IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

Rockhurst University, et al.	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 4:20-CV-00581-BCW
	)	
Factory Mutual Insurance Company,	)	
	)	
Defendant.	)	
	)	

DEFENDANT FACTORY MUTUAL INSURANCE COMPANY'S SUGGESTIONS IN SUPPORT OF ITS MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS

ORAL ARGUMENT REQUESTED

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Pursuant to Rule 12(c) of the Federal Rules of Civil Procedure, Defendant Factory Mutual Insurance Company ("FM Global") respectfully submits these suggestions in support of its Motion for Partial Judgment on the Pleadings.

I. Introduction

On July 23, 2020, Plaintiffs Maryville University ("Maryville") and Rockhurst University ("Rockhurst") brought this action on behalf of themselves and several putative classes of universities and colleges, contending that the terms of their property insurance policies (the "Policies") with FM Global cover damages Plaintiffs allegedly suffered due to the COVID-19 pandemic. Specifically, Plaintiffs claimed that they were entitled to coverage up to the full amount of those Policies, or approximately $278.1 million for Rockhurst and $314.1 million for Maryville.

Since that time, an avalanche of decisions from this Court and courts all over the country has made clear that the presence of the novel coronavirus or the COVID-19 disease cannot constitute physical loss or damage as a matter of law. Perhaps anticipating a similar result in this case, Plaintiffs filed an Amended Complaint that—while containing claims identical to those in its first Complaint—adds a number of allegations regarding the coronavirus's ability to persist on, and even bind to, common surfaces like wood or metal. Most of these new allegations are unsourced, and all are far too vague or conditional to satisfy the Rule 12 pleading standard. But even if this Court were to take them at face value, FM Global would still be entitled to judgment on the pleadings, for three separate reasons.

First, Plaintiffs' allegations cannot establish the existence of "physical loss or damage," which is a prerequisite to five of the eight coverages Plaintiffs identify as applicable to their claims. Even if they were able to show the novel coronavirus was present on their properties, and even if the coronavirus resulted in some "physical alteration" to those properties, Plaintiffs still have failed to plead that such alteration resulted in *any* harm necessitating repair or replacement of the affected

properties. To the contrary, Plaintiffs concede that the coronavirus is susceptible to routine cleaning and disinfecting, fatally undercutting those claims. Nor have Plaintiffs alleged any facts tending to show that the "utility or habitability" of their properties was "effectively eliminated," and their admission that students and essential workers remained in those buildings during the pandemic is similarly dispositive.

Second, and relatedly, even if this Court were to accept Plaintiffs' conclusory allegations that COVID-19 was present on their properties, *and* that such presence had eliminated those properties' utility, the Policies' exclusion of damages stemming from "Loss of Use" would bar coverage under those same five provisions.

Third, the Policies contain a broad and comprehensive "Contamination Exclusion," which expressly excludes any losses due to "contamination, and any cost due to contamination including the inability to use or occupy property or any cost of making property safe or suitable for use or occupancy." Policies at 15. The Policies define "contamination" to include "disease causing or illness causing agent[s]," including "virus," "bacteria," "pathogen," and "pathogenic organism." Policies at 76. Plaintiffs affirmatively allege that their purported losses resulted from the novel coronavirus and that the coronavirus is a virus. Accordingly, and as at least one other court in this District has concluded with regard to a similar provision, the Contamination Exclusion bars Plaintiffs' claims with regard to the same five Policy provisions that require a showing of physical loss or damage.

Plaintiffs also claim coverage under the Policies' Communicable Disease Response and Interruption by Communicable Disease provisions. Unlike the provisions discussed above, these coverages (along with that for Claims Preparation Costs) do not require physical loss or damage and are not subject to the Loss of Use and Contamination Exclusions. Instead, they simply require

that a claimant show (1) the "actual not suspected presence" of a communicable disease, like COVID-19, on its premises, and (2) a government shutdown order or corporate directive limiting the use of the claimant's facilities. In other words, these coverages—as their names suggest—are designed for precisely the situation in which Plaintiffs find themselves. Accordingly, FM Global is not moving for judgment on the pleadings as to Plaintiffs' claims under these coverages, which are subject to a sublimit of $1 million in the annual aggregate.

Over the past thirteen months, the coronavirus pandemic has taken a heavy toll on people and businesses. Plaintiffs appear to be no exception. But the unambiguous language of the Policies makes clear that, at most, Plaintiffs are entitled to the coverages they purchased for Communicable Disease (and, of course, for the costs of preparing any such successful claim). In demanding that FM Global reimburse them for losses exceeding those provisions' $1 million sublimit, under unrelated provisions of coverage and in contravention of the Policies' explicit exclusions, Plaintiffs are seeking the benefit of a bargain they never made. Accordingly, this Court should dismiss all of Plaintiffs' claims except those as to the Communicable Disease coverages.

II. Factual and Procedural Background

A. Relevant Terms of Plaintiffs' Policies.

Plaintiff Rockhurst is "a private Jesuit university in Kansas City, Missouri" serving "nearly 4,000 students." Am. Compl. ¶ 26. Plaintiff Maryville is "a private university located in St. Louis, Missouri" serving "over 10,000 students." *Id.* ¶ 28. Both Rockhurst and Maryville belong to the College and University Risk Management Association (CURMA), the members of which each purchase property and casualty insurance through Defendant FM Global. *Id.* ¶ 29. The annual aggregate limit of liability per occurrence under the Rockhurst and Maryville Policies is $278.1 million and $314.1 million, respectively. *Id.* ¶ 16. In exchange for this coverage, Rockhurst pays an annual policy premium of $131,790 and Maryville pays $194,825. *Id.* ¶ 110.

The policy provisions at issue here include the same language. Both insure Plaintiffs "against ALL RISKS OF PHYSICAL LOSS OR DAMAGE, ***except as hereinafter excluded***," to certain named properties. Am. Compl. ¶ 11; Policies at 1 (emphasis added). Stated differently, if there is physical loss or damage to covered property or other loss that is covered by the Policies and all other requirements for coverage have been met, such loss is covered unless a specific exclusion bars coverage. The Policies' exclusions are in turn subject to certain exceptions. *See* Am. Compl. ¶ 99; Policies at 11 (exclusions apply "unless otherwise stated").

Plaintiffs allege that they are entitled to coverage for their "property damage" and business interruption losses due to the novel coronavirus and/or COVID-19 under eight provisions in the Policies.[1] Five of the provisions which allegedly provide coverage explicitly require the existence (or, in the case of Protection and Preservation of Property, the "immediately impending existence") of "physical loss or damage":

Protection and Preservation of Property	This Policy covers . . . reasonable and necessary costs incurred for actions to temporarily protect or preserve insured property; provided such actions are necessary due to actual, or to prevent immediately impending, ***insured physical loss or damage*** to such insured property. Policies at 33 (emphasis added)
Time Element Coverage—Extra Expense, Gross Earnings and Extended Period of Liability, Gross Profit, and Tuition Fees[2]	This Policy insures TIME ELEMENT loss, as provided in the TIME ELEMENT COVERAGES, directly resulting from ***physical loss or damage of the type insured*** . . . . Policies at 40 (emphasis added)

[1] Plaintiffs appear to reserve the right to claim additional coverage provisions would apply (Am. Compl. ¶ 175), but their deadline for amending the pleadings has passed.

[2] Plaintiffs identify these as five different provisions, but "Extra Expense," "Gross Earnings and Extended Period of Liability," "Gross Profit," and "Tuition Fees" are types of "Time Element Coverage" subject to the "Loss Insured" requirements.

