IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI

LINDENWOOD FEMALE COLLEGE d/b/a LINDENWOOD UNIVERSITY, individually and on behalf of all others similarly situated, Plaintiff, v. ZURICH AMERICAN INSURANCE COMPANY, Defendant.	Case No. 20-CV-01503-HEA

LINDENWOOD'S OPPOSITION TO ZURICH'S MOTION TO DISMISS

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INTRODUCTION

At bottom, Zurich's motion to dismiss presents two pivotal questions:

1. Has Lindenwood plausibly alleged a reasonable interpretation of its "All Risks" property insurance Policy demonstrating that coverage exists for economic losses caused by one or more of the following alleged Covered Causes of Loss: (a) the actual presence of the Coronavirus and the COVID-19 disease on Lindenwood's property and the surrounding property of others; (b) the continuous imminent threat and inherent risk of exposure from the Coronavirus and the COVID-19 disease to Lindenwood's property and the surrounding property of others; (c) the ongoing COVID-19 global pandemic; and/or (d) orders issued by national, state and local governments and agencies in response thereto?

2. Has Zurich proven that the Policy's exclusion for "Contamination" clearly and unambiguously eliminates any possibility of coverage for Lindenwood's claims?

With respect to the first question, Lindenwood has certainly alleged that its economic losses fall within the scope of Zurich's contractual promise to pay for any loss attributable to "direct physical loss of or damage to" property – an entirely undefined phrase in the Policy. This Court can dispose of Zurich's motion by simply applying the general consensus that has emerged in decisions reached under Missouri law (which the parties agree controls): that a policyholder adequately states a covered claim to recover economic losses by alleging a loss of use of its insured property caused by the actual presence of the Coronavirus on its property. At this juncture, the Court need delve no further into Lindenwood's claim because it has plainly stated a claim upon which relief can be granted for Zurich's breach of contract.

With respect to the second question, Zurich cannot meet its heavy burden to prove that the Policy's "Contamination" exclusion clearly and unambiguously eliminates any possibility of coverage for Lindenwood's claim. Application of Missouri's rules for interpreting insurance contracts compels the conclusion that Zurich's "Contamination" exclusion does not even include "virus" as an excluded cause of loss. Of particular importance here, Zurich's decision to alter this Policy's "Contamination" exclusion through an endorsement that expressly removes "virus" from its exclusionary scope demonstrates the reasonableness of interpreting this "All Risks" Policy to include "virus" (i.e., the Coronavirus) as a Covered Cause of Loss.

Thus, this Court should deny Zurich's motion to dismiss.

STANDARD OF REVIEW

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). On a motion to dismiss for failure to state a claim, the Court takes the plaintiff's allegations as true, draws reasonable inferences in the plaintiff's favor, and assesses whether the plaintiff has asserted a claim that has facial plausibility. *See, e.g.*, *Gallagher v. City of Clayton*, 699 F. 3d 1013, 1016 (8th Cir. 2012). No heightened pleading standard applies to an insurance coverage dispute, whether it be in the context of a COVID-19 coverage claim or otherwise.

SUMMARY STATEMENT OF LINDENWOOD'S ALLEGATIONS

Lindenwood's First Amended Complaint (FAC (Doc. 33)) spans 43 pages and includes 155 separately numbered paragraphs; filed with it is a copy of the Policy (Doc. 33-1). Lindenwood made all the necessary factual allegations – which must be accepted as true – to state a claim for breach of contract against Zurich. Specifically, Lindenwood alleges (1) the existence of Lindenwood's insurance contract with Zurich (including identification of the Policy's relevant provisions); (2) that it suffered economic losses covered under the Policy because they are attributable to "direct physical loss of or damage" to property; and (3) that it submitted a claim to Zurich for coverage under the Policy, which Zurich wrongfully denied. For the convenience of the Court, Lindenwood has filed as Exhibit 1 to the declaration filed contemporaneously herewith a statement summarizing the allegations in its operative First Amended Complaint.

ARGUMENT

I. LINDENWOOD HAS PLAUSIBLY ALLEGED THAT THE POLICY'S COVERAGE IS TRIGGERED FOR ITS COVID LOSSES.

The Policy here "insures against direct physical loss of or damage caused by a Covered Cause of Loss to Covered Property." (Policy § 1.01). The Policy defines a Covered Cause of Loss as: "All risks of direct physical loss of or damage from any cause unless excluded." (Policy § 7.11)

Lindenwood alleges in its First Amended Complaint that it sustained economic losses (including lost revenues and added expenses) as a result of the Coronavirus, the disease it causes (COVID-19) and the physical loss of and damage to property that they cause, and the accompanying governmental closure orders (collectively, Lindenwood's "COVID Losses").

Lindenwood's First Amended Complaint alleges in considerable detail how the presence of the Coronavirus on its campus caused Lindenwood to experience both direct physical loss **and** damage to property (either prong is alone sufficient to trigger coverage). Lindenwood's First Amended Complaint also alleges that the Policy here is unique and quite unlike the policies considered by other courts in that it expressly contemplates "virus" as a Covered Cause of Loss, which propels Lindenwood's claim that coverage was triggered far beyond the plausibility standard necessary to survive a motion to dismiss.

Because the Policy's "Contamination" exclusion, which Zurich modified by endorsement, is an integral part of Lindenwood's argument that its COVID Losses are covered under the Policy, Lindenwood urges the Court to start its analysis by considering this exclusion.

A. The Policy's "Contamination" Exclusion, as Zurich Modified It by Policy Endorsement, Dictates that "Virus" Is a Covered Cause of Loss

Zurich contends that "Lindenwood's claims fall squarely within the Contamination exclusion." (Doc. 37 at 30). But satisfying Zurich's desire to wield the Policy's Contamination exclusion to deny coverage for Lindenwood's COVID Losses would require the Court to upend long-standing principles of insurance contract interpretation. This Court should reject Zurich's argument and instead hold that the Policy's Contamination exclusion, as Zurich modified it by Policy endorsement, dictates that "virus" (e.g., the Coronavirus) is a Covered Cause of Loss.

Lindenwood's "all-risk" Zurich Edge Policy provides coverage for Lindenwood's COVID Losses because, under its plain language, the exclusion upon which Zurich relies does not apply. Indeed, the Policy includes an endorsement by which Zurich expressly deleted "virus" from the Policy's Contamination exclusion (the "Virus Deletion Endorsement"). (FAC at ¶¶ 117-21, 126).

Nevertheless, in response to Lindenwood's claims (and the deluge of similar claims under the same Zurich Edge Policy form), Zurich has taken the position that the Virus Deletion Endorsement applies only to Louisiana locations based solely upon the title of the endorsement that refers to "Louisiana." (Doc. 37 at 33-35). But that argument fails because the Policy contains a clear and unambiguous provision stating that titles of endorsements "shall not in any way affect the provisions to which they relate" (the "Titles Provision"). And unlike other state-titled endorsements to this Zurich Edge Policy that expressly limit the geographical scope of their application within their provisions to one state (such as the New York and Connecticut Amendatory Endorsements), the Virus Deletion Endorsement does no such thing.

Indeed, Zurich's position that the headings in the Policy should be used to define the scope of coverage is belied by long-established principles of insurance policy interpretation:

- Unambiguous policy language – such as the Titles Provision that says that titles may not be used to interpret the policy – must be enforced as written;
- Exclusionary clauses – such as the Virus Deletion Endorsement, which modifies the Contamination exclusion to remove virus – must be strictly construed against the insurer in favor of coverage; and
- To the extent policy language is ambiguous, the ambiguity must be resolved in favor of the insured.

When presented with claims for COVID Losses, Zurich disregarded basic principles of insurance contract interpretation turned its back on Lindenwood and other similarly situated policyholders who paid premiums believing they had insurance coverage for precisely the type of losses they suffered.

Moreover, Zurich's position also is undercut by its own conduct. Zurich attached the Virus Deletion Endorsement to Zurich Edge policies issued to many policyholders – like Lindenwood – with no Louisiana locations. Even worse, in the Fall of 2020, Zurich sought and received approval for a revised Louisiana Amendatory Endorsement to the Zurich Edge Policy that now states: "**THIS ENDORSEMENT ONLY APPLIES TO LOCATIONS IN LOUISIANA**" (the

"Modified Louisiana Endorsement"). This language is absent in the Virus Deletion Endorsement contained in Lindenwood's Policy and other Edge Policies for which Zurich has denied coverage.

Zurich's after-the-fact conduct is either conclusive evidence that the Virus Deletion Endorsement as it appears in Lindenwood's Policy unambiguously applies to the whole Policy or, at a minimum, concedes a prior ambiguity that must be resolved in favor of coverage for the insured – Lindenwood. At a minimum, this revelation requires discovery into the circumstances behind why, after the emergence of COVID Losses like Lindenwood's, Zurich added a Louisiana geographical limitation into a Virus Deletion Endorsement that had no such limitation.

