IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 21-15367

CIRCUS CIRCUS LV, LP,

Appellant,

v.

AIG SPECIALTY INSURANCE COMPANY,

Appellee.

On Appeal from the United States District Court, District of Nevada
The Honorable Jennifer A. Dorsey presiding
Case No. 2:20-CV-1240-JAD-NJK

AIG SPECIALTY INSURANCE COMPANY'S ANSWERING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1(a), AIG Specialty Insurance Company states that it is a direct, wholly-owned (100%) subsidiary of AIG Property Casualty U.S., Inc., which is a wholly-owned (100%) subsidiary of AIG Property Casualty Inc., which is a wholly-owned (100%) subsidiary of American International Group, Inc., which is a publicly-held corporation. No parent entity or publicly held entity owns 10% or more of the stock of American International Group, Inc.

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INTRODUCTION

Like nearly every other resort and casino in the U.S., Circus Circus LV, LP ("Circus") was subject to shutdown orders that governments entered to prevent the spread of COVID-19. When those orders were lifted (and not a moment before), Circus reopened, albeit with social distancing guidelines in place.

Circus purchased a standard property insurance policy ("the Policy") with AIG Specialty Insurance Company. The Policy provides coverage only for "direct physical loss or damage" to insured property.

Circus alleges it suffered "business interruption" losses from "physical loss or damage" when it closed its doors to patrons at 12:01 a.m. on March 18, 2020—the very last moment it was allowed to do so under the Governor's emergency order. Circus did not close earlier, even though it alleges COVID-19 was on its property for *months* beforehand. Courts nationwide have rejected similar claims to recover purely economic loss as a result of these prophylactic government orders. The district court was right to do so as well.

Attempting to avoid the same fate, Circus recast its allegations, and argued what it actually meant to allege was that it also closed because of the *physical presence* of the COVID-19 virus on its property. That coverage theory doesn't pan out, either. Courts both inside and outside the Ninth Circuit have interpreted "physical loss or damage" to require a distinct, demonstrable, physical *alteration* of property or a physical *change* in the condition of property. Circus and its amici dwell on when and how COVID-19 is deposited on and transmitted from surfaces to people (or vice versa), but the district court aptly noted what was missing: any

allegation that during this process, the property *itself* is physically *altered* in some way. COVID-19 is harmful to people, but not to walls, doors or floors.

Circus again pivots, arguing the words "physical loss" must have a different meaning than "physical damage," otherwise the former would be superfluous. But that does not mean "physical loss" equates to property rendered "uninhabitable" but physically unaltered. Not only does such an interpretation read the word "physical" out of "physical loss," courts also reject this argument, including dozens in the COVID-19 context; they recognize "physical loss" refers unambiguously to the permanent dispossession (e.g., theft) or permanent destruction (e.g., from a hurricane) of property.

Thus, the district court did not miss any pre-COVID "majority" rule: its ruling is consistent with the cases Circus and amici cite, in which (i) a demonstrable physical alteration resulted in permanent dispossession (*e.g.*, having to abandon property, drilling equipment lost underground) or (ii) a foreign substance imbedded in the property, physically altering it and requiring repair or replacement of the property *itself* (*e.g.*, mold, lead contamination, oil/gas spills). Circus has not alleged COVID-19 became imbedded in its property such that it was physically altered and needed to be repaired or replaced; nor did Circus have to abandon its property. In fact, Circus resumed operations not when any such repair work was done, but when the Governor permitted it to reopen its doors to the public.

Those are not the only problems with this lawsuit. Circus's Policy unambiguously excludes any loss caused, directly or indirectly, by the actual or

threatened dispersal of a "virus"—which "can cause or threaten damage to *human health* … or *loss of use* to property." That language perfectly describes the losses Circus allegedly sustained due to COVID-19. Not surprisingly, then, on motions to dismiss in COVID-19 coverage cases, courts throughout the country have enforced virus exclusions similar in scope and language as the exclusion in Circus's Policy.

Given Circus's inability to allege "physical loss or damage" or that the Policy's contaminant exclusion does not apply (or both), this Court should affirm without certification to the Nevada Supreme Court or leave to amend.

STATEMENT OF JURISDICTION

AIG agrees with Circus's statement. (Opening Br. ("OB") 4.)

STATEMENT OF THE CASE

On November 4, 2020, in a 15-page order, the district court granted AIG's motion to dismiss Circus's breach of contract and declaratory judgment action. The district court also granted Circus's motion for leave to amend to state a claim under N.R.S. 686A.310(1)(c), Nevada's unfair-claim practices statute. (1-ER-16-19.) Circus, however, declined to amend its Complaint, rendering its (unfounded) bad-faith claim allegations irrelevant. (OB 9-10.) Accordingly, on March 2, 2021, the district court entered final judgment dismissing this action with prejudice.

STATEMENT OF FACTS

A. The Nevada Governor ordered all casinos and non-essential businesses to cease operations to prevent the spread of COVID-19.

Circus alleges it incurred financial losses when, in response to emergency "Stay at Home" orders related to COVID-19, it ceased at least some operations at its casino/hotel complex. (4-ER-561, ¶33.) Specifically, Circus points to the

Governor's March 17, 2020 order that required casino gaming activity to temporarily cease as of March 17, 2020 at 11:59 p.m.; Circus alleges that, "[a]s a direct result of COVID-19 and these Orders," it "closed its doors at 12:01 AM on March 18, 2020." (4-ER-562, ¶40.) The orders were issued to prevent activities that "result in the congregation of persons for extended periods of time." (3-ER-526-27 (noting "correlation between density of persons gathered and the risk of transmission of COVID-19"); *see also* 4-ER-667 ("the propensity of the COVID-19 disease to spread via interpersonal contact precipitated the widespread closure of certain businesses").)[1]

B. Circus's property policy covers "direct physical loss or damage."

Circus's Policy covers "all risks of direct physical loss or damage to Insured Property from a Covered Cause of Loss." (4-ER-593.) Covered Cause of Loss is defined as "a peril or other type of loss, *not otherwise excluded* under this Policy." (4-ER-617 (emphasis added).)

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[1] The Complaint cites other emergency orders (4-ER-562, ¶¶43-44), all of which were issued to address the spread of COVID-19 among people (4-ER-641-42 (coordinating response to "prevent the further transmission of[] COVID-19 to persons in this state"); 4-ER-645 (goal "is to prevent[] … people coming together unnecessarily, where people who have the infection can easily spread it to others"); 4-ER-651-52 (closing businesses "that promote recreational social gathering activities," which "unnecessarily extend periods of interpersonal contact")).

If there is "direct physical loss or damage," the Policy pays for the cost to repair, rebuild or replace the damaged property. (4-ER-593, 597.) Thus, if a fire destroys part of Circus's roof, it would be reimbursed the costs to repair the roof.

Pertinent here, if that same loss or damage *also* interrupts Circus's operations, the Policy covers certain business interruption ("BI") losses until repairs are finished. Specifically, the Policy's Time Element provision states:

> This **Policy** covers actual loss of income sustained by the Insured during the necessary partial or total interruption of the Insured's business operations … during the Period of Interruption directly resulting from a **Covered Cause of Loss** to Insured Property ….

(4-ER-600.)

For payment to be made, there must be a Period of Interruption which begins with "the time of direct physical loss or damage from a **Covered Cause of Loss** to Insured Property" and ends when, "with the exercise of due diligence and dispatch," either:

> 1. Normal operations resume; or
>
> 2. Physically damaged buildings and equipment could be repaired or replaced and made ready for operations under the same or equivalent physical and operating conditions that existed prior to such loss or damage;
>
> Whichever is less.

(4-ER-600-01.) "BI" insurance is therefore an extension of the property insurance—not an all-purpose guarantee of sustained business income regardless of cause or whether any property has been physically lost or damaged.

Circus further alleges coverage under the Policy's Contingent Time Element, Extra Expense, Ingress & Egress, and Civil Authority provisions. (4-ER-564-66, ¶¶61-75.) These additional coverages each require "direct physical loss or damage" to property. (OB 7; 4-ER-602-04.)

C. The Policy excludes loss or damage caused by a "virus."

There is no coverage for any loss or damage "caused directly or indirectly by" contaminants that "can cause or threaten damage to human health or human welfare," or "loss of use to property," including "virus[es]." (4-ER-594, 623 (the "Contaminant Exclusion").) Specifically, there is no coverage for

> The actual, alleged or threatened release, discharge, escape or dispersal of Pollutants ***or*** Contaminants, all whether direct or indirect, proximate or remote or in whole or in part caused by, contributed to or aggravated by any Covered Cause of Loss under this Policy….

(*Id*. at 593-94 (emphasis added).) Pollutants or Contaminants are defined as:

> ***any*** solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste, which after its release can cause or threaten damage to human health or human welfare or causes or threatens damage, deterioration, loss of value, marketability or loss of use to property insured hereunder, including, but not limited to, bacteria, ***virus***, or hazardous substances listed in applicable environmental state, federal or foreign law or regulation, or as designated by the U.S. Environmental Protection Agency or similar applicable state or foreign governmental authority….

(4-ER-623 (emphasis added).)

D. The district court made two rulings, each of which, standing alone, requires dismissal of Circus's claims.

First, the district court found that Circus failed to allege "physical loss or damage" to its property. The district court noted the Nevada Supreme Court "has generally cabined claims for coverage under similar [business property] policies to … some sort of structural *or physical change* to a property, which actually altered its functionality or use." (1-ER-9 (emphasis added).) It further noted that "California courts, which often guide Nevada's,"[2] have consistently interpreted direct physical loss or damage "to require a distinct, demonstrable, physical alteration of the property or a physical change in the condition of the property." (*Id*. (quotations omitted).)

The district court concluded Circus's allegations that its "objects and surfaces" were "contaminated" by COVID-19 were insufficient to establish an actual "physical alteration" or "physical change" to its property requiring repairs or remediation. (1-ER-10-11 (quotations omitted).) It recognized that, according to Circus's Complaint, "any alleged surface-contamination is ephemeral—the virus is only detectable on surfaces for 'up to three days.'" (1-ER-11.) Moreover, the district court noted, Circus "temporarily shut down not because COVID-19 damaged its or its neighbors' property, but because it was ordered to do so by the

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[2] *Zurich Am. Ins. Co. v. Coeur Rochester, Inc*., 720 F.Supp.2d 1223, 1235 n.11 (D. Nev. 2010) (citing *Capital Dev. Co. v. Port of Astoria*, 109 F.3d 516, 519 (9th Cir.1997)).

governor." (*Id.*)[3] In the end, as the district court put it, Circus's Complaint largely "repeat[ed] that it needed to temporarily shutter; assert[ed] that the pandemic and this closure qualify under the [P]olicy; and inton[ed] the conclusory mantra that it experienced direct 'physical damage' to its property because of COVID-19, without explaining what constitutes that direct, physical damage." (1-ER-10 (quotations omitted).)

Nor did a "loss of use" of property suffice. The district court reasoned that, given the plain meaning of "physical loss," Circus had to allege "a permanent 'loss' or dispossession from the property." (1-ER-11.) "Circus has alleged nothing of the sort," the district court stated, "admitting that it reopened its doors a few months after the governor's closure orders." (*Id.*)

Second, the district court found that the Contaminant Exclusion barred coverage, because COVID-19 "falls" within the definition of a "'virus' that has been 'released[,]' 'dispersed,' or 'discharged,' or has 'escaped,' causing damage to health and human welfare." (1-ER-15 (alterations omitted).) Noting Circus's contrary arguments "contort[] the clear language of the policy," the district court found that "Circus could not expect coverage under this policy for damages caused by the COVID-19 pandemic." (*Id.*)

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[3] The district court initially cited the standard for an insured's duty to defend an insured, but it never applied that standard; accordingly, it had no bearing on the coverage rulings the district court made in its order. (OB 11.)

STATEMENT OF ISSUES

1. Circus alleges COVID-19 was present on its property in January and February of 2020. Nevertheless, Circus did not close until March 17, 2020, precisely at the time required by the Governor's orders. Did the district court correctly conclude Circus could not establish coverage because "loss of use" of property due to a prophylactic government order does not constitute "physical loss or damage"?

2. Even assuming Circus closed due to the presence of COVID-19 on its property, did the district court correctly conclude there still was no "physical loss or damage" because Circus failed to allege COVID-19 caused a distinct, demonstrable, physical alteration of its property or a physical change in the condition of its property, requiring Circus to repair or replace the property before it could reopen?

3. Alternatively, did the district court correctly conclude Circus's alleged losses were excluded under the plain language of the Contaminant Exclusion?

4. Should this Court decline Circus's belated request to certify to the Nevada Supreme Court questions involving the interpretation of the Policy, which this Court is in just as good a position as a state court to address?

5. Circus declined to amend its Complaint below. Has the issue of leave to amend, raised only by amici on appeal, been waived?

SUMMARY OF ARGUMENT

This Court should affirm on either (or both) of two grounds. First, even though Circus alleges COVID-19 was present on its property months beforehand,

Circus shut down precisely at the time required by the Governor's "stay-at-home" order. As court after court has held, loss of use of property due to a prophylactic government order does not constitute "physical loss or damage."

Moreover, it is well-established that "physical loss or damage" requires a demonstrable, physical alteration of insured property or a physical change in its condition. Circus's Complaint, however, fails to allege how COVID-19 particles on surfaces or in the air (assuming that is why Circus closed) cause such a physical alteration or change, which is why so many courts have dismissed COVID-19 BI claims like Circus's. And while "loss" has a meaning separate from "damage," that does nothing for Circus's case—"loss" equates to a *permanent* dispossession, not the temporary inhabitability of property due to the presence of a virus that can be wiped away through cleaning.

In other words, as Circus's and amici's cases demonstrate, "damage" and "loss" indicate the *degree* to which the insured property has suffered an adverse physical change necessitating repairs, replacement or remediation of the property *itself* before it can be put to use again. That is not this case. Circus reopened the very minute the Governor permitted it to reopen; noticeably missing is any allegation that Circus first had to complete repairs to physically-damaged property.

Second, the Contaminant Exclusion applies to bar coverage. On its face, the Exclusion extends to any "contaminant," specifically defined to include any "virus," which "can cause or threaten damage to human health or human welfare" or "causes … loss of use to property." Clearly, then, it is not limited to "traditional environmental pollution." That phrase appears nowhere in the Policy, and *Century*

Surety Co. v. Casino West, Inc., 329 P.3d 614 (Nev. 2014), the third-party commercial general liability ("CGL") case on which Circus relies, involved only a "pollutant" exclusion—not a "pollutant *or* contaminant" exclusion—that did not define "pollutants" with reference to harm to "human health." Accordingly, there is no reason for certifying questions to the Nevada Supreme Court or allowing leave to amend.

ARGUMENT

I. Circus shut down because of stay-at-home orders, which is not a "Covered Loss."

Although Circus alleges COVID-19 was present on its property (where exactly, it doesn't say) at some (unspecified) point in the months *before* it closed, it closed *only* when the government required it to do so. And Circus confirms it reopened "on or around June 4, 2020" (3-ER-355)—the very day the Governor allowed gaming to resume. It also is telling that Circus does not allege it took any steps to repair, rebuild or replace any "damaged" property. All this completely debunks Circus's attempt to assert it was really the physical presence of the virus that caused its temporary closure. Other courts have similarly rejected such attempts.[4]

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[4] *E.g.*, *Skillets, LLC v. Colony Ins. Co.*, No.3:20CV678-HEH, 2021 WL 926211, at *5 (E.D. Va. Mar. 10, 2021) (appeal filed) (allegations that COVID-19 was present "are not persuasive because Skillets's alleged … damages are inseparable from the closure orders"); *Another Planet Ent., LLC v. Vigilant Ins. Co.*, No.20-CV-07476-VC, 2021 WL 774141, at *1 (N.D. Cal. Feb. 25, 2021) (Continued …)

Moreover, a "wave" of cases—including the Eighth Circuit in *Oral Surgeons, P.C. v. Cincinnati Insurance Co.*, -- F.4th --, 2021 WL 2753874, at *5 n.3 (July 2, 2021) (citing additional cases)—have rejected the argument that loss of use of property from government orders issued in response to COVID-19 constitutes "direct physical loss or damage" under property policies. *Mortar & Pestle Corp. v. Atain Specialty Ins. Co.*, No.20-cv-03461-MMC, 2020 WL 7495180, at *3-4 (N.D. Cal. Dec. 21, 2020) (citing "wave" of cases); *see, e.g., 7th Inning Stretch, LLC v. Arch Ins. Co.*, No.CV-208161-SDW, 2021 WL 1153147, at *2 n.8 (D.N.J. Mar. 26, 2021)**[5] (noting "numerous other" courts have held the same);[6] *Capri Holdings, Inc. v. Zurich Am. Ins. Co.*, No.BER-L-2322-21, Addendum hereto ("Add."), Tab B at 66:7-8 (N.J. Super. Ct. June 25, 2021)

(closure orders "would have required [insured] to remain closed even if [it] could have proven to a certainty that the virus was not present at its facilities"); *Torgerson Props., Inc. v. Cont'l Cas. Co.*, No.CV-20-2184, 2021 WL 615416, at *2 (D. Minn. Feb. 17, 2021) (appeal filed) ("[I]t is not the presence of the virus on the premises that closed TPI's properties … but rather the executive orders meant to slow the virus's spread."); *Star Buick GMC v. Sentry Ins. Grp.*, No.5:20-cv-03023, 2021 WL 2134289, at *6 (E.D. Pa. May 26, 2021) (loss of use "was because of the presence of COVID-19 in the community and not from the coronavirus existing within the building"); *Wellness Eatery La Jolla LLC v. Hanover Ins. Grp.*, No.20cv1277-AJB, 2021 WL 389215, at *7 (S.D. Cal. Feb. 3, 2021) (same).

[5] ** designates an appeal has been filed.

[6] There are over a hundred decisions reaching this conclusion. *E.g.*, ER 277-81 (COVID-19 cases decided since AIG's motion below).

(dismissing COVID-19 BI claim; noting "most" decisions are in accord).[7] As explained more fully below in Section II, "losses from inability to use property do not amount to 'direct physical loss of or damage to property' within the ordinary and popular meaning of that phrase." *Pappy's Barber Shops, Inc. v. Farmers Grp.*, No.20-CV-907, 2020 WL 5500221, at *4 (S.D. Cal. Sept. 11, 2020); *see Sandy Point Dental, PC v. Cincinnati Ins. Co.*, 488 F.Supp.3d 690, 693 (N.D. Ill. 2020) ("The words 'direct' and 'physical,' which modify the word 'loss,' ordinarily connote actual, demonstrable harm of some form to the premises itself, rather than forced closure of the premises for reasons extraneous to the premises.").

These decisions recognize that accepting a "loss of use" as "physical loss or damage" would "massively expand the scope of the insurance coverage at issue," and would "potentially make an insurer liable for the negative effects of operational changes resulting from any regulation or executive decree." *Henry's La. Grill, Inc. v. Allied Ins. Co. of Am.*, 495 F.Supp.3d 1289, 1295 (N.D. Ga. 2020); *see Plan Check Downtown III, LLC v. AmGuard Ins. Co.*, 485 F.Supp.3d 1225, 1229-31 (C.D. Cal. 2020)** (interpreting "physical loss" to "include[]

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[7] These decisions are consistent with *Wakefern Food Corp. v. Liberty Mutual Insurance Co.*, 406 N.J.Super. 524, 540 (App. Div. 2009), cited by United Policyholders (at 9), which distinguished damage to a power-grid (from sagging electrical lines, requiring repairs) from a loss-of-use due only to a prophylactic shutdown order: "We would reach a different result if, for example, a governmental agency had ordered that the power be shut off to conserve electricity."

changes in what activities can physically occur in the [insured] space" would be a "sweeping expansion of insurance coverage without any manageable bounds"). In short, "a governmental edict" that restricts use of property, standing alone, does not constitute "a direct physical loss under an insurance policy." *Rose's 1, LLC v. Erie Ins. Exch.*, No.2020-CA-2424-B, 2020 WL 4589206, at *3 (D.C. Super. Aug. 6, 2020); *Seifert v. IMT Ins. Co.*, 495 F.Supp.3d 747, 752 (D. Minn. 2020) ("[G]overnmental action prohibiting the use of property, by itself, is not enough.").

II. The district court correctly concluded the presence of COVID-19 did not constitute "physical loss or damage" to Circus's property.

To avoid this "wave" of authority, Circus changed its tune in opposing AIG's motion to dismiss, claiming that when it said in its Complaint it closed its doors at 12:01 a.m. on March 18, 2020 because of "COVID-19 and [the government] Orders," it actually meant it closed because of *the physical presence* of COVID-19 on its property. Even if that were true, Circus cannot meet its burden. *See Cnty. of Clark v. Factory Mut. Ins. Co.*, No.CV-S-02-1258-KJD, 2005 WL 6720917, at *4 (D. Nev. Mar. 28, 2005) ("The insured … bears the burden of proving that its alleged loss falls within the terms of the various provisions under which it seeks coverage." (citing *Lucini-Parish Ins. v. Buck*, 836 P.2d 627, 629 (Nev. 1992))).

A. "Physical loss or damage" requires a demonstrable, physical alteration of the property or physical change in the condition of the property.

1. This Court need go no further than the Policy's plain language.

The claim that "physical loss or damage" encompasses "loss of use" due to a virus rendering property uninhabitable has "no basis in the plain language" of the Policy. (1-ER-11.) "Policy terms should be viewed in their plain, ordinary and popular connotations." *Fourth Street Place v. Travelers Indem. Co.*, 270 P.3d 1235, 1239 (Nev. 2011). "Where the provisions of a policy are clear and unambiguous, the Court must enforce them as written." *Christensen v. Darwin Nat'l Assur. Co.*, No.13-CV-956-APG, 2014 WL 1628133, at *4 (D. Nev. Apr. 14, 2014), *aff'd*, 645 F.App'x 533 (9th Cir. 2016).

Circus argues COVID-19 is "physical in every sense of the word." (OB 25.) That may be true, but Circus interprets "physical" in isolation—severing it from the words it modifies, "direct physical *loss* or *damage*"—contrary to settled principles of contract interpretation. *See Anderson v. Ford Ranch LLC*, 476 P.3d 928, 2020 WL 6955438, at *3 (Nev. Nov. 25, 2020) ("particular words or phrases in a contract should generally not be considered in a vacuum and isolated from the context but rather in light of the entire contract" (quotations omitted)); *see also Ward Gen. Ins. Servs., Inc. v. Emps. Fire Ins. Co.*, 114 Cal.App.4th 548, 554 (2004), *aff'd*, 7 Cal.Rtpr.3d 844 (2003) ("we construe the words 'direct physical' to modify both 'loss of' and 'damage to'"); *Zwillo V, Corp. v. Lexington Ins. Co.*, 504 F.Supp.3d 1034, 1040 (W.D. Mo. 2020)** (no coverage for COVID-19 losses; reading "loss" in isolation goes against "well-established proviso that an insurance

policy must be read as a whole" (quotations omitted)); *Town Kitchen LLC v. Certain Underwriters at Lloyd's, London*, No.20-22832-CIV, 2021 WL 768273, at *5 (S.D. Fla. Feb. 26, 2021) (dismissing COVID-19 BI claim; "[p]laintiff seeks to recover from economic losses caused by something physical—not physical losses").

Thus, the loss or damage *itself* must be "physical," i.e., a perceptible effect in the actual *make-up* of the property. As Circus points out, "physical" refers to "material things or having material existence: perceptible especially through the senses." (OB 24.) "Material," in turn, means "relating to, derived from, or consisting of matter; … the elements, constituents, or substances of which something *is composed*." *https://www.merriamwebster.com/dictionary/material* (last visited Jun. 30, 2021) (emphasis added). Thus, to establish "physical loss or damage," an insured must show its property suffered a perceptible change with respect to the "matter" (i.e., the substances) of which it is composed. *See Galardi v. Naples Polaris, LLC*, 301 P.3d 364, 367 (Nev. 2013) (using dictionary to interpret contract terms); *Ward*, 114 Cal.App.4th at 556 (citing dictionary definition of "physical"—"material existence, formed out of tangible matter, and … perceptive to the sense of touch"; no coverage for loss of database and consequent economic loss).

