SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

TRIUMPH HOSPITALITY LLC DBA TRIUMPH HOTELS, 47TH STREET MANAGEMENT CO. LLC, IROQUOIS HOTEL L.L.C., WASHINGTON JEFFERSON HOTEL L.L.C., BELLECLAIRE HOTEL L.L.C., NESBIT HOTEL LLC, TRIBECA HOTEL LLC, and WEST BROADWAY READE LLC,

Plaintiffs,

- against -

THE HARTFORD FIRE INSURANCE COMPANY and ZURICH AMERICAN INSURANCE COMPANY,

Defendants.

Index. No. 653853/2020
Part 48
Hon. Andrea Masley
Motion Seq.: 003

ORAL ARGUMENT REQUESTED

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT ZURICH AMERICAN INSURANCE COMPANY'S MOTION TO DISMISS

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Plaintiffs Triumph Hospitality LLC dba Triumph Hotels and 47th Street Management Co. LLC ("Triumph" or "Plaintiffs") submit this memorandum of law in opposition to Defendant Zurich American Insurance Company's ("Zurich") motion to dismiss the Complaint.

PRELIMINARY STATEMENT

The very purpose of business interruption coverage is to ensure the policyholder has funds necessary to sustain its business operation in the event disaster occurs. The COVID-19 pandemic *is that disaster*: one of unprecedented magnitude for businesses around the world, contaminating and forcing suspended operations of their properties, and cutting off the income-generating purposes for which properties like Plaintiffs' are insured.

Plaintiffs submitted a claim to Zurich, under its ***all-risk*** package policy's[1] ("the Policy") business interruption, civil authority, dependent properties, extra expense, and marine coverage provisions. Despite accepting an annual premium of nearly $500,000, Zurich denied the coverage it contracted to provide and seeks dismissal of Plaintiffs' claims based on disputed construction of critical policy terms. Its motion should be denied.

First, the Policy contains no clear and unambiguous language barring Plaintiffs' claims – and New York law requires that insurance policies be construed in favor of coverage. Zurich argues that Plaintiffs "cannot show the required physical alteration of their property, or any other property," ***but the Policy contains no such requirement.*** The Property portion of the Policy contains no definition of "direct physical loss of or direct physical damage" to property and the CGL portion of the Policy specifically defines "Property damage" to mean "physical injury to tangible property…" ***or*** "***loss of use of tangible property that is not physically injured***." Policy

[1] The package policy includes, *inter alia*, commercial general liability ("CGL"), property, and inland marine coverage. Policy at 12. (The Policy is Exhibit B to the Complaint.)

at 48 (emphasis added). The latter is consistent with New York law holding that circumstances depriving the insured of the income-generating functions of its property can trigger coverage. Zurich's argument therefore fails.

Civil Authority coverage is similarly triggered, because COVID-19 – an airborne contaminant – has caused property damage in the "immediate area" of the insured locations and throughout New York City. Compl., ¶25. Access to the insured properties has been prohibited because the closure orders – in New York and worldwide – mandated that citizens stay home except for essential needs. Similarly, dependent properties coverage is triggered because properties Plaintiffs rely upon to attract customers to their business – including tourist attractions and transportation hubs –closed.

Second, the virus exclusion does not apply. The exclusion makes no mention of "pandemics"– ***unlike Zurich's virus exclusions in other policies***, which exclude "any infectious diseases ***which have been declared as a pandemic*** by the World Health Organisation."[2] Zurich's omission of those terms here at a minimum creates ambiguity as to the scope of the exclusion. Nor does the exclusion mention indirect consequences of virus, like the exclusions in many of the cases Zurich cites.

The Complaint adequately pleads multiple bases for coverage under the Policy and raises factual issues requiring discovery. Zurich's motion should be denied.

[2] *See* NYCSEF 52 (FCA Skeleton), at p. 34, n. 57 (emphasis added), available at https://www.fca.org.uk/publication/corporate/bi-insurance-test-case-fca-skeleton-argument.pdf . Zurich (and other insurers) were nonetheless held liable for their insured's COVID-19 business interruption losses. https://www.fca.org.uk/news/press-releases/result-fca-business-interruption-test-case

FACTUAL ALLEGATIONS

Plaintiffs operate the Hotel Edison, an office space, and parking garage in New York City. Compl., ¶¶9, 47. In March 2020, after the State and City issued a series of "stay at home" orders in response to the coronavirus pandemic, Triumph was forced to close its businesses to the public. *Id.*, ¶¶3, 25. New York City's March 22, 2020 "stay at home" order directed residents to stay home except for essential needs, recognizing that COVID-19 is "causing property loss and damage." *Id.,* ¶25. The majority of U.S. states and countries worldwide issued similar orders, prohibiting or restricting travel into New York and/or the United States based on high infection rates. *Id.*[3]

The COVID-19 pandemic has impacted Plaintiffs' businesses in several ways, including, for example the: (i) actual presence of the virus at Plaintiffs' properties; (ii) inability to use Plaintiffs' properties for their intended purpose due to the possible and/or threatened presence of the virus; (iii) orders of civil authority prohibiting prospective customers from patronizing Plaintiffs' properties; and (iv) suspension of Plaintiffs' operations due to the "direct physical loss of" premises owned and operated by others (including patrons' homes, transportation hubs and tourist attractions), on which Plaintiffs depend to accept their services and attract customers to their businesses (known as "dependent properties" coverage). *Id.,* ¶¶31-32, 40-41. Plaintiffs allege the Policy's "virus exclusion" is inapplicable for multiple reasons. *Id.,* ¶57.

Plaintiffs timely provided notice of their losses to Zurich in March 2020 and Zurich denied their claim. *Id.,* ¶59.

[3] Governor Cuomo also issued a series of Executive Orders imposing 14-day quarantine restrictions on travelers arriving in New York. NYSCEF 38.

