The Honorable Barbara J. Rothstein

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

FIRST AND STEWART HOTEL OWNER, LLC, a Delaware limited liability company,

Plaintiff,

v.

FIREMAN'S FUND INSURANCE COMPANY, a California corporation,

Defendant.

No. 2:21-cv-00344-BJR

PLAINTIFF FIRST AND STEWART HOTEL OWNER, LLC'S OPPOSITION TO DEFENDANT'S RULE 12(C) MOTION TO DISMISS FIRST AND STEWART'S AMENDED COMPLAINT

ORAL ARGUMENT REQUESTED

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INTRODUCTION

First and Stewart Hotel Owner, LLC ("F&S") filed a First Amended Complaint ("FAC") that is unlike any other that has come before this Court subject to the consolidated briefing or the Court's May 28 Order (the "Order"). By far the most detailed, it does not rely solely on government orders or economic loss as the basis for its claims. Rather, it is the only complaint based on extensive reference to the latest scientific findings that show that Coronavirus inflicts property loss or damage, most markedly, by physically altering indoor air.

Because of this distinction, F&S could not agree to be wholesale bound by the consolidated briefing; although in an effort to streamline the briefing, F&S incorporates by reference and will refer to the Plaintiffs' Omnibus Opposition in this opposition to the motion filed by Fireman Fund Insurance Company ("FFIC"). Review of the allegations here and the recent science that supports them reveals that the presence of Coronavirus at F&S's property caused "physical loss or damage" to property, triggering coverage, and requiring denial of FFIC's Motion, as no exclusion applies. Only by refusing to accept the allegations in the FAC as true, refusing to make reasonable inferences in F&S's favor, ignoring Policy language expressly acknowledging that "communicable disease" can cause physical loss or damage to property, ignoring recent decisions from Washington courts, and disregarding decades of pre-COVID precedent, all of which would be improper at this stage, could any other result be reached. FFIC's Motion should thus be denied.

STATEMENT OF FACTS

A. Coronavirus was present at and within 1,000 Feet of the Hotel

F&S owns and operates the Thompson Seattle Hotel (the "Hotel"), a luxury hotel in downtown Seattle. FAC ¶ 57. Individuals infected with Coronavirus, including Hotel employees, were present at and within 1,000 feet of the Hotel, as well as at properties attracting customers to the Hotel ("Leader Locations"), where they spread Coronavirus. (FAC ¶¶ 43, 99-110.) Further, it is statistically certain or near certain that many other individuals at or around the Hotel contracted and carried Coronavirus before the Hotel closed, especially given the prevalence of asymptomatic

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cases of COVID-19. (*Id.*; *see also id*. ¶¶ 14, 45, 61-62, 99).

B. Coronavirus creates unsafe property conditions, which cannot be removed or eliminated by routine cleaning

As F&S pleads in detail, risk of infection by Coronavirus, which causes COVID-19, renders indoor air, objects, surfaces, and other areas exposed to the virus dangerous and potentially fatal. (FAC ¶¶ 31, 68-69, 71-86.) Infection occurs when someone is exposed to the virus through respiratory particles (*e.g.*, droplets or aerosols) expelled by an infected person. The infected respiratory particles can be inhaled out of the air, or they can be transferred from objects or surfaces where people touch them and then touch their eyes, nose, or mouth. (*Id.* ¶¶ 86-87, 89-90, 97-98, 114.) Air is a primary transmission vector for Coronavirus. (*Id.* ¶¶ 20, 73-77.)

Unlike any complaint this Court has yet considered, the FAC makes abundantly clear that Coronavirus actually physically alters the air, thereby damaging the property. (*Id.* ¶¶ 14-15, 19, 71-86, 117.) And also unlike any complaint yet to come before this Court, F&S's allegations are supported by citation to ***over three dozen*** recent peer-reviewed scientific studies demonstrating the physical loss or damage caused by Coronavirus. (*Id.* ¶¶ 71-98, n.41-83.)[1]

Coronavirus can remain airborne for "for indefinite periods unless removed by air currents or dilution ventilation." (*Id.* ¶¶ 73-75.) Ventilation systems can also be transmission vectors by spreading the airborne particles up to 56 meters from an infected person. (*Id.* ¶ 74.) Crucially, removing airborne Coronavirus particles *cannot be achieved by routine surface cleaning*; surface cleaning may in fact cause virus particles to become airborne and spread more widely. (*Id.* ¶¶ 15, 20, 35-39, 87-98.) Decontamination measures include "making changes to air filtration systems," though the only surefire method is to shutter the property, as no amount of cleaning can remove Coronavirus from the air or prevent reintroduction by an infected person. (*Id.* ¶¶ 15, 94, 97-98.)

Further, Coronavirus fomites can remain infectious for hours or even days after exposure.

[1] As the FAC necessarily relies on these studies as the bases for its claims and their authenticity cannot in good faith be contested, F&S incorporates by reference 43 of said studies. *See* Ex. A, Decl. of J. Jean, at Exs. 1-43.