Tracking those definitions, two other federal district courts, applying Nevada law, concluded that "physical loss or damage" requires "a distinct, demonstrable, physical alteration of the property or a physical change in the condition of the property." *Project Lion LLC v. Badger Mut. Ins. Co.*, No.2:20-cv-768, 2021 WL

2389885, at *2 (D. Nev. May 19, 2021) (quotations omitted); *Levy Ad Grp. v. Chubb Corp.*, No.2:20-cv-763-JAD, 2021 WL 777210, at *3 (D. Nev. Feb. 16, 2021)** (insureds must allege "some sort of structural or physical change to a property"). Both cases, and the district court below, recognized this Court has held that "'physical' loss cannot occur to the intangible," *Sentience Studio, LLC v. Travelers Ins. Co.*, 102 F.App'x 77, 81 (9th Cir. 2004), and required "some physical damage" to property to trigger coverage, *Commw. Enters. v. Liberty Mut. Ins. Co.*, 1996 WL 660869, 101 F.3d 705, at *2 (9th Cir. Nov. 13, 1996) (no coverage where tenants vacated "because of asbestos contamination or their perception that there was asbestos contamination, not because of fire damage").[8]

2. Under California law, which informs Nevada courts, "physical loss or damage" requires tangible, demonstrable change.

California courts have held that "direct physical loss or damage" requires "a distinct, demonstrable, physical alteration of the property" to trigger coverage; in other words, "some external force must have acted upon the insured property *to cause a physical change in the condition of the property*, i.e., it must have been 'damaged' within the common understanding of that term." *MRI Healthcare Ctr.*

[8] Circus argues that in *Liberty Mutual*, there was coverage for floors 14, 15, 16 and 19. (OB 36.) On *those* floors, asbestos fibers/materials broke off and "were deposited by the fire" or there was other damage caused by smoke or water. 101 F.3d at *1-2.

of Glendale, Inc. v. State Farm Gen. Ins. Co., 187 Cal.App.4th 766, 779-80 (2010) (emphasis added); *see Meridian Textiles, Inc. v. Indem. Ins. Co. of N. Am.*, No.CV 06-4766 CAS, 2008 WL 3009889, *6 (C.D. Cal. Mar. 20, 2008) (insured must show some "tangible" or "detectable physical change"; "mere alteration of property at the microscopic level does not obviate th[at] requirement"); *J&J Pumps, Inc. v. Star Ins. Co.*, 795 F.Supp.2d 1023, 1028 (E.D. Cal. 2011) ("distinct, demonstrable, physical alteration of the property" is "widely held" rule (quotations omitted)).

COVID-19 property coverage cases in California have followed suit. The meaning of "physical loss or damage" is "well established under California law. Property must undergo a 'distinct, demonstrable, physical alteration.'" *L.A. Cnty. Museum of Nat. Hist. Found. v. Travelers Indem. Co.*, No.CV-01497-SVW, 2021 WL 1851028, at *3 (C.D. Cal. Apr. 15, 2021)**; *see Islands Rests., LP v. Affiliated FM Ins. Co.*, No.3:20-CV-02013-H-JLB, 2021 WL 1238872, at *4 (S.D. Cal. Apr. 2, 2021)** ("California courts consistently interpret these coverage triggers to require a 'distinct, demonstrable, physical alteration' to property.").[9]

Other jurisdictions agree. A requirement of physical loss or damage to property, "in ordinary parlance and widely accepted definition, … means distinct,

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[9] "The weight of California law … appears to require some tangible alteration, no matter whether the trigger language uses 'loss' or 'damage.'" *Plan Check*, 485 F.Supp.3d at 1230.

demonstrable, and physical alteration of its structure." *ATCM Optical, Inc. v. Twin City Fire Ins. Co.*, No.CA-20-4238, 2021 WL 131282, at hn.15 (E.D. Pa. Jan. 14, 2021) ("[p]laintiff has failed to plead plausible facts that COVID-19 caused damage or loss in any physical way to the property"); *see TJBC, Inc. v. Cincinnati Ins. Co.*, No.20-CV-815-DWD, 2021 WL 243583, at *4 (S.D. Ill. Jan. 25, 2021)** ("[D]irect physical loss under the parties policy unambiguously requires some form of tangible loss or damage to the physical dimension of [p]laintiff's property."); *Woolworth LLC v. Cincinnati Ins. Co.*, No.2:20-CV-01084-CLM, 2021 WL 1424356, at *6 (N.D. Ala. Apr. 15, 2021)** ("The court has … found a *clear consensus* that the terms 'physical loss' and 'physical damage' … require some *material* change to the insured's property that requires repair or replacement." (emphasis added)).[10]

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[10] *See also, e.g.*, *MMMMM DP, LLC, v. Cincinnati Ins. Co.*, No. 4:20-CV-00867-SEP, 2021 WL 2075565, at *3 (E.D. Mo. May 24, 2021); *RDS Vending LLC v. Union Ins. Co.*, No.CV-20-3928, 2021 WL 1923024, at *3 (E.D. Pa. May 13, 2021)**; *ILIOS Prod. Design, LLC v. Cincinnati Ins. Co.*, No. 1:20-CV-857-LY, 2021 WL 1381148, at *5 (W.D. Tex. Apr. 12, 2021); *PF Sunset View, LLC v. Atl. Specialty Ins. Co.*, No.20-81224-CIV, 2021 WL 1341602, at *2 (S.D. Fla. Apr. 9, 2021)**; *Select Hosp., LLC v. Strathmore Ins. Co.*, No.CV-20-11414-NMG, 2021 WL 1293407, at *2-3 (D. Mass. Apr. 7, 2021)**; *Paradigm Care & Enrichment Ctr. v. W. Bend Mut. Ins. Co.*, No.20-CV-720-JPS-JPS, 2021 WL 1169565, at *6-7 (E.D. Wis. Mar. 26, 2021)**; *Cafe Plaza de Mesilla Inc. v. Cont'l Cas. Co.*, No.2:20-CV-354-KWR, 2021 WL 601880, at *6 (D.N.M. Feb. 16, 2021); *Karmel Davis & Assocs. v. Hartford Fin. Servs.*, No.1:20-CV-02181-WMR, 2021 WL 420372, at *4 (N.D. Ga. Jan. 26, 2021); *Bluegrass, LLC v. State Auto. Mut. Ins. Co.*, No.2:20-CV-00414, 2021 WL 42050, at *5 (S.D. W. Va. Jan.

(Continued …)

United Policyholders' brief (UP 44-45) cites a California case where heavy rains caused the backyard of the insured's home to slide into a creek, leaving the house partially overhanging a 30-foot cliff. *Hughes v. Potomac Ins. Co.*, 199 Cal.App.2d 239, 248 (1962). Certainly that is a "physical loss"—a *permanent* dispossession, as the house can never be occupied. *Id.* at 248 ("no amount of repairs to the present structure alone will cure the damage or replace the dwelling until the earth movement under the structure is stabilized" (emphasis omitted)); *see infra* at 28-29, 39-40.[11]

Regardless, *Hughes* held the insured property included the backyard, which clearly was physically altered. 199 Cal.App.2d at 248-49. If property need only be inhabitable to trigger coverage under a property policy, *Hughes* could have dispensed with that analysis. Thus, the California Court of Appeal later made clear that "the loss of the backyard" in *Hughes* was "[q]uite clearly ... a physical loss of tangible property." *Ward*, *supra* at 15, 114 Cal.App.4th at 558 (*Hughes* "does *not*

5, 2021); *Kirsch v. Aspen Am. Ins. Co.*, No.20-11930, 2020 WL 7338570, at *4 (E.D. Mich. Dec. 14, 2020)**; *Gerleman Mgmt., Inc. v. Atl. States Ins. Co.*, 506 F.Supp.3d 663, 670 (S.D. Iowa 2020)**.

[11] The same was true of the landslide in *Strickland v. Federal Insurance Co.*, 200 Cal.App.3d 792, 800 (1988) (Boyd Gaming Corp. & JC Hospitality's Br. ("BG/JCH") 7) ("the residence cannot be fully protected from continuing damage unless the entire … landslide is stabilized").

stand for the proposition that loss of or damage to intangible property can constitute a physical loss" (emphasis added)).

BG/JCH's brief (at 18-19) cites *Armstrong World Indus. v. Aetna Casualty & Surety Co.*, 45 Cal.App.4th 1 (1996), a third-party CGL case where the policy, unlike here, defined "property damage" as "loss of use of tangible property *which has not been physically injured or destroyed*." *Id.* at 88 (emphasis added).[12] In the property-insurance context, the "*mere presence* of asbestos ... lacks the distinct and demonstrable character necessary for ... coverage." *Port Auth. of N.Y. & N.J. v. Affiliated FM Ins. Co.*, 311 F.3d 226, 232, 236 (3d Cir. 2002) (emphasis added) ("physical loss or damage" requires the "[insured] structures were, in fact, physically damaged"); *see also Commw. Enters.*, 101 F.3d 705, at *2, *supra* at n.8; *Great N. Ins. Co. v. Benjamin Franklin Fed. Sav. & Loan Ass'n*, 793 F.Supp. 259, 263 (D. Or. 1990) (no physical loss from mere presence of asbestos; "[t]he building has remained physically intact and undamaged. The only loss is economic."), *aff'd*, 953 F.2d 1387 (9th Cir. 1992); *Source One Rest. Corp. v. W. World Ins. Co.*, No.20-L-7421, Add., Tab A at *8 (Ill. Circuit Ct. May 10, 2021)

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[12] First-party property policies, like Circus's, "must be carefully distinguished from the coverage analysis" in third-party CGL policies, *Garvey v. State Farm Fire & Cas. Co.*, 770 P.2d 704, 710 (Cal. 1989), which draws on "traditional tort concepts of fault, proximate cause and duty" and thus can result in "a broader spectrum of risks," *Montrose Chem. Corp. v. Admiral Ins. Co.*, 913 P.2d 878, 886 (Cal. 1995) (quotations omitted).

(distinguishing asbestos, which is "embedded into the physical structure," from COVID-19, which "naturally dissipates and is easily killed through ordinary cleaning").[13]

Circus argues physical damage should not be limited to "structural damage." (OB 16, 26.) That's a red herring. The district court never said coverage depends on a showing of "structural damage," a point Circus acknowledges. (OB 35.)

The district court got it right—"physical loss or damage" unambiguously requires that property undergo a distinct, demonstrable, physical alteration or physical change in the condition of the property. *See Galardi*, 301 P.3d at 366 ("ambiguity does not arise simply because the parties disagree on how to interpret their contract"). As explained below, Circus did not allege—and cannot allege—such a physical alteration or change.

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[13] This alone distinguishes *Sentinel Management Co. v. New Hampshire Insurance Co.*, 563 N.W.2d 296 (Minn. Ct. App. 1997) (OB 26-27), where "released asbestos fibers … contaminated the [insured] buildings," rendering them uninhabitable until the asbestos was abated. *Id*. at 300 (emphasis added); *see Yale Univ. v. Cigna Ins. Co.*, 224 F.Supp.2d 402, 412-13 (D. Conn. 2002) (UP 9) (distinguishing between "chipping paint," a physical alteration requiring abatement, and "mere presence of materials containing asbestos," which is not covered).

Even if *Armstrong* applied to first-party property insurance, COVID-19, unlike asbestos-containing materials ("ACBM"), does not become "incorporated" into the property itself such that removal of the virus results in damage to the property. 45 Cal.App.4th at 91-92 (ACBM is "incorporated … into the building … and not merely contained (as a piece of furniture is contained in a house but can be removed without damage to the house)").

B. There are no allegations that COVID-19 physically damages property.

According to Circus, COVID-19 "physically attach[es] to and reside[s] on surfaces." (OB 15-16.) But Circus does not allege COVID-19 actually alters the physical makeup of those surfaces. Instead, Circus "simply … recited the coverage criteria set forth in the Policy,"[14] "intoning the conclusory mantra that it experienced direct 'physical damage' to its property because of COVID-19, without explaining what constitutes that direct, physical damage." (1-ER-10 (quotations omitted).)

Similarly, Circus alleges (OB 15-16), and the district court accepted as true (1-ER-10-11) that COVID "physically alter[s] the content of the indoor air" not by changing the properties of the air itself, but by causing it "to contain infectious particles." That's not "physical damage" to property. *E.g.*, *L&J Mattson's Co. v. Cincinnati Ins. Co.*, No.20-C-7784, 2021 WL 1688153, at *5 (N.D. Ill. Apr. 29, 2021) ("[t]he presence of virus in the air does not physically damage any of the property at the premises"); *Kim-Chee LLC v. Phila. Indem. Ins. Co.*, No.1:20-cv-1136, 2021 WL 1600831, at *4 (W.D.N.Y. Apr. 22, 2021) (same; "[t]he virus is

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[14] *W. Coast Hotel Mgmt. v. Berkshire Hathaway Guard Ins. Cos.*, 498 F.Supp.3d 1233, 1240 (C.D. Cal. 2020) (no coverage for COVID-19 losses; under *Twombly*, "a court need not take as true threadbare recitals of the elements of a cause of action" (quotations & alteration omitted)); *10E, LLC v. Travelers Indem. Co.*, 483 F.Supp.3d 828, 837 (C.D. Cal. 2020) (granting motion to dismiss where insured "paraphrased the language of the Policy without specifying facts that could support recovery").

short-lived—if 'life' is the correct expression—and is rendered harmless by the passage of a few days of exposure to the environment"). Thus, "disease vectors" is nothing more than an attempt to explain how COVID-19 is transmitted from one *person* to another *person*. (OB 5-6 (infected visitors "emit[]" particles from their respiratory tract, which "survive in clouds of aerosolized particles, which uninfected individuals breathe").)

Yes, COVID-19 is dangerous to *people*. But that has nothing to do with physical changes to the property surface or air *itself*. While COVID-19 "damages lungs," it "doesn't damage the property." *Soc. Life Mag., Inc. v. Sentinel Ins. Co.*, 1:20-cv-03311-VEC, 2020 WL 2904834, at *5-6 (S.D.N.Y. May 14, 2020). Accordingly, courts have rejected BI claims based on the alleged presence of COVID-19 on a surface or in the air of insured property. *E.g.*, *Jeffrey M. Dressel, D.D.S. v. Hartford Ins. Co. of the Midwest, Inc.*, No.1:20-cv-02777-KAM, 2021 WL 1091711, at *4 (E.D.N.Y. Mar. 22, 2021) ("[T]he court is not aware of any scenario in which [COVID-19's] presence can cause 'physical damage' to property such as a building, or other inanimate objects."); *Uncork & Create LLC v. Cincinnati Ins. Co.*, 498 F.Supp.3d 878, 883 (S.D. W. Va. 2020)** ("even when present, COVID-19 does not threaten the inanimate structures"); *Lemontree Academy, LLC v. Utica Mut. Ins. Co.*, No.3:20-cv-00126-CDL, 2021 WL 1940627, at *6 (M.D. Ga. Mar. 11, 2021) ("mere presence" of COVID-19 "would not constitute the direct physical damage necessary to trigger coverage"); *Sandy Point*, 488 F.Supp.3d at 694 (COVID-19 "does not physically alter the appearance, shape, color, structure, or other material dimension of the property"); *MMMMM*, 2021

WL 2075565, at *4 ("The virus does not physically alter property."); *Assocs. in Periodontics PLC v. Cincinnati Ins. Co.*, No.2:20-cv-171, 2021 WL 1976404, at *6 (D. Vt. May 18, 2021) ("The virus posed a threat to people, while ultimately leaving the property and its environment unscathed."); *Ralph Lauren Corp. v. Factory Mut. Ins. Co.*, No.CV-20-10167, 2021 WL 1904739, at *3, n.6 (D.N.J. May 12, 2021)** ("[a]lthough the [v]irus can harm humans, it does not physically alter structures"); *Legal Sea Foods, LLC v. Strathmore Ins. Co.*, No.CV 20-10850-NMG, 2021 WL 858378, at *3 (D. Mass. Mar. 5, 2021)** ("[a] virus is incapable of damaging physical structures" (quotations omitted)).[15]

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[15] In the following cases, courts granted an insurer's motion to dismiss and rejected the claim that COVID-19's presence in the air and/or on surfaces constitutes "physical damage." *1 S.A.N.T. Inc. v. Berkshire Hathaway, Inc.*, No.2:20-cv-862, 2021 WL 147139, at *7 (W.D. Pa. Jan. 15, 2021); *B Street Grill & Bar LLC v. Cincinnati Ins. Co.*, No.2:20-cv-1326, 2021 WL 857361, at *4-5 (D. Ariz. Mar. 8, 2021); *Karen Trinh, DDS, Inc. v. State Farm Gen. Ins. Co.*, No.5:20-cv-04265-BLF, 2020 WL 7696080, at *5 (N.D. Cal. Dec. 28, 2020); *Tappo of Buffalo LLC v. Erie Ins. Co.*, No.1:20-cv-00754V(SR), 2020 WL 7867553 (W.D.N.Y. Dec. 29, 2020); *Bend Hotel Dev. Co. v. Cincinnati Ins. Co.*, No.20-C-04626, 2021 WL 271294, at *3 (N.D. Ill. Jan. 27, 2021)**; *Vandelay Hosp. Grp. v. Cincinnati Ins. Co.*, No.3:20-cv-01348-D, 2021 WL 462105 (N.D. Tex. Feb. 9, 2021); *DAB Dental PLLC v. Main Street Am. Protection Ins. Co.*, No.20-CA-5504, 2020 WL 7137138, at *4 (Fla. Cir. Ct. Nov. 10, 2020); *1210 McGavock St. Hosp. Partners v. Admiral Indem. Co.*, No.3:20-CV-694, 2020 WL 7641184, at *7 (M.D. Tenn. Dec. 23, 2020); *R.T.G. Furniture Corp. v. Hallmark Specialty Ins. Co.*, No.8:20-CV-2323-T-30AEP, 2021 WL 686864, at *3 (M.D. Fla. Jan. 22, 2021)**; *Manhattan Partners, LLC v. Am. Guar. & Liab. Ins. Co.*, No.CV-2014342SDW, 2021 WL 1016113, at *2 (D.N.J. Mar. 17, 2021)**; *Bridal Expressions LLC v. Owners Ins. Co.*, No.1:20-CV-833, 2021 WL 1232399, at *4, 6, n.4 (N.D. Ohio

(Continued …)

Circus objects to the district court's observation that COVID-19 is "ephemeral" in nature (OB 12), but its own Complaint alleges a virus particle's existence is short-lived. (4-ER-560, ¶26 (COVID-19 "was detectable in aerosols for up to three hours, up to four hours on copper, up to 24 hours on cardboard, and up to three days on plastic and stainless steel").) Nonetheless, as a factual matter, it is irrelevant exactly how long the virus survives (BG/JCH 13), or whether it is constantly "reintroduced" into the air at Circus, *infra* at 32, n.22; as the district court correctly concluded, nothing in the Complaint plausibly suggests the virus ever becomes embedded into the surface of property so as to alter the make-up or physical condition of the property itself.[16] In this regard, COVID-19 is no different than the spreading of "virus particles causing influenza or the common cold." *Dino Drop, Inc. v. Cincinnati Ins. Co.*, No.20-12549, 2021 WL 2529817, at *7 (E.D. Mich. June 21, 2021) ("Though each virus can be harmful and potentially deadly, no reasonable person would assert that their presence renders property uninhabitable or substantially unusable.").

Mar. 23, 2021)**; *Mangia Rest. Corp. v. Utica First Ins. Co.*, No.713847-2020, 2021 WL 1705760, at *4 (N.Y. Sup. Ct. Mar. 30, 2021).

[16] *Uncork*, *supra* at 24, did not make "factual findings" on a motion to dismiss (UP 23); instead, it simply noted "artful pleading" cannot substitute for allegations as to *how* COVID-19 physically alters property surfaces or the air.

Nor are the "effects of COVID-19 on … property" in any way "validated by" the closure orders. (OB 10.) There is no language in there indicating Nevada closed casinos and other non-essential facilities because of the risk COVID-19 would physically damage a business's tables and chairs. The April 29, 2020 Order's reference to "damage" and "loss" merely reflects that COVID-19 "survives on surfaces for indeterminate periods of time." (4-ER-667.) In fact, the purpose of that Order was to outline the plan for a "staged reopening that *protects the public's health* while laying a strong foundation for long-term economic recovery." (*Id*. (emphasis added).)

Tellingly, Circus says that "[p]hysical damage to property occurs when there is a physical alteration *to the property's functionality or use*. (OB 34 (emphasis added).) Thus, Circus's "physical damage" allegations depend on adding terms not in the Policy and are nothing more than the same "loss of use or functionality" theory that court after court has rejected.

C. "Physical loss" has a meaning separate from "physical damage," but it does not mean what Circus claims it means.

Alternatively, Circus argues property left uninhabitable or unusable due to the presence of a virus must be covered because if it were not, "physical loss" would be no different than "physical damage"—and both terms must be given meaning. That argument does not follow. A hurricane could cause direct physical damage to property where strong winds blow off the roof. By the same token, it could cause a physical loss where strong winds completely destroy the building

resulting in a permanent destruction of the structure. As explained further below, Circus's argument is fatally flawed.

1. A "physical loss" means the insured is dispossessed of his property.

When modified by "direct' and "physical," the term "loss" is not reasonably susceptible to Circus's proffered definition. "Physical *damage*" requires a physical alteration requiring the property to be repaired or replaced in order to be returned to its business use; a "physical *loss*" is a permanent physical dispossession (not a mere decline in value), such as a theft. And the insured's "loss of use" must bear some causal connection to the physical condition of the premises, such as when a fire burn downs an insured restaurant or a thief steals all of the cooking equipment. *See, e.g.*, *ATCM*, 2021 WL 131282, at hn.17 ("the source that destroys … the property's utility must have something to do with the physical condition of the premises"). If "loss of use" alone were enough, any interruption of business would be covered, rendering meaningless the core requirement that a BI loss must be caused by "direct physical loss or damage."

Circus's argument that the district court improperly inserted "permanent" into "direct physical loss" misses the mark. The very definition of "loss" reflects that the holder of property is dispossessed of it. *https://www.merriam-webster.com/dictionary/loss* (last visited Jun. 30, 2021) ("destruction, ruin," or the "fact of being unable to keep or maintain something"); *https://www.dictionary.cambridge.org/us/dictionary/english/loss* (last visited June 30, 2021) (defining "loss" as "the fact that you no longer have something or have

less of something"); *see Total Intermodal Servs., Inc. v. Travelers Prop. Cas. Co. of Am.*, No.CV-17-4908, 2018 WL 3829767, at *3 (C.D. Cal. July 11, 2018) ("Under an ordinary and popular meaning, the loss of property contemplates that the property is misplaced and unrecoverable …." (quotations omitted)).

As one court explained:

> 'Physical' means '[o]f, relating to, or involving material things, pertaining to real, tangible objects.' *Physical*, Black's Law Dictionary (11th ed. 2019). … [O]nly one [definition of 'loss'] could apply to physical objects: '[t]he failure to maintain possession of a thing.'

Michael Cetta, Inc. v. Admiral Indem. Co., No.20-CIV-4612-JPC, 2020 WL 7321405, at *6 (S.D.N.Y. Dec. 11, 2020) (dismissing property claim for COVID-19 losses).

COVID-19 cases have adhered to the district court's definition of "physical loss," concluding it necessarily entails a permanent dispossession:

> The plain wording of the [policy] … requires either a *permanent dispossession* of the property due to a physical change ('loss'), or physical injury to the property requiring repair ('damage').

Crescent Plaza Hotel Owner, L.P. v. Zurich Am. Ins. Co., No.20-C-3463, 2021 WL 633356, at *3 (N.D. Ill. Feb. 18, 2021) (mere loss-of-use insufficient); *La. Grill*, 495 F.Supp.3d at 1295 (explaining owner would suffer "physical loss" if a tornado destroyed restaurant; owner would suffer "physical damage to" that property if a tree fell on part of the kitchen); *Promotional Headwear Int'l v. Cincinnati Ins. Co.*, 504 F.Supp.3d 1191, 1202 (D. Kan. 2020)** (coverage requires "permanent dispossession").

Thus, *Real Hospitality, LLC, v. Travelers Casualty Insurance Co.* held "physical loss" has a meaning distinct from "physical damage"—but that meaning is not "loss of use." 499 F.Supp.3d 288, 294-95 (S.D. Miss. 2020). Rather, a property owner suffers a "physical loss" when its property is "physically lost," which refers to a "permanent dispossession":

> In a restaurant with ten tables, there could be a fire, which completely burns up five of the tables--thus, there is a 'direct physical loss' of property. The fire also could melt the tabletops or cause smoke damage to the remaining five tables--thus, there is 'damage' to property.

Id. Absent permanent dispossession, Circus cannot state a BI claim based on an alleged "physical loss."

2. The definition of "period of business interruption" confirms the district court properly interpreted "physical loss."

Other Policy language confirms the term "physical loss" is not ambiguous and does not include any occurrence that merely leaves property temporarily unfit for its intended purpose. Most notably, BI costs are payable only "during the period of interruption," which begins when the property suffers physical loss or damage and ends when, "with the exercise of due diligence and dispatch" (i) it is "repaired or replaced and made ready for operations under the same or equivalent physical and operating conditions that existed prior to such loss or damage," or (ii) "when normal operations resume." (*Supra* at 5.)