Each of Zurich's arguments as to why the Virus Deletion Endorsement does not apply to the entire Policy is meritless. As the drafter of the Policy, it was incumbent upon Zurich to clarify its intention within the plain language of the Policy. It cannot wait until after a claim is filed to craft its arguments to deny coverage. Indeed, the law of insurance policy interpretation requires the precise opposite result: *in favor of coverage* for the insured.

1. Zurich Seeks to Upend Long-Established Rules of Insurance Policy Interpretation

a. The Titles Provision expressly prohibits attaching meaning to the Virus Deletion Endorsement's title.

Under Missouri law, when interpreting the language of an insurance policy, its provisions "are read in the context of the policy as a whole." *Am. Econ. Ins. Co. v. Jackson*, 476 F.3d 620, 624 (8th Cir. 2007). "Policy terms are given the meaning which would be attached by an ordinary person of average understanding if purchasing insurance." *Vogt v. State Farm Life Ins. Co.*, 963 F.3d 753, 763 (8th Cir. 2020). "Where insurance policies are unambiguous, they will be enforced as written…." *Id.*

According to the Policy's plain language, titles cannot be used to interpret the Policy and must be given no meaning or affect:

> 6.21. TITLES
>
> The titles of the various paragraphs and *endorsements* are solely for reference and *shall not in any way* affect the provisions to which they relate.

(Policy § 6.21) (emphasis added). Because this provision is clear and unambiguous, this Court must enforce it as written and may not "create an ambiguity in order to distort the language" of the Virus Deletion Endorsement "or enforce a particular construction which it might feel is more appropriate." *Doe Run Res. Corp. v. Lexington Ins. Co.*, 719 F.3d 868, 875-76 (8th Cir. 2013) (quoting *Rodriguez v. Gen. Accident Ins. Co. of Am.*, 808 S.W.2d 379, 382 (Mo. 1991)). Thus, the reference to "Louisiana" in the title of the endorsement has no relevance to, and should not be considered in, determining the scope of the exclusion.

Indeed, the insurance marketplace is full of provisions, endorsements and policy forms whose titles and headings have no relevance to the actual scope and meaning of the provisions themselves. *See, e.g.*, *Sylvester & Sylvester, Inc. v. State Auto. Mut. Ins. Co.*, No. 2020-cv-00817, 2021 WL 137006, at *5 (Ohio Ct. Com. Pl. Jan. 7, 2021) (applying "Food-Borne Illness" endorsement to COVID-19 business interruption claim where endorsement "contains no limitation that the risk must be related to food, but rather applies to 'a contagious or infectious disease,'" explaining "the scope of coverage is determined not by the headings or titles used by the insurer, but by the policy language itself").

Zurich seeks to have this Court ignore a standard policy provision (included in the Policy by Zurich itself) that directs policyholders like Lindenwood to rely on the terms and conditions of the Policy to determine the scope of coverage without regard to headings and titles. But courts across the nation have consistently rejected the same arguments advanced by insurers that Zurich advances here.[1]

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[1] *See, e.g.*, *Welch Foods, Inc. v. National Union Fire Ins. Co. of Pittsburgh, PA et al.*, 659 F.3d 191, 193 (1st Cir. 2011) (enforcing provision stating "[t]he descriptions in the headings of this policy are solely for convenience, and form no part of the terms and conditions of coverage"); *MDL Capital Mgmt., Inc. v. Fed. Ins. Co.*, 274 F. App'x 169, 171 (3d Cir. 2008) (holding "District Court overlooked the caution in the binder providing that the titles of the endorsements 'are for convenience only'"); *Pine Bluff Sch. Dist. v. Ace Am. Ins. Co.*, 984 F.3d 583, 593 (8th Cir. 2020) (rejecting use of section header to interpret coverage where policy explicitly stated "[t]he titles and headings to [the] endorsements of the Policy are included solely for ease of reference [and] do not in any way limit, expand or otherwise affect the provisions of such parts, sections, subsections or endorsements."); *Miami-Luken, Inc. v. Navigators Ins. Co.*, No. 1:16-cv-876, 2018 WL 3424448, at *7 (S.D. Ohio July 11, 2018) (rejecting argument that heading in policy is relevant to scope of coverage where policy explicitly precluded headings from terms and conditions of coverage); *Beaufort Rentals LLC v. Westchester Fire Ins. Co.*, No. 9:18-cv-02658-DCN, 2018 WL 6248770, at *4 (D.S.C. Nov. 29, 2018) (rejecting argument that exclusion contained in endorsement titled "Property Manager and Real Estate" only applied to property management when policy explicitly precluded headings from defining scope of coverage).

This Court should do the same and give full meaning and effect to the Policy's clear and unambiguous "Titles" provision.[2]

b. State-titled endorsements without geographic limitations – like the Virus Deletion Endorsement – apply to the entire policy.

Courts regularly apply state-titled endorsements that do not contain express geographical limitations to the entire policy.

For example, in *John Akridge Co. v. Travelers Cos*., 837 F. Supp. 6 (D.D.C. 1993), a case on all fours with this action, a property insurer asserted that a coverage action related to property damage that occurred in Washington, D.C., was time-barred by the policy's two-year contractual limitations period. *Id.* at 7. The policyholder, on the other hand, argued that a three-year limitations period in an endorsement titled "Maryland Changes" applied because "neither the title nor the language of the endorsement in any way limits its application to Maryland properties." *Id.* at 8. The *Akridge* court agreed with the policyholder's interpretation for two reasons and held that the "Maryland Changes" endorsement applied policy wide – not just to Maryland locations. First, "no language in the endorsement limits its application to insured property located in Maryland." *Id.* Second, the court noted that other endorsements the insurer had issued in other policies *did* use geographically limiting language. These other endorsements showed that "had Travelers wished to limit its endorsement to insured property located in Maryland, it was more than capable of doing so." *Id.* Likewise, here, Zurich included geographic limitations in some of its state-titled endorsements in ***this Policy***, but ***not*** in the Virus Deletion Endorsement. *See infra* A.1.c.

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[2] Lindenwood acknowledges that one court interpreting an Edge Policy recently dropped a footnote in its letter opinion stating that it was "unpersuaded by Plaintiffs' argument" about the effect of the Virus Deletion Endorsement. *Manhattan Partners, LLC, et al. v. Am. Guar. & Liab. In. Co.*, No. 20-14342 (SDW), at 4 n.3 (D. N.J. March 17, 2021). But the *Manhattan Partners* court improperly relied entirely on the *title* of the endorsement in suggesting the endorsement was limited to a single state. *Id.* Although the policy at issue in that case includes the same "Titles" provision as the Policy here, the plaintiffs in *Manhattan Partners* did not raise it in their briefing (see Ex. 5 (excerpt of plaintiffs' briefing on the contamination exclusion) – making it perhaps unsurprising that the court expressed it was "unpersuaded by Plaintiffs' argument." Because the *Manhattan Partners* court was not fully apprised of the relevant language in the policy (which likely would have driven a different result), its footnote on this issue is of no persuasive value.

When insurers like Zurich fail to use geographically limiting language in the endorsement itself, courts consistently refuse to read that limitation into the policy or, as the court in *Arch Specialty Ins. Co. v. Cline* phrased it, refuse to make that "leap":

> Although the endorsement is titled "New York Amendatory Endorsement," nowhere in the Subject Policy or the endorsement is the endorsement limited to applicability solely in New York State. Rather, even above the title "New York Amendatory Endorsement" the endorsement proclaims in bold, capital letters that "[t]his endorsement changes the policy." The Court simply cannot make the logical leap from the document containing "New York" in its title to the document only applying in New York, when no other language supports such a construction and such a construction would make the entire endorsement surplusage.

No. 10-2114-STA-dkv, 2012 WL 12823706 (W.D. Tn. Dec. 4, 2012) (applying "New York Amendatory Endorsement" to exclude coverage even though claim arose in Tennessee).

At minimum, an insurer's failure to use geographically limiting language subjects the endorsement to more than one reasonable interpretation, rendering it ambiguous, and mandating its construction in favor of the insured. In *Security Storage Properties v. Safeco Ins. Co. of Am.*, a Kansas federal court analyzed this exact issue in a policy containing Texas and Kansas titled endorsements, neither of which included geographically limiting language. No. 09-1036-WEB-DWB, 2010 WL 1936127, at *5 (D. Kan. May 12, 2010). The court found the endorsements ambiguous, explaining "the actual terms of this policy are susceptible to more than one reasonable construction, and nothing in the policy necessarily ties application of the [state] endorsement to any damage claim arising out of property located in that state," thus "[t]he policy is ambiguous in this respect." *Id.* at *5-6. "Because the policy fails to make clear that the Texas rather than the Kansas endorsement must be applied to the plaintiffs' claim," the court applied the interpretation favorable to the insured. *Id.* at *6.

As these cases make clear, when enforcing an insurance contract, a court is required to look at the entire policy, including state-titled endorsements. And where such endorsements do not include geographically limiting language, they apply policy wide. To the extent there is a conflict between these provisions and the rest of the policy (including other endorsements), it must be

resolved in favor of the policyholder and against the insurer, who drafted the policy in the first place. This makes sense: otherwise, it would allow insurers to consciously introduce ambiguities and pivot as necessary to deny coverage. But the law prohibits this.

c. Other State-Titled Endorsements in the Zurich Edge Policy make clear the Virus Deletion Endorsement is not limited to a specific State.