ARGUMENT

On a motion to dismiss for failure to state a claim under CPLR 3211(a)(7), the "scope of the court's inquiry… is narrowly circumscribed." *P.T. Bank Cent. Asia v. ABN AMRO Bank*, 301 A.D.3d 373, 375 (1st Dep't. 2003). The court cannot "assess the merits in the complaint or any of its factual allegations." *Id.* at 376. Instead, the Court must afford the complaint a liberal construction, and "accord plaintiffs the benefit of every possible favorable inference." *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994).

The "sole criterion is whether the pleading states a cause of action" – not whether plaintiff can ultimately establish its allegations. *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 (1977). A CPLR 3211(a)(1) motion cannot be granted unless the documents submitted "conclusively establish[] a defense as a matter of law" and are "explicit and unambiguous." *5 East 59th Street Realty Holding Co., LLC v. Leahey*, No. 452192/2018, 2020 WL 4936915, *5 (Sup. Ct. N.Y. Cty. Aug. 24, 2020).

I. ALL-RISKS POLICIES ARE BROADLY CONSTRUED IN FAVOR OF COVERAGE

Under New York law, "all risk" policies cover all perils not specifically excluded. *Parks Real Estate Purchasing Grp. v. St. Paul Fire & Marine Ins. Co*., 472 F.3d 33, 41 (2d Cir. 2006). The insurer "bears the burden of establishing that the exclusions apply in a particular case and they are subject to no other reasonable interpretation." *Gaetan v. Firemen's Ins. Co. of Newark*, 264 A.D.2d 806, 808 (2d Dep't. 1999). Exclusions or exceptions from policy coverage "must be specific and clear in order to be enforced," and cannot be "extended by interpretation or implication, but are to be accorded a strict and narrow construction." *Seaboard Sur. Co. v. Gillette Co*., 64 N.Y.2d 304, 311 (1984). The law governing interpretation of exclusionary

clauses is highly favorable to the insured. *Pioneer Tower Owners Ass'n v. State Farm Fire & Cas. Co.,* 12 N.Y.3d 302, 306 (2009).

Further, a court construing an insurance policy "must strive to 'give meaning to every sentence, clause, and word,'" and avoid construction that would render terms superfluous. *Zurich Am. Ins. Co. v. ABM Indus., Inc.,* 397 F.3d 158, 165 (2d Cir. 2005). Ambiguities must be construed ***against the insurer*** as the drafter of the policy. *See Guardian Life Ins. Co. of Am. v. Schaefer*, 70 N.Y.2d 888, 890 (1987).

New York insurance law requires the policies be construed "in light of 'common speech' and the reasonable expectations of a businessperson." *Belt Painting Corp. v. TIG Ins. Co*., 100 N.Y.2d 377, 383 (2003). The very purpose of business interruption coverage is ensure the insured has funds "necessary to sustain its business operation in the event disaster occur[s]." *Bi-Econ. Mkt., Inc. v. Harleysville Ins. Co. of New York*, 10 N.Y.3d 187, 194 (2008); *see also Nat'l Union Fire Ins. Co. v. TransCanada Energy USA, Inc.,* 52 Misc.3d 455, 466 (Sup. Ct. N.Y. Cty. 2016), *aff'd sub nom,* 153 A.D.3d 1153 (1st Dep't. 2017) (purpose of business insurance is to cover "inability to continue normal business operation"). Applying the foregoing standards, Zurich's motion should be denied.

II. TRIUMPH ALLEGES THE DIRECT PHYSICAL LOSS OF ITS HOTELS FOR THEIR INTENDED USE AND DIRECT PHYSICAL DAMAGE

Zurich's arguments attempt to inject a definition of "direct physical loss of" Insured Premises not contained in the Policy, contrary to the foregoing, well-settled rules of construction. Plaintiffs have pled direct physical loss of and damage to their insured premises and associated business interruption.

A. "Direct Physical Loss of" Covered Property Is Distinct From "Direct Physical Damage to" Covered Property

Contamination – even invisible – qualifies as physical loss under New York law. *Port*

Auth. of N.Y. & N.J. v. Affiliated FM Ins. Co., 311 F.3d 226, 236 (3d Cir. 2002) (applying New York law and finding when contamination of a building is "such as to make the structure uninhabitable and unusable, then there has been a distinct loss to its owner."); *Newman Myers Kreines Gross, P.C. v. Great Northern Ins. Co.*, 17 F. Supp. 3d 323, 330 (S.D.N.Y. 2014) (physical loss or damage "does not require that the physical loss or damage be tangible, structural or even visible," and "even invisible fumes can represent a form of physical damage."). Loss of merchantability also constitutes a covered property loss under New York law. *See Pepsico, Inc. v. Winterthur Intern. Am. Ins. Co*., 24 A.D.3d 743 (2d Dep't. 2005) (tainted soda resulting from faulty ingredients sufficient to constitute physical loss because soda could not be sold, and therefore was unusable for its intended purpose).

These holdings are consistent with cases nationwide finding airborne contamination triggered coverage under the term "physical loss of" an insured premises. *See, e.g., Oregon Shakespeare Festival Ass'n v. Great Am. Ins. Co.*, No. 1:15-cv-01932-CL, 2016 WL 3267247, *2 (D. Or. June 7, 2016) (finding physical loss of property where wildfire smoke infiltrated the covered premises), *vacated on other grounds*, 2017 WL 1034203 (D. Or. Mar. 6, 2017); *Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am*., No. 2:12–cv–04418 (WHW)(CLW), 2014 WL 6675934, **1-3 (D.N.J. Nov. 25, 2014) (granting plaintiff summary judgment because ammonia contamination constituted "direct physical loss of" property and rendered it "physically unfit for normal human occupancy"); *Yale Univ. v. Cigna Ins. Co*., 224 F. Supp. 2d 402, 412-13 (D. Conn. 2002) (lead and asbestos contamination satisfied policy's "physical loss of or damage to property" requirement); *Western Fire Ins. Co. v. First Presbyterian Church*, 165 Colo. 34, 40 (1968) (gasoline vapors that infiltrated soil around church rendered building uninhabitable, triggering coverage); *Matzner v. Seaco Ins. Co*., No. Civ. A. 96-0498-B, 1998 WL 566658 at *4

(Mass. Super. Ct. Aug. 26, 1998) (carbon monoxide contamination triggered coverage); *see also Motorists Mut. Ins. Co. v. Hardinger*, 131 F. App'x 823, 826-27 (3d Cir. 2005) (reversing summary judgment for insurer because whether E. coli contamination constituted physical loss was a jury question).

