec. 9, 2020). There, the court compared the same interpretations of *direct physical loss or damage* forwarded by the Nation and Defendant Insurers respectively to determine coverage resulting from the Pandemic. The Eastern District of Virginia—invoking the same cannons of construction utilized in Oklahoma—reviewed many of the cases cited to the Court and reached the same conclusion:

> Therefore, given the spectrum of accepted interpretations, the Court interprets the phrase "direct physical loss" in the Policy in this case most favorably to the insured to grant more coverage. *See Virginia Farm Bureau Mut. Ins. Co. v. Williams*, 278 Va. 75, at 81 (2009) ("[I]f disputed policy language is ambiguous ... we construe the language in favor of coverage and against the insurer."). Based on the case law, the Court finds that it is plausible that a fortuitous "direct physical loss" could mean that the property is uninhabitable, inaccessible, or dangerous to use because of intangible, or non-structural, sources. *See US Airways, Inc. v. Commonwealth Ins. Co.*, 2004 WL 1094684, at *5 (Va. Cir. Ct. May 14, 2004) (holding FAA order grounding flights at Reagan National Airport could constitute direct physical loss when "nothing in the Policy ... requires that [there] be damage to [the insured's] property."). Here, while the Light Stream Spa was not structurally damaged, it is plausible that Plaintiff's experienced a direct physical loss when the property was deemed uninhabitable, inaccessible, and dangerous to use by the Executive Orders because of its high risk for spreading COVID-19, an invisible but highly lethal virus. That is, the facts of this case are similar those where courts found that asbestos, ammonia, odor from methamphetamine lab, or toxic gasses from drywall, which caused properties uninhabitable, inaccessible, and dangerous to use, constituted a direct physical loss.

Elegant Massage, LLC v. State Farm Mut. Auto. Ins. Co., No. 2:20-CV-265, 2020 WL 7249624, at *8 (E.D. Va. Dec. 9, 2020). Defendant Insurers could have avoided this outcome if they had defined *direct physical loss or damage* as they (and others before them) have argued it should be interpreted. *See infra* fn. 17. But Defendants did not do so.

As explained in more detail below, the Court finds the Nation's interpretation of the TPIP is reasonable. Thus, even if the Defendant Insurers interpretation was also reasonable, the Court would be left with two competing interpretations—a result commensurate with the conclusions of other courts around the country. Under Oklahoma law, such patent ambiguity must be interpreted in the Nation's favor. *Oklahoma Attorneys Mut. Ins. Co. v. Cox*, 2019 OK CIV APP 25, ¶ 9; *Serra v. Estate of Broughton*, 2015 OK 82, ¶ 10. Ultimately, however, the Court also finds that Defendant's interpretation of "direct physical loss" is unreasonable, and the Nation's interpretation is correct. Under either rationale, the Nation has a covered loss.

A. ***The Nation presented the only reasonable interpretation.***

The Court finds that the Nation's interpretation is the correct interpretation and Defendant Insurers have forwarded an unreasonable interpretation of *direct physical loss or damage* in the context of the TPIP Policy.

First, the Nation cites to several cases where *direct physical loss* has been interpreted to include property rendered unusable for its intended purpose. *E.g., Western Fire Ins. Co. v. First Presbyterian Church*, 165 Colo. 34, 437 P.2d 52 (1968); *Oregon Shakespeare Festival Ass'n v. Great Am. Ins. Co.*, No. 1:15-CV-01932-CL, 2016 WL 3267247, at *7-9 (D. Or. June 7, 2016); *see also* the Nation's Motion at fn. 11. This includes several cases evaluating closures due to the Pandemic. *Harrison v. Optical Services, USA et al.*, BER-L-3681-20, at 27 (Bergen Cnty., N.J. Aug. 13, 2020); *Studio 417, Inc. v. Cincinnati Ins. Co.*, No. 20-CV-03127-SRB, 2020 WL 4692385, at *5 (W.D. Mo. Aug. 12, 2020); *Elegant Massage, LLC*, No. 2:20-CV-265, 2020 WL 7249624, at *8 (E.D. Va. Dec. 9, 2020). Defendant Insurers characterize the Nation's argument as "the proposition that loss of use is sufficient to establish . . . business interruption, without physical impairment of the property."[13] But this argument appears to be misplaced, as the Nation's interpretation accounts for physical impairment through the closure itself, as another court observed:

> As an initial matter, the Policies do not define the terms 'direct,' 'physical loss,' or 'physical damage.' The Court must therefore turn first to the ordinary meaning of those terms. Merriam-Webster defines 'direct,' when used as an adjective, as 'characterized by close logical, causal, or consequential relationship,' as 'stemming immediately from a source,' or as 'proceeding from one point to another in time or space without deviation or interruption.' *Direct*, Merriam-Webster (Online ed. 2020). Merriam-Webster defines 'physical' as relating to 'material things' that are 'perceptible especially through the senses.' *Physical*, Merriam-Webster (Online ed. 2020). The term is also defined in a way that is tied to the body: 'of or relating to the body.' *Id.* Webster's Third New International Dictionary defines physical as 'of or relating to natural or material things as opposed to things mental, moral, spiritual, or imaginary.' Physical, Webster's Third New International Dictionary (2020). The definition from Black's Law Dictionary comports: 'Of, relating to, or involving material things; pertaining to real, tangible objects.' *Physical*, Black's Law Dictionary (11th ed. 2019). Finally, 'loss' is defined as 'the act of losing possession,' 'the harm of privation resulting from loss or separation,' or the 'failure to gain, win, obtain, or utilize.' *Loss*, Merriam-Webster (Online ed. 2020). Another dictionary defines the term as 'the state of being deprived of or of being without something that one has had.' *Loss*, Random House Unabridged Dictionary (Online ed. 2020). ***Applying these definitions reveals that the ordinary meaning of the phrase 'direct physical loss' includes the inability to utilize or possess something in the real, material, or bodily world, resulting from a given cause without the intervention of other conditions.***

[13] Hearing Tr. 52:23-53:4 (Oct. 27, 2020) (R. Doran).

E.g., North State Deli, LLC, et al. v. Cincinnati Insurance Co., et al., 20-CVS-02569 (Durham Cnty., N.C. Oct. 9, 2020) (emphasis added) (Granting plaintiff-insured summary judgment for business interruption coverage due to the COVID Pandemic). In fact, it was undisputed that the Nation could not physically utilize its property because of the Pandemic.

Surrounding provisions of the TPIP Policy also demonstrate that requiring a physical alteration of the property is inconsistent with the policy before the Court. For example, several exclusions within the TPIP Policy exclude losses that do not require physical alteration to the property, such as infidelity, loss of market, and inventory shortage. *TPIP Policy* at 24-25. There is simply no explanation as to why Defendant Insurers would exclude causes of loss that would not meet the interpretation of *direct physical loss* regardless. *See* Hearing Tr. 7:3-8:1 (Oct. 27, 2020) (M. Burrage).

The same is true of the new Communicable Disease exclusion that was added to the TPIP policy language ***one day after*** the Nation filed its Petition:

ENDORSEMENT 5

COMMUNICABLE DISEASE EXCLUSION

1. This policy, subject to all applicable terms, conditions and exclusions, covers losses attributable to direct physical loss or physical damage occurring during the period of insurance. Consequently and notwithstanding any other provision of this policy to the contrary, this policy does not insure any loss, damage, claim, cost, expense or other sum, directly or indirectly arising out of, attributable to, or occurring concurrently or in any sequence with a Communicable Disease or the fear or threat (whether actual or perceived) of a Communicable Disease.

The Nation's Motion (*Ex. 12* – New TPIP Policy Endorsement 5 (Mar. 25, 2020) ("Communicable Disease Exclusions")).[14] This new exclusion concerns the "fear or threat (whether actual or perceived) of a Communicable Disease." If pandemics as a cause of loss were clearly not covered by the 2019-2020 TPIP Policy, then the new exclusion would be superfluous.[15] *Compare Wynn v.*

[14] The Court would find the Nation's interpretation reasonable even in the absence of this exclusion. The Court considers this exclusion and the fact that it was added one day after considering the "patent ambiguity" created by Defendant Insurers failure to define *direct physical loss or damage. Hensley v. State Farm Fire & Cas. Co.*, 2017 OK 57, ¶ 36. "The presence of patent ambiguity allows for the conduct of the parties to be used to determine the meaning of the contract." *Id.*

[15] Defendant Hallmark utilizes virtually identical language but goes one step further to specifically identify pandemics in its new "Pandemic and Epidemic Exclusion," further illustrating the purpose of these recent efforts. *See* The Nation's Reply to Defendant Hallmark Specialty Insurance Company's Supplemental Opposition to Nation's Motion for Partials Summary Judgment on Business Interruption Coverage at 6; *see also supra* fn. 14.

Avemco Ins. Co., 1998 OK 75, ¶ 9 ("[I]t is presumed, unless a contrary intention appears, that the parties intended that the renewal policy cover the same terms, conditions, and exceptions as the original policy.") *with Orren v. Phoenix Ins. Co.*, 288 Minn. 225, 229-30 (1970) ("Moreover, in our opinion, the change in language made in the revised policy persuasively illustrates the ambiguity."). As discussed above, the addition of the exclusion only makes sense where the Nation's interpretation applies and pandemics can constitute a covered cause of loss.

The "all risk" nature of the TPIP policy also cuts against Defendant Insurers' interpretation. First, the true triggering language of coverage under the TPIP Policy is *all risk of direct physical loss or damage*. As the Nation highlighted within its Motion and Reply, "*all risk of*" expands coverage to include losses from anticipated harms or danger. The Nation's Motion at 15-16; The Nation's Reply at 8. Indeed, the Nation notes that the TPIP Policy provides coverage specifically for ***imminent*** physical loss:

> In case of actual or ***imminent physical loss*** or damage of the type insured against by this Policy, the expenses incurred by the Named Insured in taking reasonable and necessary actions for the temporary protection and preservation of property insured hereunder shall be added to the total physical loss or damage otherwise recoverable under the Policy and be subject to the applicable deductible and without increase in the limit provisions contained in this Policy.

TPIP Policy at 13 (Protection and Preservation of Property) (emphasis added). Common sense dictates that the Policy cannot require the insured to demonstrate physical alteration to the property while also promising coverage for anticipated loss as well. This is consistent with the only Oklahoma law available on the issue as well, as the Oklahoma Court of Civil Appeals has stated that "risks of direct physical loss" includes "anticipated damage" to property. *Gutkowski v. Oklahoma Farmers Union Mut. Ins. Co.*, 2008 OK CIV APP 8, ¶ 11. Defendant Insurers' failed to dispute the Nation's interpretation of *all risk of* and did not submit their own interpretation.

Defendant Insurers' interpretation of *direct physical loss or damage* also fails to abide by Oklahoma law for construing insurance policies—specifically, the rule against superfluity. "The rule of construction is that some particular operation, effect, and meaning must be assigned to each sentence, phrase, and word used, and when this may fairly and properly be done, no part of the language used can be rejected as superfluous or unmeaning." *Kingkade v. Cont'l Cas. Co.*, 1912 OK 807, 35 Okla. 99, 128 P. 683, 685 (internal quotation omitted). Applying this foundational canon to the TPIP Policy, the Court would entertain that *direct physical damage* may be shown by "distinct, demonstrable, physical alteration to the property;" however, *direct physical loss* must have a distinct meaning. Because the policy provides for *direct physical loss or damage*, the Court must place value in the disjunction "*or*." *See Studio 417, Inc. v. Cincinnati Ins. Co.*, No. 20-CV-03127-SRB, 2020 WL 4692385, at *5 (W.D. Mo. Aug. 12, 2020) (citing *Nautilus Grp., Inc. v. Allianz Global Risks US*, No. C11-5281BHS, 2012 WL 760940, at * 7 (W.D. Wash. Mar. 8, 2012) ("if 'physical loss' was interpreted to mean 'damage,' then one or the other would be superfluous")). The word *loss* is divested of any meaning under Defendant Insurers' interpretation. Tellingly, Defendant Insurers never explain the difference between *direct physical loss* and *direct physical damage* under their interpretation. Therefore, the TPIP Policy must contemplate two categories of covered loss: *direct physical damage*, which may exist under Defendant Insurers' interpretation; and *direct physical loss*, which includes the Nation's interpretation. The Court finds additional support for this interpretation because the policy uses *physical damage* and *physical*

loss separately throughout its other provisions, demonstrating the phrases have distinct meanings.[16] The Nation's Motion at 7 (citing the TPIP Policy at 10, 11, 20, 23); *Oklahoma Sch. Risk Mgmt. Tr.*, 2019 OK 3, ¶ 24 ("[W]hen an insurer creates specificity in one clause of a policy and then omits it in a similar context, the omission is considered purposeful and should be given meaning.").[17] Looking at the plain and ordinary meaning of the TPIP Policy, the Court is convinced that the Nation's interpretation gives meaning to each and every word in the TPIP Policy and is the only reasonable interpretation before the Court.

B. Goodwill and the other ISO supplemental cases are distinguishable

When the TPIP Policy is "read as a whole" as required by the Court, it is clear that neither *Goodwill* nor the other Insurance Services Office ("ISO") policy cases listed in Defendant Insurers' Notices of Supplemental Authority are applicable. *Oklahoma Sch. Risk Mgmt.* Tr., 2019 OK 3, ¶ 22. Simply put, the policy language is not the same. *See Goodwill Indus. of Cent. Oklahoma, Inc. v. Philadelphia Indem. Ins. Co.*, No. CV-20-511-R at *1 (W.D. Okla. Nov. 9, 2020).

