IN THE DISTRICT COURT OF CHEROKEE COUNTY
STATE OF OKLAHOMA

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LESA ROUSEY-DANIELS, Court Clerk
CHEROKEE COUNTY
By________________Deputy

CHEROKEE NATION, CHEROKEE NATION BUSINESSES, LLC, & CHEROKEE NATION ENTERTAINMENT, LLC	)	Case No. CV-20-150
Plaintiff,	)	Hon. Douglas Kirkley
v.	)	
LEXINGTON INSURANCE COMPANY, et al.	)	
Defendants.	)	

THE NATION'S COMBINED REPLY TO DEFENDANT INSURERS' OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON BUSINESS INTERRUPTION COVERAGE AND OBJECTION TO VARIOUS SUPPLEMENTAL AUTHORITIES SUBMITTED BY DEFENDANT INSURERS

The Cherokee Nation, Cherokee Nation Businesses, LLC, & Cherokee Nation Entertainment, LLC (collectively the "Nation") submit this Combined Reply to Defendant Insurers' Opposition to Plaintiff's Motion for Partial Summary Judgment on Business Interruption Coverage and Objection to Various Supplemental Authorities Submitted by Defendant Insurers (collectively the "Reply"). In support of its Motion and this Reply, the Nation states:

SUMMARY

There is no dispute between the parties: The Tribal Property Insurance Program ("TPIP") insurance policies (Policy Nos. 017471589/06 (Dec 31) 9469, 017471589/06 (Dec 15) 9110, & 017471589/06 (Dec 37) 9109) issued to the Nation are ripe for interpretation by the Court. Through their Oppositions, Defendant Insurers have now provided the Court and the Nation with previously undelivered excess policies, claiming that various exclusions within those policies apply. As this is the Nation's first opportunity to see many of these policies, it asserts numerous defenses bar application of those exclusions to the Nation's claim. But for purposes of summary judgment, even

assuming *arguendo* the exclusions are part of the TPIP Policy, the Court must find as a matter of law such exclusions lack clear and distinct language barring pandemic coverage as required by Oklahoma law. Thus, summary judgment in the Nation's favor is proper. And, if the Court finds both parties interpretations of the Policy are reasonable, the Nation prevails.

THE NATION'S MATERIALS FACTS[1]

1. The parties do not dispute the TPIP Policy is ripe for interpretation. Within their Objections Defendant Insurers attached excess policies with exclusions they claim prevent coverage. In turn, the Nation asserts and reserves for a later time various defenses such as failure of consideration, the reasonable expectation doctrine, failure to delivery, and violation of Oklahoma insurance laws bar application of those exclusions to the TPIP.[2] Although the Nation attests to the facts supporting those defenses,[3] it will also points out that its Motion only requested a finding of coverage based on an interpretation of the TPIP Policy. The Nation is, consequently, entitled to summary judgment because, even assuming *arguendo* those exclusions apply to the TPIP Policy, the interpretation of

[1] Defendant Insurers beg the Court to deny the Motion on the basis that the Nation did not provide citation within its Statement of Undisputed Material Facts, but the Nation provided such citation contextually within its Arguments and Authorities as permitted by Oklahoma District Court Rule 13. Specifically, Summary Judgment requires "a concise written statement of the material facts as to which the movant contends no genuine issue exists and a statement of argument and authority demonstrating that summary judgment or summary disposition of any issue should be granted. Reference shall be made in the statement to the pages and paragraphs or lines of the evidentiary materials that are pertinent to the motion." Okla. Dist. R. 13.

[2] All excess policies were not delivered until after the Pandemic began, making their exclusions hidden and beyond the Nation's reasonable expectation of coverage. *Max True Plastering Co. v. U.S. Fid. & Guar. Co.*, 1996 OK 28, 912 P.2d 861, 869 (A "hidden exclusion" is "not given effect.") (adopting the reasonable expectation doctrine). Further, the excess policies reduced coverage after the policy term began without the Nation's consent or returning the Nation's premium, in-part, both of which render the exclusions invalid. *See, e.g., S. Farm Bureau Cas. Ins. Co. v United States*, 395 F.2d 176, 180 (8th Cir. 1968) (holding that "a limiting endorsement must be supported by consideration," and finding no such consideration, in part, because there was no reduction in premium); see Okla. Admin. Code 365:15-1-3 ("Coverage elimination after policy issuance. Any endorsement which eliminates or restricts coverage and which is issued during the policy term shall be identified as accepted by the insured, by the signature of the insured thereon, and a signed copy (original, computer generated or microfilm) of such endorsement shall be retained in the files of the insurer for one year after the expiration of the policy.").

[3] *Ex.* 1, Calvert Affidavit & *Ex.* 2, Copeland Affidavit (Establishing the factual basis of the Nation's defenses).

those exclusions is a question of law,[4] and the exclusions fail to clearly and expressly exclude pandemics.

2. The Nation submitted undisputed proof it suffered a loss when it closed its facilities due to the COVID-19 Pandemic ("Pandemic"). In Opposition, Defendant Insurers failed to submit an affidavit pursuant to District Court Rule 13(d) and 12 O.S. § 2056(F) stating they were unable to show specific facts in opposition to summary judgment and/or requesting a continuance so they could investigate this allegation further. *McClain v. Riverview Vill., Inc.*, 2011 OK CIV APP 57, ¶ 7; *Been v. O.K. Indus., Inc.*, 495 F.3d 1217, 1236 (10th Cir. 2007); *Dreiling v. Peugeot Motors of Am., Inc.*, 850 F.2d 1373, 1376 (10th Cir. 1988). Indeed, the Nation agreed to give Defendant Insurers nearly two (2) months to respond to the Motion,[5] during which time any of the seventeen (17) plus Defendant Insurers could have scheduled a deposition to establish a fact disputing the loss—but they did not. In fact, within their Opposition, Defendant Insurers requested the Court take judicial notice of webpages demonstrating the Nation reopened its facilities with health and safety protocols in response to the Pandemic.[6] And, given the Nation is Cherokee County's largest employer and business operator, the Court is likely already aware and can take judicial notice of, the Nation's closure is in response to the Pandemic.[7] Consequently, the Nation's loss is undisputed.

[4] "The interpretation of an insurance policy, with its exclusions, is a question of law." *Oklahoma Attorneys Mut. Ins. Co. v. Cox*, 2019 OK CIV APP 25, ¶ 8, 440 P.3d 75, 78; "The validity of an exclusion from compulsory liability insurance is a question of law, *Hartline*, 2001 OK 15 at ¶ 5, 39 P.3d at 767, and construction of an insurance contract is a question of law. *BP America, Inc. v. State Auto Property & Casualty Ins. Co.*, 2005 OK 65, ¶ 6, 148 P.3d 832, 835." *Mulford v. Neal*, 2011 OK 20, 264 P.3d 1173, 1185.

[5] *Ex. 3*, Eml. from Defendant Insurers (Aug. 13, 2020).

[6] *Compare* Defendant Insurers' Response to Plaintiff's Material Facts No. 2 *with* Defendant Insurers' Statement of Additional Undisputed Material Facts No. 12.

[7] "A judicially noticed adjudicative fact shall not be subject to reasonable dispute in that it is . . . [g]enerally known within the territorial jurisdiction of the trial court." 12 O.S. § 2202 (B)(1).

3. The Pandemic is a fortuitous event. Defendant Insurers inability to comprehend fortuity does not create a dispute of material fact. The Pandemic was not premeditated by the Nation but occurred by chance rendering it a fortuitous loss.

DEFENDANT INSURERS' STATEMENT OF ADDITIONAL UNDISPUTED FACTS

1-5. In response to Defendant Insurers' Additional Undisputed Facts Nos. 1-5, the Nation agrees the TPIP Policy is the contract at issue before the Court. Further, the Nation agrees, the Court must assume, for purposes of summary judgment, the excess policies' exclusions are valid additions to the TPIP Policy. However, the Nation refutes that the exclusions bar coverage as they do not use clear and distinct language applicable to the Pandemic, and it reserves its fact-based defenses as to the validity of the excess policies and their exclusions for a later date.

6-7. Defendant Insurers' Additional Fact Nos. 6 and 7 are not material facts but Defendant Insurers' opinions regarding the sufficiency of evidence. Additional Facts Nos. 6 and 7 do not dispute the substance of facts presented to the Court. *See supra* The Nation's Material Fact No. 2.

8-12. The Nation admits Defendant Insurers' Additional Fact Nos. 8-12, except for the second sentence to Additional Fact No. 11 as closure due to civil authority is not before the Court, the interpretation of the declarations and proclamations is not relevant, and the Nation denies Defendant Insurers' interpretation of the declarations and proclamations.

13. Because Defendant Insurers' Additional Fact No. 13 only relates to discovery it is not a material fact that effects the substance of the contracts subject to interpretation by the Court. Further, Defendant Insurers failed to submit an affidavit as discussed *supra* outlining what discovery is lacking for the Court to interpret the contact of the TPIP Contract.

ARGUMENTS AND AUTHORITIES

I. THE NATION IS THE ONLY PARTY TO PRESENT A COMPLETE INTERPRETATION OF THE CONTRACT.

To interpret an insurance contract, the insurance policy must be read "as a whole giving the language its ordinary and plain meaning to carry out the parties' intentions." *Oklahoma Sch. Risk Mgmt. Tr.*, 2019 OK 3, ¶ 22. The Nation is the only party to provide interpretations of the TPIP Policy that comply with that requirement as Defendant Insurers request the Court contort provisions and phrases to Frankenstein a new policy into existence. In opposition, the Nation does not ask the Court to rely on other jurisdictions alone to decide our State's insurance law; rather, it is the only party to forward opinions interpreting all-risk policies under Oklahoma law. The Court can look to *Oklahoma Schools Risk Management Trust v. McAlester Public Schools*, 2019 OK 3, *Gutkowski v. Oklahoma Farmers Union Mut. Ins. Co.*, 2008 OK CIV APP 8, and *Texas Eastern Transmission Corp. v. Marine Office-Appleton & Cox Corp.*, 579 F.2d 561 (10th Cir. 1978), which demonstrate the Nation forwards the correct interpretation.

A. *The Nation is the only party to define Direct Physical Loss.*

The Nation's interpretation of the terms at issue (*damaged property*, *repair*, and *all risks of direct physical loss*) are consistent with the interpretation that *direct physical loss* occurs when property is rendered unusable for its intended purpose. [8] Contrary to Defendant Insurers' misgivings, the phrase "unusable for its intended purpose" does not mean any "loss of use" qualifies as direct physical loss. Instead, a property is unusable when a dangerous condition makes

[8] Aside from the case law cited *ad nauseum*, the Nation's interpretation is consistent with the ordinary definition of the words "direct physical loss" as the Pandemic directly caused the Nation to be unable to physically use its covered property, which was a loss. *Direct*, MERRIAM-WEBSTER DICTIONARY (2 a "stemming immediately from a source // direct result") https://www.merriam-webster.com/dictionary/direct (last visited Oct. 19, 2020); *Physical*, MERRIAM-WEBSTER DICTIONARY ("of or relating to material things") https://www.merriam-webster.com/dictionary/physical (last visited Oct. 19, 2020); *Loss*, MERRIAM-WEBSTER DICTIONARY ("the act of losing possession : DEPRIVATION // *loss* of sight") https://www.merriam-webster.com/dictionary/loss (last visited Oct. 19, 2020).

it so that property cannot be utilized for its intended purpose.[9] To that point, Defendant Insurers concede the Pandemic is a dangerous condition that rendered the covered properties unusable.[10] Despite their attempts to distinguish *Western Fire* and *Oregon Shakespeare* from the case at hand, both courts patently rejected Defendant Insurers' argument that *direct physical loss* requires structural alteration to the property.[11] Defendant Insurers then falsely claim the Nation's interpretation ignores the words *direct* and *physical*, even though the Nation's interpretation comes from courts evaluating "direct physical loss" as a term-of-art.[12]

Aside from the myriad cases in the Nation's Motion, several other courts have rejected Defendant Insurers' attempt to define *physical loss* and *physical damage* as synonymous:[13] In a

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[9] *E.g., W. Fire Ins. Co. v. First Presbyterian Church*, 165 Colo. 34, 38–39, 437 P.2d 52, 55 (1968) ("But, in the instant case the so-called 'loss of use,' occasioned by the action of the Littleton Fire Department, cannot be viewed in splendid isolation, but must be viewed in proper context. When thus considered, this particular 'loss of use' was simply the consequential result of the fact that because of the accumulation of gasoline around and under the church building the premises became so infiltrated and saturated as to be uninhabitable, making further use of the building highly dangerous.").

[10] The Nation's Motion for Partial Summary Judgment on Business Interruption Coverage at 12-14 (quoting *Friends of Danny DeVito v. Wolf*, 227 A.3d 872, 881 (Pa. 2020), *cert. denied*, No. 19-1265, 2020 WL 5882242 (U.S. Oct. 5, 2020)).

[11] "Despite the fact that a 'dwelling building' might be rendered completely useless to its owners, appellant would deny that any loss or damage had occurred unless some tangible injury to the physical structure itself could be detected. Common sense requires that a policy should not be so interpreted in the absence of a provision specifically limiting coverage in this manner." *W. Fire Ins. Co. v. First Presbyterian Church*, 165 Colo. 34, 40–41, 437 P.2d 52, 56 (1968) (quotation omitted); "Defendant implies that, in order to be 'physical,' the loss or damage must be structural to the building itself. Defendant does not provide any evidence from within the policy to show that the plain meaning of the term 'physical' includes such a limitation." *Oregon Shakespeare Festival Ass'n v. Great Am. Ins. Co.*, No. 1:15-CV-01932-CL, 2016 WL 3267247, at *5 (D. Or. June 7, 2016).

[12] *Oregon Shakespeare Festival Ass'n v. Great Am. Ins. Co.*, No. 1:15-CV-01932-CL, 2016 WL 3267247, at *9 (D. Or. June 7, 2016) ("Other courts around the country have held that damage does not have to be 'structural' to be 'physical,' as long as it renders the property unusable for its intended purpose. *See, e.g., Western Fire Ins. Co. v. First Presbyterian Church*, 165 Colo. 34, 437 P.2d 52 (1968) (where gasoline vapors penetrated the foundation of the insured church and accumulated, rendering building uninhabitable, the property was held to have suffered a 'direct, physical loss'); *Matzner v. Seaco Ins. Co.*, 1998 WL 566658 (Mass. Super. 1998) (holding that carbon monoxide levels in an apartment building sufficient to render building uninhabitable were a 'direct, physical loss')").

[13] "'[L]oss' must mean something more than just 'damage.' A basic canon of construction is that courts should construe a text to give effect to every word and not make any portion of the text superfluous (*verba cum effectu sunt accipienda*), and if 'loss' simply meant 'damage,' there would be no reason for the contract to use the disjunctive 'loss or damage.' See Antonin Scalia & Bryan Garner, READING LAW, 174-79 (2012) (discussing the 'surplusage canon'). Furthermore, the courts that have considered the phrase 'direct physical loss' have not interpreted it as requiring physical damage or alteration. Rather, they have interpreted 'direct physical loss' as limiting the loss to only tangible, concrete, and measurable losses, rather than including speculative or intangible losses." *C.f. James W. Fowler Co. v. QBE Ins. Corp.*, No. 3:18-CV-1705-SI, 2020 WL 4261272, at *7 (D. Or. July 24, 2020).

recent decision from the Western District of Missouri, the court found a business interruption claim due to the Pandemic must proceed because the policy forced the court to "give meaning to both terms." *Ex. 4, Studio 417, Inc. v. Cincinnati Ins. Co.*, No. 20-CV-03127-SRB, 2020 WL 4692385, at *5 (W.D. Mo. Aug. 12, 2020) (*citing Nautilus Grp., Inc. v. Allianz Global Risks* US, No. C11-5281BHS, 2012 WL 760940, at * 7 (W.D. Wash. Mar. 8, 2012) ("if 'physical loss' was interpreted to mean 'damage,' then one or the other would be superfluous")). "Other courts have similarly recognized that even absent a physical alteration, a physical loss may occur when the property is uninhabitable or unusable for its intended purpose." *Id.* at *5.[14] Simply put, one shoe cannot fit both feet: the same meaning cannot be given to distinct terms-of-art.

Likewise, the Superior Court of New Jersey rejected the interpretation forwarded by Defendant Insurers in another Pandemic claim case. There the court found *Wakefern Food Corp. v. Liberty Mutual Fire* to be a compelling and applicable case, which stated: "Since the term 'physical' can mean more than material alteration or damage, it is incumbent on the insurer to clearly and specifically rule out coverage in the circumstances where it was not to be provided." *Ex. 5, Harrison v. Optical Services, USA et al.*, BER-L-3681-20, at 27 (Bergen Cnty., N.J. Aug. 13, 2020) (quoting 406 N.J. Super. 524 (App. Div. 2019)). The court further doubted the carrier's interpretation as *Wakerfern* held a grocery store was entitled to coverage when the "electrical grid and transmission lines were physically incapable of performing their essential function of providing electricity even though they were not necessarily damaged." *Id.* at 27-28.

[14] *Citing "Port Auth. of New York and New Jersey v. Affiliated FM Ins. Co.*, 311 F.3d 226, 236 (3d Cir. 2002) (affirming denial of coverage but recognizing that '[w]hen the presence of large quantities of asbestos in the air of a building is such as to make the structure uninhabitable and unusable, then there has been a distinct [physical] loss to its owner'); *Prudential Prop. & Cas. Ins. Co. v. Lilliard-Roberts*, CV–01–1362–ST, 2002 WL 31495830, at * 9 (D. Or. June 18, 2002) (citing case law for the proposition that 'the inability to inhabit a building [is] a 'direct, physical loss' covered by insurance'); *General Mills, Inc. v. Gold Medal Ins. Co.*, 622 N.W.2d 147, 152 (Minn. Ct. App. 2001) ('We have previously held that direct physical loss can exist without actual destruction of property or structural damage to property; it is sufficient to show that insured property is injured in some way.')".

And, a court in North Carolina granted the same summary judgment the Nation seeks through this Court. *Ex. 6, North Star Deli, LLC, et al. v. Cincinnati Ins. Co., et al.*, 20-CVS-02569 (Durham Cnty., Oct. 9, 2020). There, the court employed the same standards utilized within Oklahoma to interpret the plain and ordinary meaning of "direct physical loss" to be "the inability to utilize or possess something in the real, material, or bodily world, resulting from a given cause without the intervention of other conditions."[15] *Id.* 5-7. The *North Star* court rejected the interpretation forwarded by Defendant Insurers: "Under Cincinnati's argument, however, if 'physical loss' also requires structural alteration to property, then the term 'physical damage' would be rendered meaningless. But the Court must give meaning to both terms." *Id.* at 7.

Most recently, the Eastern District of Virginia adopted the definition proposed by the Nation. *Ex. 7, Elegant Massage, LLC v. State Farm Mut. Auto. Ins. Co.*, No. 2:20-CV-265, 2020 WL 7249624, at *8 (E.D. Va. Dec. 9, 2020). In *Elegant Massage*, the plaintiffs sought coverage under their all-risk business interruption policy for losses due to the pandemic, even though it is neither alleged "that there is a presence of a virus at the covered property nor that a virus is the direct cause of the property's physical loss." *Id.* at 13. In denying the carrier's motion to dismiss in relevant part, the court looked at the "spectrum of interpretations" for *direct physical loss* "ranging from direct tangible destruction of the covered property to impacts from intangible

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[15] "As an initial matter, the Policies do not define the terms 'direct,' 'physical loss,' or 'physical damage.' The Court must therefore turn first to the ordinary meaning of those terms. Merriam-Webster defines 'direct,' when used as an adjective, as 'characterized by close logical, causal, or consequential relationship,' as 'stemming immediately from a source,' or as 'proceeding from one point to another in time or space without deviation or interruption.' Direct, Merriam-Webster (Online ed. 2020). Merriam-Webster defines 'physical' as relating to 'material things' that are "perceptible especially through the senses.' Physical, Merriam Webster (Online ed. 2020). The term is also defined in a way that is tied to the body: "of or relating to the body." Id Webster's Third New International Dictionary defines physical as 'of or relating to natural or material things as opposed to things mental, moral, spiritual, or imaginary." Physical, Webster's Third New International Dictionary (2020). The definition from Black's Law Dictionary comports: 'Of, relating to, or involving material things; pertaining to real, tangible objects.' Physical, Black's Law Dictionary (11th ed. 2019). Finally, 'loss' is defined as 'the act of losing possession,' 'the harm of privation resulting from loss or separation,' or the 'failure to gain, win, obtain, or utilize.' Loss, Merriam-Webster (Online ed. 2020). Another dictionary defines the term as "the state of being deprived of or of being without something that one has had." Loss, Random House Unabridged Dictionary (Online ed. 2020)." *Ex. 6, North Star Deli,* 20-CVS-02569 at 5-6.

noxious gasses or toxic air particles that make the property uninhabitable or dangerous to use"—the interpretations forwarded by Defendant Insurers and the Nation respectively. *Id.* There, the court adopted plaintiffs' (i.e. the Nation's) interpretation because the wide range of interpretations rendered the triggering language ambiguous:

> Therefore, given the spectrum of accepted interpretations, the Court interprets the phrase "direct physical loss" in the Policy in this case most favorably to the insured to grant more coverage. *See Virginia Farm Bureau Mut. Ins. Co. v. Williams*, 278 Va. 75, at 81 (2009) ("[I]f disputed policy language is ambiguous ... we construe the language in favor of coverage and against the insurer."). ***Based on the case law, the Court finds that it is plausible that a fortuitous "direct physical loss" could mean that the property is uninhabitable, inaccessible, or dangerous to use because of intangible, or non-structural, sources.*** *See US Airways, Inc. v. Commonwealth Ins. Co.*, 2004 WL 1094684, at *5 (Va. Cir. Ct. May 14, 2004) (holding FAA order grounding flights at Reagan National Airport could constitute direct physical loss when "nothing in the Policy ... requires that [there] be damage to [the insured's] property.").

Id. at 10 (brackets in original) (emphasis added).

Meanwhile, ***none*** of the cases cited by Defendant Insurers use *physical loss* and *physical damage* as they are used throughout the TPIP Policy in separate provisions. For example, Off Premises Services Interruption, Building Laws, Demolition Cost, Increased Cost of Construction, and Contingent Time Element coverages are all extended to *physical damage* without reference to *physical loss*. *TPIP Policy* at 10, 11, 20. Inversely, the Period of Restoration relied on by Defendant Insurers only refers to *physical loss* as a trigger, omitting any reference to *physical damage*. *Id.* at 23. There is simply no reasonable explanation as to why physical loss and physical damage are used separately throughout the TPIP Policy if they share a synonymous meaning. While Defendant Insurers may argue these are scrivener's errors, Oklahoma law states "when an insurer creates specificity in one clause of a policy and then omits it in a similar context, the omission is considered purposeful and should be given meaning." *Oklahoma Sch. Risk Mgmt. Tr.*, 2019 OK 3, ¶ 24. Since at least 1968, numerous courts have warned carriers that if they wish to define *direct*

physical loss or damage in the way the Defendant Insurers attempt to here, they should provide a definition stating as much. *E.g., Western Fire Ins. Co. v. First Presbyterian Church*, 165 Colo. 34, 437 P.2d 52 (1968). Without such a definition, the Nation's interpretation controls.

B. *"All risk of direct physical loss" includes anticipated harms.*

Because *all risk of* modifies direct physical loss, coverage occurs "if there is a *danger of* direct physical loss coupled with a condition that creates the threat or danger of physical loss, then there is coverage." 5 NEW APPLEMAN ON INSURANCE LAW LIBRARY EDITION § 42.02[3] (2019) (emphasis added) (citing *Hampton Foods v. Aetna Cas. and Sur. Co.*, 787 F.2d 349,351–352 (8th Cir. 1986)). That is the only interpretation consistent with Oklahoma law:

> Farmers claims under the facts of this case, the policy terms "for ***risks of direct physical loss***" limit its liability for the Insureds' loss to the composition shingles only. Farmers submits this provision excludes from coverage the damage to the wood shingles that ***will result*** from the removal of the composition shingles. First, we reiterate, under Oklahoma law, when an insurer desires to limit its liability under a policy of insurance, it must employ language that clearly and distinctly reveals its stated purpose. *Spears v. Shelter Mut. Ins. Co.*, 2003 OK 66, ¶ 7, 73 P.3d 865, 868. Such clear and distinct language of limitation was not employed in the instant policy. . . . ***We therefore reject Farmers claim that the anticipated damage . . . was not a covered loss under the policy.***

Gutkowski v. Oklahoma Farmers Union Mut. Ins. Co., 2008 OK CIV APP 8, ¶¶ 9-11 (emphasis added). Defendant Insurers failure to articulate an interpretation of *"all risk of" direct physical loss* that would exclude the Nation's anticipation of loss due to the Pandemic means the losses resulting from the mitigation efforts are covered.

C. *Defendant Insurers repeat, without explanation, that there is no covered loss.*

Despite the evidence provided, Defendant Insurers misread *Oklahoma Schools* to assert the Nation must prove some other unknown, particular and unexplained covered loss to afford coverage. That is simply not in agreement with applicable case law. The Nation's Motion

demonstrated a covered loss occurs when there is a loss and it is fortuitous.[16] In fact, the sentence Defendant Insurers rely upon in *Oklahoma Schools* cites to *Texas Eastern Transmission Corp*,[17] which states: "The general rule, in accordance with the trial court's instructions to the jury in the instant case, is that the burden is upon the insured to prove that a loss occurred and that it was due to some fortuitous event or circumstance." *Texas Eastern Transmission Corp.*, 579 F.2d at 564. The *Texas Eastern* court explicitly rejected the Defendant Insurers' argument. *Id.* at 564-565 ("Acknowledging as authority such cases as *British* and *Foreign Marine Ins. Co., Ltd.*, which hold that the insured need not prove the cause of loss, defendant here asserts that as a practical matter proof of cause of the loss is necessary in order to establish that the loss was by a fortuity. . . . The problem in the context of this case is that it is difficult to see what risks the insurance company was insuring against if the defendant's position is upheld.").

D. Defendant Insurers misinterpret the Period of Restoration.

Defendant Insurers point to the *rebuild, repair, or replace* language in the Period of Restoration provision to argue that absent such actions by the Nation there can be no coverage. That provision, when read in context, does not support Defendant Insurers 'argument:

> The period during which business interruption and or rental interruption applies will begin on the date *direct physical loss* occurs and interrupts normal business operations and ends on the date that the damaged property should have been repaired, rebuilt or replaced with due diligence and dispatch, but not limited by the expiration of this policy.

TPIP Policy at 23 (emphasis added).

First, this provision clearly relates to the length of time for coverage, **not** the trigger of coverage. If the Court were to accept Defendant Insurers' interpretation, it would create illusory

[16] *See* The Nation's Motion for Partial Summary Judgment on Business Interruption Coverage at 7-8.
[17] *Oklahoma Sch. Risk Mgmt.*, 2019 OK 3 n. 13.

coverage as the carriers expressly promised coverage for *all risk of direct physical loss* but in fact sold actual physical damage coverage only. That monstrous interpretation must be rejected.[18]

Second, there is a noteworthy difference in terminology as this section refers to *direct physical loss* and "damaged property," but not *direct physical damage*. As previously stated, the Court must place value in the specific words used within the Policy. *Oklahoma Sch. Risk Mgmt. Tr. v. McAlester Pub. Sch.*, 2019 OK 3, ¶ 24; *Kingkade v. Cont'l Cas. Co.*, 1912 OK 807, 35 Okla. 99, 128 P. 683, 685. Because the words *direct* and *physical* no longer modify the word *damage*, the Court must accept an ordinary reading of the word, where damage means a "loss or injury to person or property." *Damage*, BLACK'S LAW DICTIONARY (11th ed. 2019).[19] Meanwhile, the TPIP must have intended the Period of Restoration to apply perils more broad than *direct physical damage*, which is why the provision only references *direct physical loss*.

Finally, Defendant Insurers rest on the flawed and erroneous argument that the Nation failed to *replace, repair, or rebuild* the covered property. To be certain, the Nation made repairs to its properties before reopening. In fact, Defendant Insurers requested the Court take judicial notice of a news article and the Nation's reopening manual, both of which demonstrate the Nation implemented mitigation protocols to repair the covered properties after the Pandemic began.[20]

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[18] *Lexington Ins. Co. v. Precision Drilling Co., L.P.*, 951 F.3d 1185, 1194 (10th Cir. 2020) ("illusory coverage" occurs when a carriers attempts to construe policies "in such a limited and tortured way that it would thwart the general object of the . . . Policies.").

[19] "The term 'damage' is not statutorily defined so its meaning is to be determined by its common usage. *Cullen v. State*, 832 S.W.2d 788, 797 (Tex.App.-Austin 1992, writ ref'd). Dictionary definitions of damage include 'loss or injury to person or property,' Black's Law Dictionary 393 (7th ed.1999), and 'loss or harm resulting from injury to person, property or reputation,' Merriam–Webster's Collegiate Dictionary (11th ed.2003)." *Ortiz v. State*, 280 S.W.3d 302, 305 (Tex. App. 2008).

[20] *See* Defendant Insurers' Statement of Additional Undisputed Material Facts No. 13 (referenced webpages are attached here as Ex. 8, D. Sean Rowley, *Cherokee Nation Business gives reopening dates for its casinos*, CHEROKEE PHOENIX (June 5, 2020), https://www.cherokeephoenix.org/Article/index/134813 and Ex. 9, Cherokee Nation, Responsible Hospitality, https://www.cherokeecasino.com/-/media/shared-content---hr-and-cc/re-opening-campaign/responsible-hospitality-v2/responsible-hospitality-v2.pdf?la=en&hash=B060BA5042D3E74D4F0BA18B 69F49B7A (last visited Dec. 12, 2020). The Nation joins Defendant Insurers request to take judicial notice of the websites as "it is not uncommon for courts to take judicial notice of factual information found on the world wide web." *Prescott v. Oklahoma Capitol Pres. Comm'n*, 2015 OK 54, n. 34 (quoting *O'Toole v. Northrop Grumman Corp.*, 499

Those documents demonstrate that the Nation installed sanitation stations and barriers between patrons and employees, staggered seating and gaming machines, implemented mask requirements, etc. Defendant Insurers' Additional Undisputed Material Fact No. 12; *see also e.g., Ex. 9,* Responsible Hospitality at 10. These modifications meet the ordinary meaning of repair, "to restore to a sound or health state: renew." *Repair*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/repair (last visited Sep. 23, 2020); *Repair*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("To renew . . . after loss, expenditure, exhaustion, etc.").[21] Ironically, despite advancing the argument, Defendant Insurers provide no definitions for the terms "replace," "repair," or "rebuild." Indeed, the Nation completed the exact type of repairs other courts have recognized:

> In this case, it is undisputed that the interior of the building had to be cleaned, the air filters had to be changed multiple times, and smoke in the air within the theater had to dissipate before business could be resumed. . . . Defendant claims that this period of time cannot be considered "restoration" because no structural repairs were necessary. Once again, the Court can find no such limitation within the terms of the policy.

See, e.g., Oregon Shakespeare Festival Ass'n v. Great Am. Ins. Co., No. 1:15-CV-01932-CL, 2016 WL 3267247, at *6 (D. Or. June 7, 2016).

F.3d 1218, 1224–25 (10th Cir.2007)); *Burns v. Cline*, 2016 OK 99, 382 P.3d 1048, 1056 ("As the United States Court of Appeals for the Tenth Circuit has pointed out, it is not uncommon for courts to take judicial notice of factual information found on the World Wide Web."); *Farley v. City of Claremore*, 2020 OK 30, ¶ 13 ("In federal court, judicial notice of fact may occur when the fact is not subject to reasonable dispute and it 'can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.' The Oklahoma statute has similar language. Some federal courts have stated a court may take judicial notice of an indisputably accurate fact on the world wide web (or internet). . . .").

[21] "[R]epair—'to restore to a sound or health state.'" *Guadiana v. State Farm Fire & Cas. Co.*, No. CIV 07-326 TUC FRZ, 2012 WL 243737, at *6 (D. Ariz. Jan. 25, 2012).

II. THE TPIP POLICY DOES NOT EXCLUDE COVERAGE.

A. The TPIP's contamination and pollution exclusions do not apply.

Defendant Insurers off-handedly mention the TPIP Policy includes exclusions for pollution and contamination without any analysis as to why those provisions are applicable. To be clear, the Nation's losses result from the Pandemic—***NOT*** the pollution/contamination of COVID-19. But even if those exclusions could apply, Defendant Insurers have not met their burden.[22] Rather than conduct an investigation to prove a virus was on the Nation's property, [23] Defendant Insurers merely assert various viral, microbial, pollutant,[24] and contamination exclusions hoping the Court will do the heavy lifting. The carriers cannot make a blanket assertion that such exclusions bar coverage when the presence of the virus has not been established.[25]

Also, the pollution and contamination exclusion in the TPIP Policy is inapplicable to all-risk policies:

> Loss, damage, costs or expenses in connection with any kind or description of seepage and/or pollution and/or contamination, direct or indirect, arising from any cause whatsoever.
>
> * * *
>
> However, if the covered property is the subject of direct physical loss or damage for which the Company has paid or agreed to pay, then this Policy (subject to its

[22] "[T]he insurer has a burden to show the loss is excluded by the policy." *Oklahoma Sch. Risk Mgmt. Tr.*, 2019 OK 3, ¶ 16.

