UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JUJAMCYN THEATERS LLC, Plaintiff, v. FEDERAL INSURANCE COMPANY and PACIFIC INDEMNITY COMPANY, Defendants.	Civil Action No. 1:20-CV-06781-ALC **ORAL ARGUMENT REQUESTED**

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR JUDGMENT ON THE PLEADINGS AND TO STRIKE AFFIRMATIVE DEFENSES

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PRELIMINARY STATEMENT

SARS-CoV-2, COVID-19, the later actions and orders of state and local civil authorities, guidance from the Centers for Disease Control, and the need to mitigate losses and damage have left the Broadway theater industry in dire circumstances. Virtually every other business and industry can operate in some capacity and generate some revenue. But that is not true for Broadway. No one knows with certainty when Broadway will be permitted to reopen in any capacity or when it will be permitted to reopen at capacity. When Broadway re-opens, Jujamcyn Theaters LLC ("Jujamcyn") may ultimately be required to make physical and structural alterations to reduce the presence of the virus in the airspace and on the surfaces in its theaters.

Jujamcyn owns and operates five Broadway theaters, making it one of the largest theater owners on Broadway. Before March 12, 2020, in any given week when shows were playing in all of its theaters, Jujamcyn could host more than 48,000 people from around the globe. Also before March 12, 2020, Jujamcyn paid significant premiums for the two separate "all-risk" insurance policies that Federal Insurance Company ("Federal") and Pacific Indemnity Company ("Pacific") (both members of the Chubb group of insurers and referred to together as the "Insurers") promised would provide tens of millions of dollars of insurance for business income and other losses. The Insurers long have known the risks that pandemics present and that if they elected not to incorporate long-available "virus" or "pandemic" exclusions into their property policies, they would be called on to pay business interruption losses under those policies. *See* Compl. ¶¶ 33-36 and sources cited therein.[1] Unlike other policies they sold, the Insurers elected not to include any such exclusions in the Jujamcyn policies. Not deterred, Federal still denied any coverage obligation whatsoever and Pacific paid a fraction of what it owes.

[1] "Compl." refers to Jujamcyn's Complaint filed on August 24, 2020. D.E. 1. Jujamcyn also filed a separate Request for Judicial Notice ("RJN") in connection with this motion.

The Insurers ultimately revealed that the grounds on which they breached are as theatrical as the performances that Jujamcyn can no longer host. Federal relied on one policy exclusion that courts routinely deem ambiguous and "unconscionable" to enforce. It also interprets "direct physical loss or damage" by ignoring the fact that Jujamcyn's airspace is its "property" and is "damaged," and in a way that renders superfluous the insurance industry's standard-form virus exclusion—something New York law does not permit and that is in stark contrast to science, historical case law, the policy itself, and a declaration by the Mayor of New York City. *See* RJN ¶ 1, Ex. A. Pacific's payment of what it said was the limit of its liability also runs afoul of the policy and the law, and creates far more ambiguities than it resolves. Despite making that payment, Pacific now asserts the diametrically opposed allegation that Jujamcyn "failed to cooperate" and comply with other conditions precedent to coverage. The affirmative defenses advanced by the Insurers are both irreconcilable with fact and are textbook examples of what New York law deems "implausible."

Consistently, the Insurers ground their improper denials on words and phrases in their respective policies that are undefined. According to the policies themselves, these undefined terms have "no special meaning" and New York law deems them ambiguous. The Insurers now present strained meanings to words and phrases that they previously did not believe warranted any definition at all and ask this Court to write them into the policies now—something else that New York law does not condone. At best for the Insurers, their respective policies and the feigned interpretations they advance are ambiguous, mandating a resolution of those ambiguities in favor of coverage. This is particularly so when that interpretation limits coverage (or, in this case, eliminate coverage altogether). The affirmative defenses the Insurers invoke should be stricken as a matter of law and Jujamcyn is entitled to judgment on the pleadings.

STATEMENT OF FACTS

A. The Policies

Federal sold Jujamcyn "Customarq Series Entertainment Insurance Program" policy number 7944-46-01 for the period May 1, 2019, to May 1, 2020 ("Federal Policy") Compl. ¶ 37. Pacific sold Jujamcyn "Performance Disruption" coverage under "Entertainment – Property Insurance for the Performing Arts Policy" number 7993-60-33 for the period May 1, 2019, to May 1, 2020 ("Pacific Policy") (individually a "Policy" and together "the Policies"). *Id*. ¶ 65.

The Policies' pertinent coverages are discussed below but both Policies include three critical components. First, the Policies provide "all-risk" coverage, meaning that they insure all risks not expressly excluded (and neither Policy excludes losses caused by or resulting from viruses, communicable diseases, or pandemics). *Id*. ¶¶ 36, 44. Second, the Policies identify and specifically insure all five of Jujamcyn's theaters.[2] *Id*. ¶¶ 39, 66. Finally, the Policies include dozens of definitions. The Federal Policy alone defines at least 76 terms and phrases. D.E. 1-11. Both Policies inform Jujamcyn that the Insurers elected to define some but not all of its terms and that only those "[w]ords or phrases that appear in **bold** print have special meanings and are defined." D.E. 1-1, 1-13 (emphasis in original). As established below, none of the terms and phrases relied on by the Insurers to deny or severely limit coverage have "special meanings."

B. The COVID-19 Pandemic And Subsequent Civil Authority Orders

The first cases of COVID-19 in humans were reported in December 2019 in Wuhan, China. Compl. ¶ 21. Since then, SARS-CoV-2 and COVID-19 have spread throughout the world, prompting the World Health Organization to declare a global pandemic. *Id*. As explained by the World Health Organization,

[2] The "Theaters" are the St. James Theatre; the Al Hirschfeld Theatre; the Walter Kerr Theatre; the Eugene O'Neill Theatre; and the August Wilson Theatre, all of which are located in New York City's "theater district." *Id*. ¶ 39.

> [p]eople can catch COVID-19 from others who have the [SARS-CoV-2] virus. The disease can spread from person to person through small droplets from the nose or mouth which are spread when a person with COVID-19 coughs or exhales. These droplets land on objects and surfaces around the person. Other people then catch COVID-19 by touching these objects or surfaces, then touching their eyes, nose or mouth. People can also catch COVID-19 if they breathe in droplets from a person with COVID-19 who coughs out or exhales droplets.

"How does COVID-19 spread?," World Health Organization (April 16, 2020), *available at* https://www.who.int/news-room/q-a-detail/q-acoronaviruses.