Civil or Military Authority	This Policy covers the Actual Loss Sustained and EXTRA EXPENSE incurred by the Insured during the PERIOD OF LIABILITY if an order of civil or military authority limits, restricts or prohibits partial or total access to an insured location provided such order is the direct result of ***physical damage of the type insured*** at the insured location or within five statute miles/eight kilometres of it. Policies at 55 (emphasis added)
Ingress/Egress	This Policy covers the Actual Loss Sustained and EXTRA EXPENSE incurred by the Insured due to the necessary interruption of the Insured's business due to partial or total physical prevention of ingress to or egress from an insured location, whether or not the premises or property of the Insured is damaged, provided that such prevention is a direct result of ***physical damage of the type insured*** to property of the type insured. Policies at 56 (emphasis added)
Expediting Costs	This Policy covers the reasonable and necessary costs incurred . . . for the temporary repair of ***insured physical damage*** to insured property; . . . for the temporary replacement of insured equipment suffering ***insured physical damage***; and . . . to expedite the permanent repair or replacement of such damaged property. Policies at 26 (emphasis added)

Accordingly, unless Plaintiffs can demonstrate such extant or immediately impending "physical loss or damage" or "physical damage" to their property, these five coverages are inapplicable. By contrast, the three remaining coverages which allegedly apply—"Communicable Disease Response," "Interruption by Communicable Disease" (together, the "Communicable Disease Provisions") and "Claims Preparation Costs"—contain no mention of, and thus do not require Plaintiffs to show, impending or actual "physical loss or damage." *See* Policies. As to the Claims Preparation Costs coverage, as discussed *infra*, Plaintiffs must show that FM Global has "accepted liability" for the underlying claim before that coverage is triggered. The coverage is also subject to a sublimit of "$25,000 plus 50% of the amount recoverable under that coverage in excess of $25,000." Policies at 4.

It should also be noted that, in connection with each of the Time Element coverages above—including Extra Expense, Gross Earnings and Extended Period of Liability, Gross Profit, Tuition Fees, Civil or Military Authority, and Ingress/Egress—the Policies provide for a "Period of Liability." *See* Policies at 48-52. In each case, the Period of Liability commences at the "time of physical loss or damage of the type insured." As for its end date, with the exception of the Gross Profit coverage, which is subject to a predetermined 12 month period, the Period of Liability ends "when with due diligence and dispatch the building and equipment could be: (i) *repaired or replaced*; *and* made ready for operation under the same or equivalent physical or operating conditions that existed prior to the damage." *Id.* at 48 (emphasis added). In other words, the Policies implicitly recognize that "physical loss or damage of the type insured" necessitates the repair or replacement of that property. And, the Policies' coverage for Expediting Costs (located within the Property Damage section) makes this connection explicit, providing coverage for the "temporary *repair* of insured physical damage to insured property," the "temporary *replacement* of insured equipment suffering insured physical damage," and the expedition of "permanent *repair or replacement*." *Id.* at 26 (emphasis added).

The Policies also contain enumerated exclusions that apply "unless otherwise stated," two of which are relevant here. First, the Policies exclude "loss of market or loss of use" (the "Loss of Use Exclusion"). *Id.* at 12. To the extent that Plaintiffs' claimed losses stem from an impairment to use due to government shut-down orders (the "Stay-At-Home Orders") and/or COVID-19, this exclusion bars recovery (again, subject to applicable exceptions).

Second, the Policies contain a Contamination Exclusion which states, in relevant part:

> [The] Policy excludes the following unless directly resulting from other physical damage not excluded by this Policy: 1) ***contamination, and any cost due to contamination including the inability to use or occupy property or any cost of making property safe or suitable for use or occupancy***.

Policies at 15 (emphasis added). "Contamination" is defined as:

> any condition of property due to the actual or suspected presence of any foreign substance, impurity, pollutant, hazardous material, poison, toxin, ***pathogen or pathogenic organism, bacteria, virus, disease causing or illness causing agent,*** fungus, mold or mildew.

Id. at 76 (emphasis added). By its plain terms, the definition of contamination encompasses "viruses" and other "disease causing or illness causing agents" like the novel coronavirus (*id.*), and thus precludes recovery unless the contamination in question results from "other physical damage not excluded by [the Policies]" or falls within one of the Policies' exceptions. *Id.* at 15.

The Contamination and Loss of Use Exclusions act as separate bars to recovery under the provisions pursuant to which Plaintiffs claim coverage other than the provisions for Communicable Disease. The Communicable Disease Provisions provide coverage under the following conditions:

> If a location owned, leased or rented by the Insured has the actual not suspected presence of communicable disease[3] and access to such location is limited, restricted or prohibited by:
>
> 1) an order of an authorized governmental agency regulating the actual not suspected presence of communicable disease; or
>
> 2) a decision of an Officer of the Insured as a result of the actual not suspected presence of communicable disease[.]

Id. at 23-24, 62. If Plaintiffs can show (1) they had the "actual not suspected presence" of COVID-19 on their covered property, and (2) access to that property is limited by the applicable Stay-At-Home Orders, they may be eligible to recover a total of up to $1 million in costs for remediation and public relations services as well as other losses and expenses. *Id.* at 24. As for the Claims

[3] The Policies define "communicable disease" as a "disease which is . . . transmissible from human to human by direct or indirect contact with an affected individual or the individual's discharges, or . . . Legionellosis." Policies at 76.

Preparation Costs provision, the Policies simply offer coverage for preparing a successful claim, reimbursing "the actual costs incurred by the Insured:

> 1) of reasonable fees payable to the Insured's: accountants, architects, auditors, engineers, or other professionals; and
>
> 2) the cost of using the Insured's employees, for producing and certifying any particulars or details contained in the Insured's books or documents, or such other proofs, information or evidence required by the Company *resulting from insured loss payable under this Policy for which the Company has accepted liability*. . . ."

Id. at 23 (emphasis added). Thus, the Claims Preparation Costs provision is not triggered unless an "insured loss" has occurred for which FM Global "has accepted liability." *Id.*

B. Plaintiffs' Claims for Coverage and the Filing of this Lawsuit.

On or about June 1 and June 18, 2020, respectively, Rockhurst and Maryville sent notice of insurance claims to FM Global "for physical loss or damage to covered property and resulting business interruption and other covered losses and damage . . ." Am. Compl. ¶ 17. Despite failing to provide specific details regarding the alleged injury they had suffered, Plaintiffs asked for FM Global's "confirmation as to coverage with respect to each and every potentially applicable basis for coverage under all provisions" of the Policies (*id.* ¶ 202) and assert that FM Global failed to acknowledge any possibility of coverage beyond the Communicable Disease Provisions. *See id*. ¶¶ 17, 20. FM Global has not yet paid Plaintiffs in connection with their claims. *See id*.

On July 23, 2020, Plaintiffs filed a putative class action complaint against FM Global in this Court, seeking declaratory judgment and breach of contract. *See* Complaint, Dkt. 1. Plaintiffs filed a motion to amend their complaint on February 12, 2021, which FM Global agreed not to oppose and which this Court granted on March 10, 2021. Dkt. 40. On March 11, 2021, Plaintiffs filed the Amended Complaint, in which they allege a variety of losses "due directly to the presence of the Coronavirus, COVID-19, and the ongoing pandemic." Dkt. 41. They seek judgment not only

on their own behalf, but also on behalf of four separate classes and subclasses made up of "institutions of higher learning." *Id.* at ¶ 189.