Exclusions – such as the Virus Deletion Endorsement, which modifies the Contamination Exclusion by deleting virus, pathogen or pathogenic organism and disease causing or illness causing agent from its ambit – must be "*strictly*" construed against the drafter. *Burns v. Smith*, 303 S.W.3d 505, 510 (Mo. 2010) (emphasis original). The reason for this deep-seated rule is that "as the drafter of the insurance policy, the insurance company is in the better position to remove ambiguity from the contract." *Krombach v. Mayflower Ins. Co.,* 827 S.W.2d 208, 211 (Mo. banc 1992); *accord* 16 Williston on Contracts § 49:15 (4th ed.) (the rule incentivizes insurers to "use clear, explicit and precise language").

Had Zurich wanted to limit the Virus Deletion Endorsement's geographic scope it could have done so in the terms and conditions just as it did in other endorsements. For example, the Policy's Connecticut endorsement states: "**THIS ENDORSEMENT CHANGES THE POLICY AND APPLIES TO THOSE RISKS IN CONNECTICUT**." (Policy, Doc. 33-1 at p. 98) (emphasis added). The Policy's New York endorsement similarly states: "**THIS ENDORSEMENT CHANGES THE POLICY AND APPLIES TO THOSE RISKS IN NEW YORK**." (Policy, Doc. 33-1 at p. 146) (emphasis added).

Because other state-titled endorsements in Lindenwood's Policy clearly and unambiguously limit their application to only property located in a specific state, and the Virus Deletion Endorsement ***does not***, the Virus Deletion Endorsement must be construed strictly against Zurich to apply to the entire Policy.

d. Zurich's Recently Amended Endorsement Adding a Geographical Limitation Confirms the Virus Deletion Endorsement Has None

Zurich recently has been seeking regulatory approval for a new Edge II Policy form, that would re-insert "virus" into the Louisiana state-titled endorsement and therefore re-insert it into the Contamination exclusion. At least one state regulator disapproved of Zurich's proposed form in 2020.[3]

Notwithstanding, in the Fall of 2020, well after it began receiving claims for COVID Losses and being sued across the United States, Zurich sought and received approval for a revised Louisiana endorsement to the Zurich Edge Policy.[4] In its regulatory filing, Zurich described the proposed amendment as follows:

> Pursuant to La. Stat. § 22:885(B), Zurich North America and all affiliated companies are updating Louisiana Amendatory Endorsements. ***The change removes language concerning premium refunds*** attributable to mortgagees when there is a policy cancellation. ***The only changes are those in the above referenced code***.

Ex. 4 at 4(emphasis added). In addition to removing the language concerning premium refunds, however, Zurich also added: "**THIS ENDORSEMENT ONLY APPLIES TO LOCATIONS IN LOUISIANA**." *Id.* at 14. This geographically limiting language is absent in the Virus Deletion Endorsement contained in Lindenwood's Policy and other Edge Policies for which Zurich has denied coverage across the country. It is also the only amendment to the Zurich Edge Policy that Zurich has sought and received since the emergence of the Coronavirus, COVID-19 and the ensuing massive COVID Losses. Zurich's request to amend the Virus Deletion Endorsement clearly shows its intent to substantively modify the provision to cover locations *only* in Louisiana.

e. Zurich's remaining arguments cannot change the meaning and applicability of the Virus Deletion Endorsement.

Zurich's remaining arguments are without merit. (Doc. 37 at 33-35). First, the McCarran-Ferguson Act and the U.S. Constitution have no relevance here. This is an insurance contract case – ***not*** an insurance regulation case. Lindenwood had nothing to do with any discussions between

[3] *See* Ex. 3 (New York EDGE II Filing) at 3, 7 (submitted to New York on April 3, 2020; disapproved on September 22, 2020).

[4] *See* Ex. 4 (Louisiana EDGE Endorsement Filing, the "Modified Louisiana Endorsement") at 3, 7 (submitted to Louisiana on August 31, 2020; approved on September 8, 2020).

Zurich and the regulators; nor is it asking the Court to allow Louisiana to regulate Zurich outside of Louisiana. Instead, Lindenwood simply asks the Court to enforce the plain language of the pre-printed contract that Zurich drafted.

Second, Zurich's reliance on purported conflicting provisions among the endorsements does not affect the application of the Virus Deletion Endorsement. To the extent there is a conflict between state-titled endorsements without express geographic limitations, the insurer has created an ambiguity that must be resolved in favor of the policyholder. *See Ritchie v. Allied Prop. & Cas. Ins. Co.*, 307 S.W.3d 132, 135 (Mo. banc 2009) (ambiguity exists "when there is duplicity, indistinctness, or uncertainty in [the policy's] meaning" or where it is "reasonably open to different constructions"); *Peters v. Emp'rs Mut. Cas. Co.*, 835 S.W.2d 300, 302 (Mo. 1993) ("If the language is ambiguous, it will be construed against the insurer."). For example, the Policy's state-titled endorsements have differing periods by which the policyholder must sue Zurich and under the above principles, the policyholder would receive the *longest* time period in those provisions – the one providing the broadest coverage.

Zurich ignores this bedrock principle of insurance contract construction in support of its position, arguing that conflicting state-specific endorsements suggests that the only reasonable interpretation is that each endorsement applies only to property within that state. Zurich's self-serving statement is not credible. As the Policy's drafter, Zurich is in the best (and, indeed, the only) position to avoid these conflicts. Zurich chose to include the Titles Provision in the Policy, and to include all of the state-titled Endorsements in the Policy – even to those issued to policyholders like Lindenwood who have no property in Louisiana. Thus, courts will properly apply state-titled endorsements to the entire policy even if there is a conflict, resolving the conflict in favor of coverage for the insured, not in favor of the insurer that drafted the policy and created the ambiguity. *See, e.g.*, *John Akridge Co. v. Travelers Cos*., 837 F. Supp. 6 (D.D.C. 1993).

But as a practical matter, there is no conflict here. The Virus Deletion Endorsement is the only endorsement in Lindenwood's Policy to delete virus, pathogen or pathogenic organism and

disease causing or illness causing agent from the Contamination exclusion. Indeed, it is the sole endorsement in Lindenwood's Policy to even mention these things.

Finally, the only cases Zurich relies upon in support of its geographic limitation argument – three unpublished district court decisions – are distinguishable and irrelevant to the issues before this Court.[5] In short, none of these cases involved "all-risk" policies, let alone any analysis of policies that included a Titles Provision expressly prohibiting consideration of state titles in the application of insurance coverage. Zurich's reliance on these cases for the sweeping proposition that "state-specific endorsements do not apply to property outside the respective state" is incorrect.

2. The Contamination Exclusion Does Not Apply to "Loss".

Even if Zurich's interpretation of the geographic scope of the Virus Deletion Endorsement were correct, the Contamination Exclusion would apply, at most, only to "costs" due to Contamination. Business interruption "losses," which make up the vast majority of Lindenwood's claimed damages here, would still be covered. According to its terms, even as un-amended, the Contamination exclusion applies only to "Contamination … and any *cost* due to Contamination." (Policy § 3.03.01.01. The Policy plainly distinguishes "costs" from "loss."[6] A reasonable policyholder might understand "costs" to mean out-of-pocket expenditures, and "loss" to include diminishment of value and lost earnings. In the COVID-19 coverage context, one court recently

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[5] *See* Doc. 37, p. 34 *citing Menard v. Gibson Applied Tech. & Eng'g, Inc.*, No. 16-498, 2017 WL 6610466 (E.D. La. Dec. 27, 2017) (finding plaintiff had no right of direct action under Louisiana's direct-action statute nor a Louisiana direct action endorsement, because plaintiff was not an intended third-party beneficiary of the policy), *Am. Int'l Spec. Lines Ins. Co. v. Cont'l Case. Ins. Co.*, 142 Cal. App. 4th 1342 (Cal. App. 2006) (relying on titles of state-specific endorsement with no indication that the policy contains a "Titles" provision, like Lindenwood's here), *Tomars v. United Fin. Cas. Co.*, No. 12-CV-2162 (JNE/HB), 2015 WL 3772024 (D. Minn. June 17, 2015) (addressing whether Minnesota law superseded an Ohio endorsement as applied to risks in Minnesota, with no discussion of title of endorsement), and *Kamp v. Empire Fire & Marine Ins. Co.*, No. 3:12-CV-904-JFA, 2013 WL 310357 (D.S.C. Jan. 25, 2013) (declining to extend excess UM benefits where form policy unambiguously excluded excess UM coverage and no state-specific endorsement granted UM coverage back).