The policy at issue in *Goodwill* and the vast majority of cases relied upon by Defendant Insurers utilize standardized ISO form policy language. Hearing Tr. 33:3-17 (Oct. 27, 2020) (A. Vance); *see e.g., Goodwill Indus. of Cent. Oklahoma, Inc.*, No. CV-20-511-R, at *1; *see also Colony Ins. Co. v. Jackson*, No. 09-CV-780-TCK-TLW, 2011 WL 2118728, at *3 (N.D. Okla. May 27, 2011) ("ISO is a national insurance policy drafting organization that develops standard policy forms and files them with each state's insurance regulators. *See French v. Assurance Co. of Am.*, 448 F.3d 693, 697 & n. 1 (4th Cir.2006)."). The TPIP Policy, however, does not utilize the same language, definitions, or provisions as the ISO form policies. First and foremost, the triggering language within the ISO Policies and the TPIP Policy is simply not the same. Courts cited by Defendant Insurers have assigned special meaning to "direct physical loss *of property*" in the ISO Policies. *E.g., Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.*, No. 20-cv-03213-JST, 2020 WL 5525171, at *3-4 (N.D. Cal. Sept. 14, 2020) (finding "loss of" requires property be permanently misplaced or unrecoverable); *see also Karen Trihn, DDS, Inc. v. State Farm Gen. Ins. Co.*, No. 5:20-CV-04265-BLF, 2020 WL 7696080, at *4 (N.D. Cal. Dec. 28, 2020) ("In other words, the term 'loss of' contemplates that the property is unrecoverable."). But "*all risk of direct physical loss*"—the triggering language within the TPIP Policy—neither has "property" as the object of the clause nor includes "of" modifying the scope of *loss*. And as previously discussed,

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[16] Defendant Insurers rely on the Period of Restoration provision of the TPIP Policy to support its interpretation, but as the Nation showed, the provision relates to the length of time coverage is afforded; it is not a trigger of coverage. The Nation's Reply at 9-11. Moreover, the webpages provided in Defendant Insurers' additional facts demonstrated that the Nation made repairs as contemplated by the Period of Restoration provision. *Id.*

[17] It is also notable that since at least 1968, several courts have rejected Defendant Insurers' interpretation and instructed carriers to clearly limit *direct physical loss or damage* within their policies for it to have the meaning Defendants advance here. *E.g., W. Fire Ins. Co. v. First Presbyterian Church,* 165 Colo. 34, 40–41, 437 P.2d 52, 56 (1968); *TRAVCO Ins. Co. v. Ward*, 715 F. Supp. 2d 699, 709–10 (E.D. Va. 2010), aff'd, 504 F. App'x 251 (4th Cir. 2013). Defendant Insurers failed to do so.

the Nation dedicated substantial argument to demonstrate that "all risk of" within the triggering language of the TPIP broadens the scope of coverage contemplated therein.

Further, the *Goodwill* court noted numerous other provisions in the ISO policies that are absent from the TPIP Policy. The *Goodwill* policy required "actual loss" due to a "suspension" of "operation," but such words and requirements are absent from the TPIP Policy. *See Goodwill Indus. of Cent. Oklahoma, Inc.*, No. CV-20-511-R, at *1-2. Meanwhile, the TPIP Policy provides coverage for "imminent loss." *See supra* at 8. To interpret these policies the same would render those different words, definitions, and provisions meaningless, which this Court will not do. *Supra Kingkade*, 1912 OK 807.

Defendant Insurers had the option to adopt ISO language, which the vast majority of carriers in cases cited by Defendant Insurers did; however, the Tribal Property Insurance Program Policy was clearly drafted with more expansive language, presumptively in the hopes of cornering the tribal casino market. But regardless of the motivation behind the chosen language, the triggering language of the TPIP Policy (particularly when interpreted in light of other provisions therein) plainly covers more than the ISO Policies. Accordingly, the *Goodwill* case and other ISO authority is distinguishable and simply not persuasive to the Court.

* * *

For the foregoing reasons, the Court finds that the Nation's is the only reasonable interpretation of the TPIP Policy. However, even assuming Defendant Insurers' interpretation was also reasonable, the result would be a patent ambiguity, which Oklahoma law requires be resolved in favor of coverage. Either way, the Nation's reading would control.

II. THE EXCLUSIONS DO NOT APPLY

"[I]f an insurer desires to limit its liability under a policy, it must employ language that clearly and distinctly reveals its stated purpose." *First United Methodist Church of Stillwater, Inc. v. Philadelphia Indem. Ins. Co.*, 2016 OK CIV APP 59, ¶ 34. "[I]n cases of doubt . . . words of exclusion are strictly construed against the insurer." *Max True Plastering Co.*, 1996 OK 28, 912 P.2d at 865.[18] Utilizing these canons, the Court finds the various exclusions forwarded by Defendant Insurers do not clearly and distinctly apply to the Pandemic as a cause of loss.

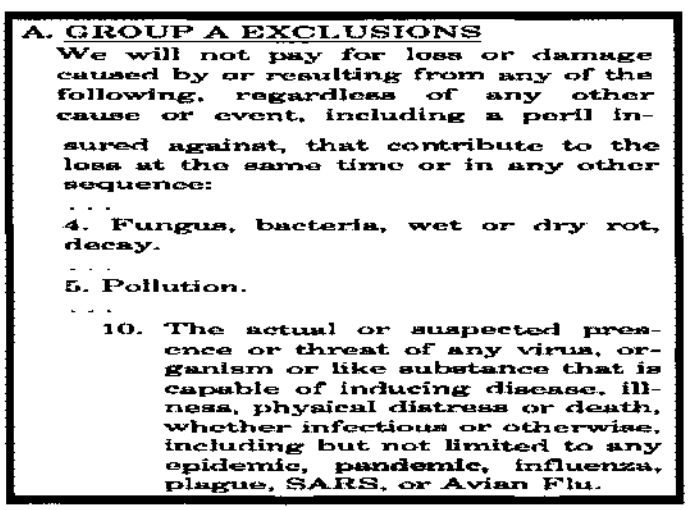
To be clear, the only loss shown to the Court was the Pandemic. And a pandemic is a loss distinct from a virus; regardless of whether there was definitive proof that the COVID-19 virus *was* or *was not* on the Nation's property, the property was still rendered useless due to the reasonable precautionary measures implemented in response to the Pandemic. *See Friends of Danny DeVito*, 227 A.3d 872 (Pa. 2020). Thus, because actual presence of the virus was not

[18] For all-risk policies specifically, "the insurer has a burden to show the loss is excluded by the policy." *Oklahoma Sch. Risk Mgmt. Tr.*, 2019 OK 3, ¶ 16. Indeed, it is the carrier that must prove a particular and excluded cause of loss is the source of the insured's claim to bar coverage under an all-risk policy. *Texas E. Transmission Corp. v. Marine Office-Appleton & Cox Corp.*, 579 F.2d 561, 564–65 (10th Cir. 1978). Alternatively stated, the carrier must show that the language itself clearly and distinctly excludes the cause of loss, and separately that the excluded cause of loss is the source of the insured's claim.

relevant to the closure of Nation's properties, it is not relevant to the Court's determination that *direct physical loss* occurred. The Nation's Reply at 13 (quoting *Urogynecology Specialist of Florida LLC, v. Sentinel Insurance Company, Ltd.*, 6:20-01174-ACC-EJK (Sep. 24, 2020)).

Turning to the exclusions provided, the Court takes "all inferences and conclusions to be drawn from the evidentiary materials . . . in the light most favorable to" Defendant Insurers. *See Carmichael v. Beller*, 1996 OK 48, 914 P .2d 1051, 1053. The Court assumes, for purposes of summary judgment, that the exclusions included within the TPIP Policy and various excess policies are valid additions to the TPIP Policy.[19] But even with that assumption, the Court finds that Defendant Insurers failed to clearly and distinctly exclude the Nation's loss.

The Nation demonstrated through various examples that insurance carriers are aware of the risk of pandemics as a peril, regularly exclude them with clear and distinct language, but that these Defendant Insurers failed to do so here. The Nation's Reply to Defendant Hallmark Reply to Defendant Hallmark Specialty Insurance Company's Supplemental Opposition to Nation's Motion for Partial Summary Judgment on Business Interruption Coverage at 6 [hereafter the "Nation's Reply to Hallmark"]; *see also Meyer Nat. Foods, LLC v. Liberty Mut. Fire Ins. Co.*, 218 F. Supp. 3d 1034, 1038 (D. Neb. 2016). For example, in 2008 Lloyds published *Pandemic: Potential Insurance Impacts*, where is stated business interruption coverage needed to be carefully drafted by carriers because a "pandemic is inevitable." The Nation's Reply at 16, fn. 28 (*Ex. 10*). That was a known risk to these Defendant Insurers as well:



A. GROUP A EXCLUSIONS

We will not pay for loss or damage caused by or resulting from any of the following, regardless of any other cause or event, including a peril insured against, that contribute to the loss at the same time or in any other sequence:

. . .

4. Fungus, bacteria, wet or dry rot, decay.

. . .

5. Pollution.

. . .

10. The actual or suspected presence or threat of any virus, organism or like substance that is capable of inducing disease, illness, physical distress or death, whether infectious or otherwise, including but not limited to any epidemic, pandemic, influenza, plague, SARS, or Avian Flu.

Meyer Nat. Foods, LLC v. Liberty Mut. Fire Ins. Co., 218 F. Supp. 3d 1034, 1038 (D. Neb. 2016) (Demonstrating Defendant Liberty Mutual previously excluded "suspected presence or threat or any virus" and specifically expanded the exclusion to include "pandemic.").

[19] Again, the Court does not address the fact-based defenses raised by the Nation, as those arguments are rendered moot by the Court's finding that the TPIP Policy's exclusions lack that clear and distinct language to make them applicable to the Nation's claim. *See supra* fn. 3.

PANDEMIC AND EPIDEMIC EXCLUSION

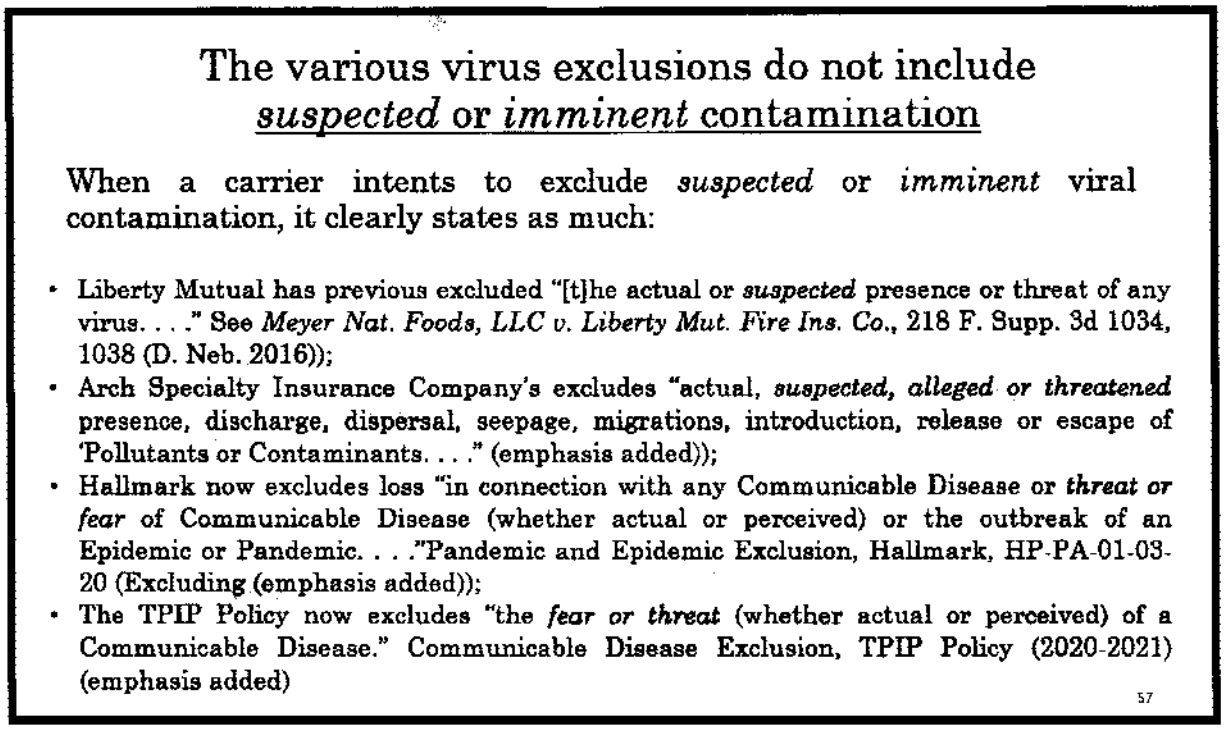
THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

Notwithstanding any provision to the contrary within this policy or any endorsements thereto, it is understood and agreed,

This Contract shall exclude any loss, damage, liability, cost or expense or any other amount incurred by the (re)insured directly or indirectly arising out of, originating from, resulting from, caused by and or contributed to and or a consequence of and by, regardless of any other cause contributing concurrently or in sequence to the loss or otherwise, in connection with any Communicable Disease or threat or fear of Communicable Disease (whether actual or perceived) or the outbreak of an Epidemic or Pandemic, whether declared as such or not by any person or entity, including foreign and domestic governments and their representatives, agencies, and courts, the United Nations and its representatives and agencies, and similar persons and entities responsible for managing public health, or any action taken by any party, person, entity, company, agency, and/or government to treat or prevent the spread thereof.

Pandemic and Epidemic Exclusion, Hallmark, form HP PA 01 03 20 (Demonstrating Defendant Hallmark has expressly excluded "pandemic" and "epidemic" losses elsewhere but did not within the TPIP Policy). When carriers fail to use clear and distinct language to exclude a cause of loss known in the market, they "act at their own peril." *Pan American World Airways, Inc. v. Aetna Casusalty & Surety Co. Ex. 9,* 505 F.2d 989, 1001 (2d Cir. 1974). As with the definition of *direct physical loss*, the Defendant Insurers could have included language that would have clarified any ambiguity regarding pandemic coverage, but they chose not to do so. Indeed, Defendant Insurers' choice to add the "Communicable Disease Exclusion" (discussed above) underscores the conclusion that the policy at issue does not clearly and distinctly exclude pandemics.

Moreover, even when not specifically excluding "pandemics," carriers regularly utilize words like *suspected, threatened,* and *fear of* to expand virus exclusions beyond actual viruses present on covered property:



Court's *Ex.* 1, The Nation's PowerPoint at 56; *see* The Nation's Reply to Hallmark at 4, fn. 5. But no applicable virus exclusions used such language here. Absent such language, the Nation has shown the various virus exclusions require proof that the COVID virus is actually on the premises to be applicable. The Nation's Motion at 14-15 (explaining *Duensing v. Traveler's Companies*, 257 Mont. 376 (1993)); *Elegant Massage, LLC.*, 2:20-CV-265, 2020 WL 7249624 (E.D. Va. Dec. 9, 2020). Except for the exclusion from Defendant Arch Specialty Insurance, [20] the Court agrees with the Nation that the viral exclusions, by their language, only apply where there is proof of actual viral presence:

- The TPIP Policy's Pollution and Contamination exclusion requires a showing of "seepage and/or pollution and/or contamination" of a virus to be applicable;[21]
- Defendant Hallmark's Excess Policy's exclusion requires there be a showing of "dispersal, application, release of or exposure to" a virus;

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[20] Defendant Arch Specialty Insurance Company's Pollution and Contamination exclusion does exclude "suspected, alleged, or threatened presence" of viruses. *Ex.* A-1 to Defendant Arch Specialty Insurance Company's Supplemental Opposition to Plaintiff's Motion for Partial Summary Judgment. But the exclusion is limited to claims "caused by, contributed to or aggravated by any *physical damage*," without reference to *physical loss. Id.* (emphasis added). Defendant Arch acknowledged that it incorporated the TPIP Policy as the basis for the excess policy. Defendant Insurers' Undisputed Material Fact No. 1. Consequently, and as explained above, *physical damage* and *physical loss* have distinct meanings within the TPIP Policy and thus Defendant Arch must have intended to provide coverage for physical loss.