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(*Id.* ¶¶ 77, 79-80.) The Hotel contains materials—like plastics, glass, metals, and fabrics—that are a routine part of Hotel operations and that have been documented as Coronavirus fomites. (*Id.* ¶¶ 94-95.) Coronavirus can be transmitted by touching a fomite and then touching another surface or disturbing a fomite—like shaking a textile (e.g., bedsheets)—spreading Coronavirus particles into the air and creating additional fomites subject to further airborne transmission. (*Id.* ¶¶ 79-80, 83.)

Recent science confirms Coronavirus cannot be removed with ordinary cleaning, and the CDC has found little evidence to suggest that disinfectants can prevent the transmission of Coronavirus and that Coronavirus is "much more resilient to cleaning than other respiratory viruses." (*Id.* ¶¶ 20, 87-98.) Nevertheless, and as directed by various government orders, the Hotel undertook great efforts in an attempt to render its property safe for use, but ultimately had to close for many months and only reopen at a reduced capacity with limitations on the amenities (e.g., restaurants, rooftop bar, fitness center) that attract customers and guests and provide the expected luxury that differentiates the Hotel from its competition. (*Id.* ¶¶ 40-41, 45, 104, 109-10, 122-24.)

C. Government orders responding to the dangerous property conditions created by Coronavirus drastically limited use of the Hotel

Various government orders (collectively, "Government Orders") also required closure of many parts of the Hotel, including its restaurants, bars, and recreational facilities, limited the size of gatherings at the Hotel, and also adversely impacted Leader Locations. (FAC ¶¶ 118-31.) For example, in a March 16, 2020 order relying on the fact that COVID-19 was a "public disaster affecting….property," Governor Inslee ordered the closing of restaurants, bars, entertainment, and recreational facilities, and limited the size of gatherings. (*Id.* ¶ 118.) On March 23, 2020, the Governor ordered all Washingtonians to stay home unless needed for essential activities, banned gathering for social and recreational purposes, and closed all but essential businesses. (*Id.* ¶ 119.)

By August 2020, the Hotel re-opened to overnight guests, but was unable to open its restaurants, the fitness center, and other amenities that differentiate the Hotel from its competitors. (*Id.* ¶¶ 40, 122.) But reopening did not entirely abate the Hotel's injuries, as Government Orders

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continued to impose restrictions on the Hotel, such as reduced hours, reduced capacity, and restrictions on use of the Hotel and its amenities. (*Id.* ¶¶ 123-24.)

F&S notified FFIC of its covered losses on April 8, 2020, and despite never sending anyone to investigate, FFIC denied the claim 8 months later. (*Id.* ¶¶ 125, 158-63.) This action followed.

LEGAL STANDARD

When deciding a Rule 12(c) motion, the Court applies the same standard of review applicable to a motion under Rule 12(b)(6). *Gregg v. Haw. Dep't of Pub. Safety*, 870 F.3d 883, 887 (9th Cir. 2017). The Court must accept the allegations in the complaint as true and construe the pleadings in the light most favorable to the plaintiff. *Id.* F&S further refers the Court to pages 7-11 of Plaintiffs' Omnibus Opposition to Defendants' Motions to Dismiss, 2:20-cv-00597-BJR, ECF No. 58 (the "Omnibus Opp."), which F&S incorporates by reference, for further discussion of the standards governing Rule 12 motions and insurance policy interpretation under Washington law. Finally, the Court should consider the various studies that serve as the basis for F&S's claims and assume their contents to be true because those studies' authenticity cannot in good faith be contested, and they are being used to support, not contradict, the FAC's allegations. *Beverly Oaks Physicians Surgical Ctr. v. Blue Cross & Blue Shield of Ill.*, 983 F.3d 435, 439 (9th Cir. 2020); *Loomis v. Slendertone Distrib., Inc.*, 420 F. Supp. 3d 1046, 1063 (S.D. Cal. 2019).

I. F&S Alleged "Direct Physical Loss or Damage" At and Within 1,000 Feet of the Hotel

A. FFIC improperly seeks to impose "structural alteration" and "permanent dispossession" requirements for "physical loss or damage"

The parties agree the relevant coverages largely turn on interpretation of the undefined phrase "direct physical loss or damage" ("PLOD"), which FFIC seeks to define as requiring either structural alteration (for damage) or permanent physical dispossession (for loss). Mtn. at 6-8, 11.