[6] The term "cost" is not defined in the Policy, but its use makes clear that it refers to affirmative out-of-pocket expenditures. "Loss" is a term that pertains to the Policy's Time Element coverage (which includes business interruption and extra expense coverage, among others). (*See* Policy § IV – TIME ELEMENT) Under the Time Element provision, coverage is afforded for "loss," which is specified in the Policy to include, among other things, the loss of Gross Earnings loss and incurred increased operating expenses. (*See* Policy §§ 4.01, 4.02). The Policy does not specifically define "loss," but it does explain how to determine Gross Earnings loss: "Gross Earnings value that would have been earned during the Period of Liability, *less charges and expenses* that do not necessarily continue during the Period of Liability." (Policy, § 4.02.01.02.03 (emphasis added)).

concluded that an identical Contamination exclusion was ambiguous for this very reason. *Thor Equities, LLC v. Factory Mut. Ins. Co.*, 20 Civ. 3380, 2021 WL 1226983, at *4 (S.D.N.Y. March 31, 2021) (finding Contamination exclusion ambiguous because "the Policy distinguishes between 'cost' and 'loss' elsewhere" and "the plain meaning of cost…could plausibly refer to affirmative outlays, like paying for temporary use of other property"). Policy exclusions are strictly and narrowly construed. *Dodson Int'l Parts, Inc. v. National Union Fire Ins. Co.*, 332 S.W.3d 139, 146 (Mo. App. W.D. 2010). Had Zurich intended for the Contamination exclusion to apply to "loss," it could have specified that scope, just as it did in other Policy exclusions. But Zurich did not, and this Court should not rewrite the Policy to do so now. *Jones v. Mid-Century Ins. Co.*, 287 S.W.3d 687, 691 (Mo. banc 2009) (noting Missouri courts do "not rewrite insurance policies to add language").

* * *

As shown above, Zurich cannot meet its heavy burden to prove that the Policy's exclusion for "Contamination" clearly and unambiguously eliminates any possibility of coverage for Lindenwood's claims. Indeed, Zurich's "Contamination" exclusion does not even include "virus" as an excluded cause of loss; a conclusion compelled by application of Missouri's rules for interpreting insurance contracts. Of particular importance here, Zurich's decision to alter this Policy's "Contamination" exclusion through an endorsement that expressly removes "virus" from its exclusionary scope demonstrates the reasonableness of interpreting this "All Risks" Policy to include "virus" as a Covered Cause of Loss.

B. Lindenwood Sufficiently Alleges that Its COVID Losses Are Attributable to Direct Physical Loss of or Damage to Property.

Lindenwood plausibly alleges a claim falling within the "all risk" Policy's insuring agreement against "direct physical loss of or damage" to property. (Policy § 1.01).

The insuring agreement contains two different and distinct triggers of coverage – "loss" and "damage." It uses the disjunctive "or" to set them apart. Lindenwood, therefore, may show *either* "loss" or "damage" to trigger coverage. *State v. Graham*, 149 S.W.3d 465, 467 (Mo. App.

E.D. 2004) ("The disjunctive 'or' in its ordinary sense marks an alternative generally corresponding to the term 'either.'") (citing *Council Plaza Redev. Corp. v. Duffey*, 439 S.W.2d 526, 532 (Mo. banc 1969)). The Policy does not define "direct," "physical," "loss," or "damage."

Whether the Coronavirus is capable of causing direct physical "loss" or "damage" to property is a novel and disputed question of fact that implicates expert testimony inappropriate for a dispositive determination on a motion to dismiss. As one court has aptly cautioned at the motion to dismiss stage of a COVID-19 coverage dispute, a court should "not masquerade as an expert in the complex intricacies of science." *Ungarean, DMD v. CNA et al.*, No. GD-20-006544, 2021 WL 1164836, at *13 (Allegheny Cnty. Ct., March 22, 2021).

Though it need show only one or the other to trigger coverage, Lindenwood certainly has plausibly alleged both direct physical loss of ***and*** damage to property. (FAC ¶¶ 26-85). It has alleged that not only is the Coronavirus capable of physically altering (i.e., damaging) property, it physically and adversely altered Lindenwood's property to the point of rendering it unusable for its intended purposes. (*id.* at ¶¶ 71-85). This more than satisfies Missouri law and analogous precedent from this Circuit, which requires only that the cause render the property unfit for its intended purpose. *See Studio 417 v. Cincinnati Ins. Co.*, 478 F. Supp. 3d 794, 800-02 (W.D. Mo. 2020) (collecting cases) (summarizing intra-circuit and extra-circuit caselaw recognizing that "absent a physical alteration, a physical loss may occur when the property is uninhabitable or unusable for its intended purposes").

1. The First Amended Complaint Plausibly Alleges Direct Physical Damage to Property

"Direct physical damage" is undefined in the Policy; thus, it must be given the meaning that would be attached by an ordinary person of average understanding. *Ritchie*, 307 S.W.3d at 135. And for Zurich to prevail, it must demonstrate that its interpretation of these terms is the only reasonable interpretation. If another reasonable interpretation exists (such as the one Lindenwood advances based on recognized dictionary definitions and adopted by at least some courts), Lindenwood prevails and, at minimum, Zurich's motion must be denied.

Lindenwood alleges that the presence on property of the Coronavirus constitutes physical "damage" to property, as that undefined term is reasonably understood, because its physical presence causes physical harm to and alters the property. (FAC ¶¶ 71-85).[7] For instance, the Coronavirus physically attaches to and can remain on surfaces and in the air for days, even up to 28 days based on one study. (FAC ¶¶ 64, 76). Aerosols, too, present a significant source of transmission, with the virus remaining in the air within a property for hours or days and traveling on indoor air currents – rendering the entire physical space dangerous. (FAC ¶¶ 63, 71-85)

Moreover, the First Amended Complaint includes detailed allegations describing how the Coronavirus physically alters property it comes in contact with. (FAC ¶¶ 71-85). Specifically, it attaches to surfaces when viral particles collide with the surface forming a noncovalent chemical bond with the surface. (FAC ¶ 76). And once the virus-surface bond is formed, it will persist, if left undisturbed for many weeks in some cases. (FAC ¶ 73). Notably, humans can become infected by touching or otherwise contacting a surface to which viral particles have attached. (FAC ¶ 83).

These allegations easily satisfy the meaning that an ordinary person would ascribe to "physical damage." For undefined terms, courts look to the dictionary definition to determine if the insured's proposed construction is reasonable. *Doe Run Res. Corp. v. Am. Guarantee & Liab. Ins.*, 531 S.W.3d 508, 512 (Mo. banc 2017). The word "physical" can mean "having material existence: perceptive especially through the senses and subject to the laws of nature."[8] No one can doubt that the Coronavirus, which has upended all human life on the planet, has a material existence and is perceptible by the laws of nature. Nor should there be any doubt that a life-threatening virus attaching itself to a physical surface – as occurred on Lindenwood's property –

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[7] Zurich argues that Lindenwood provided insufficient specificity about its claim because Lindenwood has not identified the precise surface locations on which the Coronavirus was present on its property. *See* Doc. 37 at 18. But Lindenwood's campus is itself an insured location under the Policy. Zurich identifies nothing in the Policy requiring Lindenwood to be any more precise in making its coverage claim. Moreover, Zurich previously took the position that no greater specificity was needed to address Lindenwood's claim. Indeed, Zurich's position has always been that the "presence of the COVID-19 virus does not constitute 'direct physical loss of or damage' to property." FAC at ¶ 14. Zurich cannot defeat Lindenwood's claim at this stage based on information it believed was irrelevant to coverage under the Policy and that it never requested from Lindenwood in the claims process.

[8] PHYSICAL, Meriam-Webster Online Dict., avail at *https://www.merriam-webster.com/dictionary/physical*.

constitutes "damage." The word "damage" certainly has a meaning broad enough to include "harm caused to something which makes it less attractive, useful or valuable"[9] and "[p]hysical harm that impairs the value, usefulness, or normal functioning of something."[10]

Recently, the Hon. Janet Sutton, Circuit Court Judge for the 7th Judicial Circuit, Clay County, Missouri, and the first Missouri state court judge to pass on this controlling question of Missouri law, denied a defendant-insurer's motion to dismiss, concluding that the same allegations made by Lindenwood here "satisfy the meaning that an ordinary person would ascribe to the phrase 'physical damage…'" *Craven et al. v. Cameron Mut. Ins. Co.*, Case No. 20CY-CV06381, 2021 WL 1115247, at *1 (Mo. Cir. Ct. March 9, 2021). This is evident by analogy: if a vandal spray painted graffiti on property, no one would doubt that physical damage has occurred. No ordinary person would consider the presence of the Coronavirus – which causes a life-threatening illness – on property *less* damaging than particles of paint.