At least ***seventeen*** courts have agreed that COVID-19-related business interruption claims can trigger property policy coverage. In *Studio 417, Inc. v. Cincinnati Ins. Co.*, No. 20-cv-03127, 2020 WL 4692385, *4 (W.D. Mo. Aug. 12, 2020), the court held plaintiffs (hair salon and restaurants) "adequately alleged a direct physical loss" based on the plain meaning of the phrase because COVID-19 can attach to property, "making it 'unsafe and unusable, resulting in direct physical loss'" of property. The court found defendant conflated "loss" and "damage" in arguing tangible physical alteration was required, and concluded "even absent a physical alteration, a physical loss may occur when the property is uninhabitable or unusable for its intended purpose." *Id.* at *5 (citing *Port Authority*, 311 F.3d at 236).

The court in *Blue Springs Dental Care LLC v. Owners Ins. Co.*, No. 4:20-cv-00383-SRB, 2020 WL 5637963, *6 (W.D. Mo. Sept. 21, 2020) similarly found plaintiff dental clinics adequately alleged a claim for "direct physical loss," and rejected defendant's argument that business income coverage could not be triggered because Plaintiffs never fully suspended operations. The court found plaintiffs adequately alleged physical loss of their clinics based on COVID-19 contamination, government shutdown orders prohibiting the public from accessing their clinics, and threat of loss posed by COVID-19. *Id.*

The court in *North State Deli, LLC v. Cincinnati Ins. Co.*, No. 20-CVS-02569, 2020 WL 6281508 (N.C. Super. Ct. Oct. 9, 2020) granted summary judgment *to plaintiff-insured*, concluding:

> 'direct physical loss' describes the scenario where business owners and their employees, customers, vendors, suppliers, and others ***lose the full range of rights and advantages of using or accessing their business property***. This is precisely the loss caused by the Government Orders.

NYSCEF 19, *6 (emphasis added).

The court observed that plaintiffs were expressly forbidden by government decree from accessing and using their property for the income-generating purposes for which it was insured. *Id.*; *see also Cajun Conti LLC v. Certain Underwriters at Lloyds, London*, No. 2020-02558, p. 5 (Civ. Ct. La. Nov. 4, 2020) (NYSCEF 39) (denying summary judgment to insurer and finding whether civil authority orders "prohibited access" to premises by restricting patrons' presence was a factual issue).

Numerous other courts have refused to dismiss in COVID-19 business interruption cases on similar grounds.[4] As in those cases, Plaintiffs allege both physical contamination (*i.e.*, damage) to and loss of their properties, and Zurich's motion should be likewise denied.

[4] *Best Rest Motel Inc v. Sequoia Ins. Co.*, No. 37-2020-00015679-CU-IC-CTL (San Diego Sup. Ct. Sept. 30, 2020) (finding issues of fact) (NYSCEF 40); *Francois Inc. v. Cincinnati Ins. Co.*, No. 20CV201416 (Ohio Ct. Com. Pl. Sept. 29, 2020) (same) (NYSCEF 41); *Somco, LLC v. Lightning Rod Mut. Ins. Co.*, No. CV-20-931763, 2020 WL 1897326, *1 (Ohio Ct. Com. Pl. Aug. 12, 2020) (same); *780 Short North LLC v. Cincinnati Ins. Co.*, No. 20CV003836 (Ohio Ct. Com. Pl. Sept. 8, 2020) (finding factual issues and converting to summary judgment) (NYSCEF 42); *SSF II, Inc. v. Cincinnati Ins. Co.*, No. 20CV201416 (Ohio Ct. Com. Pl. Sept. 8, 2020) (same) (NYSCEF 43); *K.C. Hopps, Ltd. v. Cincinnati Ins. Co., Inc.*, No. 4:20-cv-00437, 2020 WL 6483108, *1 (W.D. Mo. Aug. 13, 2020) (finding claims adequately alleged); *Hill and Stout PLLC v. Mut. of Enumclaw Ins. Co.,* No. 20-2-07925-1 (Wash. Sup. Ct. Nov. 13, 2020) (finding "physical loss of" ambiguous because it is fairly susceptible to two reasonable interpretations) (NYSCEF 44); *Dino Palmieri Salons, Inc. v. State Auto. Mut. Ins. Co.*, No. CV-20-932117, at *11 (Ohio Ct. Com. Pl. Nov. 17, 2020) (plaintiffs adequately alleged physical presence of COVID-19 on their premises and suffered physical loss or damage directly stemming from COVID-19) (NYSCEF 45); *see also infra* p. 19-20 (cases denying motions to dismiss despite virus exclusions).

B. Zurich's Efforts to Rewrite the Policy Should be Rejected

The Policy contains both Commercial General Liability ("CGL") coverage and property coverage. The CGL portion of the Policy defines "Impaired Property" as "tangible" property and "property damage" as ***either*** "physical injury to tangible property" ***or*** "loss of use of tangible property that is not physically injured." Policy at 46, 48. Reading the Policy as a whole supports Plaintiffs' construction, not Zurich's.