[23] *Buzzard v. Farmers Ins. Co.*, 1991 OK 127, 824 P.2d 1105, 1109 ("To determine the validity of the claim, the insurer must conduct an investigation reasonably appropriate under the circumstances.").

[24] And, while that exclusion does not define pollution, the TPIP Policy includes a specific Pollution Policy, which defines pollutants as "any solid, liquid, gaseous or thermal irritant, or contaminant, including smoke, soot, vapors, fumes, acids, alkalis, chemicals, hazardous substances, hazardous materials, or waste materials, including medical, infectious and pathological wastes, at levels in excess of those naturally occurring," **except "Pollutants shall not include bacteria and virus."** TPIP Pollution Liability Policy at 18 (emphasis added) (The Pollution Policy further defines Pollution as dispersal of pollutants.). Regardless of whether the Court determines the TPIP Pollution Policy provides the relevant definition to pollution, or if it demonstrates that pollution is subject to an interpretation that omits viruses from the exclusion, the exclusion is inapplicable.

[25] The Nation already summarized *Duensing v. Traveler's Companies* in its Motion, where the Supreme Court of Montana found that viral contamination exclusions require proof of actual contamination to apply, and mere suspicion of viral contamination was insufficient. Defendant Insurers failed to refute the application of that case to the exclusions provided. See *Duensing v. Traveler's Companies*, summarized in the Nation's Motion for Partial Summary Judgment on Business Interruption Coverage at 14-15.

> terms, conditions and limitations) insures against direct physical loss or damage to the property covered hereunder caused by resulting seepage and/or pollution and/or contamination.

TPIP Policy at 28. Because this is an all-risk policy, the Pandemic constitutes "direct physical loss . . . for which the Company has agreed to pay," and the Pollution/Contamination exclusion does not apply. *See Id.*

B. Defendant Insurers' various excess exclusions do not apply.

Prior to COVID, carriers were aware of the pandemic perils and often used clear and express language excluded that risk from property policies. Defendant Insurers nonetheless ask the Court to utilize a jumble of broad exclusions to deny the Nation's pandemic claim. But the Oklahoma Supreme Court has recently rejected the application of broad exclusions to particular events under all-risk policies. *Compare Oklahoma Sch. Risk Mgmt. Tr. v. McAlester Pub. Sch.*, 2019 OK 3, ¶ 24 ("[A] lack of specificity in the language may make an exclusion ambiguous when applied to a particular event.") *with Max True Plastering Co. v. U.S. Fid. & Guar. Co.*, 1996 OK 28, 912 P.2d 861, 865 ("[A]mbiguities are construed most strongly against the insurer."). Moreover, numerous courts have recently refused to apply generic virus exclusions to the Pandemic. For example, the District Court for the Middle District of Florida recently held:
"The virus exclusion states that Sentinel will not pay for loss or damage caused directly or indirectly by the presence, growth, proliferation, spread, or any activity of 'fungi, wet rot, dry rot, bacteria or virus." *Ex. 10, Urogynecology Specialist of Florida LLC, v. Sentinel Insurance Company, Ltd.*, 6:20-CV-01174-ACC-EJK (Sep. 24, 2020) (internal citation omitted). But the court continued to say "Denying coverage for losses stemming from COVID-19, however, does not logically align with the grouping of the virus exclusion with other pollutants such that the Policy necessarily anticipated and intended to deny coverage for these kinds of business losses. . .

." *Id.* And that is the same conclusion reached by the *Elegant Massage* court from the Eastern District of Virginia:

> Accordingly, the Court finds that the Virus Exclusion particularly deals with the "[g]rowth, proliferation, spread or presence" of "virus, bacteria or other microorganism" just as it applies to " 'fungi' or wet or dry rot." . . . . This supports the interpretation that the Virus Exclusion applies where a virus has spread throughout the property. Other state and federal courts have interpreted similar virus, bacteria, and fungi exclusions in the same the way. *See, e.g., Mount Vernon Fire Ins. Co. v. Adamson*, 2010 WL 3937336, at *4 (E.D. Va. Sept. 15, 2010) (exclusions barring coverage for mold exposure barred claims for mold exposure); *Poore v. Main Street Am. Assurance Co.*, 355 F. Supp. 3d 506, 512 (W.D. Va. 2018) (finding mold exclusion barred coverage from losses stemming from mold in the insured's property); *Alexis v. Southwood Ltd. P'ship*, 792 So. 2d 100, 104 (La. Ct. App. 2001) (communicable disease exclusion barred coverage from illness after exposure to raw sewage); *Evanston Ins. Co. v. Harbor Walk Development, LLC*, 814 F. Supp. 2d 635, 652 (E.D. Va. 2011) (finding pollution exclusion which barred claims stemming from bodily injury or property damaged caused by pollutants barred claims stemming from bodily injury or property damage caused by pollutants). Therefore, in applying the Virus Exclusion there must be a direct connection between the exclusion and the claimed loss and not, as the Defendants argue, a tenuous connection anywhere in the chain of causation. That is, although the Virus Exclusion does require that the virus be the cause of the policyholder's loss, the connection must be the immediate cause in the chain. Here, Plaintiff is neither alleging that there is a presence of a virus at the covered property nor that a virus is the direct cause of the property's physical loss. Also, Plaintiff does not allege that the Executive Orders the Commonwealth of Virginia issued were as a result of "growth, proliferation, spread or presence" of virus contamination at the Plaintiff's property. . . . Therefore, Defendants have failed to meet its burden to show that the Virus Exclusion applies to Plaintiff's claim.

Ex. 7, Elegant Massage, LLC v. State Farm Mut. Auto. Ins. Co., No. 2:20-CV-265, 2020 WL 7249624, at *12–13 (E.D. Va. Dec. 9, 2020).

Although *Oklahoma Schools* provides the law the Court will rely upon, the application is not dissimilar to *Pan American World Airways, Inc. v. Aetna Casualty & Surety Co. Ex. 11,* 505 F.2d 989, 1000 (2d Cir. 1974). More specifically, when all-risk carriers fail to adopt a specific exclusion that is known and exists within the market ***"they acted at their own peril."*** *Id.* at 1001

(emphasis added).[26] Echoing *Pan Am*, Defendant Insurers here are aware of the pandemic peril and previously utilized pandemic exclusions. For example, the Nation's Motion referenced a pre-2016 Liberty Mutual exclusion that specifically excluded *suspected* and *threatened* viruses including *pandemics*, but such language is not utilized here. Likewise, Defendant Arch modified its viral exclusion with *suspected* or *threatened* language but limited its application to *physical damage* and failed to exclude reference pandemics. Immediately following the Pandemic, Defendant Hallmark released a new "Epidemic and Pandemic Exclusion" showing it could clearly and distinctly exclude such coverage. Meanwhile, the new TPIP Policy exclusion for Communicable Diseases was added one day after the Nation filed its claim. Taken together, Defendant Insurers were well aware of the pandemic peril,[27] knew how to craft clear and express language to exclude this Pandemic and have since published such exclusions. Unfortunately for Defendant Insurers, they failed to include an applicable exclusion within the TPIP Policy.

III. DAMAGES ARE NOT AT ISSUE AT THIS TIME.

Some excess Defendant Insurers believe the Nation is not entitled summary judgment because underlying carriers have not paid. This is wholly irrelevant as the Nation seeks a determination of coverage in its Motion, not damages,[28] and this is the same argument the Court rejected from Defendants Hallmark and Aspen's Motions to Dismiss.

Further, the Priority of Payments provision many of the "excess carriers" rely upon, states:

---

[26] "From this discussion it should be evident that if the district court erred in its application of *contra proferentem*, it erred in the direction of giving it too little weight. It found that this 'ancient canon' is not a 'decisive concern.' But the maxim defines the scope of coverage as much as if it were a clause in the all risk policies. It is part of the understanding of the parties. The experienced all risk insurers should have expected the exclusions drafted by them to be construed narrowly against them, and should have calculated their premiums accordingly." *Pan Am.*, at 1003-04 (internal citations omitted).

[27] For example, Lloyd's published *Pandemic: Potential Insurance Impacts* in 2008, which stated: "A pandemic is inevitable. There have been a series of pandemics in history, since the 1600s these have had an average recurrence rate of 30-50 years." *Ex. 10* at 6. With regard to business interruption coverage specifically, the report warns that "***[c]ontract certainty may be a useful defence here.***" *Id.* at 21.

[28] "An interlocutory summary judgment may be rendered on liability alone, even if there is a genuine issue on the amount of damages." 12 O.S. § 2056 (D).

> In the event of loss ***caused by or resulting from more than one peril or coverage***, the limit of liability of the primary / underlying coverage shall apply first to the peril(s) or coverage(s) not insured by the excess layers and the remainder, if any, to the peril(s) or coverage(s) insured hereunder. Upon exhaustion of the limit of liability of the primary / underlying coverage, ***this Policy shall then be liable for loss uncollected from the peril(s) or coverage(s) insured hereunder***, subject to the limit of liability and the other terms and conditions as specified.

TPIP Policy at 8 (emphasis added). Here, however, the Nation alleges only ***one*** peril (the Pandemic) and only ***one*** coverage (business interruption coverage under the TPIP Policy), therefore the Priority of Payment provision offers no relief to carriers by its plain terms.[29]

IV. THE NATION OBJECTS TO DEFENDANT INSURERS' NOTICES OF SUPPLEMENTAL AUTHORITY.

Defendant Insurers' assertion that the November 9, 2020 Order of the U.S. District Court for the Western District of Oklahoma in *Goodwill Industries of Central Oklahoma, Inc. v. Philadelphia Indemnity Insurance Co* addresses "allegations and arguments" that are "virtually identical" to those by the Nation is false. No. CV-20-511-R, 2020 WL 6561315 (W.D. Okla. Nov. 9, 2020). In fact, the policy at issue in *Goodwill* and the vast majority of supplemental authority submitted by Defendant Insurers utilize Insurance Services Office, Inc. ("ISO") language substantially different than that of the TPIP Policy. *Colony Ins. Co. v. Jackson*, No. 09-CV-780-TCK-TLW, 2011 WL 2118728, at *3 (N.D. Okla. May 27, 2011) ("ISO is a national insurance policy drafting organization that develops standard policy forms and files them with each state's insurance regulators. See *French v. Assurance Co. of Am.*, 448 F.3d 693, 697 & n. 1 (4th Cir.2006)."). Unlike ISO policies, the TPIP Policy was created, designed, and marketed specifically for tribes:

> Tribal First truly does "insure Native America." We are the largest provider of tribal insurance solutions to Indian Country overall and are the leader in our specialty areas of Indian gaming facilities, Tribal workers' compensation, high-value

[29] And, as an aside, the Priority of Payments provision is ambiguous on its face as the second emphasized section above reads as though the TPIP Policy is itself the excess policy.

> property (casino), and tribal self-insurance. Our programs are backed by "A" rated insurers and are designed to protect both the legal sovereignty of Native American tribes and their physical and financial assets.

Tribal First, ALLIANT, https://www.alliant.com/Industry-Solutions/Tribal-Nations/Pages/default.aspx (last visited on December 3, 2020) (emphasis added).

When the TPIP Policy is "read as a whole" as required by the Court, it is clear that neither *Goodwill* nor the other ISO policy cases listed in Defendant Insurers' Notices of Supplemental Authority are applicable. *Oklahoma Sch. Risk Mgmt. Tr.*, 2019 OK 3, ¶ 22. The Nation has dedicated substantial argument to demonstrate that "all risk of" within the triggering language broadens the scope of coverage contemplated by the TPIP Policy; conversely, the *Goodwill* court did not provide analysis of that language. *See generally Goodwill Indus. of Cent. Oklahoma*, No. CV-20-511-R, 2020 WL 6561315. Moreover, the ISO Policy at issue in *Goodwill* defined "Cause of Loss" and required a "suspension" of "operation" due to "direct physical loss of or damage to property." But such words, definitions, and provisions are absent here, casting doubt on Defendant Insurers' reliance on Goodwill. Furthermore, the triggering language within the ISO Policies and the TPIP Policy are simply not the same. Even courts cited by Defendant Insurers have assigned special meaning to "direct physical loss of property" in the ISO Policies, unlike all risk of direct physical loss generally, which neither has property as the object of the clause nor include the of modifying the scope of loss. To interpret these policies the same would render those different words, definitions, and provisions meaningless against Oklahoma law.

For example, many of the cases relied on by Defendant Insurers noted that "direct physical loss *of*" has a unique meaning within policy interpretation to include permanent dispossession without physical damage. *E.g., Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.*, No. 20-CV-03213-JST, 2020 WL 5525171, at *3 (N.D. Cal. Sept. 14, 2020) ("The court reasoned that 'the '*loss of*'

property contemplates that the property is misplaced and unrecoverable, without regard to whether it was damaged." (emphasis in original)). And still other courts have distinguished ISO policies from others based on the other provisions therein: The court in, stated:

> Plaintiff heavily relies on Studio 417, Inc. v. The Cincinnati Insurance Co., 20 C 3127-SRB (S.D. Mo Aug. 12, 2020), a Missouri case that found that the coronavirus cause a physical loss to property warranting insurance coverage. That court rested its decision on that policy's expansive language, language very different from the policy in the instant case. The unambiguous language in the instant policy warrants a different conclusion.

Sandy Point Dental, PC v. Cincinnati Insurance Company, 2020 WL 5830465 fn. 3 (N.D. Ill Sep. 21, 2020). The Nation can assure the Court that the language in the TPIP Policy is even more expansive and inclusive than the language in the *Studio 417* case, as recognized in *Sandy Point*.

While Defendant Insurers contend a "strong majority" of courts support its argument for dismissal, that does not appear true. According to the University of Pennsylvania Law School's "COVID Coverage Litigation Tracker"—which keeps a nationwide tally on COVID-related business interruption litigation—courts are split on the issue, granting and denying insurers' motions to dismiss in equal measure. See Outcomes on Merits-Based Motions to Dismiss, COVID Coverage Litigation Tracker, available at https://cclt.law.upenn.edu/judicial-rulings/ (noting eleven grants of dismissal and eleven denials when policy did not contain virus exclusion). This split in authority, combined with the lack of Oklahoma-specific case law on the issue, granting the Nation's Motion for Partial Summary Judgment.

Conclusion

The Nation respectfully requests the Court find the TPIP Policy issued by Defendant Insurers requires the Nation be indemnified for fortuitous losses related to the COVID-19 Pandemic Disaster under its business interruption coverage. The Nation further requests this Court strike the supplemental authorities filed by Defendant Insurers from the record.

Respectfully submitted,

Michael Burrage, OBA #1350
Reggie N. Whitten, OBA #9576
Patricia Sawyer, OBA #30712
Austin R. Vance, OBA #33294
J. Renley Dennis, OBA #33160
Tiffani J. Shipman, OBA #34261
WHITTEN BURRAGE
512 North Broadway Avenue, Suite 300
Oklahoma City, OK 73102
Telephone: (405) 516-7800
Facsimile: (405) 516-7859
Emails: rwhitten@whittenburragelaw.com
mburrage@whittenburragelaw.com
psawyer@whittenburragelaw.com
avance@whittenburragelaw.com
jdennis@whittenburragelaw.com
tshipman@whittenburragelaw.com

Bradley E. Beckworth, OBA #19982
Chad E. Ihrig, OBA #19491
Michael Angelovich, *Pro Hac Vice*
Bradley Beskin, *Pro Hac Vice*
Nix Patterson, LLP
3600-B North Capital of Texas Highway, Suite 350
Austin, TX 78746
T: 512-328-5333
F: 512-328-5335
bbeckworth@nixlaw.com
cihrig@nixlaw.com
mangelovich@nixlaw.com
bbeskin@nixlaw.com

ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

This is to certify that on this 11th day of December 2020, a true and correct copy of the foregoing instrument was served by electronic mail and/or U.S. Mail upon the following:

Shannon O'Malley
Kristin Cummings
Steven J. Badger
Bennett Moss
Zelle LLP
901 Main Street, Suite 4000
Dallas, TX 75202-3975
T: 214-742-3000
F: 214-760-8994
somalley@zelle.com
KCummings@zelle.com
sbadger@zelle.com
BMoss@zelle.com

Matthew L. Gonzalez
ZELLE LLP
45 Broadway, Ste. 920
New York, NY 10006
MGonzalez@zelle.com
Attorney for Defendants Arch Specialty Insurance Company, Liberty Mutual Fire Insurance Company, RSUI-Landmark American Insurance Company, XL Insurance America, Inc .. , and AXA/XL America

Dan Millea
Nicholas Dolejsi
Zelle LLP
500 Washington Ave. S, Suite 4000
Minneapolis, MN 55415
T: 612-339-2020
F: 612-336-9100
dmillea@zelle.com
ndolejsi@zelle.com
Attorney for Defendants XL Insurance America, Inc. and AXA/XL America

William W. O'Connor
Margo E. Shipley
Hall, Estill, Hardwick, Gable, Golden & Nelson, P.C.
320 South Boston Ave., Suite 200
Tulsa, OK 74103-3706
T: 918-594-0400
F: 918-594-0505
boconnor@hallestill.com mshipley@hallestill.com
Attorneys for Defendants Arch Specialty Insurance Company, Liberty Mutual Insurance Company, and RSUI-Landmark American Insurance Company

Roger N. Butler, Jr
Nathaniel T. Smith
Secrest, Hill, Butler & Secrest
7134 South Yale Avenue, Suite 900
Tulsa, OK 74136-6360
T: 918-494-5905
F: 918-494-2847
rbutler@secresthill.com
nsmith@secresthill.com
Attorneys for Defendant Evanston Insurance Company

C. William Threlkeld
Sterling Pratt
Fenton, Fenton, Smith, Reneau & Moon
211 N. Robinson, Suite 800 N
Oklahoma City, OK 73102
T: 405-235-4671
F: 405-235-5247
cwthrelkeld@fentonlaw.com
sepratt@fentonlaw.com
Attorney for Defendants XL Insurance America, Inc. and AXA/XL America

Jack Cadenhead

Dan S. Folluo

The Cadenhead Law Firm, P.C.
P.O. Box 2067
Seminole, OK 74818-2067
T: 405-382-6341
F: 405-382-5513
jecadenhead@gmail.com

Dustin DeBose
Mound Cotton Wollan & Greengrass - TX
ddubose@moundcotton.com

Costantino Suriano
Deanna Manzo
Mound Cotton Wollan & Greengrass - NY
CSuriano@moundcotton.com
DManzo@moundcotton.com
Attorney for Defendant Allied World National Assurance Company

Robert Fisher
Eric Benedict
CLYDE&CO
271 17th St. NW, Ste. 1720
Atlanta, GA 30363
Robert.Fisher@clydeco.us
Eric.Benedict@clydeco.us

Susan Koehler Sullivan
Taylor Davis
CLYDE&CO
355 S Grand Ave., Ste. 1400
Los Angeles, CA 90071
Susan.Sullivan@clydeco.us
Taylor.Davis@clydeco.us

Joe Hampton
Amy Pierce
Johnny Blassingame
HAMPTON BARGHOLS PIERCE, PLLC
210 Park Avenue, Suite 2700
Oklahoma City, OK 73102
jhampton@hbplawok.com
apierce@hbplawok.com
jblassingame@hbplawok.com
Attorneys for Chubb Bermuda LTD
Larry D. Ottaway

Kerry R. Lewis
Rhodes, Hieronymus, Jones, Tucker & Gable, PLLC
P.O. Box 21100
Tulsa, OK 74121-1100
T: 918-582-1173
F: 918-592-3390
dfolluo@rhodesokla.com
klewis@rhodesokla.com

Seth I. Weinstein
LEWIS BRISBOIS
77 Water St., 21st Flr.
New York, NY 10005
Seth.Weinstein@lewisbrisbois.com
Attorneys for Defendant Hallmark Specialty Insurance Company

Phil R. Richards
Joy Tate
RICHARDS & CONNOR
Park Centre Blvd., 12th Flr
525 S. Main St.
Tulsa, OK 74103
prichards@richardsconnor.com
jtate@richardsconnor.com

Richard J. Doren (*pro hac vice* forthcoming)
Matthew A. Hoffman (*pro hac vice* forthcoming)
Deborah L. Stein (*pro hac vice* forthcoming)
Gibson, Dunn & Crutcher LLP
333 South Grand Avenue
Los Angeles, California 90071-3197
Telephone: (213) 229-7000
Facsimile: (213) 229-7520
rdoren@gibsondunn.com
mhoffman@gibsondunn.com
dstein@gibsondunn.com
Attorneys for Lexington Insurance Company

Amy S. Fischer
FOLIART HUFF OTTAWAY & BOTTOM
201 Robert S. Kerr, Ste. 1200
Oklahoma City, OK 73102
larryottaway@oklahomacounsel.com
amyfischer@oklahomacounsel.com

Amy M. Churan
ROBINS KAPLAN LLP
2049 Century Park East, Ste. 3400
Los Angeles, CA 90067
AChuran@RobinsKaplan.com

Matthew P. (Matt) Cardosi
ROBINS KAPLAN LLP
800 Boylston St., Ste. 2500
Boston, MA 02199
MCardosi@RobinsKaplan.com
Attorneys for
Defendants Underwriters at Lloyd's-Syndicates; ASC1414. XLC 2003, TAL 1183, MSP 318, ATL1861, KLN 510, AGR 3268; Underwriters at Lloyd's - Syndicate: CNP 4444; Underwriters at Lloyd's - Syndicates: KLN 0510, ATL 1861, ASC 1414, QBE 1886, MSP 0318, APL 1969, CHN 2015, XLC 2003; Underwriters at Lloyd's - Syndicate BRT 2987; Underwriters at Lloyd's - Syndicates: KLN 0510, TMK 1880, BRT 2987, BRT 2988, CNP 4444, ATL 1861, Neon Worldwide Property Consortium, AUW 0609, TAL 1183, AUL 1274; Endurance Worldwide Insurance LTD T / AS Sompo International

Austin R. Vance

IN THE DISTRICT COURT OF CHEROKEE COUNTY
STATE OF OKLAHOMA

CHEROKEE NATION, CHEROKEE NATION BUSINESSES, LLC, & CHEROKEE NATION ENTERTAINMENT, LLC Plaintiff, v. LEXINGTON INSURANCE COMPANY, et al. Defendants.	)	Case No. CV-20-150 Hon. Douglas Kirkley

AFFIDAVIT

I, Carey Calvert, Director of Risk Management for the Cherokee Nation Businesses, LLC, and Cherokee Nation Entertainment, LLC, (collectively "Entities") do solemnly swear and declare that I manage the insurance policies for the Entities. Prior to litigation, the only property policies the Entities received from Defendant Insurers were: (1) the Tribal Property Insurance Program ("TPIP") insurance policies (Policy Nos. 017471589/06 (Dec 31) 9469 & 017471589/06 (Dec 15) 9110), and (2) the Liberty Mutual Excess Policy. Those policies were delivered in December 2019, more than five (5) months into their effective term. The Entities did not consent to the virus exclusion endorsement added to the Liberty Mutual Excess Policy during the 2019-2020 term of coverage, and it did not receive a partial refund of its premium for the same. The above statements are made to the best of my knowledge, under penalty of perjury, and I, as affiant, state nothing further.

Carey Calvert

Subscribed and sworn before me by Carey Calvert on this 11 day of December 2020:

Commission No.:
Commission Exp:

CYNTHIA A. NORMAN NOTARY # 19008538 EXP. 08/22/23 PUBLIC STATE OF OKLAHOMA

Notary Public

EXHIBIT 1

IN THE DISTRICT COURT OF CHEROKEE COUNTY
STATE OF OKLAHOMA

CHEROKEE NATION, CHEROKEE NATION BUSINESSES, LLC, & CHEROKEE NATION ENTERTAINMENT, LLC	)	Case No. CV-20-150
Plaintiff,	)	Hon. Douglas Kirkley
v.	)	
LEXINGTON INSURANCE COMPANY, et al.	)	
Defendants.	)	

AFFIDAVIT

I, Tamara Copeland, Director of Risk Management for the Cherokee Nation (the "Nation") do solemnly swear and declare that I manage the insurance policies for the Nation. Prior to litigation, the only property policy the Nation received from Defendant Insurers was the Tribal Property Insurance Program ("TPIP") insurance policy (Policy No. 017471589/06 (Dec 37) 9109). That policy was delivered in December 2019, more than five (5) months into their effective term. The Nation was not delivered any virus exclusion with the TPIP Policy and did not receive a partial refund of their premium for the same. The above statements are made to the best of my knowledge, under penalty of perjury, and I, as affiant, state nothing further.

[signature]
Tamara Copeland

Subscribed and sworn before me by Tamara Copeland on this 10th day of December 2020:

Commission No.: CN1715
Commission Exp: 4-2-2021

[signature: Justin Godwin]
Notary Public

[SEAL]

JUSTIN GODWIN NOTARY #CN1715 CHEROKEE NATION

EXHIBIT
2

From: Larry Ottaway
To: Michael Burrage
Cc: Amy Churan; Matthew P. Cardosi; Amy Fischer
Subject: MSJ responses
Date: Thursday, August 13, 2020 11:52:03 AM

Thanks for agreeing that the defendants' responses to plaintiffs' MSJs will be due on 9/14 in all cases.

Larry D. Ottaway
Foliart, Huff, Ottaway & Bottom
405-232-4633 office
405-834-1746 mobile

EXHIBIT

3

KeyCite Yellow Flag - Negative Treatment
Distinguished by Blue Springs Dental Care, LLC v. Owners Insurance Company, W.D.Mo., September 21, 2020

2020 WL 4692385
Only the Westlaw citation is currently available.
United States District Court, W.D. Missouri, Southern Division.

STUDIO 417, INC., et al., Plaintiffs,
v.
The CINCINNATI INSURANCE COMPANY, Defendant.

Case No. 20-cv-03127-SRB
|
Signed 08/12/2020

Synopsis
Background: Insureds, businesses which had purchased all-risk property insurance policies, brought action against property insurer, seeking declaratory judgment and class certification and alleging breach of contract arising from insurer's denial of coverage for losses resulting from COVID-19 pandemic. Property insurer moved to dismiss.

Holdings: The District Court, Stephen R. Bough, J., held that:

insureds adequately alleged that they incurred direct physical loss;

insureds plausibly stated claim for civil authority coverage;

insureds plausibly stated claim for ingress and egress coverage;

insureds plausibly stated claim for dependent property coverage; and

insureds plausibly stated claim for sue and labor coverage.

Motion denied.

Procedural Posture(s): Motion to Dismiss for Failure to State a Claim.

Attorneys and Law Firms

Jack Thomas Hyde, Thomas A. Rottinghaus, Tyler Hudson, Wagstaff & Cartmell, Jeremy M. Suhr, Brandon J.B. Boulware, Boulware Law LLC, Todd M. Johnson, Votava Nantz & Johnson LLC, Kansas City, MO, for Plaintiffs.

Daniel G. Litchfield, Pro Hac Vice, Litchfield Cavo LLP, Chicago, IL, Ericka Hammett, Pro Hac Vice, Litchfield Cavo LLP, Milwaukee, WI, Kelvin J. Fisher, Michael Lloyd Brown, Wallace Saunders, Overland Park, KS, for Defendant.

ORDER

STEPHEN R. BOUGH, UNITED STATES DISTRICT JUDGE

*1 Before the Court is Defendant The Cincinnati Insurance Company's ("Defendant") Motion to Dismiss. (Doc. #20.) For the reasons set forth below, the motion is DENIED.

I. BACKGROUND

Because this matter comes before the Court on a motion to dismiss, the following allegations in Plaintiffs' First Amended Class Action Complaint (the "Amended Complaint") are taken as true. (Doc. #16); *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (internal citations and quotation marks omitted) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)); *Zink v. Lombardi*, 783 F.3d 1089, 1098 (8th Cir. 2015).[1]

1 The Amended Complaint is 54 pages long and contains 253 separate allegations. This Order only discusses those allegations and issues necessary to resolve the pending motion.

The named Plaintiffs in this case are Studio 417, Inc. ("Studio 417"), Grand Street Dining, LLC ("Grand Street"), GSD Lenexa, LLC ("GSD"), Trezomare Operating Company, LLC ("Trezomare"), and V's Restaurant, Inc. ("V's Restaurant") (collectively, the "Plaintiffs"). Studio 417 operates hair salons in the Springfield, Missouri, metropolitan area. Grand Street, GSD, Trezomare, and V's Restaurant own and operate full-service dining restaurants in the Kansas City metropolitan area.

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Plaintiffs purchased "all-risk" property insurance policies (the "Policies") from Defendant for their hair salons and restaurants. (Doc. #1-1, ¶ 26.) All-risk policies cover all risks of loss except for risks that are expressly and specifically excluded. The Policies include a Building and Personal Property Coverage Form and Business Income (and Extra Expense) Coverage Form. Defendant issued each Plaintiff a separate policy, and all were in effect during the applicable time period. The parties agree that the Policies contain the same relevant language.

The Policies provide that Defendant would pay for "direct 'loss' unless the 'loss' is excluded or limited" therein. (Doc. #16, ¶ 27.) A "Covered Cause of Loss" "is defined to mean accidental [direct] physical loss *or* accidental [direct] physical damage." (Doc. #16, ¶ 31) (emphasis supplied); (Doc. #1-1, pp. 24, 57.)[2] The Policies do not define "physical loss" or "physical damage." The Policies also "do not include, and are not subject to, any exclusion for losses caused by viruses or communicable diseases." (Doc. #16, ¶ 13.) A loss, as defined above, is a prerequisite to invoke the different types of coverage sought in this lawsuit. (*See* Doc. #21, p. 15.) These coverages are set forth below.

2 All page numbers refer to the pagination automatically generated by CM/ECF.

First, the Policies provide for Business Income coverage. Under this coverage, Defendant agreed to:

> 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 'loss' to property at a 'premises' caused by or resulting from any Covered Cause of Loss.

(Doc. #1-1, pp. 37-38.)

Second, the Policies provide "Civil Authority" coverage. This coverage applies to:

*2 the actual loss of 'Business Income' sustained 'and necessary Extra Expense' sustained 'caused by action of civil authority that prohibits access to' the Covered Property when a Covered Cause of Loss causes direct damage to property other than the Covered Property, the civil authority prohibits access to the area immediately surrounding the damaged property, and '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[.]'

(Doc. #16, ¶ 42.)

Third, the Policies provide "Ingress and Egress" coverage. This coverage is specified as follows:

> We will pay for the actual loss of 'Business Income' you sustain and necessary Extra Expense you sustain caused by the prevention of existing ingress or egress at a 'premises' shown in the Declarations due to direct 'loss' by a Covered Cause of Loss at a location contiguous to such 'premises.' However, coverage does not apply if ingress or egress from the 'premises' is prohibited by civil authority.

(Doc. #1-1, p. 95.)

Fourth, the Policies provide "Dependent Property" coverage. This coverage applies if the insured suffers a loss of Business Income because of a suspension of its business "caused by direct 'loss' to 'dependent property.' " (Doc. #1-1, pp. 63-64.) "Dependent property means property operated by others whom [the insured] depend[s] on to ... deliver materials or services to [the insured] ... [a]ccept [the insured's] products or services ... [and] [a]ttract customers to [the insured's] business." (Doc. #1-1, p. 64.)

Finally, the Policies provide what is commonly known as "Sue and Labor" coverage. In relevant part, the Policies require the insured to "take all reasonable steps to protect the Covered Property from further damage," and to keep a record of expenses incurred to protect the Covered Property for consideration in the settlement of the claim. (Doc. #1-1, pp. 49-50.) The Policies do not exclude or limit losses from

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viruses, pandemics, or communicable diseases. (Doc. #16, ¶ 28.)

Plaintiffs seek coverage under the Policies for losses caused by the Coronavirus ("COVID-19") pandemic. Plaintiffs allege that over the last several months, it is likely that customers, employees, and/or other visitors to the insured properties were infected with COVID-19 and thereby infected the insured properties with the virus. (Doc. #1-1, ¶ 60.) Plaintiffs allege that COVID-19 "is a physical substance," that it "live[s] on" and is "active on inert physical surfaces," and is "emitted into the air." (Doc. #16, ¶¶ 47, 49-60.) Plaintiffs further allege that the presence of COVID-19 "renders physical property in their vicinity unsafe and unusable," and that they "were forced to suspend or reduce business at their covered premises." (Doc. #1-1, ¶¶ 14, 58, 102.)