Accordingly, as the Eighth Circuit held, coverage is triggered by a *physical alteration* to property that can be remedied through repair or replacement. *Surgeons*, 2021 WL 2753874, at *4 ("Property that has suffered physical loss or

physical damage requires restoration."). "[A] reasonable insured would understand a 'repair' to become necessary only upon a tangible alteration of property"—and not in context of a government order imposing use restrictions. *Hillcrest Optical Inc. v. Cont'l Cas. Co.*, 497 F.Supp.3d 1203, 1213 (S.D. Ala. 2020) ("a statewide order which 'required' [p]laintiff to shutdown" does not "necessitate" any "sort of repair"). Because "there is nothing to fix, replace, or even disinfect" for Circus "to regain occupancy of its property," there is no coverage for its claimed losses. *Mudpie, Inc. v. Travelers Cas. Ins. Co.*, 487 F.Supp.3d 834, 840 (N.D. Cal. 2020)** (dismissing claim for COVID-19 losses).[17]

Alternatively, coverage under the Policy is triggered when, "with the exercise of due diligence and dispatch," "normal operations" resume, which does not happen—indeed, *cannot* happen—when COVID-19 is wiped away, or through any "diligence or dispatch" of the insured. Even if/when Circus cleaned its

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[17] *See also, e.g.*, *Newman Myers Kreines Gross Harris, P.C. v. Great N. Ins. Co.*, 17 F.Supp.3d 323, 332 (S.D.N.Y. 2014) ("The words 'repair' and 'replace' contemplate physical damage to the insured premises as opposed to loss of use of it."); *Philadelphia Parking Auth. v. Fed. Ins. Co.*, 385 F.Supp.2d 280, 287 (S.D.N.Y. 2005) ('"Rebuild,' 'repair' and 'replace' all strongly suggest that the damage contemplated by the Policy is physical in nature."); *MHG Hotels v. EMC Risk Servs. LLC*, No.1:20-cv-01620, Add.-Tab D (S.D. Ind. Mar. 8, 2021) (same); *Family Tacos LLC v. Auto Owners Ins. Co.*, No.5:20-cv-01922, 2021 WL 615307 (N.D. Ohio Feb. 17, 2021) (period of restoration "makes sense following and contemplates a material (physical) loss, not a loss of use with no impact to the property's structure").

property surfaces, Circus still had to stay closed *because of* the Governor's order. What allowed (or will allow) normal operations to resume was the *lifting* of that stay-at-home order (and other social distancing restrictions), which has nothing to do with any physical alteration of property and which is not "direct physical loss or damage" to property. *Supra* at 11-14. As Circus states, "[t]here is simply no way to clean, remove, or eradicate COVID-19 and SARS-CoV-2 from such a large, public place. They are constantly spread and reintroduced throughout the site." (OB 37; *see also* OB 11.)

Circus's proffered interpretation of "physical loss" also defies common sense. The covered property is not "lost," as it remains intact and freely accessible to Circus, which, following the lifting of stay-at-home orders, operated (and still operates) at partial capacity despite the ongoing presence of COVID-19.

D. Circus's pre-COVID cases do not undermine the district court's ruling.

While some courts have found a physical loss in particular circumstances involving different items or substances, *none* have suggested that a temporary loss of use due to the presence of a virus establishes a "direct physical loss." Instead, they have found coverage consistent with the same physical-damage principle the district court applied and as has been historically applied to property insurance losses.

1. Contaminants physically embedded in property, requiring repair or replacement, are distinguishable from viruses.

Circus and amici cite cases where a foreign substance (i) is *physically embedded* in the property in such a way that certain courts have found the

substance physically alters the property or is perceptible through the senses or otherwise demonstrable, and (ii), importantly, was found to necessitate a *repair or replacement* of that property before it could be used again. Whatever the merits of those decisions,[18] Circus's argument that a "loss" need not be permanent is only half the story: in that scenario, the insured can/must undertake the necessary repairs to return the damaged property to its normal use.

For instance, in *Gregory Packaging Inc. v. Travelers Property Casualty Co.*, No.2:12-cv-04418, 2014 WL 6675934 (D.N.J. Nov. 25, 2014), there "[was] no genuine dispute that the ammonia release" from a refrigeration system "*physically transformed the air*." *Id*. at *6; *see Capri*, Add., Tab B at 65 (noting *Gregory* supports dismissal of COVID-19 BI claims). Remediation work "to reduce the ammonia gas" was completed *before* there was a "safe level for occupancy." *Id*. at *3, 7 (ammonia "physically changed the facility's condition to an unsatisfactory state *needing repair*" (emphasis added));[19] *see Arbeiter v. Cambridge Mut. Fire*

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[18] The "opposite result" passage in *Couch on Insurance* (UP 18-20), and the text of § 11.41 of Allan Windt, *Insurance Claims & Disputes* (6th ed.) (OB 25), both refer to these same "foreign substance" decisions, which, as explained herein, are consistent with the district court's analysis. In any event, right above the *Couch* passage is this statement: "The requirement that the loss be 'physical' … is *widely held* to exclude alleged losses … unaccompanied by a distinct, demonstrable, physical alteration of the property." (UP 19 (emphasis added).)

[19] *Brand Management, Inc. v. Maryland Casualty Co.*, No.CIV-A-05-2293-R, 2007 WL 1772063 (D. Colo. June 18, 2007) (UP 10) (listeria contamination), did not address whether there was "physical loss or damage."

Ins. Co., No.94-837, 1996 WL 1250616, at *1-2 (Mass. Super. Ct. Mar. 15, 1996) (oil leak caused by bursting pipe required excavation/removal of contaminated soil, treatment of groundwater, and replacement of oil-damaged portions of building); *Matzner v. Seaco Ins. Co.*, No.CIV-A-96-498, 1998 WL 566658, at *1-2 (Mass. Super. Ct. Aug. 12, 1998) (carbon monoxide buildup caused by sections of old galvanized pipes "that had 'wedged their way into the top of' and were blocking the chimney"; remediation required removal of piping and lining of chimney).

Other cases reflect this same repair-or-remediation-before-reoccupancy principle.[20] Circus, though, had to do nothing of the sort to allow for its

[20] *General Mills, Inc. v. Gold Medal Ins. Co.*, 622 N.W.2d 147, 150 (Minn. Ct. App. 2001) (UP 18) ("[t]o remove all traces of [adulterated oat stocks]," insured had to "disassemble[], clean[], and reassemble[] … all machinery at the milling plants"); *Am. Alliance Ins. Co. v. Keleket X-Ray Corp.*, 248 F.2d 920, 930 (6th Cir. 1957) (UP 8) (contamination from radium salt, which "had been taken up by porous material such as wood or concrete," required replacement of floors and walls); *Stack Metallurgical Servs. v. Travelers Indem. Co.*, No.CIV-05-1315-JE, 2007 WL 464715, at *1, 8 (D. Or. Feb. 7, 2007) (UP 8) (lead contamination of furnace caused by melted hammer, a "physical transformation" which "rendered [furnace] useless," required restoration of furnace before operations resumed); *Ass'n of Apartment Owners of Imperial Plaza v. Fireman's Fund Ins. Co.*, 939 F.Supp.2d 1059, 1062 (D. Haw. 2013) (UP n.29) (arsenic contamination caused by moisture decomposing floor insulation required removal of entire concrete slab); *Factory Mut. Ins. Co. v. Fed. Ins. Co.*, No.CV-17-760-GJF, 2019 WL 5742167, at *1 (D.N.M. Nov. 5, 2019) (UP 11-12) (mold contamination shut down antibiotic production "until remediation efforts concluded"); *Azalea, Ltd. v. Am. States Ins. Co.*, 656 So.2d 600, 601 (Fla. Dist. Ct. App. 1995) (UP 9) (substance dumped into sewage treatment system "caused the destruction of a bacteria colony which was part of the sewage treatment process"; insured had to "drain the entire system" and "by hand chiseling remove this chemical residue"); *Cyclops Corp. v. Home Ins.*

(Continued …)

reopening—it was able to reopen, and did reopen, only when the Governor allowed it to. *See, e.g., G. Gordon Enters. v. AGCS Marine Ins. Co.*, No.21-STCV-2950, 2021 WL 2388958, at *8 (Cal. Super. Ct. June 1, 2021) ("[I]f fully vaccinated individuals can now enter onto [p]laintiff's real property and utilize [its] personal property, [p]laintiff has not pled what physical change occurred to its []property which enabled such patronage to resume.").[21]

Indeed, temporary deposits on surfaces, which do not imbed in property and can be cleaned, are *not* direct physical loss or damage. *E.g., Universal Image Prods., Inc. v. Fed. Ins. Co.*, 475 F.App'x 569, 574, n.8 (6th Cir. 2012) (items cleaned by "Lysol" and ordinary washing); *Mama Jo's, Inc. v. Sparta Ins. Co.*,

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Co., 352 F.Supp. 931, 933 (W.D. Pa. 1973) (UP n.32) (loose axle required motor to be "dismantled and shipped [out] for repairs" before it could be operated again).

[21] *Manpower Inc. v. Insurance Co. of the State of Penn.*, No.08C0085, 2009 WL 3738099 (E.D. Wis. Nov. 3, 2009) (UP 5), covered losses from a building collapse that prevented an insured from accessing its floors. *Id.* at *1, 6 (collapse "created a *physical barrier* between the insured and its property" and was not "an 'intangible' or 'incorporeal' loss" (emphasis added)). Moreover, the insured in *Manpower* had to relocate its business. *Id.* at *1. In contrast, there was no "physical" barrier preventing Circus from accessing its property—it was a government order entered to stop the spread of a virus that prevented (temporarily) its use by customers. *See also Hampton Foods, Inc. v. Aetna Cas. & Sur. Co.*, 787 F.2d 349, 352 (8th Cir. 1986) (UP n.8) (plaster fell from ceiling, "building evidenced other signs it was in imminent danger of collapse," and insured could not return "unless the building was repaired; he "suffered direct, concrete and immediate loss due to extraneous physical damage to the building").

No.17-cv-23362-KMM, 2018 WL 3412974 at *9 (S.D. Fla. June 11, 2018) (dust and debris on property), *aff'd* 823 F.App'x 868 (11th Cir. 2020) ("an item or structure that merely needs to be cleaned has not suffered a 'loss' which is both 'direct' and 'physical'"). Circus does not allege COVID imbeds in property such that it must be repaired or replaced; rather, Circus concedes COVID-19 has temporal limitations and will not be "detectable" after a matter of hours or days. (4-ER-560, ¶26.)

COVID-19 property insurance cases reflect this fundamental difference between distinct and demonstrable physical alterations to property and cleaning the surface of property. *E.g.*, *Food for Thought Caterers Corp. v. Sentinel Ins. Co.*, No.20-CV-3418-JGK, 2021 WL 860345, at *5 (S.D.N.Y. Mar. 6, 2021) ("virus's presence can be eliminated by 'routine cleaning and disinfecting'"); *Mohawk Gaming Enters., LLC v. Affiliated FM Ins. Co.*, No.8:20-CV-701, 2021 WL 1419782, at *6 (N.D.N.Y. Apr. 15, 2021) (same). "[A]ll that is needed to decontaminate is to wipe [the virus] off the surface with disinfectant, attesting to the fact that there is no underlying damage." *Nguyen v. Travelers Cas. Ins. Co. of Am.*, No.2:20-cv-597-BJR, 2021 WL 2184878, at *10 (W.D. Wash. May 28, 2021)**; *see also Accents of Sterling, Inc. v. Ohio Sec. Ins. Co.*, No.20-cv-11005-DJC, 2021 WL 2117180, at *2 (D. Mass. May 25, 2021) ("[c]ontamination that requires a need to clean surfaces that could host a virus does not constitute actual physical damage" (quotations omitted)); *Ascent Hosp. Mgmt. Co. v. Emps. Ins. Co. of Wausau*, No.2:20-CV-770-GMB, 2021 WL 1791490, at *4 (N.D. Ala. May 5, 2021)** (same). Circus's case falls squarely with these cases.

2. Unlike cat urine, smoke or gas fumes, COVID-19 is not perceptible through the senses.

Odor cases are also distinguishable. In *Mellin v. Northern Security Insurance Co.*, 115 A.3d 799 (N.H. 2015) (OB 27, 54), where cat odor emanated into an adjacent townhouse, the court "agree[d] ... the term 'physical loss' requires a distinct and demonstrable alteration of the insured property." *Id*. at 805. *Mellin* concluded the odor was a change in the property that could be perceived by the sense of smell. *Id*. at 803; *see W. Fire Ins. Co. v. First Presbyterian Church*, 437 P.2d 52, 55 (Colo. 1968) (OB 26) (noting while there is no coverage for mere "loss of use," coverage existed where gasoline "infiltrated and saturated" soil under and around church, resulting in "strange odor" and precluding its use until gasoline levels were reduced to specified level); *Hetrick v. Valley Mut. Ins. Co*., No.2245-CV-1988, 1992 WL 524309, at *1 (Pa. Ct. Comm. Pleas May 28, 1992) (UP 7) (following *Western Fire*; oil spill caused by fire that "heavily damaged" home); *Oregon Shakespeare Festival Ass'n v. Great Am. Ins. Co*., No.15-CV-01932-CL, 2016 WL 3267247, at *3, 6 (D. Or. June 7, 2016), *vacated*, 2017 WL 1034203 (D. Or. Mar. 6, 2017) (OB 29; UP 7) (particulates in air could be "perceived" by theater-goers, rendering theater unusable until "air filters [were] changed multiple times").[22]

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[22] As explained in *Sentinel* (*supra* at 13), *Farmers Insurance Co. v. Trutanich*, 858 P.2d 1332 (Or. Ct. App. 1993) (UP 12), held that the "cost of removing [methamphetamine lab] odor in a house constituted physical loss because removal was direct *rectification* of physical problem." 563 N.W.2d at 301 (Continued …)

"Unlike an unpleasant odor, however, COVID-19 is imperceptible; it does not endure beyond a brief passage of time or a proper cleaning, let alone render the property permanently uninhabitable or unusable." *Am. Food Sys., Inc. v. Fireman's Fund Ins. Co*., No.CV-20-11497-RGS, 2021 WL 1131640, at *4 (D. Mass. Mar. 24, 2021)**. In "odor damage cases, the physical damage is demonstrated by the persistent, pervasive odor…. The *mere adherence* of molecules to porous surfaces, without more, does not equate physical loss or damage." *Columbiaknit, Inc. v. Affiliated FM Ins. Co*., No.CIV-98-434-HU, 1999 WL 619100, at *7 (D. Or. Aug. 4, 1999) (emphasis added); *see Diesel Barbershop, LLC v. State Farm Lloyds*, No.5:20-CV-461-DAE, 2020 WL 4724305, at *5 (W.D. Tex. Aug. 13, 2020) ("COVID-19 does not produce noxious odors that make a business uninhabitable" and need not be removed for property to be habitable again); *Prudential Prop. & Cas. Ins. Co. v. Lillard-Roberts*, No.CV-01-1362-ST, 2002 WL 31495830, at *8 (D. Or. June 18, 2002) (UP 9) ("existence of visible mold contamination" that was likely not removable, rendering property a "total loss," suffices as "distinct and demonstrable damage" (quotations omitted)).

(emphasis added). There was no "direct rectification" of a physical problem here: as Circus concedes, no matter the amount of cleaning, COVID-19 is reintroduced to its property when visitors patronize the hotel and casino. (4-ER-563, ¶¶53, 55; 3-ER-351:4-7; OB 1-2, 15-16.)

3. Permanent dispossession constitutes "physical loss," but that is not this case.

Nor can Circus show it was permanently dispossessed of its property, as insureds in other cases established. In *Mellin*, plaintiffs had to sell their condominium due to the odor. 115 A.3d at 801; *see Motorists Mut. Ins. Co. v. Hardinger*, 131 F.App'x 823, 826 (3d Cir. 2005) (OB 27) (e-coli contamination of well water resulted in home being "nearly eliminated or destroyed"; insured permanently vacated property); *Widder v. La. Citizens Prop. Ins. Co.*, 82 So.3d 294, 295-96 (La. Ct. App. 2011) (OB 27) (family "had to move from the home due to the dangerous level of lead contamination"; property "uninhabitable until it has been gutted and remediated").

Moreover, in *Cook v. Allstate Insurance Co.*, No.48D02-0611-PL-01156, 2007 Ind. Super. LEXIS 32 (Nov. 30, 2007) (UP n.28), brown recluse spiders living and breeding inside walls forced the insured and his family to leave their house and try (unsuccessfully) to sell it. *Id.* at *10. And in *Murray v. State Farm Fire & Casualty Co.*, 509 S.E.2d 1 (W. Va. 1998) (UP 5), boulders fell on and damaged the insured's homes, and the threat of additional rock falls forced them to abandon their homes. *Id.* at 17; *see also Fowler Co. v. QBE Ins. Corp.*, 474 F.Supp.3d 1149, 1153, 1158 (D. Or. 2020) (UP 20, 21) (drilling equipment "permanently buried underground" and irretrievable); *Intermodal*, 2018 WL 3829767, at *1-3 (OB 33-34) (cargo sent to wrong location was unrecoverable).

BG/JCH (at 7, 10, 18) cite *Shade Foods, Inc. v. Innovative Products Sales & Marketing*, 78 Cal.App.4th 847 (2000), but it involved a CGL claim (not a first-party property claim) arising out of wood splinters found in nut clusters used in a

cereal. There was a *total* dispossession of the property: the "entire stock of contaminated boxes of cereal … [was] destroyed," and the remaining nut clusters had to be grinded into a power and used for a different product. *Id*. at 861-62.

E. Circus's COVID cases are distinguishable or lack persuasive value.

Circus fares no better with its reliance on a handful of decisions finding coverage for COVID-19 losses, in contrast to the hundreds of contrary cases. *See supra* at 11-32.

Kingray Inc. v. Farmers Group, No.ED-CV-20963-JGB, 2021 WL 837622 (C.D. Cal. Mar. 4, 2021) (OB n.8, n.10), involved different policy language—coverage for "loss of use of tangible property *that is not physically injured*." *Id*. at *4 (emphasis added); *supra* at 21.[23] Moreover, while *Kingray* purported to apply California and New York law, it did so without mentioning the seminal California decision—*MRI Healthcare*, *supra* at 17-18—and without citing a single case from New York, where courts uniformly reject the notion "physical loss" can occur without physical alteration to the property.[24] Also, *Kingray* specifically noted

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[23] *Schlamm Stone & Dolan, LLP v. Seneca Insurance Co.* is also unhelpful because the policy there covered "loss of use" without physical damage. 800 N.Y.S.2d 356, 2005 WL 600021, at *4-5 (Sup. Ct. Mar. 4, 2005) (UP 10) (smoke and dust in office following 9/11 attacks); *see Essex Ins. Co. v. BloomSouth Flooring Corp*., 562 F.3d 399, 401 (1st Cir. 2009) (UP n.7) (same; "sour chemical" odor from carpet).

[24] *Sharde Harvey, DDS, PLLC v. Sentinel Ins. Co*., No.20-CV-3350-PGG, 2021 WL 1034259, at *5-6 (S.D.N.Y. Mar. 18, 2021) (citing seven COVID-19 (Continued …)

dismissal was required where, as here (*infra* at 45), the policy excludes losses caused by a virus. *Id*. at *6.[25]

Moreover, neither *In re Society Ins. Co*., No.20-C-2005, 2021 WL 679109 (N.D. Ill. Feb. 22, 2021), nor *Derek Scott Williams PLLC v. Cincinnati Insurance Co*., No.20-C-2806, 2021 U.S. Dist. LEXIS 37096 (N.D. Ill. Feb. 28, 2021) (OB n.10), addressed, referenced, or attempted to distinguish any of the slew of cases holding that limits on the use of physical space for a particular purpose is not a "physical loss" absent physical alteration of the property itself. *Society* and *Derek Scott* are also inconsistent with overwhelming case law from Illinois, *see Crescent*, 2021 WL 633356 ("overwhelming majority of courts have found no coverage

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decisions from New York); *Kim-Chee LLC v. Phila. Indem. Ins. Co*., No.1:20-cv-1136, 2021 WL 1600831, at *3 (W.D.N.Y. Apr. 23, 2021) (noting "unbroken line" of decisions against insureds in COVID-19 cases); *see also Roundabout Theatre Co. v. Cont'l Cas. Co*., 302 A.D.2d 1, 7-8 (N.Y. App. Div. 2002) (rejecting "loss of use" claim without physical damage).

[25] In *Cinemark Holdings, Inc. v. Factory Mutual Insurance Co*., 500 F.Supp.3d 565, 566-67 (E.D. Tex. 2021) (OB n.10), the policy at issue, unlike Circus's, covered loss caused by "communicable disease." And two other decisions cited by Circus, *Serendipitous, LLC/Melt v. Cincinnati Insurance Co*., No.2:20-cv-873-MHH, 2021 WL 1816960, at *5 (N.D. Ala. May 6, 2021) (OB n.10), and *Ungarean, DMD v. CNA & Valley Forge Insurance Co*., No.GD-20-6544, 2021 WL 1164836, at *9 (Pa. Common Pleas Ct. Mar. 25, 2021) (OB n.10), did not involve the presence of COVID-19 on the property.

when interpreting "physical loss or damage"),[26] and elsewhere, *supra* at 11-32; *Town Kitchen*, 2021 WL 768273, at *5-6 (rejecting *In re Society*); *St. Julian Wine Co. v. Cincinnati Ins. Co.*, 1:20-cv-374, 2021 WL 1049875, at *3 (W.D. Mich. Mar. 19, 2021) (rejecting *Derek Scott*).

Similarly, the same judge decided *Studio 417, Inc. v. Cincinnati Insurance Co.*, *Blue Springs Dental Care, LLC v. Owners Insurance Co.*, and *Neco, Inc. v. Owners Insurance Co*. (OB n.10, n.11.) A different Missouri federal district court, however, rejected a COVID-19 property claim, regardless of "[w]hether the complaint is couched in terms of [the virus's] presence on the premises or of loss of use of premises due to the stay-at-home orders (or the virus itself)." *Zwillo*, 504 F.Supp.3d at 1041. Indeed, "[m]ultiple courts have considered those decisions of … [the *Studio 417*] Judge … and have found them to be outliers." *Select Hosp.*, 2021 WL 1293407, at *3; *see also Akridge Family Dental, Inc. v. Cincinnati Ins. Co.*, No.CV1:20-427-JB, 2021 WL 2020605, at *4 (S.D. Ala. May 6, 2021) (rejecting *Studio 417*). Moreover, in *Studio 417*, *Blue Springs* and *Neco*, the absence of a virus exclusion was significant. 478 F.Supp.3d 794, 797 (W.D. Mo.

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[26] The "majority of courts" in Illinois "have found that the loss of use of property because of government closure orders … does not constitute a direct physical loss of property." *Bachman's Inc. v. Florists' Mut. Ins. Co.*, No.20-2399, 2021 WL 981246, at *4 (D. Minn. Mar. 16, 2021); *see Zajas, Inc. v. Badger Mutual Ins. Co.*, No.20-cv-1055-DWD, 2021 WL 1102403, at *2-3 (S.D. Ill. Mar. 23, 2021)** ("[a]greeing with many courts" that COVID-19 losses are not covered under a property policy).

2020); 488 F.Supp.3d 867, 870 n.2 (W.D. Mo. 2020); No.20-CV-4211-SRB, 2021 WL 601501, at *6 (W.D. Mo. Feb. 16, 2021).

Courts have also refused to follow *Elegant Massage, LLC v. State Farm Mutual Automobile Insurance Co*., No.2:20-cv-265, 2020 WL 7249624 (E.D. Va. Dec. 9, 2020) (OB 45), labeling it "unpersuasive" and a "notable outlier." *Eye Care Center of N.J. v. Twin City Fire Ins. Co*., No.20-5743-KM, 2021 WL 457890, at *4, n.4 (D.N.J. Feb. 8, 2021); *see, e.g.*, *LJ New Haven v. AmGUARD Ins. Co*., No.3:20-cv-751-MPS, 2020 WL 7495622, at *7 n.7 (D. Conn. Dec. 21, 2020) (*Elegant Massage* unpersuasive in light of weight of contrary authority); *15 Oz Fresh & Healthy Food LLC v. Underwriters at Lloyd's London*, No.20-23407-CIV, 2021 WL 896216, at *6, n.2 (S.D. Fla. Feb. 22, 2021) (same); *Bluegrass*, 2021 WL 42050, at *4 (describing *Elegant Massage* as a "notable outlier"). And for good reason: the primary case on which *Elegant Massage* relied, *TRAVCO Ins. Co. v. Ward*, 715 F.Supp.2d 699 (E.D. Va. 2010), actually held that property must have been "rendered unusable *by physical forces*," like a rock slide. *Id*. at 708 (emphasis added).[27] Closure to prevent the spread of disease does not qualify. *See Kahn v. Pa. Nat'l Mut. Cas. Ins. Co*., No.1:20-cv-781, 2021 WL 422607, at *6

[27] *TRAVCO*, 715 F.Supp.2d at 704, and *In re Chinese Manufactured Drywall Products Liability Litigation*, 759 F.Supp.2d 822, 832, 837 (E.D. La. 2010) (UP n.37), involved corrosion damage to structures contaminated with toxic gases released by drywall; the policies covered "loss of use of tangible property" *even without physical damage*. *Supra* at 21, n.23.

(M.D. Pa. Feb. 8, 2021) (rejecting COVID-19 claim under property policy). In any event, as *Elegant Massage* recognized, it "d[id] not go as far as to interpret 'direct physical loss' to mean whenever property cannot be used for its intended purpose due to intangible sources." 2020 WL 7249624, at *9.