Plaintiffs contend that they are entitled to coverage in connection with actions they took to limit access to their locations, including closing their campuses "entirely to all but a few essential personnel." *Id.* ¶ 5; *see also id.* ¶¶ 34-35. Although Plaintiffs later reopened their campuses, they allege "the effects of the Coronavirus, COVID-19, and ongoing pandemic continue to deprive Plaintiffs of the full use of their campuses and property." *Id.* ¶ 6. The lost revenue and added expense "attributable to the Coronavirus, COVID-19, and the ongoing pandemic" include items such as lost tuition and fundraising income, added technology expenses for virtual learning, added cleaning, disinfecting, and sanitizing costs, and changes to work schedules and meeting protocols. *Id.* ¶¶ 8-9; *see also* ¶ 80 ("Plaintiffs have incurred increased costs to clean, disinfect, and sanitize their property."). Plaintiffs do not enumerate any of these alleged damages with specificity. Moreover, and critically, they do not identify any objects or property which suffered tangible harm or had to be "repaired or replaced" due to their alleged contact with the novel coronavirus.

III. Applicable Legal Standard

Under Federal Rule of Civil Procedure 12(c), a court will enter judgment on the pleadings "where no material issue of fact remains to be resolved and the movant is entitled to judgment as a matter of law." *Osby v. Citigroup, Inc.*, 2008 WL 2074102, at *1 (W.D. Mo. May 14, 2008). "The standard for a motion for judgment on the pleadings is the same as that for a motion to dismiss." *Wright v. Missouri*, 2008 WL 151368, at *3 (W.D. Mo. Jan. 7, 2008). In deciding a Rule 12(c) motion, a court "generally may not consider materials outside the pleadings when deciding a motion . . . for judgment on the pleadings." *Greenman v. Jessen*, 787 F.3d 882, 887 (8th Cir. 2015) (citing *Porous Media Corp. v. Pall Corp.*, 186 F.3d 1077, 1079 (8th Cir. 1999)). Consequently, a court "may consider the pleadings themselves, materials embraced by the

pleadings, exhibits attached to the pleadings, and matters of public record." *Mills v. City of Grand Forks*, 614 F.3d 495, 498 (8th Cir. 2010) (citing *Porous Media*, 186 F.3d at 1079).

The interpretation of an insurance policy is a question of law for the Court. *Volk v. Ace Am. Ins. Co.*, 748 F.3d 827, 828 (8th Cir. 2014).[4] Courts interpret insurance policy language according to its plain and ordinary meaning. *Consumers Ins. USA, Inc. v. Davis*, 2010 WL 1438823, at *6 (W.D. Mo. Apr. 12, 2010) (citing *Shahan v. Shahan*, 988 S.W.2d 529, 535 (Mo. 1999)). If the express language is clear and unambiguous, courts must enforce the language as written, *id.*, and "may not create ambiguities to distort the language of an unambiguous policy." *Id.* at *6. Ambiguities arise "when there is 'duplicity, indistinctness or uncertainty in the meaning of the words used in the insurance policy.'" *Id.* "[C]reating an ambiguity where none exists" is impermissible. *Kern v. Liberty Mut. Ins. Co.*, 398 F.2d 958, 960 (8th Cir. 1968) (citation omitted).

IV. Argument

Under Missouri law, the insured has the burden of establishing that its claim falls within a policy's coverage. *Elec. Power Sys. Int'l, Inc. v. Zurich Am. Ins. Co*., 880 F.3d 1007, 1009 (8th Cir. 2018) ("It is the insured's burden to establish coverage under the policy."); *Am. Fam. Mut. Ins. Co. v. Co Fat Le*, 439 F.3d 436, 439 (8th Cir. 2006) (same). As discussed below, Plaintiffs have alleged no facts that could allow them to meet that burden here because the Policies clearly

[4] Missouri law applies here. In a diversity case, the forum state's choice of law principles governs. *Allianz Ins. Co. of Canada v. Sanftleben*, 454 F.3d 853, 855 (8th Cir. 2006). When construing insurance contracts that have no choice of law provision, like the Policies, Missouri applies the law of the state with the "most significant relationship" with the contract. *See, e.g.*, *Emerson Elec. Co. v. Crawford & Co.*, 963 S.W.2d 268, 273 (Mo. Ct. App. 1997). The principal location of the insured risk is given the greatest weight, but additional factors are also considered, including the place of contracting, the place of negotiation of the contract, the place of contract performance, the location of the subject matter of the contract, and the place of business for the parties. *Accurso v. Amco Ins. Co.*, 295 S.W.3d 548, 553 (Mo. Ct. App. 2009). Here, the Policies at issue covered Plaintiffs' premises in Missouri, which is also the place of performance.

and unambiguously do not cover (and, in fact, explicitly exclude) the damages sought by Plaintiffs under five of the eight provisions cited by Plaintiffs. Accordingly, Plaintiffs' claims under each of those provisions should be dismissed with prejudice.

A. Plaintiffs Have Not Pled and Cannot Plead the Existence of "Physical Loss or Damage" at Their Insured Properties.

Plaintiffs acknowledge that, in order to state a claim under five of the eight Policy provisions pursuant to which they claim coverage, they must demonstrate the existence of "physical loss or damage." At a minimum, this means they must be able to demonstrate that there has been a tangible alteration of property resulting in distinct and demonstrable harm to that property. *Zwillo V v. Lexington Ins. Co*., 2020 WL 7137110, at *4 (W.D. Mo. Dec. 2, 2020) ("'[D]irect physical loss of or damage to property' requires physical alteration of property, or, put another way, a tangible impact that physically alters property."); *Medavera, Inc. v. Travelers Casualty Ins. Co*. of Am., No. 18-03174- CV-S-BP, 2019 WL 5686713 at *2 (W.D. Mo. May 31, 2019) ("Direct physical loss or damage" requires "tangible" impact); *Bbms v. Cont'l Cas. Co*., 2020 WL 7260035, at *3 (W.D. Mo. Nov. 30, 2020) ("A survey of cases, both from Missouri and elsewhere, confirms that the phrase requires some physical event or force on, in or affecting the property in question and not mere 'loss of use.' Ruling otherwise would render the word 'physical' a nullity.").

This same standard applies elsewhere. Indeed, courts in New York and California recently dismissed substantively identical claims for coverage against an FM Global affiliate based on the failure to demonstrate "physical loss or damage" under the same policy language at issue here. *See Out West Restaurant Group Inc. et al., v. Affiliated FM Insurance Company*, 2021 WL 1056627, at *4 (N.D. Cal. Mar. 19, 2021) ("Where a policy additionally requires 'direct physical loss of or physical damage to property,' there must either be a physical change in the condition or a

permanent dispossession of the property."); *Mohawk Gaming Enterprises, LLC v. Affiliated FM Insurance Co.*, (N.D.N.Y. Apr. 15, 2021) ("the inclusion of the modifier 'physical' . . . clearly imposes a requirement that the damage actually be tangible in nature.").

In attempting to meet this standard, Plaintiffs begin by alleging—in conclusory fashion—that the "SARS-CoV-2 virus and the resulting COVID-19 disease was and has been present on Plaintiffs' insured property and in surrounding areas since at least March 2020." Am. Compl. ¶ 43. Plaintiffs next contend that the purported "omnipresence" (*id.* ¶ 41) of both the coronavirus and COVID-19 caused physical loss or damage through two different "mechanisms" (*id.*): one, that the virus itself "physically altered such property and air…sufficient to constitute physical loss or damage to property" (*id.* ¶ 46); and two, that the virus or COVID-19 "effectively eliminate[d] the utility and habitability of such property sufficient to constitute physical loss or damage to such property within the meaning of the Policy." *Id.* ¶ 41. Even if one were to assume that Plaintiffs have satisfied their burden of establishing the actual presence of the novel coronavirus or COVID-19 on their premises, the fact remains that neither of the two mechanisms identified by Plaintiffs can constitute physical loss or damage as a matter of law.

i. Plaintiffs Never Allege that the Coronavirus or COVID-19 Can Cause or Has Caused Tangible Harm to Their Properties.