Zurich relies heavily on an order denying a preliminary injunction in *Social Life Magazine, Inc. v. Sentinel Ins. Co., Ltd.*, No. 20:cv-03311-VEC (S.D.N.Y. 2020) (NYSCEF 25). Apart from being procedurally inapposite, *Social Life* misconstrues relevant New York law and is contrary to many more recent decisions.

Social Life purports to rely on *Newman*, *supra*, and *Roundabout Theatre Co. v. Cont'l Cas. Co.*, 302 A.D.2d. 1 (1st Dep't. 2002) – both summary judgment opinions – considering policies covering "direct physical loss or damage" – missing the critical preposition "of." *See Newman,* 17 F. Supp. 3d at 326; *Roundabout,* 302 A.D.2d at 2; *see also Total Intermodal Servs. v. Travelers Prop. Cas. Co. of Am.*, No. 2:17-cv-04908-AB-KS, 2018 WL 3829767, *4 (C.D. Cal. July 11, 2018) (distinguishing *Newman* because its policy omitted the preposition "of").

While *Newman* determined that a power outage did not result in physical loss, it acknowledged that "even invisible fumes can represent a form of physical damage." *Newman,* 17 F. Supp. 3d at 330. The policy in *Roundabout* did not include civil authority coverage, which was critical because whereas plaintiff's claim was based on orders prohibiting access to its property due to nearby collapsed scaffolding, *not* damage to plaintiff's property. *Roundabout,* 302 A.D.2d at 8.

Iannuci v. Allstate Ins. Co., 354 F. Supp. 3d 125 (N.D.N.Y. 2018) (Mot. 8.) – a ***post-trial*** decision – does not support Zurich. *Iannuci* states the Second Circuit "has defined 'physical loss or damage' in the insurance context as 'strongly impl[ying] that there was an initial satisfactory state that was changed into an unsatisfactory state.'" *Id.* at 140. Here, the Policy covers "direct physical loss ***of***" – affording broader coverage than the *Iannuci* policy. Further, Plaintiffs specifically allege the presence and threatened presence of COVID-19 at their properties as one example of physical damage. That ***does*** change the state of Plaintiffs' properties to an "unsatisfactory" one.

Zurich's argument regarding the Period of Restoration (Mot. 9) also fails. The Policy does not state that the need to repair or replace damaged property is a prerequisite to coverage. Whether or not the virus can be neutralized by surface cleaning (Mot. 9) is of no moment. The virus spreads through aerosolized particles, often by asymptomatic individuals, meaning that "any location…where two or more people can congregate is within the disaster area [of COVID-19]." *See Friends of Danny Devito v. Wolf*, 227 A.3d 872, 890 (Pa. Sup. Ct. Apr. 13, 2020). Simply cleaning does not obviate the dangers of COVID-19, stop recontamination, or make the properties safely usable. *See, e.g., Cajun Conti*, p. 4 (NYSCEF 39) (denying summary judgment to insurer and rejecting "period of restoration" argument, finding whether harms of COVID-19 "can be abated with simple household cleaning supplies" and "how COVID impacts the environment" to be questions of fact); *Blue Springs*, 2020 WL 5637963, *6 (rejecting similar period of restoration argument).

Zurich's cited cases are inapposite. Several involve different coverage language, and did not involve property contamination of any kind. They are distinguishable on that basis alone. For example, in *United Airlines, Inc. v. Ins. Co. of State of Pa.*, 385 F. Supp. 2d 343, 346-48

(S.D.N.Y. 2005) (Mot. 11) – ***decided on summary judgment*** – plaintiff sought system-wide damages resulting from the closure of airports following the 9/11 terrorist attacks; a shutdown that affected its profits but caused no damage to its property (other than minimal damage at two locations), and argued that no physical adverse effect on its property was necessary to trigger coverage for "damage" to its business. Significantly, the policy did *not* include the phrase "physical loss of," as here. *Id.* at 347-48. Moreover, here, plaintiffs ***do*** allege physical damage to their properties; the toxic infiltration of COVID-19, in the forms of both sickness among their employees and contamination of surfaces – which cannot be readily prevented without closure of those properties and which recurs whenever exposed persons reenter them. *See* Compl. ¶31. Such toxic contamination ***is*** physical damage, regardless of whether it can be readily seen. *United Airlines*, therefore, is inapplicable.

The Philadelphia Parking Authority v. Federal Ins. Co., 385 F. Supp. 2d 280 (S.D.N.Y. 2005) (Mot. 11-12) also addressed different policy language, omitting the preposition "of." It also involved claims for business interruption following the grounding of flights after 9/11 (and applied Pennsylvania, not New York, law), and specifically distinguished the contamination line of cases from the "purely economic damages" plaintiff alleged. It is therefore also inapposite.

Satispie LLC v. Trav. Prop. Cas. Co., 448 F. Supp. 3d 287 (W.D.N.Y. 2020) (Mot. 11) also was decided on summary judgment, after substantial discovery, not a motion to dismiss where plaintiffs' allegations are accepted as true (indeed, defendant's motion to dismiss was largely denied, *id*. at 291). In any event, *Satispie* does not support Zurich because the "ammonia leak" coverage dispute there applied only to whether plaintiff could recover for food spoilage despite the policy's express limit on the amount of such ammonia spoilage coverage and the fact that the discarded food was ***not*** contaminated. *Id*. at 292-293. Here, in contrast, Plaintiffs have