Lindenwood has alleged that COVID-19 (and its causative Coronavirus) has been physically present on its property in this manner and has caused (and continues to cause) an adverse alteration to it. (FAC at ¶¶ 31-41, 71-85, 99). Zurich insists that physical damage "unnoticeable to the naked eye…must meet a higher threshold" than physical damage that "demonstrably alter[s]" a building (Doc. 37 at 21). But there is nothing in the Policy that contains those words or imposes any such requirement, and the Missouri Supreme Court has insisted that it "does not rewrite insurance policies to add language." *Jones v. Mid-Century Ins. Co.*, 287 S.W.3d 687, 691 (Mo. banc 2009). Courts with similar interpretative law have reached the same conclusion in similar circumstances, rejecting arguments that "physical damage" must be "visible" and concluding that covered injury "may be something less than structural damage or some other

[9] DAMAGE, Oxford Learners Dictionary, avail at *https://www.oxfordlearnersdictionaries.com/us/definition/english/damage_1*.

[10] DAMAGE, Lexico, avail. at *https://www.lexico.com/definition/damage* ("Physical harm that impairs the value, usefulness, or normal function of something.").

tangible injury." *Seifert v. IMT Ins. Co.*, No. CV 20-1102 (JRT/DTS), 2020 WL 6120002, at *3 (D. Minn. Oct. 16, 2020) (applying Minnesota law).[11]

Zurich nevertheless argues that the presence of the Coronavirus on Lindenwood's property does not trigger coverage because – according to Zurich – it can be "readily eradicated" through "simple cleaning." (Doc. 37 at 20-21). No such allegation exists in the First Amended Complaint, however, and the Court can use "common sense" (*Iqbal*, 556 U.S. at 679) to conclude that the existence of a global COVID-19 pandemic that has extended over a year, causing well over 26 million infections and over 440,000 deaths in the United States (FAC at ¶ 2), belies Zurich's claim that it can be "readily eradicated" through "simple cleaning." Here, Zurich is advancing an argument outside the operative Complaint that, simply put, defies common sense. Zurich's argument is also plainly disputed by Lindenwood's allegations – which must be taken as true at this stage – that the Coronavirus is "uniquely resilient" (FAC ¶ 43), that actions taken in an effort to remove the Coronavirus from property "are significant and far beyond ordinary cleaning and routine measures" (FAC ¶ 41), that the efficacy of removal efforts are highly dependent on a number of factors (FAC ¶¶ 79-81), and that cleaning efforts present opportunities for re-contamination (FAC ¶¶ 61, 63).[12] At minimum, whether and how the Coronavirus can be

[11] For example, in *Oregon Shakespeare Festival Association*, the court held that smoke from a nearby wildfire that caused the performance company to cancel outdoor performances constituted "direct physical loss of or damage to" covered property. *Oregon Shakespeare Festival Ass'n v. Great Am. Ins. Co.,* No. 1:15-CV-01932-CL, 2016 WL 3267247, at *6 (D. Or. June 7, 2016), vacated by stipulation of parties, 2017 WL 1034203 (D. Or. Mar. 6, 2017). The smoke itself had no visible effects; it only caused performers and the audience to have itchy throats and eyes and difficulty breathing. *Id.* at 3. There was no permanent damage to the property, which could be restored by cleaning, but the court easily determined that the smoke caused direct physical loss or damage. "[P]hysical damage can occur at the molecular level and can be undetectable in a cursory inspection." *Id.* at *7 (quoting *Columbiaknit, Inc. v. Affiliated FM Ins. Co.,* No. Civ. 98–434–HU, 1999 WL 619100, at *6 (D. Or. Aug. 4, 1999)). As long as the damage renders the property unusable for its intended purpose, that it was not permanent is not significant. *Id.* at 9; *see also Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am.,* No. 2:12-CV-04418 WHW, 2014 WL 6675934, at *7 (D.N.J. Nov. 25, 2014) (ammonia release within a facility that rendered the facility unsafe and unfit for occupancy was covered "direct physical loss or damage"; there was "an actual change in insured property then in a satisfactory state, occasioned by accident or other fortuitous event directly upon the property causing it to become unsatisfactory for future use or requiring that repairs be made to make it so.").

[12] A number of studies have shown that the Coronavirus is actually quite resilient to cleaning. *See* Lindenwood's Request for Judicial Notice, filed contemporaneously with this Opposition.

eradicated is a disputed factual question that implicates expert testimony and cannot be resolved on a motion to dismiss.[13]

Lindenwood has alleged that COVID-19 was present on its property and caused damage to it. (FAC ¶¶ 26, 29-30, 33-37). Lindenwood has also alleged the mechanism and explained in considerable detail the underlying science by which the Coronavirus has physically altered its property and changed it from a safe condition to a hazardous and potentially dangerous instrumentality. (FAC ¶¶ 71-85). Because allegations in the First Amended Complaint are taken as true on a motion to dismiss, this must be deemed established for purposes of Zurich's Motion. At this stage, the Court must defer to Lindenwood's detailed factual allegations that advance the scientifically supported conclusion that the presence of the Coronavirus on property causes direct physical damage to that property sufficient to trigger coverage under this Policy.

2. The First Amended Complaint Plausibly Alleges" Direct Physical Loss of" Property

Separate from "damage to" property, "direct physical loss of" property is an independent coverage trigger under the Policy. Ordinary rules of contract construction require that the Court conclude "[l]oss" means something different from "damage." *See Dibben v. Shelter Ins. Co*., 261 S.W.3d 553, 556 (Mo. App. W.D. 2008) ("In interpreting an insurance contract, we must endeavor to give each provision a reasonable meaning and to avoid an interpretation that renders some provisions useless or redundant."). Lindenwood alleges that the physical presence of the Coronavirus rendered its campus unfit for intended function and unsafe. (FAC ¶¶ 31-41, 102).

Applying Missouri law, Judge Bough in the Western District of Missouri concluded that similar allegations stated a claim for "direct physical loss of" property in four separate cases: (1) *Studio 417*, 478 F. Supp. 3d at 799 n.3; (2) *K.C. Hopps v. The Cincinnati Ins. Co.*, Case No. 20-cv-00437-SRB, 2020 WL 6483108 (W.D. Mo. Aug. 12, 2020); (3) *Blue Springs Dental Care, LLC et al. v. Owners Ins. Co.*, 488 F. Supp. 3d 867 (W.D. Mo. 2020); and (4) *Neco, Inc. v. Owners*

[13] Lindenwood has filed an Opposition to Zurich's Request for Incorporation by Reference and for Judicial Notice in Support of its Motion to Dismiss, explaining why it is inappropriate for the Court to take judicial notice of any facts about the efficacy of cleaning procedures for removing COVID-19.

Ins. Co., Case No. 20-CV-04211-SRB, 2021 WL 601501, at *4 (W.D. Mo. Feb. 16, 2021). In those cases, as here, the policies did not define "direct physical loss," so the court looked to the dictionary to identify the "plain and ordinary meaning of the phrase." *Studio 417*, 478 F. Supp. 3d at 800; *Blue Springs Dental*, 2020 WL 5637963, at *4; *Neco*, 2021 WL 601501, at *4. Noting that the dictionary defines "physical" as "having material existence: perceptible" and "loss" as "deprivation," Judge Bough concluded that the plaintiffs, by pleading that the Coronavirus had deprived them of the use of their property, had adequately alleged a direct physical loss." *Studio 417*, 478 F. Supp. 3d 794 at 800; *Blue Springs Dental*, 488 F. Supp. 3d at 873-74; *Neco*, 2021 WL 601501, at *4. Judge Sutton in *Craven*, applying Missouri law, similarly concluded that "[t]he ordinary person of average understanding, purchasing protection under the Policy would understand the inability to use the property due to a physical condition – here, the actual and/or threatened presence of COVID-19 – is *physical loss* covered under the Policy." *Craven*, 2021 WL 1115247, at *2.

Dictionary definitions of "loss," include "the act of losing possession" and "deprivation." *See Merriam-Webster*, https://www.merriam-webster.com/dictionary/loss. Lindenwood has been "depriv[ed]" of its property. (FAC ¶¶ 31-41, 102) Lindenwood invested in the property, insured the property, insured the income derived from the property, but has been deprived of the use of the property because of the Coronavirus and related government shutdown orders. (*id.* at ¶¶ 31-41, 71-85, 110-11) The "ordinary person of average understanding," *Ritchie*, 307 S.W.3d at 135, purchasing protection under the Policy would understand loss of use of the covered property to constitute a *physical loss* covered under the Policy. *See also Mehl v. The Travelers Home & Marine Ins. Co.*, Case No. 16-CV-1325-CDP, 2018 WL 11301983, at *1 (E.D. Mo. May 2, 2018) (concluding that presence of brown recluse spiders in the plaintiff's home could constitute "physical loss" under the plaintiff's property insurance policy); *Elegant Massage, LLC v. State Farm Mut. Auto. Ins. Co.,* No. 2:20-CV-265, 2020 WL 7249624, at *10 (E.D. Va. Dec. 9, 2020) ("[T]he 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***.") (emphasis added).