Plaintiffs have failed to allege any facts which, if taken as true, would demonstrate that their properties suffered tangible harm caused by the coronavirus or COVID-19. Although their Amended Complaint spends multiple paragraphs discussing the ability of the novel coronavirus to travel through the air and to persist on (or even "bond to") certain surfaces (*see, e.g.*, Am. Compl. ¶¶ 81-95), it never once describes any actual physical *damage* inflicted upon Plaintiffs' property. Indeed, Plaintiffs fail to identify a single object which had to be repaired or replaced as a result of

the presence of the coronavirus; to the contrary, they freely acknowledge that the coronavirus can be eliminated through "cleaning, sanitizing and disinfecting." *Id.* ¶ 6.

For this reason, almost every court to have considered the argument advanced by Plaintiffs here has rejected it soundly as a matter of law. *See, e.g.*, *Bel Air Auto Auction Inc. v. Great Northern Ins. Co.*, 2021 WL 1400891, at *11 (D. Md. Apr. 14, 2021) (dismissing argument that "contamination" ostensibly caused by COVID-19 could constitute physical loss or damage because the virus "does not threaten the structures covered by property insurance policies" and plaintiff did not need to "repair or replace its property due to the Pandemic."); *Rococo Steak, LLC v. Aspen Specialty Ins. Co.*, 2021 WL 268478 (M.D. Fla. Jan. 27, 2021) (presence of virus did not constitute direct physical loss given the lack of tangible damage to property); *Uncork & Create LLC v. Cincinnati Ins. Co*., 2020 WL 6436948, at *5 (S.D. W. Va. Nov. 2, 2020) ("Even when present, COVID-19 does not threaten the inanimate structures covered by property insurance policies, and its presence on surfaces can be eliminated with disinfectant. Thus, even actual presence of the virus would not be sufficient to trigger coverage for physical damage or physical loss to the property."); *Kahn v. Pennsylvania Nat'l Mut. Cas. Ins. Co.*, 2021 WL 422607, at *6 (M.D. Pa. Feb. 8, 2021) (finding no physical loss because plaintiff's building did not suffer any kind of physical or structural impairment as required to trigger coverage).[5] Indeed, in *Out West*,

[5] *See also Wellness Eatery La Jolla LLC v. Hanover Ins. Grp.*, 2021 WL 389215, at *5-8 (S.D. Cal. Feb. 3, 2021) (finding no direct physical loss of or damage to property because loss of use alone, without tangible damage to the eateries themselves, does not constitute physical damage to property); *Bend Hotel Dev. Co., LLC v. Cincinnati Ins. Co.*, 2021 WL 271294, at *2-3 (N.D. Ill. Jan. 27, 2021) (holding that the virus does not cause direct physical loss or damage to property*); Karmel Davis & Assocs. v. Hartford Fin. Servs. Grp*., 2021 WL 420372, at *4 (N.D. Ga. Jan. 26, 2021) (finding no direct physical loss or damage to property because COVID-19 "does not and has not physically altered the insured property"); *O'Brien Sales & Mktg., Inc. v. Transp. Ins. Co.*, 2021 WL 105772, at *4 (N.D. Cal. Jan. 12, 2021) ("[T]he presence of the virus itself, or of individuals infected with the virus, at [O'Brien's] business premises or elsewhere did not constitute direct physical loss of or damage to property"); *Tappo of Buffalo, LLC v. Erie Ins. Co.*, 2020 WL

which involved language *identical* to that found in the Policies at issue here, the Northern District of California specifically held that the coronavirus's susceptibility to cleaning and disinfecting by *itself* compelled the conclusion that it could not constitute physical loss or damage as a matter of law. *Out West*, 2021 WL 1056627, at *5 (agreeing with "[t]he overwhelming majority of courts" that "the virus fails to cause physical alteration of property because temporary loss of use of property (if any) during a pandemic and while government orders are in effect does not qualify as physical loss or damage."); *see also 1 S.A.N.T., Inc. v. Berkshire Hathaway, Inc.*, 2021 WL 147139, at *7 (W.D. Pa. Jan. 15, 2021) (no direct physical loss because properties could remain open for takeout and plaintiff did not lose all access to premises despite the state-ordered closures).

Similarly, and as another court in this circuit has held, general statements regarding employees "affected by the virus" and individuals testing positive for the virus are "insufficient to establish the sort of contamination that might give rise to a claim for 'direct physical loss.'" *Torgerson Props. v. Cont'l Cas. Co.*, 2021 WL 615416, at *2 (D. Minn. Feb. 17, 2021); *see also Zwillo V*, 2020 WL 7137110, at *4; *Pappy's Barber Shops, Inc. v. Farmers Grp., Inc.*, 2020 WL 5847570, *1 (S.D. Cal. Oct. 1, 2020) (holding that the presence of the virus or infected persons did not constitute physical loss); *Mohawk*, No. 8:20-CV-701 at 14 (granting motion for judgment on the pleadings related to a policy with the same language at issue here on the basis that "the presence of the novel coronavirus at the Casino would still not qualify as 'physical damage.'").[6]

In addition to the overwhelming weight of the caselaw, the Policies' language itself fatally undercuts Plaintiffs' argument on this score. As discussed in further detail in Section II, *supra*, all

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7867553, at *4 (W.D.N.Y. Dec. 29, 2020) ("[A]n item or structure that merely needs to be cleaned has not suffered a 'loss' which is both 'direct' and 'physical.").

[6] *See also Mohawk* at 13 ("the mere presence or spread of the novel coronavirus is insufficient to trigger coverage when the policy's language requires physical loss or damage.").

the applicable provisions at issue on this Motion implicitly or explicitly equate "physical loss or damage" with the need to "repair" or "replace" the affected property.[7] Specifically, the "period of liability" for each of Extra Expense, Gross Earnings and Extended Period of Liability, Gross Profit, Tuition Fees, Civil or Military Authority, Ingress/Egress and Expediting Costs lasts as long as it takes to either repair or replace the damaged property. If, as Plaintiffs urge, physical loss or damage can exist absent any need to repair or replace property, there would be no way to determine what the "period of liability" actually is, thus effectively reading that provision out of the contract.[8] That, of course, is impermissible under black-letter Missouri law. *Doe Run Res. Corp. v. Certain Underwriters at Lloyd's London*, 400 S.W.3d 463, 474 (Mo. Ct. App. 2013) ("We read insurance policies as a whole to determine the parties' intent, and give effect to this intent by enforcing the contract as written. . . We must endeavor to give each provision a reasonable meaning and to avoid an interpretation that renders some provisions useless or redundant."); *see also Jaudes v. Progressive Preferred Ins. Co.*, 11 F. Supp. 3d 943, 957 (E.D. Mo. 2014) (finding no coverage under plain language of insurance policy).

Finally, there is a practical, common sense aspect to consider. In essence, Plaintiffs' argument—that the mere presence of transient particles visible only through an electron

[7] The two exceptions are "Gross Profit," which has a predetermined period of liability of 12 months, and "Protection and Preservation of Property," which by definition covers losses incurred *prior* to any physical loss or damage. *See* Policies at 6; 33.

[8] Plaintiffs may contend that "cleaning" and "disinfecting" the property is tantamount to "repair." But that argument is at odds with the common dictionary definition of the word "repair," which means to "fix," "mend," or "restore." Numerous cases have reached this same conclusion. *See, e.g.*, *Moody v. Fin. Grp., Inc.,* -- F. Supp. 3d --, 2021 WL 135897, at *6 (E.D. Pa. Jan. 14, 2021) (holding that "cleaning surfaces cannot reasonably be described as repairing, rebuilding, or replacing" property); *Chief of Staff*, 2021 WL 1208969, at *3 (relying on language such as "repair," "rebuild," and "replace" to find that "the better reading of the provision is the one that requires some physical change to the condition or location of the property at the insured's premises"); *Bel Air*, 2021 WL 1400891, at *11 (same).

microscope constitutes "physical loss or damage" sufficient to trigger coverage under a property insurance policy—would render insurers potentially responsible for every cost associated with the billions of organic and inorganic particles that travel through the air or rest on the surfaces around us at every moment of every day. As other courts have recognized, this absence of any limiting principle provides another reason why Plaintiffs' claims must be dismissed. *See, e.g.*, *Bel Air*, 2021 WL 1400891, at *10 ("[I]f the presence of COVID-19 were actual 'contamination' . . . then every place of business in the State and the country" would have a claim for "contamination," "including hospitals, grocery stores and other businesses where people continue to flock during the pandemic."). As set forth above, that cannot be, and is not, the law.

ii. Plaintiffs' Alleged Loss of Use Due to the Alleged Presence of COVID-19 on Their Properties Cannot Constitute Physical Loss or Damage.