Henderson Road Restaurant Systems, Inc. v. Zurich American Insurance Co., No.20-cv-1239, 2021 WL 168422 (N.D. Ohio Jan. 19, 2021) (OB 45 n.10), involved a policy that, unlike Circus's, did not define "covered cause of loss" to include a "direct physical loss" requirement. Instead, the policy covered a "fortuitous cause or event, not otherwise excluded," such that closure orders or the presence of a virus could qualify. *Id*. at *10.

Finally, three state court cases did not apply the *Twombly* pleading standard. *P.F. Chang's China Bistro, Inc. v. Certain Underwriters at Lloyd's of London*, No.20-ST-CV-17169, 2021 WL 818659 (Cal. Super. Ct. Feb. 4, 2021) (OB n.10); *Goodwill Indus. of Orange Cnty. v. Philadelphia Indem. Ins. Co.*, No.302020001169032-CUICCX, 2021 WL 476268 (Cal. Super. Ct. Jan. 28, 2021); *Craven v. Cameron Mut. Ins. Co.*, No.20CY-CV6381, 2021 WL 1115247 (Mo. Cir. Ct. Mar. 9, 2021) (OB n.10).

Moreover, *Goodwill* and *P.F. Chang's* simply dismissed as "not binding" the numerous California federal district court cases (*supra* at 17-20) interpreting "physical loss or damage." 2021 WL 476268, at *4; 2021 WL 818659, at *2. As a result, "[t]hese two trial court decisions are outliers and stand in stark contrast to the weight of California decisions, including other state court decisions." *Barbizon*

Sch. of S.F., Inc. v. Sentinel Ins. Co., No.20-cv-8578-TSH, 2021 WL 1222161, at *8 n.2 (N.D. Cal. Mar. 31, 2021).

And *Craven* relied on *Henderson* (different policy language, *supra* at 44) and *Neco*, a Missouri federal district court decision, without even mentioning *Zwillo*, a contrary Missouri federal court decision. *Supra* at 15. In any event, none of the three state court decisions involved a virus exclusion.[28]

III. The district court correctly concluded the Contaminant Exclusion bars all coverage.

A. The Contaminant Exclusion's plain language is dispositive.

An independent basis to affirm is the Policy's Contaminant Exclusion, which defines "contaminant" to include any "virus" which "after its release *can cause or threaten damage to human health* or human welfare or causes or threatens damage, deterioration, loss of value, marketability or *loss of use* to property." (4-ER-623 (emphasis added).) And this Exclusion applies whether a virus is the "direct or indirect, proximate or remote" cause for the loss or damage. (4-ER-594.)

The application of the Contaminant Exclusion is apparent from the face of the Complaint. There is no question the COVID-19 virus can cause or threaten damage to human health: Circus alleges COVID-19 has killed more than 127,000

[28] The exclusion in *Southern Dental Birmingham LLC v. Cincinnati Insurance Co.*, No.2:20-CV-681-AMM, 2021 WL 1217327, at *1 (N.D. Ala. Mar. 19, 2021) (OB n.10), applied to radioactive contamination, mold, pollutants, and volcanic ash, but *not* viruses.

Americans. (4-ER-559.) Circus further asserts COVID-19 is "spread by human-to-human transfer," through the air by breathing, coughing, and sneezing. (4-ER-560; *id*. at 3-ER-535, 548-51.) Thus, as the district court correctly found, Circus' pleadings confirm COVID-19 "has been released, dispersed, and discharged into the atmosphere, resulting in infections and transmissions."[29] (1-ER-15.) Where, as here, a policy exclusion is unambiguous, courts "review it, like any other contract, as it is written, without … attempting to effectuate [the insured's] reasonable expectations." *McDaniel v. Sierra Health & Life Ins. Co.*, 53 P.3d 904, 906 (Nev. 2002).

Numerous courts have dismissed claims for COVID-19 losses based on similar (some nearly identical) exclusions. For instance, in *Zwillo*, like here, the policy excluded losses caused by or resulting from the "actual, alleged or threatened release, discharge, escape or dispersal of Contaminants or Pollutants"; as with Circus's Policy, "Contaminants or Pollutants" expressly included a "virus." 504 F.Supp.3d at 1041-42. And *Jenkinson's South, Inc. v. Westchester Surplus Lines Insurance Co.*, No.OCN-L-1607-20, Add., Tab C at *4 (N.J. Super. Ct. July 2, 2021), also enforced the same exclusion. *Id*. at *14 ("based on a plain reading of the policy the term 'virus' is *not* intended to be modified by [environmental statutes]" (emphasis added)).

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[29] *See* 3-ER-343 (arguing COVID-19 is "comparable to a wildfire" that is "spread by infected people breathing out invisible embers").

The exclusion in *Ralph Lauren*, 2021 WL 1904739, defined "contamination" to include a "virus." *Id.* at *4. Thus, that exclusion "unambiguously excludes coverage for 'any condition of property due to the actual or suspected presence of any ... virus,' which would encompass … COVID-19." *Id.*; *see Manhattan*, 2021 WL 1016113, at *2 n.3 (policy "clearly and explicitly" excludes coverage for losses "arising from 'Contamination,' which is defined as '[a]ny condition of property due to the actual presence of any foreign substance" including viruses); *Ascent*, 2021 WL 1791490, at *4 (noting "virus" was "a type of contaminant identified in the policy"; allegations COVID-19 had caused "the loss of use of [insured's] property … establish the applicability of the Contamination Exclusion").[30]

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[30] *See also, e.g.*, *Lion*, 2021 WL 2389885, at *1, 4 (excluding losses "caused by, resulting from, or relating to any virus"; finding "no reason to not join" the "chorus" of cases finding such an exclusion unambiguous); *Mauricio Martinez, DMD v. Allied Ins. Co.*, 483 F.Supp.3d 1189, 1191-92 (M.D. Fla. 2020) (no coverage where policy "expressly excludes" losses "caused 'directly or indirectly' by any virus"); *G&A Family Enters. v. Am. Fam. Ins. Co*., No.1:20-cv-03192, 2021 WL 1947180, at *6 (N.D. Ga. May 13, 2021) (same); *10012 Holdings, Inc. v. Sentinel Ins. Co*., No.20-CIV-4471-LGS, 2020 WL 7360252, at *4 (S.D.N.Y. Dec. 15, 2020)** (exclusion for "pollutants," defined as any "material which causes or threatens to cause … loss of use of property, or which threatens human health or welfare"); *Brunswick Panini's, LLC v. Zurich Am. Ins. Co*., No.1:20-cv-1895, 2021 WL 663675, at *9 (N.D. Ohio Feb. 19, 2021)** (exclusion for "loss or damage consisting of, directly or indirectly caused by … the presence, growth, proliferation, spread, or any activity of 'microorganisms'," which includes "virus"); *Mortar*, 2020 WL 7495180, at *2 (excluding losses "resulting from, caused directly or indirectly, proximately or remotely by … any … virus");
(Continued …)

"[T]he applicability of the [contaminant] exclusion is free from doubt." *Firebirds Int'l, LLC v. Zurich Am. Ins. Co.*, No.2020-CH-05360, 2021 WL 2007870, at *4-5 (Ill. Cir. Ct. Apr. 19, 2021) (exclusion "clear and unambiguous"; "contamination" defined as "any condition of property due to the actual presence of any foreign substance, impurity, pollutant, hazardous material, … or … virus"). The factual scenario in this case is the exact type anticipated by the Contaminant Exclusion.

B. The Contaminant Exclusion is not limited to traditional pollution.

Nothing in the Policy limits the Contaminant Exclusion to "traditional environmental pollution" that is "released" onto its property. *See PBM Nutritionals LLC v. Lexington Ins. Co.*, 724 S.E.2d 707, 714 (Va. 2012) (pollution exclusions did not "reference any terms such as 'environment,' 'environmental,' 'industrial,' or any other limiting language suggesting that the exclusions are limited to 'traditional'" pollution). And "release, discharge, escape, or dispersal" are common words with meanings *outside* the environmental-pollution context.[31] (OB 53-55.)

Boulevard Carroll Ent. Grp. v. Fireman's Fund Ins. Co., No.CV2011771SDW, 2020 WL 7338081, at *1 (D.N.J. Dec. 14, 2020)** (excluding loss caused "directly or indirectly or resulting from … any conditions of health, bacteria, or virus").

[31] "[D]ispersal" is "the process or result of the spreading of *organisms* from one place to another." https://www.merriam-webster.com/dictionary/dispersal (last visited June 30, 2021) (emphasis added). "Release" is defined as "the act or an (Continued …)

1. *Casino West* has no relevance to this case.

Century Surety Co. v. Casino West, Inc., 329 P.3d 614 (Nev. 2014), the principal case Circus invokes in an attempt to limit the Contaminant Exclusion to "traditional environmental pollution," is distinguishable for at four significant reasons.

a. *Casino West* did not involve a "contaminant" exclusion.

First, the Contaminant Exclusion expressly applies to other contaminants not traditionally involved in environmental pollution, like viruses. The exclusion in *Casino West* was a "Pollution Exclusion" (not a "Pollution *or Contamination* Exclusion"), where "Pollutants" did *not* encompass health-harming contaminants that are not traditional pollutants (i.e., viruses). *See Ascent*, 2021 WL 1791490 at *5 ("any definition of 'virus' that somehow carves out COVID-19 is not a permissible meaning" of a contaminant exclusion; rejecting insured's "traditional environmental pollution" argument as an "invitation to engage in … mental gymnastics"); *Zwillo*, 504 F.Supp.3d at 1041 ("[T]he provision … expressly excludes damage or … loss of use of property caused by a virus. As alleged in the complaint, COVID-19 is plainly a virus.").

Circus cites *In Atlantic Mutual Insurance Co. v. McFadden*, 595 N.E.2d 762 (Mass. 1992) (OB 54), where the policy's "pollution exclusion" did not

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instance of liberating or freeing." https://www.merriam-webster.com/dictionary/release (last visited June 30, 2021).

specifically define "pollutant" to include lead paint; thus, the court looked to other terms in the exclusion to conclude it did not apply to lead paint-related injuries. *Id.* at 764. Here, the Contaminant Exclusion is specifically defined to *include* health-harming "viruses" like COVID-19. It is therefore irrelevant whether other terms in the Contaminant Exclusion may also be commonly used in environmental law. *See Enron Oil Trading & Transp. v. Walbrook Ins. Co.*, 132 F.3d 526 (9th Cir. 1997) (OB 53, 56) (coverage under third-party CGL policy for causing product contamination; "use of the words 'seepage, pollution and contamination,' together with the specific exclusion of 'the cost of removing, nullifying or cleaning-up seeping polluting or contaminating substances,'" indicated exclusion addressed environmental-type harms).

b. *Casino West* involved a CGL policy.

Second, *Casino West* involved a CGL policy, in which "pollution" exclusions are intended to prevent "polluters" from escaping liability for harm to third parties caused by their environmental pollution. *Id.* at 617-18.[32] As the district court recognized (1-ER-14-15), that doctrine does not apply to a first-party property policy with an exclusion directed at contaminants that harm *people*,

[32] "[I]f an insured knows his or her policy covers any type of pollution, he or she may take fewer precautions to ensure such environmental contaminations do not occur." 329 P.3d at 618. But that is irrelevant to a first-party property policy, where the insured's negligence is irrelevant to causation. *See Garvey*, 770 P.2d at 711; *supra* at n.12.

including "viruses," and not just pollutants that could harm the environment. In fact, Circus's Policy does not insure against liability to third parties at all. Thus, by its very purpose, the Policy does not insure Circus for risk as a potential environmental polluter.

Broome County v. Travelers Indemnity Co., 6 N.Y.S.3d 300 (App. Div. 2015), illustrates these points. *Broome* held a pollution exclusion in a first-party property policy (unlike *Enron*) was not ambiguous because silica dust fell squarely within the policy's definition of "pollutant," which expressly included (unlike *Enron* above) "*unhealthy* or hazardous building materials." *Id.* at 303 (emphasis added). The court further rejected, as inapplicable to such policies, the argument that the terms "discharge, dispersal, seepage, migration, release or escape" in a pollution exclusion suggest the exclusion is limited to environmental pollution:

> if the words '[d]ischarge, dispersal, seepage, migration, release or escape' are read as not intended to describe short migratory events where the relevant contaminant remains on the plaintiff's property and does damage to it, then the exclusion has no significance at all in this first-party policy … Applying the only reasonable reading … that exclusion precludes coverage for the loss at issue.

Id. (citations omitted); *see Deni Assocs. of Fla., Inc. v. State Farm Fire & Cas. Ins. Co.*, 711 So.2d 1135, 1137 (Fla. 1998) (enforcing exclusion for property loss "arising out of the actual, alleged or threatened discharge, dispersal, release or escape of … contaminant").

Moreover, Circus's Policy separately excludes coverage for environmental features like "land" and "water." (4-ER-597.) Thus, interpreting the Contaminant Exclusion to apply only to liability from traditional environmental pollution would

impermissibly render it meaningless. *Fourth Street*, 270 P.3d at 1239 (policy must be construed so as not to render term meaningless).

c. The Contaminant Exclusion is limited in scope.

Third, and relatedly, *Casino West*'s rationale for limiting a pollution exclusion to traditional environmental pollution is not present here. The Nevada Supreme Court noted that, "[t]aken at face value, the policy's definition of a pollutant is broad enough that it could be read to include items such as soap, shampoo, rubbing alcohol, and bleach insofar as these items are capable of reasonably being classified as contaminants or irritants. … Such results would undoubtedly be absurd and contrary to any reasonable policyholder's expectations." 329 P.3d at 617. However, the health-harming Contaminant Exclusion here, by its terms, does *not* apply to every irritant or contaminant; rather, it applies only to an irritant or contaminant "which after its release can cause or threaten damage to human health or human welfare or causes or threatens damage, deterioration, loss of value, marketability or loss of use to property insured hereunder." (4-ER-623.) Thus, while the Contaminant Exclusion is not limited solely to traditional environmental pollution, it is certainly not "limitless." (OB 56.)

d. The exclusion in *Casino West* did not address "loss of use" of property.

Fourth, the Contaminant Exclusion in Circus's Policy applies where a health-harming contaminant causes a "loss of use to property." It is not limited to

damage from the contaminant's environmental impact, as in *Casino West*. (4-ER-623.)

These are not "slight differences," as Circus claims, in the language of *Casino West*'s exclusion and the Contaminant Exclusion here. They are significant differences that make *Casino West* inapplicable.

2. The term "virus" is not limited to "waste."

Circus erroneously argues the Contaminant Exclusion's reference to "virus" in the bolded phrase below is merely an "example" of what the exclusion means by "waste":

> Pollutants or Contaminants means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste, which after its release can cause or threaten damage to human health or human welfare or causes or threatens damage, deterioration, loss of value, marketability or loss of use to property insured hereunder, **including, but not limited to, bacteria, virus, or hazardous substances** ….

(OB 52-53.) The district court rejected that argument, noting Circus "contorts the clear language of the [P]olicy when it argues that the exclusion requires the virus to have been released from solid waste, improperly deleting an intermediary clause in order to support its reading." (1-ER-15 ("Such efforts are unpersuasive and have been rejected by courts before me."); *see Zwillo*, 504 F.Supp.3d at 1042 (rejecting same argument; courts "may not create an ambiguity" by distorting policy language). The bolded phrase above actually modifies "irritant or contaminant." *See Dow v. Lassen Irrigation Co.*, 216 Cal.App.4th 766, 783 (2013) (where "a phrase is set off from the rest of the main sentence by commas, it should be read as

a parenthetical phrase that is segregate[d] … from the rest of the sentence" (quotations omitted)). Thus, the definition is correctly read as: "any … irritant or contaminant (*including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste*) which after its release can cause or threaten damage to human health … including, but not limited to, … virus." *Zwillo*, 504 F.Supp.3d at 1041.

3. Circus's cases are distinguishable.

Unlike the Contaminant Exclusion, the exclusions in Circus's cases (OB 51) were limited to "pollutants" or "pollution"—they did *not* extend to contaminants. *Vigilant Ins. Co. v. V.I. Techs., Inc.*, 676 N.Y.S.2d 596 (App. Div. 1998)*; Unitrin Auto & Home Ins. Co. v. Karp,* 481 F.Supp.3d 514, 517 (D. Md. 2020); *Villa Los Alamos Homeowners Ass'n v. State Farm Gen. Ins. Co.*, 130 Cal.Rptr.3d 374, 384 (App. 2011); *Republic Franklin Ins. Co. v. L&J Realty Corp.*, 720 N.Y.S.2d 473 (App. Div. 2001). In addition, none of the exclusions in Circus's cases defined "pollutant" to include a "virus."

Amici BG/JCH (at 26) cite *JGB Vegas Retail Lessee, LLC v. Starr Surplus Lines Insurance Co.*, No.A-20-816628-B, 2020 WL 7190023 (Nev. Dist. Ct. Nov. 30, 2020), but as the district court noted, *JGB* was "decided under Nevada Rule [] 12(b)(5), which articulates a lenient 'notice' pleading standard that has been abandoned by the federal courts." (1-ER-13.) Nor did *JGB* undertake any analysis of the "pollution and contamination" exclusion in that case, or address the distinction between so-called "polluters' exclusions" in CGL policies and contaminant exclusions in first-party property policies. (*Supra* at 49-52.) Moreover, *JGB* also failed to address any of the overwhelming contrary authorities

on the "direct physical loss" issue. The opinion is so flawed Circus doesn't even cite it in its Opening Brief.

C. Nothing required AIG to use the so-called "standard" virus exclusion.

Circus (OB 47) and amici BG/JCH (24-27) suggest that, if AIG had intended to exclude all losses from viruses, it could have used what Circus refers to as the "standard" form "virus exclusion, which the Insurance Services Office ("ISO") developed after the first SARS epidemic." Courts have rejected that argument. *Kim-Chee*, 2021 WL 1600831, at *8; *Zwillo*, 504 F.Supp.3d at 1042; *see also Headwear*, 504 F.Supp.3d at 1201 n.61 ("The fact that Defendant chose not to include [ISO's] virus exclusion in the Policy does not render it ambiguous."); *St. Julian*, 2021 WL 1049875, at *4 (same). An unambiguous exclusion, like the Contaminant Exclusion, is not somehow nullified simply because a different policy uses different words to similar effect.

Nor does Circus and its amici give the full picture. In the circular containing the so-called standard "Virus or Bacteria" Endorsement, ISO explained:

> While property policies have not been a source of recovery for losses involving contamination by disease-causing agents, *the specter of pandemic* or hitherto unorthodox transmission of infectious material raises the concern that insurers employing such policies may face claims in which there are efforts to expand coverage and to create sources of recovery for such losses, *contrary to policy intent*."

https://www.propertyinsurancecoveragelaw.com (emphasis added); BG/JCH 24 n.13. Indeed, ISO told state regulators the virus exclusion would merely *clarify* that "coverage for disease-causing agents *has never been in effect*, and was *never intended to be included*, in the property policies." *Id*. (emphasis added). In other

words, "the reason ISO submitted a virus exclusion was precisely to make explicit that the standard policy was meant to exclude virus-related claims." *AFM Mattress Co. v. Motorists Com. Mut. Ins. Co.*, No.20-CV-3556, 2021 WL 1725790, at *2 (N.D. Ill. Apr. 15, 2021)** (dismissing COVID-19 BI claim). The ISO "form" virus exclusion is a non-issue in this case.

IV. Certification to the Nevada Supreme Court is unnecessary and would cause undue delay.

Circus's request that this Court certify two Policy interpretation questions is too little, too late.

First, Circus raised certification for the first time on appeal. "Ordinarily ... a movant should not be allowed a second chance at victory when ... the district court employed a reasonable interpretation of state law." *In re McLinn*, 744 F.2d 677, 681 (9th Cir. 1984) ("[P]articularly compelling reasons must be shown when certification is requested for the first time on appeal."); *see Thompson v. Paul*, 547 F.3d 1055, 1065 (9th Cir. 2008) ("[o]therwise, the initial federal court decision will be nothing but a gamble with certification sought only after an adverse ruling").

Second, the questions Circus seeks to certify concern the proper interpretation of a contract, an exercise the state courts are in no better position to conduct than this Court. *See Micomonaco v. State of Wash.*, 45 F.3d 316, 322 (9th Cir. 1995) (refusing certification where interpretation turned on objective test, which state supreme court was "in no better position" to apply). Indeed, Nevada's contract interpretation rules provide this Court "with an adequate basis to decide this appeal." *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 208 n.11 (5th Cir.

2007) (denying certification of policy interpretation question); *see Erie Ins. Grp. v. Sear Corp.*, 102 F.3d 889, 892 (7th Cir. 1996) (denying certification motion involving policy interpretation; "we receive ample assistance from general principles of contract interpretation and persuasive authority from other jurisdictions that have interpreted similar provisions"); *TransAm. Ins. Co. v. Duro Bag Mfg. Co.*, 50 F.3d 370, 372 (6th Cir. 1995) (denying certification; "[a]lthough Kentucky has not addressed the exact question at issue, it does have well-established principles to govern the interpretation of insurance contracts.").

Because a state court's involvement is unnecessary to decide this appeal, certification would serve no purpose other than to delay these proceedings with another round of briefing. *In re McLinn*, 744 F.2d 677, 682 (9th Cir. 1984) (denying motion where certification, with its delays, would not be "sufficiently helpful"). This Court should decide the contract-interpretation issues Circus chose to bring in federal court. *See Rain v. Rolls-Royce Corp.*, 626 F.3d 372, 378-79 (7th Cir. 2010) (denying certification; "we are entitled to take into account whether the request for certification to the state court came from the party who chose federal jurisdiction in the first place").

V. Circus waived leave to amend, which would be futile in any event.

Nor is there any basis on which to remand this case with leave to amend the Complaint. Circus didn't request leave in its Opening Brief. *See Indep. Towers of Wash. v. State of Wash.*, 350 F.3d 925, 929 (9th Cir. 2003) ("We will not consider any claims that were not actually argued in appellant's opening brief." (quotations omitted)). And the district court previously granted leave to amend to Circus,

which declined so it could seek an immediate appeal of the district court's dismissal order. (1-ER-19.) Circus should not be allowed a second bite at the apple simply because it does not like the outcome on appeal.

Nor can amici BG/JCH resurrect a waived issue. *Am. Trucking Ass'ns, Inc. v. City of L.A.*, 559 F.3d 1046, 1053 n.11 (9th Cir. 2009) ("We decline to consider the amicus brief … which seeks to raise issues not raised or briefed by the parties."); *U.S. v. City of L.A.*, 288 F.3d 391, 400 (9th Cir. 2002) (amicus status "does not allow [amicus] to raise issues or arguments" not already raised "and gives it no right of appeal"). "The role of amicus' briefing is to inform the Court and provide perspective on the issue the parties *themselves* raise; it is not to act like a plaintiff and bring additional causes of action." *Wildearth Guardians v. Jeffries*, 370 F.Supp.3d 1208, 1228 & n.2 (D. Or. 2019) (citing *Miller-Wohl Co. v. Comm'r of Labor & Indus. State of Mont.*, 694 F.2d 203, 204 (9th Cir. 1982) ("[a]n amicus curiae is not a party to litigation")); *see also* 4 Am.Jur.2d *Amicus Curiae* § 7 ("[A]n appellate court cannot grant relief on an issue raised by the amicus brief, but not by the appellant.").

Regardless, "the many physical remedial and mitigation measures that businesses have undertaken" (BG/JCH 16-17), such as "spatial reconfigurations," "improve[d] ventilation," and "modification of physical behaviors" (i.e., social

distancing), are designed to stop the spread of the virus between people.[33] None of that involves repairing or remediating property that *itself* was physically altered or lost because of COVID-19's presence.

Finally, BG/JCH claim (13-14) "even after cleaning, some physical residue of the virus, and some alteration of the surface caused by the virus, remains." The sole cite for that claim, however, is "Fomite *transmission* and *disinfection* strategies for SARS-CoV-2 and related viruses," an article (not in the record, and not referenced in the Complaint) that goes into detail about COVID-19's molecular make-up; however, it makes no mention of any physical alteration to property itself.[34]

CONCLUSION

This Court should affirm the order dismissing this action with prejudice.

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[33] *See State Farm Fire & Cas. Co. v. Super. Ct.*, 215 Cal.App.3d 1435, 1445 (1989) ("the cost of repair or replacement" are *not* "active physical forces"—"they are *not the cause of the damage* to the structures" (emphasis added)); *Crescent*, 2021 WL 633356, at *3 (installing air filters, plexiglass partitions, and protection shields does not constitute "repairs" to physically-damaged property); *Cafe La Trova, LLC v. Aspen Specialty Ins. Co.*, No.20-22055-CIV, 2021 WL 602585, at *9 (S.D. Fla. Feb. 16, 2021) (same).

[34] The same is true of BG/JCH's argument (at 14) that COVID-19 "can migrate substantial distances through a building's ventilation systems." No matter how far it travels, a virus particle does not physically alter the ducts, fans, compressors, etc.

RESPECTFULLY SUBMITTED this 9th day of July, 2021.