Zurich's attempts to disparage or distinguish *Studio 417* and similar cases are unavailing. *First*, Zurich claims that *Studio 417* is among a "small minority" of decisions denying motions to dismiss in the COVID-19 context. That is false. Courts across the country, presented with similar facts and policy language, have interpreted coverage for COVID-19 related losses in the same way as Lindenwood. Indeed, there have been nearly 40 decisions in COVID-19 insurance cases finding in favor of plaintiff-insureds and against defendant-insurers on similar policies and facts. ***See* Exhibit 2 (listing and summarizing decisions).**[14] Importantly, Lindenwood's interpretation of the Policy – as Judge Bough has concluded – is supported by Missouri law. *Id.* at *4 (declining to follow non-Missouri cases because the court's "interpretation of 'direct physical loss' is supported by Eighth Circuit and Missouri case law"). And, as discussed below, a general consensus has emerged across the handful of cases from Missouri courts that Lindenwood's allegations in this case plausibly state an accepted theory to trigger coverage under the Policy.

Second, Zurich asserts that the *Studio 417* plaintiffs and Lindenwood here, have alleged only that the *cause* of their loss was physical, but have failed to show that the *loss* suffered was physical. (Doc. 37 at 23). Again, not so. Lindenwood has alleged that the Coronavirus caused it to close dorms; shutter dining halls; close administrative buildings; and close campus entirely to all but a few essential personnel, among other things. (FAC at ¶¶ 5, 31-41). Those are "physical" losses of property. *See, e.g.*, *In re Society*, 2021 WL 679109, at *8 (concluding that "pandemic-

[14] *See, e.g.*, *Southern Dental Birmingham LLC v. The Cincinnati Insurance Company*, Case No. 20-cv-681-AMM, 2021 WL 1217327, at *6 (S.D. Ala. March 19, 2021) (denying motion to dismiss "[b]ecause Southern Dental alleges that the coronavirus was present on the Property and impaired the Property's ordinary use, and because Cincinnati has not established under controlling precedent or doctrine that…this allegation is necessarily insufficient to plead a Covered Cause of Loss…."); *Derek Scott Williams PLLC v. Cincinnati Ins. Co.*, No. 20 C 2806, 2021 WL 767617, at *4 (N.D. Ill. Feb. 28, 2021) ("the 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. That's the common meaning of loss…and there is no basis to believe that the Cincinnati policy uses the term any differently."); *Dino Palmieri Salons, Inc. v. State Auto. Mut. Ins. Co.*, No. CV-20-932117 (Ohio Ct. Co. Pl. Nov. 17, 2020) (denying motion to dismiss because "[h]ere, not only do Plaintiffs allege that COVID-19 – a physical substance – was *likely* on their premises (as do the plaintiffs in *Studio 417* and *Blue Springs Dental*), but that it *was* physically present and that it caused physical loss and damage.").

caused shutdown orders do impose a *physical* limit: the restaurants are limited from using much of their physical space."); *see also Ungarean*, 2021 WL 1164836, at *7 (the "spread of COVID-19 and social distancing measures (with or without the Governor's orders) caused Plaintiff, and many other businesses, to *physically* limit the use of property and the number of people that could inhabit *physical* buildings at any given time. Thus, the[] spread of COVID-19 did not, as Defendant's contend, merely impose economic limitations. Any economic losses were secondary to the businesses' *physical* losses.").

Third, Zurich argues that a loss is covered only if it renders the property *completely* unusable. (Doc. 37 at 23-25). This argument makes little sense. Under Zurich's theory, if the private dining room of a restaurant catches fire, causing it to be unusable, but the main dining room is unaffected, there is no coverage because the restaurant was not required to shut down completely. Unsurprisingly, the cases Zurich discusses do not compel this absurd result.[15]

Fourth, Zurich claims that the Policy's definition of "Period of Liability" precludes Lindenwood's claim. (Doc. 37 at 26). At the outset, Zurich completely omits an essential part of the definition of that term in the Policy. Specifically, Zurich states that the Period of Liability ends when "the building and equipment could be repaired or replaced," but fails to recite that this sentence continues and states that the relevant time period extends up to the time needed to make the property "ready for operations under the same or equivalent physical and operating conditions that existed prior to the damage." (Policy, § 4.03.01.01) Lindenwood alleges that its "property has not returned to its condition pre-occurrence." (FAC at ¶¶ 31-41). The definition of "Period of Liability" is entirely consistent with Lindenwood's claimed losses. *See, e.g.*, *In re Society Ins. Co. COVID-19 Business Interruption Protection Ins. Litig.*, MDL No. 2964, 2021 WL 679109, at *9 (N.D. Ill. Feb. 22, 2021) ("the definition of the Period of Restoration is consistent with interpreting

[15] *Port Auth. of New York & New Jersey v. Affiliated FM Ins. Co.*, 311 F.3d 226, 232 (3d Cir. 2002) (claim arising from the presence of asbestos but "unaccompanied by even the suggestion of actual release or imminent threat of release of asbestos fibers."); *Prudential Prop. & Cas. Ins. Co. v. Lillard-Roberts*, No. CV-01-1362-ST, 2002 WL 31495830, at *8 (D. Or. June 18, 2002) (mold present throughout house, rendering it total loss; nothing suggesting mold in part of house is not covered); *W. Fire Ins. Co. v. First Presbyterian Church*, 437 P.2d 52, 55 (Colo. 1968) (gasoline seepage rendered premises unusable; nothing suggesting that complete loss of use required).

direct physical loss of property to include the loss of physical use of the covered property imposed by the shutdown orders"). Moreover, contrary to Zurich's claim, the "period of restoration" is not a substantive coverage provision; it merely provides the measurement of Time Element Losses. *See Ungarean*, 2021 WL 1164836, at *8 ("The 'period of restoration' does not somehow redefine or place further substantive limits on types of available coverage.").

Lindenwood also alleges that it suffered "physical loss" in another way. Specifically, COVID-19 proximately caused the government shutdown orders, which in turn caused Lindenwood to lose the full use of its insured property. (FAC ¶¶ 110-11). This theory was recently adopted by Judge Chang, in the *In re: Society Ins. COVID-19* multidistrict litigation, 2021 WL 679109, at *8, as well as by Judge Matthew Kennelly in *Williams PLLC et al. v. The Cincinnati Ins. Co.*, Case No. 20 C 2806, 2021 WL 767617 (N.D. Ill. Feb. 28, 2021). In *In re Society*, Judge Chang concluded that "a reasonable jury could find" that COVID-19 proximately caused the government shutdown orders, which in turn caused direct physical loss of property necessary to trigger coverage, because those government orders prohibited businesses from using all the physical space on their insured property. *In re Society*, 2021 WL 679109, at *8-9.

Lindenwood alleges that various civil authority orders issued by national, state, and local governments caused it to lose the full use of its property. (FAC ¶¶ 110-12). Lindenwood further alleges that the physical damage and loss caused by Coronavirus and COVID-19 *caused* those government entities to impose the civil authority orders. (FAC ¶ 110). Like the stay-at-home orders at issue in *In re Society*, insurers are liable for covered risks that are *proximate* causes of the loss or damage at issue. *See, e.g.*, *Allstate Ins. Co. v. Blount*, 491 F.3d 903, 911 (8th Cir. 2007) ("Under Missouri law, the concurrent cause doctrine 'provides that when an insured risk and an excluded risk constitute concurrent proximate causes of an injury, a[n] insurer is liable so long as one of the causes is covered by the policy."). Thus, even if the Court determines that the government orders *directly* caused Lindenwood's losses, those orders were proximately caused by the COVID-19 pandemic, triggering coverage.

Courts across the country widely agree – and have done so for years – that the loss of access to a property, including loss of its essential functionality, constitutes a physical loss of property. *See, e.g.*, *TRAVCO Ins. Co. v. Ward*, 715 F. Supp. 2d 699, 702 (E.D. Va. 2010), *aff'd*, 504 F. App'x 251 (4th Cir. 2013) (rejecting the insurer's argument that physical damage requires some "physical alteration or injury to the property's structure" and finding direct physical loss because "the building in question ha[d] been rendered unusable by physical forces").[16] The fact that courts have (for decades) construed physical loss broadly proves that Lindenwood's – and Judge Bough's, Judge Chang's, Judge Kennelly's, and many others' – interpretation of the Policy is *at least* a reasonable reading that an ordinary insured could have relied upon. Lindenwood has sufficiently alleged a claim for direct physical loss of property sufficient to withstand Zurich's motion.

3. Zurich's Case Law Is Inapposite and Unpersuasive

Zurich cites to other cases decided in the COVID-19 business interruption context, claiming that they support its position that the Coronavirus cannot under any set of facts or circumstances cause physical loss of or damage to property. (Doc. 37 at 18-19). But Zurich makes no effort to show that the *allegations* made in those cases were substantially similar to the ones here. Lindenwood here has substantial factual allegations explaining in detail how the Coronavirus affects the air surrounding and surfaces on covered property that *are not present in any other decided case* of which Lindenwood is aware. *See, e.g.*, FAC ¶¶ 2-6, 26-41, 42-85 (describing how COVID-19 forms a chemical bond on the surfaces on which it lands and will persist, if left untouched, for days or weeks).