Aerosolized droplets exhaled by normal breathing can travel significant distances and stay suspended in air for hours until gravity ultimately forces them to the nearest surface. Studies now suggested that the SARS-CoV-2 virus can remain contagious on some surfaces for at least 28 days. RJN ¶ 2.[3]

There have been more than 54,558000 confirmed cases of COVID-19 throughout the world, more than 1,320,000 of which have led to deaths. RJN ¶ 3. As of November 17, 2020, there were more than 10,933,900 confirmed cases of COVID-19 in the United States, more than 244,400 of which have led to deaths. There are confirmed cases of COVID-19 in every state. Due in part to the initial absence and later limited availability of tests, and questions about the accuracy of the tests, the true number of COVID-19 cases is significantly higher than the reported numbers suggest. RJN ¶ 4; Compl. ¶ 24.

In response to the pandemic and the worldwide spread of SARS-CoV-2, civil authorities throughout the United States began issuing "stay-at-home" and "shelter in place" orders, requiring the suspension of non-essential business operations and ordering businesses to close in March 2020. *Id*. ¶ 25. The potential danger of SARS-CoV-2 being present in theaters is greater than that posed by many other businesses. People from all over the country and world travel to

[3] Earlier studies concluded that it could remain on surfaces for six days. Compl. ¶ 22.

New York to see a Broadway show. Countless individuals, asymptomatic, pre-symptomatic, or otherwise, were present at the Theaters before March 12, 2020. These individuals may have unknowingly spread the virus inside the Theaters and to countless others before returning to the cities, states, and countries from which they came. Additionally, the operation of a Broadway theater involves a large gathering of people within an enclosed space for a prolonged period, increasing the likelihood that SARS-CoV-2 would be in the airspace and on surfaces, and that such theater would be a potential source of exposure. *Id*. ¶27.

Recognizing these facts, Governor Andrew Cuomo issued Executive Order 202.1 on March 12, 2020, directing that "any theater seating five hundred or more attendees for a live performance located in [the City of New York] shall not hold any further performances after 5 pm on March 12, 2020." Compl. ¶ 3. This was one day after the media reported that an individual working at two Broadway theaters—both well within 10 miles of the Theaters—tested positive. RJN ¶ 5; Compl. ¶ 28. Consistent with this data, Jujamcyn informed Federal that it knew of at least seven individuals who perform in productions at, or who otherwise work or provide services at, the Theaters, who tested positive for COVID-19, SARS-CoV-2 or the antibodies. Compl. ¶ 29.

On March 16, 2020, New York City Mayor de Blasio issued Emergency Executive Order No. 100 in which he declared that "***the virus physically is causing property loss and damage***" (emphasis added). Compl. ¶ 30; RJN ¶ 1, Ex. A. In that same Executive Order, Mayor de Blasio directed that "all entertainment venues, including those with seating capacity below 500, are hereby closed effective Monday, March 16, 2020 at 8:00 PM. *Id.* Entertainment venues shall include . . . theatres[.]" *Id.* Subsequent Executive Orders continued to describe the physical property damage being sustained by New York businesses. Compl. ¶ 30.

C. The Insurers' Breaches Of Their Respective Policies

1. Federal's Coverage Denial

On or before June 22, 2020, Federal "completed [its] investigation" and "den[ied] coverage for the claim." D.E. 1-11.[4] Unlike many policies that provide business income coverage, the Federal Policy has no exclusion for losses caused by or resulting from the spread of viruses, communicable diseases, or pandemics. Because it is an "all-risk" policy that insures all risks not expressly excluded, it insures losses caused by or resulting from viruses, communicable diseases, and pandemics. In other words, because these perils are not excluded, they are insured "covered perils." Compl. ¶ 44. Thus, Federal's denial depended solely on two grounds: (1) the invocation of the Acts or Decisions exclusion; and (2) that the Theaters did not sustain "direct physical loss or damage." *Id.* Federal never supplemented or amended its coverage position and never asked Jujamcyn for any information, documentation, or statement. D.E. 1-11; Schulman Decl., Ex. A.

Federal took its position on "physical loss or damage" 10 days after Mayor de Blasio issued, under the N.Y. Executive Law, Emergency Executive Order No. 100, closing all theaters based on the conclusion that "the virus physically is causing property loss and damage." Compl. ¶ 48.[5] *See, e.g.*, N.Y. Executive Law § 24 (authorizing the issuance of an order that limits use and occupancy of buildings in a public emergency). Additionally, Federal has not articulated how the Acts or Decisions exclusion unambiguously bars coverage for Jujamcyn's entire claim. In fact, it never asked about what, if any, "acts" were taken or "decisions" were made that bars

[4] Jujamcyn's July 6 response to Federal's June 22 letter is attached to the Complaint. Federal's letter is filed herewith. *See* Declaration of Jeffrey L. Schulman, dated November 6, 2020 ("Schulman Decl."), Ex. A.

[5] Federal also took the same position through its trade association, the American Property Casualty Insurance Association in a letter to the United States House of Representatives Committee on Business. Compl. ¶ 48. *The* Association wrote on March 18, 2020, just two days after Mayor de Blasio's order, stating: "Business interruption policies do not, and were not designed to, provide coverage against communicable diseases such as COVID-19." *Id.*

coverage. Thus, before Federal did any meaningful investigation (if it did any investigation at all), it already decided to deny coverage for Jujamcyn's losses. *Id.*

2. Pacific's Failure To Fully Honor Its Contractual Obligations

By letter dated June 10, 2020, Pacific "accepted Jujamcyn's performance disruption claim" but concluded that "coverage is limited to a single limit of $250,000 for all theaters." Schulman Decl., Ex. B. Pacific invoked no other policy terms or conditions, nor any exclusions. *Id.* It reiterated that position by letter dated July 17, 2020 which, once again, cited no other policy terms, conditions or exclusions. *Id.*

ARGUMENT

I. STANDARD OF REVIEW

A. Legal Standard Governing A Motion For Judgment On The Pleadings

Federal Rule of Civil Procedure 12(c) permits a party to move for judgment on the pleadings "[a]fter the pleadings are closed—but early enough not to delay trial." "The standard for granting a Rule 12(c) motion for judgment on the pleadings is identical to that of a Rule 12(b)(6) motion[.]" *Patel v. Contemporary Classics*, 259 F.3d 123, 126 (2d Cir. 2001) (collecting cases).[6] Thus, the Court may rely on "the complaint, the answer, any written documents attached to them, and any matter of which the court can take judicial notice." *Roberts v. Babkiewicz*, 582 F.3d 418, 419 (2d Cir. 2009) (*per curiam*). The Court may also consider documents not incorporated by reference if the complaint "relies heavily upon its terms and effect" and is therefore "integral" to the pleading. *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 152-53 (2d Cir. 2002) (citation omitted).

[6] It also "governs the sufficiency of the pleading of affirmative defenses" (*E.E.O.C. v. Kelley Drye & Warren, LLP*, No. 10 Civ. 655(LTS)(MHD), 2011 WL 3163443, at *2 (S.D.N.Y. July 25, 2011)) and a Rule 12(f) motion to strike. *Aspex Eyewear, Inc. v. Clariti Eyewear, Inc.*, 531 F. Supp. 2d 620, 622-23 (S.D.N.Y. 2008).