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, AIG states that, to its knowledge, the following appeals pending in this Court may raise the same or closely related issue that is raised in Circus's appeal—the proper interpretation of "physical loss or damage" in a business property policy:

1. *Chattanooga Prof'l Baseball LLC v. National Cas. Co.*, No. 20-17422 (appeal filed 12/11/20).

2. *Karen Trinh, DDS v. State Farm Gen. Ins. Co.*, No. 21-15147 (appeal filed 1/25/21).

3. *Unmasked Mgmt. Inc. v. Century-National Ins. Co.*, No. 21-55090 (appeal filed 2/4/21)

4. *O'Brien Sales & Mktg., Inc. v. Transp. Ins. Co.*, No. 21-15241 (appeal filed 2/10/21)

5. *Founder Institute Inc. v. Hartford Fire Ins. Co.*, No. 21-15404 (appeal filed 3/5/21)

6. *Out West Rest. Grp. Inc. v. Affiliated FM Ins. Co.*, No. 21-15585 (appeal filed 4/1/21)

7. *Daneli Shoe Co. v. Valley Forge Ins. Co.*, No. 21-55374, (appeal filed 4/16/21)

8. *Another Planet Entm't LLC v. Vigilant Ins. Co.*, No. 21-16093 (appeal filed 6/28/21)

9. *Nguyen v. Travelers Cas. Ins. Co. of Am.*, No. 21-35496 (appeal filed 6/24/21).

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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of July, 2021, I caused a true and correct copy of the foregoing Answering Brief to be electronically filed with the Clerk of the Court and served on the following case participants using the CM/ECF system:

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ADDENDUM TO ANSWERING BRIEF

Tab A — Order in *Source One Restaurant Corp. v. Western World Insurance Co.*, No.20-L-7421 (Ill. Circuit Ct. May 10, 2021)

Tab B — Transcript of decision in *Capri Holdings, Ltd. v. Zurich American Insurance Co.*, No. BER-L-2322-21 (N.J. Super. Ct. June 25, 2021)

Tab C — Order in *Jenkinson's South, Inc. v. Westchester Surplus Lines Insurance Co.*, No.OCN-L-1607-20 (N.J. Super. Ct. July 2, 2021)

Tab D — Order in *MHG Hotels v. EMC Risk Servs. LLC*, No.1:20-cv-01620 (S.D. Ind. Mar. 8, 2021)

Addendum

Tab A

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

SOURCE ONE RESTAURANT CORPORATION d/b/a KENNY'S IRISH PUB, Plaintiff, v. WESTERN WORLD INSURANCE CO., INC., RISK PLACEMENT SERVICES, INC., and KMB INSURANCE CONSULTANTS, INC., Defendant.	)	No. 20 L 7421

ORDER

This matter coming to be heard on 1) the motion of defendant Western World Insurance Co., Inc. ("Western World") for judgment on the pleadings on the First Amended Complaint of plaintiff Source One Restaurant Corporation d/b/a Kenny's Irish Pub ("plaintiff") pursuant to 735 ILCS 5/2-615(e), and 2) the motion of defendant KMB Insurance Consultants, Inc. ("KMB") to dismiss Count VII of plaintiff's complaint pursuant to 735 ILC 5/2-615.

Facts

The claims in the first amended complaint stem from losses plaintiff alleges it incurred as a result of the Covid-19 pandemic. On March 15, 2020, Governor Pritzker issued an executive order closing all restaurants, bars, and movie theaters in an effort to slow the spread of Covid-19. Governor Pritzker's executive order was expanded on March 16, 2020 to close all "non-essential business" until March 30, 2020. The executive order was again extended until May 30, 2020. Plaintiff alleges defendant Western World extended to it an all-risk commercial property insurance policy in exchange for substantial premiums. Plaintiff alleges Western World agreed to provide it with "business income coverage" in the event of suspension of operations. Further,

plaintiffs allege the policy agreed to provide "extra expense coverage" and "extra expense" as indicated in the policy. Plaintiff alleges Western World agreed to provide "civil authority" coverage for damage to property including losses caused by action of civil authority that prohibits access to the premises.

In response to the pandemic and executive orders, plaintiff alleges it was forced to suspend operations and terminate, lay-off and furlough the majority of its workforce. Plaintiff alleges prior to the closure, the Covid-19 contagion remained present on the surfaces of the premises and there was physical damage. Plaintiff alleges damages resulting in substantial loss of business income, loss of labor force expense, and an increase in expenses to continue business operations. Plaintiff alleges Western World breached its contract by failing to pay out under the policy for all the damage due to the business interruption. At issue is whether the policy issued by Western World covers losses due to the Covid-19 pandemic and subsequent closure orders of Governor Pritzker.

Plaintiff additionally alleges Risk Placement Services, Inc., ("RPS") and KMB Insurance Consultants, Inc. ("KMB") failed to procure the proper insurance coverage when it sought an all-risk policy that provided broad commercial business interruption coverage. Plaintiff alleges on November 19, 2019, RPS and KMB each identified Western World as a suitable insurer to provide the requested coverage.

Plaintiff filed a seven-count complaint including: Count I: Declaratory Judgment (against Western World); Count II: Breach of Contract (against Western World); Count III: Vexatious Misconduct - §155 (against Western World); Count IV: Negligence (against RPS); Count V: Negligent Misrepresentation (against RPS); Count VI: Negligence (against KMB); Count VII: Negligent Misrepresentation (against KMB).

Court's Analysis

Western World's Motion for Judgment on the Pleadings

Defendant moves for judgment on the pleadings pursuant to 735 ILCS 5/2-615(e). Judgment on the pleadings is proper where the pleadings disclose no genuine issue of material fact so that the movant is entitled to judgment as a matter of law. *Lebron v. Gottlieb Mem. Hosp*., 237 Ill. 2d 217, 227 (2010). In ruling on a motion for judgment on the pleadings, the Court will consider only those facts apparent from the face of the pleadings, matters subject to judicial notice, and judicial admissions in the record. *Gillen v. State Farm Mut. Auto. Ins. Co.,* 215 Ill.2d 381, 385 (2005). A motion for judgment on the pleadings is a pleading motion. *People v. Agora Syndicate, Inc.*, 323 Ill.App.3d 543, 549 (1st Dist. 2001). In considering a motion for judgment on the pleadings, the court must determine if the pleadings present a material issue of fact, and if they do, the motion must be denied. *Id.* If pleadings put in issue one or more material facts, evidence must be taken to resolve such issues, and judgment may not be entered on the pleadings. *Cont'l Cas. Co. v. Cuda*, 306 Ill. App. 3d 340, 347 (1st Dist. 1999). The question thus presented is whether those pleadings construed most strongly against the movant nevertheless show that there is no factual issue which, if determined against the movant, would prevent entry of judgment on behalf of the movant. *Glassberg v. Warshawsky*, 266 Ill. App. 3d 585, 591 (1st Dist. 1994).

Count I: Declaratory Judgment

The essential elements of a declaratory judgment action are: (1) a plaintiff with a legal tangible interest; (2) a defendant having an opposing interest; and (3) an actual controversy between the parties concerning such interests. *Beahringer v. Page,* 204 Ill. 2d 363, 372 (2003). "'Actual' in this context does not mean that a wrong must have been committed and injury

inflicted. Rather, it requires a showing that the underlying facts and issues of the case are not moot or premature, so as to require the court to pass judgment on mere abstract propositions of law, render an advisory opinion, or give legal advice as to future events. The case must, therefore, present a concrete dispute admitting of an immediate and definitive determination of the parties' rights, the resolution of which will aid in the termination of the controversy or some part thereof." *Underground Contractors Association v. City of Chicago*, 66 Ill. 2d 371, 375 (1977). Because the Court finds no breach of contract can exist on the facts before it, there is not an actual controversy between the parties and the Count is dismissed.

Count II: Breach of Contract

In order to state a claim for breach of contract, a plaintiff must show: (1) the existence of a valid and enforceable contract; (2) performance by the plaintiff; (3) a breach of the subject contract by the defendant; and (4) that the defendant's breach resulted in damages. *Unterschuetz v. City of Chicago*, 346 Ill. App. 3d 65, 69 (1st Dist. 2004); *International Supply Co. v. Campbell*, 391 Ill. App. 3d 439, 450 (2009). The parties do not dispute the existence of a valid and enforceable contract or that plaintiff performed under the contract with its payment of premiums. At issue is defendant's alleged breach of the contract by failing to make payment under the insurance policy.

In the case of a contract of insurance, the Illinois Supreme Court has long held that the burden rests with the insured to prove that its claim falls within the coverage of its policy. *Addison Insurance Co. v. Fay*, 232 Ill. 2d 446, 453 (2009). Once the insured has demonstrated coverage, the burden shifts to the insurer to prove that a limitation or exclusion applies. *Id.* at 453-54; *Erie Insurance Exchange v. Compeve Corp.*, 2015 IL App (1st) 142508, ¶ 18. Under Illinois law, "[a]n insurer has the right to limit coverage on a policy, and where an

insurer has done so, a court must give effect to the plain language of the limitation, absent a conflict with the law." *Phusion Projects, Inc. v. Selective Ins. Co.*, 2015 IL App (1st) 150172, ¶ 38. In construing an insurance contract, regular contract interpretation principles apply. The objective of the court is to ascertain the intent of the parties, construing the policy as a whole, with due regard to the risk undertaken, the subject matter of the policy and the purposes of the entire contract. *Outboard Marine Corp. v. Liberty Mutual Ins. Co.*, 154 Ill. 2d 90 (1992). If words in the policy are unambiguous, the court must afford them their ordinary meaning. *Id.* But if words are susceptible to more than one reasonable interpretation, they are ambiguous, and the insurance policy should be construed in favor of the insured and against the insurer who drafted the policy. *Id.*

Plaintiff seeks recovery under its "all-risk" policy. Plaintiff contends the policy extends coverage to all "direct physical loss of or damage to Covered Property" unless expressly excluded. Plaintiff seeks recovery pursuant to the following provisions in the policy: 1) Building and Personal Property Coverage; 2) Business Income & Extra Expense Coverage; and 3) Civil Authority Coverage Forms. Defendant argues the losses are not covered losses under the policy or subject to an exclusion.

The relevant policy provisions are as follows:

Business and Personal Property Coverage Form

> We will pay for direct physical loss of or damage to Covered Property at the premises described in the Declarations Cause by or resulting from any Covered Cause of Loss.

Business Income (and Extra Expense) Coverage

> We will pay for the actual loss of Business Income you sustain due to the necessary "suspension" of your "operations" during the "period of restoration." The "suspension" must be caused by direct physical loss of or damage to property at premises which are described in the Declaration and for which a Business

Income Limit of Insurance is shown in the Declarations. The loss or damage must be caused by or a result from the Covered Cause of Loss. (pg. 27)

Extra Expense Coverage

Extra Expenses means necessary expenses you incur during the "period of restoration" that you would not have incurred if there had been no direct physical loss or damage to property caused by or resulting from a Covered Cause of Loss. (pg. 27)

[…]

Avoid or minimize the "suspension" of business and to continue operations at the described premises or at replacement premises or temporary locations, including relocation expenses and costs to equip and operate the replacement location or temporary location;

[…]

and to minimize the suspension of business if you cannot continue operations.

Civil Authority Coverage

In this Additional Coverage – Civil Authority, the described premises are premises to which this Coverage Form applies, as shown in the Declarations.

When a Covered Cause of Loss causes damage to property other than property at the described premises, we will pay for the actual loss of Business Income you sustain and necessary Extra Expense caused by action of civil authority that prohibits access to the described premises, provided that both the following apply:

(1) Access to the are immediately surrounding the damaged property is prohibited by civil authority as a result of the damage, and the described premises are within that area but are not more than one mile from the damaged property; and
(2) The action of civil authority is taken in response to dangerous physical conditions resulting from the damage or continuation of the Covered Cause of Loss that caused the damage, or the action is taken to enable a civil authority to have unimpeded access to the damaged property.

Exclusion of Loss Due to Virus or Bacteria

A. The exclusion set forth in paragraph B. applies to all coverage under all forms and endorsements that comprise this Coverage Part of Policy, including but not limited to forms or endorsements that cover property damage to buildings or personal property and forms or endorsements that cover business income, extra expense or action of civil authority
B. We will not pay for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease.

Not Covered Losses

No Direct Physical Loss

The Court finds the alleged losses are not covered under the policy's business interruption coverage because there is neither *direct physical loss* of nor damage to insured property. Plaintiff argues its property was physically damaged by the presence of COVID-19 contagion on the surfaces at plaintiff's premises (complaint ¶¶57-68). Plaintiffs argue as a result, the contagion caused them to "restrict, slowdown, and/or cease ordinary business activities at its insured premises." (complaint ¶67.)

The Illinois Supreme Court has found "that to the average, ordinary person, tangible property suffers a "physical" injury when the property is altered in appearance, shape, color or in other material dimension. Conversely, to the average mind, tangible property does not experience "physical" injury if that property suffers intangible damage, such as diminution in value." *Travelers Ins. Co. v. Eljer Mfg., Inc.*, 197 Ill. 2d 278, 301 (2001). The temporary state of any contagion on surfaces of a business does not amount to an alteration of the property as contemplated. A thorough cleaning of the premises through ordinary means eliminates the contagion and makes clear that the presence of Covid-19 is temporary and not an alteration.

Plaintiffs seek to extend the body of asbestos cases to the Covid-19 arena. The argument is unavailing. To be sure, the health risks associated with Covid-19 and asbestos exposure are each serious and significant, but they are distinguishable. The Court in *Travelers* described asbestos as a physical injury because it was a:

> result of the presence of toxic asbestos fibers within the structures, as "the buildings and their contents (e.g., carpets, upholstery, drapes, etc.) are virtually contaminated or impregnated with asbestos fibers, the presence of which poses a serious healthy hazard to the human occupants," Thus this court concluded that the "the contamination of the buildings and their contents" due to the continuous release of these toxins constituted "physical injury" under the policies.

Asbestos is difficult to remediated and must be done by a licensed professional since it is embedded into the physical structure and systems of the physical property. Covid-19, on the other hand, is readily ameliorated. The coronavirus (Covid-19) is disseminated through different means (respiratory transmission) and exposure can be reduced significantly thorough prophylactic measures like proper masking, hand washing and social distancing. Moreover, surfaces can be cleaned with cleansers readily available in most grocery stores and hardware stores. Covid-19 contagion naturally dissipates and is easily killed through ordinary cleaning means. Simply put, Covid-19 impacts human health and behavior but not physical structures.

Unable to credibly argue direct physical injury, plaintiffs' claims arise from a suspension of its business operations by excluding employees and customers from its restaurant. The resultant loss of revenue is an economic loss, not a physical injury to covered property. Loss of use is not a covered loss under the policy.

Business Interruption Coverage~ No Period of Restoration

The unambiguous language of the Business Interruption provision is only applicable when the insured sustains interruption during a "period of restoration." The obvious import of the provision is for a time period for repair or rebuilding of a property that sustained direct physical loss or damage, *ie*. fire or flooding. The provision is only applicable if the suspension of its operations is caused by a direct physical loss. As indicated *supra*, plaintiff is unable to allege any direct physical damage that caused its business to be interrupted while it repaired or restored the premises.

Civil Authority Coverage ~ No additional property implicated

Again, there is no coverage under this provision because plaintiff is unable to allege that the covered damage is a result of physical injury. Further, the attempt to shoehorn the

Governor's executive order as triggering this provision is disingenuous. The policy applies only to damage to property *other* than the described premises. There are no allegations in the complaint of damage to property other than at the insured premises or that the civil authority limited access to the covered premises as a result of physical damage to another property. A classic example where this would apply is if the building next door experienced a serious fire such that a civil authority limited access to the covered premises due to the physical damage to a surrounding structure; the coverage would be triggered. Here, however, plaintiff attempts to stretch the application beyond a fair reading of the policy. The provision does not provide coverage.

Exclusion of Loss Due to Virus or Bacteria

A. The exclusion set forth in paragraph B. applies to all coverage under all forms and endorsements that comprise this Coverage Part of Policy, including but not limited to forms or endorsements that cover property damage to buildings or personal property and forms or endorsements that cover business income, extra expense or action of civil authority
B. We will not pay for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease.

Defendant argues should coverage under the policy be found, loss or damages are expressly excluded under the policy. Plaintiff argues the language of the Virus Exclusion is ambiguous and should be narrowly interpreted. The Court is unpersuaded. The language of the exclusion could not be more clear. Paragraph B of the provision provides defendant will not pay for loss or damage caused by or *resulting from any virus*. There is no limitation. Paragraph A unambiguously directs the insured that the virus exclusion applies to *all* coverage under *all* forms and endorsements *including* provisions that cover business income, extra expense or action of civil authority, each of the provisions under which plaintiff seeks recovery.

Plaintiff additionally argues the exclusion contravenes public policy and is unenforceable. This type of exclusion is not new or in response to Covid-19. Plaintiff provides no provision of the Insurance Code or any caselaw in support of this argument and the Court finds none through its own research. Curiously, plaintiff argues the word "virus" and "pandemic" do not have the same meaning and thus, the provision does not apply. Covid-19 is a virus. The fact that it has exploded to pandemic proportions is not relevant to the discussion of applicability and coverage. The policy unambiguously excludes loss as a result of any virus.

Count III: Vexatious Misconduct ~ §155

§155 of the Illinois Insurance Code provides a remedy for an insured who encounters unnecessary difficulties when an insurer withholds policy benefits. *Bedoya v. Illinois Founders Insurance Co.*, 293 Ill. App. 3d 668, 679 (1997). In order to recover damages from an insurer for bad faith, the plaintiff must allege and prove that the defendant disputed the amount of the loss, delayed settling a claim or refused to provide coverage when coverage was not debatable. Further, plaintiff must plead and prove the defendant's action or delay was unreasonable and vexatious. The question of whether any given behavior is vexatious and unreasonable is a question of fact. *Boyd v. United Farm Mutual Reinsurance Co.,* 231 Ill. App. 3d 992, 999 (1992). Under Illinois law, however, where there is a *bona fide* dispute and where the Court finds there is no coverage owed under a policy, §155 sanctions are inappropriate. In light of this Court's finding of no coverage under the policy, the Count is dismissed.

KMB's Motion to Dismiss Count VII ~§2-615

KMB moves to dismiss the claim for negligent misrepresentation. To state a cause of action for negligent misrepresentation, plaintiffs must allege: (1) a false statement of material fact; (2) defendant's carelessness or negligence in ascertaining the truth of the statement; (3) an

intention to induce plaintiffs to act; (4) reasonable reliance on the truth of the statement by plaintiffs; and (5) damage to plaintiffs resulting from this reliance. Thus, negligent misrepresentation has essentially the same elements as a fraud claim, except that the defendant need not know that the statement is false; rather his own carelessness or negligence in ascertaining the truth of the statement will suffice. *First Mercury Insurance Co. v. Ciolino*, 2018 IL App (1st) 171532, ¶ 1.

As a threshold matter, a complaint must "allege facts establishing a duty owed by the defendant to communicate accurate information." *Brogan v. Mitchell International, Inc.*, 181 Ill. 2d 178, 183 (1998). See also *Doe-3*, 2012 IL 112479, ¶ 28. The Illinois Supreme Court has recognized a duty to communicate accurate information only in two circumstances: (1) "to avoid negligently conveying false information that results in physical injury to a person or harm to property"; and (2) "where one is in the business of supplying information for the guidance of others in their business transactions." *Brogan*, 181 Ill. 2d at 184. See also *Hoover v. Country Mut. Ins. Co.*, 2012 IL App (1st) 110939, ¶ 45.

The first prong is quickly dispensed with. Plaintiffs make no allegations that they suffered any physical injury to a person or harm to property based on defendant's sale of an insurance policy.

Second, most cases addressing claims for negligent misrepresentation involve situations where a defendant who, in the course of their business or profession supplies information for the guidance of others in their business relations with third parties. *Hoover*, 2012 IL App (1st) 110939, ¶ 20. In *Hoover*, the plaintiffs filed a filed suit against the insurance broker alleging negligent misrepresentation. The *Hoover* plaintiffs alleged they sought an insurance policy that would cover full replacement of their home and its contents in the event of loss. Plaintiffs

alleged the agent assured them that the policy had sufficient coverage. After an explosion destroyed the premises, the insurance company denied the claim for full coverage indicating the policy had a liability limit of 80% of the actual replacement cost. *Id.* ¶ 17. The appellate court found there could be no claim for negligent misrepresentation because the defendants were not in the business of providing information to the homeowners for guidance in their business transactions, and any information provided was merely ancillary to the sale of homeowners' insurance. *Id.* ¶ 47; see also *University of Chicago Hospitals v. United Parcel Service*, 231 Ill. App. 3d 602, 606 (1992) (the insurer could not be held liable for negligent misrepresentation because an insurance company is not in the business of supplying information for the guidance of others, but rather accepts risks in return for money).

In the case before this Court, the complaint alleges that KMB is in the business of selling insurance but fails to allege facts that it is in the business of supplying information to plaintiffs for guidance in their business transactions with a third party. Because the insurance brokerage defendant here is different from the insurance company defendants in *Hoover* and *University of Chicago*, a claim for negligent misrepresentation may be possible.

Missing however from the complaint are facts to support the rest of the elements. Plaintiffs allege in conclusory fashion they sought an all-risk policy with no specific detail. Plaintiffs make no allegations of what statement was ever made negligently, when any such statement was made, who made the statement and to whom, or even any circumstances surrounding the misstatement. Absent such specific factual allegations, the Court cannot infer any intention on the part of defendant to induce plaintiff to act and that plaintiff relied on statements to meet that end. In plaintiff's response to the motion, it argues the policy was

procured, discussed, and negotiated, yet the complaint fails to provide any factual support for that contention. The Count is dismissed without prejudice.

IT IS HEREBY ORDERED THAT:

1. Defendant Western World Insurance Co. Inc.'s Motion for Judgment on the Pleadings pursuant to 735 ILCS 5/2-615 (e) is granted with prejudice.

2. Defendant KMB Insurance Consultants, Inc.'s Motion to Dismiss Count VII pursuant to 735 ILCS 5/2-615 is granted without prejudice.

3. Plaintiff has 28 days, up to and including June 7, 2021 to replead Counts VII.

4. Defendant KMB may have 28 days thereafter, to July 6, 2021 to answer or otherwise plead to the Amended Complaint.

5. This matter is set for status on July 12 , 2021 at 9:50 am. via Zoom. To attend hearing, go to www.zoom.us or telephone to 312-626-6799 and, when prompted, enter

Meeting ID: 929 4698 2164 and Password: 2007

ENTER:

Judge Patrick J. Sherlock

MAY 10 2021

Honorable Patrick J. Sherlock
Judge Presiding

Circuit Court – 1942

May 10, 2021

Tab B

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - CIVIL PART
BERGEN COUNTY
DOCKET NO. BER-L-002322-21
A.D. # _____

CAPRI HOLDINGS, LTD, Plaintiff, v. ZURICH AMERICAN INSURANCE COMPANY, ET AL, Defendant.	TRANSCRIPT OF MOTION

Place: Bergen County Justice Center
(Heard Via Zoom)

Date: April 25, 2021

B E F O R E:

HONORABLE JOHN D. O'DWYER, J.S.C.

TRANSCRIPT ORDERED BY:

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(Finazzo, Cossolini, O'Leary, Meola & Hager, LLC)

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A P P E A R A N C E S: (Continued)

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you.
THE COURT: All right.
Does anybody have anything to say about the infectious disease position of Allianz here?
MR. JEAN: Yes, Your Honor. Joseph Jean for Capri. So we -- I'll -- I'll be -- I'll be very brief. We -- we do address this extensively in the -- in the briefing. The -- the language is in an endorsement to the policy. That endorsement is -- if you -- if you look at the endorsement, it's incredibly -- I think it's incredibly direct. But at -- at worst it incredibly confusing. It talk -- it talks about reinsurance and it talks about coverage in many other countries other than the United States as a preamble to the section. And then it -- and then it talks about the insurer not covering infectious disease.
Our view of that is it's just not even applicable to this because Allianz isn't providing reinsurance -- reinsurance to Zurich. And -- and, thus, no reasonable policyholder or whatever take a look at this language which was solely drafted by Allianz to preclude coverage for us. Perhaps it's excluding coverage for Zurich under its reinsurance agreement, but it doesn't go to Capri.
THE COURT: Thank you.

MR. JEAN: Thank you, Your Honor.
THE COURT: All right. Anybody else? We're good to go.
MS. HAGER: Your Honor, just one comment. This is Rachel Hager for Liberty Mutual Fire Insurance Company. We're -- we're relying on, you know, the oral argument here. We -- we're under the same direct Zurich forum. I just wanted to make one comment to something that Mr. Jean said when he was responding to Your Honor about what is the physical loss or damage, and he said the -- you know, it's the Coronavirus on the surfaces and in the air.
Our brief and other briefs here cite to the -- the -- the cases across the country that have rejected that same position. And -- and just for the record, I refer Your Honor to the cases of Manhattan Partners, Arash Emami, and Ralph Lauren Corp v. Fashion Mutual all decided under New Jersey law, all decided by New Jol (sic) -- New Jersey Courts, and all the findings that even if it could be proven that COVID-19 was in the air and the surfaces, that it is insufficient to show physical loss or damage.
I won't bother you with any other argument and I appreciate Your Honor's time.
THE COURT: Thank you.