Plaintiffs appear to recognize that (a) they have failed to allege any actual damage to their property caused by the coronavirus or COVID-19 and (b) it would be untenable for the mere presence of a viral particle to constitute physical loss or damage. Accordingly, they suggest that, after "bonding with, and becoming part of, the property that it comes in contact with, the SARS-CoV-2 virus adversely alters" that property, thus rendering it "uninhabitable, unfit for its intended purpose, dangerous and, indeed, potentially deadly." ¶ 95. Plaintiffs assert that it is this loss of utility—not the purported "physical alteration"—which in fact constitutes physical loss or damage.

The problem for Plaintiffs is that almost every court to consider the matter—including at least one in this District—has squarely rejected identical arguments seeking to characterize "loss of use" as physical loss or damage. In *Zwillo V*, for instance, this Court explicitly concluded that "the term 'direct physical loss of or damage to' does not encompass simple deprivation of use," and that the virus's "presence on the premises or of loss of use of premises due to the stay-at-home orders (or the virus itself)" was insufficient to constitute physical loss or damage. 2020 WL

7137110, at *5-6 (collecting cases holding same).[9] Similarly, courts have found that the policy language of "direct physical loss" cannot be construed to cover "mere loss of use" because such interpretation would negate or render loss of use provisions such as FM Global's superfluous. *See Robert E. Levy, D.M.D., LLC v. Hartford Fin. Servs. Grp. Inc.*, 2021 WL 598818, at *11 (E.D. Mo. Feb. 16, 2021); *Ballas Nails & Spa, LLC v. Travelers Cas. Ins. Co. of Am.*, 2021 WL 37984, at *4 (E.D. Mo. Jan. 5, 2021); *Chief of Staff, LLC v. Hiscox Insurance Company Inc.*, 2021 WL 1208969, at *3 (N.D. Ill. Mar. 31, 2021) ("[I]t does not follow that mere loss of *use*—without any tangible alteration to the physical condition or location of property at the insured's premises—falls within the meaning of either" the phrase "direct physical loss" or "direct physical…damage."). These holdings are consistent with the Eighth Circuit's decision in *Pentair* that mere loss of use or function does not constitute "direct physical loss or damage" under an insurance policy. *Pentair, Inc. v. Am. Guarantee & Liab. Ins. Co.*, 400 F.3d 613, 616 (8th Cir. 2005).

This conclusion is also buttressed by Plaintiffs' own allegations. Plaintiffs admit that their campuses remained open at all times to certain individuals, and that a number of their employees and contractors remained on the job during the pandemic. Am. Compl. ¶¶ 39, 95. Plaintiffs also admit that, despite the fact that the pandemic continues, their campuses reopened for students and professors in the fall of 2020. *Id.* at ¶¶ 34-35. And Plaintiffs never affirmatively allege that their facilities were completely shut down or lost all utility as a result of the actual presence of the

[9] *See, e.g., Judicial Rulings on the Merits in Business Interruption Cases*, Covid Coverage Litigation Tracker ("*Judicial Rulings*") (last visited Apr. 23, 2021), https://cclt.law.upenn.edu/judicial-rulings/ (summarizing rulings in COVID-19 coverage cases). As of the filing of this brief, over 90 percent of cases in federal courts have been dismissed.

coronavirus. *See generally* Am. Compl. Under such circumstances, Plaintiffs cannot meet and have not met their burden of demonstrating "physical loss or damage of the type insured."

iii. Plaintiffs' Alleged Loss of Use Due to the "Imminent Threat" of COVID-19 Cannot Constitute Physical Loss or Damage.

Plaintiffs also claim that the "imminent risk" of COVID-19 on Plaintiffs' property and other nearby property and in the air "effectively eliminates the utility and habitability of such property sufficient to constitute physical loss or damage." *See* Amended Compl. ¶ 48. This allegation, which is meant to trigger coverage for "Protection or Preservation of Property," fails for the same reasons laid out in Sections IV(i) and (ii). Plaintiffs never allege an "imminent risk" of *physical loss or damage* to their insured property, but instead allege that there is an "imminent risk of the *presence*" of COVID-19 such that their properties' utility and habitability have been "effectively" eliminated. *Id.* (emphasis added). But if the presence of COVID-19 (or the "loss of use" resulting therefrom) is insufficient to constitute "physical loss or damage," it necessarily follows that the "imminent risk" of such presence or loss of use is similarly insufficient. *See Zwillo V*, 2020 WL 7137110, at *4 (physical loss or damage "requires physical alteration of property, or, put another way, a tangible impact that physically alters property."); *Ballas Nails*, 2021 WL 37984, at *5 (E.D. Mo. Jan. 5, 2021) ("[Plaintiff's] complaint does not allege any facts demonstrating that it experienced a direct physical loss of or direct physical damage to its property by the coronavirus or as a result of government closure orders"); *see also supra* Section IV(A)(i).

iv. The Location of the "Communicable Disease" Provisions Does Not Establish That COVID-19 Causes Physical Loss or Damage.

Finally, to the extent that Plaintiffs attempt to argue that the location of the "Communicable Disease" provisions in the Policies somehow indicates that COVID-19 causes physical loss or damage, that argument also fails. In their Amended Complaint, Plaintiffs allege for the first time that the Policies "equate[] the presence[] of a 'communicable disease' at property with physical

loss or damage of the type insured under the Policy." *See* Am. Compl. ¶ 117. Although the precise wording of the paragraph is difficult to follow, Plaintiffs appear to argue that by including "Communicable Disease Response" within the "Property Damage" section of the Policies, FM Global has implicitly admitted that a "communicable disease" *itself* can cause physical loss or damage. *See id.* ¶ 119.

This is too cute by half, and directly contravened by the plain language of the Policies. Indeed, there are at least five reasons why Plaintiffs' argument on this point fails.

First, Plaintiffs' argument rests on false equivalences. "Property Damage"[10] is not the same thing as "physical loss or damage," and "Communicable Disease Response," which is a specifically defined grant of coverage containing multiple conditions precedent, is not the same thing as *a* "communicable disease" like COVID-19, which is a state of ill health. Moreover, the Communicable Disease Response provision is one of 31 provisions under the "Property Damage" section of the Policies, and each and every one of the provisions that requires "physical damage" or "physical loss or damage" says so explicitly. For example, the "Data Restoration" provision states that it "covers insured physical loss or damage to electronic data, programs or software." Policies at 18; *see also* 19-20 ("Data Service Provider Property Damage" requires "such physical loss or damage . . . from the interruption of off-premises data processing or data transmission services"); 20 ("Accidental Interruption of Services" requires "*physical damage*"), 21 ("Accounts Receivable" requires "*physical loss or damage*") (emphasis added). By contrast, the "Communicable Disease Response" provision does *not* even mention physical loss or damage, which demonstrates that the provision unambiguously does not require physical loss or damage.

[10] In any event, Section 11 of the Policies' section on General Provisions makes clear that "Titles," like that of "Property Damage," "are only for reference" and "do not in any way affect the provisions" of the Policies. *See* Policies at 75.