alleged (and will show through discovery and at trial) that their workers were infected and their properties contaminated by COVID-19, damaging those properties and triggering coverage under their policies. *Cytopath Biopsy Lab v. United States Fid. & Guar. Co*., 6 A.D.3d 300 301 (1st Dep't. 2004) (Mot. 11) is distinguishable because the court found the lab involved was "closed for only a few hours and could have returned to operation promptly had the pipe [that leaked fumes] been repaired expeditiously." Municipal authorities required plaintiff to obtain proper permits and install a better ventilation system, but the policy excluded coverage for damages flowing from "acts or decisions of any person, group, organization or governmental body." Zurich's other cases are procedurally inapposite. *See Ski Shawnee, Inc. v. Commonwealth Ins. Co.*, No 3:09-CV-02391, 2010 WL 2696782, *4 (M.D. Pa. July 6, 2010) (Mot. 13) (granting *summary judgment* where damage was only to a bridge that led to plaintiff's property and plaintiff did not claim any damage to the property itself); *S. Texas Med. Clinics, P.A. v. CNA Fin. Corp*., No. H-06-4041, 2008 WL 450012, *10 (S.D. Tex. Feb. 15, 2008) (Mot. 12-13) (granting insurer *summary judgment*, following discovery, under civil authority coverage provision because neither plaintiff's properties nor surrounding properties suffered *any* damage from hurricane that did not strike the area and evacuation order was not based on damage that had occurred in storm's path).

Zurich also cites *Wal-Mart Stores, Inc. v. United States Fid. & Guar. Co.*, 29 A.D.3d 315 (1st Dep't. 2006) for the proposition that "[c]ourts have also found no coverage for actions taken to prevent potential future harm from occurring." (Mot. 12). However, in *Wal-Mart*, the court affirmed the ***denial*** of ***summary judgment***, because issues of fact existed regarding whether closure of plaintiff's store was due to a rockslide or merely prophylactic. *Id*. at 316. Here, again, there has been no discovery – indeed, nothing other than plaintiffs' allegations of damage

to their properties (which must be accepted as true on defendants' motion), and defendants' blanket denials. And unlike here, *Wal-Mart*, involved a discrete incident of damage that might or might not subsequently recur, not a global pandemic with state and city-wide shutdowns due to the virtual certitude of further infection and contamination absent those shutdowns. Indeed, Zurich's reasoning would, if accepted, produce disastrous results; insureds, like Plaintiffs, would be forced to either adhere to state and city pandemic guidelines, or continue to operate, exposing their employees and patrons to the risk of substantial injury or death.

Zurich's reliance on *Pappy's Barber Shops, Inc. v. Farmers Group, Inc*., No. 3:20-cv-00907, 2020 WL 5500221 (S.D. Cal. Sept. 11, 2020) (Mot. 12) is similarly misplaced. In *Pappy's,* plaintiffs alleged their damages were caused by "precautionary measures taken by the state to prevent the spread of COVID-19 in the future, *not because coronavirus was found on or around Plaintiffs' insured properties*." *Id*. at *2 (emphasis added). Thus, "the complaint [did] not allege that COVID-19 or the coronavirus itself caused a direct physical loss triggering coverage under the policy." *Id*. That is simply not the case here. Compl. ¶31.

Zurich's argument regarding suspension (Mot. 13) is contrary to Policy language defining suspension to include slowdown of business. Policy at 144.

C. Dependent Properties Coverage Is Triggered

Plaintiffs allege coverage under the Dependent Properties provision of the Policy, based in part on the closure of New York tourist attractions due to COVID-19. Compl. ¶32. Plaintiffs rely on tourist attractions to "attract customers" to their properties, within the meaning of the

Policy. Those closures include Broadway theaters,[5] restaurants,[6] museums and historical sites – many of which will never reopen.[7] The physical loss of those properties for their respective intended income-generating purposes caused lost income to Plaintiffs, who rely on those properties to attract customers to their businesses. And stay-at-home orders restrict patrons to their homes – premises Plaintiffs depend on to accept their services.

Plaintiffs have thus adequately pled claims for coverage under the Dependent Properties provision of the Policy.

D. Civil Authority Coverage Is Triggered

Zurich's argument (Mot. 15) that stay-at-home orders did not prohibit access to the Hotel Edison is nonsensical. Those orders required that citizens – *i.e.* prospective patrons – stay home except for essential needs, due to the health dangers, widespread property damage, and physical loss of property caused by COVID-19. The complaint alleges the presence of the virus throughout New York City and is sufficient to trigger coverage.

United Airlines Inc. v. Ins. Co. of State of Pa., 439 F.3d 128 (2d Cir. 2006) (Mot. 16) is inapposite because the orders at issue there were based on the speculative threat of future terrorist attacks – not the actual threat presented by COVID-19 until and unless there is widespread vaccine inoculation.

Issues of fact concerning the applicability of the civil authority provision preclude dismissal at this stage. *See Zurich,* 397 F.3d at 171 (reversing summary judgment for Zurich on

[5] *See, e.g., Jujamcyn Theaters LLC v. Fed. Ins. Co.*, No. 1:20-cv-06781-ALC, (S.D.N.Y.), Dkt. 1 (NYSCEF 53).

[6] *See, e.g., Abruzzo DOCG d/b/a Tarallucci e Vino v. Acceptance Indem. Ins.*, No. 514089/2020 (Sup. Ct. Kings Cty. Aug. 3, 2020), Dkt. 1 (NYSCEF 54).

[7] *See, e.g.,* https://www.nytimes.com/2020/11/17/arts/design/museum-closings-covid-19.html

claim that civil authority orders restricting access to defendant's work sites triggered policy coverage because factual disputes remained); *Massi's Greenhouses, Inc. v. Farm Family Mut. Ins. Co.*, 233 A.D.2d 844 (4th Dep't. 1996) (denying summary judgment as to applicability of "civil authority" coverage because issue of fact remained regarding whether plaintiff's losses stemmed from bacterial contamination itself or state quarantine order).

III. THE VIRUS EXCLUSION DOES NOT BAR TRIUMPH'S CLAIMS

Zurich's virus exclusion does not preclude coverage because it: (i) does not encompass pandemics; (ii) does not encompass losses indirectly caused by virus; (iii) is ambiguous; and (iv) is unenforceable under the doctrine of regulatory estoppel.