[21] Moreover, the Court agrees with the Nation that the Pollution and Contamination exclusion is ambiguous because the TPIP Policy covers *all risk of direct physical loss or damage*, which meets the exception provided in the third paragraph of the exclusion. The Nation's Reply at 11-12.

- Defendant Landmark's Excess Policy's exclusion requires "discharge, dispersal, seepage, migration, release, escape or application of" a virus;
- Defendant XL's Excess Policy's exclusion requires "presence" of a virus; and,
- Defendant Liberty Mutual's Excess Policy exclusion requires the virus is "capable of inducing physical distress, illness or disease," but to be capable of inducing such an effect the virus would need to be on the premises.

Because none of these exclusions contemplate *pandemics,* or *suspected*, *imminent*, *threatened*, or *fear of* viruses—common language utilized by carriers to exclude such losses clearly and distinctively—these exclusions do not clearly and distinctly apply to the Nation's loss.[22]

Finally, Defendant Liberty Mutual asserts its loss-of-use exclusion with its excess policy bars coverage. But by the plain terms of the TPIP Policy, Defendant Liberty Mutual cannot assert that all forms of loss of use are excluded. As the Nation has shown, business interruption coverage as contemplated by the TPIP Policy necessary only results from some loss of use—*i.e.*, from some *interruption* of *business*. The Nation's Reply to Defendant Liberty Mutual Fire Insurance Company's Supplemental Opposition to the Nation's Motion at 5-6. Thus, if all loss of use was excluded, the business interruption coverage would be illusory. *Id.* For that reason, the Court accepts the proposition that when a dangerous condition like a fire, tornado, or the Pandemic causes loss of use, the exclusion would not apply. *W. Fire Ins. Co. v. First Presbyterian Church*, 165 Colo. 34, 38-39.

* * *

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Court **GRANTS** the Nation's First Motion for Partial Summary Judgment on Business Interruption Coverage and **DENIES** Defendant Insurers request for Summary Judgment. Pursuant to this order, the Nation is entitled to indemnity under the terms of the TPIP Policy for the losses sustained due to the Pandemic under its business interruption coverage.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that because the Court grants the Nation's Motion finding coverage, the question of whether Civil Authority, Ingress/Egress, or any other provision of the TPIP Policy provides for coverage due to the Pandemic is hereby rendered moot. Pursuant to 12 O.S. § 952(b)(3), this Court certifies that this order substantially affects a substantial part of the merits of the controversy and an immediate appeal of this issue would materially advance the ultimate termination of this litigation.

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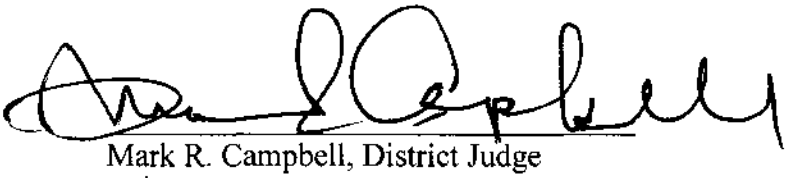
[22] In its Replies, the Nation also pointed out that the Defendant Insurers' duty to investigate and prove actual presence of a virus is consistent with Oklahoma law, citing *Buzzard v. Farmers Insurance Company* to argue Defendant Insurers should have swabbed or otherwise tested the covered properties to prove the existence of a virus if it intended the various viral exclusions to apply. The Nation's Reply at 11-12, fn. 23 (*quoting* 1991 OK 127, 824 P.2d 1105, 1109 ("To determine the validity of the claim, the insurer must conduct an investigation reasonably appropriate under the circumstances.")). But Defendant Insurers did not do so.

Now, on this 15th day of February, 2021,
IT IS SO ORDERED!



Mark R. Campbell, District Judge
19th Judicial District of Oklahoma

CERTIFICATE OF MAILING

I certify that on February 22, 2021, I delivered a copy of the foregoing instrument by email to:

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COURT CLERK SEAL BRYAN COUNTY, OKLAHOMA

Donna Alexander
Donna Alexander
Bryan County Court Clerk

The State of New Hampshire

MERRIMACK COUNTY **SUPERIOR COURT**

SCHLEICHER & STEBBINS HOTELS, LLC, et al.

v.

STARR SURPLUS LINES INSURANCE COMPANIES, et al.

Docket No.: 217-2020-CV-00309

ORDER

The Plaintiffs, Schleicher and Stebbins Hotels, LLC, Renspa Place LLC, Chelsea Gateway Property LLC, OS Sudbury LLC, Monsignor Hotel LLC, SXC Alewife Hotel LLC, Lawrenceville, LLC, Second Avenue Hotel Lessee LLC, Second Avenue Hotel Owner LLC, Medford Station Hotel LLC, WDC Concord Hotel LLC, Broadway Hotel LLC, Fox Inn LLC, Melnea Hotel, LLC, Natick Hotel Lessee LLC, Superior Drive Hotel Owner LLC, Arlington Street Quincy Hotel LLC, Albany Street Hotel Lessee LLC, Albany Street Hotel LLC, Cleveland Circle Hotel Lessee LLC, Cleveland Circle Hotel Owner LLC, Worcester Trumbull Street Hotel LLC, Assembly Hotel Operator LLC, Assembly Row Hotel LLC, Parade Residence Hotel LLC, Portwalk HI LLC, Route 120 Hotel LLC, Vaughan Street Hotel LLC, and FSG Bridgewater Hotel LLC, seek declaratory judgment that they are contractually entitled to insurance coverage for losses resulting from the COVID-19 pandemic. The Defendants, Starr Surplus Lines Insurance Company ("Starr"), certain underwriters at Lloyd's of London subscribing to policy number B1263EW0040519 ("Lloyd's"), Everest Indemnity Insurance Company ("Everest"), Hallmark Specialty Insurance Company ("Hallmark"), Evanston Insurance Company ("Evanston"), AXIS Surplus Insurance Company ("AXIS"), Scottsdale

Insurance Company ("Scottsdale"), and Mitsui Sumitomo Insurance Company of America ("Mitsui"), object. The Plaintiffs now move for partial summary judgment that the terms "loss or damage" and "direct physical loss of or damage to property," as used in the parties' contract, encompass the impact of SARS-CoV-2 on the Plaintiffs' properties. They also seek to strike a number of affirmative defenses from the Answers to the Complaint. The Defendants have filed a competing motion for summary judgment. AXIS, acting in an individual capacity, filed an additional motion for summary judgment. Moreover, the Defendants move to strike as inadmissible certain exhibits attached to the Plaintiffs' supporting affidavits. The Court held a hearing on these motions with counsel for the parties on April 16, 2021. For the following reasons, the Plaintiffs' motion for partial summary judgment and to strike defenses is GRANTED, AXIS's motion for partial summary judgment is GRANTED, the remaining Defendants' motion for partial summary judgment is DENIED, and the Defendants' motions to strike are GRANTED in part and DENIED in part.

I. Standard

To prevail on a motion for summary judgment, the moving party must establish that there is "no genuine issue as to any material fact" and that it is "entitled to judgment as a matter of law." Sabato v. Fed. Nat'l Mortg. Ass'n, 172 N.H. 128, 131 (2019). In deciding the motion, the Court assesses "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits filed by the parties." RSA 491:8-a, III. However, the Court must look to the "affidavits and other evidence," and to "all inferences properly drawn from them, in the light most favorable to the nonmoving party." Clark v. N.H. Dep't of Emp't Sec., 171 N.H. 639, 650 (2019).

II. Background

The Plaintiffs own and operate twenty-three hotels, four in this State, eighteen in Massachusetts, and one in New Jersey (the "Hotels"). (Aff. Stebbins ¶ 3.)[1] For the period beginning November 1, 2019 and ending November 1, 2020 (the "Coverage Period"), the Plaintiffs purchased $600 million of insurance coverage from the Defendants. (Compl., Exs. 1–8 ("Policies").) With the exception of certain addenda, the language of the various Policies is identical. (Id.) The Policies purport to broadly extend insurance coverage, subject to enumerated exclusions, covering "direct physical loss or damage to" "all real and personal property owned, used, leased, or intended for use" by the Plaintiffs, property "for which the [Plaintiffs] may be responsible for the insurance," and "real or personal property [t]hereafter constructed, erected, installed, or acquired" by the Plaintiffs. (Policies ¶¶ 7, 28.)

As part of the Policies, the Defendants spread the risk of liability for perils insured against amongst themselves. (See Compl., Ex. 3 at 6 (the "Participation Page").) Starr, Everest, and Lloyd's respectively insured 50%, 30%, and 20% of the first $10 million dollars in risk liability. (Id.) Everest, Evanston, AXIS, and Hallmark respectively insured 30%, 25%, 25%, and 20% of the following $40 million in risk liability. (Id.) Scottsdale insured the next $50 million in liability. (Id.) Mitsui insured the following $150 million. (Id.) Two non-parties to this action, which the Plaintiffs refer to as "One Beacon/Homeland" and "RSUI," insured an additional $350 million in excess coverage. (Aff. Stebbins, Ex. A.) In exchange, the Plaintiffs have paid the Defendants approximately $1 million in premiums. (Policies; Index ## 30, 32–25 ("Answers").)

[1] The Affidavit of Mark Stebbins is attached as an unmarked exhibit to the Plaintiffs' Motion for Partial Summary Judgment Regarding "Loss or Damage" from Coronavirus, Index # 62.

On January 9, 2020, the World Health Organization ("WHO") first identified the SARS-CoV-2 virus, which is responsible for causing COVID-19. (Aff. Gilinsky in Supp. Pl.'s Mot. Partial Summ. J. ("Aff. Gilinsky"), Ex. 4.) Reports claim the first case of a "patient . . . with confirmed COVID-19" in the United States was identified in Washington State on January 22, 2020. (Id., Ex. 5 at 3.)[2] Soon thereafter, COVID-19 had become a "pandemic" impacting "more than 117 countries" and causing thousands of deaths. (Compl., Ex. 14.) All fifty states adopted public health measures to control the spread of COVID-19. (Id., Ex. 14, Ex. D at 8.) On March 9, 2020, Governor Philip Murphy declared a public health emergency and state of emergency in New Jersey. (Id., Ex. 9 at 4.) Similarly, on March 10, 2020, Governor Charlie Baker declared a state of emergency in Massachusetts. (Id., Ex. 9 at 4.) On March 13, 2020, Governor Christopher Sununu also declared a state of emergency in this State. (Id., Ex. 11 at 3.)

Pursuant to their emergency powers, New Jersey and Massachusetts issued orders restricting the operation of the Hotels. On March 21, 2020, Governor Murphy issued Executive Order No. 107, which required "[a]ll New Jersey residents [to] remain home or at their place of residence unless" engaging in a limited set of necessary activities, such as buying groceries, going to work, seeking medical attention, or "leaving the home for an educational, religious, or political reason." (Id., Ex. 21 ¶ 3.) In addition, the order required the "brick-and-mortar premises of all non-essential retail businesses" to "close to the public as long as th[e] Order remain[ed] in effect." (Id., Ex. 21 ¶ 6.) Similarly, on March 23, 2020, Governor Baker issued COVID-19 Order No. 13, which prohibited gatherings of more than 10 people "in any confined indoor or outdoor

[2] The Court cites to this report not for the truth of the quoted assertion, but to aid in establishing a chronology of events.

space," and specifically identified as prohibited, "without limitation," any "concerts, conferences, conventions, fundraisers, . . . weddings," and other events that may otherwise ordinarily take place within the Hotels. (Id., Ex. 16 ¶ 3.) The order expressly designated certain businesses as providing "COVID-19 Essential Services," and ordered all other businesses to "close their physical workplaces and facilities ('brick-and-mortar premises') to workers, customers, and the public." (Id., Ex. 16 ¶ 2.) The definition of Essential Services, however, encompassed those services provided by "[w]orkers at hotels, motels, inns, and other lodgings providing overnight accommodation, but only to the degree th[ey] . . . [worked to] accommodate the COVID-19 Essential Workforce, other workers responding to the COVID-19 public health emergency, and vulnerable populations." (Id., Ex. 18 at 28.) Authorities in New Jersey also recognized that imposing restrictions on "Hotels, Motels, [and] Guest Homes" would be inappropriate where the restrictions "impact[ed] the ability of individuals to find necessary shelter pursuant to a State program or state or local assistance, or limit the ability of healthcare workers to find temporary housing related to their work." See, e.g., N.J. Admin. Order No. 2020-9.[3]

This State issued orders similar to those issued in New Jersey and Massachusetts. On March 26, 2020, Governor Sununu issued Emergency Order No. 17, which designated certain business activity as "Essential Services" and ordered "[a]ll businesses and other organizations that do not provide Essential Services [to] close

[3] The Court takes judicial notice sua sponte of N.J. Admin. Order No. 2020-9 and N.J. Exec. Dir. No. 20-024, below, in recognition that the Plaintiffs' hotel in New Jersey was not required to remain closed to the public throughout the pandemic. N.H. R. Ev. 201(a, c) ("A court may take judicial notice," of a fact "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned," "whether [such notice is] requested or not.").

their physical workplaces and facilities to workers, customers, and the public and cease all in person operations." (Id., Ex. 13 ¶¶ 1–2.) The order further provided that, beginning "on March 27, 2020, New Hampshire citizens shall stay at home or in their place of residence" unless engaged in a limited number of enumerated activities, such as "exercise," "employment," "essential errands," and "essential medical care." (Id., Ex. 13 ¶ 4.) Initially, workers at "hotels and commercial lodging facilities" were deemed to provide essential services and permitted to provide lodging to customers who sought their services. (Id., Ex. 13, Ex. A.) By April 6, 2020, however, the Plaintiffs, as "lodging providers," were required to restrict "lodging [to] vulnerable populations and essential workers only." (Id., Ex. 15.)

When the Hotels were permitted to reopen, a number of restrictions on the Plaintiffs' business operations remained in effect. Beginning on June 5, 2020, this State permitted hotels to accept overnight reservations from in-state residents but not to provide lodging to out-of-state visitors unless those visitors completed a fourteen-day quarantine. (Id., Ex. 14, Ex. D § M.) Beginning on June 8, 2020, when Massachusetts entered what it called "Phase 2" of its "reopening" plan, the state permitted hotels to host the general public but required that "[b]allrooms, meeting rooms, function halls, and all other indoor or outdoor event facilities must remain closed." (Id., Ex. 20.) In addition, Massachusetts guidance provided that hotels were "not permitted to host weddings, business events, or other organized gatherings of any kind." (Id.) As of July 9, 2020, hotels in New Jersey had to ensure "continuous 24-hour, seven-day-a-week coverage of a Front Desk" by someone trained to "respond to a guests' inquir[ies] related to health and safety," to "ensure that every Guest Room [was] cleaned and

sanitized" pursuant to strict protocols, and to "provide their employees with anti-microbial cleaning products certified" to combat the spread of COVID-19. N.J. Exec. Dir. No. 20-024. Moreover, states and municipalities across the country issued orders requiring individuals to stay home or shelter in place and preventing them from traveling to or staying at lodging facilities like the Hotels. (See Aff. Gilinsky, Ex. 18.)