But Washington Courts have recently rejected identical arguments, finding that the phrase "direct physical loss" is distinct from "direct physical damage" and can reasonably include a material deprivation of use for a property's intended purpose, which aligns with dictionary

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definitions of the terms "physical" and "loss." *Perry Street Brewing Co. v. Mut. of Enumclaw Ins. Co.*, No. 20-2-02212-32, 2020 WL 7258116, at *3 (Wash. Super. Ct. Nov. 23, 2020); *Hill & Stout PLLC v. Mut. of Enumclaw Ins. Co.*, No. 20-2-07925-1 SEA, 2020 WL 6784271, at *3 (Wash. Super. Ct. Nov. 13, 2020).[2] Further, common definitions of "damage" support the reasonable interpretation that it means a "material harm to property," as opposed to FFIC's proffered "structural alteration of property."[3]

F&S also directs the Court to pages 11-28 of the Omnibus Opposition, which address the interpretation of PLOD, and recent Washington authority denying dismissals in COVID coverage cases, and distinguish the *Wolstein* and *Fuji* cases upon which FFIC relies. F&S's proffered interpretations of the policy are undoubtedly reasonable, even if so too are FFIC's. But the insurer's interpretation should only be adopted if it is the ***sole*** reasonable interpretation; if the policyholder's interpretation is reasonable, as it is here, it "must be accepted." *Holden v. Farmers Ins. Co. of Wash.*, 169 Wash. 2d 750, 760 (2010).

Here, F&S has alleged both loss of use of and harm to its property. Unlike other complaints the Court has considered, which focused on surface contamination based on early science, F&S alleged in great detail and with extensive, current scientific backing that Coronavirus physically transforms the air, and as the virus's primary transmission vector, Coronavirus can remain airborne "for indefinite periods unless removed by air currents or dilution ventilation." (FAC ¶¶ 14-15, 19, 71-75, 78, 83, 85-86, 98, 117.) And while ventilation systems can be a key transmission vector by spreading airborne particles up to 56 meters from an infected person, removing airborne Coronavirus particles simply cannot be achieved, including by surface cleaning, which may only make matters worse by causing additional virus particles to become airborne. (*Id.* ¶¶ 15, 20, 35-

[2] *See also Physical*, Black's Law Dictionary, https://thelawdictionary.org/physical/ ("physical" means "material, substantive, having an objective existence, as distinguished from imaginary or fictitious"); *Loss*, 2a, 5, Merriam-Webster, https://www.merriam-webster.com/dictionary/loss ("loss" means "deprivation" or "decrease in amount, magnitude, or degree"); *Neer v. Fireman's Fund Am. Life Ins. Co.*, 103 Wash. 2d 316, 319 (1985).

[3] *See, e.g.*, *Damage*, Merriam-Webster, https://www.merriam-webster.com/dictionary/damage; *Damage*, Cambridge Dictionary, https://dictionary.cambridge.org/us/dictionary/english/damage.

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39, 74, 87-98.) Attempting to make property exposed to Coronavirus safe thus requires numerous physical alterations to property, but fully removing Coronavirus from the air is not practically possible, and no amount of cleaning will prevent reintroduction of the virus. (*Id.* ¶¶ 15, 35-37, 91, 94, 97-98.) This reality led to the closing of the Hotel and also various of its amenities, depriving F&S of use of the Hotel for its intended purpose. (*Id.* ¶¶ 82, 104, 109-10.)

There is thus nothing "conclusory" about F&S's allegations that Coronavirus physically transforms the air, thereby damaging the property, which alone requires denial of FFIC's Motion. *See Cinemark Holdings, Inc. v. Factory Mut. Ins. Co.*, 500 F. Supp. 3d 565, 569 (E.D. Tex. May 5, 2021) (denying dismissal because plaintiff alleged COVID-19 was "present and actually damaged the property by changing the content of the air"); *Goodwill Indus. of Orange Cty. Cal. v. Phil. Indem. Ins. Co.*, No. 30-2020-01169032, 2021 WL 476268, at *2 (Cal. Super. Ct. Jan. 28, 2021) (same because Coronavirus "physically alters the air"); *Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am.*, No. 2:12-CV-04418 WHW, 2014 WL 6675934, at *6 (D.N.J. Nov. 25, 2014) (ammonia "physically transformed the air" within policyholder's facility, rendering it "unfit for occupancy until the ammonia could be dissipated"); Mtn. at 7.

Further, despite FFIC's contention to the contrary, the changes to the Hotel, including to its indoor air, wrought by Coronavirus bring about precisely the sort of "functional differen[ce]" in use of the property *and* to the property itself that constitutes PLOD sufficient to trigger coverage. *See id.*; *Perry Street*, 2020 WL 7258116 at *3; *Hill and Stout*, 2020 WL 6784271 at *3; Mtn. at 7. Couch on Insurance, on which this Court previously relied, recognizes as much, concluding that PLOD occurs when an external, fortuitous force changes the physical conditions of a property and renders it unsatisfactory for continued use, as in the case of gasoline fumes permeating the premises. *See* 10A Couch on Ins. § 148:46 at 99-100; *W. Fire Ins. Co. v. First Presbyterian Church*, 165 Colo. 34, 38-40 (1968). That is precisely what was pleaded here. F&S's allegations, including that routine disinfectant use not only fails to stop Coronavirus, but in fact makes matters worse, underscoring the PLOD to the Hotel, cannot be discarded. Order at 17; FAC ¶¶ 15, 35-37,

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91, 94, 97-98.