A. The Virus Exclusion Does Not Apply to Pandemics

Zurich knows how to attempt to exclude pandemics from coverage, because its virus exclusion at issue in the FCA proceedings specifically references "any infectious diseases ***which have been declared as a pandemic***" by the World Health Organization. *See supra,* n.2.[8] Zurich did not include that language in this Policy, and cannot enlist the Court to broaden the exclusion it wrote. *See, e.g., Maison Rostang v. AXA France,* (Commercial Tribunal of Paris, RG No. 2020017022, May 22, 2020) (rejecting insurer's reliance on virus exclusion because exclusion did not reference pandemic) (NYSCEF 47).

Moreover, because the term "virus" is not defined, it must be given its ordinary dictionary definition – which does not include a "pandemic."[9] Viruses and pandemics are different: an ordinary virus impacts only those it directly infects, while a pandemic triggers a

[8] Other insurers similarly include explicit references to "pandemic" in their virus exclusions. *See, e.g., Meyer Nat. Foods, LLC v. Liberty Mut. Fire Ins. Co.*, 218 F. Supp. 3d 1034, 1038 (D. Neb. 2016) (virus exclusion stated it included "any epidemic, pandemic, influenza plague, SARS, or Avian Flu.").

[9] https://www.merriam-webster.com/dictionary/virus

wide variety of measures designed to contain the virus, impacting people and properties that the virus ***never directly reaches***. In other words, a pandemic sets off numerous ***indirect*** consequences, such as government orders and access restrictions, affecting property and its usability. Plaintiffs' losses largely result from the pandemic and ***indirect*** consequences of COVID-19, distinguishing it from Zurich's cited authorities.[10]

Whatever Zurich's reasons for not including the term "pandemic" in this Policy's exclusion – perhaps because it could not charge such high premiums if it disclosed that it intended to deny coverage for such devastating losses– the term is not included, and cannot be implied under New York law, which strictly construes policy terms ***against*** the insurer, particularly with respect to exclusions. *Seaboard*, 64 N.Y.2d at 311 (exclusions "are not to be extended by interpretation or implication, but are to be accorded a strict and narrow construction"). Zurich "bears the burden of proving that the claim falls within the scope of an exclusion ... [by] establish[ing] that the exclusion is stated in clear and unmistakable language, is subject to no other reasonable interpretation, and applies in the particular case.'" *Seneca Ins. Co. v. Kemper Ins. Co*., No. 02 Civ. 10088 (PKL), 2004 WL 1145830, *10 (S.D.N.Y. May 21, 2004). Zurich cannot do so.

[10] *Wilson v. Hartford Cas. Co*., No. CV 20-3384, 2020 WL 5820800, *7 (E.D. Pa. Sept. 30, 2020) (virus exclusion stating Hartford "will not pay for loss or damage caused directly ***or indirectly*** by ... [p]resence, growth, proliferation, spread or any activity of 'fungi', wet rot, dry rot, bacteria or virus."); *Diesel Barbershop LLC v. State Farm Lloyds*, No. 5-20-CV-461, 2020 WL 4724305, *3 (W.D. Tex. Aug. 13, 2020) (exclusion applies "whether other causes acted concurrently or in any sequence with the excluded event" or whether event arises "from natural or external forces, or occurs as a result of any combination…"); *Mauricio Martinez, DMD, P.A. v. Allied Ins. Co. of Am*., No. 2:20-cv-00401, 2020 WL 5240218, *3 (M.D. Fla. Sept. 2, 2020) (virus exclusion applies to damage caused "indirectly" by virus). Zurich also cites *Gavrilides Mgmt. Co. LLC v. Michigan Ins. Co.,* No. 20-258-CB-C30, 2020 WL 4561979 (Mich. Cir. July 21, 2020), in which the insured made no attempt to allege damage or physical loss, and did not make the virus exclusion arguments presented here. NYSCEF 25.

MDW Enters., Inc. v. CNA Ins. Co., 4 A.D.3d 338 (2d Dep't. 2004) is instructive. There, the insured, vacant property was destroyed by arson. The insurer relied on a vacancy exclusion, which excluded coverage for loss or damage during vacancy caused by "vandalism." *Id.* at 340. The court rejected that argument, finding "vandalism" ambiguous in the context of the policy as a whole, therefore construing it in the insured's favor. *Id.* at 341. The court noted "vandalism" was not defined, and that the "nature or scale of the damage of the other bases for exclusion listed with 'vandalism' are rather minor, which would be more consistent with an interpretation of 'vandalism' that focused on its petty nature." *Id.* The court criticized the lower court for "overlook[ing] the fact that ordinary businesspeople generally view 'vandalism' and 'arson' as distinct perils" and held if the insurers "wanted to exclude coverage for arson they should have said so clearly … just as they listed theft and attempted theft separately." *Id.*; *see also United Capital Corp. v. Travelers Indem. Co. of Illinois*, 237 F. Supp. 2d 270, 275 (2002) (rejecting insurer's argument that "vandalism" should be construed to include arson, noting insurer could have specifically defined it as such, notwithstanding that arsonists broke into the subject property).

Just as the courts in *MDW* and *United Capital* distinguished arson from vandalism, this Court should distinguish virus from pandemic. And just like the vandalism and arson in *MDW*, ordinary businesspeople would view a common virus such as the flu and the COVID-19 pandemic as distinct perils. If Zurich wanted to exclude coverage for pandemics, it "should have said so clearly," just as it has done in other policies and as other insurers have done. *MDW*, 4 A.D.3d at 341.

Zurich cannot sustain its burden of proving that the virus exclusion applies to Plaintiffs' losses and the Court should not expand the virus exclusion to include a term Zurich chose to exclude.