Each of the orders was issued in an attempt to control the spread of the COVID-19 virus, which primarily spreads "when an infected person is in close contact with another person." (Id., Exs. 7.) According to the United States Centers for Disease Control and Prevention (the "CDC"), "[t]ransmission of SARS-CoV-2 can occur through direct, indirect, or close contact with people through infected secretions such as saliva and respiratory secretions or their respiratory droplets, which are expelled when an infected person coughs, sneezes, talks or sings." (Id., Ex. 6.) "The epidemiology of SARS-CoV-2 indicates that most infections are spread through close contact, not airborne transmission." (Id., Ex. 9 at 2.) However, the CDC has determined that "[a]irborne transmission of SARS-CoV-2 can occur under special circumstances," such as those involving "[p]rolongued exposure to respiratory particles," "[e]nclosed spaces," or areas with "[i]nadequate ventilation or air handling." (Id., Ex. 9 at 3.) "Despite consistent evidence as to SARS-CoV-2 contamination of surfaces and the survival of the virus on certain surfaces, there are no specific reports which have directly demonstrated fomite[4] transmission." (Id., Ex. 6 at 4 (emphasis added).) Nevertheless, fomite transmission is considered, at the very least, a potential "mode of transmission," and, since the beginning of the pandemic, the CDC has consistently warned that

[4] "Fomite," as used in this exhibit, refers to any "contaminated surface[]." (Id., Ex. 6 at 4.)

"people may become infected by touching . . . contaminated surfaces." (Id., Ex. 6–7.) In view of COVID-19's potential manners of spread, the CDC recommended, at all times relevant to this action, that the general public engage in "social distancing," the "use of masks in the community, hand hygiene, [] surface cleaning and disinfection, [and the] ventilation and avoidance of crowded indoor spaces." (Id., Ex. 9 at 1, 3.)

Sometime prior to April 13, 2020, the Plaintiffs filed an insurance claim with the Defendants, requesting an advance payment for COVID-19 related losses covered under the Policies. (Aff. Stebbins, Exs. B–C, E.) In response, the Defendants had the Plaintiffs complete a questionnaire "for each location involved," repeatedly requesting examples of "direct physical loss of or damage" to property. (Id., Ex. B (emphasis in original).) After reviewing the Plaintiffs' submission, the Defendants replied with an email requesting, in part, that the Plaintiffs "elaborate regarding the following:"

> • what physical damage caused the closure or partial closure of [the Plaintiffs'] operations
> • what physical damage caused access to and from [the Plaintiffs'] hotels to be impaired or hindered
> • what physical damage triggered the order[s] o[f] civil or military authority
> • what physical damage[] prevented a supplier from supplying or a receiver from receiving goods and services

(Id., Ex. C (emphasis added).) The Plaintiffs submitted a further response to the questionnaire, following which the Defendants determined:

> It appears based on the information you have provided that your properties were not physically damaged and the loss of revenue and closures are due to the governmental orders to slow the spread of the virus, i.e. shelter in place etc.

(Id., Ex. E (emphasis added).)

On May 11, 2020, McLarens, Inc. ("McLarens"), which described itself as the insurance adjuster of at least some of the Defendants, sent a letter to the Plaintiffs

informing them that their claim was "still under investigation" and stating that the Defendants they represent "continue to reserve all rights under the [Policies]." (Id., Ex. D.)

The Policies contain a number of provisions relevant to this action. Paragraph 28, entitled "Perils Insured Against," provides the Policies insure only:

> against risks of direct physical loss of or damage to property described herein . . . [and] except as hereinafter excluded.

(Policies ¶ 28.) Despite this language, the Policies also contain two "Extensions of Time Element Coverage" provisions that provide coverage "irrespective of whether the property of the Insured shall have been damaged" (the "ETEC Provisions"). (Policies ¶ 21.) One of the ETEC Provisions (the "Civil Authority Coverage") provides:

> This policy . . . insures against . . . actual loss sustained for a period not to exceed ninety (90) consecutive days when, as a result of a peril insured against, access to real or personal property is impaired or hindered by order of civil or military authority irrespective of whether the property of the Insured shall have been damaged.

(Id. ¶ 21(d) (emphasis added).) The other ETEC Provision (the "Ingress/Egress Coverage") similarly provides:

> . . . insur[ance] against . . . actual loss sustained for a period not to exceed ninety (90) consecutive days when, as a result of a peril insured against, ingress or egress from real or personal property is thereby impaired or hindered irrespective of whether the property of the Insured shall have been damaged.

(Id. ¶ 21(e) (emphasis added).) In addition, the Policies contain a contingent business interruption clause ("CBI Coverage"), pursuant to which the Defendants:

> . . . shall cover the loss resulting from the complete or partial interruption of business conducted by the Insured including all interdependent loss of earnings between or among companies owned or operated by the Insured caused by loss, damage, or destruction by any of the perils covered herein during the term of this policy to real and personal property as covered herein . . . [I]n the event of such loss, damage or destruction [the Defendants] shall be liable for the ACTUAL

> LOSS SUSTAINED by the insured resulting directly from such interruption of business . . .

(Id. ¶ 10 (emphasis added).)

Finally, there is a list of enumerated coverage exclusions both in the text of the Policies and in addenda to each of the Policies. (Id. ¶ 29, Endorsement #1.) One of those exclusions (the "Microorganism Exclusion") provides:

> . . . [T]his policy does not insure any loss, damage, claim, cost, expense or other sum directly or indirectly arising out of or relating to:
>
> mold, mildew, fungus, spores or other microorganism of any type, nature, or description, including but not limited to any substance whose presence poses an actual or potential threat to human health.
>
> This exclusion applies regardless whether there is (i) any physical loss or damage to insured property; (ii) any insured peril or cause, whether or not contributing concurrently or in any sequence; (iii) any loss of use, occupancy, or functionality; or (iv) any action required, including but not limited to repair, replacement, removal, cleanup, abatement, disposal, relocation, or steps taken to address medical or legal concerns.

(Id., Endorsement #1 ¶ B.) A separate exclusion, which is attached only to AXIS's policy, provides:

> As used in this endorsement . . . [p]ollutants or contaminants include, but are not limited to[,] bacteria, fungi, mold, mildew, virus or hazardous substances . . . [and] . . . [t]his policy does not cover any . . . [l]oss or damage caused by, resulting from, contributed to or made worse by actual, alleged or threatened release, discharge, escape or dispersal of pollutants or contaminants, however caused . . .

(Compl., Ex. 6, Commercial Property Exclusion Endorsement ¶ 1(A)(1–2) (the "Pollution Exclusion") (emphasis added).)

On June 16, 2020, McLarens sent a second letter to the Plaintiffs, this one on behalf of Everest and Lloyd's. (Aff. Stebbins, Ex. F.) The letter stated "[a]dditional information [was] needed as to the facts and circumstances" surrounding the claim and highlighted that the Plaintiffs did not provide sufficient "details concerning the physical

damage" the Hotels are claimed to have suffered. (Id.) Days later, on June 19, 2020, the Plaintiffs brought suit in this Court. (See Compl.)

III. Analysis

A. Motions to Strike

The Court first turns to the Defendants' motions to strike exhibits. The Defendants move to strike exhibits attached to two affidavits authored by counsel for the Plaintiffs in support of the Plaintiffs' Motion for Partial Summary Judgment: the affidavit of Marshall Gilinsky and the affidavit of Michael O'Neil. (Defs.' Mot. Strike Aff. Gilinsky ("Mot. Strike Gilinsky"); Defs.' Mot. Strike Aff. O'Neil ("Mot. Strike O'Neil").) The Defendants argue Exhibits 1–18 of Mr. Gilinsky's Affidavit and Exhibits 29–30 of Mr. O'Neil's Affidavit are not based on personal knowledge and contain inadmissible hearsay evidence. (Mot. Strike Gilinsky; Mot. Strike O'Neil.) They contend the various "news articles and articles from legal, medical, and scientific journals . . . as well as various government orders issued as a result of COVID-19" cannot constitute "independent evidence about COVID-19 and its transmission and presence in the air and on surfaces." (Mot. Strike Gilinsky ¶ 5; see Mot. Strike O'Neil ¶¶ 2–3.)

The Plaintiffs reply the motions to strike are "an attempt to have this Court ignore obvious and commonly known facts that are harmful to [the] Defendants and purge them from the record." (Pl.'s Obj. Mot. Strike Gilinsky at 1; Pl.'s Obj. Mot. Strike O'Neil at 1–2.) They argue the challenged exhibits fall under recognized hearsay exceptions, that Mr. Gilinsky and Mr. O'Neil had sufficient personal knowledge to represent to the Court that the cited authorities "are what the [affidavits] . . . say[] they are," and request for the Court to take judicial notice of the facts contained in each of the challenged

exhibits. (Pl.'s Obj. Mot. Strike Gilinsky at 3, 6–7; Pl.'s Obj. Mot. Strike O'Neil at 2–3.)

"Any party seeking summary judgment shall accompany [its] motion with an affidavit based upon personal knowledge of admissible facts as to which it appears affirmatively that the affiants will be competent to testify." RSA 491:8-a, II. "The facts stated in the accompanying affidavits shall be taken to be admitted for the purpose of the motion, unless within 30 days," the opposing party files "contradictory affidavits based on personal knowledge" or "files an affidavit showing specifically and clearly reasonable grounds for believing that contradictory evidence can be presented at a trial but cannot be furnished by affidavits." Id. Personal knowledge requires more than for the moving party or its counsel to represent that "certain third parties w[ill] testify to specific facts at trial." Proctor v. Bank of N.H., N.A., 123 N.H. 395, 401 (1983). However, counsel for the moving party has sufficient personal knowledge to file an "attorney's affidavit" where it is "clear that the attorney's affidavit refer[s]" only to the "existence, authenticity, or contents" of "specific[,] existing" written testimony, such as "depositions, and other pre-trial discovery." Id.; Lortie v. Bois, 119 N.H. 72, 75 (1979).

As a general matter, the standard for the admissibility of evidence in civil matters before this Court is relevance. N.H. R. Ev. 402. For evidence to be relevant, it must have at least some "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." State v. Plantamuro, 171 N.H. 253, 257 (2018) (citing N.H. R. Ev. 401). The Court may, however, exclude relevant evidence where "its probative value is substantially outweighed by [a] danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or

needless presentation of cumulative evidence." N.H. R. Ev. 403. Whether evidence "will be of assistance to the trier of fact and admitted is a matter within the broad discretion" of this Court. State v. Baker, 120 N.H. 773, 775 (1980).

Hearsay denotes a statement "the declarant does not make while testifying at . . . trial" which is "offer[ed] in evidence to prove the truth of the matter asserted." N.H. Evid. R. 801(c). Hearsay evidence is ordinarily inadmissible. N.H. Evid. R. 802. However, hearsay contained in "[a] record or statement of a public office," under circumstances that do not indicate a lack of trustworthiness, is nevertheless admissible where "it sets out . . . (i) the office's activities; (ii) a matter observed while under a legal duty to report . . . [or (iii)] factual findings from a legally authorized investigation." N.H. Evid. R. 803(8). Hearsay is also admissible where the statement is "contained in a treatise, periodical, or pamphlet if:"

> (A) the statement is called to the attention of an expert witness on cross-examination or relied on by the expert on direct examination; and
> (B) the publication is established as a reliable authority by the expert's admission or testimony, by another expert's testimony, or by judicial notice.

N.H. Evid. R. 803(18) (emphasis added).

As a preliminary matter, the Court notes the Defendants have filed no contradictory affidavits or exhibits, nor specifically and clearly articulated why such affidavits or exhibits cannot be furnished at this stage. RSA 491:8-a, II. In addition, none of the challenged exhibits are depositions or the result of pretrial discovery. Lortie, 119 N.H. at 75. On the contrary, the content of the challenged exhibits has not been affirmed under oath and the exhibits have been introduced for the truth of the various factual assertions they contain. However, the Court concludes, and the Defendants do not credibly dispute, that Mr. Gilinsky has established the "existence[and] authenticity"

of each cited document and, based on his personal knowledge and under oath, has provided "true and accurate" copies of each. Id.; RSA 491:8-a, II. The Court need only consider, therefore, whether the challenged exhibits' assertions of fact are admissible without expert testimony in their support.

A number of the exhibits attached to Mr. Gilinsky's affidavit are admissible. Exhibit 3 is an undisputed copy of a property policy sold by Everest filed in a separate legal action with a Federal District Court in Florida. Doc 1-2, Oxbow Hosp., Inc. v. Everest Indem. Ins. Co., No. 2:20-cv-00158 (M.D. Fla. filed Mar. 6, 2020). The exhibit is relevant to this Court's interpretation of the scope of material language in the Policies. N.H. R. Ev. 402. Moreover, no assertions of Everest quoted by the Plaintiffs from Exhibit 3 constitute hearsay, because the contents of Exhibit 3 are "offered against an opposing party . . . [and were made] by the party, in an individual or representative capacity." N.H. Evid. R. 801(d)(2). Exhibits 4, 6, 7, 9, and 15 are all statements of a public office, whether the CDC or the WHO, issued "under circumstances that do not indicate a lack of trustworthiness" concerning "factual findings from [] legally authorized investigation[s]." N.H. Evid. R. 803(8). Though the WHO is an international agency of the United Nations, the Court concludes it is a public office within the meaning of Rule 402 whose publications "show[] no sign of being unreliable." Id.; see U.S. v. Garland, 991 F.2d 328, 335 (6th Cir. 1993) (holding a foreign judgment admissible pursuant to the federal analogue to N.H. Evid. R. 803(8)). Each of these statements is relevant to the nature of SARS-CoV-2 and its manner of spread. N.H. R. Ev. 402. Finally, Exhibit 18 is a copy of a state-level executive order issued by the Governor of California. As such, it is a "record or statement of a public office" that variously sets out "the office's

activities" and contains "factual findings from a legally authorized investigation" into the state of the COVID-19 pandemic at the time the order was issued. N.H. Evid. R. 803(8). The order is relevant to the ability of prospective guests at the Hotels to engage the Plaintiffs' services. N.H. R. Ev. 402. The Court therefore considers these documents for the purposes of ruling on the pending motions.