B. Pre-COVID cases confirm hazardous airborne substances constitute PLOD

F&S's interpretation is bolstered by the fact that, for decades, courts around the country have overwhelmingly found that toxic or hazardous substances in a property's air—such as asbestos, ammonia, gases, fumes, and odors—constitute PLOD when they render a property or portion of it uninhabitable or unfit for its intended use.

For example, in *Gregory Packaging*, the court found coverage under a PLOD policy for the release of ammonia into a facility's air because there could be no dispute—even at the summary judgment stage—that "the ammonia release physically transformed the air . . . so that it contained an unsafe amount of ammonia or that the heightened ammonia levels rendered the facility unfit for occupancy until the ammonia could be dissipated." 2014 WL 6675934 at *6. The court specifically rejected the same "structural alteration" argument FFIC makes here, collecting cases from around the country in accord. *Id*. at *5-6. Instead, the court held "property can be physically damaged, without undergoing structural alteration, when it loses its essential functionality." *Id*. at *5. The same applies here; the Hotel was either shuttered or reopened with limitations that prevented it from *functioning* as a luxury property. FAC ¶¶ 40-41, 45, 104, 109-10, 122-24.

Federal courts around the country have long agreed, finding the presence of a toxic airborne substance reducing the use of a property or rendering it substantially uninhabitable is consistent with PLOD. *See, e.g.*, *Motorists Mut. Ins. Co. v. Hardinger*, 131 Fed. App'x. 823, 825-27 (3d Cir. 2005) (e-coli bacteria in water supply constitutes physical loss); *Essex Ins. Co. v. BloomSouth Flooring Corp.*, 562 F.3d 399, 405-06 (1st Cir. 2009) (same as to chemical odors).[4]

Numerous state courts have also agreed, finding that physical loss connotes property that

[4] *See also, e.g., Port Auth. of New York & New Jersey v. Affiliated FM Ins. Co.,* 311 F.3d 226, 236 (3d Cir.2002) (asbestos); *TRAVCO Ins. Co. v. Ward*, 715 F. Supp. 2d 699, 709 (E.D. Va. 2010), aff'd, 504 F. App'x 251 (4th Cir. 2013) (toxic gases); *Am. Alliance Ins. Co. v. Keleket X-Ray Corp.*, 248 F.2d 920, 925, 930 (6th Cir. 1957) (radium exposure); *Ore. Shakespeare Festival Ass'n v. Great Am. Ins. Co.*, No. 1:15-CV-01932, 2016 WL 3267247, at *2, *6 (D. Or. June 7, 2016), vacated by stipulation of parties, 2017 WL 1034203 (wildfire smoke); *In re Chinese Mfg. Drywall Prods. Liab. Litig.*, 759 F. Supp. 2d 822, 831-35 (E.D. La. 2010) (sulfur gas).

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was rendered unsafe or unusable. *See, e.g.*, *W. Fire Ins.*, 437 P.2d at 55-56 (gasoline fumes); *Sentinel Mgmt. Co. v. Aetna Cas. & Sur. Co.*, 615 N.W.2d 819, 825-26 (Minn. 2000) (asbestos).[5]

Coronavirus fits squarely within these cases but is *exponentially* more deadly than the other substances courts have routinely found trigger PLOD coverage. FAC ¶¶ 11-12. Courts thus do not "near unanimously" reject that loss of use or function can comprise PLOD, *see* Mtn. at 10-11; rather, decades of precedent proves the opposite.

At the very least, this long line of precedent reveals that PLOD is ambiguous and open to "a spectrum of accepted interpretations" such that the Court should interpret the phrase most favorably to F&S. *Elegant Massage, LLC v. State Farm Mut. Auto. Ins. Co.*, No. 2:20-CV-265, 2020 WL 7249624, at *8-10 (E.D. Va. Dec. 9, 2020); *Nautilus Grp., Inc. v. Allianz Glob. Risks US*, No. C11-5281BHS, 2012 WL 760940, at *6 (W.D. Wash. Mar. 8, 2012).[6]

C. Post-COVID cases also find PLOD where Coronavirus is on the premises

FFIC also asks the Court to blindly follow what it claims to be an "overwhelming majority" of cases while ignoring approximately 50 recent decisions finding PLOD where Coronavirus is alleged to be on the premises and with allegations far less detailed than those here.[7] Mtn. at 8-9.

For example, complaints alleging employees contracted or likely contracted the virus have been found sufficient to constitute PLOD. *See, e.g.*, *Cinemark*, 500 F. Supp. 3d at 569 and Ex. A-

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[5] *See also, e.g., Mellin v. N. Sec. Ins. Co.*, 115 A.3d 799, 805 (N.H. 2015) (cat urine odor); *Farmers Ins. Co. v. Trutanich*, 858 P.2d 1332, 1335 (Or. Ct. App. 1993) (meth odor); *Bd. of Educ. v. Int'l Ins. Co.,* 720 N.E.2d 622, 625-26 (Ill. Ct. Ap. 1999) (asbestos); *Widder v. La. Citizens Prop. Ins. Corp.*, 82 So.3d 294, 296 (La. Ct. App. 2011) (lead-paint dust); *Matzner v. Seaco Ins. Co.*, No. CIV. A. 96-0498-B, 1998 WL 566658, at *4 (Mass. Super. Aug. 12, 1998) (carbon monoxide).