B. The Virus Exclusion Does Not Apply to Losses Indirectly Caused by Virus

Zurich's virus exclusion specifically provides that it only excludes loss or damage "caused by or resulting from" virus. However, other insurers' virus exclusions are worded far more broadly. For example, in *Boxed Foods Co. v. Cal. Cap. Ins. Co*., No. 20-cv-04571, 2020 WL 6271021, *3 (N.D. Cal. Oct. 26, 2020), the virus exclusion provided:

> We do not insure for loss or damage caused by, resulting from, contributing to or made worse by the actual, alleged or threatened presence of any pathogenic organism, all whether direct ***or indirect, proximate or remote, or in whole or in part caused by, contributed to or aggravated by any physical damage insured by this policy***.

(Emphasis added.)

The court specifically distinguished this language from a virus exclusion in another case, writing:

> ***The Court's holding should not be construed to necessarily apply to all virus exclusions***. The Virus Exclusion [in this case] casts an exceptionally wide net relative to other virus exclusions because it lacks relevant limitations and ambiguous language.

Id. at fn. 8 (emphasis added) (comparing policy to policy at issue in *Urogynecology Specialist of Fla. LLC v. Sentinel Ins. Co., Ltd*., No. 6:20-cv-1174-Orl-22EJK, 2020 WL 5939172 (M.D. Fla. Sept. 24, 2020), finding the latter "contained ambiguous language and potentially permitted the plaintiff's claim").[11]

[11] Similarly, the exclusion in *Vizza Wash, LP v. Nationwide Mut. Ins. Co.*, No. 5:20-cv-00680-OLG, 2020 WL 6578417, *13 (W.D. Tex. Oct. 26, 2020) provides "we will not pay for loss or

Accordingly, even if the virus exclusion is enforceable – and it is not – it could only potentially exclude damages caused by the virus, such as the costs of decontaminating the property,[12] ***not*** damages caused by the pandemic, such as lost functionality of the property for its intended use. *See, e.g., Great Northern Ins. Co. v. Dayco Corp*., 637 F. Supp. 765, 780 (S.D.N.Y. 1986) ("Where a policy expressly insures against direct loss and damage by one element but excludes loss or damage caused by another element, the coverage extends to the loss even though the excluded element is a contributory cause.").

Zurich implicitly concedes the virus exclusion does not apply to the Inland Marine Coverage form, but contends the coverage only applies to signs and unscheduled equipment (Mot at 17, n.16). However, the "Scheduled Property Floater" appended to the Marine Coverage Form (in the middle of the Policy pages Zurich cites) provides broader coverage to "your property." Policy at 287.

C. <u>The Virus Exclusion Is Ambiguous</u>

At a minimum, the virus exclusion is ambiguous as to whether it applies to the losses at issue here.

The court in *Urogynecology*, 2020 WL 5939172, *4, found language referring to indirect losses ambiguous because the losses "stemming from COVID-19" do not "logically align with the grouping of the virus exclusion with other pollutants such that the Policy necessarily anticipated and intended to deny coverage for these kinds of business losses." The court

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damaged caused directly or ***indirectly*** by any of the following….virus or bacteria." (emphasis added).

[12] However, even that is unclear given that the Policy specifically provides for limited virus coverage and Contaminant Clean-up coverage. Policy at 124.

distinguished another virus case, because it did not deal "with the unique circumstances of the effect of COVID-19….on our society – a distinction this Court considers significant." *Id.*

Other courts have in fact denied motions to dismiss in similar circumstances, concluding that issues of fact preclude dismissal based on a virus exclusion provision that is subject to conflicting interpretations. *Taps & Bourbon on Terrace, LLC v. Underwriters at Lloyds London and Main Line Ins. Offices, Inc.*, No. 00375, 2020 WL 6380449, **1-2 (Pa. Civ. Ct. Oct. 26, 2020) (denying objections as premature based on factual issues presented by COVID-19 claims); *Ridley Park Fitness LLC v. Philadelphia Indem. Ins. Co. et al.*, No. 01093, **1-2 (Pa. Civ. Ct. Aug. 31, 2020) (NYSCEF 46) (same); *Optical Services USA/JC1 et al. v. Franklin Mutual Ins. Co*., No. BER-L-3681-20, 2020 WL 5806576 (N.J. Super. L. Div. Aug. 13, 2020) (same), NYCSEF 49. This Court should do likewise.

D. The Virus Exclusion Is Unenforceable Based on the Doctrine of Regulatory Estoppel

In the insurance industry, the doctrine of regulatory estoppel is best known for its application in the context of pollution exclusions. In the 1970s and 1980s, industry representatives represented the intended scope of pollution exclusions as mere "clarifications" in coverage, securing approval of the exclusions with no reduction in premiums. Thereafter, policyholders proved that insurers misrepresented the existing coverage and courts accordingly deemed the exclusions unenforceable. *See, e.g., Joy Technologies v. Liberty Mut. Ins. Co.,* 421 S.E.2d 493 (W. Va. 1992); *Morton Int'l Inc. v. General Accident Ins. Co*., 629 A.2d 831 (N.J. 1993); *St. Paul Fire Ins. Co. v. McCormick & Baxter Creosoting Co*. 923 P.2d 1200 (Or. 1996); *Sunbeam Corp. v. Liberty Mut. Ins. Co.,* 781 A.2d 1189, 1192-93 (Pa. 2001) (concluding that after representations that new pollution exclusions would not "involve a significant decrease in

coverage from the prior language, the insurance industry will not be heard to assert the opposite position when claims are made by the insured policyholders.").