The motion should be granted upon a showing that "no material issue of fact remains to be resolved" and that the movant is entitled to judgment as a matter of law. *Juster Assocs. v. City of Rutland*, 901 F.2d 266, 269 (2d Cir. 1990) (quoting 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1368, at 690 (1969)). Disputes involving the interpretation of an insurer's contractual obligations under an insurance policy, whether any policy terms are ambiguous, and whether an exclusion applies to bar coverage are legal issues that can be resolved on the pleadings. *Great Am. Ins. Co. v. Houlihan Lawrence, Inc.*, 449 F. Supp. 3d 354, 366 (S.D.N.Y. 2020) (granting insured's motion in part and denying insurer's motion).

B. The Meaning And Significance Of "All-Risk" Policies

Jujamcyn paid substantial premiums for the "all-risk" Policies. "An all-risk policy is one that allows recovery 'for all losses arising from any fortuitous cause, unless the policy contains an express provision excluding the loss from coverage.'" *Fabrique Innovations, Inc. v. Fed. Ins. Co.*, 354 F. Supp. 3d 340, 348 (S.D.N.Y. 2019) (citing *Parks Real Estate Purchasing Grp. v. St. Paul Fire & Marine Ins. Co.*, 472 F.3d 33, 41 (2d Cir. 2006)). "[A]n 'all-risk insured . . . has the burden of establishing a *prima facie* case for recovery' by proving three elements: '(1) the existence of an all-risk policy, (2) an insurable interest in the subject of the insurance contract, and (3) the fortuitous loss of the covered property.'" *Id.* (citing *International Multifoods Corp. v. Commercial Union Ins. Co.*, 309 F.3d 76, 83 (2d Cir. 2002)). Thus, an insured has a "relatively light" burden to establish a *prima facie* case for coverage.[7] *International*, 309 F.3d at 83.

[7] "A loss is fortuitous unless it results from an inherent defect, ordinary wear and tear, or intentional misconduct of the insured." *Ingersoll Milling Mach. Co. v. M/V Bodena*, 829 F.2d 293, 307-08 (2d Cir. 1987), *cert. denied*, 484 U.S. 1042 (1988). An insured "thus needs only to show a fortuitous loss; it need not explain the precise cause of the loss." *International*, 309 F.3d at 84 (citing *In re Balfour MacLaine Int'l Ltd.*, 85 F.3d 68, 77-78 (2d Cir. 1996)).

C. New York Rules Governing Insurance Policy Construction and Interpretation

The language of insurance "contracts must be interpreted according to common speech and consistent with the reasonable expectation of the average insured." *Dean v. Tower Ins. Co*, 19 N.Y.3d 704, 708, 955 N.Y.S.2d 817 (2012) (quoting *Cragg v. Allstate Indem. Corp.*, 17 N.Y.3d 118, 122, 926 N.Y.S.2d 867, 950 N.E.2d 500 (2011)). Defined and unambiguous provisions "must be given their plain and ordinary meaning, and the interpretation of such provisions is a question of law for the court." *Dish Network Corp. v. Ace Am. Ins. Co.*, 431 F. Supp. 3d 415, 423 (S.D.N.Y. 2019) (citation omitted). A term is ambiguous if, "when … read as a whole, [it] fails to disclose its purpose and the parties' intent or where its terms are subject to more than one reasonable interpretation." *Id*. (citations omitted). The "test . . . focuses on the reasonable expectations of the average insured upon reading the policy and employing common speech." *Id*. (citation omitted). In other words, a word or phrase is ambiguous if it is "capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire … agreement and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business." *Hugo Boss Fashions, Inc. v. Fed. Ins. Co.*, 252 F.3d 608, 617 (2d Cir. 2001).

Whether a policy term is ambiguous "is a matter of law to be determined by the court." *Id*. at 616-17 (alteration, quotation marks, and citation omitted). A term or phrase is unambiguous if "there is no reasonable basis for a difference of opinion." *Id*. (citations omitted). Any ambiguity in the policy language must be resolved against the insurer and in favor of coverage. *See, e.g.*, *Great*, 449 F. Supp. 3d at 366; *Cragg*, 17 N.Y.3d at 122; *Westview Assocs. v. Guar. Nat'l Ins. Co*., 95 N.Y.2d 334, 339, 717 N.Y.S.2d 75, 740 N.E.2d 220 (2000). Indeed, any arguably reasonable reading of the policy in favor of the policyholder controls as a matter of

law. *See, e.g.*, *Nat'l Football League v. Vigilant Ins. Co.*, 36 A.D.3d 207, 212-13, 824 N.Y.S.2d 72, 76 (N.Y. App. Div. 2006) (insured's "plausible interpretation" of exclusion supporting coverage "must be sustained"); *Woods v. Gen. Accident Ins.*, 292 A.D.2d 802, 803, 738 N.Y.S.2d 791, 792 (N.Y. App. Div. 2002) ("'If an ambiguity exists, the ***insurer*** bears the burden of establishing that the construction it advances is not only reasonable, but also that it is the *only* fair construction.'" (citation omitted, emphasis added)).

II. THE NINTH, ELEVENTH, TWELFTH, THIRTEENTH, AND FIFTEENTH AFFIRMATIVE DEFENSES ARE *PER SE* IMPROPER, IMPLAUSIBLE, AND WAIVED AS A MATTER OF LAW

A. Affirmative Defenses That Are Waived

There is a "general rule that an insurer waives whatever defenses it does not include in its claim denial." *Rockland Exposition, Inc. v. Great Am. Assurance Co.*, 746 F. Supp. 2d 528, 544-45 (S.D.N.Y. 2010). In *New York v. AMRO Realty Corp.*, 936 F.2d 1420, 1432 (2d Cir. 1991), the court "unequivocally recognized" the "settled" rule "that '[w]hen one specific ground of forfeiture is urged against the claim, and a refusal to pay is based upon a specific ground, all other grounds are waived'" (citing *Luria Bros. & Co. v. Alliance Assurance Co.*, 780 F.2d 1082, 1090 (2d Cir. 1986) (quoting 16C Appleman & Appleman, *Insurance Law and Practice* § 9260, at 393 (1981)). Waiver exists "as a matter of law" "where the insurer possesses sufficient knowledge (actual or constructive) of the circumstances regarding the unasserted defense" and fails to assert it. *AMRO*, 936 F.2d at 1431.[8] The *Cirucci* court explained the rationale behind what the *AMRO* court called "this *per se*" rule:

> Although an insurer may disclaim coverage for a valid reason . . . the notice of disclaimer must promptly apprise the claimant with a high degree of specificity of

[8] *See also Gen. Accident Ins. Grp. v. Cirucci*, 46 N.Y.2d 862, 864, 414 N.Y.S.2d 512, 387 N.E.2d 223 (1979) (if a ground for denial "was not raised in the letter of disclaimer, it may not be asserted now."); *Benjamin Shapiro Realty Co. v. Agric. Ins. Co.*, 287 A.D.2d 389, 389, 731 N.Y.S.2d 453 (N.Y. App. Div. 2001) ("A notice of disclaimer must provide a claimant with a very specific ground upon which the disclaimer is predicated. A ground not raised in the letter of disclaimer may not later be asserted as an affirmative defense.") (internal citation omitted).