[6] Underscoring the reasonableness of F&S's interpretation is the fact that, when it suits their interests, insurers *themselves* argue that substances rendering property unfit for its intended purpose constitutes PLOD, without need for structural alteration or permanent dispossession. For example, in attempting to shift liability to Federal Insurance Company, Factory Mutual Insurance ("FM"), an affiliate of the Affiliated FM defendant in the consolidated cases, argued that a mold infestation "destroyed the aseptic environment" of a clean room, rendered the clean room "unfit for its intended use," and therefore constituted PLOD. Ex. A-45, FM's Motion in Limine No. 5 at p.3-6, *Factory Mut. Ins. Co. v. Federal Ins. Co.* (D.N.M, Nov. 19, 2019) (ECF No. 127) (admitting cases such as *W. Fire Ins.* and *Gregory Packaging* prove PLOD "is susceptible of more than one reasonable interpretation"). Further, a corporate affiliate of AIG has paid claims for business interruption caused by other massive viral outbreaks, such as at least $16 million to the Mandarin Oriental hotel chain for the SARS virus in 2003. Ex. A-46, *Mandarin Oriental Int'l Ltd.*, S.E.C. File No. 82-2955 (Nov. 19, 2003). Insurance companies simply cannot have it both ways.

[7] A summary of the numerous decisions denying dismissal efforts is submitted for the Court's review. Ex. B.

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44, Cinemark SAC ¶¶ 84, 91-92 (finding employees testing positive for COVID-19 sufficient where statistical modeling confirmed "to a high degree of statistical certainty" COVID-19 was present); *Blue Springs Dental Care, LLC v. Owners Ins. Co.*, 488 F. Supp. 3d 867, 874 (W.D. Mo. 2020) (same with only allegations infection was "likely").[8] F&S alleged not only that numerous employees contracted COVID-19 (FAC ¶¶ 31, 34, 42-43, 99-100, 106) but also that additional employees were unknowingly contagious based on biostatistical evidence and recent scientific findings. (*Id*. ¶¶ 14, 31, 61, 99, 101, 107-09). Far less fulsome complaints demonstrating the certainty or statistical certainty of Coronavirus on the premises have triggered coverage. *See, e.g.*, *P.F. Chang's China Bistro v. Certain Underwriters at Lloyd's of London*, No. 20STV17169, 2021 WL 818659, at *1 (Cal. Super. Ct. Feb. 4, 2021) (finding allegations of "the actual or potential presence of virus in the air . . . in the vicinity of" property sufficient).

F&S also alleged in detail various modes of Coronavirus transmission (FAC ¶¶ 14, 72-75, 77-84, 96), and recent courts have sustained complaints alleging these modes which, when coupled with the highly contagious nature of COVID-19, demonstrate PLOD. *See, e.g.*, *Blue Springs*, 488 F. Supp. 3d at 874; *Scott Craven DDS PC v. Cameron Mut. Ins. Co.*, No. 20CY-CV06381, 2021 WL 1115247, at *2 (Mo. Cir. Ct. Mar. 9, 2021); *JGB Vegas Retail Lessee, LLC v. Starr Surplus Lines Ins. Co.*, No. A-20-816628-B, 2020 WL 7190023, at *2 (Nev. Dist. Ct. Nov. 30, 2020).

F&S further alleged that Coronavirus cannot be eliminated from surfaces by routine cleaning—"no amount of routine surface cleaning could remove the aerosolized Coronavirus suspended in the air"—and F&S had to physically alter its property to protect it from further PLOD, by, among other things, evacuating a floor, installing HEPA filters and barriers, and installing sanitization stations. (FAC ¶¶ 15, 20, 35-39, 88-93, 97, 123). Such allegations have similarly been found sufficient. *See, e.g.*, Ex. A-44, Cinemark SAC ¶¶ 72-73; *Legacy Sports Barbershop LLC v. Cont'l Cas. Co.*, No. 20 C 4149, 2021 WL 2206161, at *3 (N.D. Ill. June 1,

[8] *See also, e.g.*, *Serendipitous, LLC/Melt v. Cincinnati Ins. Co.*, No. 2:20-cv-00873-MHH, 2021 WL 1816960, at *5 (N.D. Ala. May 6, 2021); *Studio 417, Inc. v. Cincinnati Ins. Co.*, 478 F. Supp. 3d 794, 798 (W.D. Mo. 2020).

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2021) (finding the need to install barriers and germ sanitation stations sufficient); *Ungarean, DMD v. CNA*, No. GD-20-006544, 2021 WL 11648326, at *7 (Pa. Com. Pl. Mar. 25, 2021); *P.F. Chang's*, 2021 WL 818659 at *1; *Goodwill*, 2021 WL 476268 at *2.