Factual representations in the remainder of the challenged exhibits, however, constitute inadmissible hearsay. Exhibit 1 to Mr. Gilinsky's Affidavit is a scholarly article written by Christopher C. French, a professor of law at Pennsylvania State University. The Court has considered the legal authority cited by Professor French, but no factual statements contained in his article are admissible for their truth under Rule 803(18). Although the Court finds the publication a reliable authority on legal matters, the Plaintiffs do not provide or contend that they expect to provide an expert to testify on matters of fact quoted by the Professor. N.H. Evid. R. 803(8)(A). Exhibit 2 is a document issued by the National Association of Insurance Commissioners ("NAIC") which purports to present aggregate national data on the prevalence of certain coverage provisions in insurance policies. However, NAIC is not a public office and no expert testimony has been offered by either party regarding the factual matters reported in the exhibit. N.H. Evid. R. 803(8, 18). The remaining exhibits, Exhibits 5, 8, 10–13, and 16–17, are each scientific studies published in reputable scientific journals, and they constitute "reliable authorit[ies]" on matters of science. N.H. Evid. R. 803(18)(B). Yet, once more, no expert affidavit or testimony is offered by either party regarding the results of these studies. N.H. Evid. R. 803(18)(A). The role of the Court is to "say what the law is," not to engage in an armchair interpretation of scientific publications

unsupported by expert testimony. See Claremont Sch. Dist. v. Governor, 143 N.H. 154, 158 (1998); see also Appeal of Conservation Law Found., 127 N.H. 606, 616 (1986) (the courts must approach the "complex scientific issues presented [to them] . . . with some diffidence.") Finally, because they are also unsupported by expert testimony, both of the challenged exhibits to Mr. O'Neil's affidavit are inadmissible. N.H. Evid. R. 803(18)(A).

For purposes of ruling on the pending motions, the Court does not allow the introduction into evidence, for the truth of the matters there asserted, of Exhibits 1, 2, 5, 8, 10–13, and 16–17 to Mr. Gilinki's Affidavit and 29–30 to Mr. O'Neil's Affidavit. Nevertheless, the parties may seek to introduce the content of the challenged exhibits at a later stage of the proceedings for another purpose, provided that purpose is relevant to the case.

B. Motions for Summary Judgment

The Court next turns to the parties' competing motions for summary judgment. A declaratory judgment provides a means "to question the validity" or application of a law, rule, or regulation. Avery v. N.H. Dep't of Educ., 162 N.H. 604, 607 (2011). To prevail on a motion for declaratory judgment, a petitioner is not required to show "proof of a wrong committed by one party against the other." Id. Rather, the "distinguishing characteristic" of declaratory judgment is that it "can be brought before an actual invasion of rights has occurred." Carlson, Tr. v. Latvian Lutheran Exile Church of Boston and Vicinity Patrons, 170 N.H. 299, 303 (2017) (citing Portsmouth Hosp. v. Indemnity Ins. Co., 109 N.H. 53, 55 (1968)) (emphasis added); cf. 26 C.S.J. § 30 (declaratory judgment may be sought as "a prophylactic measure before a breach [of

duty] occurs.") The Court will not, however, award declaratory judgment where a petitioner has a "purely subjective or speculative fear of future harm." Carlson, 170 N.H. at 304 (citing Prasco, LLC v. Medicis Pharm. Corp., 537 F.3d 1329, 1339–42 (Fed. Cir. 2008)). A petitioner must assert a right "inherently adverse" to the respondent's and show that the respondent is "likely to overburden or otherwise interfere with [the petitioner]'s right." Id. at 303 (emphasis added). Ultimately, "standing requires parties to have personal legal or equitable rights that are adverse to one another, with regard to an actual, not hypothetical, dispute, which is capable of judicial redress." Censabella v. Hillsborough County Atty., 171 N.H. 424, 427 (2018).

"A valid, enforceable contract requires offer, acceptance, consideration, and a meeting of the minds." Poland v. Twomey, 156 N.H. 412, 414 (2007). For a meeting of the minds to occur, the parties must have "the same understanding of the essential terms of the contract and manifest an intention to be bound by the contract." Id. A "[m]ere mental assent is not sufficient; a 'meeting of the minds' requires that the agreement be manifest." Durgin v. Pillsbury Lake Water Dist., 153 N.H. 818, 821 (2006) (citing Tsiatsios v. Tsiatsios, 140 N.H. 173, 178 (1995)). Absent ambiguity, "intent will be determined from the plain meaning of the language used in the contract." In re Liquidation of the Home Ins. Co., 166 N.H. 84, 88 (2014). Where, however, "the parties to the contract could reasonably disagree as to the meaning of that language," the language is deemed ambiguous, and the Court must determine, "under an objective standard, what the parties, as reasonable people, mutually understood the ambiguous language to mean." Found. for Seacoast Health v. Hosp. Corp. of Am., 165 N.H. 168, 172 (2013). The Court's objective analysis examines "the contract as a whole, the

circumstances surrounding execution and the object intended by the agreement, while keeping in mind the goal of giving effect to the intentions of the parties." See id.

Here, the Plaintiffs have the requisite standing to seek the declaratory relief requested in their motion for partial summary judgment. Whether "loss or damage" and "direct physical loss of or damage to property" are necessary for the Plaintiffs to recover under the Policies, and whether such loss or damage in fact occurred, are material to whether the Plaintiffs have a legal right to insurance coverage from the Defendants. Censabella, 171 N.H. at 427. The Plaintiffs' asserted right to coverage is "inherently adverse" to the Defendants' interest in their financial assets and regards an "actual, not hypothetical, dispute," as the Defendants claim the Policies do not entitle the Plaintiffs to any coverage at all. Id.; Carlson, 170 N.H. at 304. Finally, the issue raised by the Plaintiffs' motion for partial summary judgment concerns a pure question of law capable of judicial redress. Claremont, 143 N.H. at 158 (It is the duty of the judiciary "to interpret the constitution and say what the law is."); Duncan v. State, 166 N.H. 630, 643 (2014). The Court, therefore, proceeds to consider the merits of the parties' cross motions for summary judgment.

1. AXIS's Motion for Partial Summary Judgment

AXIS argues it is undisputed that SARS-CoV-2 is a "virus," and that any claim attributed to a virus is expressly excluded from coverage under the Pollution Exclusion. It cites to language from the Plaintiffs' Complaint explicitly stating the Plaintiffs seek coverage "in connection with losses stemming from" SARS-CoV-2. (AXIS's Mot. Partial Summ. J. at 3–6; Compl. ¶ 118.) The Plaintiffs reply (1) that pursuant to the Pollution Exclusion, the pollutant or contaminant giving rise to an excluded claim must "escape"

or be "release[d], discharge[d] . . . or disperse[d]," (2) that each of those verbs is a "term[] of art in environmental law pertaining to the improper disposal or containment of hazardous waste," and (3) that it is therefore ambiguous whether a respiratory virus like SARS-CoV-2, which is unrelated to hazardous waste disposal or containment, is covered by the Pollution Exclusion. (Pls.' Obj. Def. AXIS's Mot. Partial Summ. J.)

The Court finds the language of the Pollution Exclusion unambiguously excludes coverage for loss or damage caused or aggravated by the spread of SARS-CoV-2. The Plaintiffs seek coverage for losses resulting from the ongoing COVID-19 pandemic's various "impact[s]" to their properties. Pursuant to the "plain text" of the Pollution Exclusion, however, AXIS's policy "does not cover any . . . [l]oss or damage caused by, resulting from, contributed to, or made worse by" the "release, discharge, escape or dispersal of" a "virus." Pembroke v. Allenstown, 171 N.H. 65, 71 (2018). The Court is unconvinced by the Plaintiffs' arguments that SARS-CoV-2 is not, at the very least, "dispers[ed]" when an infected individual "coughs, sneezes, talks[,] [] sings," or engages in any of the behavior the CDC warns contributes to the spread of the virus. (See Aff. Gilinsky, Ex. 6.); see Webster's Third New International Dictionary 653 (unabridged ed. 2002) (emphasis added) (defining "to disperse" as "to cause to become spread widely."). Because COVID-19 is caused by infection with the SARS-CoV-2 virus, and "[b]ecause the plain text of" the Pollution Exclusion expressly excludes coverage of loss or damage resulting from the dispersal of a virus, AXIS is not liable under its policy for any loss or damage resulting from the spread of COVID-19. Allenstown, 171 N.H. at 71–72 (The Court cannot "change the words of a written contract" "merely because [its provisions] might operate harshly."). The Court accordingly GRANTS AXIS's motion for

partial summary judgment on the basis that AXIS's Pollution Exclusion textually bars coverage of the Plaintiffs' asserted claim.

2. Remaining Motions for Partial Summary Judgment

The Plaintiffs' motion for partial summary judgment seeks a declaratory ruling that: "Any requirement under the Policies of 'loss or damage' or 'direct physical loss of or damage to property' is met where property is impacted by the coronavirus." (Pl.'s Mot. Partial Summ. J. at 2.) In addition, the Plaintiffs move for summary judgment on their motion to strike the following affirmative defenses: (1) Mitsui's second affirmative defense, (2) Starr and Lloyd's joint second affirmative defense, (3) Everest's third, sixth, ninth, and tenth affirmative defenses, and (4) Scottsdale's fourth affirmative defense. Each of the challenged defenses concerns the Plaintiffs' alleged failure to sufficiently establish "loss or damage" to property. (See Mitsui's Answer to Compl. at 27; Starr's and Lloyd's Answer to Compl. and Demand Tr. Jury at 32; Everest's Answer to Compl. at. 24–26; and Scottsdale's Answer and Demand Tr. Jury at 17.)

In support of their requests, the Plaintiffs argue the Policies' references to "loss or damage" or "direct physical loss of or damage to property" are ambiguous, so they must be construed in favor of the insured. (Pl.'s Mot. Partial Summ. J. at 11–12.) Moreover, they contend the New Hampshire Supreme Court has interpreted "physical loss" not to require structural damage but only a showing of a "distinct and demonstrable alteration of the insured property," and add that property contaminated with SARS-CoV-2 is both "distinct" from unaffected property and "demonstrabl[y]" so. (Id. at 12–15 (citing Mellin v. N. Sec. Ins. Co., Inc., 167 N.H. 544, 550 (2015)).)

The Defendants reply that impacts to the Hotels' operations from COVID-19 do

not trigger any provision of the policy without a showing of direct physical loss of or damage to property. (Defs.' Cross-Mot. Partial Summ. J., at 10–11, 21–31.) They agree the standard applicable for determining the existence of "direct physical loss" under a property policy is that articulated in Mellin, 167 N.H. at 550, but argue that a "distinct and demonstrable alteration" must be readily perceptible by one of the five senses, must not be capable of remediation, and must result "in some dispossession." (Id. at 11–16.) They argue COVID-19 cannot be said to effect a distinct and demonstrable alteration because it cannot be perceived without sophisticated equipment, may be eliminated with proper sanitation measures, and does not by itself require the Hotels to "close properties." (Id.) Finally, the Defendants argue the Microorganism Exclusion "applies to COVID-19 because viruses are commonly understood to be 'microorganisms.'" (Defs.' Cross-Mot. Partial Summ. J., at 31–37.)

The Court rejects the arguments of the Defendants that "distinct and demonstrable" changes to property must be readily perceptible by one of the five senses, be incapable of remediation, or result in dispossession. In Mellin, the New Hampshire Supreme Court held that "physical loss," when used in an insurance agreement, includes "not only tangible changes to [an] insured property, but also changes . . . that exist in the absence of structural damage," provided only that such changes be both "distinct and demonstrable." 167 N.H. at 550. The Mellin appellants argued they "'experienced a direct physical loss' caused by 'toxic odors originating outside of [their insured property].'" 167 N.H. at 550. Areas in the vicinity of the insured property could theoretically have been cleaned such that the smell was no longer present, and a tenant could theoretically have learned to live with the smell. Yet, the

New Hampshire Supreme Court did not uphold the trial court's ruling that no physical loss occurred. That SARS-CoV-2 may, like cat urine, be removed from surfaces through cleaning and disinfection, and that certain guests might decide to stay at the Plaintiffs' Hotels despite the risks involved, does not prevent a conclusion that the properties have been changed in a "distinct and demonstrable" fashion. Like the cat urine in Mellin, SARS-CoV-2 did not originate in the Plaintiffs' properties and cannot be seen or touched. Although cat urine may be smelled while a virus may not, the presence of SARS-CoV-2 is detectable, was found by various government authorities to be widespread in the regions in which the Hotels were located, and has been "consistent[ly]" determined to "surviv[e] . . . on certain surfaces" of the kind available within and around the Hotels. (Aff. Gilinsky. Ex. 6 at 4.)

The Court concludes the Policies' use of the terms "loss or damage" and "direct physical loss of or damage to property" encompasses the kind of damage caused by the spread of SARS-CoV-2 to the Plaintiffs' properties. First, property contaminated with SARS-CoV-2 is "distinct" from uncontaminated property. Coming into contact with property exposed to the virus results in a risk of contracting a potentially deadly disease. During the April 16, 2021 hearing, counsel for the Defendants argued:

> If someone with COVID[-19] sneezes on my doorknob, I can walk over and open that door—the doorknob turns.

(Hr'g at 11:21:53–22:02 (emphasis added).) Yet, in the event an infected guest at one of the Hotels were to infect a doorknob, that the doorknob turns in no way lessens the now very different risk that it poses to human health. Moreover, whether the Plaintiffs' property is or has been infected is clearly "demonstrable" through a series of means, including laboratory testing. The Policies' references to "direct physical loss of or

damage to property" in Paragraph 28, therefore, do not prevent classification of loss resulting from SARS-CoV-2 contamination as a "peril insured against." (Policies ¶ 28.) Nor do the use of the words "loss" and "damage" in the CBI Coverage prevent recovery for any actual loss sustained due to the presence of SARS-CoV-2. Finally, because both ETEC Provisions expressly provide coverage for an actual "loss" sustained "irrespective of whether the property of the insured shall have been damaged," proof of physical damage to the Hotels, including of the kind that results from the presence of SARS-CoV-2 on hotel surfaces, is not required for recovery under either provision.

The Defendants' invocation of the Microorganism Exclusion does not change the Court's analysis. The Microorganism Exclusion is not applicable to SARS-CoV-2, because a virus is not unambiguously understood to be a "microorganism." On the contrary, the parties' briefing on the issue reveals a divergence of opinion[5] that "reasonably may be interpreted more than one way." High Country Assocs. v. New Hampshire Ins. Co., 139 N.H. 39, 42 (1994). The Court is consequently required to construe the exclusion in favor of the Plaintiffs, "and against the insurer[s]," and conclude the Microorganism Exclusion does not bar coverage of loss occasioned by a virus. Id.