All right. I appreciate how everybody laid out their arguments. The Court's obviously had a lot of time to read the briefs, look at cases and consider it.

So I'm not going to address the microorganism issue right now, but let me -- Capri Holdings, Limited brought a lawsuit seeking insurance coverage from six insurance companies in a lawsuit stating as a result of the COVID-19 pandemic. Capri is a global fashion luxury group which consists of three fashion brands, Versace, Jimmy Choo, and Michael Kors.

As alleged in its third amended complaint, Capri has stores international. May 2020, Capri submitted notice of lawsuit and coverage under the policies issued by the various insurance defendants, and two policy periods of March 14, 2019 and March 14, 2020, and March 14, 2020 and March 14, 2021. The insurance company defendants declined coverage asserting that plaintiff has not suffered any physical loss of or damage to covered property as is necessary for the coverage under the various policy versions sought by the plaintiff.

Zurich American Insurance Company is the sole insurer under the 2019-2020 policy period with what plaintiff's refer to as a "all risk" policy. For the

2020-'21 policy period, the policy risk also characterizes all risk by plaintiff insured and is shared among Zurich and other insurance companies, including XL, Liberty, Allianz and AIG. I note that defendant Mitsui Sumitomo Insurance Company and plaintiff have agreed to a stip of dismissal without prejudice.

Plaintiff asserts he's entitled to coverage under various policy provisions including the following. Prime element coverage, extra special coverage, resold interest coverage, civil or military authority coverage, injured time element coverage, and protective and preservation coverage. At the most basic level, the insurance carrier defendants assert the need for this coverage is to require there be direct physical loss of or damage to property. With the absence of any, defendants takes the position that coverage is not provided and a motion to dismiss should be granted.

Plaintiff alleges it suffered direct physical loss of or damage to its property in at least four ways. They are:

One. Assert or burden to assert the presence of COVID-19 and/or the Coronavirus in each of the three stores.

Two. The various Government orders issued to slow the spread of the Coronavirus.

Three. Further need to modify physical behaviors in order to reduce or minimize potential viral transmission.

And Four. For the need to mitigate the threat of actual physical presence of the Coronavirus on various surfaces and products inside the three stores.

Defendants point out that nowhere in the complaint does the complaint allege specific facts concerning the presence of the Coronavirus or COVID-19 at even a single one of the three stores. Rather, plaintiff relies upon infection rate, the positivity rate statistics, and the number of infections among the staff who claim the virus is "presumably certain or near certain" present in the three stores.

All parties agree that the fundamental tenant of contract interpretation pursuant to a contract control the legal analysis for this motion to dismiss. As to choice of law, the parties have to pre (sic) -- present a case regarding New Jersey law. The insured defendants will not concede that New Jersey law controls and indicate the law of New York is substantially similar and do not assert that the laws

of New York or other -- or in other forums should control.

Insurance policies are contracts of adhesion and they are the subject of special rules and interpretation. That's Gibson v. Callaghan, 158 N.J. 662, 669. An equally well settled -- I'm sorry. Excuse me. It's equally well settled that the words in insurance policies given their plain ordinary meaning at all times should be given meanings so that no words are without effect. That's Gibson again at 670.

An equally important principal in New Jersey insurance laws is any ambiguity in insurance policies must be interpreted in favor of the policyholder. Again Gibson at 670, 671. Not surprising, the parties on either side of the contract take different positions as to whether the policy provisions are clear or ambiguous.

Capri takes the position that physical loss over damage does not require physical alterations and/or total destruction of property as contended by the insurance company defendants. Capri asserts that the meaning of the phrase physical loss over damage to property includes:

One. Material or set (sic) -- substan (sic) -- a material or substantial depravation of property.

Or two. A material or substantial harm to property.

Based on the use of this conjunctive or, Capri -- (indiscernible) -- by alleging:

One. A partial loss of or diminution of -- of use of its property.

Or two. Material harm to its property.

Capri asserts that it has alleged both. Capri further asserts the presence of Coronavirus on Capri's premises by being in the air at the stores both on the property to physically damage it so as to render it uninhabitable and deprive Capri of its stores or use of its stores. Arguing the policy to be construed -- construed as the drafter, Capri argues the policies could have included a structural alteration requirement. It did not, and, therefore, cannot assert that same is required.

Capri points to three New Jersey cases in support of its claim that New Jersey Courts do not require structural alterations for lack coverage from a physical loss of or damage to property. These cases are Port Authority of New York and New Jersey v. Affiliated FM Insurance Company. That's 311 F.3d 226, (3d Cir. 2002), Wakefern Food Corp. v. Liberty Mutual Fire Insurance Company, 406 N.J. Super. 524, (App. Div.

209 (sic), and Gregory Packaging, Inc. v. Travelers Property Casualty Company of America, 214 U.S. District LEXIX (sic) -- LEXUS (sic) -- LEXIS, excuse me, 165232 (D.N.J. Nov. 25, 2014).

In short, defendants assert that the three cases not only do not support a coverage findings, but rather demonstrate the plaintiff's non entitlement to coverage on the facts herein. In Port Authority, the Third Circuit defining New Jersey law considered whether asbestos contamination into a property constitutes physical loss or damage. The plaintiff points to that portion of the decision which held. "When the presence of large quantities of asbestos in the area of the building are of such a quantity as to make the structure uninhabitable and unusable bearing to a distinct loss to the owner."

Capri asserts that the presence of the Coronavirus in the air and on fixtures in the store made the stores uninhabitable and unuseable. Defend (sic) -- the defendants point to language immediately thereafter in decision (sic) -- in the decision. I apologize. Let me drink some water. That might help.

Defendants point to language immediately thereafter in the decision which states that if a harmful substance was present on this structure, but

was not in such a form or quantity as to make the building unusable, the owner has not suffered a loss.

In Wakefern, the policyholder's select coverage were met in August 2003 when the electrical grid -- electrical grid that supplied most of the store's interior was rendered completely inoperable resulting in a loss of power to the stores. The insured denied coverage reasoning that the electrical grid had not suffered "physical damage." In Wakefern, the Court found there was a loss of function. That the entire electrical grid was rendered useless, and, therefore, coverage was granted.

The defendants emphasize the fact that unlike in Wakefern, in the matter before this Court, there was no physical damage. In Wakefern, according to defendants, there was phys (sic) -- physical damage to the power source due to a particular incident rendering the electrical grid physically incapable of performing its essential function of providing electricity. And that's Wakefern at Page 540. Defendants still point out that the plaintiff has not and cannot allege that the properties here were physically incapable of performing their essential functions.

The third coverage case construing New Jersey law in which the parties take different interpretations

is Gregory Packaging v. Travelers Property Casualty Company of America. In that case, an ammonia discharge resulting in an inability to use the property was found to provide coverage due to direct physical loss or damage. Defendants, however, point out that the decision hinges on the fact that the property in question was un (sic) -- unfit for occupancy and uninhabitable due to a -- ammonia discharge. Unlike Gregory Packaging, defendants assert the plaintiff does not allege a structural alteration nor a severe contam (sic) -- contamination rendering the property unusable.

In support of their claim by plaintiff suffered direct physical loss of or damage to property, Capri relies upon statistics. "Considering the foot traffic and positivity rates in the area of the three operating stores, a virus stistical (sic) -- virus statistical analysis shows that it is statistically certain that many stores or near certain and others that customers and other individuals who visited Capri stores contracted Cor (sic) -- and carried the Coronavirus before the stores closed. That's at plaintiff's brief at Page 6.

Extrapolating from this statistical analysis, Capri asserts that both the air and physical surfaces

were unsafe thereby rendering the premises unsafe for retail operations. Capri continues the argument taking into this the specific definition of the terms physical, loss and damage in their policies. A reasonable interpretation can be disputed and undefined policy terms offered by the plaintiff should be adhered to by this Court as stated in the -- (indiscernible) -- there were terms of the insurance policy as undefined, the Court has made a common sense approach to policy interpretations.

Capri goes to the dictionary. Capri's anal (sic) -- analysis found at Page 17 of the brief in opposition is as follows, and I quote. "According, the meaning of the phrase physical loss or damage to property includes:

One. A material or substantive dep (sic) -- substantive deprivation of property.

Or two. A material or substantive harm to property."

Thus, because of the use of the conjunctive or, Capri's insurance coverage by alleging a material loss or diminution of use of this property or a material harm to its property. From the definitions posited above, the plaintiffs assert they're entitled to coverage based upon the presence of the virus and

its cause causing damage fitting in the above definition. Based upon the plaintiff's interpretation of the term physical loss or damage that which is a part of the pure loss, use, or diminution of its property. That's in plaintiff's brief at Page -- (indiscernible).

Capri utilizes various facts and statistics to demonstrate the virus on the premises. These include over 930 cases of COVID-19 infections reported by the three employees. That it asserted additional employees were unknowingly contagious while working in the store based upon the fact -- (indiscernible) cases -- amount of cases. Next, the Coronavirus spread via -- via -- via airborne transmission. The HVAC systems can spread the virus indoors. Or the virus also spreads -- (indiscernible) transmission and the Coronavirus cannot be removed or omitted from surfaces by a routine cleaning.

The defendants challenge this premise and argue that in order to be afforded coverage of the claims involving substances unknown to the naked eye, the insured, such as Capri, must show the loss is either one:

One. Structural alterations of the property requiring repair or replacement.

Or two. Physical contamination so severe to render a property totally uninhabitable for use.

Are you all there still me? I apologize. It takes a little while. You guys gave me a lot to deal with here.

Each of the multiple policy provisions in which Capri seeks coverage from the various insurers require direct physical loss for damages. The coverage included are time element loss coverage, resell interest, ex (sic) -- expense coverage, civil and military authority, -- (indiscernible) time element, protection and preservation of property, the difference in positions by its difference -- (indiscernible).

Now we're all familiar with what -- what the standards for a motion to dismiss. That a motion to dismiss for failure to state a claim upon relief can be granted and is filed pursuant to Rule 4:6-2(e). The plaintiff is entitled to liberal first interpretation and given the benefit of all favorable inferences that reasonably may be drawn. That's the State -- State Department of Treasury, Division of Investment, McCormick v. Qwest Communications, 387 N.J. Super. 469. The test to determine the adequacy of pleadings is whether a cause of action is to testify to facts. Everybody knows Printing Mart Morristown v. Sharp

Electronics, 116 N.J. 739, 746.

The Court must review the complaint in depth and with liberability to ascertain whether a fundamental cause of action may be gleamed even from an obscure statement of claim. An opportunity to be given to amend, if necessary. Again Printing Mart.

All right. So applying the above standard, the Court finds that defendants' motion to dismiss should be granted. The plaintiffs have failed to allege -- or it did not allege that the Coronavirus caused a direct physical loss or damage which is the prerequisite to coverage in this matter. The Court does not find there's any ambiguity in the policies to affirm a direct physical loss. While the meaning of the term is no doubt fundamental to the resolution of the issue before the Court, such words are of common usage.

It is well settled that words with common usage in insurance policies are to be construed in a natural claim and ordinary sen (sic) -- sense. That's Cypress Point Condominium Association v. Adria -- I think it's Adria Towers, LLC, 246 N.J. 403, 426. Applying the right mean (sic) -- meaning to the term direct physical loss required the property to be unusable by some physical force.

The third amended complaint does not allege structural alteration or any need for repair of the physical premises. Nor does the third amended complaint allege such severe physical contamination as to render the property unusable. While it is undisputed plaintiffs were precluded from fully using the premises, the complaint does not allege that any physical force had rendered the property totally unusable or altered the physical condition of the property to do so.

Additionally, the properties are usable for clean (sic) -- proper cleaning protocols and mask wearing. There are no allegations that any of the properties required structural alterations. It is undisputed that presently most of the physical locations were utilized and opened for business.

As set forth the parties (sic) -- well, I'm sorry.

As set forth previously, the parties each point to the same three cases and cited under New Jersey law in support of their diametrically opposed positions. The case law of Port Authority v. Affiliated, Gregory Packaging, and Wakefern Food. While there is certain language in each of the cases which take it in isolation which would appear favorable

to the plaintiff, these cases in actuality support the defense position.

For instance, the Port Authority decision demonstrates the propriety of the defense position at Page 236 where the Court -- I'm quoting, "Principal loss or damage occurs only if an actual use that is specified with asbestos-containing materials have resulted in a contamination of the property such as its function is nearly eliminated or destroyed, or the structure is made useless or inhabitable, or there exists an eminent resolution of the quantity of asbestos found to have caused the loss -- (indiscernible).

Similarly, in Gregory Packaging, the Court found coverage was available for ammonia release or based upon a finding that the premises were unfit for occupancy. In Gregory Packaging, it's -- and I'm quoting, "when there was no genuine dispute that the ammonia release physically transformed the air within so that it contained an unsafe amount of ammonia. That the heightened ammonia level rendered the prem (sic) -- premises unfer (sic) -- unfit for occupancy until the ammonia could be dissipated."

Plaintiff had not alleged -- has not alleged the property function was merely eliminate (sic) nor

destroyed. Nor they have alleged that the property is useless or uninhabitable. To the contrary, it is undisputed there were proper safety precautions and the property was functional and useful. In Gregory Packaging, unsafe levels of ammonia rendered the premises unfit for human occupancy until the ammonia could be dissipated.

Capri has not sufficiently pled physical loss or damage to the property as a result of COVID-19. And accepting as true, as this Court must at this stage -- stage of the proceedings, the allegations by Capri that employees contracted COVID-19 at various locations and same occurred, so, therefore, and/or -- (indiscernible) transmission does not equate to coverage under the policy -- (indiscernible) in -- herein.

The policy as issued required a structural alteration to the property requiring repair or replacement, or physical contamination so severe as to render the property totally uninhabitable or unusable. The conclusory statements by comparing the COVID-19 virus to on surfaces in the area at various property location -- property locations it is insufficient -- (indiscernible) compliance.

In making this decision, the Court notes that counsel on both sides have issued in fact multiple

decisions both in New Jersey and elsewhere on this issue of coverage to retail and commercial establishments due to losses occasioned by COVID-19. This Court has taken time to review quite a few of the cases referenced by counsel both in New Jersey and -- and in other jurisdictions.

Many of -- most of your decisions are in line with the Court's decision today. While counsel for Capri have skillfully pieced together various arguments to overcome the policy require (sic) -- requirements, such arguments are availing so the motion to dismiss will be granted.

I have not addressed and I apologize the supplemental submissions that came in on the microorganism. I didn't look at it. And I'm -- I understand -- I mean, I looked at it while we were chatting here, but I have not made that part of my decision. I can issue a supplemental ruling on that. And will do that. But I'll -- I think this -- at least for this, takes care of everybody's vision on where we stand with this case going forward.

So I'll get and order up. Everybody be --

MR. MILLEA: I'm sorry, Your Honor, --

THE COURT: -- well.

MR. MILLEA: I'm sorry, Your Honor. If I

may, --
THE COURT: Who -- who is --
MR. MILLEA: Just --
THE COURT: -- is that?
MR. MILLEA: Dan Millea for --
THE COURT: Huh?
MR. MILLEA: -- from XL -- for XL America. As I said earlier, our position was, if you decided with defendants on physical loss or damage, there's no need to address our exclusions.
THE COURT: Fair enough. That makes my job easier.
MR. CARROLL: Your Honor, the same -- the same with Allianz. Thank you. Thank you very much. We -- we had the same position as Mr. Millea just said.
THE COURT: Great. I'll enjoy the weekend more that way. All right.
Anything else? All right. I'll get an order up. You can order -- order the transcript. You're welcome. It just --
MR. ANANIA: Your Honor -- Your Honor, --
MR. MILLEA: Thank you, Your Honor.
MR. ANANIA: -- I was just wondering that was the -- was --
THE COURT: I'm sorry. Who's -- who's

speaking?
MR. ANANIA: Mike Anania.
THE COURT: Oh, I'm sorry.
MR. ANANIA: Mike Anania. Was the motion granted with -- with -- with prejudice?
THE COURT: Yes.
MR. ANANIA: Okay.
THE COURT: Yes.
MR. ANANIA: Thank you, Your Honor.
THE COURT: Yeah. All right.
Everybody be well.
MR. MILLEA: Thank you very much, Your Honor.
UNIDENTIFIED ATTORNEY: Thank you.
UNIDENTIFIED ATTORNEY: Have a good day.
UNIDENTIFIED ATTORNEY: Thank you, Your Honor.
(Proceedings concluded)

CERTIFICATION

I, Charlene P. Scognamiglio, the assigned transcriber, do hereby certify that the foregoing transcript of proceedings in the Bergen County Superior Court, Law Division, on June 25, 2021, CD No. 6/25/21, Index Nos. 9:19:23 a.m. to 10:36:51 a.m., is prepared in full compliance with the current Transcript Format for Judicial Proceedings and is a true and accurate compressed transcript of the proceedings as recorded.

/s/ Charlene P. Scognamiglio
Charlene P. Scognamiglio AD/T 473
Tape Reporters, Inc.

Date: 6/27/21

Tab C

Prepared by the Court

JENKINSON'S SOUTH, INC. and JENKINSON'S PAVILION, Plaintiffs, vs. WESTCHESTER SURPLUS LINES INSURANCE COMPANY, AXIS SURPLUS INSURANCE COMPANY, EVANSTON INSURANCE COMPANY, ARCH SPECIALTY INSURANCE COMPANY, GENERAL SECURITY INDEMNITY COMPANY OF ARIZONA, CERTAIN UNDERWRITERS AT LLOYDS OF LONDON, IRONSHORE SPECIALTY INSURANCE COMPANY and LANDMARK AMERICAN INSURANCE COMPANY, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION OCEAN COUNTY DOCKET NO. OCN-L-1607-20 CIVIL ACTION **OPINION OF THE COURT**

This matter comes before the court by Motion for Summary Judgment filed by plaintiff, Jenkinson's South, Inc. and Jenkinson's Pavilion ("plaintiffs"), seeking recovery from defendants Westchester Surplus Lines Insurance Company, Axis Surplus Insurance Company, Evanston Insurance Company, Arch Specialty Insurance Company, General Security Indemnity Company of Arizona, Certain Underwriters at Lloyds of London, Ironshore Specialty Insurance Company and Landmark American Insurance Company ("defendants"). Plaintiffs held "all risk" policy numbers with the named defendants: D37417853 0006, EAF773479-19, MKLV11XP007241, ESP0054539-06, 34158-00016301901 (issued by General Security and Lloyds), 001650306 and LHD912138 respectively from 2019-2020. Plaintiff held "all risk" policies with the named defendants, above, respectively from 2020-2021. Plaintiffs' policy with Defendant Landmark is a second-level excess policy under number LHD907418. The defendants cross filed for Summary Judgment asserting plaintiffs do not have a valid claim for coverage under the business income or civil authority provisions of the various insurance policies at issues. After entertaining

oral argument on June 9, 2021, reviewing the exhibits and the papers presented to the court, the court hereby issues the following decision on this 2nd Day of July 2021:

BACKGROUND:

This matter has its genesis in the denial of insurance claims submitted by plaintiffs, Jenkinson's South, Inc. and Jenkinson's Pavilion, in May 2020. The claims were made under plaintiffs "all risk" commercial insurance policies, which were issued by Westchester Surplus Lines Insurance Company, Axis Surplus Insurance Company, Evanston Insurance Company, Arch Specialty Insurance Company, General Security Indemnity Company of Arizona, Certain Underwriters at Lloyds of London, Ironshore Specialty Insurance Company and Landmark American Insurance Company.

During March 2020, the COVID-19 pandemic impacted the State of New Jersey, which ultimately resulted in the temporary closure of Jenkinson's boardwalk and amusement businesses in Point Pleasant Beach, New Jersey. Plaintiffs claim an alleged loss well in excess of $10 million.

All policies held by plaintiffs included language insuring "against all risks of direct physical loss or damage to Insured Property, except as excluded." See Insua Cert. Ex. A at 5; Ex. B at 5; Ex. C at 5; Ex. D at 5; Ex. E at 5; Ex. F at 5; Ex. G at 5. Specifically, the policies' "Perils Excluded" language excludes coverage and notifies the insured that the policies do not:

"…insure for loss or damage caused by…delay, loss of market, or *loss of use*. Indirect, remote, or consequential loss or damage except as provided elsewhere by this Policy." (emphasis added). See Insua Cert. Ex. A at 8; Ex. B at 8; Ex. C at 8; Ex. D at 8; Ex. E at 8; Ex. F at 8; Ex. G at 8.

INSURANCE COVERAGE:

The Primary Policies:

Defendant AXIS Surplus Insurance Company and Westchester Surplus Lines Insurance Company (the "Primary Insurers") issued policies under two separate policy periods of a commercial insurance program, bearing the policy numbers: D37417853 006, EAF773479-19, D37417853 007 and

EAF773479-20. These policy periods were from March 19, 2019 to March 19, 2020 and March 19, 2020 to March 19, 2021. The policies issued by AXIS and Westchester include primary policies as well as excess polices issued by the other named defendants.

Primary Policies Scope of Coverage and Exclusions:

The primary policies issued by AXIS and Westchester both define covered losses under Section II – Covered Causes of Loss, Subsection B (e): "PERILS INSURED: This policy insures against all risk of direct physical loss or damage to Insured Property, except as excluded." This coverage of loss is provided to the insured under each Policy for a period of twelve months.

"Section V – Time Element Coverage Gross Earnings" of each Policy provides for the time element of coverage. Section V states:

> "This Policy is extended to cover the actual loss sustained by the Insured during the Period of Interruption directly resulting from a Covered Cause of Loss to any Property." See Insua Cert. Ex. B at 12; Ex. A at 12.

Section V, Subsection B, Period of Interruption states:

> "In determining the amount payable under this coverage, the Period of Interruption shall be: 1) The period from the time of direct physical loss or damage insured against by this Policy to the time when, with the exercise of due diligence and dispatch, either: a) normal operations resume, or b) physically damaged buildings and equipment could be repaired or replaced and made ready for operations under the same or equivalent physical and operating conditions that existed prior to such loss or damage, whichever is less. Such period of time shall not be cut short by the expiration or earlier termination date of policy." See Insua Cert. Ex. B at 13; Ex. A at 12-13.

The Policy goes on to set forth under Section V, Subsection C "Additional Time Element Coverages" which include a "Contingent Time Element", "Interruption by Civil or Military Authority", "Ingress & Egress". See Insua Cert. Ex. B at 13-15; Ex. A at 13-15.

The AXIS and Westchester policies also include sections which set forth exclusions within "Section II – Covered Causes of Los, Subsection B Perils Excluded. 2(a) and (b)", where it is stated:

> "The Company does not insure for loss or damage caused by any of the following: a) delay, loss of market or loss of use. b) Indirect, remote, or consequential loss or damage except as provided elsewhere in this Policy." See Insua Cert. Ex. B at 8; Ex. A at 8.

The policies further state the following exclusion that the companies do not insure for loss or damage resulting from:

> "the actual, alleged or threatened release, discharge, escape or dispersal of Pollutants or Contaminants, all whether or direct or indirect, proximate or remote in whole or in part caused by, contributed to or aggravated by any Covered Cause of Loss under this Policy." See Insua Cert. Ex. B at 6; Ex. A at 6.
>
> The Policies defined "Pollutants or Contaminants" as:
>
> "Pollutants or Contaminants means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste, which after its release can cause of threaten damage to human health or human welfare or causes or threatens damage, deterioration, loss of value, marketability or loss of use the property insured hereunder, including, but not limited to, bacteria, virus, or hazardous substances as listed in the Federal Water, Pollution Control Act, Clean Air Act, Resource Conservation and Recovery Act of 1976, and Toxic Substances Control Act or as designated by the U.S. Environmental Protection Agency. Waste includes materials to be recycled, reconditioned or reclaimed." See Insua Cert. Ex. B at 30; Ex. A at 30.
>
> The Axis primary policy includes a "Nuclear, Chemical and Biological Exclusion Endorsement", where Subsection B and C state:
>
> "The following exclusions are added to your Policy. This insurance does not apply to: …B. Loss or damage arising directly or indirectly from the dispersal, application or release of, or exposure to, chemical or biological materials or agents that are harmful to property or human health, all whether controlled or uncontrolled, or due to any act or condition incident to any of the foregoing, whether such loss be direct or indirect, proximate or remote, or be in whole or in part caused by, contributed to, or aggravated by, any physical loss or damage insured against by this Policy, however such dispersal, application, release or exposure may have been caused. C. This exclusion applies to all coverage under the Policy notwithstanding any coverage extension or any other endorsement." See Insua Cert. Ex. B.
>
> The Westchester primary policy, similarly, includes a "Nuclear, Biological, Chemical, Radiological Exclusion Endorsement", where Subsection B states:
>
> "The following exclusions are added to your Policy. This insurance does not apply to: …B. Loss or damage arising directly or indirectly from the dispersal, application or release of, or exposure to, chemical, radiological or biological materials or agents, all whether controlled or uncontrolled, or due to any act or condition incident to any of the foregoing, whether such loss be direct or indirect, proximate or remote, or be in whole or in part caused by, contributed to, or aggravated by, any physical loss or damage insured against by this Policy or Coverage Part, however, such dispersal, application, release of exposure may have been caused." See Insua Cert. Ex. A.