Critically, F&S also alleged that, because air is the key mode of transmission, and cleaning surfaces does not remove Coronavirus from the air, but may render the premises more dangerous, the air and fixtures within the Hotel were *physically transformed* into virus spreading transmitters, rendering the property potentially lethal to any employee or customer therein. (FAC ¶¶ 14, 72-75, 96). Such allegations that Coronavirus was present and transformed the air, rendering property uninhabitable or unfit for its intended use, are directly in line with recent cases finding PLOD coverage. *See, e.g.*, *Cinemark*, 2021 WL 1851030 at *3 (finding allegations that Coronavirus was "present and actually damaged the property by changing the content of the air" sufficient); *Scott Craven*, 2021 WL 1115247 at *1; *Goodwill*, 2021 WL 476268 at *2.[9]

None of the cases FFIC cites to the contrary are binding on this Court, and the primary decisions FFIC highlights rest on the false premise that Coronavirus can be removed by routine cleaning. For example, in the California *Out West Restaurant* and *Baker* cases (Mtn. at 8-9) neither policyholder alleged Coronavirus cannot be removed from surfaces, let alone from the air, with routine cleaning as alleged here. (FAC ¶¶ 15, 20, 35-39, 87-98). Nor were the allegations supported by the breadth of peer-reviewed science cited by F&S, which demonstrate how Coronavirus physically alters the air and surfaces it contaminates. (*Id.* ¶¶ 15, 18-20, 38, 83-84, 94).[10]

D. The Policies expressly recognize that a virus can cause PLOD

FFIC's interpretation is also inconsistent with language in the Policies' Communicable

[9] F&S further alleged Government Orders themselves caused PLOD, and courts in Washington and elsewhere have agreed. (FAC ¶¶ 115-19, 125); *Perry Street*, 2020 WL 7258116 at *3; *Hill & Stout*, 2020 WL 6784271 at *3; *In re Soc'y Ins. Co. COVID-19 Bus. Interruption Prot. Ins. Litig.*, No. 2964, 2021 WL 679109, at *9 (N.D. Ill. Feb. 22, 2021) ("shutdown orders do impose a *physical* limit: the restaurants are limited from using much of their physical space"); *Susan Spath Hegedus, Inc. v. ACE Fire Underwriters Ins.*, No. CV 20-2832, 2021 WL 1837479, at *9 (E.D. Pa. May 7, 2021) (government orders constitute PLOD); *Henderson Rd. Rest. Sys., Inc. v. Zurich Am. Ins. Co.*, No. 1:20CV1239, 2021 WL 168422 at *13 (N.D. Ohio Jan. 19, 2021). In any event, the Government Orders were certainly issued *in response to* PLOD. (FAC ¶¶ 115-25.)

[10] A summary of the various reasons FFIC's cases do not apply here is submitted for the Court's review. Ex. C.

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Disease Coverage providing coverage for "costs incurred to: . . . [r]epair or rebuild Property Insured *which has been damaged or destroyed by the communicable disease*." Policies at 21-22 (emphasis added). "Communicable disease" is defined as including "*any disease . . . or virus* that may be transmitted directly or as including from human or animal to a human." *Id.* at 53 (emphasis added). The Policies thus *expressly contemplate* that "any disease . . . or virus" can "damage or destroy" property. FFIC's position—that a virus such as Coronavirus cannot constitute PLOD—contradicts the Policies' language and renders it entirely superfluous in violation of Washington law. *Boeing Co. v. Aetna Cas. & Sur. Co.*, 113 Wash. 2d 869, 898 (1990).[11]

E. The "Period of Restoration" provision does not alter F&S's coverage claim

FFIC also argues the Period of Restoration ("POR") provision reinforces its imposition of a structural alteration requirement. But as discussed in the Omnibus Opposition at pages 14-16, the POR provision is used to calculate damages *after* liability has been triggered; it does not modify the coverage trigger. Indeed, the undefined terms "repair" and "replace" do not require physical alteration to property as common dictionaries define "repair" as "to restore to a sound or healthy state."[12] These terms merely require the POR be measured in relation to how long it takes for the Hotel to be restored to its prior condition or a sound or healthy state, i.e., back to its intended use.

Other courts addressing COVID-19 claims have found as much, ruling that a policy's POR "does not require repairs, rebuilding, replacement, or relocation of Plaintiff's property in order for Plaintiff to be entitled to coverage," but "merely imposes a time limit on available coverage." *Ungarean*, 2021 WL 1164836 at *8-10; *Henderson*, 2021 WL 168422 at *13 (the POR "ended or will end on the dates the states' restrictions are lifted"); *In re Soc'y*, 2021 WL 679109 at *9. Any other reading would also render the Communicable Disease Coverage superfluous.

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[11] Communicable diseases, writ large, are also not "limited" under the Policies. The Communicable Disease Coverage's $500,000 sublimit applies narrowly to a "communicable disease *event*," a defined set of circumstances that do not pertain to *any* loss involving a virus or disease and do not encompass all the losses claimed here, such those covered by the Business Income and Extra Expense or Dependent Property provisions. Policies at 21, 52. There is no provision clearly applying Communicable Disease Coverage sublimit to *any and all* loss involving virus or disease.