In response to the COVID-19 pandemic, civil authorities in Missouri and Kansas issued orders requiring the suspension of business at various establishments, including Plaintiffs' businesses (the "Closure Orders"). The Closure Orders "have required and continue to require Plaintiffs to cease and/or significantly reduce operations at, and ... have prohibited and continue to prohibit access to, the[ir] premises." (Doc. #16, ¶¶ 106-107.) Plaintiffs allege that the presence of COVID-19 and the Closure Orders caused a direct physical loss or direct physical damage to their premises "by denying use of and damaging the covered property, and by causing a necessary suspension of operations during a period of restoration." (Doc. #16, ¶¶ 102.) Plaintiffs allege that their losses are covered by the Business Income, Civil Authority, Ingress and Egress, Dependent Property, and Sue and Labor coverages discussed above. (Doc. #16, ¶¶ 103-108.) Plaintiffs provided Defendant notice of their losses, but Defendant denied the claims. (Doc. #16, ¶¶ 110-115.)

*3 On April 27, 2020, Plaintiffs filed this lawsuit against Defendant. The Amended Complaint asserts claims for a declaratory judgment and for breach of contract based on Business Income coverage (Counts I, II), Extra Expense coverage (Counts III, IV), Dependent Property coverage (Counts V, VI), Civil Authority coverage (Counts VII, VIII), Extended Business Income coverage (Counts IX, X), Ingress and Egress coverage (Counts XI, XII), and Sue and Labor coverage (Counts XIII, XIV). The Amended Complaint also seeks class certification for 14 nationwide classes (one for each cause of action) and a Missouri Subclass that consists of "all policyholders who purchased one of Defendant's policies in Missouri and were denied coverage due to COVID-19." (Doc. #16, ¶¶ 117-125; *see also* Doc. #21, pp. 12-13.)

Defendant responded to the Amended Complaint by filing the pending motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). Defendant's overarching argument is that the Policies provide coverage "only for income losses tied to physical damage to property, not for economic loss caused by governmental or other efforts to protect the public from disease ... the same direct physical loss requirement applies to all the coverages for which Plaintiffs sue." (Doc. #21, p. 8.) Even if a loss is adequately alleged, Defendant argues that the Amended Complaint fails to state a claim as to each type of coverage at issue. Plaintiffs oppose the motion, and the parties' arguments are addressed below.

II. LEGAL STANDARD

Rule 12(b)(6) provides that a defendant may move to dismiss for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Iqbal*, 556 U.S. at 678, 129 S.Ct. 1937 (quoting *Twombly*, 550 U.S. at 570, 127 S.Ct. 1955). "A claim 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." *Ash v. Anderson Merchs., LLC*, 799 F.3d 957, 960 (8th Cir. 2015) (quoting *Iqbal*, 556 U.S. at 678, 129 S.Ct. 1937). When deciding a motion to dismiss, "[t]he factual allegations of a complaint are assumed true and construed in favor of the plaintiff, even if it strikes a savvy judge that actual proof of those facts is improbable." *Data Mfg., Inc. v. United Parcel Serv., Inc.*, 557 F.3d 849, 851 (8th Cir. 2009) (citations and quotations omitted).

Because this case is based on diversity jurisdiction, "state law controls the construction of [the] insurance policies[.]" *J.E. Jones Const. Co. v. Chubb & Sons, Inc.*, 486 F.3d 337, 340 (8th Cir. 2007). Under Missouri law, "[t]he interpretation of an insurance policy is a question of law to be determined by the Court." *Lafollette v. Liberty Mut. Fire Ins. Co.*, 139 F. Supp. 3d 1017, 1021 (W.D. Mo. 2015) (quoting *Mendota Ins. Co. v. Lawson*, 456 S.W.3d 898, 903 (Mo. App. W.D. 2015)).[3] "Missouri courts read insurance contracts 'as a

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whole and determine the intent of the parties, giving effect to that intent by enforcing the contract as written.' " *Id.* (citing *Thiemann v. Columbia Pub. Sch. Dist.*, 338 S.W.3d 835, 840 (Mo. App. W.D. 2011)). "Insurance policies are to be given a reasonable construction and interpreted so as to afford coverage rather than to defeat coverage." *Cincinnati Ins. Co. v. German St. Vincent Orphan Ass'n, Inc.*, 54 S.W.3d 661, 667 (Mo. App. E.D. 2001).

3 Defendant notes that Kansas law may apply to one policy, but contends that Missouri and Kansas law are indistinguishable for purposes of the pending motion. (Doc. #21, p. 13 n.10.) Plaintiffs do not challenge this assertion. For purposes of this Order, the Court assumes that Missouri law applies.

*4 "Policy terms are given the meaning which would be attached by an ordinary person of average understanding if purchasing insurance." *Vogt v. State Farm Life Ins. Co.*, 963 F.3d 753, 763 (8th Cir. 2020) (applying Missouri law) (quotations omitted). When interpreting policy terms, "the central issue ... is determining whether any ambiguity exists, which occurs where there is duplicity, indistinctness, or uncertainty in the meaning of the words used in the contract." *Id.* (quotations omitted). If the "insurance policies are unambiguous, they will be enforced as written absent a statute or public policy requiring coverage. If the language is ambiguous, it will be construed against the insurer." *Id.* (quotations omitted).

III. DISCUSSION

A. Plaintiffs Have Adequately Alleged a Direct "Physical Loss" Under the Policies.

Defendant's first argument is that Plaintiffs have not adequately pled a "physical loss" as required by the Policies. (Doc. # 21, pp. 7-8, 15-16, 19-25; Doc. #37, pp. 2-10.) Defendant argues that "direct physical loss requires actual, tangible, permanent, physical alteration of property." (Doc. #21, p. 19) (citing cases). Defendant claims that the Policies provide property insurance coverage, and "are designed to indemnify loss or damage to property, such as in the case of a fire or storm. [COVID-19] does not damage property; it hurts people." (Doc. #21, p. 7.) According to Defendant, the requirement of a tangible physical loss applies to—and precludes—each type of coverage sought in this case.

In response, Plaintiffs agree that "physical loss" and "physical damage" are "the key phrases" in the Policies. (Doc. #31, p. 7.) However, Plaintiffs emphasize that the Policies expressly cover "physical loss ***or*** physical damage." (Doc. #31, p. 11) (emphasis supplied). This "necessarily means that either a 'loss' or 'damage' is required, and that 'loss' is distinct from 'damage.' " (Doc. #31, p. 11.) As such, Plaintiffs argue that Defendant's focus on an actual physical alteration ignores the coverage for a "physical loss." Plaintiffs further argue that Defendant could have defined "physical loss" and "physical damage," but failed to do so. Plaintiffs argue this case should not be disposed of on a motion to dismiss because "even if [Defendant's] interpretation of the policy language is reasonable ... Plaintiffs' interpretation is also reasonable[.]" (Doc. #31, p. 11.)

Upon review of the record, the Court finds that Plaintiffs have adequately stated a claim for direct physical loss. First, because the Policies do not define a direct "physical loss" the Court must "rely on the plain and ordinary meaning of the phrase." *Vogt*, 963 F.3d at 763; *Mansion Hills Condo. Ass'n v. Am. Family Mut. Ins. Co.*, 62 S.W.3d 633, 638 (Mo. App. E.D. 2001) (recognizing that standard dictionaries should be consulted for determining ordinary meaning). The Merriam-Webster dictionary defines "direct" in part as "characterized by close logical, causal, or consequential relationship." Merriam-Webster, www.merriam-webster.com/dictionary/direct (last visited August 12, 2020). "Physical" is defined as "having material existence: perceptible especially through the senses and subject to the laws of nature." Merriam-Webster, www.merriam-webster.com/dictionary/physical (last visited August 12, 2020). "Loss" is "the act of losing possession" and "deprivation." Merriam-Webster, www.merriam-webster.com/dictionary/loss (last visited August 12, 2020).

Applying these definitions, Plaintiffs have adequately alleged a direct physical loss. Plaintiffs allege a causal relationship between COVID-19 and their alleged losses. Plaintiffs further allege that COVID-19 "is a physical substance," that it "live[s] on" and is "active on inert physical surfaces," and is also "emitted into the air." (Doc. #16, ¶¶ 47, 49-60.) COVID-19 allegedly attached to and deprived Plaintiffs of their property, making it "unsafe and unusable, resulting in direct physical loss to the premises and property." (Doc. #16, ¶ 58.) Based on these allegations, the Amended Complaint plausibly alleges a "direct physical loss" based on "the plain and ordinary meaning of the phrase." *Vogt*, 963 F.3d at 763.

*5 Second, the Court "must give meaning to all [policy] terms and, where possible, harmonize those terms in order to accomplish the intention of the parties." *Macheca Transp. v. Philadelphia Indem. Ins. Co.*, 649 F.3d 661, 669 (8th Cir. 2011) (applying Missouri law). Here, the Policies provide coverage for "accidental physical loss ***or*** accidental physical damage." (Doc. #1-1, p. 57) (emphasis supplied). Defendant conflates "loss" and "damage" in support of its argument that the Policies require a tangible, physical alteration. However, the Court must give meaning to both terms. *See* *Nautilus Grp., Inc. v. Allianz Global Risks US*, No. C11-5281BHS, 2012 WL 760940, at * 7 (W.D. Wash. Mar. 8, 2012) (stating that "if 'physical loss' was interpreted to mean 'damage,' then one or the other would be superfluous").

The Court's finding that Plaintiffs have adequately stated a claim is supported by case law. In *Hampton Foods, Inc. v. Aetna Cas. & Sur. Co.*, 787 F.2d 349 (8th Cir. 1986), the relevant provision provided that "[t]his policy insures against loss of or damage to the property insured ... resulting from all risks of direct physical loss[.]" *Id.* at 351. Applying Missouri law, the Eighth Circuit found this provision was ambiguous and affirmed the district court's decision that it covered "any loss or damage due to the *danger* of direct physical loss[.]" *Id.* at 352 (emphasis in original).

In *Mehl v. The Travelers Home & Marine Ins. Co.*, Case No. 16-CV-1325-CDP (E.D. Mo. May 2, 2018), the plaintiff discovered brown recluse spiders in his home. *Id.* at p. 1. The plaintiff unsuccessfully attempted to eliminate the spiders, and then left the home. *Id.* The plaintiff considered the property uninhabitable and filed a claim under his homeowners insurance policy for loss of use of the property. *Id.* After his insurance company denied the claim, the plaintiff filed suit for breach of contract. The insurance company moved for summary judgment and argued that the policy only covered "direct physical loss" which required "actual physical damage." *Id.* at p. 2.

Mehl rejected this argument. As in this case, the *Mehl* policy did not define "physical loss" and the insurance company "point[ed] to no language in the policy that would lead a reasonable insured to believe that actual physical damage is required for coverage." *Id.* Although the policy in *Mehl* provided coverage for "loss of use," *Mehl* supports the conclusion that "physical loss" is not synonymous with physical damage. *Id.*

Other courts have similarly recognized that even absent a physical alteration, a physical loss may occur when the property is uninhabitable or unusable for its intended purpose. *See* *Port Auth. of New York and New Jersey v. Affiliated FM Ins. Co.*, 311 F.3d 226, 236 (3d Cir. 2002) (affirming denial of coverage but recognizing that "[w]hen the presence of large quantities of asbestos in the air of a building is such as to make the structure uninhabitable and unusable, then there has been a distinct [physical] loss to its owner"); *Prudential Prop. & Cas. Ins. Co. v. Lilliard-Roberts*, CV-01-1362-ST, 2002 WL 31495830, at * 9 (D. Or. June 18, 2002) (citing case law for the proposition that "the inability to inhabit a building [is] a 'direct, physical loss' covered by insurance"); *General Mills, Inc. v. Gold Medal Ins. Co.*, 622 N.W.2d 147, 152 (Minn. Ct. App. 2001) ("We have previously held that direct physical loss can exist without actual destruction of property or structural damage to property; it is sufficient to show that insured property is injured in some way.").

To be sure, and as argued by Defendant, there is case law in support of its position that physical tangible alteration is required to show a "physical loss." (Doc. #21, pp. 19-25; Doc. #37, pp. 3-10.)[4] However, Plaintiffs correctly respond that these cases were decided at the summary judgment stage, are factually dissimilar, and/or are not binding. For example, Defendant argues that "[a] seminal case concerning the direct physical loss requirement is *Source Food Tech., Inc. v. U.S. Fid. & Guar. Co.*, 465 F.3d 834 (8th Cir. 2006)." (Doc. #21, pp. 19-20.) However, *Source Food* was decided in the summary judgment context and under Minnesota law. *Source Food*, 465 F.3d at 834-36. Moreover, the facts of *Source Foods* are distinguishable. In that case, the insured's beef was not allowed to cross from Canada into the United States because of an embargo related to mad cow disease. *Id.* at 835. Because of the embargo, the insured was unable to fill orders and had to find a new supplier. Importantly, there was no evidence that the beef was actually contaminated. *Id.*

4 *See also* Scott G. Johnson, "*What Constitutes Physical Loss or Damage in a Property Insurance Policy?*" 54 Tort Trial & Ins. Prac. L.J. 95, 96 (2019) ("[W]hen the insured property's structure is unaltered, at least to the naked eye ... [c]ourts

have not uniformly interpreted the physical loss or damage requirement[.]")

*6 The insured sought coverage based on a provision requiring "direct physical loss to property." The district court denied coverage, and the Eighth Circuit affirmed, explaining that:

> [a]lthough Source Food's beef product in the truck could not be transported to the United States due to the closing of the border to Canadian beef products, the beef product on the truck was not—as Source Foods concedes—physically contaminated or damaged in any manner. To characterize Source Food's inability to transport its truckload of beef product across the border and sell the beef product in the United States as direct physical loss to property would render the word 'physical' meaningless.

Id. at 838.

The facts alleged in this case do not involve the transportation of uncontaminated physical products. Instead, Plaintiffs allege that COVID-19 is a highly contagious virus that is physically "present ... in viral fluid particles," and is "deposited on surfaces or objects." (Doc. #16, ¶¶ 47, 50.) Plaintiffs further allege that this physical substance is likely on their premises and caused them to cease or suspend operations. Unlike *Source Foods*, the Plaintiffs expressly allege physical contamination. Finally, *Source Foods* recognized (under Minnesota law) that physical loss could be found without structure damage. *Source Foods*, 465 F.3d at 837 (stating that property could be "physically contaminated ... by the release of asbestos fibers"). Neither *Source Foods* nor the other cases cited by Defendant warrant dismissal under Rule 12(b)(6).

Defendant's reply brief cites recent out-of-circuit decisions which found that COVID-19 does not cause direct physical loss. (Doc. #37, pp. 5-6.) For example, Defendant relies on *Social Life Magazine, Inc. v. Sentinel Ins. Co., Ltd.*, 1:20-cv-03311-VEC (S.D.N.Y. 2020). Defendant argues that "*Social Life* famously states that the virus damages lungs, not printing presses." (Doc. #37, p. 6.) But the present case is not about whether COVID-19 damages lungs, and the presence of COVID-19 on premises, as is alleged here, is not a benign condition. Regardless of the allegations in *Social Life* or other cases, Plaintiffs here have plausibly alleged that COVID-19 particles attached to and damaged their property, which made their premises unsafe and unusable.[5] This is enough to survive a motion to dismiss.

5 Defendant also relies on *Gavrilides Mgmt. Co., LLC v. Michigan Ins. Co.*, Case No. 20-258-CB (Ingham County, Mich. July 1, 2020) (transcript regarding defendant's motion for summary disposition). (Doc. #37-2.) *Gavrilides* is distinguishable, in part, because the court recognized that "the complaint also states a[t] no time has Covid-19 entered the Soup Shop of the Bistro ... and in fact, states that it has never been present in either location." (Doc. #37-2, p. 21.)

Defendant also contends that if Plaintiffs' interpretation is accepted, physical loss would be found "whenever a business suffers economic harm." (Doc. #21, p. 22; Doc. #37, p. 2.) That is not what the Court holds here. Although Plaintiffs allege economic harm, that harm is tethered to their alleged physical loss caused by COVID-19 and the Closure Orders. (Doc. #1-1, ¶¶ 106-107) (alleging that the COVID-19 pandemic and Closure Orders required Plaintiffs to "cease and/or significantly reduce operations at, and ... have prohibited and continue to prohibit access to, the premises.")[6] For all these reasons, the Court finds that Plaintiffs have adequately alleged a direct physical loss under the Policies.[7]

6 Defendant argues that COVID-19 does not present a physical loss because "the virus either dies naturally in days, or it can be wiped away." (Doc. #21, pp. 24-25.) However, as stated, a physical loss has been adequately alleged insofar as the presence of COVID-19 and the Closure Orders prohibited or significantly restricted access to Plaintiffs' premises. *See* *Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am.*, 2014 WL 6675934, at * 6 (D.N.J. Nov. 25, 2014) (recognizing that "courts considering non-structural property damage claims have found

that buildings rendered uninhabitable by dangerous gases or bacteria suffered direct physical loss or damage"). Defendant also argues that Plaintiffs have failed to adequately allege that COVID-19 was actually present on their premises. Based on Plaintiffs' allegations, and because of COVID-19's wide-spread, this argument is also rejected.

7 Although it appears to be persuasive, the Court need not address Defendant's additional argument that the Amended Complaint fails to allege "physical damage."

B. Plaintiffs Have Plausibly Stated a Claim for Civil Authority Coverage.

*7 Defendant next argues that Plaintiffs' claim for civil authority coverage should be dismissed for failure to state a claim. Defendant presents two arguments in support of dismissal. Defendant first contends that civil authority coverage requires "direct physical loss to property other than the Plaintiffs' property," and that "[j]ust as the Coronavirus is not causing direct physical loss to Plaintiffs' premises, it is not causing direct physical loss to other property." (Doc. #21, p. 27.)

This argument is rejected for substantially the same reasons as discussed above. Plaintiffs adequately allege that they suffered a physical loss, and such loss is applicable to other property. Additionally, Plaintiffs allege that civil authorities issued closure and stay at home orders throughout Missouri and Kansas, which includes property other than Plaintiffs' premises.

Defendant's second argument is that civil authority coverage "requires that access to Plaintiffs' premises be prohibited by an order of Civil Authority. But, none of the orders Plaintiffs allege prohibit access to their premises. To the contrary, the Plaintiffs admit ... that the Closure Orders allowed restaurant premises to remain open for food preparation, take-out and delivery. Likewise, Plaintiffs concede that the Closure Orders did not prohibit access to salon premises." (Doc. #21, pp. 28-29) (citations omitted).

Upon review of the record, the Court finds that Plaintiffs have adequately alleged that their access was prohibited. With respect to Studio 417's hair salons, the Amended Complaint alleges that a Closure Order "required hair salons and all other businesses that provide personal services to suspend operations." (Doc. #16, ¶ 67.) With respect to Plaintiffs' restaurants, the Closure Orders mandated "that all inside seating is prohibited in restaurants," and that "every person in the State of Missouri shall avoid eating or drinking at restaurants," with limited exceptions for "drive-thru, pickup, or delivery options." (Doc. #16, ¶¶ 71-80.)

At the motion to dismiss stage, these allegations plausibly allege that access was prohibited to such a degree as to trigger the civil authority coverage. *Compare* *TMC Stores, Inc. v. Federated Mut. Ins. Co.*, No. A04-1963, 2005 WL 1331700, at * 4 (Minn. Ct. App. June 7, 2005) ("Because access remained and the level of business was not dramatically decreased, the civil authority section of the insurance policy is inapplicable and the district court did not err in granting summary judgment."). This is particularly true insofar as the Policies require that the "civil authority prohibits access," but does not specify "all access" or "any access" to the premises. For these reasons, Plaintiffs have adequately stated a claim for civil authority coverage.

C. Plaintiffs Have Plausibly Stated a Claim for Ingress and Egress Coverage.

Defendant argues that Plaintiffs' claim for ingress and egress coverage should be dismissed for two reasons. First, Defendant argues that such coverage "requires both a direct physical loss at a location contiguous to the insured's property and the prevention of access to the insured's property as a result of that direct physical loss," and that Plaintiffs fail to allege a direct physical loss to any location. (Doc. #21, p. 30.) For substantially the same reasons discussed above, this argument is rejected.

Second, Defendant argues that this "coverage does not apply if ingress or egress from the 'premises' is prohibited by civil authority." (Doc. #21, p. 24; Doc. #1-1, p. 95.) Defendant contends that "[h]ere, the Closure Orders issued by civil authorities are the only identified causes of Plaintiffs' alleged losses." (Doc. #21, p. 30.) However, Plaintiffs have alleged that both COVID-19 and the Closure Orders rendered the premises unsafe for ingress and egress. (Doc. #1-1, p. 3, ¶ 14 ("Plaintiffs were forced to suspend or reduce business at their covered premises due to COVID-19 and the ensuing orders issued by civil authorities[.]"). The Court finds that Plaintiffs have adequately stated a claim for ingress and egress coverage.

D. Plaintiffs Have Plausibly Stated a Claim for Dependent Property Coverage.

*8 Defendant argues that Plaintiffs' claim for dependent property coverage should be dismissed for two reasons. First, Defendant argues that this coverage "requires both a direct physical loss to dependent property and a necessary suspension of the insured's business as a result of that direct physical loss." (Doc. #21, p. 30.) Defendant contends that "[h]ere, again, the [Amended] Complaint does not allege any facts that show direct physical loss at any location, let alone a dependent property." (Doc. #21, pp. 30-31.) For substantially the same reasons discussed above, this argument is rejected.

Second, Defendant argues that Plaintiffs have failed to adequately allege a suspension of their businesses because of the lack of material or services from a "dependent property." (Doc. #21, pp. 30-31.) As stated above, dependent property is defined as "property operated by others whom [the insured] depend[s] on to ... deliver materials or services to [the insured] ... [a]ccept [the insured's] products or services ... [or] [a]ttract customers to [the insured's] business." (Doc. #1-1, p. 64.) The Amended Complaint adequately alleges that Plaintiffs suffered a loss of materials, services, and lack of customers as a result of COVID-19 and the Closure Orders. The Court therefore finds that Plaintiffs have adequately stated a claim for dependent property coverage.

E. Plaintiffs Have Plausibly Stated a Claim for Sue and Labor Coverage.

Finally, Defendant moves to dismiss Plaintiffs' claim for sue and labor coverage. Defendant argues that this is not an additional coverage, but instead imposes a duty on the insured to prevent further damage and to keep a record of expenses incurred in the event of a covered loss. Defendant argues that because Plaintiffs have failed to adequately allege a covered loss, a claim has not been stated for this coverage.

However, regardless of the title of this claim, Defendant acknowledges that in the event of a covered loss, "the insured can recover these expenses[.]" (Doc. #21, p. 31.) As discussed above, the Court finds that Plaintiffs have adequately stated a claim for a covered loss. Moreover, Plaintiffs allege that in complying with the Closure Orders and by suspending operations, they "incurred expenses in connection with reasonable steps to protect Covered Property." (Doc. #16, ¶ 250.) Consequently, the Court finds that Plaintiffs have adequately stated a claim for sue and labor coverage.

In sum, Defendant's motion to dismiss will be denied in its entirety. The Court emphasizes that Plaintiffs have merely pled enough facts to proceed with discovery. Discovery will shed light on the merits of Plaintiffs' allegations, including the nature and extent of COVID-19 on their premises. In addition, the Court emphasizes that all rulings herein are subject to further review following discovery. Subsequent case law in the COVID-19 context, construing similar insurance provisions, and under similar facts, may be persuasive. If warranted, Defendant may reassert its arguments at the summary judgment stage.

IV. CONCLUSION

Accordingly, Defendant The Cincinnati Insurance Company's Motion to Dismiss (Doc. #20) is DENIED.

IT IS SO ORDERED.

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SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: CIVIL PART
BERGEN COUNTY
(HEARD VIA ZOOM)
DOCKET NO: BER-L-3681-20
A.D. #________________

OPTICAL SERVICES USA/ JC1, OPTICAL SERVICES USA, LLC, OPTICAL SERVICES USA-WO, RE & LE HOLDINGS, LLC, STONG OD EWING NJ, LLC,	)	TRANSCRIPT OF MOTION
Plaintiffs,	)	
vs.	)	
FRANKLIN MUTUAL INSURANCE COMPANY,	)	
Defendant.	)	

Place: Bergen County Justice Center
10 Main Street
Hackensack, New Jersey 07601

Date: August 13, 2020

BEFORE:

HONORABLE MICHAEL N. BEUKAS, J.S.C.

TRANSCRIPT ORDERED BY:

ERIC L. HARRISON, ESQ. (Methfessel & Werbel)

APPEARANCES:

SEAN E. ROSE, ESQ. (Olender Feldman, LLP)
Attorney for Plaintiffs

ERIC L. HARRISON, ESQ. (Methfessel & Werbel)
Attorney for Defendant

Transcriber: Laura Scicutella
Phoenix Transcription, LLC
796 Macopin Rd.
West Milford, NJ 07480
(862)248-0670

Audio Recorded
Recording Opr: Alexa D'Angelo

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1 (Proceeding commenced at 9:30:49 a.m.)
2 THE COURT: Superior Court of the State of
3 New Jersey, Bergen County Vicinage, clerk recording,
4 Alexa D'Angelo law clerk, docket number BER-L-3681-20,
5 caption is Optical Services USA/JCI (sic), Optical
6 Services USA, LLC, Optical Services USA-WO, and Re and
7 Le Holdings, LLC, Stong OD Ewing NJ, LLC versus
8 Franklin Mutual Insurance Company. Judge Michael N.
9 Beukas, chambers 453. The time is approximately 9:32
10 a.m. May I have the appearances of counsel for the
11 record, please, starting with the plaintiff?
12 MR. ROSE: Good morning, Your Honor. Sean
13 Rose from the law firm of Olender Feldman on behalf of
14 plaintiff, Optical Services USA/JC1, Optical Services
15 USA, LLC, Optical Services USA-WO, Re and Le Holdings,
16 LLC, and Stong OD Ewing NJ, LLC, collectively
17 plaintiffs, Your Honor.
18 THE COURT: Good morning, Counsel.
19 MR. ROSE: Good morning.
20 MR. HARRISON: Good morning, Judge. Eric
21 Harrison, Methfessel and Werbel, on behalf of Franklin
22 Mutual Insurance Company.
23 THE COURT: Good morning, Counsel. Okay,
24 gentlemen, just a -- a couple of --
25 RECORDING: (Indiscernible) --

1 THE COURT: -- reminders before we --
2 RECORDING: -- is now in the conference.
3 MR. HARRISON: Your Honor, this is Eric
4 Harrison speaking. As a courtesy, I should let the
5 Court know I do have a few folks dialing in. They've
6 all been instructed to keep their phones on mute.
7 Various FMI representatives and a colleague of mine
8 will be listening in but will not be participating.
9 THE COURT: Okay, very good.
10 For purposes of our established record here
11 today, gentlemen, when you do speak at oral argument, I
12 do need you to identify yourself in between oral
13 arguments so that the transcription service can clearly
14 identify which attorney is speaking.
15 When you are referencing an oral argument to
16 any specific controlling case, I need you to identify
17 that case for the record and pursuant to Rule 1:36-3, I
18 need you to identify for the record whether that is a
19 published opinion in the State of New Jersey versus an
20 unpublished opinion and whether or not you are citing
21 to any law of any other jurisdiction including the US
22 Supreme Court so that I can identify for the record as
23 to whether or not any of the law is controlling in this
24 case for purposes of oral argument.
25 In addition, we are on a Polycom speaker

1 today and at times it may be difficult for you to hear
2 me and I may need to interject to pose a question to
3 either attorney so I may have to elevate my voice so
4 that you can hear me clearly. So please don't
5 misconstrue me elevating my --
6 RECORDING: (Indiscernible) --
7 THE COURT: -- voice --
8 RECORDING: -- is now in the conference.
9 THE COURT: Okay, gentlemen, I -- if I need
10 to elevate my voice, it's for purposes of the Polycom
11 picking up my voice so that you can hear it, okay.
12 So I have before me a Motion to Dismiss the
13 Complaint for failure to state a claim upon which
14 relief can be granted pursuant to Rule 4:6-2(e) filed
15 by the defendant, Franklin Mutual Insurance Company.
16 So, Mr. Harrison, this is your Motion. You may
17 proceed.
18 MR. HARRISON: Yes, sir. Thank you, Your
19 Honor. We are all aware, I know plaintiffs' counsel is
20 aware, certainly my firm as an insurance defense firm
21 is well aware of the fast-moving nature of developments
22 in insurance litigation and other litigation over
23 Covid-19. Two significant events happened yesterday
24 and they're both worthy of mention. The first is, and
25 this is not within the record, but the Court -- it's

1 not important to the Court's decision on the policy
2 language, but it's -- it's significant background. The
3 multi-district litigation panel of the United States
4 District Court denied a nation-wide Motion to
5 Consolidate these business interruption litigations
6 that are venued in various Federal Courts around the
7 country essentially on the basis that the policy
8 language differs from policy to policy. Even though a
9 lot of insurers use (indiscernible) income and would
10 other insurers, there is still significant differences
11 between those forms and the facts of particular cases
12 also can determine whether there would be coverage and
13 to what extent.
14 The second significant thing to happen
15 yesterday was the issuance of the decision that Mr.
16 Rose brought to the Court's attention, and I don't have
17 any objection to his filing it yesterday because it
18 didn't come out until yesterday and I have had ample
19 time to review it. It's the Studio 417 case from U.S.
20 District Court, Western District of Missouri, Southern
21 Division. This opinion, which I'm not going to
22 significantly disagree with, demonstrates the wisdom of
23 the MDO panel in refusing to consolidate because the
24 denial of the Motion to Dismiss based on the
25 allegations in that complaint bespeaks the importance

1 of policy language differing from policy to policy and
2 alleged facts differing from complaint to complaint.
3 I should ask as a courtesy whether the Court
4 has any objection to me talking about this case that
5 Mr. Rose sent yesterday.
6 THE COURT: What I would like you to do,
7 Counsel, is argue your Motion to Dismiss. This Court
8 is bound by the implications of Rule 1:36-3. While the
9 parties felt compelled to cite to numerous other
10 jurisdictions with respect to their arguments, their
11 respective arguments both on the Motion and in the
12 Opposition, this Court is bound by legal precedent
13 within the State of New Jersey, namely the Appellate
14 Division, and the New Jersey Supreme Court. With
15 respect to the US Supreme Court, this -- this Court
16 also takes precedent from the US Supreme Court for
17 controlling decisions. So this Court will give
18 whatever weight is necessary to whatever arguments
19 reflect in the controlling legal precedent set forth in
20 this state as opposed to other states. So you may
21 proceed with the argument.
22 MR. HARRISON: Okay, thank you, Your Honor.
23 I just -- I just wanted to make sure that the Court
24 didn't want me to completely disregard this decision.
25 But I'm going to highlight it simply to contrast it

1 with a case we're looking at in order to argue my
2 position under New Jersey law.
3 The Studio 417 decision describes a policy
4 which defines a covered cause of loss, and that's at
5 page 2 of the opinion, as follows, "Accidental direct
6 physical loss or accidental direct physical damage."
7 It goes on to say on the same page, "The policies do
8 not include and are not subject to any exclusion for
9 losses caused by viruses or communicable diseases."
10 Now, I want to be clear about something. I
11 want to be clear about a point of agreement that
12 Franklin Mutual has with the plaintiffs in this case.
13 At paragraph 36 of the Complaint filed in this case,
14 plaintiffs recite as follows, "There is no known
15 instance of Covid-19 transmission or contamination
16 within the premises of plaintiffs' businesses." Now,
17 the declamation of coverage letter that FMI issued
18 prior to the Complaint being filed in this case because
19 the Complaint challenges that declamation of coverage
20 find it among relevant policy provisions the exclusion
21 of 12(c) for contamination by any virus, et cetera.
22 Because the complaint expressly asserts that there was
23 no contamination and because it is our universal duty
24 to read as accurate all facts alleged in the complaint
25 and I agree that the contamination exclusion would not

1 apply to this case. If the complaint had alleged that
2 there was contamination on the premises, then there
3 probably would be direct physical loss, but there would
4 also be exclusion of coverage under that virus
5 exclusion. So what we're really focused on is the
6 policy language. In Studio 417, the definition of loss
7 there was physical loss or physical damage.
8 THE COURT: Okay, but we're concerned about
9 New Jersey. We're not concerned about the Western
10 District of Missouri; correct?
11 MR. HARRISON: That is true, Your Honor, but
12 we are concerned about policy language defining direct
13 physical loss, --
14 THE COURT: Okay, but the --
15 MR. HARRISON: -- but I'm -- I'm happy to
16 take it --
17 THE COURT: -- definition (indiscernible) --
18 MR. HARRISON: -- to our policy language.
19 THE COURT: -- definition has not been
20 established by any court in this state with the
21 exception of the Wakefern case; correct?
22 MR. HARRISON: I think that is absolutely
23 correct.
24 THE COURT: Okay, I just want to establish
25 that for purposes of the record.