Accordingly, the Court GRANTS the Plaintiffs' and DENIES the Defendants' motion for partial summary judgment. The Court is satisfied that any requirement under

[5] See, e.g., (Sigur Aff. Ex. 10 (defining microorganism as ""[a] microscopic organism, especially a bacterium, virus, or fungus."); Sigur Aff. Ex. 11 (describing "[t]he major groups of microorganisms, [to include] bacteria, uchaea, fungi (yeasts and molds), algae, protozoa, and viruses.")); but see (O'Neil Aff. Ex. 40 at 14 (Educational dictionary defining "microorganism" as "a living thing (as a bacterium) that can only be seen with a microscope)); Merriam-Webster Dictionary (Online), Usage Notes (2021) ("Viruses are not living organisms, bacteria are.") (available at https://www.merriam-webster.com/words-at-play/virus-vs-bacteria-difference); (O'Neil Aff. Ex. 40 at 11 (Children's textbook asserting, "The opinions of scientists differ as to whether viruses are alive or not.").

the Policies of "loss or damage" or "direct physical loss of or damage to property" is met where property is contaminated by SARS-CoV-2. Accordingly, each of the challenged defenses is STRICKEN.

IV. Conclusion

For the foregoing reasons, the Defendants' motions to strike are GRANTED in part and DENIED in part, AXIS's motion for partial summary judgment is GRANTED, the remaining Defendants' motion for summary judgment is DENIED, and the Plaintiffs' motion for partial summary judgment and to strike defenses is GRANTED.

SO ORDERED.

6/15/21
Date

John C. Kissinger, Jr.
Presiding Justice

Clerk's Notice of Decision
Document Sent to Parties
on 06/15/2021

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

KENNETH SEIFERT d/b/a THE HAIR PLACE and HARMAR BARBERS, INC., *individually and on behalf of all others similarly situated*,	Civil No. 20-1102 (JRT/DTS)
Plaintiffs,	**MEMORANDUM OPINION AND ORDER DENYING IN PART AND GRANTING IN PART DEFENDANT'S MOTION TO DISMISS**
v.	
IMT INSURANCE COMPANY,	
Defendant.	

Amanda M. Williams and Daniel E. Gustafson, **GUSTAFSON GLUEK PLLC,** 120 South Sixth Street, Suite 2600, Minneapolis, MN 55402; and Yvonne M. Flaherty, **LOCKRIDGE GRINDAL NAUEN PLLP,** 100 Washington Avenue South, Suite 2200, Minneapolis, MN 55401, for plaintiffs.

Shayne M. Hamann, **ARTHUR, CHAPMAN, KETTERING, SMETAK & PIKALA PA,** 81 South Ninth Street, Suite 500, Minneapolis, MN 55402, for defendant.

Plaintiff Kenneth Seifert filed this action to collect lost business income after executive orders mandated the closure of his hair salon and barbershop due to the rising number of COVID-19 cases in Minnesota, lost income alleged to be covered under the insurance policies he purchased from Defendant IMT Insurance Co. ("IMT"). IMT has filed a Motion to Dismiss, claiming that the policies do not cover Seifert's losses and that, even if they did, the virus exclusion contained in the policies would preclude recovery.

Because the business income provision of the policies insures against a direct physical loss of property, as when government mandates deprive a business owner of legally occupying or using the premises and property as intended, Seifert plausibly alleges that he is entitled to coverage. Additionally, because the virus exclusion is only triggered by a direct or indirect contamination of the covered premises, the exclusion has no effect with respect to Seifert's alleged losses. However, coverage under the civil authority provision of the policies is unavailable and the doctrine of regulatory estoppel is inapplicable. Thus, the Court will grant in part and deny in part IMT's Motion to Dismiss.

BACKGROUND

I. FACTUAL BACKGROUND

In an earlier decision, the Court laid out the relevant facts in detail. *See Seifert v. IMT Ins. Co.*, 495 F. Supp. 3d 747, 749–50 (D. Minn. 2020). As Seifert has not alleged any new facts in the Amended Complaint, the Court will briefly summarize them here.

Seifert's businesses, The Hair Place and Harmar Barbers, Inc., were ordered to close by two executive orders issued in response to the growing number of COVID-19 cases in Minnesota.[1] (Am. Compl. ¶¶ 1–2, 4, 27–28, Nov. 10, 2020, Docket No. 36.) As a

[1] Minn. Emergency Exec. Order No. 20-08 (Mar. 18, 2020), https://mn.gov/governor/assets/Filed%20EO-20-08_Clarifying%20Public%20Accommodations_tcm1055-423784.pdf; *see also* Minn. Emergency Exec. Order No. 20-04 (Mar. 16, 2020), https://mn.gov/governor/assets/2020_03_16_EO_20_04_Bars_Restaurants_tcm1055-423380.pdf.

result, Seifert contacted an authorized IMT agent to file a claim for lost business income. (*Id.* ¶ 35.) Seifert was advised that his losses were not covered. (*Id.* ¶¶ 5, 35.)

The policies at issue contain a business income provision, which protects against the actual loss of business income sustained due to a "suspension of your 'operations' during the 'period of restoration' . . . caused by direct physical loss of or damage to property . . . caused by or result[ing] from a Covered Cause of Loss." (Aff. of Shayne M. Hamman ¶ 3, Ex. A ("Policy") at 82, May 29, 2020, Docket No. 13-1.[2]) "Covered Cause[] of Loss" is defined as a "[d]irect physical loss unless the loss is excluded." (Policy at 78.) "Operations" is defined as "business activities occurring at the described premises." (*Id.* at 109.) And "period of restoration" is the period of time beginning "after the time of direct physical loss or damage" and ending on the date when "the property at the described premises should be repaired, rebuilt or replaced" or when "business is resumed at a new permanent location." (*Id.* at 109–10.)

The policies also contain a civil authority provision, which protects against the actual loss of business income when "a Covered Cause of Loss causes damage to property" other than the insured property and, as a consequence, "[a]ccess to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage" and the civil authority has acted either in response to dangerous physical

[2] The four policies issued to Seifert are identical. As such, the Court will simply cite to Exhibit A instead of all four exhibits.

conditions from the damage or to have unimpeded access to the damaged property. (*Id.* at 85.)

Finally, the policies contain a virus exclusion, which precludes coverage for loss or damage caused by a "virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease." (*Id.* at 96.) Such loss or damage, whether caused directly or indirectly, is excluded "regardless of any other cause or event that contributes concurrently or in any sequence to the loss . . . whether or not the loss event results in widespread damage or affects a substantial area." (*Id.* at 93.)

II. PROCEDURAL BACKGROUND

On May 6, 2020, Seifert filed a Complaint, alleging breach of contract and seeking declaratory and monetary relief. (Compl. ¶¶ 37–48, May 6, 2020, Docket No. 1.) In response, IMT filed a Motion to Dismiss pursuant to Rule of Civil Procedure 12(b)(6). (Mot. Dismiss, May 29, 2020, Docket No. 9.) The Court granted IMT's Motion without prejudice to allow Seifert an opportunity to amend the pleadings, especially as the law concerning business interruption coverage with respect to the COVID-19 pandemic was very much in development. *Seifert*, 495 F. Supp. 3d at 753; *id.* at 753 n.7.

On November 4, 2020, Seifert filed a Motion for Extension of Time,[3] (Mot. Extension, Nov. 4, 2020, Docket No. 29), and then an Amended Complaint on November

[3] Under Rule 6(b), "[w]hen an act may or must be done within a specified time, the court may, for good cause, extend the time . . . if a request is made, before the original time or its extension expires." Fed. R. Civ. P. 6(b)(1). "[M]otions to extend are to be

10, 2020, alleging three Counts: (1) Breach of Contract; (2) Declaration of Rights; and (3) Regulatory Estoppel, (Am. Compl. ¶¶ 57–76.) IMT has filed a second Motion to Dismiss pursuant to Rule 12(b)(6). (Mot. Dismiss, Nov. 24, 2020, Docket No. 37.)

DISCUSSION

I. STANDARD OF REVIEW

In reviewing a motion to dismiss under Rule 12(b)(6), the Court considers all facts alleged in the complaint as true to determine if the complaint states a "claim to relief that is plausible on its face." *Braden v. Wal-Mart Stores, Inc.,* 588 F.3d 585, 594 (8th Cir. 2009) (quoting *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009)). The Court construes the complaint in the light most favorable to the plaintiff, drawing all inferences in plaintiff's favor. *Ashley Cnty. v. Pfizer, Inc*., 552 F.3d 659, 665 (8th Cir. 2009).

Although the Court accepts the complaint's factual allegations as true, it is not bound to accept as true a legal conclusion couched as a factual allegation. *Bell Atl. Corp.*

liberally permitted . . . to secure the just, speedy, and inexpensive determination of every action." *Baden v. Craig-Hallum, Inc.*, 115 F.R.D. 582, 585 (D. Minn. 1987) (citation omitted); *see also* 4B Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1165 (4th ed.) (stating that a request will normally be granted absent bad faith or prejudice).

Here, Seifert proceeded to file the Amended Complaint late without having received permission first. However, the Court finds that there was good cause for the six-day enlargement and that IMT was not prejudiced by it. Further, the Court held a hearing and has fully considered the pleadings and briefs, and deciding a case on the merits is always preferable to dismissing an action based on a procedural technicality. As such, the Court will grant Seifert's Motion for Extension of Time.

v. Twombly, 550 U.S. 544, 555 (2007). Instead, "[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678.

II. STATE LAW

Under Minnesota law, the interpretation of an insurance contract is a question of law. *Horizon III Real Estate v. Hartford Fire Ins. Co.*, 186 F. Supp. 2d 1000, 1004 (D. Minn. 2002). "[A] court will compare the allegations in the complaint in the underlying action with the relevant language in the insurance policy." *Midwest Family Mut. Ins. Co. v. Justkyle, Inc.*, No. 17-1632, 2018 WL 3475486, at *5 (D. Minn. July 19, 2018) (quoting *Meadowbrook, Inc. v. Tower Ins. Co.*, 559 N.W.2d 411, 415 (Minn. 1997)). "While the insured bears the initial burden of demonstrating coverage, the insurer carries the burden of establishing the applicability of exclusions." *Id.* at *6 (quoting *Travelers Indem. Co. v. Bloomington Steel & Supply Co.*, 718 N.W.2d 888, 894 (Minn. 2006)).

III. ANALYSIS

A. Coverage

The Amended Complaint presents a more nuanced theory concerning the key policy language in dispute, "direct physical loss of or damage to property." Because

Seifert does not allege any damage to his properties, only the terms "direct physical loss of" are relevant.[4]

The Court interpreted this language before when granting IMT's motion to dismiss the Complaint; but, when doing so, the Court relied on Minnesota and Eighth Circuit cases that grappled with slightly different language: "direct physical loss **to** property." *See Source Food Tech., Inc. v. U.S. Fid. & Guar. Co.*, 465 F.3d 834, 835–36 (8th Cir. 2006); *Gen. Mills, Inc. v. Gold Medal Ins. Co.*, 622 N.W.2d 147, 151 (Minn. Ct. App. 2001); *Sentinel Mgmt. Co. v. New Hampshire Ins. Co.*, 563 N.W.2d 296, 297 (Minn. Ct. App. 1997); *see also Pentair, Inc. v. Am. Guarantee & Liab. Ins. Co.,* 400 F.3d 613, 614, 616 (8th Cir. 2005) (reading a policy as if it said "direct physical loss to" instead of "direct physical loss of"). As Seifert correctly notes, because of the disjunctive separating "of" and "to," these words must mean different things. Thus, the more precise question considered now is whether "of" makes a difference when assessing the plausibility of Seifert's claims.

As the policies do not define what "direct physical loss of" means, the Court will give the words their plain and ordinary meanings. *See, e.g.*, *Farm Bureau Mut. Ins. Co. v. Earthsoils, Inc.*, 812 N.W.2d 873, 876 (Minn. Ct. App. 2012). "Direct" means "stemming

[4] Seifert does not plead any facts demonstrating that any nearby properties were damaged either. Because only damage triggers civil authority coverage, the Court will grant IMT's Motion to Dismiss with respect to Counts I and II as they relate to the civil authority provision.

immediately from a source."[5] "Physical" is "having material existence[;] perceptible especially through the senses and subject to the laws of nature."[6] These two words modify "loss," which means "destruction" or "deprivation."[7] As such, the policies insure against an immediate and materially perceptible destruction or deprivation of property. However, to give the full phrase meaning, there is also the word "of" to consider.

As courts have stated when considering similar business interruption claims, "to" and "of" are not interchangeable; that is, they mean distinctly different things. *See, e.g.*, *Seoul Taco Holdings, LLC v. Cincinnati Ins. Co.*, No. 20-1249, 2021 WL 1889866, at *6 (E.D. Mo. May 11, 2021); *T & E Chicago LLC v. Cincinnati Ins. Co.*, 20-4001, 2020 WL 6801845, at *5 (N.D. Ill. Nov. 19, 2020); *see also Source Food*, 465 F.3d at 838 ("[T]he policy's use of the word 'to' in the policy language 'direct physical loss *to* property' is significant. [Plaintiff's] argument might be stronger if the policy's language included the word 'of' rather than 'to,' as in 'direct physical loss *of* property[.]'").

"To" is a preposition indicating an action toward a thing reached, or contact.[8] "Of," on the other hand, is a preposition indicating "belonging or a possessive

[5] Merriam-Webster, https://www.merriam-webster.com/dictionary/direct (last visited May 21, 2021).

[6] Merriam-Webster, https://www.merriam-webster.com/dictionary/physical (last visited May 21, 2021).

[7] Merriam-Webster, https://www.merriam-webster.com/dictionary/loss (last visited May 21, 2021).

[8] Merriam-Webster, https://www.merriam-webster.com/dictionary/to (last visited May 21, 2021).

relationship,"[9] with "possessive" meaning "manifesting possession," or occupying and controlling property.[10] Thus, "direct physical loss to" involves a force acting toward and reaching property, a contact that leads to an immediate and materially perceptible destruction or deprivation of the property itself. *See, e.g.*, *Promotional Headwear Int'l v. Cincinnati Ins. Co.*, No. 20-2211, 2020 WL 7078735, at *7 (D. Kan. Dec. 3, 2020). "Direct physical loss of," however, is a severing of an owner's possession of property, one which causes an immediate and materially perceptible inability to occupy and control property as intended.

It is undisputed that the executive orders had the effect of depriving business owners of the ability to occupy and control business properties as intended. But a question remains: What type of deprivation is required to trigger coverage? Neither the Eighth Circuit nor Minnesota courts have answered this directly, as they have not interpreted the exact phrase, "direct physical loss of."[11] However, when interpreting "direct physical loss to" property, Minnesota courts have concluded that "direct physical

[9] Merriam-Webster, https://www.merriam-webster.com/dictionary/of (last visited May 21, 2021).

[10] Merriam-Webster, https://www.merriam-webster.com/dictionary/possession (last visited May 21, 2021); Merriam-Webster, https://www.merriam-webster.com/dictionary/possessive (last visited May 21, 2021).