[12] *Repair*, Merriam Webster Dictionary, https://www.merriam-webster.com/dictionary/repair.

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II. F&S Has Adequately Alleged Civil Authority Coverage

FFIC also seeks to evade Civil Authority ("CA") coverage. Mtn. at 11-12. But as discussed at pages 13-18 of Vita Coffee's Opposition[13] (and pages 28-44 of the Omnibus Opposition, both incorporated here by reference), all F&S need show is (1) actual loss of business income and extra expense; (2) due to the necessary "suspension" of operations caused by civil authority action; (3) that "prohibits access" to a location, where such prohibition (a) arises from PLOD "to property other than at such location," (b) stems from a covered cause of loss, and (c) occurs within one mile of the Hotel, all of which are alleged here. Policies at 3, 18; (FAC ¶¶ 30-31, 40-41, 44-45, 95, 101-05, 115-24, 150-51.)

FFIC claims CA coverage fails because access to the Hotel was not "completely prohibited." But the Policies do not say that a CA action must "prohibit *all* access," nor do they specify whose access must be prohibited. They merely provide coverage when *some unspecified access* is prohibited. Numerous courts agree, finding CA coverage provisions referring to orders "prohibiting access" to a property do not unambiguously require all access be prohibited. *See, e.g.*, *Pez Seafood DTLA, LLC v. Travelers Indem. Co.*, No. CV204699, 2021 WL 234355, at *7 (C.D. Cal. Jan. 20, 2021); *Ungarean*, 2021 WL 1164836 at *10; *Studio 417*, 478 F. Supp. 3d at 804.[14]

FFIC's argument that there is no causal link between the PLOD to neighboring properties caused by Coronavirus and the subsequent Government Orders simply ignores the FAC, which alleged PLOD beginning in January 2020 and Government Orders months later that were expressly premised, in part, on property damage. (FAC ¶¶ 28-29, 63, 70, 107, 117-19). Moreover, several courts have explicitly found that allegations of the pervasive nature of COVID-19, and the resulting need for governmental regulation, are sufficient to sustain CA coverage at this stage without need to identify specific neighboring properties tied to specific Government Orders. *See,*

[13] No. 2:20-cv-00597-BJR, (ECF No. 21).

[14] FFIC's interpretation would also render superfluous the "suspension" element, as that term only requires "*the slowdown or* cessation of [] operations, *or that a part or* all of the described premises" is untenable. Policies at 61. A required complete prohibition on access would not allow for slowdowns or that only part of a property may close.

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e.g., *Blue Springs*, 488 F. Supp. 3d at 877-79; *McKinley Dev. Leasing Co. Ltd. v. Westfield Ins. Co.*, No. 2020 CV 00815, 2021 WL 506266, at *4 (Ohio Com.Pl. Feb. 09, 2021); *Pez Seafood*, 2021 WL 234355 at *7; *Ungarean*, 2021 WL 1164836 at *10.

FFIC's contention that there are no allegations of any nexus between the Government Orders and PLOD to a property other than the Hotel similarly ignores the FAC. The FAC alleged PLOD from the presence of the virus at and Government Orders applicable to both the Hotel itself *and* Leader Locations. (FAC ¶¶ 30-31, 44, 95, 101-05, 150-51). Both caused F&S's losses of income and incurring of expenses.[15]

III. The Policies' "Covered Cause of Loss" Provisions Confirm Viruses Trigger Coverage

Several coverages, such as the Business Income and Extra Expense Coverage, Dependent Property Coverage, and Civil Authority Coverage, are triggered by PLOD to property "caused by or resulting from a *covered cause of loss*." Policies at 18-19, 53 (emphasis added). The Policies broadly define "covered cause of loss" as "risks of direct physical loss or damage not excluded or limited in this Coverage Form." *Id.* at 52. Here, the Policies affirmatively provide Communicable Disease Coverage. Thus, "communicable disease" (including any disease or virus) is a "covered cause of loss" and not excluded. It follows that when a coverage is triggered by a "covered cause of loss," and where, as here, that covered cause of loss occurs, *multiple coverages* are triggered. The Policies allow for this in their Insurance Under Two or More Coverages provision, applicable when "two or more of this Policy's coverages apply to the same loss, damage, or expense[.]" Policies at 48; *see also* FAC ¶¶ 47, 134-39, 142-44.

Courts considering such policies have concluded that an affirmative grant of coverage for a given peril renders that peril a "covered cause of loss" under a commercial property policy. For example, in *Kings Ridge Cmty. Ass'n, Inc. v. Sagamore Ins. Co.*, a Florida appellate court addressed a policy providing coverage for the peril of "collapse" as an "Additional Coverage." 98

[15] For the same reasons F&S is entitled to other coverages (e.g., Business Income and Extra Expense Coverage), F&S is entitled to Loss Avoidance or Mitigation Coverage for the necessary expenses incurred to mitigate its potential "covered loss or damage that [was and] is actually and imminently threatening" the Hotel. *See* Policies at 15.