> the ground or grounds on which the disclaimer is predicated. Absent such specific notice, a claimant might have difficulty assessing whether the insurer will be able to disclaim successfully. This uncertainty could prejudice the claimant's ability to ultimately obtain recovery. In addition, the insurer's responsibility to furnish notice of the specific ground on which the disclaimer is based is not unduly burdensome, the insurer being highly experienced and sophisticated in such matters.

46 N.Y.2d at 864. *See also Albert J. Schiff Assocs., Inc. v. Flack*, 51 N.Y.2d 692, 698, 435 N.Y.S.2d 972, 417 N.E.2d 84 (1980) ("though an insurer's [express] waiver of forfeiture be upon one ground, it is deemed to embrace unspecified grounds for forfeiture as well").

Here, both Insurers purportedly conducted and concluded their respective investigations and both Insurers transmitted correspondence stating the specific bases for their respective conclusions. Federal denied coverage based only upon the Acts or Decisions exclusion and the assertion that Jujamcyn sustained no "direct physical loss or damage" (both of which are addressed herein).[9] Pacific accepted coverage and paid what it contends is its limit of liability. Neither Insurer previously insinuated that Jujamcyn failed to honor any contractual obligation, cooperate or mitigate its losses (and Pacific surely would not have made any payment if it believed these defenses were potentially applicable). Both Insurers now assert for the first time as affirmative defenses that Jujamcyn's claims were denied under both Policies based on those very grounds: (1) "Failure to Perform Obligations, Covenants, and Conditions Precedent and/or Subsequent"; (2) "Insured's Duties in the Event of Loss or Damage/Assistance and Cooperation"; and (3) "Failure to Mitigate Damages." D.E. 20, Ninth, Twelfth, & Thirteenth Aff. Defs. The Insurers waived these affirmative defenses as a matter of law because, if they were potentially plausible in the first instance (which they are not), the Insurers had to assert

[9] Upon receipt of the Federal denial on these two grounds, Jujamcyn specifically asked Federal whether it conducted any investigation before denying coverage. D.E. 1-11. Federal never responded.

them long before joining issue.[10]

B. Affirmative Defenses That Are "Implausible"

Besides being waived under the *per se* rule articulated above, the inclusion of these affirmative defenses with no factual support fails to satisfy the "plausibility standard" recently reaffirmed by this Court in *Jablonski v. Special Counsel, Inc.*, 1:16-cv-05243 (ALC), 2020 WL 1444933, at *2 (S.D.N.Y. Mar. 25, 2020). The pleading of these affirmative defenses by Pacific, however, is both implausible and illuminates the Insurers' motives, bad faith, and potentially frivolous conduct. Pacific paid what it contends is the full limit of the Pacific Policy so the only dispute between Pacific and Jujamcyn is the number of "**LOSSES**" Jujamcyn sustained—not whether they are covered.[11] Schulman Decl., Ex. B. Pacific's assertion of these affirmative defenses is unarguably implausible because Pacific paid what it claims to be its limit of liability.

III. THE FEDERAL POLICY'S "ACTS OR DECISIONS" EXCLUSION IS AMBIGUOUS AS A MATTER OF LAW AND "UNCONSCIONABLE" TO ENFORCE

"The law governing the interpretation of exclusionary clauses in insurance policies is highly favorable to insureds." *Pioneer Tower Owners Ass'n v. State Farm Fire & Cas. Co.*, 12 N.Y.3d 302, 306, 880 N.Y.S.2d 885, 908 N.E.2d 875 (2009). The New York Court of Appeals described an insurer's obligation to clearly and unambiguously exclude coverage:

> [W]henever an insurer wishes to exclude certain coverage from its policy obligations, it must do so in clear and unmistakable language. Any such exclusions or exceptions from policy coverage must be specific and clear in order to be enforced. They are not to be extended by interpretation or implication, but

[10] Federal also invokes a "loss of market" exclusion for the first time as an affirmative defense so it is also waived. *Id*. Eleventh Aff. Def. Additionally, Federal's reliance on this exclusion is implausible and inapplicable as a matter of law, even if not waived. *See, e.g., Duane Reade, Inc. v. St. Paul Fire & Marine Ins. Co.*, 279 F. Supp. 2d 235, 240 (S.D.N.Y. 2003) ("The loss of market exclusion relates to losses resulting from economic changes occasioned by, *e.g.*, competition, shifts in demand, or the like; it does not bar recovery for loss of ordinary business caused by a physical destruction or other covered peril.").

[11] For these same reasons, Pacific's invocation of a "lack of audience" exclusion is *per se* improper. Fifteenth Aff. Def. Pacific never previously invoked this exclusion because it tendered what it contends is the Pacific Policy's limit of liability based on its interpretation of "**EACH LOSS**."

> are to be accorded a strict and narrow construction. Indeed, before an insurance company is permitted to avoid policy coverage, it must satisfy the burden which it bears of establishing that the exclusions or exemptions apply in the particular case, and that they are subject to no other reasonable interpretation.

Seaboard Sur. Co. v. Gillette Co., 64 N.Y.2d 304, 311, 486 N.Y.S.2d 873, 476 N.E.2d 272 (1984) (citations and quotation marks omitted). *See also Cragg*, 17 N.Y.3d at 122 (exclusions to be given "strict and narrow construction" (citation omitted)). To "'negate coverage by virtue of an exclusion, an insurer must establish that the exclusion is stated in clear and unmistakable language, is subject to no other reasonable interpretation, and applies in the particular case.'" *Belt Painting Corp. v. TIG Ins. Co.*, 100 N.Y.2d 377, 383, 763 N.Y.S.2d 790, 795 N.E.2d 15 (2003) (citation omitted).

The only exclusion invoked by Federal was the Acts or Decisions exclusion, which purports to deny coverage for "loss or damage resulting from acts or decisions, including the failure to act or decide, of any person, group, organization or governmental body." D.E. 1-11; Tenth Aff. Def. Courts routinely consider this exclusion ambiguous because its vague language and an insurer's equally vague interpretation "leave[s coverage] practically worthless." *Jussim v. Mass. Bay Ins. Co.*, 33 Mass. App. Ct. 235, 238–39, 597 N.E.2d 1379, 1382 (1992), *aff'd as amended*, 415 Mass. 24, 610 N.E.2d 954 (1993). *See also Rapid Park Indus. v N. Ins. Co.*, No. 09 Civ. 8292(JSR), 2010 WL 4456856, at n.11 (S.D.N.Y. Oct. 15, 2010) (the exclusion is ambiguous because "nearly any conceivable loss" could result "from the 'acts or decisions' of some person, group, organization or governmental body").