The Excess Policies:

Evanston Insurance Company, Arch Specialty Insurance Company, General Security Indemnity Company of Arizona and Certain Underwriters of Lloyds of London (issuing a policy together under "Ethos Specialty Insurance Company"), Ironshore Specialty Insurance Company and Landmark American Insurance Company (collectively, the "Excess Insurers") issued policies to plaintiffs containing the same Manuscript Policy Form terms included in the Primary Insurers policies. The Excess Polices were issued under two separate policy periods, also from March 19, 2019 to March 19, 2020 and March 19, 2020 to March 19, 2021.

Excess Policies Scope of Coverage and Exclusions:

The Evanston, Arch Specialty Insurance, Ethos Specialty Insurance Services, LLC, Ironshore Specialty Insurance and Landmark American Insurance policies all include the following language regarding the scope of coverage: "PERILS INSURED: This Policy insures against all risks of direct physical loss or damage to the Insureds Property, except as excluded." See Insua Cert. at Ex. C at 5; Ex. D at 5; Ex. E at 5; Ex. F at 5; Ex. G at 5. Each of the excess policies include the same "loss of use" exclusion language as the primary policies where the policies state the following:

> "The Company does not insure for loss or damage caused by any of the following: a) delay, loss of market, or loss of use. b) Indirect, remote, or consequential loss or damage except as provided elsewhere in this Policy." See Insua Cert. at Ex. C at 8; Ex. D at 8; Ex. E at 8; Ex. F at 8; Ex. G at 8.

The Evanston, Ethos, Ironshore Specialty and Landmark American Protection Polices also incorporates the same "Pollutants or Contaminants" exclusion as the primary policies, with the following definition:

> "Pollutants or Contaminants means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste, which after its release can cause or threaten damage to human health or human welfare or causes or threatens damage, deterioration, loss of value, marketability or loss of use to property insured hereunder, including, but not limited to, bacteria, virus, or hazardous substances as listed in the Federal Water, Pollution Control Act, Clean Air Act, Resource Conservation and Recovery Act of 1976, and Toxic Substances Control Act or as designated by the U.S. Environmental Protection Agency. Waste includes materials to be recycled, reconditioned or reclaimed." See Insua Cert. at Ex. C at 30; Ex. E at 30, Ex. F at 30, Ex. G at 30.

The Evanston excess policy includes the "Exclusion – Biological, Radiological or Chemical Materials," which states:

> "This endorsement modifies insurance provided under all Property and similar or related coverage forms attached to this policy. The following exclusion is added and is therefore not a Covered Cause of Loss: We will not pay for loss or damage caused directly or indirectly by the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss. **Biological, Radiological Or Chemical Materials**. Loss or damage caused directly or indirectly by the actual or threatened malicious use of pathogenic or poisonous biological, radiological or chemical materials, whether in time of peace or war, and regardless of who commits the act." See Insua Cert. Ex. C.

The Ethos excess policy includes the "Exclusion of Pathogenic Or Poisonous Biological Or Chemical Materials," which states:

> "This endorsement modifies insurance provided under the following coverage parts: We will not pay for loss or damage caused directly or indirectly by the discharge, dispersal, seepage, migration, release, escape or application of any pathogenic or poisonous biological or chemical materials. Such loss or damage is excluded regardless of any causes of event that contributes concurrently or in any sequence to the loss." See Insua Cert. Ex. E.

The Ironshore Specialty Insurance excess policy does not include a specific exclusion for biological, chemical or radiological materials, but the "Pollutant or Contaminant" manuscript policy exclusion incorporates both viruses and bacteria as cited above.

The Landmark American excess policy includes the "Exclusion of Pathogenic or Poisonous Biological or Chemical Materials," which states:

> "This endorsement modifies insurance provided under the following: All coverage parts. The following exclusion is added: We will not pay for loss or damage caused directly or indirectly by the discharge, dispersal, seepage, migration, release, escape or application of any pathogenic or poisonous biological or chemical materials. Such loss or damage is excluded regardless or any other cause or event that contributes concurrently or in any sequence to the loss." See Insua Cert. Ex. G.

The Arch excess policy contains the following "Loss Due to Virus or Bacteria" exclusion:

> "[Arch] will not pay for loss or damage caused by or resulting from any virus…that induces or is capable of inducing physical distress, illness or disease." See Insua Cert.at Ex. D at 1.

Under the terms of Arch's policy, the virus exclusion applies to "all coverages under all forms and endorsements that comprise" the policies, which includes property damage to buildings, personal property or endorsements that cover business income, extra expense or action of civil authority.

Civil Authority Provisions:

Each of the primary and excess policies include provisions extending coverage to the actual loss sustained during the period of time when the Insured's real or personal property is prohibited by an order of civil or military authority. However, the policies require the civil or military authority orders to be the direct result of a Covered Cause of Loss or of an imminent threat of a Covered Cause of Loss, not insured under the policies. The primary and excess policies all include the following language under "Section V-Time Element Coverage Gross Earnings, Subsection C(5)6":

> "INTERRUPTION BY CIVIL OR MILITARTY AUTHORITY: This Policy is extended to cover the actual loss sustained during the period of time when access to the Insured's real or personal property is prohibited by an order of civil or military authority, provided that such order is a direct result of a Covered Cause of Loss or of an imminent threat of a Covered Cause of Loss to real property not insured hereunder. Such period of time begins with the effective date of the order of civil or military authority and ends when the order expires, but no later than the number of days shown in Section 1., Subparagraph E.6. In no event shall the Company pay more than the Sublimit shown in Section 1., Subparagraph E.6." See Insua Cert. Ex. A at 15; Ex. B at 15; Ex. C at 15; Ex. D at 15; Ex. E at 15; Ex. F at 15.

In response to the COVID-19 pandemic, New Jersey's Governor Philip D. Murphy declared a State of Emergency and a Public Health Emergency on March 9, 2020. On March 16, 2020 Governor Murphy issued Executive Order No. 104, which limited the size of in-person gatherings, closed schools, and directed certain facilities to close to the public. See Exec. Order No. 104 (March 16, 2020). Governor Murphy's following Executive Order No. 107 directed all New Jersey residents to remain at home and mandated the closure of all non-essential businesses. See Exec. Order No. 107 (March 21, 2020). Executive Order No. 107 became effective on March 21, 2020. Id. On May 18, 2020 Governor Murphy issued Executive Order No. 147, which continued the closure of amusement parks, arcades and other public places, while authorizing the reopening of beaches and boardwalks. See Exec. Order No. 147 (May 18, 2020).

ANALYSIS:

The court denies plaintiffs' motion for summary judgment and grants defendants' cross-motions for summary judgment. In doing so, the court concludes that plaintiffs' interpretation of the direct

physical loss, the efficient proximate cause doctrine, and interpretation of the "pollutants or contaminants", "loss due to virus or bacteria" and biological material exclusions is misapplied to the facts and policies of the instant case. Further, defendants have met their burden in proving the closure of plaintiffs' business was a direct result of the COVID-19 pandemic and that no direct physical loss was incurred to the Insured's property, thus falling outside the scope of the insurance policies' coverage limits.

The test for determining whether summary judgment must be granted is based on if "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue of as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." See Town of Kearny v. Brandt, 214 N.J. 76, 91 (2013) (quoting R. 4:46-2(c)). Under the "genuine issue [of] material fact" standard, an opposing party must do more than "point to any fact in dispute" in order to defeat summary judgment. See Globe Motor Co. v. Igdalev, 225 N.J. 469, 479 (2016). The court will not grant summary judgment if the opposing party "only [offers] facts which are immaterial or of an insubstantial nature," if taking the moving party's statements of undisputed facts as true. See Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 529 (1995).

New Jersey Courts have long interpreted insurance policies in favor of the insured and against the insurer. Salem Group v. Oliver, 128 N.J. 1, 607 A.2d 138 (1992). The rational for such an interpretation is in part based upon the public policy interest of interpreting the insurance policy against the drafter. Werner Industries Inc. v. First State Insurance Company, 112, N.J. 30, 528, A.2d 188 (1988). Under the rule of contra proferentem, courts construe all ambiguities and uncertainties within the insurance policy against the insurance company and in favor of coverage. See Sparks v. St. Paul Insurance Company, 100 N.J. 325, 495 A.2d 406 (1985).

The clear and unambiguous terms of insurance policies must be enforced by the court. Erdo v. Torcon Construction Company, 275 N.J. Super 117, 645 A.2d 806 (App. Div. 1994). Courts looks to

whether the phrasing of the policy of insurance is sufficiently confusing such that the average policy-holder cannot make out of the boundaries of coverage when assessing whether an ambiguity exists in the policy language. Nunn v. Franklin Mutual Insurance Company, 274 N.J. Super, 543 644 A.2d 1111 (App Div. 1994). The language of an insurance policy is only ambiguous where a reasonably intelligent person would differ regarding its meaning. Aviation Charters, Inc. v. Avemco Insurance Co., 335 N.J Super. 591, 763 A.2d. (App. Div. 2000). The court need not consider the alleged reasonable expectations of the insured where the policy for insurance is clear and unambiguous. Katchen v. Government Employer's Ins. Co., 457 N.J. Super, 600, 607, 202 A.3d. 627 (App. Div. 2019). An ambiguity is not created alone by a disagreement over the interpretation of policy for insurance between the insurer and the insured. See Aviation Charters, 335 N.J. Super at 763.

Courts interpret the words of the insurance policy in accordance with their plain and ordinary meaning. Voorhees v. Preferred Mutual Insurance Company, 128 N.J. 165, 607 A.2d 1266 (1992). If the words of the policy give rise to two interpretations, where only one will support a finding of coverage, the court will choose the interpretation favoring the finding of coverage of the insured. Meeker Sharkey Associates, Inc. v. National Union Fire Insurance Company of Pittsburgh, 208 N.J. Super 354, 506 A.2d 19 (App. Div. 1986).

Here, the defendants first argue that the Covered Cause of Loss provision of the policies do not apply because plaintiffs have not alleged a "direct physical loss or damage" to plaintiffs' property. Defendants assert a "direct physical loss or damage" to the property must be established in order to implicate coverage under the policies.

The defendants also assert that several policy exclusions apply that preclude coverage under the policy. Specifically, defendants cite to the "loss of use" exclusion, the "pollutants or contaminants" exclusion, the "loss due to virus or bacteria" and the "nuclear, chemical and biological exclusion" as policy exclusions for coverage.

Plaintiffs argue that a direct physical loss or damage was sustained because plaintiffs were unable to use their property for its intended purpose and because employees tested positive for COVID-19 at or around the time plaintiffs' facilities closed to the public. Moreover, plaintiffs argue the loss of functionality of its premises constitute physical damage caused by the actual presence of COVID-19.

Plaintiff further contends that a blanket virus exclusion does not exist in any of the defendants' insurance policies except for Arch Specialty Insurance's excess policy. Plaintiff additionally argues to the extent that the policies, other than Arch, include a virus exclusion, the exclusion only applies to viruses listed within the Federal Water, Pollution Control Act, Clean Air Act, Resource Conservation and Recovery Act of 1976.

A. Direct Physical Loss Requirement

Plaintiffs' claim for coverage based on the loss of use of the Jenkinson's facilities does not give rise to a "direct physical loss or damage" to its property, which is required by the following language in all of the polices: "this policy insures against all risks of direct physical loss or damage to Insured Property, except as excluded." See Insua Cert. Ex. A at 5; Ex. B at 5; Ex. C at 5; Ex. D at 5; Ex. E at 5; Ex. F at 5; Ex. G at 5. The policies contain an express exclusion stating the polices do not insure for: "loss or damage caused by…delay, loss of market, or *loss of use*. Indirect, remote, or consequential loss or damage except as provided elsewhere by this Policy." (emphasis added). See Insua Cert. Ex. A at 8; Ex. B at 8; Ex. C at 8; Ex. D at 8; Ex. E at 8; Ex. F at 8; Ex. G at 8. This matter before the court is distinguishable from Wakefern Food Corp. v. Liberty Mutual Fire Ins. Co., 406 N.J. Super. 524 (App. Div.), certify. Denied 200 N.J. 209 (2009). In Wakefern, the insureds claim arose out of an electrical grid failure to the North American grid causing a four-day long electrical blackout effecting portions of the Northeastern United States and Eastern Canada. Liberty Mutual Fire Insurance Company had issued a policy to the insured containing a specific coverage provision for damage due to the loss of electrical power. The Liberty insurance policy required the interruption of coverage caused by physical damage from a covered peril to any power house, generating plant, substation power switching station, gas

compressor station, transformer, telephone exchange, transmission lines, connections or supply pipes which furnish electricity to a covered location. Id. The court found that under the policy's "Services Away Extension" the policy provided coverage for the interruption of electrical service, although the parties disputed whether the electrical blackout resulted in physical damage to the insured electrical equipment and property. Id.

Here, plaintiffs have not successfully alleged "a direct physical loss" to the property. In plaintiffs moving papers and at oral argument, plaintiffs attempted to raise the argument that the presence of COVID-19 at Jenkinson's buildings was a sufficient "direct physical loss" to the property. The court finds plaintiffs' argument without merit. First, the plaintiff relies upon certifications from various employees at plaintiffs' premises that had contracted COVID-19 at or around the time that plaintiffs closed their facilities. There has been no evidence put forth by plaintiffs that employees at plaintiffs' premises contracted COVID-19 because of exposure to the property itself.

Moreover, plaintiffs have failed to make a showing that the concentration of COVID-19 rose to a level where the property was rendered temporarily unsafe or inhospitable. This differentiates plaintiffs' claim from the District Court of New Jersey's ruling in Gregory Packaging, Inc. v. Travelers Property Casualty Company of America, where the court found that the presence and concentration of ammonia in the building required immediate closure and remediation before the property became safe for human occupancy. 2014 WL 6675934 (D.N.J. Nov. 25, 2014). In Gregory Packaging, the court held that the presence of ammonia was a sufficient "direct physical loss" at the property because the amount of ammonia present at the property "rendered the facility unstable for a period of time". Id. Here, it has not been shown that COVID-19 rose to a high concentration like the Gregory Packaging ammonia concentration in a closed space. Nothing in the record demonstrates any level of concentration of COVID-19 at any time during the policy periods in question. The plaintiffs urge the court to speculate on the presence of the virus immediately upon the facilities' closure. Upon the closure of the plaintiffs' facilities and the absence of any large crowds of people indoors, the purpose of reducing the ability of the virus to

be transmitted among humans was accomplished. There is no evidence to suggest that the plaintiffs' buildings were damage by a concentration of COVID-19.

The Executive Orders issued by Governor Murphy in the March and May of 2020, were aimed at slowing the spread of the novel COVID-19 virus. The Executive Orders required plaintiffs to close its doors to the public. The executive action did not require the actual presence of COVID-19 at plaintiffs' property to bar public access. Moreover, the Executive Orders were not issued due to a physical alteration of plaintiffs' property. Since plaintiffs' loss of use of its property does not fall under a covered cause of loss under the insurance policies, plaintiff is precluded from recovery under the civil authority provision of the policies. This is because each of the policies includes the express civil authority exclusion:

> "INTERRUPTION BY CIVIL OR MILITARTY AUTHORITY: This Policy is extended to cover the actual loss sustained during the period of time when access to the Insured's real or personal property is prohibited by an order of civil or military authority, provided that such order is a direct result of a Covered Cause of Loss or of an imminent threat of a Covered Cause of Loss to real property not insured hereunder. Such period of time begins with the effective date of the order of civil or military authority and ends when the order expires, but no later than the number of days shown in Section 1., Subparagraph E.6. In no event shall the Company pay more than the Sublimit shown in Section 1., Subparagraph E.6." See Insua Cert. Ex. A at 15; Ex. B at 15; Ex. C at 15; Ex. D at 15; Ex. E at 15; Ex. F at 15.

This court concurs with the holdings in the following District Court of New Jersey decisions where insurance coverage was denied because plaintiff did not allege any facts to support a showing that its property was physically damaged and the policies at issue exclude coverage for damage, loss or expense arising from a virus. See Boulevard Carroll Entm't Grp., Inc. v. Fireman's Fund Ins. Co, 2020 WL 7338081 (D.N.J. Dec. 14, 2020); 7th Inning Stretch LLC v. Arch Ins. Co., 2021 WL 800595 (D.N.J. Jan. 19, 2021); Arash Emami, M.D., P.C., Inc. v. CNA & Transp. Ins. Co., 2021 WL 1137997 (D.N.J. Mar. 11, 2021).

B. Loss of Use Exclusion

Here, the primary and excess policies each include provisions excluding coverage for loss of use, or damage caused by a loss of use. Considering plaintiffs' damages resulted from the closure of its business during the stated policy periods, the policies' "loss of use" exclusions apply. Plaintiffs' claims

that the Plaintiffs were required to close its doors to the public for a temporary period of time and then limit capacity before being permitted to fully reopen to the public in the spring of 2021. This court further finds that beyond the absence of direct physical loss to the plaintiffs' property, the policies' loss of use exclusion bar recovery under the policy. The plaintiffs' damages arise out of the inability to *use* the property for its intended profit-making function, which is expressly excluded by the policies involved.

C. Efficient Proximate Cause Test and the Policies' "Pollutant or Contaminant", Virus and Various Biological Materials Exclusions

New Jersey law follows to the "efficient proximate cause" test in determining whether coverage for a particular loss is excluded. Under the test, "if an exclusion 'bars coverage for losses caused by a particular peril, the exclusion applies only if the excluded peril was the 'efficient proximate cause' of the loss". See New Jersey Transit Corp. v. Certain Underwriters of Lloyd's London, 461 N.J. Supp. 440, 446 (App. Div. 2019). "Where a peril specifically insured against sets other causes in motion which, in an unbroken sequence and connection between the acts and final loss, produces the result for which recovery is sought, the insured peril is regarded as the proximate cause of the entire loss." Id. The proximate cause of a loss is not always determined by the last occurrence in a chain of events, rather the proximate cause is regarded as the predominant cause that set the chain of loss into motion. See Franklin Packaging Co. v. California Union Ins. Co., 171 N.J. Super. 188, 191 (App. Div. 1979).

As stated above New Jersey Courts follow the "efficient proximate cause" test when determining whether a particular loss is excluded under an insurance policy. Here, COVID-19 set in motion the chain of events that caused plaintiffs' losses as the virus prompted state and municipal orders that required plaintiffs to temporarily close its facilities. Within the Westchester and Axis primary policies "Section II – Covered Causes of Loss", "Pollutants or Contaminants" are an expressly stated excluded peril, where the polices state:

> "The actual, alleged or threatened release, discharge, escape or dispersal of Pollutants or Contaminants, all whether direct or indirect, proximate or remote or in whole or in part caused

by, contributed to or aggravated by any Covered Cause of Loss under this Policy." See Insua Cert. Ex. A at 6; Ex. B at 6.

Under "Section VII - Policy Definitions" of the Westchester and Axis primary policy, "Pollutants or Contaminants" are defined as:

> "…any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste, which after its release can cause or threaten damage to human health or human welfare or causes or threatens damage, deterioration, loss of value, marketability or loss of use to property insured hereunder, including, but not limited to, bacteria, virus, or hazardous substances as listed in the Federal Water, Pollution Control Act, Clean Air Act, Resource Conservation and Recovery Act of 1976, and Toxic Substances Control Act or as designated by the U.S. Environmental Protection Agency. Waste includes materials to be recycled, reconditioned or reclaimed." See Insua Cert. at Ex. A at 30; Ex. B at 30.

Additionally, plaintiff also raises the argument that the virus exclusion stated by the defendants does not apply as COVID-19 is not listed as a hazardous substance in the Federal Water, Pollution Control Act, Clean Air Act, Resource Conservation and Recovery Act of 1976. See Insua Reply Brief. This court is not persuaded by plaintiffs' interpretation of the policy language. A number of courts have recently examined this issue and have denied coverage. See Mac Prop. Grp. LLC & The Cake Boutique LLC v. Selective Fire & Cas. Ins. Co., 2020 WL 7422374 (N.J. Super 2020). It is well settled that the virus exclusion cited in the defendants' policies is intended to include viruses and based on a plain reading of the policy the term "virus" is not intended to be modified by the Federal Water, Pollution Control Act, Clean Air Act, Resource Conservation and Recovery Act of 1976. While plaintiffs' supplemental brief following oral argument on June 10, 2021 provides references to where viruses fall into definitions under the Federal Water Pollution Act, this court interprets the "Pollutants or Contaminants" definition in a disjunctive manner, where the policy excludes both "hazardous substances" found in the Federal Water Pollution Act, as well as viruses.

This court finds that the "Pollutants or Contaminants" exclusion to include an exclusion for a "virus" that "can cause of threaten damage to human health or welfare". See Insua Cert. at Ex. A, B, H and I. Additionally, the excess Arch policy clearly includes an exclusion to coverage due to viruses. See Insua Cert. Ex. D at 1. This issue has been brought before New Jersey Courts since the start of the public

health emergency. In Mac Prop. Grp. LLC., the court found that the plaintiff's complaint put COVID-19 at issue as the virus introduced the cause of loss. 2020 WL 7422374 (N.J. Super 2020). The court in Mac Prop. Grp. LLC dismissed plaintiff's claims because plaintiff's actions taken to slow or stop the spread of COVID-19 fell within the virus and bacteria exclusion. Id. This court concurs with the holding in Mac Prop. Grp. LLC and applies the same analysis. In the instant matter, plaintiffs' closure of its property as a result of COVID-19 makes clear that the virus itself was the proximate cause of loss and thereby excludes coverage under the policies.

The plaintiffs' policies contain stated exclusions for nuclear, chemical and biological materials. Although the plaintiffs dispute the biological nature of COVID-19 based on the premise that a virus is "nonliving" and requires a live host, like a human, to spread the infection this court need not determine whether COVID-19 is viral and/or biological in nature. COVID-19 was the proximate cause of the resulting civil and municipal authority closures and capacity limit requirements that impacted plaintiffs' business. The business interruption is a bar to coverage under the primary and excess policies' virus and biological material exclusions under the defined "Pollutants or Contaminants", "Loss due to Virus or Bacteria", and the various iterations of the biological, chemical, radiological exclusions. Ultimately, plaintiffs have not alleged any physical loss at the property and therefore are barred from coverage.

CONCLUSION:

For the reasons expressed above, this court finds that the defendants are entitled to Summary Judgment and plaintiffs' claims are dismissed with prejudice. Plaintiffs have not successfully alleged a direct physical loss at the property. Loss of use of the insured property is expressly excluded under the primary and excess polices. Moreover, it is undisputed that the presence of COVID-19 at the insureds' property falls within the Pollutant or Contaminant and/or Biological material exclusions. For these reasons, the court dismisses plaintiffs' claims with prejudice.

It is FURTHER ORDERED that a copy of this order shall be served upon all parties within seven (7) days.

/s/ Craig L. Wellerson

WRITTEN DECISION RENDERED
July 2, 2021

HON. CRAIG L. WELLERSON, P.J. CV.

Tab D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

MHG HOTELS, LLC, JALI, LLC, HOTELS OF SPEEDWAY, LLC, HOTELS OF DEERFIELD, LLC, MOTELS OF NOBLESVILLE, LLC, MOTELS OF AVON, LLP, MOTELS OF FISHERS, LLP, MOTELS OF INDIANAPOLIS, LLP, NATVER, LLP, MOTELS OF SEYMOUR, LLP, SRI-RAM, INC., SIVA, INC., HIREN, LLP, IDM, LLC, MOTELS OF NOBLESVILLE 2, LLP, NEAL LODGING, LLC, MOTELS OF NORTH AURORA, LLP, RANJAN, LLC, MOTELS OF BLOOMINGTON, LLC, RAVI, LLC, HOTELS OF STAFFORD, LLP, APPLETREE HOSPITALITY, LLC, EMERALD HOTEL INVESTMENTS, LLC, GOURLEY PIKE LODGING, LLC, HOTELS OF DEERFIELD BEACH, LLC, and MOTELS OF SUGARLAND, LLP, Plaintiffs, v. EMCASCO INSURANCE COMPANY, INC. and UNION INSURANCE COMPANY OF PROVIDENCE, INC.,	)	No. 1:20-cv-01620-RLY-TAB

Defendants.)