1 MR. HARRISON: Okay, so back to our policy.
2 The business interruption loss that -- of which
3 plaintiffs seek to avail themselves governs loss of
4 income resulting from direct covered loss. We go to
5 page 9 of the policy form which expressly defines
6 direct covered loss as follows, "The fortuitous direct
7 physical loss as described in Part 1(c), General Cause
8 of Lost Conditions, Coverages A, B, C, which occurs at
9 described premises occupied by you." Now, the
10 definition is (indiscernible) if it didn't refer -- if
11 it didn't cross-reference another definition, then we'd
12 be fighting over whether the closure of a business
13 because of a risk of virus spread would constitute a
14 fortuitous direct physical loss.
15 However, because it cross-references the
16 description of direct covered loss that's also in the
17 policy at page 8. We go to the more detailed
18 definition. Covered loss, "Means fortuitous direct
19 physical damage to or destruction of covered property
20 by a covered cause of loss." The requirement of direct
21 physical damage to or destruction of (indiscernible) --
22 RECORDING: (Indiscernible).
23 MR. HARRISON: -- requirement of direct
24 physical damage to or destruction of covered property
25 distinguishes this case from the Studio 417 case in

1 that there is the physical damage or destruction
2 requirement that was absent in that case which also had
3 --
4 RECORDING: (Indiscernible) is now in the
5 conference.
6 MR. HARRISON: -- I apologize -- which also
7 had the open-ended concept of loss which was not
8 defined. Our policy defines loss as requiring that
9 physical impact.
10 The Court has reviewed Wakefern I know and
11 the -- the cases -- the New Jersey cases discussed in
12 our brief I agree that there is no case directly on
13 point construing the -- this precise policy language in
14 the context a claim where there was a closure of a
15 business because of the risk of contamination by a
16 virus. But I think that the application of loss that's
17 set forth in New Jersey and in the other jurisdictions
18 we've cited as persuasive, although not binding,
19 compels the conclusion that this did not meet the
20 policy definition of direct covered loss to satisfy
21 coverage.
22 THE COURT: Counsel, let me pose -- let me
23 pose one question to you. Why didn't the policy then
24 have specific exclusions for an event such as this?
25 Meaning for virus proliferation.

1 MR. HARRISON: Well, it -- it precisely has
2 an exclusion for virus proliferation. It does not have
3 an exclusion for a closure of business based on the
4 risk of virus proliferation. I can't speak to the
5 drafters of the policy other than to say this is an
6 unprecedented event. First in my lifetime. First in
7 my parents and our parents. So, yeah, in -- in an
8 ideal world all potential cataclysmic risks could be
9 underwritten and determined in advance as to what we're
10 going to cover and to what extent or whether there
11 should be any coverage at all, but before we get to the
12 absence of an exclusion, and I agree there is no
13 exclusion that would apply on the facts as alleged in
14 this Complaint, we have to satisfy the coverage
15 definition first.
16 THE COURT: You can proceed, Counsel. Thank
17 you.
18 MR. HARRISON: I -- Your Honor, to -- to be
19 candid, I know you've reviewed the papers. I'm happy
20 to address any further questions the Court may have or
21 simply reserve an opportunity to respond to my
22 colleague. I -- I think between our papers and what
23 I've had to say this morning that I've stated our case.
24 THE COURT: Thank you, Counsel. Okay, Mr.
25 Rose, your response?

1 MR. ROSE: Thank you, Your Honor. And just
2 to try to make sure that there's a clean record
3 virtually, this is again Sean Rose, Olender Feldman, on
4 behalf of plaintiff.
5 So contrary to the insurance industry's well
6 rehearsed talking points and -- and Mr. Harrison has a
7 very good brief and very good argument, the simple fact
8 is that plaintiff and the many other in the -- and
9 (indiscernible) plaintiffs purchased business owners
10 policies to insure against, among other things,
11 unexpected business interruptions. And what happened
12 back in March, as we all know because we all lived
13 through it, that's about as unexpected as you get.
14 Plaintiffs were forced to close their businesses
15 because the executive order issued by the State --
16 well, the State pertinent to here, but issued across
17 the country in emergency response to the pandemic found
18 that there is a dangerous condition on plaintiffs'
19 property. As a result of those orders, the plaintiffs
20 closed. All residents were told to stay at home and
21 (indiscernible) claims (indiscernible).
22 Now, as Mr. Harrison pointed out, the
23 briefing reflects that there are really two main points
24 of argument that -- that I'll hit quickly because they
25 are recited at length in the brief is the first

1 (indiscernible) on the direct physical loss issue. We
2 know from, and just to again bide by Your Honor's
3 directive, we know that under the Gregory Packaging,
4 Inc. versus Travelers Property Casualty Company of
5 America case, which is an unpublished case, but from
6 the District of New Jersey and cited in both Mr.
7 Harrison's and our brief, we know that a dangerous
8 condition on the property can constitute a physical
9 loss. Now, here, we have an executive order that found
10 that plaintiffs' businesses were deemed unfit and
11 unsafe because of a dangerous condition. Plaintiffs'
12 loss of income caused by the closure orders concluding
13 that there was a dangerous condition on the property is
14 a direct physical loss. Alternatively, if we wanted to
15 get into the legal standard, at a minimum, it is
16 plausible the plaintiffs have alleged a direct physical
17 loss here which should defeat a (indiscernible) Motion
18 and allow plaintiffs to pursue discovery, among other
19 things, to discern the true intent behind policy terms
20 which, in some cases, points to coverage but in other
21 cases it may be ambiguous.
22 The second point would be the civil authority
23 coverage and I -- I think here, the Western District of
24 Missouri case has instructed, and I'll get to that in a
25 second, here we -- we, again, we know what happened.

1 We all lived through it. The closure orders forced
2 plaintiffs to close and banned occupancy of all non-
3 essential businesses. In doing so, the closure orders
4 necessarily not only affected plaintiffs' businesses,
5 but they affected all -- all properties around
6 plaintiffs. It was a stay-at-home order. Unless it
7 was an essential business, everything was closed. It's
8 alleged -- it -- it's in the Motion and, you know,
9 beyond that, Your Honor, we all lived through it. We
10 were all there. So, again, at a minimum, it is
11 plausible that plaintiffs are entitled to
12 (indiscernible) coverage here. And unless Your Honor
13 has any questions, I know the briefing was fairly
14 detailed.
15 THE COURT: Thank you, Mr. Rose. You know,
16 at the outset, gentlemen, I do commend the both of you
17 with respect to a very, very difficult topic and
18 concept in the State of New Jersey with regard to the
19 interpretation of insurance law. I did find that the
20 respective briefs were very well drafted.
21 Mr. Harrison, do you have a reply at this
22 point?
23 MR. HARRISON: Briefly, Your Honor, yes. Mr.
24 Rose says the executive order for -- forced closure
25 based on a finding that there was a dangerous condition

1 on plaintiffs' property. That's -- that's simply not
2 the case. The -- the Complaint does not allege that.
3 I understand what he's saying. It -- it's a -- it's a
4 directive closing down non-essential businesses based
5 on the risk that putting people in proximity to each
6 other indoors could result in transmission of the
7 virus, could -- it could result in the virus sitting on
8 a piece of equipment in one of the plaintiffs'
9 examining rooms, but the Complaint in this case
10 expressly alleges that there has been no known instance
11 of Covid-19 transmission or contamination.
12 I -- I get it that this is business
13 interruption insurance and to quote one of the judges I
14 appeared before in my first year arguing coverage
15 motion, he said, Mr. Harrison, before we turn to the
16 policy terms, everybody knows that when an insured buys
17 insurance for something, their reasonable expectation
18 is that they're going to be covered for whatever might
19 befall them, but then we got to go to the policy
20 language and if indeed coverage was determined by the
21 name of the coverage, business interruption, well, then
22 the insurance industry loses and FMI loses this case
23 because we're not disputing that there was business
24 interruption. Although if we were to have to dig
25 deeper, we would probably have a dispute over whether

1 plaintiffs were non-essential businesses, but that's
2 not what this Motion is about. The law requires that
3 we look carefully at the policy language. And with
4 reference to Gregory Packaging, we're talking about the
5 release of ammonia into the air, talking about
6 something physically occurring and I think it's -- it's
7 clear from the plain policy language and the meaning of
8 the terms, which are precisely defined in the policy,
9 that in this instance under this policy based on these
10 allegations there is no direct covered loss.
11 In -- in asking for discovery to determine
12 the true intent behind policy terms, right, that's
13 something you need to speak about briefly. When policy
14 language is clear, I am not aware of any precedent
15 which would support denial of a Motion to Dismiss on
16 the basis that the plaintiff is entitled to conduct
17 discovery to see what the drafter of the document, who
18 I can tell the Court was not -- is not an employee of
19 FMI, had in mind when defining direct covered loss or
20 covered loss.
21 There -- there is -- in New Jersey we do have
22 a -- a big case called Morton International which has
23 to do with pollution exclusions and that's where our
24 courts created this -- the concept of regulatory
25 estoppel where essentially the insurance industry

1 lobbied to insert a particular form of coverage within
2 a policy with an exclusion for -- that applied to
3 environmental losses and essentially the courts found,
4 hey, you came to the Department of Banking and
5 Insurance putting forth this policy language suggesting
6 it would do something and then you went to court and
7 suggested otherwise. There is no such allegation in
8 this case. I haven't seen any such allegation even
9 made in the press or -- or by the various
10 (indiscernible) or -- or in any case that's being
11 litigated that I'm aware of. When the plain policy
12 terms apply plainly and directly to the facts asserted,
13 I'm not aware of any legitimate basis for denying a
14 Motion based on the facts accepted as true in the
15 pleading on the basis that plaintiff wishes to take
16 discovery to see what the defendant meant by policy
17 language that somebody else wrote which the defendant
18 adopted if the plain language controls and is
19 unambiguous and I submit that it does control and it is
20 unambiguous here.
21 THE COURT: Thank you. Gentlemen, thank you,
22 very much. I'm prepared to rule on this Motion.
23 This matter comes before the Court on a
24 Motion Seeking Dismissal of the plaintiffs' Complaint
25 with prejudice pursuant to Rule 4:6-2(e). The Court

1 begins with a few general observations concerning the
2 standards governing dismissal motions under Rule 4:6-
3 2(e) by citing Flinn v. -- Flinn v. Amboy National
4 Bank, 40 -- 436 N.J.Super. 274 (App. Div. 2014), "In
5 reviewing a complaint dismissed under Rule 4:6-2(e),
6 the inquiry is limited to examining the legal
7 sufficiency of the facts alleged on the face of the
8 complaint," citing Printing Mart-Morristown versus
9 Sharp Electronics Corp., 116 N.J. 739 at page 746
10 (1989) and Rieder versus Department of Transportation,
11 221 N.J.Super. 547 at page 552 (App. Div. 1987).
12 The essential test as set forth in Green
13 versus Morgan Properties, 215 N.J. 431 at page 451
14 (Sup. Ct. 2013) is, "Whether a cause of action is
15 'suggested' by the facts," citing Printing Mart-
16 Morristown versus Sharp Electronics Corp., 116 N.J. at
17 746 quoting Velantzas versus Colgate-Palmolive Co., 109
18 N.J. 189 at page 192 (1988).
19 "A reviewing court searches the complaint in
20 depth and with liberality to ascertain whether the
21 fundamental of a cause of action may be gleaned, even
22 from an obscure statement of claim, opportunity being
23 given to amend if necessary," citing Di Cristofaro
24 versus Laurel Grove Memorial Park, 43 N.J.Super. 244 at
25 page 252 (App. Div. 1957).

1 In the case of Rule 4:6-2(e), Dismissals,
2 "The Court is not concerned with the ability of the
3 plaintiffs to prove the allegation contained in the
4 complaint," citing Somers Construction Co. versus Board
5 of Education, 198 F.Supp. 732, 734 (Dis. NJ. 1961).
6 Instead,
7 "The plaintiffs are entitled to every
8 reasonable inference of fact and the examination of a
9 complaint's allegations of fact required by the
10 aforestated principle should be one that is at once
11 painstaking and undertaken with a generous and
12 hospitable approach,"
13 citing Green versus Morgan Properties, 215
14 N.J. 431 at page 452 quoting Printing Mart-Morristown
15 versus Sharp Electronics Corp., 116 N.J. at 746.
16 Notwithstanding this indulgent standard, "A
17 pleading should be dismissed if it states no basis for
18 relief and discovery would not provide one," citing
19 Rezem Family Associates, LP versus Borough of
20 Millstone, 423 N.J.Super. 103 at page 113 (App. Div.
21 2011), cert. denied and the appeal was dismissed at 208
22 N.J. 366 (2011). See also Sickles versus Cabot Corp.
23 379 N.J.Super. 100 at page 106 (App. Div. 2005) cert.
24 denied at 185 N.J. 297 (2005).
25 In those rare instances, as cited in Smith

1 versus SBC Communications, Inc., 178 N.J. 265 at page
2 282 (2004), a motion to dismiss pursuant to Rule 4:6-
3 2(e) ordinarily is granted without prejudice. See
4 Hoffman versus Hampshire Labs Incorporated, 405
5 N.J.Super. 105, 116 (App. Div. 2009).
6 The defendant, Franklin Mutual Insurance
7 Company, hereinafter FMI, issued a business owners
8 policy to plaintiff, Optical Services USA/JC1 under
9 policy number SBP2598006 with effective dates of
10 October 5, 2019 to October 5, 2020. FMI issued the
11 business owners policy to the plaintiff, Stong OD Ewing
12 NJ, LLC, hereinafter Stong OD, bearing policy number
13 SBP2613680 with effective dates of April 1, 2020 to
14 April 1, 2021. Optical Services USA/JC1 and Stong OD
15 filed separate claims seeking loss of business income
16 caused by the closure mandated by Governor Murphy's
17 March 21, 2020 Executive Order Number 107 suspending
18 the operation of non-essential retail businesses on the
19 account of the Covid-19 pandemic. Plaintiffs closed
20 their businesses on March 20, 2020 and have not
21 reopened to date. Plaintiffs allege that Executive
22 Order Number 107 mandated the closure of their
23 businesses. FMI issued letters dated April 6, 2020 and
24 April 14, 2020 to Optical Services USA/JC1 and Stong OD
25 denying their claims for business income and related

1 expenses. Plaintiffs, Optical Services USA, LLC,
2 Optical Services USA-WO, Re and Le Holdings, LLC were
3 not named insureds on either policy.
4 Both policies contained the BU04010110
5 Business Owners Policy Form. The plaintiffs allege
6 that the -- the plaintiffs allege that Optical Services
7 USA/JC1, Optical Services USA, LLC, Optical Services
8 USA-WO, Re and La -- and Le Holding, LLC and Stong OD
9 Ewing NJ, LLC purchased business interruption insurance
10 from insurers to protect their business from an -- an
11 unanticipated crisis. The plaintiffs further allege
12 that the policies issued by FMI provide coverage for
13 loss of income resulting from a necessary interruption
14 of plaintiffs' businesses caused by direct covered
15 losses and temporary closures required by orders of a
16 civil authority.
17 A Complaint for a Declaratory Judgment in
18 this action was filed on June 25, 2020. The Complaint
19 also included a Demand for Trial by Jury. No answer
20 has been filed by the defendant, FMI. Therefore, the
21 discovery end date has not been established in this
22 case.
23 On July 15, 2020, the defendant, FMI, filed a
24 Motion Seeking Dismissal of the Complaint pursuant to
25 Rule 4:6-2(e). Within days of filing the Complaint,

1 the defendant, FMI, filed the within Motion to Dismiss.
2 It is clear that there is no established record in this
3 case and there has been no discovery presented to the
4 Court for consideration with respect to the arguments
5 and events by respective legal counsel.
6 Notwithstanding same, the defendants argued three
7 points before this Court. The first legal argument is
8 that the Court should dismiss the complaint for failure
9 to state a legally cognizable claim. The second legal
10 argument is that the plaintiffs did not sustain direct
11 physical loss or direct physical damage to or
12 destruction of covered property precluding coverage for
13 business income or extra expenses under the FMI policy.
14 Lastly, the defendants argue that the plaintiffs
15 occupancy of their respective properties was not
16 prohibited by civil authorities because of a loss at a
17 local premises not owned or occupied by the plaintiffs
18 precluding civil authority coverage under the FMI
19 policies.
20 The plaintiffs argue before this Court that
21 they state claims for coverage under the policies
22 because they suffered a direct covered loss and were
23 forced to close their business by order of a civil
24 authority. Plaintiffs further allege that they state
25 claims for loss of income coverage because they

1 suffered a direct covered loss under the policy and
2 they state claims for civil coverage because the
3 closure order prohibited the plaintiffs from accessing
4 their business.
5 Naturally, each of the respective arguments
6 advanced by the parties requires a fact-sensitive
7 analysis wherein the respective parties have failed to
8 present a sufficient record before this Court for a
9 legal determination of their respective positions.
10 There has been no discovery produced to the Court for
11 consideration, no affidavits, no certifications, or
12 sworn testimony derived from depositions. In fact,
13 discovery has not been undertaken by the parties with
14 respect to the declaratory relief sought in the
15 Complaint. Notwithstanding these deficiencies, the
16 Court will endeavor to address the legal arguments
17 advanced by the respective parties on the extremely
18 limited record provided to the Court.
19 The defendant, FMI, concedes that the
20 plaintiffs' business operations were interrupted by an
21 executive order based on the risk of the Covid-19 virus
22 transmission throughout the State of New Jersey. The
23 pivotal issue before this Court is the parties'
24 interpretation of the subject policy language and FMI's
25 claim denial premised on a narrow interpretation of the

1 terms of the subject policies. The issue before this
2 Court is the interpretation of a direct covered loss
3 under the policy and whether or not there was physical
4 damage to the plaintiffs' business.
5 The plaintiffs argue that the loss of
6 physical functionality and the use of their business
7 constitutes a covered loss under the policies. The
8 plaintiffs argue that Governor Murphy's executive order
9 prohibited access to the plaintiffs' premises.
10 FMI argues that the plaintiffs failed to
11 state a claim for civil authority coverage because the
12 complaint does not allege that property damage occurred
13 elsewhere leading to the loss of access to plaintiffs'
14 business. The defendant acknowledged in their moving
15 papers that presumably the plaintiffs will argue that
16 while their properties were not physically damaged,
17 they sustained a physical loss by operation of the
18 Governor's executive order. FMI argues that the
19 plaintiffs' loss of use of their respective properties
20 does not constitute a direct physical loss and
21 therefore is not a direct covered loss defined by the
22 policies.
23 A simple review of the moving papers
24 indicates that the defendant has not provided this
25 Court with any controlling legal authority to support

1 their version of the interpretation of the defined
2 terms in the policy. In fact, there is limited legal
3 authority in the State of New Jersey addressing this
4 issue. This is not surprising to the Court as the
5 State of New Jersey was recently faced with a historic
6 event which was unprecedented with respect to the
7 losses sustained by businesses across the State of New
8 Jersey due to the proliferation of the Covid-19
9 pandemic. The defendant argues that there is a plain
10 meaning of "direct physical loss" and the closure of
11 the plaintiffs' business does not qualify for business
12 -- I'm sorry, qualify for purposes of coverage. This
13 is a blanket statement unsupported by any common law in
14 the State of New Jersey or by a blanket review of the
15 policy language. Moreover, there has been no discovery
16 taken in this matter which would provide guidance to
17 the Court with respect to a Motion to Dismiss filed
18 under Rule 4:6-2(e).
19 Pursuant to the legal authority recited by
20 this Court with regard to the standards associated with
21 filing such a motion, the plaintiff should be permitted
22 to engage in issue-oriented discovery and also be
23 permitted to amend its complaint accordingly prior to
24 an adjudication on the merits of any policy language.
25 Such a motion is premature at best.

1 It is noteworthy to mention that the
2 plaintiffs' argument set forth to this Court that the
3 loss of use of their business because the State of New
4 Jersey deemed all non-essential businesses unsafe
5 constitutes a direct covered loss under the policy is
6 the pivotal issue in the absence of any issue-oriented
7 discovery on this topic is whether direct physical loss
8 and direct physical damage encompasses closure for
9 businesses that bears no specific -- relationship to a
10 specific condition on the property pursuant to an
11 executive order. The plaintiffs counter that argument
12 by alleging that the executive order of the Governor
13 deemed all non-essential businesses unsafe given the
14 risk of transmission of Covid-19 thus the closure order
15 had a specific relationship to a specific condition
16 within the plaintiffs' business.
17 The plaintiffs provide a citation from
18 <u>Wakefern Food Corp. versus Liberty Mutual Fire</u>
19 <u>Insurance Company</u>, 406 <u>N.J.Super</u>. 524 (App. Div. 2019)
20 to support their argument. Their argument based on the
21 holding of <u>Wakefern</u> is that there was a finding of
22 coverage for a grocery store that lost power when an
23 electrical grid and transmission lines were physically
24 incapable of performing their essential function of
25 providing electricity even though they were not

1 necessarily damaged. The Court in Wakefern did hold
2 that,
3 "Since the term "physical" can mean more than
4 material alteration or damage, it is incumbent on the
5 insurer to clearly and specifically rule out coverage
6 in the circumstances where it was not to be provided."
7 Citing Wakefern versus Liberty Mutual
8 Insurance Company, 406 N.J.Super. at 542. Also citing
9 Customized Distribution Services versus Zurich
10 Insurance Co., 373 N.J.Super. 480 at page 491 (App.
11 Div. 2004), cert. denied at 183 N.J. 214 (2005).
12 The Court finds such an argument compelling
13 for purposes of surviving a Motion to Dismiss pursuant
14 to Rule 4:6-2(e) in the absence of any complete record
15 for disposition. Again, the Court notes in the absence
16 of the legal precedent set forth in Wakefern, there is
17 a lack of controlling legal authority presented to the
18 Court for consideration in this regard.
19 "When interpreting insurance contracts, the
20 intention of the parties must be determined from the
21 language of the policy," citing Stone v. Royal
22 Insurance Company, 211 N.J.Super. 246 at page 248 (App.
23 Div. 1986). "When the terms of the contract are clear
24 and unambiguous, the Court must enforce the contract as
25 written." That is an incitation at page 248.

1 The language which forms the basis of the
2 complaint and the filing of a Motion to Dismiss is
3 subject to further analysis and interpretation. By
4 operation of the distinct and opposite interpretations
5 of the language set forth before the Court by the
6 parties with no other clarity from the record having
7 been established to date, which the Court notes is
8 largely non-existent, this Court reaches the inevitable
9 conclusion solely for purposes of disposition of this
10 Motion that the plaintiff should be afforded the
11 opportunity to develop their case and prove before this
12 Court that the event of the Covid-19 closure may be a
13 covered event under the Coverage C, Loss of Income,
14 when occupancy of the described premises is prohibited
15 by civil authorities. There is an interesting argument
16 made before this Court that physical damage occurs
17 where a policy holder loses functionality of their
18 property and by operation of civil authority such as
19 the entry of an executive order results in a change to
20 the property.
21 The plaintiffs are offering in advancing in a
22 novel theory of insurance coverage in this matter that
23 warrants a denial of the Motion to Dismiss at this
24 early stage of the litigation. As such, this Court
25 must afford the plaintiffs an opportunity to engage in

1 issue-oriented discovery with FMI in order to fully
2 establish the record with respect to direct covered
3 losses and to amend the Complaint accordingly if
4 required. To that end, the Motion to Dismiss is
5 denied.

6 Gentlemen, I will have an order prepared and
7 most likely uploaded by this afternoon. Again, I want
8 to thank you for your briefs and I thank you for your
9 legal arguments here today.

10 MR. HARRISON: Thank you, Your Honor. Have a
11 good weekend.

12 THE COURT: Thank you, gentlemen.

13 (Proceeding concluded at 10:08:29 a.m.)

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CERTIFICATION

I, Laura Scicutella, the assigned transcriber, do hereby certify the foregoing transcript of proceedings on CourtSmart, Index No. from 9:30:49 to 10:08:29, is prepared to the best of my ability and in full compliance with the current Transcript Format for Judicial Proceedings and is a true and accurate non-compressed transcript of the proceedings, as recorded.

/s/ Laura Scicutella
Laura Scicutella

AD/T 685
AOC Number

Phoenix Transcription LLC
Agency Name

8/14/2020
Date

STATE OF NORTH CAROLINA

COUNTY OF DURHAM

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
CASE NO. 20-CVS-02569

2020 OCT -9 P 3:14

.., C.S.C.

NORTH STATE DELI, LLC d/b/a LUCKY'S DELICATESSEN, MOTHERS & SONS, LLC d/b/a MOTHERS & SONS TRATTORIA, MATEO TAPAS, L.L.C. d/b/a MATEO BAR DE TAPAS, SAINT JAMES SHELLFISH LLC d/b/a SAINT JAMES SEAFOOD, CALAMARI ENTERPRISES, INC. d/b/a PARIZADE, BIN 54, LLC d/b/a BIN 54, ARYA, INC. d/b/a CITY KITCHEN and VILLAGE BURGER, GRASSHOPPER LLC d/b/a NASHER CAFE, VERDE CAFE INCORPORATED d/b/a LOCAL 22, FLOGA, INC. d/b/a KIPOS GREEK TAVERNA, KUZINA, LLC d/b/a GOLDEN FLEECE, VIN ROUGE, INC. d/b/a VIN ROUGE, KIPOS ROSE GARDEN CLUB LLC d/b/a ROSEWATER, and GIRA SOLE, INC. d/b/a FARM TABLE and GATEHOUSE TAVERN,

Plaintiffs,

v.

THE CINCINNATI INSURANCE COMPANY; THE CINCINNATI CASUALTY COMPANY; MORRIS INSURANCE AGENCY INC.; and DOES 1 THROUGH 20, INCLUSIVE,

Defendants.

ORDER GRANTING PLAINTIFFS' RULE 56 MOTION FOR PARTIAL SUMMARY JUDGMENT

THIS MATTER was heard on September 23, 2020, before Senior Resident Superior Court Judge Orlando F. Hudson, Jr., with Gagan Gupta appearing for the plaintiff-restaurants (including Vin Rouge, Parizade, Mateo Bar de Tapas, Rosewater, Mothers & Sons Trattoria, Saint James Seafood, Lucky's Delicatessen, Bin 54, City Kitchen, Village Burger, Nasher Cafe,

Local 22, Kipos Greek Taverna, Golden Fleece, Farm Table, and Gatehouse Tavern[1]), and Brian Reid and Drew Vanore appearing for defendant-insurers The Cincinnati Insurance Company and The Cincinnati Casualty Company (collectively, "Cincinnati"). Plaintiffs brought a Motion for Partial Summary Judgment ("Motion") with respect to Count I of their Second Amended Complaint, seeking a declaratory judgment that Cincinnati must replace Plaintiffs' lost business income and extra expenses under insurance policy contracts entered into between the parties.[2]

THE COURT, having considered the pleadings, the Motion, the briefs filed in support of and in opposition to the Motion, the oral arguments of counsel at the hearing on the Motion, the declaration of Gagan Gupta, the affidavit testimony of the Plaintiffs and their supporting affidavits of Giorgios Nikolaos Bakatsias, Matthew Raymond Kelly, and Djafar "Jay" Mehdian, the applicable law, and other appropriate matters of record, GRANTS Plaintiffs' Motion.

Upon a review of the entire record, the Court holds there are no genuine issues as to any material fact and Plaintiffs are entitled to partial summary judgment against Cincinnati as a matter of law on the issue of liability under Count I of the Second Amended Complaint. To that end, the Court sets forth its primary reasoning herein.

[1] The parent companies of these restaurants, and the entities bringing this lawsuit, are Vin Rouge, Inc. d/b/a Vin Rouge; Calamari Enterprises, Inc. d/b/a Parizade; Mateo Tapas, L.L.C. d/b/a Mateo Bar de Tapas; Kipos Rose Garden Club LLC d/b/a Rosewater; Mothers & Sons, LLC d/b/a Mothers & Sons Trattoria; Saint James Shellfish LLC d/b/a Saint James Seafood; North State Deli, LLC d/b/a Lucky's Delicatessen; Bin 54, LLC d/b/a Bin 54; Arya, Inc. d/b/a City Kitchen and Village Burger; Grasshopper LLC d/b/a Nasher Cafe; Verde Cafe Incorporated d/b/a Local 22; Floga, Inc. d/b/a Kipos Greek Taverna; Kuzina, LLC d/b/a Golden Fleece; and Gira Sole, Inc. d/b/a Farm Table and Gatehouse Tavern (collectively, "Plaintiffs").
[2] The operative pleading to which this Order applies is the Second Amended Complaint.

I. BACKGROUND[3]

Plaintiffs, which operate sixteen restaurants in the North Carolina counties of Durham, Wake, Orange, Chatham, and Buncombe, purchased "all risk" property insurance policies ("Policies") from Cincinnati to cover their restaurants. All risk policies cover all risks of loss unless those risks are expressly excluded or limited. Plaintiffs' Policies were effective during all relevant time periods and contain the same relevant language.

The Policies include a Building and Personal Property Coverage Form and a Business Income (and Extra Expense) Coverage Form. These forms provide that Cincinnati will pay for business interruption coverage as follows:

> (1) **Business Income**
> We will pay for the actual loss of "Business Income" and "Rental Value" you sustain due to the necessary "suspension" of your "operations" during the "period of restoration." The "suspension" must be caused by direct "loss" to property at a "premises" caused by or resulting from any Covered Cause of Loss.
>
> . . .
>
> (2) **Extra Expense**
> We will pay Extra Expense you sustain during the "period of restoration". Extra Expense means necessary expenses you sustain . . . during the "period of restoration" that you would not have sustained if there had been no direct "loss" to property caused by or resulting from a Covered Cause of Loss.

Under the Policies, "Covered Cause of Loss" means "direct 'loss' unless the 'loss' is excluded or limited" therein. The Policies define "loss" to mean "accidental physical loss or accidental physical damage." Therefore, absent an exclusion or limitation, the Policies provide

[3] The Court has not resolved any disputed issues of fact, as findings of fact are unnecessary for adjudicating Plaintiffs' Motion for Partial Summary Judgment. Rather, the Court offers an overview of key undisputed facts underlying the ultimate disposition.

coverage under these provisions where the policyholder shows (i) direct "accidental physical loss" to property, ***or*** (ii) direct "accidental physical damage" to property. The Policies do not define "direct," "accidental," "physical loss," or "physical damage."

Plaintiffs seek coverage under the Policies for losses arising out of the response to the SARS-CoV-2 ("COVID-19") pandemic. Beginning in March 2020, governmental authorities across North Carolina entered civil authority orders mandating the suspension of business operations at various establishments, including Plaintiffs' restaurants (hereafter, "Government Orders"). The orders also prohibited, via stay-at-home mandates and travel restrictions, all non-essential movement by all residents.

On August 3, 2020, Plaintiffs filed their Motion for Partial Summary Judgment ("Motion"), seeking a declaratory judgment against Cincinnati under Count I that the Government Orders constitute covered perils under the Policies that caused "direct 'loss' to property" at the described premises, and that therefore Cincinnati must pay for the resulting lost Business Income and Extra Expenses as defined by the Policies. Plaintiffs' primary contention is that the Government Orders forced Plaintiffs to lose the physical use of and access to their restaurant property and premises, which constitutes a non-excluded "direct physical loss."

II. STANDARDS OF INTERPRETATION FOR INSURANCE POLICIES

The meaning of an insurance policy is a question of law, *Accardi v. Hartford Underwriters Ins. Co.*, 373 N.C. 292, 295, 838 S.E.2d 454, 456 (2020), and it is black-letter law that an undefined policy term is to be given its "ordinary meaning"; in doing so, North Carolina courts have determined that it is "appropriate to consult a standard dictionary." *Allstate Ins. Co. v. Chatterton*, 135 N.C. App. 92, 94-95, 518 S.E.2d 814, 817 (N.C. Ct. App. 1999). If the term is nevertheless "reasonably susceptible to more than one interpretation," then it is ambiguous and

only then is the contract subject to judicial construction. *Id.*; *see also Joyner v. Nationwide Ins.*, 46 N.C. App. 807, 809, 266 S.E.2d 30, 31 (1980) ("[I]n deciding whether the language is plain or ambiguous, the test is what a reasonable person in the position of the insured would have understood it to mean, and not what the insurer intended."). "[A]ny ambiguity or uncertainty as to the words used in the policy should be construed against the insurance company and in favor of the policyholder or beneficiary." *Accardi*, 373 N.C. at 295, 838 S.E.2d at 456.

III. DISCUSSION

As an initial matter, the Policies do not define the terms "direct," "physical loss," or "physical damage."[4] The Court must therefore turn first to the ordinary meaning of those terms. Merriam-Webster defines "direct," when used as an adjective, as "characterized by close logical, causal, or consequential relationship," as "stemming immediately from a source," or as "proceeding from one point to another in time or space without deviation or interruption." *Direct*, Merriam-Webster (Online ed. 2020). Merriam-Webster defines "physical" as relating to "material things" that are "perceptible especially through the senses." *Physical*, Merriam-Webster (Online ed. 2020). The term is also defined in a way that is tied to the body: "of or relating to the body." *Id.* Webster's Third New International Dictionary defines physical as "of or relating to natural or material things as opposed to things mental, moral, spiritual, or imaginary." *Physical*, Webster's Third New International Dictionary (2020). The definition from Black's Law Dictionary comports: "Of, relating to, or involving material things; pertaining to real, tangible objects." *Physical*, Black's Law Dictionary (11th ed. 2019). Finally, "loss" is defined as "the act of losing possession," "the harm of privation resulting from loss or separation," or the "failure to gain, win, obtain, or utilize." *Loss*, Merriam-Webster (Online ed.