Another court explained the inherent ambiguities in this exclusion:

> Under [the insurer's] reading of the provision, any time a human or an organization of humans had any role in a loss, no matter how tangential, the policy would exclude coverage. . . Given the amorphous and expansive language in the provision, the court finds that it does not speak with the clarity required for it to effectively exclude the loss[.]

St. Paul Fire & Marine Ins. Co. v. Gen. Injectables & Vaccines, Inc., No. CIV.A.98-07370R, 2000 WL 270954, at *5, n.5 (W.D. Va. Mar. 3, 2000). *See also Mettler v. Safeco Ins. Co. of Am.*, No. C12-5163 RJB, 2013 WL 231111, *6 (W.D. Wash. Jan. 22, 2013) ("the provision appears to be overly broad, ambiguous, and irreconcilable with other policy provisions and the very concept of an all-risk insurance policy."); *Merrimack Mut. Fire Ins. Co. v. Slater*, No. 2004110, 2007 WL 2045429, 22 Mass. L. Rptr. 583, at *6 (Mass. June 13, 2007) ("The court finds that it would be unconscionable to allow [the insurer] to rely upon this overbroad exclusionary provision."); *Johnson Gallagher Magliery, LLC v. Charter Oak Fire Ins. Co.*, No. 13 Civ. 866(DLC), 2014 WL 1041831, at *7 (S.D.N.Y. Mar. 18, 2014) (significantly limiting potential scope of exclusion under particular facts and circumstances of the case).

So, too, here, the Acts or Decisions exclusion purports to bar coverage for ***every*** conceivable loss (thereby rendering coverage illusory) while simultaneously failing to unambiguously bar coverage for ***any*** conceivable loss. Federal has never articulated how this exclusion unambiguously bars any portion of Jujamcyn's claim by, for example, articulating any excluded "act" or "decision" made by anyone at any time.[12] Jujamcyn is entitled to judgment on the pleadings with respect to Federal's Tenth Affirmative Defense because this exclusion is vague, overbroad, and ambiguous, and would render the Federal Policy's coverage illusory, and because courts consider the enforcement of such an exclusion "unconscionable".

IV. JUJAMCYN'S MULTIPLE "LOSSES" UNDER THE PACIFIC POLICY

With respect to each of the Theaters, the Pacific Policy promises to "pay for the actual **business income** loss you incur due to the necessary cancellation, interruption or postponement

[12] Federal's Answer also omits any reference to the exception to this exclusion, which would plainly apply if, in fact, the exclusion arguably applied (which it does not): "This Acts or Decisions exclusion does not apply to ensuing loss or damage caused by or resulting from a covered peril not otherwise excluded." D.E. 1-6, **Policy Exclusions**.

of one or more of your performances, including the inability to open a new production as scheduled; and **extra expense** you incur due to the actual or potential cancellation, interruption, postponement or other impairment of one or more of your performances" if it "is caused by or results from a **covered occurrence**." D.E. 1-13, **Coverage**.[13] It provides a $250,000 "**LIMIT OF LIABILITY (EACH LOSS)**." *Id*., Declarations. **LOSS** appears in bold font in the declarations but is not defined. However, by using the word **EACH**, Pacific unarguably contemplated Jujamcyn incurring more than one **LOSS**. It states elsewhere: "The most we will pay in any one occurrence is the amount of loss, not to exceed the applicable Limit of Insurance shown in the Declarations."[14] *Id.*, **Limits of Insurance**. Like **LOSS**, both "loss" and "occurrence" are not defined. Pacific wrongfully concluded that the Theaters sustained one collective **LOSS** and/or "loss" and that its singular **LOSS** and/or "loss" was caused by a single "occurrence."

A. "Loss" Is Undefined and Ambiguous

The rule requiring that ambiguities be resolved in favor of an insured "is enforced even more strictly when the language at issue purports to limit the company's liability[.]" *Venigalla v. Penn Mut. Ins. Co.*, 130 A.D.2d 974, 975, 515 N.Y.S.2d 939 (N.Y. App. Div. 1987). Moreover, courts "must construe the policy in a way that affords a fair meaning to all of the language employed by the parties in the contract and leaves no provision without force and effect." *In re Viking Pump, Inc.*, 27 N.Y.3d 244, 257, 33 N.Y.S.3d 118, 125, 52 N.E.3d 1144, 1151 (2016) (citation omitted). "[S]urplusage [is] a result to be avoided." *Id*. (citation omitted). *See also Martin, Shudt, Wallace, Dilorenzo & Johnson v. Travelers Indem. Co.*, No. 1:13-CV-0498

[13] "**Covered occurrence** means any unexpected circumstances beyond your control, except as listed under Exclusions." *Id*., Definitions. In other words, a **covered occurrence** is a fortuitous loss that is not excluded.

[14] The declarations identifies a "**LIMIT OF LIABLITY (EACH LOSS)**" but not a "Limit of Insurance."

(LEK/CFH), 2014 WL 460045, at *4 (N.D.N.Y. Feb. 5, 2014) ("a policy's terms should not be assumed . . . to have been idly inserted") (citation omitted).

A policy that uses but does not define the word "loss" "creat[es] ambiguities" that must be resolved in favor of coverage. *OTC Int'l., Ltd. v. All Those Underwriters At Lloyd's of London*, 1 Misc. 3d 911(A), at *3, 781 N.Y.S.2d 626 (Sup. Ct. Queens Cty. Jan. 29, 2004) (considering whether a series of thefts constituted one or multiple losses).[15] *See also Glassalum Int'l Corp. v. Albany Ins. Co.*, No. 03 Civ. 9166(DC), 2005 WL 1214333, at * 7 (S.D.N.Y. May 23, 2005) (citing *OTC* and *Foy v. D.B. Frame Shop, Ltd.*, 210 A.D.2d 162, 620 N.Y.S.2d 356 (N.Y. App. Div. 1994) (a key term that is undefined is ambiguous); *Matter of Mostow v. State Farm Ins. Cos.*, 88 N.Y.2d 321, 323, 645 N.Y.S.2d 421, 668 N.E.2d 392 (1996) (finding a policy ambiguous because of two reasonable constructions of the policy's "per person" and "each accident" limits).