ENTRY ON DEFENDANTS' MOTION TO DISMISS

On July 23, 2020, the Plaintiffs herein, MHG, Hotels, LLC; JALI, LLC; Hotels of Speedway, LLC; Hotels of Deerfield, LLC; Motels of Noblesville, LLC; Motels of Avon, LLP; Motels of Fishers, LLP; Motels of Indianapolis, LLP; Natver, LLP; Motels of Seymour, LLP; SRI-RAM, Inc.; SIVA, Inc.; HIREN, LLP; IDM, LLC; Motels of Noblesville 2, LLP; Neal Lodging, LLC; Motels of North Aurora, LLP; Ranjan, LLC; Motels of Bloomington, LLC; Ravi, LLC; Hotels of Stafford, LLP; Appletree Hospitality, LLC; Emerald Hotel Investments, LLC; Gourley Pike Lodging, LLC; Hotels of Deerfield Beach, LLC; and Motels of Sugarland, LLP, filed an Amended Complaint against Defendants, Emcasco Insurance Company, Inc. and Union Insurance Company of Providence, Inc., for breach of contract, bad faith, and fraudulent misrepresentation arising out of the denial of Plaintiffs' March 23, 2020 claim for alleged business interruption losses. Defendants now move to dismiss Plaintiffs' Complaint under Federal Rule of Civil Procedure 12(b)(6). The court, having read and reviewed the parties' submissions and the applicable law, now **GRANTS** Defendants' motion.

I. Dismissal Standard

Federal Rule of Civil Procedure 12(b)(6) permits the court to dismiss a complaint for failure to state a claim upon which relief may be granted. When ruling on a motion to dismiss, the court may consider, in addition to the allegations set forth in the complaint itself, "documents that are attached to the complaint, documents that are central to the

complaint and referred to in it, and information that is properly subject to judicial notice." *Williamson v. Curran*, 714 F.3d 432, 436 (7th Cir. 2013). To survive, the "complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Bell Atlantic v. Twombly*, 550 U.S. 544, 555 (2007); *see Independent Trust Corp. v. Stewart Info, Servs. Corp.*, 665 F.3d 930, 935 (7th Cir. 2012) ("The complaint 'must actually *suggest* that the plaintiff has a right to relief, by providing allegations that raise a right to relief above the speculative level.'") (quoting *Windy City Metal Fabricators & Supply, Inc. v. CIT Tech. Fin. Servs.*, 536 F.3d 663, 668 (7th Cir. 2008)). "A complaint has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). With these standards in mind, the court turns to the Policy provisions at issue.

II. Policy Provisions

Plaintiffs were insured under two separate Businessowners Policies providing coverage for their various hotel properties which were effective as of August 1, 2019—the Union Insurance Company of Providence, Policy No. 5T4-85-44-20 and the Emcasco Insurance Company of Providence, Policy No. 5W4-85-44-2 ("Policy"[1]). In relevant part, the Policy provides:

SECTION I – PROPERTY

A. Coverage

[1] Because the relevant language in the Policies is identical, the court will refer to them as if there were a single policy and only cite to the Policy submitted into evidence as Filing No. 11-1.

We will pay for direct physical loss of or damage to Covered Property . . . caused by or resulting from any Covered Cause of Loss.

3. Covered Causes of Loss

Direct physical loss unless the loss is excluded or limited under Section I – Property.

(Policy at 16).

The Policy also provides "Additional Coverages" for "Business Income" and "Extra Expense" as follows:

5. Additional Coverages

* * *

f. Business Income

(1) Business Income

(a) We will pay for the actual loss of Business Income you sustain due to the necessary suspension of your "operations" during the "period of restoration." The suspension must be caused by direct physical loss of or damage to property at the described premises. The loss or damage must be caused by or result from a Covered Cause of Loss . . . .

(b) We will only pay for loss of Business Income that you sustain during the "period of restoration" and that occurs within 12 consecutive months after the date of direct physical loss or damage . . . .

(2) Extended Business Income

(a) If the necessary suspension of your "operations" produces a Business Income loss payable under this policy, we will pay for the actual loss of Business Income you incur during the period . . . .

(b) Loss of Business Income must be caused by direct physical loss or damage at the described premises caused by or resulting from any Covered Cause of Loss.

(*Id.* at 21-22).

The term "period of restoration" is defined in the Policy as the period of time that:

(1) Begins:

(a) 72 hours after the time of direct physical loss or damage for Business Income Coverage; or

(b) Immediately after the time of direct physical loss or damage for Extra Expense Coverage;

caused by or resulting from any Covered Cause of Loss at the described premises; and

(2) Ends on the earlier of:

(a) The date when the property at the described premises should be repaired, rebuilt or replaced with reasonable speed and similar quality, or

(b) The date when business is resumed at a new permanent location.

(*Id.* at 48-49).

g. Extra Expense

(1) We will pay necessary Extra Expense you will incur during the "period of restoration" that you would not have incurred if there had been no direct physical loss or damage to property at the described premises. The loss or damage must be caused by or result from a Covered Cause of Loss . . . .

(2) Extra Expense means expense incurred:

(a) To avoid or minimize the suspension of business and to continue "operations" . . .

(b) To minimize the suspension of business if you cannot continue "operations."

* * *

(4) We will only pay for Extra Expense that occurs within 12 consecutive months after the date of direct physical loss or damage. This Additional Coverage is not subject to the Limits of Insurance of Section I – Property.

(*Id.* at 23).

The Policy also provides for Civil Authority Coverage.

i. Civil Authority

When a **Covered Cause of Loss** causes damage to property other than property at the described premises, we will pay for the actual loss of Business Income you sustain and necessary Extra Expense caused by action of civil authority that prohibits access to the described premises, provided that both of the following apply:

(1) Access to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage, and the described premises are within that area but are not more than one mile from the damaged property; and

(2) The action of civil authority is taken in response to dangerous physical conditions resulting from the damage or continuation of the Covered Cause of Loss that caused the damage, or the action is taken to enable a civil authority to have unimpeded access to the damaged property.

(*Id.* at 24).

Lastly, the Policy contains a Virus or Bacteria exclusion.

B. Exclusions

1. We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause

or event that contributes concurrently or in any sequence to the loss. These exclusions apply whether or not the loss event results in widespread damage or affects a substantial area.

* * *

j. Virus or Bacteria

(1) Any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease.

(*Id.* at 35).

III. Factual Background

Plaintiffs are engaged in the business of hotel development and management. (Filing No. 11, Am. Compl. ¶ 6). They operate various hotel properties located in Illinois, Indiana, Missouri, and Texas. (*Id.* ¶ 8).

On March 11, 2020, the World Health Organization characterized the spread of the novel coronavirus, COVID-19, as a pandemic. (*Id.* ¶ 18). In response to the pandemic and threatened spread of COVID-19, governmental units across the United States including Indiana, Illinois, Missouri, and Texas, issued Executive Orders placing restrictions on travel and requiring certain businesses to close to the public or operate under significant restraints. (*See id.* ¶ 19). Executive Orders issued in Indiana, Illinois, Missouri, and Texas declared hotels and motels were essential businesses and were not required to close to the public. (*See* Filing No. 21-1, Denial Letters at 3, 15, 26, 39). Plaintiffs allege that due to the Executive Orders, customers were prevented from traveling to and staying at Plaintiffs' hotels. (Am. Compl. ¶ 19). As a result, Plaintiffs have suffered a substantial loss of revenue. (*Id.* ¶ 22).

On March 23, 2020, Plaintiffs submitted a claim to Defendants, requesting coverage for its business interruption losses under the Policy. (*Id.* ¶ 23). Defendants created four separate claim numbers based upon the state where the hotels were physically located (collectively the "claim"). (*See* Denial Letters). The following day, Plaintiffs' CEO received several calls from Defendants informing him that they did not intend to cover Plaintiffs' losses, and that he should expect a denial in the coming weeks. (Am. Compl. ¶ 24).

On April 24, 2020, Plaintiffs' claim was denied, and four separate denial letters were issued outlining the investigation and the reasons for denial of each claim. (*Id.*). Defendants concluded that no claim had been submitted for physical loss of or damage to any covered property, dependent property, or nearby property and therefore, there was no covered loss under the Policy. (*Id.*). Defendants further explained that to the extent Plaintiffs' alleged losses were caused by or related to a virus, including COVID-19, such loss was expressly excluded as a Covered Cause of Loss pursuant to the Virus or Bacteria Exclusion. (*Id.*).

IV. Discussion

The parties agree that Indiana law governs their dispute. Under Indiana law, the interpretation of an insurance policy is a question of law. *Buckeye State Mut. Ins. Co. v. Carfield*, 914 N.E.2d 315, 318 (Ind. Ct. App. 2009) (citing *Briles v. Wausau Ins. Co.*, 858 N.E.2d 208, 213 (Ind. Ct. App. 2006)). When interpreting an insurance policy, the court's goal is to "ascertain and enforce the parties' intent as manifested in the insurance

contract." *Id.* If the policy language is clear and unambiguous, it should be given its plain and ordinary meaning. *Id.* The court construes the insurance policy as a whole and considers all the provisions of the contract and not just the individual words, phrases, or paragraphs. *Briles*, 858 N.E.2d at 213. A court must accept an interpretation of the contract language that harmonizes the provisions, rather than one that supports conflicting versions of the provisions. *Id.* As such, a court "should construe the language of a contract so as not to render any words, phrases, or terms ineffective or meaningless." *Mahan v. Am. Standard Ins. Co.*, 862 N.E.2d 669, 676 (Ind. Ct. App. 2007).

A. Count I, Breach of Contract

Plaintiffs allege Defendants breached the insurance contract by denying them coverage for business income losses associated with the interruption of their business operations due to the spread of COVID-19. Specifically, they allege:

> 21. The continuous presence of COVID-19 on or around Plaintiffs' premises, and/or the threat thereof, has rendered the premises unsafe and unfit for their intended use and therefore cause physical damage or loss to Plaintiffs' property under the Policy.
>
> 22. The applicable closures and restrictions were issued in direct response to these dangerous physical conditions, or the threat thereof, and prohibited and/or severely restricted the public from accessing Plaintiffs' businesses, thereby causing the necessary limitation or suspension of Plaintiffs' operations and triggering coverage under the Policy.

(Am. Compl. ¶¶ 20-21).

1. Direct Physical Loss of or Damage to Property

Plaintiffs first seek coverage under the Business Income and Extra Expense provisions of the Policy, arguing that the business losses associated with COVID-19 and the related Executive Orders—what Plaintiffs phrase as "loss of use" of property—constitute a direct physical loss of property. Defendants disagree and argue that to establish a direct physical loss of property, Plaintiffs must allege a distinct and physical alteration of the property. (*See* Denial letter for MGH Hotels at 5 ("'Direct physical loss or damage' generally requires, at a minimum, a distinct and demonstrable physical alteration of the business property.")).

The Policy extends coverage to "direct physical loss of or damage to Covered Property." (Policy at 16). Although the phrase "direct physical loss of or damage to" is not defined in the Policy, the court finds its meaning is not ambiguous. The term "direct" signals immediate or proximate cause. *Universal Image Prods., Inc. v. Chubb Corp.*, 703 F.Supp.2d 705, 709 (E.D. Mich. 2010). The term "physical" is defined as something which has a "material existence: perceptible especially through the senses and subject to the laws of nature." Merriam–Webster, available at http://www.merriam-webster.com/ (last visited March 1, 2021); *see also* Couch on Insurance § 148:46 (3d Ed. 1998) ("The requirement that the loss be 'physical,' given the ordinary definition of the term, is widely held to exclude alleged losses that are intangible or incorporeal and, thereby, to preclude any claim against the property insurer when the insured merely suffers a detrimental economic impact unaccompanied by a distinct, demonstrable, physical alteration of the property."). Thus, "[t]he words 'direct' and 'physical,' which modify the word 'loss'

ordinarily connote actual demonstrable harm of some form to the premises itself." *Sandy Point Dental, PC v. The Cincinnati Ins. Co.*, --- F.Supp.3d ---, 2020 WL 5630465, at *2 (N.D. Ill. Sept. 21, 2020); *see also Port Auth. of New York & New Jersey v. Affiliated FM Ins. Co.*, 311 F.3d 226, 235 (3rd Cir. 2002) ("In ordinary parlance and widely accepted definition, physical damage to property means 'a distinct, demonstrable, and physical alteration' of its structure.") (quoting 10 Couch on Insurance § 148.46 (3d Ed. 1998)).

An examination of the Policy as a whole supports Defendants' interpretation. The "period of restoration" applicable to both Business Income and Expense coverage "begins 72 hours after the time of direct physical loss or damage . . . " and ends "when the property at the described premises should be repaired, rebuilt or replaced with reasonable speed and similar quality." (Policy at 48-49). "The words 'rebuild,' 'repair' and 'replace' all strongly suggest that the damage contemplated by the Policy is physical in nature." *Mudpie Inc. v. Travelers Casualty Ins. Co. of Am.*, 4:20-cv-03213, 2020 WL 5525171, at *4 (N.D. Cal. Sept. 4, 2020) (quoting *Philadelphia Parking Auth. v. Fed. Ins. Co.*, 385 F.Supp.2d 280, 287 (S.D.N.Y. 2005)). Read together, the court finds the phrase "direct physical loss" refers to a loss that requires the insured to repair, rebuild, or replace property that has been tangibly, physically altered – not the insured's loss of use[2] of that property.

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[2] Plaintiffs cite *Cook v. Allstate Ins. Co.*, 48 D02-0611-PL-01156, 2007 Ind. Super. LEXIS 32 (Madison Super. Ct. Nov. 30, 2007) for the proposition that "a condition that renders property unsuitable for its intended use constitutes a 'direct physical loss, even where some utility remains[.]'" *Id.* at *9. In *Cook*, the insured's home was infested with brown recluse spiders which the insured was unable to remove after several attempts to treat the property. *Id.* at 1-2. He was forced to move his family out of the home. *Id.* at 2. The court found, in part, that the presence

Here, Plaintiffs have continued to operate their hotels since March 2020. Their losses stem from the governmental efforts to slow the spread of COVID-19 and not from a direct physical loss of their property that requires they repair, rebuild, or replace their property. Therefore, because Plaintiffs have failed to plead a direct physical loss, they are not entitled to coverage under the Business Income and Extra Expense provisions of the Policy.

2. Civil Authority Provision

Plaintiffs also seek coverage under the Civil Authority provision. For coverage to apply, there must be (i) damage to property other than the insured's property caused by a Covered Cause of Loss; (ii) resulting in a civil authority prohibiting access to the insured's property; (iii) access to the area immediately surrounding the damaged property is prohibited as a result of the damage and the insured's property is within one mile of the damaged property; and (iv) the civil authority action is taken in response to dangerous physical conditions resulting from the damage or continuation of the Covered Cause of Loss that caused the damage. (Policy at 24).

As Defendants correctly observe, Plaintiffs have not alleged that COVID-19 and the related Executive Orders caused a direct physical loss to property other than the

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of the spiders constituted a "sudden and accidental direct physical loss" to the property. *Id.* at *8. The court reasoned that spiders "living, breeding and hunting on and within surfaces of the Home are a physical condition that renders the Home unsuitable for its intended use." *Id.* at *9. This case is distinguishable from the present case. Unlike the insured in *Cook*, Plaintiffs have not abandoned any property and continue to operate their hotels. Thus, there has been no loss of use because the hotels have remained open. Furthermore, Plaintiffs blame their losses on Executive Orders issued to stem the spread of COVID-19, not a physical condition like a spider infestation in the home.

Plaintiffs' property. Failure to satisfy this requirement alone warrants dismissal of this claim.

As to the second prong, Plaintiffs acknowledge they were deemed essential businesses per governmental orders and were open for business. Plaintiffs attempt to create ambiguity in the term "prohibit" by arguing that it has several dictionary definitions—"forbid" and "hinder." (Filing No. 27, Resp. at 10-11). "Hinder" is defined as "to cause delay, interruption, or difficulty in" and "to be an obstacle or impediment." https://www.dictionary.com/browse/hinder (last visited March 4, 2021). Plaintiffs thus argue that "Government Actions 'hindered'" Plaintiffs' businesses.

In *Sandy Pointe Dental PC v. The Cincinnati Insurance Company*, the plaintiff dental office sought coverage under a civil authority provision which only applied if an order of civil authority "prohibits access to the premises." 2020 WL 5630465, at *3. The plaintiff argued that the Illinois Executive Orders which "left dental offices able to do emergency and non-elective work, but not routine work" forced the dental office to shut down. *Id.* at *1. Applying the plain and ordinary meaning of the term "prohibit," the Northern District of Illinois rejected Plaintiffs' argument and found that "no order in Illinois prohibits access to plaintiff's premises." *Id.* at *3. The court explained: "[P]laintiff concedes that dental offices were deemed essential businesses for emergency and non-elective work. Consequently, plaintiff has failed to allege that access to its premises was prohibited by government order, and its claim for civil authority coverage fails." *Id.* Similarly here, Plaintiffs have failed to allege that access to their premises was

prohibited by government order. Therefore, Plaintiffs claim for civil authority coverage fails as a matter of law.

3. Virus and Bacteria Exclusion

Defendants argue that even if the Plaintiffs had sufficiently alleged a direct physical loss, their claim would still be excluded under the Virus Exclusion. Plaintiffs respond that they were not damaged by COVID-19; rather, "they were damaged as a result of Governmental Actions requiring individuals to 'refrain from non-essential travel' . . . [which] caused 'the necessary limitation or suspension of Plaintiffs' operations.'" (Resp. at 8).

The Virus Exclusion excludes from coverage loss or damage caused directly or indirectly by "[a]ny virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease." (Policy at 35). The exclusion applies "regardless of any other cause or event that contributed concurrently or in any sequence to the loss." (*Id.*).

The court finds Plaintiffs have pleaded that COVID-19 is in fact the reason for the Executive Orders being issued and the underlying cause of Plaintiffs' losses. While the Executive Orders technically impacted Plaintiffs' business operations, the Orders only came about because of the spread of COVID-19. *See Diesel Barbershop, LLC v. State Farm Lloyds*, 479 F.Supp.3d 353, 361 (W.D. Tex. 2020) (holding Virus Exclusion barred plaintiffs' claims because it was the presence of COVID-19—not executive orders finding barbershops "non-essential"—that was primary root cause of Plaintiffs' businesses

temporarily closing). Thus, even if the court found a direct physical loss to the Plaintiffs' properties, the Virus Exclusion applies and bars Plaintiffs' claims.

B. Count II, Bad Faith

Next, Plaintiffs allege Defendants engaged in bad faith by "summarily den[ying] Plaintiffs' request for coverage without conducting a reasonable and adequate investigation of Plaintiffs' claim" and by deceiving Plaintiffs about the scope of the Policy's coverage. (Am. Compl. ¶¶ 35, 38).

Under Indiana law, insurers have a duty to deal with an insured in good faith, and a violation of that duty is a tort giving rise to a cause of action for bad faith. *Erie Ins. Co. v. Hickman,* 622 N.E.2d 515, 519 (Ind.1993). Examples of bad faith acts by an insurer include: "(1) making an unfounded refusal to pay policy proceeds; (2) causing an unfounded delay in making payment; (3) deceiving the insured; and (4) exercising any unfair advantage to pressure an insured into a settlement of his claim." *Id.*

"[W]hether [the insurer] breached the covenant of good faith and fair dealing necessarily requires that the factfinder determine whether it wrongfully denied coverage." *HemoCleanse, Inc. v. Philadelphia Indem. Ins. Co.*, 831 N.E.2d 259, 264 (Ind. Ct. App. 2005); *see also Freidline v. Shelby Ins. Co.*, 774 N.E.2d 37, 40 (Ind. 2002) ("To prove bad faith, the plaintiff must establish, with clear and convincing evidence, that the insurer had knowledge that there was no legitimate basis for denying coverage."). As Defendants made the correct decision to deny coverage, Plaintiffs' bad faith claim predicated on a lack of diligent investigation necessarily fails.

Plaintiffs also claim they were deceived by Defendants' agent. Specifically, they allege that on July 15, 2019, while renewing the Policy, MHG Hotels' CEO, Sanjay Patel, was told by Defendants' agent that the Policy would cover all business interruptions. (Am. Compl. ¶ 9). To the extent this allegation states a claim for bad faith—indeed, a quick read of the Policy reveals that the Policy does not cover *all* business interruptions[3]—Plaintiffs must still show that Defendants' agent made those statements with a culpable state of mind.

In Indiana, a "bad faith claim is composed of an objective element (such as the lack of a reasonable basis to deny a claim) and a subjective element (such as knowledge of the lack of a reasonable basis to deny a claim)." *Clifford v. State Farm and Cas. Co.*, No. 3:10 CV 221, 2011 WL 2326969, at *14 (N.D. Ind. June 7, 2011). "A finding of bad faith requires evidence of a state of mind reflecting dishonest purpose, moral obliquity, furtive design, or ill will . . . A bad faith determination inherently includes an element of culpability." *Colley v. Indiana Farmers Mut. Ins. Grp.*, 691 N.E.2d 1259, 1261 (Ind. Ct. App. 1998) (citing *Johnston v. State Farm Mut. Auto. Ins.*, 667 N.E.2d 802, 805 (Ind. Ct. App. 1996)); *see also Auto-Owners Ins. Co. v. C&J Real Estate, Inc.*, 996 N.E.2d 803, 805-06 (Ind. Ct. App. 2013) ("[P]roving bad faith amounts to showing more than bad judgment or negligence: it implies the conscious doing of wrong because of dishonest

[3] As a general proposition, an insured has a duty to read and understand the insurance policy. *Safe Auto Ins. Co. v. Enterprise Leasing Co. of Indianapolis, Inc.*, 889 N.E.2d 392, 398 (Ind. Ct. App. 2008). "[T]he insured may be relieved of the duty to read and understand the policy where an agent ha[s] made representations about the provisions of the policy." *Anderson Mattress Col., Inc. v. First State Ins. Co.*, 617 N.E.2d 932, 940 (Ind. Ct. App. 1993); *see also id.* n. 8 (explaining the issue has arose in prior cases dealing with actual or constructive fraud).

purpose or moral obliquity . . . . [I]t contemplates a state of mind affirmatively operating with furtive design or ill will.") (quoting *Oxendine v. Public Serv. Co.*, 423 N.E.2d 612, 620 (Ind. Ct. App. 1980)).

Here, Plaintiffs simply allege Defendants acted "with malice, fraud, gross negligence and oppressiveness." (Am. Compl. ¶ 38). This allegation is conclusory; it fails to provide a sufficient factual basis to support an inference that the Defendants acted with a culpable state of mind. *See Family Christian World, Inc. v. Philadelphia Indem. Ins. Co.*, No. 2:15-CV-102, 2015 WL 6394476, at *8 (N.D. Ind. Oct. 21, 2015) (dismissing bad faith claim where the claim was "based on speculation and conclusory allegations that lack sufficient factual support evidencing the type of 'dishonest purpose, moral obliquity, furtive design, or ill will' necessary to sustain such a claim"). The court therefore finds Plaintiffs fail to state a claim against Defendants for bad faith.

C. Count III, Fraudulent Misrepresentation

A claim for fraudulent misrepresentation requires a plaintiff to establish a (i) material misrepresentation of past or existing facts by the party to be charged (ii) which was false (iii) which was made with knowledge or reckless ignorance of the falseness (iv) was relied upon by the complaining party and (v) proximately caused the complaining party injury. *Johnson v. Wysocki*, 990 N.E.2d 456, 460-61 (Ind. 2013). Federal Rule of Civil Procedure 9(b) creates a heightened pleading standard for fraud claims and requires that a party must state with particularity the circumstances constituting fraud or mistake. "While the precise level of particularity required under Rule 9(b) depends on the facts of

the case, the pleading 'ordinarily requires describing the who, what, when, where, and how of the fraud.'" *Camasta v. Jos. A. Bank Clothiers, Inc.*, 761 F.3d 732, 737 (7th Cir. 2014) (quoting *AnchorBank, FSB v. Hofer*, 649 F.3d 610, 615 (7th Cir. 2011)).

This claim is based on Defendants' agent's representations to Mr. Patel regarding the scope of coverage under the Policy. (*See* Am. Compl. ¶ 9). Specifically, Mr. Patel was told that the Policy would protect and insure Plaintiffs against damages incurred as a result of government closure and/or travel restriction orders; the Policy would protect and insure Plaintiffs against damages incurred as a result of a viral pandemic; the Policy would protect and insure Plaintiffs against losses incurred as a result of an interruption to its business operations; and that Defendants would promptly pay such a claim if Plaintiffs made a claim for those type of losses. (*Id.* ¶ 41). Plaintiffs further allege these representations were false, Defendants knew they were false and never intended to provide Plaintiffs with such coverage, Plaintiffs relied on these representations to their detriment and have suffered damages. (*Id.* ¶¶ 42, 43, 46, 48).

Defendants argue Plaintiffs' claim does not identify who made the alleged misrepresentation, the time, place, and content of the misrepresentations, and the method by which the misrepresentation was communicated to Plaintiffs. As shown above, Plaintiffs did include the content of the alleged misrepresentations and the date on which they were communicated. But Plaintiffs did not adequately identify the individual who made those alleged misrepresentations. As Defendants correctly note, they need that

information to properly evaluate Plaintiffs' allegations. The court therefore finds Plaintiffs have failed to plead their fraudulent concealment claim with particularity.

V. Conclusion

For the reasons set forth above, the court **GRANTS** Defendants' Motion to Dismiss. (Filing No. 20). Plaintiffs are granted leave to amend Count III. Such amendment is due on or before **March 29, 2021**.

SO ORDERED this 8th day of March 2021.

RICHARD L. YOUNG, JUDGE
United States District Court
Southern District of Indiana

Distributed Electronically to Registered Counsel of Record.