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So.3d 74, 75-76 (Fla. 5th DCA 2012). The *Kings* court construed the term "covered cause of loss" as including "collapse,"[16] and then rejected the insurer's attempt to use exclusions to limit the coverage, holding that "the exclusions . . . would directly contradict and conflict with the coverage provided in the collapse coverage," creating an ambiguity that must be resolved in favor of the insured. *Id.* at 75-76, 79; *see also Trautman v. Union Ins. Co.*, No. 5-09-34, 2010 WL 1267217, at *5 (Ohio Ct. App. Apr. 5, 2010) (holding that water back-up coverage provided by endorsement rendered water back-up a "covered cause of loss" for multiple policy coverages); *Dream Spa v. Fireman's Fund Ins.*, No. 06-CV-13142, 2008 WL 355458, at *6 (S.D.N.Y. Feb. 6, 2008) (same). The Policies here likewise provide that communicable disease is a "covered cause of loss" and that covered causes of loss triggers multiple coverages under the Policy. The Mortality and Disease Exclusion—to the extent it could even potentially be construed as excluding all virus-related loss—is accordingly rendered at least ambiguous. *See Kings Ridge*, 98 So.3d at 79.

IV. The Mortality and Disease Exclusion Does Not Apply

Falsely naming it a "virus exclusion," FFIC argues the Mortality and Disease exclusion precludes coverage in any event. Mtn. at 13-14. But the plain terms of the exclusion only apply when loss is caused by death as a *result of* a virus. This simply is not a virus exclusion. FFIC could have included an express and clear virus exclusion, as many insurers have, but failed to do so.

Indeed, the redundant use of the synonymous words "death" and "mortality" in the same phrase give rise to a reasonable interpretation that the exclusion should be limited to loss associated with death only: "Mortality, death by natural causes, [death by] disease, [death by] sickness, [death by] any condition of health, [death by] bacteria, or [death by] virus." Policies at 8; FAC ¶ 166. But even under a broader reading, the loss excluded (someone's death) must arise from an illness suffered or contracted by an individual (as only individual beings may die or be diseased), and F&S does not allege or claim any loss from an individual dying or getting sick.

[16] The court read "collapse" into the definition of "covered cause of loss," although the coverage was provided under the "Additional Coverages" section of the policy at issue. *See id.* at 76*; Ridge Cmty. Ass'n, Inc. v. Sagamore Ins. Co.*, 2011 WL 10643672 at *3 (Fla. Cir. Ct. Jan. 10, 2011) (setting forth precise policy wording).

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Further, if other losses besides "Mortality and Disease" due to virus were not otherwise covered, "then this provision would be unnecessary." *Nautilus*, 2012 WL 760940 at *7 (if theft was not a covered risk, policy would not have excluded theft by employees). Thus, a reasonable interpretation is that the policies cover PLOD due to virus, so long as the loss does not flow from mortality and disease of an individual. *Id*. Any other interpretation would also utterly nullify the Communicable Disease Coverage, discussed above, which *expressly* recognizes property can be "damaged or destroyed by a communicable disease." Policies at 22, 52. At the very least, this shows the Mortality and Disease Exclusion, which must be narrowly construed in the first instance in favor of coverage, is ambiguous and should be "most strictly construed against the insurer." *Am. Best Food, Inc. v. Alea London*, *Ltd*., 168 Wn.2d 398, 406, 410-11 (2010). And as noted, the exclusion is at least ambiguous due the Policies' inclusion of communicable disease as a "covered cause of loss." *See Kings Ridge*, 98 So.3d at 79.

The cases cited by FFIC provide no differently as they either apply virus exclusions that are the sort FFIC undoubtedly could have included, but did not, or offer little to no substantive analysis in support of their rulings. *See, e.g.*, *Brian Handel D.M.D., P.C. v. Allstate Ins. Co.*, 499 F. Supp. 3d 95, 100 (E.D. Pa. 2020) (excluding coverage for loss or damage if caused, either directly or indirectly, by "[a]ny virus, bacterium or other microorganism"); *see also Lynott v. Nat'l Union Fire Ins. Co. of Pittsburgh,* 123 Wn.2d 678, 688 (1994) ("[i]n evaluating the insurer's claim as to meaning of language used, courts necessarily consider whether alternative or more precise language, if used, would have put the matter beyond reasonable question").[17]

CONCLUSION

For the foregoing reasons, FFIC's Motion to Dismiss should denied in its entirety.

[17] F&S also incorporates by reference Worthy Hotel's Response (2:20-cv-01079; ECF No. 46) at pages 22-23, which further explain why the Mortality exclusion does not prevent coverage and discusses the typical virus exclusion FFIC could have, but did not, include.

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CERTIFICATE OF SERVICE

I hereby certify that on June 18, 2021, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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