[16] *See also Universal Sav. Bank v. Bankers Standard Ins. Co.,* No. B159239, 2004 WL 515952, at *6 (Cal. Ct. App. Mar. 17, 2004) ("The plain meaning of 'direct physical loss' encompasses physical displacement or loss of physical possession. That the loss must be 'physical' distinguishes the loss from some other, incorporeal loss."), *vacated on other grounds*, No. B159239, 2004 WL 3016644 (Cal. Ct. App. Dec. 30, 2004); *see also Murray v. State Farm Fire & Cas. Co.,* 509 S.E.2d 1, 17 (W.Va. 1998) (holding that losses that rendered insured property "unusable or uninhabitable, may exist in the absence of structural damage to the insured property."); *Dundee Mut. Ins. Co. v. Marifferen,* 587 N.W.2d 191, 194 (N.D. 1998) (holding coverage applied without physical alteration because the covered properties "no longer performed the function for which they were designed."); *W. Fire Ins. Co. v. First Presbyterian Church*, 437 P.2d 52, 55 (Colo. 1968) (holding that gasoline saturation under and around a church rendering occupancy unsafe constituted a "direct physical loss within the meaning of that phrase.").

Moreover, contrary to Zurich's contention, most courts have *not* decided whether the presence of the Coronavirus causes physical loss or damage within the meaning of property insurance policies. In fact, in most of Zurich's cases, the courts did not reach that issue because the plaintiffs *did not even allege the presence of COVID-19* on their property. *See* Doc. 39-18. Rather, most of the cases Zurich cites involve insurance policies with clear and unambiguous "virus exclusions" stating that the policies at issue did not cover damage or loss caused directly or indirectly by a "virus." Those cases actually *support* Lindenwood's reading of the Policy here: i.e., the fact that some insurers expressly *exclude* virus-causing harm demonstrates that it is reasonable to believe that a virus can cause "physical loss of or damage to property." The Policy here is a perfect example of that: as noted, the Policy references virus in the Contamination exclusion, suggesting that viruses *can* cause physical loss or damage, and Zurich modified that exclusion to remove "virus" from its exclusionary scope; making "virus" a Covered Cause of Loss is expressly contemplated by *this Policy*.

Moreover, in three of the four Missouri cases Zurich cites, the plaintiffs did not plead that the Coronavirus caused the physical loss or damage because then they would have pled *into* the virus exclusion. At bottom, the cases decided so far under Missouri law reveal a general consensus that a policyholder – like Lindenwood here – adequately states a covered claim to recover business interruption losses by alleging a loss of use of its insured property caused by the actual presence of the Coronavirus on its property.

For example, in *Ballas Nails & Spa, LLC v. Travelers Cas. Ins. Co. of Am.*, No. 4:20 CV 1155 CDP, 2021 WL 37984 (E.D. Mo. Jan, 5, 2021), the policy at issue contained an exclusion stating that the insurer "will not pay for loss or damage caused by or resulting from any ***virus***, bacterium, or other microorganism…."). *Id.* at *2 (emphasis added). As a result, the plaintiff tried to argue that the government shutdown orders, *not* the presence of the Coronavirus, caused physical loss or damage. In rejecting this argument, Judge Perry wrote: "Here, **unlike the plaintiff-businesses in *Studio 417***, Ballas does not allege that the virus was present on its property, and indeed affirmatively avers its absence…." *Id.* at *4 (emphasis added). The court granted the

defendant's motion to dismiss because, by failing to "assert facts showing that its property was actually contaminated by the coronavirus or that the presence of the virus itself on the premises rendered the property uninhabitable or unusable….Ballas's claim therefore fails to fall within the permissible realm of 'direct physical loss….'" *Id.* [17] In *BBMS, LLC v. Continental Cas. Co.*, No. 20-0353-CV-W-BP, 2020 WL 7260035 (W.D. Mo. Nov. 30, 2020), Judge Phillips also explicitly distinguished *Studio 417*, noting that in *Studio 417*, "the plaintiff alleged that the virus was present in and on its premises…which differentiates *Studio 417* from this case." *Id.* at *5.

And Judge Clark in *Robert E. Levy, D.M.D., LLC v. Hartford Financial Services Group*, No. 4:20-cv-00643-SRC, 2021 WL 598818 (E.D. Mo. Feb. 16, 2021), also expressly distinguished *Studio 417* and *Blue Springs Dental*, noting that in those cases the plaintiffs "alleged that the insured property had been contaminated by COVID-19," whereas the plaintiffs in *Levy* "do not allege that COVID-19 contaminated their properties…." *Id.* at *3.

In the final Missouri case cited by Defendant – *Zwillo V, Corp. v. Lexington Ins. Co.*, No. 4:20-00339-CV-RK, 2020 WL 7137110 (W.D. Mo. Dec. 2, 2020) – Judge Ketchmark likewise noted that the "main distinction between the case at bar and *Studio 417*, *K.C. Hopps*, and *Blue Springs Dental* is here the policy contains" a virus exclusion. *Id.* at *8. The court analyzed the exclusion at issue, concluded it barred coverage for losses caused by a virus, and dismissed on that basis. *Id.* at *8. **Again, there is no such exclusion in the Policy in this case.**

Another distinguishing aspect of this case and *Zwillo* is that here, unlike in *Zwillo*, Lindenwood has alleged in considerable detail how the Coronavirus attaches to property and

[17] Zurich argues that *Ballas* suggests that the "imminent threat" of the presence of the Coronavirus on property is insufficient to trigger coverage. But in *Ballas*, Judge Perry noted that the plaintiff did not allege "the threat of coronavirus coming onto its premises," 2021 WL 37984, at *5 n.3, so any analysis on that issue is mere dicta. Moreover, courts have concluded that the imminent threat of loss or harm from the spread of materials similar to the Coronavirus is sufficient to constitute physical loss and damage to an insured's property. *See Port Authority of New York & New Jersey v. Affiliated FM Insurance*, 311 F.3d 226, 236 (3d Cir. 2002) ("if there exists an imminent threat of release of a quantity of asbestos fibers that would cause such loss of utility"); *Motorists Mutual Ins. v. Hardinger*, 131 F.App'x 823, 827 (3d Cir. 2005) (imminent threatened release of contamination causes loss of use or utility"); *Murray v. State Farm Fire & Cas. Co.*, 509 S.E.2d 1, 17 (W.Va. 1998) ("physical loss" found based on imminent risk of falling rocks not on the premises). This is supported by a common sense reading of the Policy: an insured who proactively reduces or ceases operations to prevent physical loss or damage based on the presence of COVID-19 is mitigating damages, as required under the Policy (Policy § 5.02.23).

physically alters property by forming chemical bonds on the surfaces on which it lands, which can persist, for many weeks, and infect humans. FAC ¶¶ 71-85. Those allegations were not made by the plaintiffs in *Zwillo*, nor in any of the cases on which *Zwillo* relies.

4. "Direct Physical Loss of or Damage to" Property Is at Least Ambiguous

It is important to note the high burden Zurich must surmount to obtain dismissal. It is not enough for Zurich to show its reading of the Policy is reasonable or even the most reasonable interpretation. It must show it is the *only* reasonable interpretation. Otherwise, the Policy is ambiguous and Zurich loses as a matter of Missouri law because an ambiguous policy must be construed against the insurer and in favor of coverage.

The Eighth Circuit has held that a provision stating that the policy insured against "loss of or damage to the property insured…resulting from all risks of physical loss" is ambiguous. *See Hampton Foods, Inc. v. Aetna Cas. & Sur. Co.*, 787F.2d 349, 352 (8th Cir. 1986) ("We agree that the disputed language ["direct physical loss"] is ambiguous and, thus, must be construed in Hampton's favor."); *Studio 417*, 478 F. Supp. 3d at 801 (citing *Hampton Foods* in concluding that the phrase "direct physical loss or damage to" property is ambiguous). Courts in the COVID-19 business interruption context have concluded that insuring phrase at issue here is ambiguous; *see also In re Society*, 2021 WL 679109, at *10 ("Here, the scope of the term 'direct physical loss' is genuinely in dispute. A reasonable jury could find for either side based on the arguments and factual record presented so far in the litigation.").

Furthermore, as noted, the fact that other insurers include a virus-related exclusion shows that, at minimum, insurers believe viruses can cause physical loss or damage. Otherwise, the exclusion itself would be redundant. As alleged in the First Amended Complaint, in 2006, following the outbreak of the SARS virus, the Insurance Services Office ("ISO") (an industry organization that provides policy writing services to insurers) announced the submission of an exclusion of loss "due to disease-causing agents such as viruses and bacteria." (FAC ¶¶ 127-28). Despite the availability and widespread use of a specific exclusion for viruses like COVID-19,

Zurich chose not to include that exclusion in the Policy offered to – and ultimately paid for – by Lindenwood. (FAC ¶ 129). In fact, as discussed above, *Zurich chose to expressly remove "virus" from the scope of the Contamination exclusion in this Policy*. The existence of the ISO exclusion – and Zurich's decision to remove "virus" from this Policy's Contamination exclusion – strongly shows that a reasonable insured could believe that losses caused by the Coronavirus are a Covered Cause of Loss under the Policy.