[4] Cincinnati does not contest whether Plaintiffs' losses were "accidental."

2020). Another dictionary defines the term as "the state of being deprived of or of being without something that one has had." *Loss*, Random House Unabridged Dictionary (Online ed. 2020).

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

The parties sharply dispute the meaning of the phrase "direct physical loss." Cincinnati argues that "the policies do not provide coverage for pure economic harm in the absence of direct physical loss to property, which requires some form of physical alteration to property." Even if Cincinnati's proffered ordinary meaning is reasonable, the ordinary meaning set forth above is also reasonable, rendering the Policies at least ambiguous. Accordingly, in giving the ambiguous terms the reasonable definition which favors coverage, the phrase "direct physical loss" includes the loss of use or access to covered property even where that property has not been structurally altered. *See Accardi*, 373 N.C. at 295, 838 S.E.2d at 456 ("[A]ny ambiguity or uncertainty as to the words used in the policy should be construed against the insurance company and in favor of the policyholder or beneficiary.").

Moreover, it is well-accepted that "[t]he various terms of the policy are to be harmoniously construed, and if possible, every word and every provision is to be given effect." *See C. D. Spangler Constr. Co. v. Industrial Crankshaft & Engineering Co.*, 326 N.C. 133, 142, 388 S.E.2d 557, 563 (1990). Here, the Policies provide coverage for "accidental physical loss ***or*** accidental physical damage." Cincinnati's argument that the Policies require physical alteration conflates "physical loss" and "physical damage." The use of the conjunction "or" means—at the very least—that a reasonable insured could understand the terms "physical loss" and "physical damage" to have distinct and separate meanings. The term "physical damage" reasonably requires alteration to property. *See Damage*, Merriam-Webster (Online ed. 2020) ("loss or harm resulting from injury to person, property, or reputation"). Under Cincinnati's argument, however, if "physical loss" also requires structural alteration to property, then the term "physical damage" would be rendered meaningless. But the Court must give meaning to both terms.

Finally, nothing in the Policies excludes coverage for Plaintiffs' losses. Notably, it is undisputed that the Policies do not exclude virus-related causes of loss. Cincinnati instead contends that three other exclusions apply: the "Ordinance or Law" exclusion, the "Acts or Decisions" exclusion, and the "Delay or Loss of Use" exclusion. Upon a review of the entire record, the Court concludes that these exclusions, based on their terms and the undisputed facts, do not apply to Plaintiffs' losses as a matter of law.

For these primary reasons, the Court concludes that the Policies provide coverage for Business Income and Extra Expenses for Plaintiffs' loss of use and access to covered property mandated by the Government Orders as a matter of law.

IV. CONCLUSION

Accordingly, Plaintiffs' Motion for Partial Summary Judgment is GRANTED. This Court certifies, pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure, that this Order represents a final judgment as to Count I of the Second Amended Complaint and is immediately appealable as there is no just reason for delay of any such appeal. **IT IS THEREFORE ORDERED, ADJUDGED AND DECREED AS FOLLOWS**: That partial summary judgment is hereby granted in favor of Plaintiffs and against Cincinnati, jointly and severally, on Count I (Declaratory Judgment).

This the 7th day of October, 2020.

ORLANDO F. HUDSON, JR.
SENIOR RESIDENT SUPERIOR COURT JUDGE

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this day served the foregoing Order in the above captioned action on all parties by depositing a copy hereof in a postpaid wrapper in a post office depository under the exclusive care and custody of the United Postal Service, addressed as follows:

STUART M. PAYNTER
GAGAN GUPTA
106 S. Churton Street, Suite 200
Hillsborough, NC 27278
Counsel for Plaintiffs

ANDREW A. VANORE III
Post Office Box 1729
Raleigh, NC 27602-1729
Counsel for Defendant, The Cincinnati Insurance Company

KENDRA STARK
JUSTIN M. PULEO
421 Fayetteville Street, Suite 330
Raleigh, NC 27601
Counsel for Defendant Morris Insurance Agency, Inc.

This the 9th day of October, 2020.

ASSISTANT CLERK OF COURT
DURHAM COUNTY

2020 WL 7249624
Only the Westlaw citation is currently available.
United States District Court, E.D. Virginia.

ELEGANT MASSAGE, LLC d/b/a LIGHT STREAM SPA, on behalf of itself and all others similarly situated, Plaintiff,
v.
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY and STATE FARM FIRE AND CASUALTY COMPANY, Defendant.

CIVIL ACTION NO. 2:20-cv-265
|
Filed 12/09/2020

MEMORANDUM OPINION AND ORDER

Raymond A. Jackson United States District Judge

Before the Court is State Farm Mutual Automobile Insurance Company's and State Farm Fire and Casualty Company's (collectively, "State Farm" or "Defendants"), Motion to Dismiss under Federal Rule of Civil Procedure 12(b)(6). ECF No. 29. Plaintiff has responded in opposition and Defendants replied. ECF Nos. 39, 41. Having reviewed the parties' filings, this matter is ripe for judicial determination. For the following reasons, Defendant's Motion to Dismiss is **DENIED IN PART AND GRANTED IN PART.**

I. FACTUAL AND PROCEDURAL HISTORY

The following facts taken from Elegant Massage, LLC's ("Elegant" or "Plaintiff") Complaint are considered true and cast in the light most favorable to Elegant. ECF No. 1; *see also,* *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982).

Since 2016, Elegant has owned and operated Light Stream Spa which provides therapeutic massages in Virginia Beach, Virginia. On July 22, 2019, State Farm sold an insurance policy (Policy No. 96-C6-P556-1) ("the Policy") to Plaintiff. *See* ECF No. 1 at Exhibit 1. The Policy issued to Plaintiff is an "all risk" commercial property policy, which covers loss or damage to the covered premises resulting from all risks other than those expressly excluded. *Id.* The Policy was effective through July 22, 2020 and Plaintiff paid an annual premium of $475.00. *Id.* at ¶ 27. The Policy includes coverage of "Loss of Income and Extra Expense." The standard form for Loss of Income and Extra Expense Coverage is identified as CMP-4705.1. *Id.* at ¶ 33. Under the provision, the policy provides for the loss of business income sustained as a result of the suspension of business operations which includes action of a civil authority that prohibits access to the Plaintiff's business property. *Id.* at ¶ 34-35. The Policy also states that it does not cover Exclusions for "Fungi, Virus or Bacteria," "Ordinance or Law," "Acts or Decisions," or "Consequential Loss" *Id.*

On March 13, 2020, President Donald J. Trump issued a National Emergency Concerning the Novel Coronavirus Disease ("COVID-19) Outbreak.[1] On March 16, 2020, the Centers for Disease Control (CDC) issued guidance recommending the implementation of "social distancing" policies to prevent the spread of the a novel strain of coronavirus, SARS-CoV-2 ("COVID-19"). On March 20, 2020, Governor Northam and the Virginia State Health Commissioner declared a public health emergency and restricted the number of patrons permitted in restaurants, fitness centers and theaters to ten or less.[2] On March 23, 2020, Governor Northam issued Executive Order No. 53, which ordered the closure of "recreational and entertainment businesses," including "spas" and "massage parlors." ECF No. 30 at Exhibit 1 at 1-4. On March 23, 2020, Governor Northam issued Executive Order No. 55, which ordered all individuals in Virginia to stay home unless they were carrying out necessary life functions. *Id.* at Exhibit 1 at 5-7. On May 8, 2020, the Governor issued Executive Order No. 61, which amended Executive Order Nos. 53 and 55 and, beginning on May 15, 2020, eased some of the restrictions. *Id.* at Exhibit 1 at 8-18. Under Executive Order No. 61, spas and message centers were permitted to re-open subject to certain restrictions including limiting occupancy to 50% as well as requiring six feet between workstations, workers and patrons to wear face coverings, and hourly cleaning and disinfection while in operation. However, if businesses were unable to comply with the restrictions in Executive Order No. 61, they were ordered to remain closed. *Id.*

As a result of the policies on social distancing and restrictions on its business, Plaintiff voluntarily closed Light Stream Spa on March 16, 2020 and remained closed through May 15, 2020. *Id.* at ¶ 25. Accordingly, Plaintiff suffered a complete loss of income since closing on March 16, 2020. On March 16, 2020, Plaintiff submitted a claim for loss of business income and extra expenses under the Policy. *Id.* at ¶ 42. On March 26,

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EXHIBIT
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2020, Defendants denied Plaintiff's claim ("Denial Letter"). *Id.* The Denial Letter stated that the grounds for denial were because Plaintiff voluntarily closed their business on March 16, 2020, there was no civil order to close the business, there was no known damage to the business space or property resulting from **COVID**-19, and the **Loss** of Income Coverage excludes coverage for **loss** caused by **virus**. *Id.*

On May 27, 2020, Plaintiff filed the instant Class Action complaint for Declaratory Judgement (Count I) and Breach of Contract (Count II) against Defendants, pursuant to Fed. R. Civ. P. 23(b)(1), 23(b)(2) and 23(b)(3) on behalf of themselves and all members of the proposed class and sub-class. *Id.* at ¶ 48. On July 13, 2020, Plaintiff filed a First Amended Complaint ("FAC") stating that it is bringing Counts I and II on behalf of itself and the proposed class and sub-class, as well as adding a claim for Breach of Covenant of Good Faith and Fair Dealing (Count III). ECF No. 20 at ¶ 173. On August 11, 2020, Defendants filed a Motion to Dismiss Count II. ECF No. 29. Plaintiff responded in opposition and Defendants replied. ECF Nos. 39, 41.

II. LEGAL STANDARD

A. Motion to Dismiss

Federal Rule of Civil Procedure 12(b)(6) provides for dismissal of actions that fail to state a claim upon which relief can be granted. The United States Supreme Court has stated that in order "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Specifically, "[a] claim 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." *Id.* at 678. Moreover, at the motion to dismiss stage, the court is bound to accept all of the factual allegations in the complaint as true. *Id.* However, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* Assessing the claim is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 679.)). In considering a Rule 12(b)(6) motion to dismiss, the Court cannot consider "matters outside the pleadings" without converting the motion to a summary judgment. Fed. R. Civ. P. 12(d). Nonetheless, the Court may still "consider documents attached to the complaint ... as well as those attached to the motion to dismiss, so long as they are integral to the complaint and authentic." *Sec'y of State for Defence v. Trimble Navigation Ltd.*, 484 F.3d 700, 705 (4th Cir. 2007); *see also* Fed. R. Civ. P. 10(c).

B. Class Certification

In order to certify a suit as a class action, the proponent of class certification has the burden of establishing that the conditions enumerated in Rule 23 of the Federal Rules of Civil Procedure have been met. *Windham v. American Brands, Inc.*, 565 F.2d 59, 64 n.6 (4th Cir. 1977) (en banc) *cert. denied*, 435 U.S. 968, 56 L. Ed. 2d 58, 98 S. Ct. 1605 (1978). The Court must conduct a "rigorous analysis" in determining whether the requirements of Rule 23 have been met. *General Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147, 161, 72 L. Ed. 2d 740, 102 S. Ct. 2364 (1982). Whether the proponent of certification has met his or her burden is left to the trial court's discretion and will be reversed only for abuse of such discretion. *Windham*, 565 F.2d at 65. In conducting its rigorous analysis of Rule 23, the Court must take a "close look at the facts relevant to the certification question and, if necessary, make specific findings on the propriety of certification." *Thorn v. Jefferson—Pilot Life Ins. Co.*, 445 F. 3d 311, 319 (4th Cir. 2004) (internal quotations omitted). "Such findings can be necessary even if the issues tend to overlap into the merits of the underlying case." *Id.*

III. DISCUSSION

A. Class Certification

In order to conduct a proper analysis of Plaintiff's allegations on behalf of all members of the proposed classes (or any other class authorized by the Court), Plaintiff must move the Court to apply relevant facts within Plaintiffs' Complaint to Rule 23(a) and (b). However, Plaintiff has not yet moved the Court to certify the class. Therefore, the Motion to Dismiss will only address Counts II and III as they apply to Plaintiff and not on behalf of any members of a proposed class. That is, any matters pertaining to a Class may only be considered after Plaintiff moves for it.

B. Subject Matter Jurisdiction and Choice of Law

As an initial matter, the Court has diversity jurisdiction under 28 U.S.C. § 1332. Plaintiff Elegant Massage, LLC, doing business as Light Stream Spa, is a Virginia Corporation and with its principle place of business located in Virginia Beach, Virginia. ECF No. 20 at ¶ 22. Defendant State Farm Mutual Automobile Insurance Company is organized under the laws of the State of Illinois, is licensed in all 50 states, and has its Corporate headquarters in Bloomington, Illinois. *Id.* at ¶ 23. Defendant State Farm Fire and Casualty Company is organized under the laws of the State of Illinois, provides property insurance for State Farm customers in the United States, and has its Corporate headquarters Bloomington, Illinois. *Id.* at ¶ 24. The amount in controversy exceeds $75,000. *Id.* This Court has personal jurisdiction over Defendants, because they have purposefully availed themselves to jurisdiction in this District by marketing, advertising and selling insurance policies, including the insurance policy sold to Plaintiff, within this District, including through numerous agents doing business in Virginia.

In a diversity action, district courts apply federal procedural law and state substantive law. *See Res. Bankshares Corp. v. St. Paul Mercury Ins. Co.*, 407 F.3d 631, 635 (4th Cir.2005) (citing *Klaxon v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, at 496 (1941)) ("A federal court hearing a diversity claim must apply the choice-of-law rules of the state in which it sits."); *see also, Gasperini v. Ctr. For Humanities, Inc.*, 518 U.S. 415, 427 (1996). In this case, the Complaint was filed in Virginia, and, therefore, Virginia's choice-of-law rules apply. ' "Under Virginia law, a contract is made when the last act to complete it is performed, and in the context of an insurance policy, the last act is the delivery of the policy to the insured.' " *Id.* (citing *Seabulk Offshore, Ltd. v. Am. Home Assurance Co.*, 377 F.3d 408, 419 (4th Cir.2004); *Buchanan v. Doe*, 246 Va. 67, 70 (1993)). Here, Plaintiff received the Policy on July 22, 2019 and, now, alleges breach of contract (Count I) and breach of Covenant of good faith and fair dealing, which are examined based on law in the Commonwealth of Virginia. Va. Code Ann. § 8.1A-304 ("Every contract or duty within the Uniform Commercial Code imposes an obligation of good faith in its performance and enforcement."); *see Charles E. Brauer Co.*, 466 S.E.2d at 385; *see also Allaun v. Scott*, 59 Va. Cir. 461, 465 (2002).

C. Count II: Breach of Contract

In Virginia, the elements of a breach of contract action are (1) a legally enforceable obligation of a defendant to a plaintiff; (2) the defendant's violation or breach of that obligation; and (3) injury or damage to the plaintiff caused by the breach of obligation. *Sunrise Continuing Care, LLC v. Wright*, 277 Va. 148, 671 S.E.2d 132, 134 (2009). To be actionable, Plaintiff must establish that the breach was material. *Horton v. Horton*, 254 Va. 111, 487 S.E.2d 200, 204 (1997). A material breach is a failure to do something that is so fundamental to the contract that the failure to perform that obligation defeats an essential purpose of the contract. *Id.* Plaintiff also bears the burden to establish the element of damages with reasonable certainty. *Nichols Construction Corp. v. Virginia Machine Tool Co., LLC*, 276 Va. 81, 661 S.E.2d 467, 472 (2008). Damages that are contingent, speculative, and uncertain are not recoverable because they cannot be established with reasonable certainty. *Shepherd v. Davis, 265 Va. 108, 574 S.E.2d 514, 524 (2003).*

Here, the issue at heart is whether Plaintiff has sufficiently pleaded facts to establish the plausibility that Defendants breached their duty in the contract by refusing to cover Plaintiff's "accidental direct **physical loss**" as a result of the **COVID**-19 Executive Orders.

1. General Principles of Virginia Insurance Contract Interpretation

In Virginia, " '[c]ourts interpret insurance policies, like other contracts, in accordance with the intention of the parties gleaned from the words they have used in the document.' " *Seals v. Erie Ins. Exchange*, 277 Va. 558, 562 (2009) (quoting *Floyd v. Northern Neck Ins. Co.*, 245 Va. 153, 158 (1993)); *see Bohreer v. Erie Ins. Grp.*, 475 F. Supp. 2d 578, 584 (E.D. Va. 2007) ("[A]n insurance policy is a contract governed by rules of contract interpretation."); *see also, Evanston Ins. Co. v. Harbor Walk Dev., LLC*, 814 F. Supp. 2d 635, 643 (E.D. Va. 2011), *aff'd sub nom. Evanston Ins. Co. v. Germano*, 514 F. App'x 362 (4th Cir. 2013). As such, "when the language in an insurance policy is clear and unambiguous, courts ... give the language its plain and ordinary meaning and enforce the policy as written." *Selective Way Ins. Co. v. Crawl Space Door Sys., Inc.*, 162 F. Supp. 3d 547, 551 (E.D. Va. 2016) (citing *Blue Cross & Blue Shield v. Keller*, 248 Va. 618, at 626 (1994)); *see also, PMA Capital Ins. Co. v. U.S. Airways,*

Inc., 271 Va. 352, 359 (2006) (citation omitted). It is not the function of the Court to ' "make a new contract for the parties different from that plainly intended and thus create a liability not assumed by the insurer." ' *Keller*, 248 Va. at 626 (quoting *Pilot Life Ins. Co. v. Crosswhite*, 206 Va. 558, 561 (1965)).

However, "[insurance] companies bear the burden of making their contracts clear." *Res. Bankshares Corp.*, 407 F.3d at 636. "Accordingly, if an ambiguity exists, it must be construed against the insurer." *Id.* (citations omitted). "A policy provision is ambiguous when, in context, it is capable of more than one reasonable meaning." *Id.* (citation omitted). "In determining whether the provisions are ambiguous, we give the words employed their usual, ordinary, and popular meaning." *Nextel Wip Lease Corp. v. Saunders*, 276 Va. 509, 516 (2008) (citation omitted). "An ambiguity, if one exists, must be found on the face of the policy," *Granite State Ins. Co. v. Bottoms*, 243 Va. 228, 233–34 (1992) (citation omitted), and "courts must not strain to find ambiguities." *Res. Bankshares Corp.*, 407 F.3d at 636 (citations omitted). "[C]ontractual provisions are not ambiguous merely because the parties disagree about their meaning." *Nextel Wip*, 276 Va. at 516, 666 S.E.2d at 321.

Finally, the policyholder bears the burden of proving that the policyholder's conduct is covered by the policy." *Res. Bankshares Corp.*, 407 F.3d at 636 (citations omitted). However, "the insurer bears the burden of proving that an exclusion applies." *Bohreer v. Erie Ins. Group*, 475 F.Supp.2d 578, 585 (E.D. Va. 2007) (citations omitted). Therefore, "[w]here an insured has shown that his loss occurred while an insurance policy was in force, if the insurer relies upon exclusionary language in the policy as a defense, the burden is upon the insurer to prove that the exclusion applies to the facts of the case." *Bituminous Cas. Corp.*, 239 Va. 332, at 336 (1990); *see also Am. Reliance Ins. Co. v. Mitchell*, 238 Va. 543, 547 (1989) ("Exclusionary language in an insurance policy will be construed most strongly against the insurer and the burden is upon the insurer to prove that an exclusion applies.").

2. The All-Risk Policy

a. Coverage

On July 22, 2019, Plaintiff purchased from Defendant an "all-risk" insurance policy which covers loss or damage to the covered commercial property resulting from all risks other than those expressly excluded. ECF No. 1 at Exhibit 1. Although, the Policy incorrectly names "Ladies Spa Inc." as the insured, instead of Elegant Massage, LLC d/b/a Light Stream Spa, the Policy correctly identifies Plaintiff's principal place of business located at 665 Newtown Road, Suite 114, Virginia Beach, Virginia 23462, as the premises covered under the Policy. Light Stream Spa is the only business operating at 665 Newtown Road, Suite 114, Virginia Beach, Virginia 23462. *Id.* at ¶ 32.

The Policy includes coverage of "Loss of Income and Extra Expense." *Id.* Under provision CMP-4705.1, the Policy provides for the loss of business income sustained as a result of the " 'suspension[3] ' of 'operations'." *Id.* The suspension "must be caused by accidental *direct physical loss* to property at the described premises." (*emphasis added*). The Policy states that it will only pay for " 'Loss of Income' that [the policyholder] sustains during the 'period of restoration' that occurs after the date of accidental direct physical loss." *Id.* Under the provision regarding "Extra Expenses," the Policy provides that it will pay "necessary 'Extra Expense' [the policyholder] incur[s] during the 'period of restoration' that [the policyholder] would not have incurred if there had been no accidental direct physical loss to property at the described premises. The loss must be caused by a Covered Cause of Loss." *Id.* According to the Policy, a Covered Cause of Loss is an "accidental direct physical loss to covered property unless the loss is (1) Excluded in SECTION 1-EXCLUSIONS; or (2) Limited in the Property Subject to Limitations Provisions." *Id.* (*emphasis added*).

Furthermore, the Policy covers the loss of income that results from the suspension of the policyholder's operations. The Policy also covers loss of income and extra expenses "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 damaged... [and] (2) the action of civil authority is taken in respond to dangerous physical conditions resulting from the damage or continuation of the Covered Clause of Loss that caused the damage, or the action is taken to enable a civil authority to have unimpeded access to the damaged authority." *Id.* Additionally, the loss of income will be reduced to the extent that the policyholder can "resume [ ] operations, in whole or in part, by using damaged or undamaged property." *Id.*

b. Exclusions

Under SECTION 1-EXCLUSIONS, the Policy states:

> 1. We do not insure under any coverage for any loss which would not have occurred in the absence of one or more of the following excluded events. We do not insure for such loss regardless of: (a) the cause of the excluded event; or (b) other causes of the loss; or (c) whether other causes acted concurrently or in any sequence with the excluded event to produce the loss; or (d) whether the event occurs suddenly or gradually, involves isolated or widespread damage, arises from natural or external forces, or occurs as a result of any combination of these: ... a. Ordinance Or Law b. Earth Movement, c. Volcanic Eruption, d. Governmental action, e. Nuclear Hazard, f. Power failure, g. War And Military Action, h. Water, i. Certain Computer-related losses, and j. Fungi, Virus or Bacteria.
>
> *Id.* at Exhibit 1, at 5-6.

There are three relevant exclusions for the instant case. First, the "Fungi, Virus, or Bacteria" exclusion does not cover for loss of income and extra expense due to "(2) Virus, bacteria or other microorganism that induces or is capable of inducing physical distress, illness or disease" or (3) [a]ny loss of use or delay in rebuilding covered property, including any associated cost of expense, due to interference at the described premises or location of the rebuilding, repair, or replacement of that property, by 'fungi,' wet or dry rot, virus, bacteria or other microorganism." *Id.* at 5-6.

Second, the "Ordinance or law" exclusion does not cover for loss of income and extra expenses due to the "(1) Enforcement of any ordinance or law: (a) regulating the construction, use or repair of any property; or (b) requiring the tearing down of any property, including the cost of removing its debris. (2) This exclusion applies whether the loss results from: (a) An ordinance or law that is enforced even if the property has not been damaged; or (b) the increased costs incurred to comply with an ordinance or law in the course of construction, repair, renovation, remodeling or demolition of property or removal of its debris, following an accidental direct physical loss to that property." *Id.* at Exhibit 1 at 5.

Third, the "Acts or Decisions" exclusion does not cover for "conduct, acts or decisions, including the failure to act or decide, of any person, group, organization or governmental body whether intentional, wrongful, negligent or without fault." *Id.* at 8.

Additionally, the Policy also excludes coverage for consequential losses due to "delay, loss of use or loss of market." *Id.*

3. *Plaintiff's Claim*

a. *A fortuitous "Direct Physical Loss"*

Based on a plain reading of the all-risk Policy, the Court finds that the Policy covers all accidental or fortuitous "direct physical loss[es]" unless the cause of the loss is explicitly excluded under the contract. *See, Fid. & Guar. Ins. Underwriters, Inc. v. Allied Realty Co.*, 238 Va. 458, 461 (1989) (recognizing that all-risk insurance policies provide broad coverage against all risk other than those the parties know to be inevitable at the time of contracting). In this context, a fortuitous loss is defined in various ways, but is essentially an event that is dependent on chance, an accident, or is unexpected. *See Id.* (holding that "[a] fortuitous loss is one that does not result from any inherent defect in the property insured, ordinary wear and tear, or intentional misconduct"); *see also, Ins. Co. of N. Am. v. U.S. Gypsum Co.*, 678 F.Supp. 138, 141 (W.D.Va. 1988), *aff'd*, 870 F.2d 148 (4th Cir. 1989) (" 'All risk' insurance contracts are a type of insurance where the insurer agrees to cover all risks of loss except for certain excluded events."). Accordingly, the insured, Plaintiff, has the initial burden of proof to establish that the loss was fortuitous. *U.S. Gypsum Co.*, 678 F.Supp. at 141.

In the instant case, Plaintiff entered into a contract with Defendant on July 19, 2019 with the intent to cover for all foreseeable and unforeseeable, tangible and intangible, risks covered by the Policy which were not explicitly excluded. On March 16, 2020, after the Nationwide and Statewide orders and guidelines to reduce the spread of COVID-19, Plaintiff voluntarily closed Light Stream Spa. *Id.* at ¶ 25. However, seven days later, on March 23, 2020, Plaintiff was required by Executive Order No. 53 to close until May 15, 2020. *See* ECF No. 1 at ¶¶ 79-81. On March 24, 2020, Plaintiff submitted a good faith claim for loss of business income and extra expenses under the Policy for a date of loss starting on March 15, 2020 due to the unexpected loss which impacted the operations and services of the covered commercial property. ECF No. 1 at ¶ 42.

The question here is whether the mandated closures based on the Orders qualifies as a fortuitous loss which caused a "direct

physical loss" to the Plaintiff's commercial property. That is, if the Court finds that a plain reading of the Policy provides that Plaintiff's claim was explicitly excluded then the Court must grant the instant Motion to Dismiss. However, if the Court finds ambiguity or multiple interpretations of the Policy that plausibly allow Plaintiff to recover, then the motion to dismiss must be denied.

b. *"Direct Physical Loss": A Spectrum of Legal Definitions*

The first key issue is what constitutes a "direct physical loss" in context of the Policy and Plaintiff's circumstances. Since the Policy does not define "direct physical loss," the Court must determine whether "direct physical loss" is ambiguous. *See* Lott v. Scottsdale Ins. Co., 827 F. Supp. 2d 626, at 631 (E.D. Va. 2011) (interpreting ambiguous insurance policy provisions under Virginia law and noting that "when unambiguous, [insurance policies] must be given their plain and ordinary meaning" but that "policy language is not always clear and unambiguous."). In making this determination, the Policy's provisions "must be considered and construed together, and any internal conflicts between provisions must be harmonized, if reasonably possible, to effectuate the parties' intent." Va. Farm Bureau Mut. Ins. Co. v. Williams, 278 Va. 75 (2009). When a disputed policy term is unambiguous, the Court must apply its plain meaning as written. *Id.* "However, if disputed policy language is ambiguous and can be understood to have more than one meaning, [the court must] construe the language in favor of coverage and against the insurer." *Id.*; *see also, Copp v. Nationwide Mut. Ins. Co.*, 279 Va. 670, at 681 (2010); St. Paul Fire & Marine Ins. Co. v. S.L. Nusbaum & Co., 227 Va. 407, 411 (Va. 1984); *Am. Reliance Ins. Co.*, 238 Va. at 547 ("[D]oubtful, ambiguous language in an insurance policy will be given an interpretation which grants coverage[.]"); *Bituminous Cas. Corp.*, 239 Va. at 336 ("[B]ecause insurance contracts are ordinarily drafted by insurers rather than by policyholders, the courts consistently construe such contracts, in cases of doubt, in favor of that interpretation which affords coverage.").

Defendants argue that "direct physical loss" unambiguously requires that there be "structural damage" to the covered property for the Plaintiff to recover under the Policy. ECF No. 29. Particularly, Defendants argue that various district courts in other jurisdictions have interpreted "direct physical loss" to mean perils that cause actual, tangible structural damage to property of the kind caused by hurricane winds, rainwater, and fire, for example. *Id.* [4] However, while the Court recognizes these cases, the Court finds that they are out-of-circuit and non-binding cases which rely on out-of-state law in ruling on what constitutes a "direct physical loss to property"—an interpretation that this Court must make in accordance with Virginia State law and case law.

On the other hand, Plaintiff argues that, under Virginia law, "direct physical loss" has not been consistently interpreted to require structural or tangible damage to property. ECF No. 39 at 11. Particularly, Plaintiff argues that federal courts have interpreted "direct physical loss" to mean the inability to use the premises because of uncontrollable forces. That is, Plaintiff argues that the Executive Orders physically prohibited Plaintiff from using the commercial property between March 16, 2020 to May 15, 2020 which resulted in a suspension of its business operations and substantial loss of income. ECF No. 20 at ¶¶ 58, 63, 73, 76.