[11] As mentioned above, the *Pentair* court read the "loss of" policy language as if it actually read "loss to." 400 F.3d at 614, 616. Because the significance of "of" was not questioned or established in *Pentair*, and because the *Source Food* court then explicitly stated that the analysis would likely be different if a policy uses "of" rather than "to," 465 F.3d at 838, the Court finds that the Eighth Circuit has not yet established binding precedent with respect to the precise question considered here.

loss" can exist without structural damage or tangible injury to property; "it is sufficient to show that the insured property is injured in some way." *General Mills*, 622 N.W.2d at 152 (citing *Sentinel*, 563 N.W.2d at 300 (intangible contamination of property)). As such, a qualifying loss may arise from "an impairment of function and value" to property, as when legal regulations stymie a business's ability to lawfully provide its products. *Id.* (citing *Marshall Produce Co. v. St. Paul Fire & Marine Ins. Co.*, 98 N.W.2d 280, 293 (Minn. 1959)). Additionally, a qualifying loss may arise if a building's function is seriously impaired and the property is rendered useless. *Sentinel*, 563 N.W.2d at 300.

Here, with "of" instead of "to" in play, the situation is not completely analogous. However, the Court concludes that Minnesota courts would extend the same reasoning when interpreting "direct physical loss of" and only require some injury to an owner's ability to occupy and control property as intended, not an absolute or permanent dispossession.[12] The Court further concludes that if a government deems a property dangerous to use and an owner is thus unable to lawfully realize the business property's physical space to provide services, Minnesota courts would find this to be a cognizable impairment of function and value. In sum, the Court concludes that a plaintiff would

[12] When the Minnesota Supreme Court has not decided an issue, federal courts must predict how it would resolve the issue, and while intermediate appeals court decisions are not binding, they are not to be disregarded unless the Court is convinced that the Minnesota Supreme Court would decide otherwise. *Harleysville Ins. Co. v. Physical Distribution Servs., Inc.*, 716 F.3d 451, 457 (8th Cir. 2013). The Court is not convinced of such here.

plausibly demonstrate a direct physical loss of property by alleging that executive orders forced a business to close because the property was deemed dangerous to use and its owner was thereby deprived of lawfully occupying and controlling the premises to provide services within it. *Accord In re Soc'y Ins. Co. COVID-19 Bus. Interruption Prot. Ins. Litig.*, No. 20-2005, 2021 WL 679109, at *8–10 (N.D. Ill. Feb. 22, 2021) ("Plaintiffs did suffer a direct 'physical' loss of property on their premises . . . the pandemic-caused shutdown orders do impose a *physical* limit . . . Plaintiffs cannot use (or cannot fully use) the physical space.").[13]

Seifert alleges just this, for he asserts that his businesses were forced to close by executive orders issued in response to the pandemic and, as a result, the businesses suffered an impairment of function and value, as he was deprived of occupying and controlling them to provide hair salon and barbershop services. Thus, the Court finds that Seifert plausibly alleges direct physical losses of his property. Additionally, the business activities that were suspended while the executive orders were in effect certainly qualify

[13] Courts have come to the same conclusion when interpreting policy language that involves "direct physical loss to." *See Elegant Massage, LLC v. State Farm Mut. Auto. Ins. Co.*, No. 20-265, 2020 WL 7249624, at *10 (E.D. Va. Dec. 9, 2020) ("[I]t is plausible that Plaintiff's experienced a direct physical loss when the property was deemed uninhabitable, inaccessible, and dangerous to use by the Executive Orders[.]"); *Studio 417, Inc. v. Cincinnati Ins. Co.*, 478 F. Supp. 3d 794, 800–01 (W.D. Mo. 2020) ("[A] physical loss may occur when the property is uninhabitable or unusable for its intended purpose.").

as "operations" under the policies.[14] As IMT has allegedly refused to cover these losses, the Court will deny IMT's Motion to Dismiss with respect to Counts I and II as they relate to the business income provision.

B. Exclusions

The virus exclusion precludes coverage for any loss or damage caused indirectly or directly by any virus that induces or is capable of inducing physical distress, illness or disease.[15] Furthermore, the virus exclusion is an anti-concurrent loss provision, which "exclude[s] coverage where any portion of the loss was caused or contributed to by an excluded loss." *Ken Johnson Props., LLC v. Harleysville Worcester Summary Ins. Co.*, No. 12-1582, 2013 WL 5487444, at *12 (D. Minn. Sept. 30, 2013).

[14] With respect to the "period of restoration," the Court notes that this period ends when "the property at the described premises should [have been] repaired, rebuilt or replaced." (Policy at 110). "Replace" means, as relevant here, "to restore to a former place or position," which would include restoring an owner's full manifestation of possession over property to occupy and control it as intended. Merriam-Webster, https://www.merriam-webster.com/dictionary/replace (last visited May 21, 2021),

[15] In addition to the virus exclusion, IMT argues that the ordinance or law exclusion applies. However, IMT offers nothing to demonstrate that the executive orders specifically closing barbershops and hair salons had the force of law. Moreover, this exclusion likely only applies to ordinances or laws regulating the construction or repair of a property, or land use. *See, e.g.*, *Frank Van's Auto Tag, LLC v. Selective Ins. Co. of the Southeast.*, No. 20-2740, 2021 WL 289547, at *8–9 (E.D. Pa. Jan. 28, 2021). As such, IMT has not meet its burden to demonstrate that the ordinance or law exclusion applies.

IMT also argues that the consequential losses exclusion would preclude coverage resulting from any loss of use. However, as the policies specifically insure against lost business income, interpreting "loss of use" to sweep in such income would undermine the central purpose of the policy provisions in dispute. As such, the Court finds this argument to be unavailing.

Seifert alleges that his businesses would be open, "if not for the Governmental Closure Orders." (Am. Compl. ¶ 33.) Thus, he alleges a single cause of loss: the executive orders. Of course, the orders were issued in response to the growing cases of COVID-19 in Minnesota, which in turn were a result of the coronavirus spreading within the community. Yet, as the Amended Complaint demonstrates, when the insurance industry proposed this exclusion to state regulators, they were intent on excluding coverage "involving contamination by disease-causing agents" at the property.[16] (Am. Compl. ¶ 51).

The Court concludes that the policies' virus exclusion is intended to preclude coverage only when there has been some direct or indirect contamination of the business premises, not whenever a virus is circulating in a community and a government acts to curb its spread by means of executive orders of general applicability. *Accord Henderson Rd. Rest. Sys., Inc. v. Zurich Am. Ins. Co.*, No. 20-1239, 2021 WL 168422, at *14–15 (N.D. Ohio Jan. 19, 2021); *see also Urogynecology Specialist of Fla. LLC v. Sentinel Ins. Co., Ltd.*, 489 F. Supp. 3d 1297, 1302–03 (M.D. Fla. 2020) (noting that no prior cases considering

[16] Seifert also alleges that IMT should be estopped from invoking the virus exclusion because the industry made misrepresentations when they proposed it. However, the Minnesota Supreme Court has rejected the regulatory estoppel doctrine when an exclusion is clear and unambiguous, as it is here. *Anderson v. Minnesota Ins. Guar. Ass'n*, 534 N.W.2d 706, 709 (Minn. 1995); *see also SnyderGeneral Corp. v. Great Am. Ins. Co.*, 928 F. Supp. 674, 682 (N.D. Tex. 1996), *aff'd sub nom. SnyderGeneral Corp. v. Cont'l Ins. Co.*, 133 F.3d 373 (5th Cir. 1998). As such, the Court will grant IMT's Motion to Dismiss with respect to Count III.

virus exclusions considered "the unique circumstances of the effect COVID-19 has had on our society—a distinction this Court considers significant"). Extending the causal chain beyond situations involving a direct or indirect contamination of business premises would extend the chain too far; in this case, it would transform a virus exclusion into a government-order or pandemic exclusion, which is not what the parties intended. As such, the operative question is whether Seifert's losses involved a viral contamination at the covered premises.

No. Seifert's business income losses are all alleged to have been caused by executive orders, ones which shuttered every barbershop and hair salon irrespective of whether they had been contaminated. Moreover, Seifert does not allege that his businesses suffered any actual contamination or that staff or patrons either contracted or circulated the coronavirus. The Court therefore finds that Seifert's losses, as alleged, are not precluded by the virus exclusion and will deny IMT's Motion to Dismiss in this regard.

ORDER

Based on the foregoing, and all the files, records, and proceedings herein, **IT IS HEREBY ORDERED** that:

1. Seifert's Motion for Extension of Time [Docket No. 29] is **GRANTED**;
2. IMT's Motion to Dismiss [Docket No. 37] is **DENIED in part and GRANTED in part** as follows:

a. The Motion is denied with respect to Counts I and II as they relate to coverage under the business income provision;

b. The Motion is granted with respect to Counts I and II as they relate to coverage under the civil authority provision; and

c. The Motion is granted with respect to Count III.

DATED: June 2, 2021
at Minneapolis, Minnesota.

JOHN R. TUNHEIM
Chief Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

SERENDIPITOUS, LLC/MELT; MELT FOOD TRUCK, LLC d/b/a MELT; and FANCY'S ON FIFTH, LLC d/b/a FANCY'S ON FIFTH,	}	
Plaintiffs,	}	**Case No.: 2:20-cv-00873-MHH**
v.	}	
THE CINCINNATI INSURANCE COMPANY,	}	
Defendant.	}	

MEMORANDUM OPINION AND ORDER

"Serendipitous" means to unexpectedly come upon something good, beneficial, or favorable. *See Serendipitous*, *Dictionary.com*, http://dictionary.reference.com/browse/serendipitous (last visited May 6, 2021). The COVID-19 pandemic was unexpected, but it was not good or beneficial or favorable for restaurants like Serendipitous, Melt Food Truck, and Fancy's on Fifth, LLC—the plaintiffs in this case. The restaurants seek insurance coverage from defendant Cincinnati Insurance Company for losses the restaurants attribute to the pandemic. Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, Cincinnati Insurance has asked the Court to dismiss this coverage action. (Doc. 21).

For the reasons stated below, the Court denies Cincinnati Insurance's motion to dismiss.

MOTION TO DISMISS STANDARD

Rule 12(b)(6) enables a defendant to move to dismiss a complaint for "failure to state a claim upon which relief can be granted." FED. R. CIV. P. 12(b)(6). Pursuant to Rule 8(a)(2), a complaint must contain, "a short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8(a)(2). Generally, to survive a Rule 12(b)(6) motion to dismiss and meet the requirements of FED. R. CIV. P. 8(a)(2), "a complaint does not need detailed factual allegations, but the allegations must be enough to raise a right to relief above the speculative level." *Speaker v. U.S. Dep't of Health & Human Servs. Centers for Disease Control & Prevention*, 623 F.3d 1371, 1380 (11th Cir. 2010) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 570 (2007)). "Specific facts are not necessary; the statement need only 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (quoting *Twombly*, 550 U.S. at 555).

In deciding a Rule 12(b)(6) motion to dismiss, a district court must view the allegations in a complaint in the light most favorable to the non-moving party. *Sun Life Assurance Co. v. Imperial Premium Fin., LLC*, 904 F.3d 1197, 1207 (11th Cir. 2018). A district court must accept well-pleaded facts as true. *Little v. CRSA*, 744

Fed. Appx. 679, 681 (11th Cir. 2018). Therefore, in this opinion, the Court construes all factual allegations and the reasonable inferences from those allegations in the light most favorable to the restaurants, the non-movants.

FACTUAL ALLEGATIONS

The restaurants operate in Jefferson County, Alabama. (Doc. 15, p. 1, ¶ 1). The Cincinnati Insurance Company sold the restaurants commercial property insurance Policy No. ECP0400693, which insured the restaurants from all risks not excluded by the policy. (Doc. 15, p. 4, ¶ 21).[1] The plaintiffs allege that the policy covers loss from physical damage, including coverage for "loss of use of property, as well as, business interruption, extra expense, and civil authority coverages, among other coverages." (Doc. 15, p. 4, ¶ 22). The policy does not include a "virus exclusion" as commercial property insurance policies sometimes do. (Doc. 15, p. 4, ¶ 23).

The policy was in effect from March 11, 2020 through June 19, 2020, the date on which the plaintiffs filed this action against Cincinnati Insurance. (Doc. 15, p. 4, ¶ 24). On March 11, 2020, the World Health Organization declared COVID-19 a

[1] The policy is attached to Cincinnati Insurance's motion to dismiss. The Court may consider the terms of the policy without converting Cincinnati Insurance's motion to dismiss into a summary judgment motion because the Court may review documents attached to a motion to dismiss if the documents are central to the plaintiff's claim, and the parties do not dispute the authenticity of the documents. *See Horsley v. Feldt*, 304 F.3d 1125, 1134 (11th Cir. 2002). The restaurants' policy is central to the complaint, and no party disputes the authenticity of the document.

global pandemic. (Doc. 15, p. 3, ¶ 13). By July of 2020, millions of Americans had been infected with the disease, which is spread when coughing, sneezing, talking, or laughing causes contagious droplets to deposit in the air and on surfaces. (Doc. 15, pp. 3–4, ¶¶ 15, 17, 18). In response to the spread of COVID-19, the State of Alabama, Jefferson County, and the City of Birmingham issued orders that temporarily closed many businesses or required them operate under significant restraints. (Doc. 15, p. 5, ¶ 30). Pursuant to these orders, for months, the restaurants could provide only "curbside" pick up. Later, the restaurants were able to seat customers but at a restricted capacity. (Doc. 15, p. 6, ¶¶ 32–33).

COVID-19 and the government orders concerning the pandemic caused the restaurants to suffer business income losses, so the restaurants submitted a claim to Cincinnati Insurance Company for coverage for their losses under their commercial property insurance policy. (Doc. 15, p. 6, ¶¶ 34–35). Cincinnati Insurance denied the claim, stating that business disruption caused by COVID-19 was not covered by the policy. (Doc. 15, p. 6, ¶¶ 36–38). The restaurants then filed this lawsuit against Cincinnati Insurance. (Doc. 1; Doc. 15).

ANALYSIS

Cincinnati Insurance argues that Court should dismiss this action because the restaurants have not adequately pleaded a direct physical loss under the terms of the policy and because the restaurants have not adequately pleaded that they are entitled

to coverage under the policy's civil authority provision. (Doc. 22). Alabama law governs these arguments. *Sphinx Int'l, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 412 F.3d 1224, 1227 (11th Cir. 2005).

Under Alabama law, the rules that govern the interpretation of an insurance policy are well-settled. A court must decide whether the policy, as it relates to the coverage at issue, is ambiguous or unambiguous. *Crook v. Allstate Indemnity Co.*, ___ So. 3d ___, 2020 WL 3478552, *3 (Ala. June 26, 2020) (quoting *State Farm Fire & Cas. v. Slade*, 747 So. 2d 293, 308 (Ala. 1999)). To make this determination,

> a court gives words used in the policy their common, everyday meaning and interprets them as a reasonable person in the insured's position would have understood them. *Western World Ins. Co. v. City of Tuscumbia*, 612 So. 2d 1159 (Ala. 1992); *St. Paul Fire & Marine Ins. Co. v. Edge Mem'l Hosp.*, 584 So. 2d 1316 (Ala. 1991).