Rather, the Communicable Disease Provisions involve only two prerequisites: (1) "the actual, not suspected presence of a communicable disease" and (2) the resulting limitation or preclusion of access to such property by a governmental order or an officer of the insured company. Policies at 23-24, 62-63. If those conditions are satisfied, there is no need for a further showing of physical loss or damage, which is why those words do not appear within those provisions.[11]

Second, and relatedly, the Policies clearly state that the Additional Coverages are "subject to the Policy provisions, including applicable exclusions and deductibles," so Plaintiffs cannot simply choose to read additional conditions into the Policies. *See Kern*, 398 F.2d at 960. Because the Communicable Disease Provisions do not refer to "physical loss or damage," Plaintiffs may not assume that it is required. *Coble v. Econ. Forms Corp.*, 304 S.W.2d 47, 53 (Mo. App. 1957) ("[W]here general and specific allegations are made concerning the same subject, the specific allegations control and limit the general allegation. If the two are inconsistent, the general allegation must fail."). Indeed, other provisions within the Policy—including Claims Preparation Costs—are also silent on the issue of physical loss or damage, and thus also do not

[11] The PERIOD OF LIABILITY applicable to the Interruption by Communicable Disease coverage further underscores the bankruptcy of Plaintiffs' position on this subject. If Plaintiffs were correct that the Communicable Disease Provisions treat a communicable disease (such as COVID-19) as "physical loss or damage," there would be no need for the Policies to specify a separate period of liability than set forth in the GROSS PROFIT and GROSS EARNINGS provisions. But the Policies do exactly that. *Compare* Policies at 61 (stating that the Period of Liability for Interruption by Communicable Disease begins with "the time of the order" of an authorized agency or Officer of the Insured) *with* Policies at 50 (stating that Period of Liability for GROSS PROFIT and GROSS EARNINGS begins with "the time of physical loss or damage of the type insured"). *See also*, *e.g.*, *Water Sports Kauai, Inc. v. Fireman's Fund Ins. Co.*, 2020 WL 6562332, at *7 (N.D. Cal. Nov. 9, 2020) (rejecting argument that physical loss or damage could occur based on loss of use where the policy's "period of restoration" states that the policy covered lost business income and extra expenses beginning "on the date of direct physical loss or damage"); *Santo's Italian Café LLC v. Acuity Ins. Co.*, 2020 WL 7490095, at *10 (N.D. Ohio Dec. 21, 2020) (finding that "period of restoration" definition illustrated the scope of "direct physical loss or damage loss or damage"); *Michael Cetta, Inc. v. Admiral Indem. Co.*, 2020 WL 7321405 at *6-7 (S.D.N.Y. Dec. 11, 2020) (same).

require it for coverage to exist. *See, e.g.* Policies at 23 ("Claims Preparation Costs"); 27 ("Installment or Deferred Payments"); 30 ("Loss Payment Increased Tax Liability").

Third, where the Policies intend to adopt a definition of "physical loss or damage" which differs from its ordinary definition, they say so explicitly. For example, the "Data Restoration" provision specifically defines "physical loss or damage to electronic data, programs or software" to mean "the destruction, distortion or corruption of electronic data programs, or software." Policies at 18, 80. If FM Global meant to adopt a different definition of the term for purposes of the Communicable Disease clauses, it would have done so. It did not.

Fourth, Plaintiffs' proffered interpretation would paradoxically provide insureds—including Rockhurst and Maryville—with *less* coverage than the Policies otherwise afford. If Plaintiffs were correct that the Communicable Disease provisions require "physical loss or damage," then Plaintiffs would have to demonstrate (as discussed above) that the presence of COVID-19 caused a physical, tangible alteration to their properties, something they cannot do as a matter of law. On the other hand, under FM Global's interpretation, Plaintiffs can recover up to $1 million under the Communicable Disease Provisions provided they are each able to show*, inter alia,* the presence of a person with COVID-19 at an insured location.

Finally, and perhaps most importantly, Plaintiffs' argument would render nugatory the $1 million sublimit in the annual aggregate to which both Communicable Disease Provisions are subject. Boiled down to its essence, Plaintiffs are arguing that the inclusion by FM Global of the Communicable Disease Provisions in the Policies itself transforms the mere presence of a "communicable disease" like COVID-19 into physical loss or damage. According to Plaintiffs, this definitional argument unlocks multiple other time element coverages in the Policy which *contain no limit on liability at all*, other than the overall Policy limit. But if that were the case, the

Communicable Disease Provisions, along with their attendant sublimit, would serve no purpose, thus violating one of the cardinal rules of contact interpretation. *See State ex rel. Blue Springs Sch. Dist. v. Grate*, 576 S.W.3d 262, 271 (Mo. Ct. App. 2019) (finding that court could not "render[] superfluous" the provisions of a policy that expressly limited coverage); *Nooter Corp. v. Allianz Underwriters Ins. Co*., 536 S.W.3d 251, 264 (Mo. Ct. App. 2017) ("[W]e aim to give a reasonable meaning to every provision and to avoid an interpretation that renders some provisions trivial or superfluous."). The fact of the matter is that the Communicable Disease Provisions—as their names imply—were included by FM Global precisely because coverage for epidemic- or pandemic-related losses is not available under any of the other provisions in the Policies. They are, after all, "additional coverages." Plaintiffs might want hundreds of millions of dollars in extra insurance coverage, but that is not the coverage for which they bargained or paid.

B. The Policies' Loss of Use Exclusion Also Bars Plaintiffs' Claims for Damages Arising from Plaintiffs' Inability to Fully Use Their Properties.

Plaintiffs repeatedly allege that the coronavirus has deprived them of the full use of their properties. *See, e.g.*, Am. Compl. ¶ 6 ("the effects of the Coronavirus, COVID-19 and ongoing pandemic continue to deprive Plaintiffs of the full use of their campuses and property"); ¶ 33 ("Plaintiffs ceased normal operations and effectively closed their campuses in mid-March 2020 and have not yet been able to resume normal operations and use of their insured property in the same manner as they had prior to the initial loss and damage"), ¶ 45 (alleging that the virus "impacted Plaintiffs' and others' ability to access and use their property during the ongoing pandemic."), ¶ 95 (alleging that due to the virus, Plaintiffs' buildings are no longer safe, habitable or fit for their intended purpose until the pandemic has been controlled or eliminated). The Policies' Loss of Use Exclusion, however, expressly precludes recovery of damage due to "loss of market or loss of use." *See* Policies at 11-12.

Courts considering similar loss of use exclusions have held that they preclude coverage for such claims stemming from the pandemic. For example, in *Salon XL Color & Design Grp., LLC v. W. Bend Mut. Ins. Co.*, the court found that a policy's exclusion for losses due to "delay, loss of use or loss of market" precluded plaintiff's claims based on its inability to use its property as intended due to the presence of COVID-19. 2021 WL 391418, at *4 (E.D. Mich. Feb. 4, 2021); *see also Whiskey River on Vintage, Inc. v. Illinois Cas. Co.*, 2020 WL 7258575, at *18 (S.D. Iowa Nov. 30, 2020) ("The Consequential Losses provision unambiguously states that Defendant will not pay for loss or damage resulting from a loss of use."); *Harvest Moon Distributors, LLC v. S.-Owners Ins. Co.*, 2020 WL 6018918, at *6 (M.D. Fla. Oct. 9, 2020) (policy exclusion for losses due to "delay, loss of use, or loss of market" applied to claims for "loss of use" of insured property due to the COVID-19 pandemic). This Court should do the same.