In strikingly similar fashion, the insurance industry pushed through virus exclusions in 2006, representing them to be mere clarifications of coverage. Specifically, Insurance Services Office ("ISO") – acting as Zurich's agent – submitted circular LI-CF-2006-175 (July 6, 2006) to insurance regulators in various states, including New York, falsely stating "…property policies ***have not been a source of recovery for losses involving contamination by disease-causing agents***..." *See* NYSCEF 50 (emphasis added). To the contrary, courts nationwide concluded property policies covered contamination-related loss (see pp. 5-7, *infra*). Just as courts estopped insurers from relying on the pollution exclusions they secured through misrepresentation, this Court should estop insurers from relying on virus exclusions secured through misrepresentation.

The footnoted *dicta* in *Papock v. American Home Assurance Co*., Index No. 924/95 (Sup. Ct. West. Cty. Aug. 16, 1996), relied on by Zurich (Mot. 21) (NYSCEF 27) does not preclude plaintiffs' regulatory estoppel claim here. In *Papock*, the court noted that, regardless of the alleged regulatory misrepresentations by defendants, the claim involved continuing contamination over a period of years, not an "accidental" release within the policies' pollution exclusion clauses because "the use, handling and disposal of the contaminants was intentional and the resulting contamination can be said to be foreseeable." *Id*. at *8, n.7. That is not the case here, where the occurrence of the COVID-19 pandemic was unforeseeable. Moreover, as shown above, there is, at a minimum, ambiguity regarding the proper interpretation and application of Zurich's virus exclusion language, such that resort to extrinsic evidence via discovery is proper and, at this stage, that ambiguity must be construed in plaintiffs' favor. *See*

Dean v. Tower Ins. Co. of New York, 19 N.Y.3d 704, 708 (2012) ("'Ambiguities in an insurance policy are to be construed against the insurer'").

Employers Ins. of Wassau v. Duplan Corp., No. 94-CIV. 3143 (CSH), 1999 WL 777976 (S.D.N.Y. Sept. 30, 1999) (Mot. 21) also is inapplicable. There, the court held that regulatory estoppel did not apply because "extrinsic evidence is not permitted to vary the terms of a clear and unambiguous" policy provision. *Id*. at *14. Here, however, again, the virus exclusion is *not* clear and unambiguous, and is susceptible to alternative interpretations (*see supra* pp. 15-20). The *Duplan* court's rejection of the regulatory estoppel theory in that case is therefore irrelevant.

Plaintiffs' allegation here is that the insurance industry made affirmative misrepresentations regarding the virus exclusion, not mere omissions. Compl., ¶6.[13] Discovery is necessary regarding ISO and Zurich's representations to regulators to determine if regulatory estoppel applies to invalidate the exclusion. *See Hussey Copper, Ltd. v. Royal Ins. Co. of Am.*, 567 F. Supp. 2d 774, 787 (W.D. Pa. 2008) (allowing discovery regarding regulatory estoppel before ruling on summary judgment).

IV. BAD FAITH IS A QUESTION OF FACT

Zurich states in passing that "Plaintiffs also cannot prevail on their bad faith claims since Zurich's position, which accords with the Policy terms and the governing law, certainly has an 'arguable' basis." (Mot. 22.) Zurich's argument is premature. As shown, Zurich's position does ***not*** accord with key Policy terms and relevant law. Bad faith is a question of fact not capable of resolution at this stage in the proceedings – as evidenced by the fact that both cases cited by

[13] Plaintiffs believe that all their causes of action are sufficiently pled, but if the Court disagrees, Plaintiffs should be granted leave to amend to cure any purported deficiencies. *Culligan Soft Water Co. v. Clayton Dubilier & Rice, LLC*, No. 651863/2012, 2019 WL 78923, *2 (Sup. Ct. N.Y. Cty. Jan. 2, 2019) ("Leave to amend a pleading is freely given").

Zurich were decided on summary judgment, not a motion to dismiss. *See also Pinto v. Allstate Ins. Co.,* 221 F.3d 394, 404 (2d Cir. 2000) (whether insurer acted in bad faith was a jury question).

V. THE ISSUES RAISED BY ZURICH'S MOTION REQUIRE DISCOVERY

The issues raised by Zurich's motion go to the proper construction of its ambiguous policy – a subject matter requiring discovery. *Bd. of Ed. v. CNA Ins. Co*., 647 F. Supp. 1495, 1502 (S.D.N.Y. 1986) (ambiguities present disputed issues of fact that must be resolved by finder of fact). Triumph has already served document requests on Zurich, seeking critical documents concerning the proper interpretation of the ambiguous Policy terms discussed herein. Triumph also prepared a subpoena to ISO.

In addition to discovery concerning the disputed provisions discussed above, discovery is needed (and has been requested) regarding the Policy's liberalization clause, which potentially broadens coverage: "if we adopt any revision that would broaden this Coverage Part, without additional premium…during this policy period, the broadened coverage will immediately apply to you." Compl., ¶49; Policy at 260. If any versions of the Policy provide broader virus coverage, or omit the virus exclusion, Triumph would be entitled to the benefit of those broader provisions. *See, e.g., Government Emp. Ins. Co. v. Wilson*, 69 Misc.2d 1020, 1024 (Sup. Ct. Erie Cty. 1972) ("if there is any ambiguity in regard to the liberalization clause of the insurance policy, it must be construed strictly against the insurer"); *Mattis v. State Farm Fire & Cas. Co*., 454 N.E.2d 1156, 1160 (Ill. App. 1983) (although original policy controlled property damage claim, liberalization clause in original policy made broader coverage provisions in amended policy applicable to claim).

CONCLUSION

For all of the foregoing reasons, Zurich's motion should be denied.

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Respectfully submitted,

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Certification of Word Count

The undersigned hereby certifies that the forgoing PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO ZURICH AMERICAN INSURANCE COMPANY'S MOTION TO DISMISS contains 6,894 words according to the word count of the word-processing software used to prepare the memorandum, excluding the caption, table of contents, table of authorities, signature block, and this certification.

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