The Court finds that the phrase "direct physical loss" has been subject to a spectrum of interpretations in Virginia on a case-by-case basis, ranging from direct tangible destruction of the covered property to impacts from intangible noxious gasses or toxic air particles that make the property uninhabitable or dangerous to use. Accordingly, "[w]hen [various] constructions are equally possible, that most favorable to the insured will be adopted. Language in a policy purporting to exclude certain events from coverage will be construed most strongly against the insurer." *Seals*, 277 Va. at 562, 674 S.E.2d 860 (quoting St. Paul Fire & Marine Ins. Co. v. S.L. Nusbaum & Co., Inc., 227 Va. 407, 411, 316 S.E.2d 734 (1984)). Here, the Court is not straining to find ambiguities but rather is carefully examining the accepted definitions based on Virginia case law to apply to the unprecedented circumstances of this case. *See Res.* *Bankshares Corp.*, 407 F.3d at 636. Moreover, while both parties disagree over the meaning of "direct physical loss", "[c]ontractual provisions are not ambiguous merely because the parties disagree about their meaning." Nextel WIP Lease Corp. v. Saunders, 276 Va. 509, 516, 666 S.E.2d 317 (2008) (citing Dominion Sav. Bank, FSB v. Costello, 257 Va. 413, 416, 512 S.E.2d 564 (1999)). Therefore, the Court is tasked with determining where "direct physical loss," as applied to this case, falls on the spectrum of accepted interpretations.

i. Structural Damage

First, at one end of the spectrum, Virginia case law establishes that "direct physical loss" has traditionally, though not exclusively, been defined as covering incidents that result in structural damage to the property caused by, for example, fires, floods, hurricanes, and rainwater. *See, e.g.,* *Whitaker v. Nationwide Mutual Fire Ins. Co.*, 115 F. Supp. 2d 612, at 617 Fn.5 (E.D. Va. 1999) (holding that "[a]ssuming Plaintiffs' loss is fortuitous, the Policy nevertheless covers *only* those fortuitous losses that are direct and physical. Thus, it is the definition of 'direct physical loss' that is dispositive."); *Lower Chesapeake Assocs. v. Valley Forge Ins. Co.*, 260 Va. 77, 89 (2000) (finding that the disputed all-risk policy provision regarding "direct physical damage" was ambiguous and that rainwater damage to a home qualified as direct and physical); *Clark v. Nationwide Mut. Fire Ins. Co., 48 Va. Cir. 454, 1999 WL 370407* (Fairfax Cir. Ct. 1999) (fire damage as a covered loss generally); *Capitol Prop. Mgmt. Corp. v. Nationwide Prop. & Cas. Ins. Co.*, 261 F. Supp. 3d 680, 684 (E.D. Va. 2017), *aff'd*, 757 F. App'x 229 (4th Cir. 2018) (holding that an "insurance claim processing fee, payable to insured's property manager under property management agreement between property manager and insured, did not qualify as an extra expense covered under property insurance policy, which provided coverage for direct physical loss to building or business personal property."). However, Plaintiff's claim is distinguishable because Plaintiff's covered property did not suffer from a structural form of direct physical loss.

ii. Distinct and Demonstratable Physical Alteration

Second, some court have also found physical loss when a plaintiff cannot physically use his or her covered property, even without tangible structural destruction, if a plaintiff can show a distinct and demonstrable physical alteration to the property. *See e.g.,* *TRAVCO Ins. Co. v. Ward*, 715 F. Supp. 2d 699, 708 (E.D. Va. 2010), *aff'd*, 504 F. App'x 251 (4th Cir. 2013) (noting that "physical damage to the property is not necessary, at least where the building in question has been rendered unusable by physical forces."); *Murray v. State Farm Fire & Cas. Co.*, 203 W.Va. 477, 493 (1998) (" 'Direct physical loss' provisions require only that a covered property be injured, not destroyed. Direct physical loss also may exist in the absence of structural damage to the insured property." (citation omitted)); *See, Capitol Prop. Mgmt. Corp. v. Nationwide Prop. & Cas. Ins. Co* 261 F. Supp. 3d 680, at 685 (E.D. Va. 2017), *aff'd*, 757 F. App'x 229 (4th Cir. 2018) (Holding that a payment of an insurance processing fee, on its own, does not constitute a direct physical loss to property.); *see also,* *Mellin v. N. Sec. Ins. Co., Inc.*, 167 N.H. 544, 115 A.3d 799 (2015) ("Physical loss" within meaning of homeowners policy covering direct physical loss to property may include not only tangible changes to the insured property, but also changes that are perceived by the sense of smell and that exist in the absence of structural damage; however, these changes must be distinct and demonstrable."). Recently, in cases dealing with a similar issue as the instant matter, sister jurisdictions narrowly relied on this interpretation to dismiss plaintiff's action. *See 10E, LLC v. Travelers Indem. Co. of Connecticut*, No. 2:20-CV-04418-SVW-ASx, 2020 WL 5359653, at *4 (C.D. Cal. Sept. 2, 2020) (holding that "[p]hysical loss or damage occurs only when property undergoes a 'distinct, demonstrable, physical alteration' ") (quoting *MRI Healthcare Ctr. of Glendale, Inc. v. State Farm Gen. Ins. Co.*, 187 Cal.App.4th, 766, 799 (2010)); *W. Coast Hotel Mgmt., LLC v. Berkshire Hathaway Guard Ins. Companies*, No. 220CV05663VAPDFMX, 2020 WL 6440037, at *3 (C.D. Cal. Oct. 27, 2020). In the instant matter, there is no distinct, demonstrable, or physical alteration to the structure of the property. However, this second plausible interpretation of "direct physical loss" does show that if Defendants wanted to limit liability of "direct physical loss" to strictly require structural damage to property, then Defendants, as the drafters of the policy, were required to do so explicitly. *See Allstate Ins. Co. v. Gauthier*, 273 Va. 416, 420 (2007) (noting that if insurer wanted to not provide coverage under certain circumstances "it needed to use language clearly accomplishing that result."); *see also, Res.* *Bankshares Corp.*, 407 F.3d at 636 ("[b]ecause insurance companies typically draft their policies without the input of the insured, the companies bear the burden of making their contracts clear."). Defendants were fully aware of cases that interpreted intangible damage as a "direct physical loss" promulgated before the issuance of Plaintiff's policy. Since Defendants did not explicitly include "structural damage" in the language, the Policy may be construed in favor of more coverage based on plausible interpretations.

iii. Uninhabitable, Inaccessible, and Dangerous to Use

Third, courts have also interpreted direct physical loss to include incidents that make the covered property uninhabitable, inaccessible, and dangerous to use for the owners and clients because of, for example, intangible and invisible noxious gasses or toxic air particles. *See, e.g.,* *TRAVCO Ins. Co. v. Ward*, 715 F. Supp. 2d 699

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(E.D. Va. 2010), *aff'd*, 504 F. App'x 251 (4th Cir. 2013) ("[u]nder Virginia law, insured's residence sustained "direct physical loss" within meaning of homeowners policy when it was rendered uninhabitable by toxic gases released by drywall manufactured in China, even though drywall was still intact.); *Western Fire Ins. Co. v. First Presbyterian Church*, 165 Colo. 34 (1968) (en banc) (gasoline fumes which rendered church building unusable constitute physical loss); *Farmers Ins. Co. of Oregon v. Trutanich, 123 Or. App. 6*, 858 P.2d 1332, 1336 (1993) (cost of removing odor from methamphetamine lab constituted a direct physical loss); *Murray v. State Farm Fire & Cas. Co., 203 W.Va. 477*, 509 S.E.2d 1, 17 (1998) (home rendered unusable by increased risk of rockslide suffered direct physical loss even in the absence of structural damage); *See Port Authority of N.Y. & N.J. v. Affiliated FM Ins. Co.*, 311 F.3d 226, 236 (3d Cir.2002) (" '[P]hysical loss or damage' occurs only if an actual release of asbestos fibers ... has resulted in contamination of the property ..., *or the structure is made useless or uninhabitable* ..." (emphasis added)); *Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am.*, 2014 WL 6675934, at *6 (D.N.J. Nov. 25, 2014) (holding there was a direct physical loss to property when "ammonia physically rendered the facility unusable for a period of time"); *Sentinel Mgmt. Co. v. New Hampshire Ins. Co.*, 563 N.W.2d 296, 300 (Minn. Ct. App. 1997) (finding "[a]lthough asbestos contamination does not result in tangible injury to the physical structure of a building, a building's function may be seriously impaired or destroyed and the property rendered useless by [its] presence"); *Homeowners Choice Prop. & Cas. v. Miguel Maspons*, 211 So. 3d 1067, 1069 (Fla. 3d DCA 2017) ("[I]t is clear that the failure of the [property] to perform its function constituted a 'direct' and 'physical' loss to the property within the meaning of the policy."). However, the Court does 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. *Pentair v. American Guarantee and Liability Ins.*, 400 F.3d 613, 616 (8th Cir. 2005).

* * *

Therefore, given the spectrum of accepted interpretations, the Court interprets the phrase "direct physical loss" in the Policy in this case most favorably to the insured to grant more coverage. *See Virginia Farm Bureau Mut. Ins. Co. v. Williams*, 278 Va. 75, at 81 (2009) ("[I]f disputed policy language is ambiguous ... we construe the language in favor of coverage and against the insurer."). Based on the case law, the Court finds that it is plausible that a fortuitous "direct physical loss" could mean that the property is uninhabitable, inaccessible, or dangerous to use because of intangible, or non-structural, sources. *See US Airways, Inc. v. Commonwealth Ins. Co.*, 2004 WL 1094684, at *5 (Va. Cir. Ct. May 14, 2004) (holding FAA order grounding flights at Reagan National Airport could constitute direct physical loss when "nothing in the Policy ... requires that [there] be damage to [the insured's] property."). Here, while the Light Stream Spa was not structurally damaged, it is plausible that Plaintiff's experienced a direct physical loss when the property was deemed uninhabitable, inaccessible, and dangerous to use by the Executive Orders because of its high risk for spreading COVID-19, an invisible but highly lethal virus. That is, the facts of this case are similar those where courts found that asbestos, ammonia, odor from methamphetamine lab, or toxic gasses from drywall, which caused properties uninhabitable, inaccessible, and dangerous to use, constituted a direct physical loss.

Accordingly, the Court finds that Plaintiff submitted a good faith plausible claim to the Defendants for a "direct physical loss" covered by the policy. Therefore, Plaintiff's complaint has alleged "facts and circumstances, some of which, if proved, would fall within the risk covered by the policy." *Brenner v. Lawyers Title Ins. Corp.*, 240 Va. 185, 397 S.E.2d 100, 102 (1990); *see also, Reisen v. Aetna Life and Cas. Co.*, 225 Va. 327, 302 S.E.2d 529, 531 (1983); *See* ECF No. 20 at ¶¶ 57-65, ¶¶ 79-95.

c. Civil Authority Provision

The Policy provides coverage for extra expenses and loss of income caused by "action of a 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 the civil authority is taken in response to dangerous physical conditions resulting from the damage of continuation of the Covered Cause of loss that caused the damage, or the action is taken to enable a civil

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authority to have unimpeded access to the damaged property." ECF No. 1 at Exhibit 1.

Plaintiff alleges that the Civil Authority Coverage applies because (1) COVID-19 caused damage to property other than Plaintiff's property, ECF No. 1 at ¶ 85; (2) the damage was caused by a Covered Cause of Loss; (3) the Orders were issued by a civil authority—state and local executives; (4) the governmental authorities limited and prohibited access to the nearby property prior to issuing the Orders, *Id.* at ¶¶ 45–47, ¶85; and (5) these actions were taken in response to a dangerous physical condition. *Id.* at ¶¶ 38, 45–53. *See, e.g.*, *Assurance Co. of Am. v. BBB Serv. Co.*, 593 S.E.2d 7, 8–9 (Ga. Ct. App. 2003) (civil authority coverage applied where order was issued in response to hurricane after storm progressed and caused damage to property other than the insured premises). Particularly, Plaintiff alleges that "[t]he Orders were issued as a result of *physical damage and dangerous physical conditions* occurring in properties all around cities and business districts. As a result of direct physical loss stemming from the pandemic, Light Stream Spa's operations were suspended, and it lost business income and incurred other covered expenses." *Id.* at ¶ 85 (*emphasis added*).

Defendants argue that the Civil Authority Coverage does not apply because it only applies when "access to an insured's property is prevented or prohibited by an order of civil authority issued as a direct result of physical damage to other premises in the proximity of the insured's property." ECF No. 30 at 22 (citing *Dickie Brennan & Co. v. Lexington Ins. Co.*, 636 F.3d 683, 686-87 (5th Cir. 2011); *see* *United Air Lines, Inc. v. Ins. Co. of State of Pa.*, 439 F.3d 128, 131 (2d Cir. 2006); *Kelaher, Connell & Conner, P.C. v. Auto-Owners Ins. Co.*, 440 F. Supp. 3d 520, 528-29 (D.S.C. 2020); *S. Tex. Med. Clinics, P.A. v. CNA Fin. Corp.*, 2008 WL 450012, at *9 (S.D. Tex. Feb. 15, 2008).).

Here, the Court finds that the Civil Authority Coverage does not apply because Plaintiff has not shown a causal link between any physically damaged or dangerous surrounding properties proximate to the insured property and a civil authority prohibiting Plaintiffs from accessing or using their property. That is, the Executive Orders were issued because "COVID-19 presents an ongoing threat to [Virginia] communities", and not because of prior actual "physical damage" to its own property or surrounding properties. *See* Exec. Or. 53 at 1. Therefore, Defendant's Motion is **GRANTED IN PART** on this ground.

4. Defendants Shifted Burden of Proof: Exclusions

Despite the inapplicability of the Civil Authority Provision, Plaintiff has still established a plausible claim for a fortuitous "direct physical loss" under the Policy. Thus, the burden now shifts to the insurance provider, Defendants, to show that the loss is excluded under the contract. *See* *Bituminous Cas. Corp. v. Sheets*, 239 Va. 332, 389 (1990) ("Where an insured has shown that his loss occurred while an insurance policy was in force, but the insurer relies upon exclusionary language in the policy as a defense, the burden is upon the insurer to prove that the exclusion applies to the facts of the case."); *TravCo Ins. Co. v. Ward*, 284 Va. 547 (2012) ("[T]he burden is upon the insurer to prove that an exclusion of coverage applies."); *see also,* *Reisen* 302 S.E.2d at 531 (holding this burden is not especially onerous since the insurer must defend unless "it clearly appears from the initial pleading the insurer would not be liable under the policy contract for *any* judgment based upon the allegations." (citing *Travelers Indem. Co. v. Obenshain*, 219 Va. 44, 245 S.E.2d 247, 249 (1978)).

On March 26, 2020, Defendants denied Plaintiff's claim ("Denial Letter"). *Id.* at Exhibit 2. The Denial Letter stated that the grounds for denial were because Plaintiff voluntarily closed their business on March 16th because of waning business, there was no civil order to close the business as of March 24, 2020, there was no known physical damage to the business space or property resulting from COVID-19, and the Policy excluded losses caused by a virus. *Id.* In the Denial Letter, Defendant State Farm did not provide an explanation of how the exclusions applied specifically to the Plaintiff but rather provided verbatim language of SECTION 1-EXCLUSIONS.

a. Virus Exclusion

As with the other provisions of an insurance policy, the interpretation of an exclusionary clause is an issue of law. *See Res.* *Bankshares Corp.*, 407 F.3d at 636. (4th Cir. 2005).

In their Motion to Dismiss, Defendants argue that the Virus Exclusion applies as defined in SECTION 1-EXCLUSIONS of the Policy. ECF No. 29 at 7. Defendants argue that the Virus Exclusion unambiguously applies in this circumstance

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because COVID-19 is at the heart of the Executive Orders that required Plaintiff to close their business and "applies to any loss where a virus is anywhere in the chain of causation." *Id.* at 10. Specifically, Defendants allege that the Virus Exclusion has an expansive anti-concurrent causation clause which excludes from coverage "for losses if virus is 'in any sequence' in the chain of causation, even if there are also other causes." *Id.* (citing *Tuepker v. State Farm Fire & Cas. Co.*, 507 F.3d 346, 351, 354 (5th Cir. 2007); *see also Metro Brokers, Inc. v. Transportation Ins. Co.*, 603 F. App'x 833, 836 (11th Cir. 2015)). Notably, the Court finds that the expansive anti-concurrent causation clause is not a recognized or settled doctrine in the Court's jurisdiction.

On the other hand, Plaintiff alleges that the loss of business occurred as a result of the Orders that mandated specific kinds of businesses, like the Light Stream Spa, to discontinue operations from March 16, 2020 to May 15, 2020 to prevent the spread of COVID-19. ECF No. 1. Plaintiff also asserts that the Court should find that the Virus Exclusion does not apply because COVID-19 was not present at Plaintiff's property and is not the basis for the loss of income. ECF No. 39 at 16-18.

The Fungi, Virus or Bacteria Exclusion specifically excludes losses from: "(1) Growth, proliferation, spread or presence of 'fungi' or wet or dry rot; or (2) Virus, bacteria or other microorganism that induces or is capable of inducing physical distress, illness or disease; and (3) We will also not pay for ... (a) Any remediation of "fungi", wet or dry rot, virus, bacteria or other microorganism...." ECF No. 20 at Exhibit 2.

The Court finds that the Virus Exclusion does not apply here and that the anti-concurrent theory has not been established as law in this jurisdiction. Thus, to be enforceable, the insurer "must draft the language of an exclusion conspicuously, plainly and clearly set forth any limitation on coverage to the insured." *Waste Mgmt., Inc. v. Great Divide Ins. Co.*, 381 F. Supp. 3d 673, at 683 (E.D. Va. 2019) (citation omitted).

Although the Policy does not define "Virus," the Court will base its analysis on a plain reading of the Virus Exclusion taken together with the exclusion language as a whole. *See Virginia Farm Bureau Mut. Ins. Co. v. Williams*, 278 Va. 75, 80 (2009)) ("Provisions of an insurance policy must be considered and construed together, and any internal conflicts between provisions must be harmonized, if reasonably possible, to effectuate the parties' intent."); *see also, Copp*, 279 Va. at 681 ("Each phrase and clause of an insurance contract should be considered and construed together and seemingly conflicting provisions harmonized when that can be reasonably done, so as to effectuate the intention of the parties as expressed therein."). Accordingly, the Court finds that the Virus Exclusion particularly deals with the "[g]rowth, proliferation, spread or presence" of "virus, bacteria or other microorganism" just as it applies to " 'fungi' or wet or dry rot." *Id.* Indeed, the plain reading of the language indicates that the Policy excludes coverage for losses stemming from the "[g]rowth, proliferation, spread or presence" of " 'fungi' or wet or dry rot" or "[v]irus, bacteria or other microorganism that induces or is capable of inducing physical distress, illness or disease[.]" Furthermore, the Policy also provides that it will not cover for remediation or removal of virus, bacteria, or fungi at the property which includes "tear out and replace[ment]" of building parts to access the virus and "contain[ment], treat[ment], detoxify[cation], neutraliz[ation] or dispos[al]" of the virus). *Id.* This supports the interpretation that the Virus Exclusion applies where a virus has spread throughout the property. Other state and federal courts have interpreted similar virus, bacteria, and fungi exclusions in the same the way. *See, e.g., Mount Vernon Fire Ins. Co. v. Adamson*, 2010 WL 3937336, at *4 (E.D. Va. Sept. 15, 2010) (exclusions barring coverage for mold exposure barred claims for mold exposure); *Poore v. Main Street Am. Assurance Co.*, 355 F. Supp. 3d 506, 512 (W.D. Va. 2018) (finding mold exclusion barred coverage from losses stemming from mold in the insured's property); *Alexis v. Southwood Ltd. P'ship*, 792 So. 2d 100, 104 (La. Ct. App. 2001) (communicable disease exclusion barred coverage from illness after exposure to raw sewage); *Evanston Ins. Co. v. Harbor Walk Development, LLC*, 814 F. Supp. 2d 635, 652 (E.D. Va. 2011) (finding pollution exclusion which barred claims stemming from bodily injury or property damaged caused by pollutants barred claims stemming from bodily injury or property damage caused by pollutants). Therefore, in applying the Virus Exclusion there must be a direct connection between the exclusion and the claimed loss and not, as the Defendants argue, a tenuous connection anywhere in the chain of causation. That is, although the Virus Exclusion does require that the virus be the cause of the policyholder's loss, the connection must be the immediate cause in the chain.

Here, Plaintiff is neither alleging that there is a presence of a virus at the covered property nor that a virus is the direct cause of the property's physical loss. Also, Plaintiff does not allege that the Executive Orders the Commonwealth of

Virginia issued were as a result of "growth, proliferation, spread or presence" of virus contamination at the Plaintiff's property. Rather, Plaintiff alleges that the Orders were the "sole cause of the Plaintiff's [...] loss of business income and extra expense." ECF No. 20 at ¶ 84. Moreover, while some businesses could continue operating despite the COVID-19 social distancing guidelines, the Executive Orders specifically classified Plaintiff's type of property, a spa, as a hotspot for COVID-19 and, thus, selectively ordered that it be closed as a preventative health measure. Therefore, Defendants have failed to meet its burden to show that the Virus Exclusion applies to Plaintiff's claim.

b. Ordinance and Law Exclusion

Defendants also assert that the Ordinance and Law Exclusion applies. ECF No. 29 at 25-26. The "Ordinance or law" Exclusion bars coverage for any loss due to "[t]he enforcement of any ordinance or law" "regulating the ... use ... of any property," and "applies ... even if the property has not been damaged." ECF No. 20 at Exhibit 2 at 5. The Policy states that the ordinance or law must "(a) regulate the construction, use or repair... or (b) requir[e] the tearing down of any property." *Id.* The Policy also provides that the exclusion applies "whether the loss results from: (a) An ordinance or law that is enforced even if the property has not been damaged; or (b) the increased costs incurred to comply with an ordinance or law in the course of construction, repair, renovation, remodeling or demolition of property or removal of its debris, following an accidental direct physical loss to that property." *Id.*

Here, however, the Court concludes that the Executive Orders, which were temporary restrictions that impacted the Plaintiff's business, were not ordinances or laws such as safety regulations or laws passed by a legislative body regulating the construction, use, repair, removal of debris, or physical aspects of the property. Therefore, there is no ordinance or law, from a legislative body, that prohibits the physical use of Plaintiff's covered property. Furthermore, it is clear that the Ordinance or law Exclusion applies to ordinances related to the structural integrity, maintenance, construction, or accessibility due to the property's physical structural state, which existed *before*. The physical structural integrity of the covered property is not the central issue in this case. Thus, "Ordinance or Law" exclusion is unavailable to the Defendants to dismiss Plaintiff's claims.

c. Acts or Decisions Exclusion

The "Acts or Decisions" Exclusion bars coverage for any loss caused by "[c]onduct, acts or decisions ... of any person, group, organization, or governmental body whether intentional, wrongful, negligent or without fault." ECF No. 20 at Exhibit 2 at 8.

Some courts have found the "acts or decisions" exclusion in similar insurance policies to be ambiguous and concluded that coverage was not excluded. As one court explained, if the exclusion were to be taken literally, "it would exclude coverage from all acts and decisions of any character of all persons, groups, or entities. Such an interpretation would leave the insurance policy practically worthless." *Jussim v. Massachusetts Bay Ins. Co.*, 33 Mass. App. Ct. 235, 238–39, 597 N.E.2d 1379, 1382 (1992), *aff'd as amended*, 415 Mass. 24, 610 N.E.2d 954 (1993); *see also*, *St. Paul Fire & Marine Ins. Co. v. Gen. Injectables & Vaccines, Inc.*, No. CIV.A.98-07370R, 2000 WL 270954, at *5, n.5 (W.D. Va. Mar. 3, 2000); *Cincinnati Holding Co., LLC v. Fireman's Fund Ins. Co.*, No. 1:17CV105, 2020 WL 635655, at *9 (S.D. Ohio Feb. 11, 2020); *see also* *Mettler v. Safeco Ins. Co. of Am.*, No. C12-5163 RJB, 2013 WL 231111, at *6 (W.D. Wash. Jan. 22, 2013) (same). However, some courts have held that if the acts or decisions of the Plaintiff were the cause of the damage, then the "acts or decisions" exclusion does apply. *See* *Landmark Hosp., LLC v. Cont'l Cas., Co.*, No. CV 01-0691, 2002 WL 34404929, at *2 (C.D. Cal. July 2, 2002) (concluding the "acts or decisions" exclusion is unambiguous and holding that "[t]his exclusion provision excuses Defendant from providing coverage for damages caused by Plaintiff's negligence" if it is later determined that "Plaintiffs acts are the predominate cause of the damages.").

Here, the Court finds that the "acts and decisions" exclusion is so ambiguous and broad, that taken literally under its plain reading, the Policy would be worthless as any act from any character of all persons, groups, or entities would prohibit coverage. To the extent the language of the Policy is ambiguous, the Court must construe it against the insurer. *See*, *Hopeman Bros., Inc. v. Cont'l Cas. Co.*, 307 F. Supp. 3d 433, 461 (E.D. Va. 2018); see also, *GenCorp, Inc. v. American Intern. Underwriters*, 178 F.3d 804, 818 (6th Cir. 1999); *see also* John H. Mathias et al., *Insurance Coverage Disputes (LJP)* § 1.03 (2017) ("Where the following form policy is silent on how to resolve conflicts in wording with the underlying policy or policies it purports to follow, however, the conflict should be resolved in the manner most favorable

to the policyholder."). Moreover, in this case, Plaintiff was not the cause of the Executive Orders which issued the covered property to close. Thus, the "Acts or Decisions" exclusion is unavailable to the Defendants to dismiss Plaintiff's claims.

d. Consequential Losses Exclusion

The "Consequential Loss" Exclusion bars coverage for "loss whether consisting of, or directly and immediately caused by ... [d]elay, loss of use or loss of market." ECF No. 20 at Exhibit 2 at 6. Between March 16, 2020 to March 22, 2020 (before the Executive Orders), Plaintiff decided to voluntarily close the business as a result of waning business. Therefore, the Court grants that during this period of time, March 16, 2020 to March 22, 2020 (or period before the mandatory closure Orders), Plaintiff was properly barred from coverage under this exclusion. Accordingly, the extent to which Plaintiff's claim is based on this limited period, March 16, 2020 to March 22, 2020, the Defendant's motion is **GRANTED IN PART.**

D. Count III: Breach of Covenant of Good Faith and Fair Dealing

Plaintiff also makes a claim for breach of the duty of good faith and fair dealing. ECF No. 20 at ¶¶ 173-75. "Under Virginia law, the elements of a claim for breach of an implied covenant of good faith and fair dealing are "(1) a contractual relationship between the parties, and (2) a breach of the implied covenant." *Enomoto v. Space Adventures, LTD*, 624 F.Supp.2d 443, 450 (E.D.Va. 2009) (citing *Charles E. Brauer Co., Inc. v. NationsBank of Va., N.A.*, 466 S.E.2d 382, 386 (Va. 1996). At minimum, however, it includes "faithfulness to an agreed common purpose and consistency with the justified expectations of the other party [to a contract]." *Id.* (citing Restatement (Second) of Contracts § 205 cmt. a (1981); *see also RW Power Partners, L.P. v. Virginia Elec. & Power Co.*, 899 F.Supp. 1490, 1498 (E.D.Va. 1995) (citing, among other authorities, the commentary of Section 205 of the Restatement for a definition of "good faith"). This duty of good faith and fair dealing prohibits a party from acting arbitrarily, unreasonably, and in bad faith. It also prohibits one party from acting in such a manner as to prevent the other party from performing its obligations under the contract. *See* Restatement (Second) of Contracts § 205 cmt. a (1981). Moreover, the United States Court of Appeals for the Fourth Circuit has made clear that every contract governed by the laws of Virginia contains an implied covenant of good faith and fair dealing. *See Va. Vermiculite, Ltd. v. W.R. Grace & Co.*, 156 F.3d 535, 541–42 (4th Cir. 1998); *see also*, *Enomoto*, 624 F.Supp.2d at 450; see also, *SunTrust Mortg., Inc. v. Mortgages Unlimited, Inc.*, No. 3:11CV861-HEH, 2012 WL 1942056, at *3 (E.D. Va. May 29, 2012).

In the instant case, Defendants argue that this claim should be dismissed because there is no coverage under the Policy for Plaintiff's losses. ECF No. 29 at 29. Although coverage is a pre-requisite to a claim for bad faith, the Court has found that Plaintiff has pleaded sufficient facts, which if proved, would fall within the Policy's coverage. *See*, *Builders Mut. Ins. Co. v. Dragas Mgmt. Corp.*, 709 F. Supp. 2d 432, 441 (E.D. Va. 2010) (noting that "coverage is a prerequisite to a claim for bad faith"). Therefore, the Defendants' Motion is **DENIED** on this ground.

* * *

In summary, for Plaintiff to establish a Covered Cause of Loss under the Policy, the claim must both constitute an "accidental direct physical loss to" Covered Property and it must not be explicitly excluded by the Policy. ECF No. 20 at Exhibit 1. Here, Plaintiff has pled sufficient facts to state a claim to allow this Court to draw reasonable inferences that relief is plausible on its face for Counts II and III. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Also, since Defendants failed to show that any of the Policy's Exclusions clearly apply, Plaintiff's claims may proceed.

IV. CONCLUSION

Based on the foregoing reasons, Defendant's Motion to Dismiss is **DENIED IN PART AND GRANTED IN PART.**

The Court **DIRECTS** the Clerk to provide a copy of this Order to the parties.

IT IS SO ORDERED.

Norfolk, Virginia

All Citations

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Footnotes

1 Proclamation No. 9994, 85 Fed. Reg. 15337 (March 18, 2020). "Declaring a National Emergency Concerning the Novel **Coronavirus** Disease (**COVID**-19) Outbreak." ("Presidential **COVID**-19 Proclamation").

2 Order of Public Health Emergency One, "Amended Order of the Governor and State Health Commissioner Declaration of Public Health Emergency," (March 20, 2020).

3 The Policy defines "suspension" as (a) The partial slowdown or complete cessation of your business activities; or (b) that part or all of the described premises is rendered untenable, if coverage for "**Loss** of Income" applies. *Id. at CMP-4705.1.8.*

4 For example, various state and federal district courts have interpreted that mandatory **COVID**-19 closures orders did not constitute a "direct **physical loss**" according to their State laws and the specific facts of those cases and insurance policies. *See, e.g* *Travelers Cas. Ins. Co. of Am. v. Geragos & Geragos*, 2020 WL 6156584 (C.D. Cal. Oct. 19, 2020); *Hillcrest Optical, Inc. v. Cont'l Cas. Co.*, 2020 WL 6163142 (S.D. Ala. Oct. 21, 2020); *Seifert v. IMT Ins. Co.*, 2020 WL 6120002 (D. Minn. Oct. 16, 2020) ("Minnesota law does not require a showing of structural damage to qualify for coverage for direct **physical loss** in all-risk policy."); *West Coast Hotel Management, LLC v. Berkshire Hathaway Guard Insurance Companies*, 2020 WL 6440037 (C.D. Cal. Oct. 27, 2020); *Vizza Wash, LP d/b/a The Wash Tub v. Nationwide Mutual Insurance Company and Bradley Worth*, No. 5:20-cv-00680-OLG, 2020 WL 6578417, (W.D. Tex. Oct. 26, 2020); *Uncork and Create LLC v. The Cincinnati Insurance Company*, 2020 WL 6436948 (S.D.W.Va. Nov. 2, 2020); *Real Hospitality, LLC d/b/a Ed's Burger Joint v. Travelers Casualty Insurance Company*, 2020 WL 6503405 (S.D. Miss. Nov. 4, 2020); *Raymond H. Nahmad DDS PA v. Hartford Casualty Insurance Company*, 2020 WL 6392841 (S.D. Fla. Nov. 2, 2020).

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Cherokee Nation Businesses gives reopening dates for its casinos

BY D. SEAN ROWLEY
Senior Reporter
06/05/2020 09:45 AM

TULSA – After closing its casinos for more than two months in accordance with recommendations to prevent the spread of COVID-19, Cherokee Nation Businesses announced on June 4 its planned

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phased reopening of its 10 gaming venues in northeast Oklahoma.

"Over the last two months, we have worked diligently to implement industry-leading protocols that will help ensure the safety of our team members, our guests and our communities. We are confident in our approach and will continue to monitor conditions and recommendations from federal, state and local health authorities," said Principal Chief Chuck Hoskin Jr. "This is the worst public health crisis we've faced in generations, and it has presented challenges to Cherokee Nation and Cherokee Nation Businesses like none before. We have made great progress in our fight to slow the spread of COVID-19, but the work is far from done. As we begin to welcome back our guests, we must remain vigilant in our efforts to protect one another."

1 2 3

Cherokee Casino Tahlequah and Cherokee Casino Fort Gibson were reopened on June 1. Cherokee Casino Sallisaw reopened on June 2.

CNB announced on May 18 its strategy to offer a safe environment for guests and employees at its entertainment properties, naming it "Responsible Hospitality." It addressed operations including casino gaming, food and beverage service, hotel, retail, golf and live entertainment. It outlined procedures for maintaining physical distance, enhanced cleaning and sanitization, and noninvasive temperature screenings for employees and guests.

Pending the successful application of the Responsible Hospitality plan and approval from the Cherokee Nation Gaming Commission, Cherokee Casino Will Rogers Downs, Cherokee Casino Grove and Cherokee Casino Roland will open on June 10.

The remaining properties – the Hard Rock Hotel & Casino Tulsa, Cherokee Casino West Siloam Springs, Cherokee Casino South Coffeyville and Cherokee Casino Ramona – are expected to open by mid-June. The Cherokee Hills golf course at Hard Rock will be open.

Safety measures will remain in place. Those with a temperature in excess of 100.4 degrees Fahrenheit will not be permitted entry into venues, and face masks must be worn by everyone. Guests are asked to bring their own masks covering the nose and mouth but not the entire face.

The CNB announcement addresses only casino operations and not hotel occupancy at the Hard Rock Hotel & Casino Tulsa. The website hardrockcasinotulsa.com states that when it is decided that guests can return to the hotel, occupancy will initially be limited and adjusted to suit conditions needed for safety. Additional safety protocols that follow recommended guidelines will be in place in Hard Rock's dining areas.

"I couldn't be more proud of the dedication, determination and resilience demonstrated by our team members throughout this pandemic," CNB CEO Chuck Garrett said. "Their passion for service is what built our reputation for

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excellence, and we share their excitement as we begin to welcome back our loyal guests. While the guest experience may be different than before, our guests will continue to receive the first-class hospitality they have come to know and love."

When first announced, the "Responsible Hospitality" plan also suggested reduced hours of operation. Each casino floor will remain closed to the public from 2 a.m. to 10 a.m. daily to allow cleaning and sanitization.

Visit **www.Anadisgoi.com**www.Anadisgoi.com for information about the "Responsible Hospitality" plan. Patrons can call their respective Cherokee Casinos to inquire about the status of each venue's reopening.

About the Author

D. SEAN ROWLEY
david-rowley@cherokee.org • 918-453-5560

Sean Rowley was hired by the Cherokee Phoenix at the beginning of 2019. Sean was born a long time ago in Tulsa, where he grew up and attended Booker T. Washington High School as a freshman before moving to Pawnee County and graduating from Cleveland High School in 1987. He graduated sans honors from Northeastern State University in 1992 with a bachelor of arts in mass communication with emphases in advertising and public relati ...
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Cherokee Phoenix

RESPONSIBLE HOSPITALITY

Cherokee Nation Entertainment's plan for offering a safe, responsible place of employment and entertainment

A Wholly Owned Subsidiary of Cherokee Nation Businesses

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Osiyo!

The Cherokee Nation and Cherokee Nation Businesses have made tremendous progress in our fight to stop the spread of COVID-19 in our workplace and our communities these past two months. Isolating at home and working remotely has been unprecedented in the history of our tribe. Thankfully, when the public health crisis swept through northeast Oklahoma, we were prepared and ready to act using guidance based on science, medical facts and compassion from our health teams and the CDC. I commend you all for doing your part to stay safe, keeping your families safe and keeping your neighbors safe. Our data shows that our State of Emergency and Shelter in Place movement early on proved effective in minimizing the number of positive cases within the Cherokee Nation. We're navigating our way through the worst public health crisis in generations and will continue to work together to get through these next chapters. After all, we're all in this together.

Chuck Hoskin Jr.
Principal Chief
Cherokee Nation

A message to our team members and guests,

The health and safety of Cherokee Nation Entertainment (CNE) team members, valued guests and the communities where we live and work will continue to be our top priority as we navigate through this challenging time. Our venues provide entertainment and enjoyment, but also serve as a key part of the economic engine of the Cherokee Nation, one of the largest job providers in northeast Oklahoma.