C. The Policies' Contamination Exclusion Is an Independent Bar to Coverage.

The Contamination Exclusion excludes from coverage "contamination, and any cost due to contamination including the inability to use or occupy property or any cost of making property safe or suitable for use or occupancy." Policies at 15. "Contamination" includes "any condition of property due to the actual or suspected presence of any . . . *pathogen or pathogenic organisms*, bacteria, *virus*, [or] *disease causing or illness causing agent*." *Id*. at 76 (emphasis added).

The Policies make clear that the exclusions apply to time element (or business interruption) losses. Specifically, the "Time Element" section of the Policies expressly states that Time Element coverage "is subject to the Policy provisions, ***including applicable exclusions and deductibles***." *Id*. at 40 (emphasis added). The "Exclusions" section similarly provides that "exclusions apply unless otherwise stated." *See id*. at 11. And, per the Policies, "interruption of business, except to the extent provided by this Policy" is excluded from coverage. *Id*.

Plaintiffs admit, as they must, that COVID-19 is a virus. They also allege that "this action arises out of a coverage dispute between FM Global and Plaintiffs' ongoing physical loss or damage to covered property and resultant economic losses *attributable to the Severe Acute Respiratory Syndrome Coronavirus 2 (SARS-CoV-2 or the Coronavirus), the Coronavirus Disease 2019 (COVID-19) and the ongoing pandemic*…." Am. Compl. ¶ 1 (emphasis added); *see also id.* ¶ 5. Plaintiffs seek to recover not only for the alleged deprivation of the "full use of their campuses and property," but also, among other things, for "public safety expenses in the form of facilities changes including" the "installation of signage and plexiglass shields" and "modified work area layouts and seating arrangements." *See, e.g.*, Am. Compl. ¶¶ 6, 9. Accordingly, their claims fall squarely within the Contamination Exclusion, which precludes recovery for "[any condition of property due to virus], and any cost due to [any condition of property due to virus], *including the inability to use or occupy property or any cost of making property safe or suitable for use or occupancy*." Policies at 15 (emphasis added).

Once again, *Zwillo V* is instructive. There, this Court held that a contamination exclusion —which defined "contaminant" to include "virus" along with other traditional pollutants and hazardous substances such as smoke, soot, chemicals, and waste—barred plaintiffs' claims for insurance coverage due to the COVID-19 pandemic. In particular, this Court found, in pertinent part, that because the word "virus" was included in the definition of contamination, the contamination exclusion barred plaintiffs' claims. *Zwillo V*, 2020 WL 7137110, at *6. Similarly, in *Manhattan Partners, LLC v. Am. Guarantee & Liab. Ins. Co.,* 2021 WL 1016113 (D.N.J. Mar. 17, 2021), the United States District Court for the District of New Jersey held that a Contamination Exclusion identical to those in the Policies was "a final bar to Plaintiffs' claims" for losses due to the alleged presence of COVID-19 on its properties and government-issued "stay-at-home" orders

because it "*clearly and explicitly excludes coverage for damage, loss or expense arising from a virus*." *Id.* at *2 n.3 (emphasis added). *Accord Firebirds International, LLC v. Zurich American Insurance Co.*, No. 2020-CH-05360 (Cir. Ct. Cook County Ill. Apr. 19, 2021) (construing virtually identical provision to bar plaintiff's pandemic-related insurance claims).

In an effort to escape this authority, Plaintiffs proffer six separate arguments meant to convince this Court that the Contamination Exclusion is inapplicable here. All six fail.

First, Plaintiffs assert that because (A) the Contamination Exclusion contains an exception for contamination "directly resulting from *other* physical damage not excluded by the Policy" (Am. Compl. ¶ 177) and (B) communicable disease ostensibly constitutes "physical damage" that is not excluded, the Contamination Exclusion simply does not apply. *See* Am. Compl. ¶ 178(a). Plaintiffs' argument is meritless. By its clear terms, the Contamination Exclusion applies to *every* virus; there is no carve-out for hypothetical viruses which exist independently of communicable disease (nor does any such virus exist). Policies at 76 (emphasis added). Additionally, as described in Section IV.A., *supra*, there is simply no basis in the Policies for the argument that a communicable disease like COVID-19 constitutes "physical damage." Logically, simply carrying a "communicable disease" onto a property cannot constitute physical loss or damage to that property, nor are infected people themselves manifestations of "physical loss or damage."[12] Moreover, the "Communicable Disease" provisions themselves are sub-limited to $1 million. If, as Plaintiffs argue, the existence of those provisions renders the Contamination Exclusion inapplicable and thus unlocks the other coverages Plaintiffs identified, losses stemming from a

[12] As *Iqbal* points out, a court is entitled to "draw on its judicial experience and common sense" when analyzing the plausibility of a claim. *See* 556 U.S. at 679.

"communicable disease" would be covered in excess of the sublimit, thus impermissibly stripping it of any meaning.

Second, Plaintiffs allege that the Contamination Exclusion does not apply because it only "applies to 'contamination,' which is limited to the 'actual or suspected presence' of specified substances at a location" and not "losses caused by closures or other measures responding to 'threatened' presence of virus." Am. Compl. ¶ 178(b). But that purported distinction is irrelevant where, as here, Plaintiffs go to great lengths to allege the "presence of the SARS-CoV-2 virus on Plaintiffs' property and nearby property and in the air at such property." *See, e.g.*, *id.* ¶ 47. Additionally, putting aside the blurred line between "threatened" and "suspected" contamination, it would make no commercial sense for an insurer to exclude loss or damage stemming from the actual or suspected presence of a virus, but at the same time to cover loss or damage stemming from the "threatened" presence of that same virus.

Third, Plaintiffs argue that the exclusion applies to "traditional pollution, not to natural catastrophes such as disease outbreaks." Am. Compl. ¶ 178(c). This argument, of course, runs directly counter to the exclusion's text, which mentions not only "virus" and "bacteria," but also the catch-all terms "disease causing or illness causing agent." Policies at 76. Not surprisingly, this Court rejected an analogous argument in *Zwillo V*, concluding that the exclusion applied, as "a 'court may not create an ambiguity . . . to distort policy language and enforce a construction it feels is more appropriate.'" *Zwillo V*, 2020 WL 7137110, at *6-*7 (rejecting contention that a similar exclusion applied only to "traditional environmental and industrial pollution); *see also Firebirds Int'l,* at *7-9 (exclusion for "virus" or "disease causing or illness causing agent" barred claims).

Fourth, Plaintiffs argue that the Contamination Exclusion contrasts with broader exclusions within the Policies and is purportedly narrower than a form exclusion used by other

insurers (the "ISO Virus Exclusion"). Am. Compl. ¶ 178(d). But how that language compares to other exclusions in the Policies or in other insurers' policies[13] is a red herring: by its terms, the Contamination Exclusion still applies, which ends the inquiry.[14] *See Zwillo V.*, 2020 WL 7137110, at *8; *Boulevard Carroll Entm't Grp., Inc. v. Fireman's Fund Ins. Co.*, 2020 WL 7338081, at *1, 2 (D.N.J. Dec. 14, 2020) (exclusion for loss or damage stemming from "disease, sickness, any conditions of health, bacteria, or virus" barred claims). Courts so find even where the clauses in question contain references to "traditional pollution" which are even more explicit than those in this Contamination Exclusion. *See, e.g.*, *Zwillo V*, 2020 WL 7137110, at *6 (coverage barred by exclusion which defined "contaminant" to include "virus" along with other traditional pollutants and hazardous substances such as smoke, soot, chemicals, and waste).