Consistent with this authority, both **EACH LOSS** and "loss" are ambiguous because neither is defined and they cannot be synonymous. The fact that the Pacific Policy provides a limit of liability **EACH LOSS** and separately insures each of the Theaters establishes an intent by Pacific and a reasonable expectation by Jujamcyn that there can be more than one loss and, here, at least five losses. The fact that neither **EACH LOSS** nor "loss" is defined creates an inherent ambiguity that the Pacific Policy fails to resolve. Pacific cannot establish that the sole reasonable interpretation of the Pacific Policy mandates a finding that Jujamcyn sustained one **LOSS** and/or "loss." These ambiguities must be resolved in favor of coverage, mandating a determination that Jujamcyn sustained more than one **LOSS** and/or "loss" as a matter of law.

[15] The court in *Horowitz v. Am. Int'l Grp., Inc.*, No. 09 Civ. 7312(PAC), 2010 WL 3825737, at * 5 (S.D.N.Y. Sept. 30, 2010) agreed and cited *OTC Int'l* for the notion that this "ambiguity is foreseeable."

B. Pacific's Interpretation Is Inconsistent with the Pacific Policy's Terms and Renders Other Policy Terms Superfluous

Pacific's secondary argument is that the number of **LOSSES** or "losses" sustained is irrelevant because Jujamcyn's claim only arises from a single "occurrence." Compl. ¶ 72. This argument fails for similar reasons. First, Pacific interchangeably uses the words "loss" and "occurrence" as if they were synonymous. As noted above, they cannot be. Second, Pacific acknowledges that Jujamcyn's claim arises from at least one **covered occurrence** and now uses that defined phrase and the undefined word "occurrence" interchangeably. However, like with **EACH LOSS** and "loss," **covered occurrence** and "occurrence" must both mean something but they cannot mean the same thing. Moreover, the undefined use of the word "occurrence" is ambiguous regardless of the Pacific Policy's failure to distinguish it from **covered occurrence**.

In *World Trade Center Properties, L.L.C. v. Hartford Fire Ins. Co.*, 345 F.3d 154, 190 (2d Cir. 2003), *abrogated on other grounds*, *Wachovia Bank v. Schmidt*, 546 U.S. 303 (2006), the court affirmed the district court's holding that "the meaning of 'occurrence'" is ambiguous. The court held that "in a first-party property insurance case, the meaning of the undefined term 'occurrence' is an open question as to which reasonable finders of fact could reach different conclusions." *Id.* at 190 (citing *Newmont Mines Ltd. v. Hanover Ins. Co.*, 784 F.2d 127, 136, n.9 (2d Cir. 1986) ("the meaning of 'occurrence' must be interpreted in the context of the specific policy and facts of this case.")). In *Dataflow, Inc. v. Peerless Ins. Co.*, No. 3:11-cv-1127 (LEK/DEP), 2015 WL 6023675, at *6 (N.D.N.Y. Oct. 15, 2015), the court held that neither *World Trade Center* nor *Newmont* precluded the court from determin[ing] the number of occurrences as a matter of law."

Finally, the Pacific Policy evidences no intent to aggregate losses into a single "occurrence." Pacific could have defined "occurrence" in the manner it does now or could have

provided coverage on a "per occurrence" basis rather than providing a limit of liability **EACH LOSS**. No definition of "occurrence" or purported intent to provide coverage on a "per occurrence" basis can be written into the Pacific Policy now. *See, e.g., Roman Catholic Diocese v. Nat'l Union Fire Ins. Co.*, 21 N.Y.3d 139, 149, 969 N.Y.S.2d 808, 814, 991 N.E.2d 666, 672 (2013) (the policy must "evince[] an intent to aggregate" all losses into a single occurrence). On each of these grounds, individually and in the aggregate, the Pacific Policy does not unambiguously support Pacific's one **LOSS**/loss/occurrence theory. Thus, Jujamcyn is entitled to judgment that it sustained, at a minimum, five **LOSSES—**one for **EACH** of the Theaters.[16]

V. THE PRESENCE OF SARS-CoV-2 IN THE THEATERS CONSTITUTES "DIRECT PHYSICAL LOSS OR DAMAGE" UNDER THE FEDERAL POLICY

The Federal Policy provides three distinct, pertinent coverages: (1) Premises Coverage; (2) Business Income and Extra Expense; and (3) Civil Authority. The Premises Coverage provides more than $63,000,000 in "all-risk" coverage for "direct physical loss or damage" to the Theaters unless otherwise excluded. D.E. 1-1. The "Business Income and Extra Expense" and "Civil Authority" coverages provide more than $29,000,000 in additional coverage.[17] *Id.* The former responds in the event of an actual or potential impairment of **operations** "caused by or resulting from direct physical loss or damage by a **covered peril** to **property**[.]" *Id*. The latter promises to pay "**business income** loss" or **extra expense** incurred "due to the actual impairment of your **operations**, directly caused by "the prohibition of access to your premises . . . by a civil

[16] Each of the Theaters arguably sustained a new **LOSS** with each extension of Executive Order 202.1. Although the number of **LOSSES** sustained may ultimately be for a jury to decide, this Court can declare that Jujamcyn sustained more than one and at least five.

[17] "The purpose of business interruption insurance is to indemnify the insured against losses arising from inability to continue normal business operation and functions due to the damage sustained as a result of the hazard insured against." *Nat'l Union Fire Ins. Co. v. TransCanada Energy USA, Inc.*, 52 Misc. 3d 455, 466, 28 N.Y.S.3d 800 (N.Y. Sup. Ct. 2016), aff'd sub nom., 153 A.D.3d 1153 (1st Dep't 2017); *Cytopath Biopsy Lab., Inc. v. U.S. Fid. & Guar. Co.*, 6 A.D.3d 300, 301 (2004). "In other words, the goal is to preserve the continuity of the insured's earnings." *United Air Lines, Inc. v. Ins. Co. of State of Pa.*, 439 F.3d 128, 131 (2d Cir. 2006).

authority" which is the "direct result of direct physical loss or damage to property away from such premises . . . by a **covered peril**, provided such property is within" 10 miles "from such premises[.]" Compl. ¶ 43. The only exclusion on which Federal relies was dispensed with above. Federal's sole remaining contention—that neither Jujamcyn nor any other premises within 10 miles of the Theaters sustained "direct physical loss or damage"—is incorrect.

Given the many decisions discussed below and the fact that airspace inside of a building is "property" that can be "damaged" and is insured by a property policy, it is no surprise that the insurance industry acknowledged in 2006 that viruses cause property damage and developed a "virus and bacteria" exclusion found in most property policies sold in the United States. RJN ¶ 6, Ex. B. Federal elected not to include the exclusion in the Federal Policy despite its knowledge of pandemics and potential insurance losses stemming from them. Compl. ¶¶ 33-36.