We suspended operations across all of our properties in mid-March to protect our employees, our guests and the general public. While challenging, it is clear it was the right course of action. Now, we must rise to meet the challenge of bringing our organization back to safe and productive operations. We have been closely monitoring all available guidance regarding COVID-19 for both our industry and our region, including information supplied by the Centers for Disease Control and Prevention (CDC), and our state and local health departments.

As we approach a multi-phase reopening of our facilities and amenities, we have developed extensive guidelines and procedures that enhance our stringent standards for sanitization and cleaning. We will commence operations only when we are confident we can provide an experience that minimizes the risks to the safety and security of our employees, our guests and our community.

We are incredibly proud of the work our team has done to protect one another and to ensure our guest experience remains unparalleled. While the guest experience will be different than before, we will continue to deliver the same market-leading hospitality and entertainment they have come to know and love.

How we move forward from this pandemic will be a part of our legacy. We intend to emerge confident in the knowledge that we did all we could to protect the safety of our employees, ensure the enjoyment of our guests and preserve the security of our future. We are proud of the commitment of our team and look forward to welcoming guests back soon.

Chuck Garrett

Chuck Garrett
Chief Executive Officer
Cherokee Nation Businesses

1.0 Responsible Hospitality

The ***Responsible Hospitality*** program was designed to enhance safety and minimize risk for Cherokee Nation Entertainment (CNE) team members and guests. The program ensures sanitization and hygiene practices at our facilities surpass already rigorous standards and meet or exceed regulatory requirements and recommendations of health officials.

We have incorporated the most current information available on enhanced sanitization and cleanliness for the hospitality industry and will remain ready to augment our program as new information emerges. CNE will continue to monitor guidelines from the Centers for Disease Control and Prevention (CDC), as well as other governmental and local health agencies. We are deploying simple solutions such as hand sanitizer stations, as well as more complex solutions, such as temperature screenings and reconfiguring amenities throughout all casino properties, retail operations and golf courses.

2.0 Our Approach

CNE's current operations span 10 properties across northeast Oklahoma and we rely on thousands of team members to deliver quality guest service and experiences. We have chosen to take a measured approach to reopening our venues to the public and will be evaluating each location based on its relative complexity, size and health factors in surrounding areas. CNE's phased approach for reopening is called ***Responsible Hospitality*** and will be implemented in three phases:

- **Now:** Immediately upon reopening.
- **Near:** Progress and adapt to a new operating environment.
- **Future:** Incorporate firsthand learning experiences with data and science to add resiliency and preparation for stable, healthy, long-term operations.

At every step, our program focuses on team member and guest safety. ***Responsible Hospitality*** includes additional training for our team, physical distancing guidelines, enhanced sanitization and cleaning, with the use of personal protective equipment (PPE) to help mitigate risks. Our guests should expect the most stringent measures to be in place now, with adjustments made as circumstances evolve. We will continue to monitor conditions in our communities to ensure that we are bringing venues back into service appropriately and at the right time.

3.0 What Responsible Hospitality Means For Our Team Members

CNE has adopted many new health and safety practices and will ensure details are clearly communicated and monitored. We want our team to be comfortable during their workday and to return home to their families and communities safely. A healthy, safe team also means a healthier, safer environment for our guests. As we begin our ***Responsible Hospitality*** program and facility reopenings, team members can expect the following protocols:

Entry Screening: All team members will be subject to a brief health questionnaire upon arrival including a noninvasive temperature screening. Any team member experiencing a temperature above 100.4°F, or who displays other risks based on the health questionnaire, will not be allowed access to the property and will be provided with information and assistance to seek medical care.

Personal Protective Equipment: All team members will be issued and required to wear masks when working indoors. Those working outdoors will be required to wear a mask while in close proximity to one another or guests. Training on proper mask usage will be provided and disposable gloves will be required based upon roles and responsibilities.

Handwashing: We will refresh training on handwashing and remind each other, and our guests, to take advantage of this easy preventative measure with increased rigor. Additional touchless hand sanitizer stations will be placed throughout each property including employee work zones.

3.0 What Responsible Hospitality Means For Our Team Members (cont)

Physical Distancing: Wherever possible, we are redesigning our workflow and our physical environment to encourage and maintain physical distance in accordance with health guidelines. Signage will be added to provide guidance throughout each property and will indicate areas that are temporarily closed.

Back of House: Sanitization and cleaning efforts will also extend to back of house areas. Some break areas will be temporarily closed. Shifts will have staggered start times to reduce back of house traffic.

Training: Additional procedures require additional training. CNE's Compliance Team has developed a comprehensive COVID-19 training program. All team members will be required to complete this mandatory training prior to returning to their position. This includes, but is not limited to, face mask etiquette, enhanced sanitization and cleaning procedures, and handwashing.

Questions and concerns from team members regarding CNE's Responsible Hospitality program can be addressed to the Human Resources team via the HResponse Hotline or email.

4.0 What Responsible Hospitality Means For Our Guests

We look forward to serving our guests again soon and providing the unmatched hospitality and entertainment they have come to expect. CNE will continue to follow evolving health guidelines and utilize the most current science and facts to keep our guests and our team members safe. We ask for patience and understanding as we adapt to this new operating environment. Now, and in the near term, guests should expect:

Hours and Amenities: We will limit our operating hours at select properties to allow time to clean and sanitize thoroughly each day. Some amenities and venues will be temporarily closed throughout our multi-phased reopening.

Entry Screening: Just like our team members, we will require and offer guests a noninvasive temperature screening prior to entering our facilities. Anyone with a temperature in excess of 100.4°F will not be permitted access to our properties.

Masks: It is required that all guests, as well as team members, wear a mask. We suggest that guests bring their own masks, which should cover the nose and mouth, but not the entire face or head.

Please note: There are areas within each property where masks may be briefly removed to accommodate eating or drinking. Brief removal of a mask may also be required by staff for identification purposes.

4.0 What Responsible Hospitality Means For Our Guests (cont)

Physical Distancing: Six-foot distancing guidelines will be in place according to recommendations by the CDC. **Guests will be asked to follow the same guidelines, observe signage and follow recommendations from team members:**

- We will be reducing the maximum allowable occupancy of our properties and venues to ensure guests have the appropriate amount of space to follow physical distancing guidelines.
- Electronic Games and Table Games will be arranged to accommodate recommended minimum distances.
- We are reducing capacities in our restaurants to ensure spacing recommendations are implemented effectively.
- Our cashiers and customer service areas will have clear, protective shields installed to provide a protective barrier between team members and guests, as well as signage indicating physical distancing recommendations.
- Additional signage will be visible throughout each property to address recommended distancing practices in elevators, lobbies and other areas.

4.0 What Responsible Hospitality Means For Our Guests (cont)

Inside the Properties: We've implemented new, extensive cleaning and sanitization processes, some of which will be visible to guests and others that are not. These processes include:

Sanitizer Stations: Stations with sanitizer and disinfectant wipes will be accessible throughout the property.

Enhanced Cleaning & Sanitization: These processes will take place throughout our venues including utilizing disinfecting equipment and cleaning agents that meet or exceed established guidelines. During the closure, and for the foreseeable future, CNE will continue to work with third-party companies to perform extensive deep cleaning and disinfecting within each of our facilities. Some of these protocols include:

- Our processes will utilize cleaning and sanitization chemicals that are certified to kill up to 99.9999% of all bacteria and viruses (including the COVID-19 virus.)
- Electrostatic sprayers will be used to apply disinfectant coatings on hard and soft surfaces.
- The frequency of cleaning will be increased for public spaces like restrooms and high-use common areas such as elevators, entryways and service counters.
- Electronic Games and Table Games will be cleaned in-between guest use and upon request.
- An increased number of team members will be on duty, dedicated to cleaning and sanitizing our venues.
- We will increase the frequency in which we sanitize our casino chips using state-of-the-art equipment and supplies.

4.0 What Responsible Hospitality Means For Our Guests (cont)

Safety & Security Staff: Our safety and security teams are being trained on additional procedures and will remain ready to help any guests as needed. Physical distancing and PPE will be utilized. Brief removal of mask may be required for identification purposes.

Our customer service team will always be available to address concerns about CNE's ***Responsible Hospitality*** policy and procedures or the guest experience. In addition, guests can find up-to-date information on our website and the One Star Rewards mobile app.

5.0 Casino Operations

Our casinos will continue to offer guests the excitement and entertainment they have come to expect. We are making significant changes to ensure that our team and our guests are safer while in the casino. Here are some changes guests will notice while visiting our casinos:

Electronic Games:

- The number of Electronic Games and seats made available to the public will be reduced in an effort to promote proper physical distancing.
- Sanitizing wipes will be readily available throughout the gaming floor to allow guests to sanitize their gaming machine of choice.
- An increased number of team members will be present on the floor, dedicated to cleaning and sanitizing Electronic Games and seating.

Table Games:

- Table Game seating will be reduced to a maximum of three seats per table. Chairs and rails will be sanitized after each guest leaves.
- Guests will be offered hand sanitizer at the start of play.
- Items including cell phones, wallets and keys will not be permitted on the table.
- Cards will be changed out a minimum of three times per day.
- Chip trays, shufflers, card shoes, discard racks and other equipment will be thoroughly sanitized at frequent intervals.

5.0 Casino Operations (cont)

Poker Operations: Poker operations will not be available immediately upon reopening. Once we determine it is safe to offer poker again, we will do so with additional safety protocols in place.

Player's Club: Our market-leading Player's Club program will be available to assist guests upon reopening. To ensure guest safety, we will:

- Sanitize all keypads and touch screens after each guest's use and have sanitizing wipes readily available for guests to use on touch screens and kiosks.
- Limit the exchange of physical Player's Club cards between guests and staff.
- Brief removal of mask may be required for identification purposes.

6.0 Promotions & Events

In the future, we will begin to reintroduce the promotions and events our loyal guests have come to know and love. We will find innovative ways to offer limited promotions and gift events that reward guest loyalty upon reopening. All event-based and drawing promotions will remain suspended. Previously announced promotions, as well as offers that were interrupted during recently suspended operations, will be addressed as follows:

March Promotions:

- March promotions will be rescheduled.
- Guests will retain all entries previously earned and will continue to earn entries added to the previous total until the promotion is completed.
- Guests who earned the required points to receive March's "Gift of the Month" will be able to claim their gift at a future date. Other guests will be granted an extended earning window.
- Rewards play not redeemed for March will be added to guest accounts upon reopening and will be available for 30 days.

One Star Rewards:

- The tier qualifying year has been extended through December 31, 2020, to all guests.
- Points that were set to expire after 12 months of no activity will be granted an additional 90 days until expiration.
- Some One Star tier offers have been suspended for at least 60 days due to health and safety concerns including cruises and Las Vegas trips.
- Food and beverage promotions will remain suspended.

7.0 Food & Beverage Offerings

To further enhance the safety of our guests and team members, we are adding additional protocols that support recommended guidelines for food and beverage service. At this time, all buffet-style restaurants and banqueted events will remain suspended. Additional changes will be made as we implement our ***Responsible Hospitality*** program including:

- Venues will have a reduced seating capacity and we will be limiting the group sizes permitted to dine together to help maintain distancing.
- Dining tables, counters and seating will be cleaned and sanitized after each use.
- Venues will utilize contact-less food delivery methods whenever possible.
- Team members will wear gloves when preparing and delivering food items.
- Venues will utilize disposable menus and provide a new menu for each guest.
- Most food and beverage items will be served in disposable containers.
- Some menus may be limited due to product availability and to reduce the amount of staff required in our kitchens.
- Self-serve drink stations will be temporarily closed.
- Single-use condiments and utensils will be available upon request.

8.0 Hotel Operations & Amenities

Upon reopening, our hotels will limit occupancy. We will adjust occupancy plans as conditions allow. Key changes guests can expect when they stay with us include:

- Hotel guests will receive a complimentary welcome package upon check-in equipped with a mask, gloves and disinfecting wipes.
- Each room will be deep cleaned prior to occupancy with a peroxide-based cleaner and disinfectant. A notice will be posted on each door to alert guests that the room has been thoroughly sanitized.
- We will use a 2-person team to change over each room—one to remove used items and one to place new, sanitized items on disinfected surfaces.
- Some in-room items will be removed including throw pillows and printed materials.
- All high-touch surfaces including coffee makers, remotes, door handles and light switches will be cleaned and disinfected.
- Bell service and valet services will be temporarily suspended.
- Ice machines on guest floors will be disabled and ice will be delivered upon request in disposable packaging.
- Pool areas will remain temporarily closed.

Though the guest experience may be different than in the past, we remain committed to providing a clean, relaxing and enjoyable environment for guests.

9.0 Entertainment & Golf

Entertainment: We are working to bring back our iconic live music and entertainment performances, and look forward to announcements about bookings and safety measures soon. Entertainment will be offered with the following changes:

- Limited, live entertainment will continue without dancing.
- Dance floors will provide more space for recommended physical distancing.
- Seating will be reduced to allow for proper physical distancing.

View the entertainment schedule for each property by visiting the website or in the One Star Rewards mobile app.

Golf: We will continue to offer an award-winning golf experience to our guests. The following changes will be implemented to maximize the health and safety of our golfers including:

- Golf carts will be sanitized between each user. Limit one player per cart.
- On the course, cups are turned upside down to prevent unnecessary contact.
- Hand sanitizer stations have been added near course restrooms.
- Masks are required to enter the clubhouse and Pro Shop areas, but are not required on the course during play.
- Team members and guests must follow recommended physical distancing guidelines.

10.0 Retail

Retail options at our properties will operate differently as we make changes for the safety of our guests and team members including:

- **Limited hours of operation to allow our team time to clean and sanitize more frequently. Fogging cleaners will be used for soft goods and merchandise.**
- **The number of guests allowed in the store at any one time will be limited.**
- **Plexiglass partitions will be installed at the counters.**
- **Guests in the store and waiting in line must maintain recommended physical distance.**
- **Counters, keypads, touch screens and door handles will be sanitized frequently. Credit card machines will be sanitized after each use and guests will be offered a single-use, clean pen if requested.**
- **Stand-alone smoke shops will be drive-through only.**

11.0 What's Next

CNE's ***Responsible Hospitality*** program was designed to be a flexible, evolving program that addresses the needs of now, while working towards returning our properties, amenities and services to full use. We will continue to implement industry-leading practices to ensure our team members and guests remain safe and healthy. We look forward to revising, streamlining and implementing improved measures as we progress towards a more resilient future.

Wado!

Hard Rock
HOTEL & CASINO
TULSA

your
ONE STAR

Cherokee
CASINO

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

UROGYNECOLOGY SPECIALIST OF FLORIDA LLC,

Plaintiff,

v. **Case No: 6:20-cv-1174-Orl-22EJK**

SENTINEL INSURANCE COMPANY, LTD.,

Defendant.

ORDER

This cause comes before the Court on the Motion to Dismiss filed by Defendant Sentinel Insurance Company, LTD. (Doc. 6). Plaintiff Urogynecology Specialist of Florida, LLC filed a Response in Opposition (Doc. 16) and Sentinel filed a Memorandum in Support of its Motion (Doc. 19). For the following reasons, the Motion will be denied.

I. BACKGROUND[1]

The dispute in this case arises from an insurance contract and the alleged breach of that contract. Sentinel issued Plaintiff an all-risk insurance policy[2] ("the Policy") to cover its gynecologist practice for the period of June 19, 2019 to June 19, 2020. (Doc. 5-1). In early March 2020, the Governor of Florida issued an executive order declaring a state of emergency in Florida due to the COVID-19 pandemic. *See Mauricio Martinez, DMD, P.A. v. Allied Ins. Co. of Am.*, No. 2:20-cv-00401-FTM-66NPM, 2020 WL 5240218, at *1 (M.D. Fla. Sept. 2, 2020). As a result of the nationwide and ongoing pandemic, Plaintiff was forced to close its doors for a period of time in March 2020 and could not operate as intended. (Doc. 1-1 at ¶ 13-15). While Plaintiff's business

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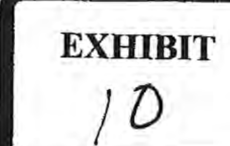
[1] For the purposes of this Motion, the Court will consider as true all of the allegations in Plaintiff's Complaint.

[2] Plaintiff is a named insured under Policy No. 21 SBA BX5636. (Doc. 1-1 at ¶ 18).



was shut down, Plaintiff suffered numerous losses including loss of use of the insured property, loss of business income, and loss of accounts receivable. (*Id.* at ¶ 12). Plaintiff also incurred additional business expenses to minimize the suspension of the business and continue its operations. (*Id.* at ¶ 15).

Plaintiff notified Sentinel of its losses associated with the medical office closing due to the ongoing pandemic and Sentinel denied coverage. (*Id.* at ¶ 20-23). As a result, Plaintiff filed this suit in the Ninth Judicial Circuit, in and for Orange County, Florida on June 2, 2020. (Doc. 1). The relevant Policy provisions upon which Plaintiff's suit relies are as follows:

> **A. COVERAGE**
> We will pay for direct physical loss of or physical damage to Covered Property at the premises described in the Declarations (also called "scheduled premises" in this policy) caused by or resulting from a Covered Cause of Loss.
>
> . . . .
>
> **3. Covered Causes of Loss**
> RISKS OF DIRECT PHYSICAL LOSS unless the loss is:
> a. Excluded in Section B., EXCLUSIONS; or
> b. Limited in Paragraph A.4. Limitations; that follow.
>
> . . . .
>
> **5. Additional Coverages**
>
> . . . .
>
> **o. Business Income**
> **(1)** 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 a direct physical loss of or physical damage to property at the "scheduled premises", including personal property in the open (or in a vehicle) within 1,000 feet of the "scheduled premises", caused by or resulting from a Covered Cause of Loss.
>
> . . . .
>
> **p. Extra Expense**
> **(1)** We will pay reasonable and necessary Extra Expense you incur during the "period of restoration" that you would not have incurred

if there had been no direct physical loss or physical damage to property . . .

. . . .

q. Civil Authority

(1) This insurance is extended to apply to the actual loss of Business Income you sustain when access to your "scheduled 7 premises" is specifically prohibited by order of a civil authority as the direct result of a Covered Cause of Loss to property in the immediate area of your "scheduled premises".

. . . .

6. Coverage Extensions

. . . .

a. Accounts Receivable

(1) You may extend the insurance that applies to your Business Personal Property, to apply to your accounts receivable.

We will pay for:

(a) All amounts due from your customers that you are unable to collect;
(b) Interest charges on any loan required to offset amounts you are unable to collect pending payment of these amounts;
(c) Collection expenses in excess of your normal collection expenses that are made necessary by the physical loss or physical damage; and
(d) Other reasonable expenses that you incur to reestablish your records of accounts receivable.

(Doc. 5-1 at 36-48).

In Count I, Plaintiff asserts a claim for breach of contract for failure to adequately reimburse Plaintiff for its losses. (Doc. 1-1 at ¶ 24). In Count II, Plaintiff seeks a declaration of the parties' rights under the insurance contract. (*Id.* at ¶ 30). Sentinel was served on June 4, 2020, and timely removed to this Court on July 1, 2020. (*Id.*). Sentinel alleged in its Notice of Removal that this Court has subject matter jurisdiction based on diversity of citizenship pursuant to 28 U.S.C. § 1332; the Notice of Removal stated that (1) Sentinel is a foreign corporation and citizen of

Connecticut, (2) all members of Plaintiff's LLC are citizens of Florida, and (3) Plaintiff's claims supported a conclusion that damages were in excess of $75,000. (Doc. 1 at 2-6).

II. LEGAL STANDARD

When deciding a motion to dismiss based on failure to state a claim upon which relief can be granted, the court must accept as true the factual allegations in the complaint and draw all inferences derived from those facts in the light most favorable to the plaintiff. *Randall v. Scott*, 610 F.3d 701, 705 (11th Cir. 2010). "Generally, under the Federal Rules of Civil Procedure, a complaint need only contain 'a short and plain statement of the claim showing that the pleader is entitled to relief.'" *Id.* (quoting Fed. R. Civ. P. 8(a)(2)). However, the plaintiff's complaint must provide "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). "A claim 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, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (citing *Twombly*, 550 U.S. at 556). Thus, the Court is not required to accept as true a legal conclusion merely because it is labeled a "factual allegation" in the complaint; it must also meet the threshold inquiry of facial plausibility. *Id.*

III. ANALYSIS

Sentinel moves to dismiss Plaintiff's Complaint arguing that the plain language of the policy excludes coverage for Plaintiff's losses. Specifically, Sentinel argues that the Policy expressly excludes losses caused by a virus. Plaintiff responds that the Policy is ambiguous, and any ambiguity should be read in favor of coverage.

A. Breach of Insurance Contract

The issues surrounding whether insurance policy virus exclusions apply to losses caused by COVID-19 are novel and complex. Courts considering these issues have applied basic contract

principles to determine whether such virus-related clauses exclude coverage. *See Mauricio Martinez, DMD, P.A.*, 2020 WL 5240218, at *2 (analyzing virus exclusions under state law contract interpretations); *see also Turek Enterprises, Inc., v. State Farm Mutual Automobile Ins. Co.*, No. 20-11655, 2020 WL 5258484, at *5 (E.D. Mich. Sept. 3, 2020) (same); *10E, LLC v. Travelers Indem. Co. of Connecticut*, No. 2:20-cv-04418-SVW-AS, 2020 WL 5095587, at *4 (C.D. Cal. Aug. 28, 2020) (same).

In Florida, to state a claim for breach of contract, a plaintiff must allege "(1) the existence of a contract, (2) a breach of the contract, and (3) damages resulting from the breach." *Beck v. Lazard Freres & Co.*, LLC, 175 F.3d 913, 914 (11th Cir. 1999). Here, Plaintiff alleges that Sentinel breached the insurance contract by failing to pay for covered losses. Sentinel argues that the plain language of the insurance contract excludes coverage for the cause of Plaintiff's loss. Sentinel relies on the following language from the Policy under the "Limited Fungi, Bacteria or Virus Coverage" provision which states that Sentinel

> 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:
>
> **(1)** Presence, growth, proliferation, spread or any activity of "fungi," wet rot, dry rot, bacteria or virus.
>
> **(2)** But if "fungi," wet rot, dry rot, bacteria or virus results in a "specified cause of loss" to Covered Property, we will pay for the loss or damage caused by that "specified cause of loss."

(Doc. 5-1 at 141).

Under Florida law, the "construction of an insurance policy is a question of law for the court." *U.S. Fire Ins. Co. v. J.S.U.B., Inc.*, 979 So. 2d 871, 877 (Fla. 2007). "The scope and extent of insurance coverage is determined by the language and terms of the policy." *Ernie Haire Ford, Inc. v. Universal Underwriters Ins. Co.*, 541 F. Supp. 2d 1295, 1298 (M.D. Fla. 2008) (quoting *Bethel v. Sec. Nat'l Ins. Co.*, 949 So. 2d 219, 222 (Fla. 3d DCA 2006)). An insurance policy is a

contract that is construed according to its plain meaning. *Garcia v. Fed. Ins. Co.*, 969 So. 2d 288, 291 (Fla. 2007). When construing the plain meaning of phrases in an insurance contract, Florida courts "may consult references commonly relied upon to supply the accepted meanings of words." *Id.* (relying on Merriam Webster's Collegiate Dictionary to supply the plain meaning of language in an insurance contract). Finally, the Florida Statutes provide, "Every insurance contract shall be construed according to the entirety of its terms and conditions as set forth in the policy." Fla. Stat. § 627.419.

Sentinel argues that the unambiguous policy terms exclude coverage for any losses caused by a virus, including COVID-19. Plaintiff argues that ambiguity in the insurance policy requires the Court to construe the Policy in favor of coverage. Policy language is ambiguous if it "is susceptible to more than one reasonable interpretation, one providing coverage and another limiting coverage." *Garcia*, 969 So. 2d at 291 (citing *Auto-Owners Ins. Co. v. Anderson*, 756 So. 2d 29, 34 (Fla. 2000)). "A provision is not ambiguous simply because it is complex or requires analysis." *Id.* In addition, "[t]he fact that both sides ascribe different meanings to the language does not mean the language is ambiguous." *Kipp v. Kipp*, 844 So. 2d 691, 693 (Fla. 4th DCA 2003). An ambiguity exists only if a "genuine inconsistency, uncertainty, or ambiguity in meaning . . . remains after the application of the ordinary rules of construction." *Am. Strategic Ins. Co. v. Lucas-Solomon*, 927 So. 2d 184, 186 (Fla. 2d DCA 2006) (internal quotation marks omitted).

Here, several arguably ambiguous aspects of the Policy make determination of coverage inappropriate at this stage. Notably, the Policy provided does not exist as an independent document. For example, the "Limited Fungi, Bacteria or Virus Coverage" section of the Policy (Doc. 5-1 at 141) starts by stating that it modifies certain coverage forms. Those forms are not provided in the Policy itself, nor were they provided to the Court. Additionally, the second paragraph states that the virus exclusion "is added to paragraph B.1 Exclusions of the Standard

Property Form and the Special Property Coverage Form" which was similarly not provided to the Court. Without the corresponding forms which are modified by the exclusions, this Court will not make a decision on the merits of the plain language of the Policy to determine whether Plaintiff's losses were covered. Additionally, it is not clear that the plain language of the policy unambiguously and necessarily excludes Plaintiff's losses. The virus exclusion states that Sentinel will not pay for loss or damage caused directly or indirectly by the presence, growth, proliferation, spread, or any activity of "fungi, wet rot, dry rot, bacteria or virus." (*Id.*). Denying coverage for losses stemming from COVID-19, however, does not logically align with the grouping of the virus exclusion with other pollutants such that the Policy necessarily anticipated and intended to deny coverage for these kinds of business losses.

In arguing that the plain language of the Policy excludes coverage for Plaintiff's losses, Sentinel cites a number of cases which uphold similar virus exclusions. The cases, however, are nonbinding and distinguishable. In arguing that Florida courts routinely enforce policy provisions excluding coverage for viruses, Sentinel cites a case in which a policyholder sought coverage when a third-party asserted a claim against him for the transmission of a sexually transmitted virus. *See Clarke v. State Farm Florida Ins.*, 123 So. 3d 583, 584 (Fla. 4th DCA 2012). In arguing that the Court should give the virus exclusion a straightforward application to exclude coverage for losses caused by COVID-19, Sentinel cites cases dealing with pollution exclusions and sewage backups, damage caused by mold, and claims resulting from illness or disease, all of which fell under policy exclusions. (Doc. 6 at 11-12). Importantly, none of the cases dealt with the unique circumstances of the effect COVID-19 has had on our society—a distinction this Court considers significant. Thus, without any binding case law on the issue of the effects of COVID-19 on insurance contracts virus exclusions, this Court finds that Plaintiff has stated a plausible claim at this juncture. Plaintiff alleged the existence of the insurance contract, losses which may be covered under the insurance

contract, and Sentinel's failure to pay for the losses. These allegations, when read in the light most favorable to Plaintiff, are facially plausible. *See Twombly*, 550 U.S. at 555 (holding that a complaint "attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations").

Based on the foregoing, it is ordered as follows:

1. Defendant's Motion to Dismiss (Doc. 6) will be **DENIED.**

2. Defendant **IS ORDERED TO FILE** an Answer to the Complaint within fourteen days of the date of this Order.

DONE and **ORDERED** in Chambers, in Orlando, Florida on September 24, 2020.

Anne C. Conway
ANNE C. CONWAY
United States District Judge

Copies furnished to:

Counsel of Record

KeyCite Yellow Flag - Negative Treatment
Not Followed on State Law Grounds International Multifoods Corp. v. Commercial Union Ins. Co., 2nd Cir.(N.Y.), October 17, 2002

505 F.2d 989
United States Court of Appeals, Second Circuit.

PAN AMERICAN WORLD AIRWAYS, INC., Plaintiff-Appellee-Appellant,
v.
The AETNA CASUALTY & SURETY CO. et al., Defendants-Appellants, and The United States of America, Defendant-Appellee-Appellant, and Philip Gaybell Wright et al., Defendants-Appellees.

Nos. 771, 929, 930, Dockets 73-2604, 73-2606, 73-2766.
|
Argued April 2, 1974.
|
Decided Oct. 15, 1974.

Synopsis

American airline brought action to recover against insurers of its aircraft which was hijacked over London by members of Palestinian terrorist group and was destroyed in Egypt. The United States District Court for the Southern District of New York, Marvin E. Frankel, J., 368, F.Supp. 1098, found issuers of all-risk policies to be liable for the loss. Such insurers appealed and airline and Government cross-appealed. The Court of Appeals, Hays, Circuit Judge, held that maxim of contra proferentem was applicable to interpretation of all-risk policies which did not specifically exclude coverage of losses relating to hijacking and that loss sustained by airline was not due to damage or destruction by military or usurped power and was not due to war, warlike operations, insurrection, civil commotion or riot within exclusion clauses of such policies.

Affirmed.

Attorneys and Law Firms

***992** James C. Blair, New York City, (Cleary, Gottlieb, Steen & Hamilton, New York City, on the brief, Fowler Hamilton, Roger E. Berg, New York City, of counsel), for plaintiff-appellee-appellant.

Lawrence E. Walsh, New York City (Davis Polk & Wardwell, New York City, on the brief, Henry L. King, Guy Miller Struve, Bartlett H. McGuire, Charles J. Moxley, Jr., Jack P. Levin, New York City, of counsel; Bigham Englar Jones & Houston, New York City, on the brief as co-counsel for defendants-appellants David Linton Dann, and others, John J. Martin, New York City of counsel), for defendants-appellants.

Mel P. Barkan, Asst. U.S. Atty., S.D.N.Y. (Paul J. Curran, U.S. Atty. S.D.N.Y., on the brief, Daniel H. Murphy, II, Gerald A. Rosenberg, Asst. U.S. Attys., of counsel), for the defendant-appellee-appellant.

William E. Hegarty, New York City (Mendes & Mount, New York City, on the brief, Matthew J. Corrigan, Stephen E. Cohen and Cahill Gordon & Reindel, ***993** Floyd Abrams, Roger S. Fine, Michael P. Tierney, New York City, of counsel), for defendants-appellees.

Before HAYS and OAKES, Circuit Judges, and CHRISTENSEN, District judge.[*]

[*] Honorable A. Sherman Christensen, United States District Court for the District of Utah, sitting by designation.

Opinion

HAYS, Circuit Judge:

On September 6, 1970 Pan American Flight 083, while on a regularly scheduled flight from Brussels to New York, was hijacked in the sky over London about 45 minutes after it had taken off from an intermediate stop in Amsterdam. Two men, Diop and Gueye, acting for the Popular Front for the Liberation of Palestine (the 'PELP'), forced the crew of the aircraft to fly to Beirut, where a demolitions expert and explosives were put on board. The aircraft, a Boeing 747, was then flown to Egypt still under PFLP control. In Cairo, after the passengers were evacuated, the aircraft was totally destroyed.

We are asked on this appeal to determine which of the various underwriters that insured the aircraft must bear the cost of the loss. This determination depends on whether the September 6 hijacking was proximately caused by an agency fairly described, for insurance purposes, by any of the exclusions contained in a group of identical all risk aviation policies—policies which, if not for the exclusions, would cover the loss.

The district court held that the all risk policies covered the loss. Pan American World Airways, Inc. v. Aetna Casualty and Surety Co., 368 F.Supp. 1098 (S.D.N.Y.1973).

EXHIBIT
11

I. Insurance Policies in Suit

There is no dispute as to the fact of the loss of the 747, as to the amount of the loss, or as to the provisions of the various insurance policies potentially covering the loss. The controversy on this appeal involves the interpretation of those policies.

The aircraft in question was covered by 'a more or less seamless mosaic' of insurance policies, 368 F.Supp. at 1101, distributing among three classes of insurers, the risk of loss depending on the proximate cause of the damage.

Members of the first class of insurers wrote identical aviation all risk policies. These policies indemnified Pan American against 'all physical loss of or damage to the aircraft,' except for any loss 'due to or resulting from' certain specified exclusions. The all risk policies became effective as a group on November 12, 1969, and covered the aircraft for the following year. They covered damage or loss in any amount up to the full agreed upon value of the 747, to wit, \$24,288,759. Pan American paid a premium of \$4,571,635 for this coverage for its entire 747 fleet for the period of January 1, 1970 to September 21, 1970.[1]

1 We follow the district court's practice of stating premiums based on the period of January 1, 1970 to September 21, 1970, regardless of the actual period of coverage in order to facilitate comparison of the relative size of the various premiums. See 368 F.Supp. at 1103 n. 2.

This first class of insurers, to be referred to as the 'all risk insurers,' included three separate groups. Members of the United States Aviation Insurance Group (the 'USAIG'), including Aetna Casualty and Surety Co., participated in the all risk insurance to the extent of one-third of the agreed upon value of the Pan American fleet. The insurance was written on USAIG forms. Members of Lloyd's underwriting syndicate (the 'London all risk insurers'), including David Linton Dann, participated to the extent of one-sixth of the agreed upon value. Members of the Associated Aviation Underwriters (the 'AAU'), an American group, participated to the extent of one-half of the agreed upon value by way of reinsurance of the Federal Insurance Co. Parenthetically, it appears that these three groups include *994 all of the underwriters in the world who write aviation all risk insurance for American air carriers.