Fifth, Plaintiffs assert that because the Contamination Exclusion excludes "contamination" and "any ***cost*** resulting from contamination," it somehow does not apply to "consequential economic losses" but only to "any costs incurred to remove the contamination from covered property." Am. Compl. ¶ 178(e) (emphasis added by Plaintiffs). That reading of the Policies is directly contradicted by the clause immediately following that language, which states that the Policies exclude "contamination, ***and*** any cost ***resulting from*** contamination ***including*** the inability to use or occupy property or any cost of making property safe or suitable for use or occupancy." Policies at 15 (emphasis added). In other words, the language specifically encompasses the "economic losses" Plaintiffs claim are not subject to the Contamination

[13] In fact, the Contamination Exclusion overlaps significantly with the Insurance Services Office Virus Exclusion to which Plaintiffs approvingly cite (Am. Compl. ¶ 178(d)), which applies to losses or damage due to "any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness, disease."

[14] As of the date of this filing, there are well over 50 cases on which courts have dismissed claims due to the existence of a virus exclusion. *See supra* note 9.

Exclusion. If that were not enough, Plaintiffs' argument also ignores the fact that the Policies' definition of "contamination" includes the "actual *or suspected* presence of any" virus. *Id.* at 76 (emphasis added). Given that there is no way to "remove" a virus whose presence is only "suspected," that clause of course must refer to "time-element losses or extra expenses." Finally, this argument completely ignores the inconvenient fact that the Contamination Exclusion excludes "contamination" in *addition* to "costs due to contamination." In essence, Plaintiffs read the inclusion of an additional phrase set off by the word "and" to somehow *limit* the reach of the Contamination Exclusion, an interpretation which has been flatly rejected by at least one court considering the issue. *See Firebirds International, LLC*, No. 2020-CH-05360 (applying virus exclusion based on "the conjunction 'and' in the 'Contamination' exclusion [which] has the effect of excluding from coverage *both* an otherwise covered loss caused by a 'Contamination' as well as an otherwise covered loss attributed to a 'Contamination.'). As the court in *Firebirds* explained, the Policies provide coverage for "physical loss or damage," not just costs. The conjunction "and" in the Contamination Exclusion has the effect of excluding from coverage both an otherwise covered loss caused by Contamination as well as an otherwise covered "cost" attributed to Contamination. Thus, the word "contamination" is meaningless unless it excludes (at a minimum) physical loss or damage.[15]

[15] Although Plaintiffs will likely cite to *Thor Equities, LLC v. Factory Mut. Ins. Co.*, 2021 U.S. Dist. LEXIS 62967 (S.D.N.Y. Mar. 31, 2021) in support of their Contamination Exclusion arguments, that case is an outlier of no help to Plaintiffs. In particular, the *Thor* court *rejected* Plaintiffs' argument that the Exclusion applies only to costs, finding instead that "the first two words of the Exclusion – '**contamination, and'** must be given effect and Plaintiff's proffered reading "could tend to render certain aspects of the Exclusion meaningless." *Thor* at *10 (emphasis added). Notwithstanding that conclusion, however, the court went on to hold that the Contamination Exclusion was somehow "ambiguous" about whether it covered anything beyond "costs" due to contamination. Even more inexplicably, it noted that the exclusion encompassed the "inability to use or occupy property" but declined to apply it to Thor's inability to use its property as a result of the coronavirus. *Id*. at *8-10.

Sixth, Plaintiffs contend that the Contamination Exclusion is only directed at "conditions of property" and does not address other losses "due to civil authority orders or impairment of ingress or egress occasioned by covered Communicable Disease." Once again, Plaintiffs ignore the language in the Contamination Exclusion which applies that provision to "the inability to use or occupy property." Policies at 15. Plaintiffs' argument also rests on the assumption that the words "contamination" and "costs of contamination" in the Contamination Exclusion refer to precisely the same thing—non-economic losses (such as cleanup and remediation costs) due to a "condition of property" caused by a contaminant. But this reading would improperly render those two different clauses as entirely co-substantial and redundant—a result at odds with basic principles of contract interpretation. And like Plaintiffs' first argument, this argument is directly contradicted by Plaintiffs' own complaint. If the Contamination Exclusion is directed at "conditions of property," as Plaintiffs contend, then it is directed at the precise events that allegedly occurred here, because as described by Plaintiffs, the "condition of Plaintiffs' insured property has not returned to its condition prior to the initial loss and damage." Am. Compl. ¶ 51.[16]

Although Plaintiffs will undoubtedly seek to avail themselves of decisions in this district that have allowed pandemic-related complaints to proceed, those decisions are distinguishable. *See, e.g., Blue Springs Dental Care, LLC v. Owners Ins. Co.*, 488 F. Supp. 3d 867, 870 n.2 (W.D. Mo. 2020) (explicitly noting the body of caselaw "granting dismissal of COVID-19 claims" would

[16] To the extent that Plaintiffs argue that the Contamination Exclusion does not apply because their loss purportedly stems from government orders, not the onsite presence of the virus, that argument has been roundly rejected. *See, e.g.*, *Causeway Auto., LLC v. Zurich Am. Ins. Co.*, 2021 WL 486917, at *6 (D.N.J. Feb. 10, 2021) (rejecting plaintiffs' argument that exclusion only applied to on-site presence); *AFM Mattress Co., LLC v. Motorists Com. Mut. Ins. Co*., 2020 WL 6940984, at *3 (N.D. Ill. Nov. 25, 2020) ("Plaintiff's argument that its losses occurred because the Indiana and Illinois governmental entities issued shutdown orders, not because of the virus itself, is unpersuasive. Plaintiff's complaint undermines its argument—the complaint alleges that plaintiff's losses were due to both the virus and the shutdown orders that followed.").

not apply because the insurer "did not include a virus exclusion clause in the Policies at issue"); *NeCo, Inc. v. Owners Ins. Co.*, 2021 WL 601501, at *5 (W.D. Mo. Feb. 16, 2021) (distinguishing cases "because they involved policies with a virus exemption," unlike the Policies here); *Studio 417, Inc. v. Cincinnati Ins. Co.*, 478 F. Supp. 3d 794, 797 (W.D. Mo. 2020) (no virus exclusion in the policy); *K.C. Hopps, Ltd v. The Cincinnati Ins. Co., Inc*, No. 20-CV-00437-SRB, 2020 WL 6483108, at *1 (W.D. Mo. Aug. 12, 2020) (same).

D. Plaintiffs May Still Recover Under the Communicable Disease Provisions, Assuming They Can Meet Those Provisions' Factual Predicates.

The Policies' Communicable Disease provisions are exceptions to the Loss of Use and Contamination Exclusions and do not require physical loss or damage. *See supra* at Section IV.A.iv. They do, however, require Plaintiffs to show (1) the "actual not suspected presence" of a communicable disease, like COVID-19, on its premises, and (2) a government shutdown order or corporate directive limiting the use of the claimant's facilities. These coverages provide Plaintiffs coverage up to $1 million in the annual aggregate.

FM Global does not dispute that Plaintiffs potentially could meet these two preconditions of coverage, but Plaintiffs have yet to do so. Although Plaintiffs submitted claims (Am. Compl. ¶ 17) and Rockhurst provided some "documentation" concerning positive COVID-19 tests (*id.* ¶ 39), the parties dispute whether Plaintiffs have adequately substantiated those claims by showing the presence of COVID-19 on site. Accordingly, FM Global is not moving for judgment on the pleadings with respect to the Communicable Disease coverages.[17]

[17] Plaintiffs' attempt to argue that the Communicable Disease provisions supplement other applicable provisions on the grounds that they are "additional" or "extension" coverages (Am. Compl. ¶¶ 181-183), runs counter to the clear language of the Policies stating that Additional Coverages are subject to "the applicable limit[s] of liability." Policies at 17.

V. Conclusion

For the reasons set forth above, this Court should grant FM Global's Motion for Partial Judgment on the Pleadings.

Dated: April 23, 2021

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CERTIFICATE OF SERVICE

On April 23, 2021, I caused the foregoing to be filed using the Court's electronic case filing system, which provides service upon all counsel of record.

By /s/Brian R. Markley
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