As established above, Mayor de Blasio declared that the virus "physically is causing property damage." This is consistent with the fact that an insured's airspace is as much a part of the property as the land and structure, and that the presence of a virus is an alteration of and damage to the airspace. *See, e.g.*, *D'Amico v. Waste Management of New York, LLC*, 6:18-CV-06080 EAW, 2019 WL 1332575, at *5 n.2 (W.D.N.Y. Mar. 25, 2019) (citing *Butler v. Frontier Tel. Co.*, 186 N.Y. 486, 491 (1906) ("space above land is real estate the same as the land itself."). That declaration also adheres to the historical case law from around the country holding that the contamination of a property's airspace or surfaces by a hazardous substance constitutes "direct physical loss or damage," even without demonstrable, tangible alterations, if that contamination impairs the property's function or purpose, or renders it uninhabitable for its intended purpose.

This analysis begins with the Federal Policy language, which confirms that Federal failed to define "direct physical loss or damage" in whole or in part. Thus, it has no "special meaning."

In any event, "insurance industry commentators agree that 'microscopic' or 'molecular' injury is still property damage, if it affects the use of the property." Richard P. Lewis & Nicholas M. Insua, *Business Income Insurance Disputes* § 2.04 (2d ed., 2020-2 Supp. 2012), *citing* Barry R. Ostrager & Thomas A. Newman, *Handbook on Insurance Coverage Disputes* §21.02[a] (12th ed. 2004) ("A 'direct physical loss' often involves some physical alteration to the covered property.…The alteration can be at the 'microscopic' or 'molecular' level.").[18]

Many courts recognize that the "direct physical loss or damage" requirement is satisfied by the presence of, for example, bacteria, smoke, asbestos fibers, fumes, vapors, odors, chemical contaminants and mold—all of which, like SARS-CoV-2, may be invisible to the naked eye but can permeate and damage the air and surfaces in real property.

In *Pepsico, Inc. v. Winterthur Int'l America Ins. Co.*, 24 A.D.3d 743, 744, 806 N.Y.S.2d 709 (N.Y. App. Div. 2005), the insured sought coverage after the taste of its soft drink products was altered because of faulty ingredients provided by third-party suppliers. The court rejected the insurer's contention that the products were not physically damaged under an all-risk first-party property insurance policy.

> While "physical damages" are not defined in the policy, we disagree with Winterthur that to prove "physical damages" the plaintiffs must prove that "there has been a distinct demonstrable alteration of [the] physical structure [of the plaintiffs' products] by an external force," in other words, that the product has gone from good to bad. It is sufficient under the circumstances of this case involving the unmerchantability of beverage products that the product's function and value have been seriously impaired, such that the product cannot be sold.

Id. *See also Schlamm Stone & Dolan LLP v. Seneca Ins. Co.*, 6 Misc. 3d 1037(A), 800 N.Y.S.2d 356, 2005 WL 600021, at *5 (N.Y. Sup. Ct. Mar. 4, 2005) ("the presence of noxious particles,

[18] If that were insufficient to establish "direct physical loss or damage" of the Theaters, Federal knows that numerous individuals who either perform in productions at, or who otherwise work or provide services at the Theaters tested positive. Compl. ¶¶ 28-29.

both in the air and on surfaces in plaintiff's premises, would constitute property damage under the terms of the policy").

Many courts have been in accord for decades. In *Oregon Shakespeare Festival Ass'n v. Great American Insurance Co.*, No. 1:15-cv-01932-CL, 2016 WL 3267247 (D. Ore. June 7, 2016), festival theater performances were cancelled due to air quality and health concerns from smoke infiltration caused by wildfires. *Id.* at *2. The court held that "the smoke that infiltrated the theatre caused direct property loss or damage by causing the property to be uninhabitable and unusable for its intended purpose." *Id.* at *9. It explained that this loss was "physical" because it was "not mental or emotional, nor is it theoretical." *Id*. at *5.

The *Oregon* court considered the "extremely persuasive" (*id.* at *8) decision in *Gregory Packaging, Inc. v. Travelers Property Casualty Co.* No. 2:12-cv-04418 (WHW)(CLW), 2014 WL 6675934 (D.N.J. Nov. 25, 2014). There, an accidental release of ammonia into a packaging facility caused its shutdown until the ammonia dissipated. *Id*. at *3. The necessary remedy was to "air the property." The court noted that "structural alteration provides the most obvious sign of physical damage" but reaffirmed that "property can sustain physical loss or damage without experiencing structural alteration." *Id*. at *5.

In *Wakefern Food Corp. v. Liberty Mutual Fire Insurance Co.*, 968 A.2d 724 (N.J. App. Div. 2009), the insureds suffered financial losses because of food spoilage at their supermarkets during an electrical blackout. *Id.* at 727. The policy extended coverage for an interruption of electrical power to the insureds' supermarkets, provided the interruption was caused by "physical damage" to specified electrical equipment. *Id.* at 727. New Jersey's Appellate Division rejected the insurer's argument that the insured sustained no "property damage" because of the outage. The court first concluded that "the undefined term 'physical damage' was ambiguous." *Id.*

at 734. It then explained that "the electrical grid was 'physically damaged' because . . . the grid and its component generators and transmission lines were physically incapable of performing their essential function of providing electricity." *Id.* The court then held, in words applicable here: "Since 'physical' can mean more than material alteration or damage, it was incumbent on the insurer to clearly and specifically rule out coverage in the circumstances where it was not to be provided, something that did not occur here." *Id.* at 735. Rejecting the insurer's argument that a "narrowly-parsed definition of 'physical damage'" should be adopted, the court held that "[f]rom the perspective of the millions of customers deprived of electric power for several days, the system certainly suffered physical damage, because it was incapable of providing electricity." *Id. See also TRAVCO Ins. Co. v. Ward*, 715 F. Supp. 2d 699, 709-10 (E.D. Va. 2010) ("direct physical loss" based on gases released from drywall rendering premises uninhabitable); *W. Fire Ins. Co. v. First Presbyterian Church*, 165 Colo. 34, 39-40 (1968) (direct physical loss when gasoline contaminated building making it dangerous to use).[19]

The most recent reaffirmation of this rule is found in *North State Deli, LLC v. Cincinnati*