St. Paul Fire & Marine Ins. Co. v. Britt, 203 So. 3d 804, 811 (Ala. 2016) (quoting *Travelers Cas. & Sur. Co. v. Alabama Gas Corp.*, 117 So. 2d 695, 699–700 (Ala. 2012) (internal marks omitted). "In determining the common meaning of the terms of an insurance policy," a court may "look[] to dictionary definitions." *B.D.B. v. State Farm Mut. Auto. Ins. Co.*, 814 So. 2d 877, 880 (Ala. Civ. App. 2001). A court also may consider "the writing as a whole and . . . its nature, purpose, and subject matter." *Blue Cross & Blue Shield of Alabama v. Beck*, 523 So. 2d 121, 124 (Ala. Civ. App. 1988); *see also Twin City Fire Ins. Co. v. Alfa Mut. Ins. Co.*, 817 So. 2d 687, 691–92 (Ala. 2001) ("'[A] court must examine more than an isolated sentence

or term; it must read each phrase in the context of all other provisions.'") (quoting *Attorneys Ins. Mut. Of Alabama, Inc. v. Smith, Blocker & Lowther, P.C.*, 703 So. 2d 866, 870 (Ala. 1996)).

"If, under this standard," the words in a policy "are reasonably certain in their meaning," then the policy provisions are not ambiguous as a matter of law. *Britt*, 203 So. 3d at 811. "Only in cases of genuine ambiguity or inconsistency is it proper to resort to rules of construction." *Britt*, 203 So. 3d at 811. If a policy is ambiguous, then the policy must be "'construed liberally in respect to persons insured and strictly with respect to the insurer.'" *Travelers Cas. & Sur. Co.*, 117 So. 3d at 700 (quoting *Crossett v. St. Louis Fire & Marine Ins. Co.*, 269 So. 2d 869, 873 (Ala. 1972)).

Here, the meaning of the word "loss" in the "Building and Personal Property Coverage" portion of the restaurants' policy is at issue. To help us determine whether the word "loss" is ambiguous under the policy's property coverage provisions, we first examine that coverage as a whole to help us identify the context in which the term "loss" appears.

The "Building and Personal Property Coverage" portion of the restaurants' policy covers physical property like buildings, permanent machinery and equipment, furniture, outdoor signs, and "business personal property" like merchandise and

supplies. (Doc. 22-1, p. 24).[2] The "Building and Personal Property Coverage" also provides "Additional Coverages" for expenses associated with physical property loss like debris removal and fire department service charges, (Doc. 22-1, p. 34), and "Coverage Extensions" for business losses related to a physical property loss such as lost payments attributable to damaged or lost accounts receivable records and lost business income and extra expenses incurred while damaged or lost physical property is restored. (Doc. 22-1, pp. 37, 39).

The latter coverage extension for "Business Income and Extra Expense" is the policy provision under which the restaurants seek coverage for their loss of income during the pandemic. (Doc. 30, p. 4). The Business Income coverage extension provides:

> 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 "loss" to property at a "premises" caused by or resulting from any Covered Cause of Loss.

(Doc. 22-1, p. 39). The policy states that "words and phrases that appear in quotation marks have special meaning," and the policy directs the insured to the

[2] A detailed list of the physical property that the restaurants' policy covers appears at Doc. 22-1, pp. 24–25. A detailed list of physical property not covered by the policy appears at Doc. 22-1, pp. 25–26. Covered business personal property includes "Stock," and the definition of "Stock" appears at Doc. 22-1, p. 61 and includes merchandise and supplies.

DEFINITIONS section of the policy to find the special meaning of words and phrases in quotation marks. (Doc. 22-1, p. 24).

In the DEFINITIONS section of the "Building and Personal Property Coverage" portion of the restaurants' policy, "Business Income" means "Net Income (net profit or loss before taxes) that would have been earned or incurred." (Doc. 22-1, p. 59). "'Suspension' means: **a.** The slowdown or cessation of your business activities; and **b.** That a part or all of the 'premises' is rendered untenantable." (Doc. 22-1, p. 61). "'Operations' means [] Your business activities occurring at the 'premises' . . ." (Doc. 22-1, p. 59). The phrase "Period of Restoration" means: "the period of time that **a.** Begins at the time of the direct 'loss'. **b.** Ends on the earlier of: **(1)** The date when the property at the 'premises' should be repaired, rebuilt or replaced with reasonable speed or similar quality; or **(2)** The date when business is resumed at a new permanent location." (Doc. 22-1, pp. 59–60). But, a "Period of restoration does not include any increased period required due to the enforcement or compliance with any ordinance or law that **(1)** Regulates the construction, use, or repair, or that requires the tearing down of any property; or **(2)** Requires any insured or others to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to or assess the effects of 'pollutants.'" (Doc. 22-1, p. 60). "'Loss' means accidental physical loss or accidental physical damage." (Doc. 22-1, p. 59).

In their complaint, the restaurants allege facts that, if proven, would allow the restaurants to establish that they lost income that they would have earned had they not had to slow down and, at times, cease activity at their restaurant locations. The plaintiffs assert that the COVID-19 pandemic caused them to have to close their restaurants and operate with limited seating when the restaurants were open. (Doc. 15, p. 5, ¶ 27). The restaurants allege that they "have been closed or limited in their operations since March 2020 due to physical loss or damage caused by COVID-19" and due to orders from the State of Alabama, Jefferson County, and the City of Birmingham. (Doc. 15, p. 5, ¶¶ 29–30). By way of example, the restaurants allege that in March and April of 2020, they were "open only for 'curbside' pick up." (Doc. 15, p. 5, ¶ 31).

Though the restaurants likely can prove that they lost income because they had to suspend their operations during the pandemic, the restaurants may recover under the "Business Income and Extra Expense" coverage extension in their policy only if the suspension of their restaurant activities was "caused by direct 'loss' to property." Cincinnati Insurance argues that the critical policy terms concerning "loss" are unambiguous and that the restaurants have not identified "***physical***" loss or damage to property needed to trigger coverage. (Doc. 22, p. 7) (emphasis in Cincinnati Insurance's brief). The restaurants contend the policy's definition of "loss" is ambiguous and that because the "loss" or "damage" requirements in the

definition of "Loss" are disjunctive, the words "loss" and "damage" must have distinct meaning. (Doc. 30).

Again, the policy provides coverage for "'direct 'loss' to Covered Property at the 'premises' caused by or resulting from any Covered Cause of Loss," meaning direct "accidental physical loss or accidental physical damage." (Doc. 22-1, pp. 59, 112). The restaurants correctly point out that the alternative phrases "accidental physical loss" or "accidental physical damage" in the policy's definition of "Loss" indicates that each phrase has a separate meaning. Were that not so, one of the phrases superfluous. The distinction indicates that loss means something other than damage.

To help clarify the meaning of the word "loss," we can look to the dictionary. *B.D.B.*, 814 So. 2d at 880 (using the Merriam-Webster's Collegiate Dictionary definition of "primarily"). Merriam-Webster defines "loss" as, among other things, "the act of losing possession," "the harm or privation resulting from loss or separation," and "the amount of an insured's financial detriment by death or damage that the insurer is liable for." https://www.merriam-webster.com/dictionary/loss (last visited May 6, 2021). Excluding, then, the concept of damage from the definition of "loss," loss means the restaurants' separation from business property that is physically intact.

It easy to identify examples of distinct "accidental physical loss" and "accidental physical damage." The policy's definition of "Specified causes of loss" provides a good place to begin. The policy includes in the definition of "Specified causes of loss" "windstorm." (Doc. 22-1, p. 60). Windstorms and tornadoes are all too familiar to Alabama residents. A strong wind can lift the roof from a building or tear apart an exterior wall of a building. Either constitutes physical damage to the building. That same wind can carry away indoor and outdoor furniture, merchandise, and outdoor signs, scattering the property miles from the insured building without necessarily damaging the property. The insured suffers a physical loss of that furniture and merchandise. Similarly, the policy includes in the definition of "Specified causes of loss" "riot or civil commotion." (Doc. 22-1, p. 60). Much like a windstorm, rioters can break down a door, and they can carry out of a building furniture and merchandise. The former is physical damage; the latter is physical loss in that the insured has lost possession of and been deprived of insured property. When property is damaged so badly that it cannot be used again, it typically is considered a loss. *See Britt*, 203 So. 3d at 806–08 (claim for policy proceeds after insured sailboat sank was claim for "accidental direct physical loss" of the insured property).

The restaurants have alleged facts that, if proven, constitute actual physical loss of their buildings and furniture during the pandemic. The restaurants allege that

they have had to close completely to disinfect their premises when an employee tests positive for the COVID virus. (Doc. 15, pp. 7, 9). The restaurants assert that between June 2020 and July 13, 2020, the day the restaurants filed their second amended complaint, seven employees tested positive for COVID-19. The restaurants allege that civil authorities determined that restaurants "were so likely to have a presence of the COVID-19 virus that their operations needed to be restricted to prevent further spread of the virus," such that, even when they have been open during the pandemic, the restaurants have not been able to use their tables for dining. (Doc. 15, pp. 5–6, ¶¶ 27–31). In other words, the restaurants have alleged that they have been physically deprived of their property because of the COVID-19 virus. Civil orders restricting the restaurants' access to their property because of the widespread presence of a rapidly spreading, invisible, lethal virus that survives on surfaces such as restaurant tables are not different in any meaningful way from civil orders that restrict access to a restaurant after fire destroys part of the building. (Doc. 15, pp. 3–4, ¶¶ 14–19; *see* Doc. 22-1, p. 40). Granted, a restaurant could state with certainty that the COVID-19 virus was physically present in its building only when an occupant became physically ill on the premises and tested positive for the virus shortly afterwards, but the restaurants allege that civil authorities limited access to the restaurants because the virus was so prevalent in the community and that the restaurants had to close completely when an employee contracted the virus, whether

or not the employee contracted COVID-19 at the restaurant, to disinfect the premises because the potential for spread of the "highly contagious" virus made the premises "dangerous and unusable" until the premises were disinfected. (Doc. 15, pp. 4, 9).[3]

The fact that the COVID-19 virus has not physically altered the restaurants' property does not mean that coverage necessarily is not available for impacts to the property that are invisible to the naked eye. The policy language indicates that the insurer understands that an insured may suffer physical loss without physical alteration of property because the policy excludes from coverage some expenses incurred because of invisible substances like vapor and fumes. (*See*, *e.g.*, Doc. 22-1, pp. 29, 31, 37).[4] Cincinnati could have excluded invisible substances like viruses but did not. (Doc. 15, p. 4, ¶ 23).

The Court has found no binding authority that addresses this unusual situation. Cincinnati Insurance relies on *Mama Jo's Inc. v. Sparta Ins. Co.*, 823 Fed. Appx. 868 (11th Cir. 2020), a recent non-binding opinion from the Eleventh Circuit Court of Appeals. In *Mama Jo's*, a restaurant sought coverage under an "all risk" commercial insurance policy for expense the restaurant incurred for the removal of

[3] The periods of closure for disinfection seem to qualify as periods of restoration if repair is understood by its dictionary definition. *See* https://www.merriam-webster.com/dictionary/loss (last visited May 6, 2021) (stating that the verb "repair" means, among other things, "to restore to a sound or healthy state").

[4] Under the policy, vapor and fumes fall under the definition of "Pollutants." "Pollutants" include solid, liquid, gaseous, or thermal contaminants including vapor and fumes. (Doc. 22-1, p. 60).

"dust and debris generated by" nearby road construction and for lost income during the construction period. 873 Fed. Appx. at 871. Employees in the restaurant used "normal cleaning methods" to clear dust during the 18-month construction period. The restaurant lost income during the construction because, though the restaurant was open, "customer traffic decreased during the roadwork." 873 Fed. Appx. at 871. Applying Florida law, the Eleventh Circuit affirmed summary judgment for the insurer, finding that the restaurant had not established that the presence of dust and debris on its premises constituted direct physical loss or damage to the restaurant. With respect to the claim for cleaning expenses, the Eleventh Circuit stated that, "under Florida law, an item or structure that merely needs to be cleaned has not suffered a 'loss' which is both 'direct' and 'physical.'" 873 Fed. Appx. at 879. Under the terms of the all risk policy, the restaurant could not recover damages for lost income attributed to the nearby construction because the restaurant "did not put forward any Rule 56 evidence that it suffered a direct physical loss of or damage to its property during the policy period." 873 Fed. Appx. at 879.

Cincinnati Insurance argues that, like the dust in *Mama Jo's*, the presence of COVID-19 cannot be a direct physical loss because the COVID-19 virus can be cleaned from surfaces in the restaurant. Cincinnati Insurance states, "[t]he loss Plaintiffs allege is caused by the presence of the virus in our world, not by any

physical damage or effect on Plaintiffs' building or someone else's property." (Doc. 22, p. 19).

But the restaurants have alleged that they had to close entirely when employees tested positive for COVID-19. That distinguishes this case from *Mama Jo's*. And the highly contagious nature of COVID-19 caused civil authorities to temporarily limit capacity in restaurants to prevent the spread of the physical but invisible virus in restaurants. Cleaning was only one precaution for COVID-19; physical distancing was another, and that distancing, allegedly by civil order and not by choice, deprived the restaurants of the use of their property, i.e. their tables and seating, while the temporary orders were in place.

Mama Jo's, a summary judgment opinion, does not require dismissal of the complaint in this action. Ultimately, the restaurants may not prevail on their claims, but the Court does not find, based on Cincinnati Insurance's arguments concerning the definition of "Loss" in the restaurants' "Building and Personal Property Coverage," that dismissal under Rule 12(b)(6) is appropriate.[5]

[5] The Eleventh Circuit Court of Appeals has not issued a binding opinion concerning all risk coverage for COVID-19 business property losses. District courts have reached different conclusions regarding coverage largely based on the particular factual allegations and evidence in their respective cases. *Compare Southern Dental Birmingham LLC v. Cincinnati Insurance Co.*, Case No.: 2:20-cv-681-AMM, 2021 WL 1217327 (N.D. Ala. March 19, 2021), *with Hillcrest Optical, Inc. v. Continental Casualty Co.*, CIVIL ACTION NO. 1:20-CV-275-JB-B, 2020 WL 6163142 (S.D. Ala. Oc. 21, 2020).

CONCLUSION

For the reasons stated above, the Court denies Cincinnati Insurance's motion to dismiss. (Doc. 21).

DONE and **ORDERED** this May 6, 2021.

MADELINE HUGHES HAIKALA
UNITED STATES DISTRICT JUDGE