Finally, the cases discussed above finding coverage under policies similar to Lindenwood's also show that Lindenwood's policy interpretation is reasonable. While Zurich cites cases that reach a different conclusion, many of them are factually and legally distinguishable. But even those that may appear analogous *are proof of ambiguity* under controlling Missouri law. *See Vogt*, 963 F.3d at 764 ("That several courts have examined the issue in very similar circumstances and have reached differing conclusions supports the conclusion that the phrase is ambiguous."); *see also Macheca Transp. v. Philadelphia Indem. Ins. Co.*, 649 F.3d 661, 668 (8th Cir. 2011) ("The fact that several jurisdictions have reached divergent conclusions about the meaning of [a] term ... is evidence of the term's ambiguity under Missouri law.") (citing *Harrison v. Tomes*, 956 S.W.2d 268, 270 (Mo. 1997)). The Policy's ambiguity must be construed against Zurich and in favor of coverage for Lindenwood's claims. Thus, Zurich's motion to dismiss must be denied.

5. The Policy Does Not Broadly Exclude Coverage for "Loss of Use"

Zurich briefly argues that the Policy broadly excludes coverage for "loss of use." (Doc. 37 at 17-18). Under Missouri law, Zurich bears the burden to prove that this exclusion clearly and unambiguously applies. *Manner v. Schiermeier*, 393 S.W.3d 58, 62 (Mo. 2013). And exclusions are to be narrowly construed. *Dodson*, 332 S.W.3d at 146. Zurich fails to meet that burden because the only reasonable interpretation of this "loss of use" exclusion is that it narrowly applies (if at all) only to defeat claims for loss of use if those claims are completely untethered to any claim of physical loss of or damage to property. Indeed, as the preface to this exclusion states, it applies only to circumstances not otherwise within the Policy's broad grant of coverage for "direct physical loss of or damage to property". (Policy § 3.03.01). Zurich's reliance on this "loss of use"

provision is misguided and is no bar whatsoever to Lindenwood's claim for direct physical loss and damage to property under the Policy.

Zurich asserts that Judge Perry's *Ballas* decision supports applying the exclusion here. Again, in that case, the plaintiff "affirmatively aver[red]" that COVID-19 was *not* present on its property in an effort to plead around the policy's virus exclusion. *Ballas*, 2021 WL 37984, at *4. Instead, the plaintiff argued that government shutdown orders alone deprived it of the use of its property. *Id.* But Judge Perry rejected this argument: "Ballas's contention that its losses were caused by the government closure orders themselves – without any claim that its property was physically affected – is not enough to show 'direct physical loss.'" *Id.*

Judge Perry cited a "loss of use" exclusion only to show that some *physical* force is necessary for coverage. Specifically, she wrote that the existence of the "loss of use" exclusion shows the "'direct physical loss of property' clause was not intended to encompass a loss where the property was rendered unusable without an intervening physical force." *Id.* Construing the policy to allow coverage for mere loss of use *without any physical force* would "negate the 'loss of use' exclusion." *Id.* In *BBMS*, Judge Phillips similarly noted that the phrase "direct physical loss" requires some physical event or force on, in or affecting the property in question and not mere 'loss of use'….[because] [r]uling otherwise would render the word 'physical' a nullity." *BBMS*, 2020 WL 7260035, at *3. Lindenwood's allegations here are on all fours with and entirely consistent with these cases. (FAC ¶¶ 26-41, 71-85, 102, 197, 115). Unlike the plaintiffs in *Ballas Nails* and *BBMS*, Lindenwood here *does* allege that the Coronavirus was physically present on its property. (FAC ¶¶ 26, 29-30, 33-37).

Also, Zurich's broad interpretation of the "loss of use" exclusions would render meaningless the Policy's explicit coverages for business interruption, which necessarily contemplates loss of use. If loss of use – when caused by some physical force like, for instance, a fire – is not covered, then the entire coverage provisions for Time Element and Civil Authority are rendered meaningless. *Henderson Road Restaurant Systems, Inc. v. Zurich American Insurance Company,* Civil Case No. 1:20-cv-01239-DAP, 2021 WL 168422, at *16 (N.D. Jan. 19, 2021)

(rejecting insurer's argument and holding that the Loss of Use provision cannot be construed to "vitiate the Loss of Business Income coverage"); *Ungarean*, 2021 WL 1164836, at *28 (same). At minimum this creates an ambiguity that must be construed against Zurich. *Ritchie*, 307 S.W.3d at 136 ("To the extent these policy provisions are inconsistent, they create an ambiguity that, under Missouri law, must be construed in favor of the insured.").

C. The First Amended Complaint Also States a Claim for Relief under the Policy's "Civil or Military Authority" Coverage

First, Zurich argues that Lindenwood cannot recover under the Policy's Civil or Military Authority provision because government orders were prophylactic, and not issued in response to direct physical loss or damage. (Doc. 37 at 27-28). Zurich cites Judge Perry's *Ballas* decision in support of its position, but it only shows the weakness of Zurich's position. There, the plaintiff *alleged* that the closure orders were issued merely "to prevent the spread of the coronavirus." 2021 WL 37984, at *5. Because the plaintiff alleged that the orders were preventative and "Ballas makes no allegations of damage to neighboring property," Judge Perry dismissed the civil authority claim. *Id.* In contrast, here, Lindenwood alleges that the governmental orders were issued in response to physical loss of or damage to property in the areas surrounding it campus and within the community in which Lindenwood is a part. (FAC ¶¶ 26, 28, 30, 33-39, 45-48, 52, 69-70, 110-13). Moreover, numerous cases hold that governmental orders that require closures in cases of mass disruption of society *do state a claim that* triggers civil authority coverage.[18]

Second, Zurich asserts that access to Lindenwood's campus was not "prohibited" as required for Civil Authority coverage, because "applicable government orders allowed Lindenwood to continue operating" at least in part. (Doc. 37 at 29). But Zurich does not point to anything in the Policy that says Civil Authority coverage applies only if *everyone* is prohibited from accessing the insured's property. Moreover, the fact that the Policy's Civil Authority

[18] *See Assurance Co. of Am. v. BBB Serv. Co.,* 265 Ga. App. 35 (2004) (finding civil authority coverage available when restaurants closed in response to county evacuation order as Hurricane Floyd approached); *Southlanes Bowl, Inc. v. Lumbermen's Mut. Ins. Co.,* 46 Mich. App. 758 (1973) (finding civil authority coverage available when governor's order in response to riots forced insured to close its bowling alleys, restaurants, and motels); *Narricot Indus., Inc. v. Fireman's Fund Ins. Co.,* No. 01-4679, 2002 WL 31247972 (E.D. Pa. Sept. 30, 2002) (holding that civil authority order prohibited access to industrial plant that was directed to suspend operations due to Hurricane Floyd).

coverage attaches to a suspension of Lindenwood's business activities – defined as "the slowdown or cessation of [Lindenwood's] business activities (FAC ¶ 100; Policy § 7.69.01) – shows that the term "prohibits access," reasonably construed within the context of this Policy, certainly embraces something less than a total prohibition of all access.

Notwithstanding Zurich's bare assertion to the contrary, Lindenwood *does* allege that a substantial class of people were prohibited from accessing Lindenwood's campus. (FAC ¶¶ 26, 28, 30, 33-39, 45-48, 52, 69-70, 110-13). For example, by Order of the County Executive 20-06 (effective March 23, 2020), every person in St. Charles County was ordered to remain in their residence or on the property surrounding their residence, subject to limited exceptions. FAC ¶ 112; *see also id.* (on April 3, 2020, the State of Missouri issued its stay-at-home order). As stated in that Order, nearby St. Louis County and the City of St. Louis had also issued "Shelter in Place" orders, effective March 23, 2020. *Id.* Similarly, the State of Illinois issued on March 20, 2020 an order for all individuals living within the State of Illinois. *Id.* Thus, the governmental orders prevented *everyone* not subject to limited exceptions from accessing Lindenwood's property, which satisfies the Policy's requirement that "access" be prohibited. *See Studio 417*, 478 F. Supp. 3d at 804 (civil authority orders that prevented in-person dining – but not drive-thru, pickup, or delivery – still prohibited access "to such a degree as to trigger the civil authority coverage."); *Ungarean*, 2021 WL 1164836, at *10 (civil authority coverage does not requires "a complete and total prohibition of all access to Plaintiff's property by any person for any reason"); *Henderson*, 2021 WL 168422, at *11 (same). At worst, "prohibited" in the Civil Authority provision is ambiguous and must be construed against Zurich and in favor of coverage.

CONCLUSION

Lindenwood has plausibly alleged a reasonable interpretation of its "All Risks" Policy demonstrating that coverage exists for its COVID Losses. Zurich has failed to prove that any Policy exclusion clearly and unambiguously eliminates any possibility of coverage for Lindenwood's claim as a matter of law. Accordingly, Zurich's motion should be denied.

Date: April 7, 2021

Respectfully submitted,

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