[19] *See also Port Authority v. Affiliated FM Ins. Co.*, 311 F.3d 226, 236 (3d Cir. 2002) (property sustained a direct physical loss because it was rendered uninhabitable by the presence of asbestos fibers); *Gen. Mills, Inc. v. Gold Medal Ins. Co.*, 622 N.W.2d 147 (Minn. Ct. App. 2001) (affirming "an impairment of function and value sufficient to support of finding of physical damage" and rejecting insurer argument that loss was only because of a government regulation); *Arbeiter v. Cambridge Mut. Fire Ins. Co.*, No. 9400837, 1996 WL 1250616, at *2 (Mass. Super. Ct. Mar. 15, 1996) (presence of oil fumes in building constituted "physical loss" to building); *Farmers Ins. Co. v. Trutanich*, 123 Or. App. 6, 9-11, 858 P.2d 1332 (1993) (odor from methamphetamine "cooking" constituted "direct physical loss"); *Sentinel Mgmt. Co. v. N.H. Ins. Co.*, 563 N.W.2d 296, 300 (Minn. Ct. App. 1997) ("Although asbestos contamination does not result in tangible injury to the physical structure of a building, a building's function may be seriously impaired or destroyed and the property rendered useless by the presence of contaminants. . . . Under these circumstances, we must conclude that contamination by asbestos may constitute a direct, physical loss to property under an all-risk insurance policy."); *AIU Ins. Co. v. Superior Court*, 51 Cal. 3d 807, 842 (1990) ("contamination of the environment satisfies" requirement of property damage); *Armstrong World Indus., Inc. v. Aetna Cas. & Sur. Co.*, 45 Cal. App. 4th 1, 103 (1996) (asbestos fibers in building's air and on its surfaces constitute property damage); *Matzner v. Seaco Ins. Co.*, No. CIV.A. 96-0498-B, 1998 WL 566658, at *4, 9 Mass. L. Rptr. 41 (Mass. Super. Ct. Aug. 12, 1998) (building with unsafe levels of carbon monoxide sustained direct physical loss); *Essex Ins. Co. v. BloomSouth Flooring Corp.*, 562 F.3d 399, 406 (1st Cir. 2009) (odor from carpet and adhesive "can constitute physical injury to property"); *Mellin v. N. Sec. Ins. Co., Inc.*, 167 N.H. 544, 548 (2015) (odor from cat urine is direct physical loss because it "encompass changes that are perceived by the sense of smell"); *In re Chinese Mfg. Drywall Prods. Liab. Litig.*, 759 F. Supp. 2d 822, 832 (E.D. La. 2010) (release of sulfur gas from drywall is "physical loss" because it prevents owner from "fully using and enjoying" the premises).

Insurance Co., 2020 WL 6281507 (N.C. Super. Oct. 9, 2020), in which the insured sought coverage for its COVID-19 business losses. There, as here, the policy did not include a "virus exclusion" and did not define "direct," "physical loss" or "physical damage." The court first considered their ordinary meanings:

> Merriam-Webster defines 'direct,' when used as an adjective, as 'characterized by close logical, causal, or consequential relationship,' as 'stemming immediately from a source,' or as 'proceeding from one point to another in time or space without deviation or interruption.' Merriam-Webster defines 'physical' as relating to 'material things' that are 'perceptible especially through the senses.' The term is also defined in a way that is tied to the body: 'of or relating to the body.' Webster's Third New International Dictionary defines physical as 'of or relating to natural or material things as opposed to things mental, moral, spiritual, or imaginary.' The definition from Black's Law Dictionary comports: 'Of, relating to, or involving material things; pertaining to real, tangible objects.' Finally, 'loss' is defined as 'the act of losing possession,' 'the harm of privation resulting from loss or separation,' or the 'failure to gain, win, obtain, or utilize.' . . . Another dictionary defines the term as 'the state of being deprived of or of being without something that one has had.'

Id. at 5 (citations omitted). The court then held:

> Applying these definitions reveals that the ordinary meaning of the phrase 'direct physical loss' includes the inability to utilize or possess something in the real, material, or bodily world . . . [and, therefore] describes the scenario where businessowners . . . lose the full range of rights and advantages of using or accessing their business property. This is precisely the loss caused by the Government Orders. ***Plaintiffs were expressly forbidden by government decree from accessing and putting their property to use for the income-generating purposes for which the property was insured. These decrees resulted in the immediate loss of use and access without any intervening conditions. In ordinary terms, this loss is unambiguously a 'direct physical loss,' and the Policies afford coverage***.

Id. (emphasis added).

The court granted summary judgment to the insured, holding that "direct physical loss" does not require that a property be "structurally altered" and because, even assuming the insurer's "proffered ordinary meaning [of direct physical loss] is reasonable," it is not the only reasonable ordinary meaning.

So, too, here, Jujamcyn's loss of the Theaters is neither mental, emotional, nor

theoretical. Given, for example, that individuals working at the Theaters tested positive, the airspace and surfaces inside the Theaters were contaminated and certainly would be again were Jujamcyn permitted to host a theatrical performance of any size. That is why Jujamcyn cannot host performances and, thus, the Theaters are unusable and uninhabitable for their intended purpose and function. The law considers it irrelevant that Jujamcyn's "direct physical loss or damage" is neither overtly tangible nor structural. Black-letter law provides that if Federal intended to require tangible or structural loss, it could have and should have drafted the Federal Policy in a way that clearly and unambiguously expresses that intent. *See also Hughes v. Potomac Insurance Co.*, 1999 Cal. App. 2d 239, 249 (1962) (the loss of use of property constitutes "direct physical loss of or damage to property," even where no structural damage or physical alteration occurred). Federal essentially argues that Jujamcyn must sustain observable damage but the law does not so hold and the Federal Policy does not so require. It also provides that if Federal intended to bar coverage for viruses, it knew how to do so.

As a result of the suspensions of its business operations, Jujamcyn continues to sustain covered Business Income With Extra Expense losses as defined in the Federal Policy. These losses are because of the "actual impairment" or "potential impairment" of its "operations" and the various orders and declarations issued by the City and State of New York, each of which is a "civil authority." Compl. ¶ 51. Those "civil authority" orders were issued because of, and prohibit access to the Theaters because of, the presence of SARS-CoV-2 in the City, State, and County of New York and the desire to avoid the spread of SARS-CoV-2 and the disease that it causes, COVID-19. *Id.* ¶ 52. Because the SARS-CoV-2 virus can adhere to surfaces of property for weeks and can linger in the air in buildings for several hours, and because the airspace in the Theaters is Jujamcyn's property and was damaged by the presence of the SARS-CoV-2 virus, it

amounts to "direct physical loss or damage" as a matter of fact and law as that phrase is used in the Federal Policy. *Id.* Moreover, given the fact that SARS-CoV-2 lingers in the air and on surfaces, the manner in which the virus is transmissible, and the desire to "flatten the curve," Jujamcyn's Theaters remain incapable of being used for their essential functions. *Id.* ¶ 53. Thus, because there is no virus exclusion and because the "civil authority" orders and presence of SARS-CoV-2 substantially impaired and continues to impair the Theaters and render them uninhabitable and unusable for their intended purpose, Jujamcyn sustained "direct physical loss or damage" as a matter of law. *Id.*

VI. CONCLUSION

As a matter of law: (1) the exclusions on which the Insurers rely are inapplicable, implausible, ambiguous, and waived; (2) Jujamcyn suffered at least five **LOSSES** under the Pacific Policy; and (3) Jujamcyn suffered "direct physical loss or damage" under the Federal Policy. Thus, judgment should be entered in favor of Jujamcyn under both Policies.

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