The exclusions in the all risk policies, insofar as they are relevant here, read as follows:

'34. LOSS OR DAMAGE NOT COVERED

. . . .OR

'C. This policy does not cover anything herein to the contrary notwithstanding loss or damage due to or resulting from:

1. capture, seizure, arrest, restraint or detention or the consequences thereof or of any attempt thereat, or any taking of the property insured or damage to or destruction thereof by any Government or governmental authority or agent (whether secret or otherwise) or by any military, naval or usurped power, whether any of the foregoing be done by way of requisition or otherwise and whether in time of peace or war and whether lawful or unlawful (this subdivision 1. shall not apply, however, to any such action by a foreign government or foreign governmental authority follow-the forceful diversion to a foreign country by any person not in lawful possession or custody of such insured aircraft and who is not an agent or representative, secret or otherwise, of any foreign government or governmental authority) (hereinafter 'clause 1');

2. war, invasion, civil war, revolution, rebellion, insurrection or warlike operations, whether there be a declaration of war or not (hereinafter 'clause 2');

3. strikes, riots, civil commotion (hereinafter 'clause 3').

The only issues in this appeal involve the interpretation of these exclusions.

Effective January 1, 1970, Pan American obtained coverage on the London war risk market for losses caused by the perils excluded by the all risk policies. The terms of this coverage were contained in so-called war risk policies that were issued by Lloyd's underwriters, including Philip Gaybell Wright, and various other participants in the London war risk market. These insurers will be referred to jointly as the 'war risk insurers.' At the time of the loss, September 6, 1970, the language specifying coverage in these policies was precisely identical to the language specifying exclusions in the all risk policies. The upper limit of war risk coverage was \$14,226,290.47. Pan American paid a premium of \$190,511 for this coverage for its 747 fleet for the period January 1 through September 12.

The London market was and is the only private source of aviation war risk insurance. American underwriters do not

write war risk coverage. Thus, Pan American had to turn to the United States government for war risk coverage for the excess over the London market limit. The Secretary of Transportation is authorized by Title XIII of the Federal Aviation Act of 1958, as amended, 49 U.S.C. §§ 1531-1542 (1970), to issue insurance covering the types of risks normally excluded under 'free of capture and seizure' clauses ('F.C.&S.' clauses)[2] similar to clauses 1 and 2 of ***995** the all risk exclusions. Accordingly, for a premium of $45,000, the government issued a policy covering specified war risks in the amount of $9,763, $709.53 in excess of $14,226,290.47. The total limit of London and government war risk coverage was $24,000,000, or about $288,000 less than the agreed upon value of the aircraft. The government policy covered loss or damage 'resulting from the following perils:

2 The following modern example of a marine F.C.&S. clause is given by Gilmore & Black:
'Notwithstanding anything herein contained to the contrary, this insurance is warranted free from capture, seizure, arrest, restraint, detainment, confiscation, preemption, requisition or nationalization, and the consequences thereof or any attempt thereat, whether in time of peace or war and whether lawful or otherwise; also warranted free, whether in time of peace or war, from all loss or damage caused by any weapon of war employing atomic fission or radioactive force; also warranted free from all consequences of hostilities or warlike operations (whether there be a declaration of war or not) but this warranty shall not exclude collision, explosion or contact with any fixed or floating object (other than a mine or torpedo), stranding, heavy weather or fire unless caused directly (and independently of the nature of the voyage or service which the vessel concerned or, in the case of collision, any other vessel involved therein, is performing), by a hostile act by or against a belligerent power; and for the purpose of this warranty 'power' includes any authority maintaining naval, military or air forces in association with a power.
'Further warranted free from the consequences of civil war, revolution, rebellion, insurrection, or civil strife arising therefrom, or piracy.'
G. Gilmore & C. Black, The Law of Admiralty § 2-9 at 64-65 (1967).

'War, invasion, acts of foreign enemies, hostilities (whether war be declared or not), civil war, rebellion, revolution or insurrection, military or usurped power or confiscation and/or nationalization or requisition or destruction by any government or public or local authority or *by any independent unit or individual engaged in irregular warfare*.'(Emphasis added.)

In the district court, the government conceded that the italicized language describes the present loss, unless the loss was due to 'strikes, riots, (or) civil commotion.' But the government policy does not cover war losses to the extent that there is double insurance coverage. It disclaims

'(a) Any liability or claim for injury, loss, damage or expense covered under any other policy of insurance, including any guaranty or indemnity agreement, in effect for the benefit of the Insured; the Insured warrants that the Insurer shall be free from any such liability or claim.'

Thus, the government must pay the 9.8 million dollar excess if the loss was proximately caused by an event described by the clause 1 or the clause 2 exception to all risk coverage. But if the loss was caused either by 'strikes, riots, (or) civil commotion' as described in the clause 3 exception, or by any cause not excluded from the all risk insurance, the government is not liable for the excess.

Pan American closed the final major gap in its insurance coverage in July, 1970, when for an additional premium of $29,935, the American all risk insurers 'wrote back' coverage, that is deleted the exclusion, for the clause 3 risks to the extent of $10,062,393 in excess of $14,226,290. Members of the USAIG and the AAU each underwrote half of this additional coverage.

The interest of the insured and the various insurers in the interpretation of the all risk exclusions may be summarized as follows: If the loss was proximately caused by a clause 1 peril ('capture, seizure . . . or any taking . . . by any military . . . or usurped power'), or a clause 2 peril ('war . . . civil war, revolution, rebellion, insurrection or warlike operations'), Pan American will recover $24,000,000, approximately $14,200,000 of which will be paid by underwriters in the London war risk market, and approximately $9,800,000 of which will be paid by the United States government. If the loss was proximately caused by one of the risks described in clause 3 of the all risk exclusions ('riots, civil commotion'), Pan American will recover approximately $24,300,000, of which $14,200,000 will be paid by the London war risk market, and approximately $10,000,000 will be paid in two equal shares by members of the USAIG and AAU. If none of the all risk exclusions describes the proximate cause of the loss, Pan

American will recover $24,300,000 from the all risk insurers, one-third from USAIG members, one-sixth from participants in the London all risk market, and one-half from members of the AAU. In any event, Pan American *996 is entitled to receive approximately $5,000,000 in pre-judgment interest.

II. The District Court Proceeding

When in response to Pan American's claims all of the insurers denied coverage, Pan American brought the present diversity action in the Southern District of New York, stating claims in the alternative against the three classes of insurers. The all risk insurers cross-claimed for a declaratory judgment that the war risk policies covered the loss, a cross-claim that the district court properly dismissed as frivolous. 368 F.Supp. at 1142.

The all risk insurers took the position in the district court that the destruction of the 747 was covered by the clause 1 exclusion for 'damage or destruction . . . by any military . . . or usurped power'; that it was also covered by each of the clause 2 exclusions except that of 'invasion'; and that it was due to 'riots' and 'civil commotion' as those terms are used in clause 3. See 368 F.Supp. at 1117. The war risk insurers took the position that the loss was not 'due to or resulting from' any of the excluded risks. Pan American took the position that the loss was not due to an excluded risk, and alternatively, that if it was due to an excluded risk, it was caused by 'riots' or 'civil commotion.' The government's position shifted periodically, but it finally seemed to rest on its claim that the loss was due to Pan American's barratry. 368 F.Supp. at 1141.

After the usual extended procedural preliminaries, the case came to trial before Judge Frankel, sitting without a jury. The trial lasted twenty-four days, during which time the court heard the testimony of thirty witnesses, many of whom were brought to Foley Square from distant countries. Depositions of eleven other witnesses were admitted, along with 439 exhibits. The record on appeal includes 267 documents which fill six file drawers.

At the trial, the all risk insurers put in an immense amount of evidence relating to the history of war and political tension in the Middle East, and to the climate of political unrest in Jordan. They undertook to show that the hijacking was caused by PFLP or Palestinian Arab 'military . . . or usurped power,' by offering evidence that these groups operated as paramilitary quasi-governments in parts of Jordan, independently of King Hussein's authority. They relied on the same kind of evidence and an asserted PFLP intent to overthrow King Hussein, to establish that the loss of the 747 was caused by an 'insurrection' in Jordan. With regard to the applicability of these two exclusions, they claimed that various 'Fedayeen,' organizations of Palestinian refugees seeking to return Israel to Arab control, had power over substantial territory from which they excluded government functionaries, and that the Fedayeen engaged in violent clashes with the Jordanian Army, culminating in a 10-day 'civil war' following the September 1970 hijacking. The all risk insurers also attempted to bring the loss within the scope of the term 'war' and 'warlike operations' by showing that the PFLP engaged in 'guerilla warfare.' Finally, they sought to connect the Pan American hijacking with other hijackings committed on the same day, arguing that all of the hijackings together constituted a single 'civil commotion.'

A great deal of the evidence adduced by the all risk insurers was double and triple hearsay properly admitted under the relaxed rules of evidence applicable in bench-tried cases, but of dubious probative value. Much of the all risk testimonial and documentary evidence related to propaganda statements made by the PFLP and other Fedayeen organizations, statements which for the most part were not designed for factual accuracy. The testimony of various individuals, relating as it does to emotionally explosive Middle Eastern events, frequently betrayed the bias of the speaker. There was reliable evidence as to the facts immediately surrounding the hijacking. Otherwise, the evidence *997 consisted largely of hearsay, propaganda, speculation and conjecture.

The war risk insurers introduced evidence supporting their view of the Middle Eastern situation and the nature and goals of the PFLP. They also sought with some success to undermine the testimony of witnesses for the all risk insurers. For example, they demanded that the testimony of each witness relate to the PFLP, rather than to the Fedayeen in general, cf. 368 F.Supp. at 1108, or if such relation was impossible, that the testimony be appropriately qualified. They constantly pinned down the all risk witnesses in terms of time and space, providing material for their argument that the hijacking over London was not proximately caused by any of the remote events in the Middle East.

The war risk insurers introduced evidence establishing so-called insurance facts. For example, they sought to prove that in May, 1970, a USAIG body circulated a memorandum discussing, among other things, the ambiguity of the all risk exclusions in the context of a political hijacking.

At the end of the trial the district court was faced with the task of resolving the extensive conflicts in the evidence. After considering post-trial memoranda submitted by the

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parties, Judge Frankel held that the loss of the 747 was not proximately caused by any peril excluded from coverage by the all risk policies, and he therefore granted judgment for Pan American against the all risk insurers.

The district court made detailed findings as to the goals and structure of the Fedayeen in general and the PFLP in particular. Id. 368 F.Supp. at 1107-1109. It found that the PFLP was a militant Marxist-Leninist-Maoist organization, which received financial support and arms from China and North Korea. The PFLP had approximately 600 to 1200 members, 150 of whom constituted a permanent core. Though the PFLP's primary enemy was Israel, it also condemned 'reactionary' Arab regimes, 'universal capitalism' and the United States as its enemies, and it was hostile toward the other, generally more moderate, Fedayeen groups.

The district court traced the history of Fedayeen activity against Israel, activity which reached a high point in 1968 when the Palestine Liberation Army participated in the Battle of Karama. Id. at 1108. It detailed the rise and fall of the Fedayeens' prestige among the members of the Palestinian refugee community.

The district court found that the purpose of the 'external operations' being carried on by the PFLP at the time of the destruction of the Pan American plane was to bolster the morale of the Palestinians, to aggrandize the PFLP's position in relation to the other Fedayeen groups, and to call world attention to the plight of the Palestinian refugees. Id. at 1110. The court concluded that the PFLP was a small, isolated group pursuing its own long term objectives. Id.

The district judge paid particular attention to the events in Jordan beginning in February 1970. See id. at 1109, 1124-1126. Upon reviewing the evidence, he concluded that the hijacking was not 'due to or resulting from' the violent events of 1970 in Jordan.

Proceeding to its legal conclusions, the district court found that under governing New York law an ambiguity in a term of exclusion will be resolved in the manner least favorable to the insurer. Id. at 1118. It held that 'war' means a conflict between governments, not political groups like the PFLP. Id. at 1130. It further held that the loss was not due to a PFLP 'warlike operation' because that term does not include the inflicting of damage on the civilian property of non-belligerents by political groups far from the site of warfare, particularly when the purpose is propaganda. Id. The district court also held that the loss was not due to the acts of the PFLP as a 'military or usurped power.' First, the PFLP did not qualify as such a power since it held territory only at the sufferance of the Jordanian government, ***998** the de jure sovereign. Second, even if the PFLP was a 'power' in Jordan, it did not act as such when it hijacked a plane over London. Id. at 1129-1130. In addition the court held that the PFLP activity was not part of an 'insurrection' since there was insufficient evidence that an insurrection against the Jordanian government was in progress at that time, and even if there was an insurrection, the hijacking in question was not primarily caused by it. Id. at 1123-1129. The loss was not due to 'riot' because the hijacking was not accompanied by the sort of uproar or disorder that riot connotes in current usage. Id. at 1132-1136. Finally, the district court held that the phrase 'civil commotion' comprehends a local disorder rather than a hijacking occurring in the skies over two continents. Id. at 1136-1139.

In short, the district court held that the all risk insurers failed to meet their burden of proving that the cause of the loss was fairly within the intended scope of any of the exclusions. It found that the ancient marine insurance terms selected by the all risk insurers simply do not describe a violent and senseless intercontinental hijacking carried out by an isolated band of political terrorists.

The all risk insurers appeal, assailing the district court's findings of fact as to the size, power, organization, intent and purpose of the Fedayeen and the PFLP, and as to the lack of connection between the hijacking and the larger Middle Eastern events. They attack the district court's interpretations of the contract clauses, claiming that these interpretations are not supported by the weight of authority, particularly the authorities founded on the law of England.

Pan American and the government cross-appeal.

We affirm.

III. The Hijacking

Although there is considerable controversy surrounding the nature, organization and objectives of the PFLP, the facts immediately connected with the hijacking are essentially undisputed.[3] On September 6, 1970, two men traveling on Senegalese passports bearing the names Diop and Gueye purchased tickets in Amsterdam for Pan American Flight 093. About two hours before that purchase, they had attempted to take El Al Flight 219, but because El Al security personnel became suspicious of them, they were not permitted to purchase tickets. Diop and Gueye also aroused Pan American

suspicions, but they were allowed to board Flight 093 after being searched. See 368 F.Supp. at 1112-1113.

3 The facts of the hijacking were established by stipulation essentially as stated here.

Forty-five minutes after Flight 093 departed from Amsterdam, Diop and Gueye produced handguns and grenades, and took control of the aircraft, ordering the crew to fly to Beirut, Lebanon. They had initially planned to take the aircraft to Dawson's Field, a rudimentary airstrip in northeastern Jordan that had been 'occupied' by the PFLP of the same day, but they abandoned that plan when they were convinced that a 747 could not land at Dawson's Field.

The hijackers explained their purpose in the following words:

'p.f.l.p. is speaking

'why we take the airoplane? we took the American Airoplane because the government of America helps Israel daily— The government of America gives Israel Fantom airoplanes which attack our camps and burn our village. We— The Group of AKA— which is following for p.f.l.p. know that by warning the people of America for the crimes and murders which is committed always on Palestine and Vitnam— make him feel how his government help the Zionism.

'We left our homes, and our lands of 20 years old, Every day the Jews attack us— in our Camps— We think that by our work make you know the truth

*999 'We are sorry for what we make of disturbance but you must understand us.' [4]

4 The quoted statement is the text of a handwritten note which Diop and Gueye attempted to read to the passengers on Flight 093. It was introduced in the district court as Aetna Exhibit. 1.

When the aircraft came within radio range of Lebanon, the hijackers demanded that PFLP representatives be brought to the Beirut airport. Radio contact was established between the hijackers and Lebanese PFLP leaders Abu Khaled and Abu Ahmad. After Diop and Gueye threatened to blow up the 747 in mid-air if not permitted to land, Lebanese officials reluctantly granted permission on the condition that it take off again after refueling. Once on the ground, seven or eight PFLP members came aboard and placed explosives in the aircraft. One of these additional members, evidently an explosives expert, stayed on board for the next leg of the flight.

The 747 took off for Cairo, still under PFLP command. Again after PFLP threats, Egyptian officials reluctantly gave their permission for it to land. The explosive fuses were lit while the aircraft was still in the air. After landing, the passengers were evacuated in good order. The explosives detonated on schedule, and the 747 was a total loss.

On the same date, about two hours before Flight 093 was hijacked, the PFLP successfully hijacked TWA Flight 741, forty-five minutes after it left Frankfurt, and Swissair Flight 100, ten minutes after it left Zurich. An attempt to hijack El Al Flight 219 was foiled in the air by El Al security personnel. The TWA and Swissair aircraft were forced to fly to Dawson's Field, [5] where they were surrounded at a distance by about 200 to 1000 Jordanian troops. Explosives were placed around the aircraft by the hijackers. The PFLP held the passengers as hostages, demanding the release of PFLP members held prisoner in Germany, Great Britain, and Switzerland. On September 12, the airplanes were destroyed.

5 A BOAC VC-10 was hijacked on September 9 and was added to the collection of aircraft at Dawson's Field. 368 F.Supp. at 1111.

IV. Preliminary Legal Issues

The all risk insurers, if they were to prevail, had the burden of proving that the proximate cause of the loss of the 747 was included within one of the terms of exclusion. [6] The all risk insurers' task is made even more difficult by the rule that exclusions will be given the interpretation which is most beneficial to the insured. The maxim contra proferentem receives added force in this case because the all risk insurers knew that their exclusions were ambiguous in the context of a political hijacking, and they knew of but did not employ exclusionary terms used by other all risk insurers which would have clarified the ambiguity. Finally on this appeal, the all risk insurers have the burden of demonstrating that the trial judge's findings of fact adverse to them were clearly erroneous.

6 13 G. Couch, Cyclopedia of Insurance Law § 48:139 (2d ed. 1965); 1A W. Barron & A. Holtzoff, Federal Practice and Procedure § 279, at 163 (Wright ed. 1960). The rule has special applicability to all risk insurance because if not for the affirmative defense of exclusion, the cause

of the loss need not be proved. Cf. Chase Rand Corp. v. Central Insurance Co., 152 F.2d 963 (2d Cir. 1945) (per curiam); Souza v. Corvick, 142 U.S.App.D.C. 323, 441 F.2d 1013, 1020 (1970).

A. Burden of Proof.

In the district court the insured had the burden of proving the existence of the all risk policies, and the loss of the covered property. Neither of these elements is disputed. Thus Pan American began the action with a prima facie case for recovery which the all risk insurers could meet only by proving that the cause of the loss came under one of the terms of exclusion.

B. Contra Proferentem.

The loss in this case is covered by the all risk policies if Pan American or the war risk insurers can formulate ***1000** a reasonable interpretation of the terms of exclusion to permit coverage. On the other hand, it is not sufficient for the all risk insurers' case for them to offer a reasonable interpretation under which the loss is excluded; they must demonstrate that an interpretation favoring them is the only reasonable reading of at least one of the relevant terms of exclusion. Sincoff v. Liberty Mutual Fire Insurance Co., 11 N.Y.2d 386, 390, 230 N.Y.S.2d 13, 15, 183 N.E.2d 899, 901 (1962). Sincoff states the well-established New York rule for all types of insurance. See, e.g., Bronx Savings Bank v. Weigandt, 1 N.Y.2d 545, 551, 154 N.Y.S.2d 878, 882-883, 136 N.E.2d 848, 851 (1956); Hartol Products Corp. v. Prudential Insurance Co., 290 N.Y. 44, 49-50, 47 N.E.2d 687, 690-691 (1943); Rickerson v. Hartford Fire Insurance Co., 149 N.Y. 307, 313, 43 N.E. 856, 858 (1896); Shneiderman v. Metropolitan Casualty Co., 14 A.D.2d 284, 289-290, 220 N.Y.S.2d 947, 951-952 (1st Dept 1961).

Contra proferentem has special relevance as a rule of construction when an insurer fails to use apt words to exclude a known risk. Cf. National Screen Service Corp. v. United States Fidelity & Guaranty Co., 364 F.2d 275, 278-279 (2d Cir.), cert. denied, 385 U.S. 958, 87 S.Ct. 394, 17 L.Ed.2d 304 (1966). The evidence indicates that the risk of a hijacking was well known to the all risk insurers. Between 1960 and 1970 over 200 commercial aircraft were hijacked, eight of which belonged to Pan American. International hijacking is the subject of the Tokyo Convention of 1963 and the Hague Convention of 1970.[7] Hijacking is forbidden by a federal statute, 49 U.S.C. § 1472 (1970). The specific risk which caused the present loss was known to the all risk insurers at least three months before the inception of the Pan American policies. In August, 1969, the PFLP hijacked a Trans World Airlines 707 to Damascus and seriously damaged it through the use of explosives. TWA's war risk insurers, who had written policies with coverage clauses similar to the present all risk exclusions, denied liability.[8] The present all risk insurers took no steps to clarify their exclusions even after the Damascus loss made it clear that the London market did not consider the PFLP hijackings to be within the terms of USAIG all risk exclusions.

7 Tokyo Convention on Offenses and Certain Other Acts Committed on Board Aircraft, (1969-3) U.S.T. 2941, T.I.A.S. No. 6768 (effective Dec. 4, 1969); Hague Convention for the Suppression of Unlawful Seizure of Aircraft, (1971-2) U.S.T. 1643, T.I.A.S. 7570 (effective Jan. 26, 1973).

8 TWA's all risk insurers were not subject to liability because the loss was less than a deductible amount in the TWA all risk policies.

Various exclusionary terms in use or being considered for use prior to the present loss would have excluded the loss had they been employed. The war risk insurers have demonstrated that 'hijacking,' 'act for political or terrorist purposes,' 'irregular warfare,' 'intentional damage,' 'forceful diversion' and 'theft' enjoyed some currency.[9] For example, in 1969 underwriters in the London all risk aviation market began to consider various alternative wordings for a hijacking exclusion. In November, 1969, an organization of such underwriters adopted the text of an exclusion called 'AV-48,' which excluded the following:

9 'Hijacking' and 'acts for political or terrorist purposes' are taken respectively from the provisions of AV-48 and AV-48A, discussed infra. 'Irregular warfare' was employed in the government insurance policy at suit as a coverage clause. 'Intentional damage' was used by Pan American's all risk insurers for the four years prior to March, 1969. 'Forceful diversion' appears in a parenthetical in clause 1 of the all risk exclusions, a parenthetical designed to deal with hijacking to Cuba. 'Theft' was used by the insurer in Sunny South Aircraft Service, Inc. v. American Fire &

Casualty Co., 140 So.2d 78 (Fla.D.Ct.App.1962), aff'd, 151 So.2d 276 (Fla.1963).

'(f) Unlawful seizure or wrongful exercise of control of the Aircraft or crew in flight (including any attempt at such seizure or control) made by ***1001** any person or persons on board the Aircraft acting without the consent of the Insured.'

The text of AV-48 was known to the USAIG by June, 1969. Had AV-48 been employed by the present all risk insurers, they might well have avoided liability for the loss of the 747.

On September 12, 1969, the London all risk market revised AV-48 to make it even more specific. The revised exclusion, AV-48A, includes the following language:

'This Policy does not cover claims directly or indirectly occasioned by, happening through or in consequences of:—

. . . .y d

'(d) Any act of one or more persons, whether or not agents of a sovereign Power, for political or terrorist purposes and whether the loss or damage resulting therefrom is accidental or intentional.

'(e) Any malicious act or act of sabotage.

. . . .lic

'(g) Hi-jacking or any unlawful seizure or wrongful exercise of control of the Aircraft or crew in flight . . ..'

Any of these three AV-48A clauses, if employed by the appellant all risk insurers, might well have excluded the present loss.

Not only does it appear from the record that various clauses which would have excluded the present loss were in common use, but it appears that the General Policy Committee of the USAIG, which supplied the forms for the present all risk insurance, realized by May, 1970, that 'current war risk exclusions do not appear to be effective against intentional damage such as might be caused by hijackings, by bombs placed in aircraft by political activists, by riotous acts, etc.' See 368 F.Supp. at 1119. When the all risk insurers failed to exclude 'political risks in words descriptive of today's world events,' id., they acted at their own peril.[10]

10 The district court gave appropriate weight to other extrinsic evidence as to the relative scope of all risk and was risk coverage. It found that for a relatively small premium, $190,511, the war risk insurers assumed the risk of war-related losses relying on the benefit of such familiar canons of construction as contra proferentem. It is clear that the size of the premiums is relevant to the construction of the policy. 1 G. J. Couch, Cyclopedia of Insurance Law § 15:51 (2d ed. 1959); Beem v. General Accident, Fire & Life Assurance Corp., 231 Mo.App. 685, 105 S.W.2d 956 (1937); Prather v. American Motorists Insurance Co., 2 N.J. 496, 67 A.2d 135 (1949); cf. Muller v. Globe & Rutgers Fire Insurance Co., 246 F. 759, 761 (2d Cir. 1917). The district court gave proper weight to the fact that the all risk insurers adopted new clauses to deal with the present type of loss within six months after September 6. This fact is evidence of the ambiguity of the exclusions employed prior to September 6. 368 F.Supp. at 1120; see Hartol Products Corp. v. Prudential Insurance Co., 290 N.Y. 44, 48, 47 N.E.2d 687, 690 (1943); Orren v. Phoenix Insurance Co., 288 Minn. 225, 179 N.W.2d 166 (1970).

The all risk insurers contend that the insured, Pan American, should not have the benefit of contra proferentem because the exclusions in the all risk policies are not legally ambiguous. Citing cases like State Farm Mutual Automobile Insurance Co. v. Xaphes, 384 F.2d 640 (2d Cir. 1967), and Order of United Commercial Travelers v. Knorr, 112 F.2d 679 (10th Cir. 1940), they argue that the principle of construing ambiguity against the speaker does not apply to insurance terms that have 'already been judicially defined.' We find this argument completely unpersuasive on the facts of this case. The all risk insurers overstate when they assert that their exclusions have been subjected to extensive judicial interpretation. Terms such as 'insurrection,' 'rebellion' and 'civil commotion' have received little of the clear judicial construction which the courts in Xaphes and Knorr found in regard to the terms in those cases. See 384 F.2d at 641-642; 112 F.2d at 682. It is not irrelevant that the various counsel in this case have been able to infer radically different versions of the 'established ***1002** judicial meanings' of the exclusions. The plausibility of several of these interpretations is convincing evidence of the ambiguity of the exclusions, and a compelling reason for applying contra proferentem against the all risk insurers.

The all risk insurers claim that contra proferentem is not applied where 'the dispute is in reality between groups of insurers.' While their statement of principle may accurately represent the law in some jurisdictions, see, e.g., Boston Insurance Co. v. Fawcett, 357 Mass. 535, 538, 258 N.E.2d 771, 776 (1970), it does not state New York law. In London Assurance Corp. v. Thompson, 170 N.Y. 94, 62 N.E. 1066 (1902), the court resolved a dispute between an insurer and a reinsurer by construing the ambiguity of a dubious coverage clause against the author of the clause, the insurer, relying on the maxim of contra proferentem. In any event, the present case is no mere dispute between insurers. The all risk insurers' frivolous 'crossclaim' against the war risk insurers did not convert this action to a 'dispute between insurers.' It did not extinguish Pan American's substantial interest in the insurance policies. If loss was caused by a clause 1 or a clause 2 exclusion, Pan American will suffer serious financial consequences. As the district court accurately observed, 368 F.Supp. at 1122 n. 27, Pan American faces a $288,000 gap in coverage, which certainly creates a substantial interest. Furthermore, if the loss was caused by a clause 1 or clause 2 agency, there is serious doubt as to whether Pan American can collect any of the government excess war insurance, and as to whether it can collect prejudgment interest from the government.

The all risk insurers argue, at least insofar as they claim that the loss was proximately caused by 'war,' that although contra proferentem is used in construing life insurance policies, it is not employed in construing property policies. They base this distinction on the apparently fortuitous fact that none of the property cases which construes 'war' specifically relies on contra proferentem, probably because of a lack of ambiguity under the facts of those cases which for the most part arose during periods of declared war. The all risk insurers also press upon us the novel argument that contra proferentem is applicable to life policies only because there is no alternative source of war life coverage, while it is not applicable in property policies because alternative war risk coverage is available, presumably on the London market. But the existence of alternative sources of insurance cannot affect the scope of all risk coverage. See Equitable Fire & Marine Insurance Co. v. Allied Steel Construction Co., 421 F.2d 512, 514 (10th Cir. 1970). It is no help to the all risk case that Pan American obtained alternate coverage, particularly as to the value of the 747 in excess of 14 million dollars, for which there was no private alternative source of insurance. For the excess war coverage, Pan American was forced to turn to the government, historically also the source of war life insurance coverage. See, e.g., Reinold v. United States, 167 F.2d 556 (2d Cir.), cert. denied, 335 U.S. 824, 69 S.Ct. 48, 93 L.Ed. 378 (1948); Dennehy v. United States, 15 F.2d 196 (S.D.N.Y.1926). The distinction between property and life coverage has no basis in the decided cases or in common sense.

The all risk insurers argue that construing the ambiguity of their exclusions against them would not serve the rationale of contra proferentem, because, they claim, the all risk policies at suit are not adhesion contracts since there is no disparity between Pan American's and the all risk insurers' bargaining power. However, they offer no authority for the dubious proposition that contra proferentem derives only from the policy favoring victims of adhesion contracts. In any event, the district court correctly found that in the relevant sense the present all risk policies are adhesion contracts. See ***1003** 368 F.Supp. at 1121-1122. The all risk insurers are in effect all of the underwriters in the world who write such insurance. Pan American had no place else to turn for all risk coverage. The types of risks to be excluded by the all risk policies may have been negotiable to a certain limited extent, but the words describing these risks were not open to negotiation. These words were offered to the insured on a take-it-or-leave-it basis. Pan American was in no better bargaining position than any other insured. It could negotiate the scope of its coverage, paying a larger or smaller premium according to whether the scope of coverage was more or less extensive, but it had no significant control of the terms defining coverage.

Finally, the all risk insurers seek to avoid the special force which contra proferentem is given in cases where a known risk is not excluded by an apt term, by arguing that they had business reasons for not resorting to more specific exclusions. They argue that the risks of owning an aircraft are divided into three categories: 'operational' risks, which are normally undertaken by all risk carriers; 'war' risks of the type described in clauses 1 and 2 and in the standard marine F.C. & S. clause, and which are normally undertaken by war risk carriers; and 'gray area' risks, risks in between operational risks and war risks, which may be undertaken by either all risk or war risk carriers. They claim that 'hijacking' is a gray area risk. They argue that they contemplated that the risk of hijacking would be divided into 'warlike' hijacking, which risk was to be undertaken by the war risk insurers, and 'non-warlike' hijacking, which risk was to be undertaken by the all risk insurers. It was necessary to so divide the risk, they argue, because domestic airlines desired and needed 'non-warlike' hijacking coverage, while American insurers

had insufficient experience and premium volume to insure a carrier with foreign routes against 'warlike' hijacking. They argue, and one of their experts testified, that if 'political risk' exclusions had been incorporated in the USAIG forms, American insurers would have lost premiums to the London market. They claim that if they had employed market. They claim that if they had employed would have faced a gap in coverage, and if they had used that exclusion in part, reinsurance would have been impossible.

The district court found as a matter of fact that these business reasons are not to be credited, 368 F.Supp. at 1122, a finding that is not clearly erroneous. The all risk 'business reasons' sound like an attempt to extract the premium for insuring against hijacking, while not covering the type of hijacking that must have been of greatest concern to the international air carrier. There is nothing in the exclusionary language chosen by the all risk insurers to suggest a distinction between 'warlike' and 'non-warlike' hijackings; these dubious phrases appear nowhere in the policies in suit. Even if the all risk insurers intended to distinguish between 'warlike' and 'non-warlike' hijackings at the time the policies were written, their subjective or hidden intent is not competent to determine the meaning of the words they employed. See Rickerson v. Hartford Fire Insurance Co., 149 N.Y. 307, 43 N.E. 856 (1896); Wilson Sullivan Co. v. International Paper Makers Realty Corp., 307 N.Y. 20, 25, 119 N.E.2d 573, 575 (1954); Hotchkiss v. National City Bank, 200 f. 287, 293 (S.D.N.Y.1911), aff'd, 201 F. 664 (2d Cir. 1912), aff'd, 231 U.S. 50, 34 S.Ct. 20, 58 L.Ed. 115 (1913).

From this discussion it should be evident that if the district court erred in its application of contra proferentem, it erred in the direction of giving it too little weight. It found that this 'ancient canon' is not a 'decisive concern.' 368 F.Supp. at 1118. But the maxim defines the scope of coverage as much as if it were a clause in the all risk policies. It is part of the understanding of the parties. The experienced all risk insurers should have expected the exclusions drafted by them to be ***1004** construed narrowly against them, and should have calculated their premiums accordingly.

C. Standard of Review.

This case comes to us with the district court having resolved all factual issues against the all risk insurers. Rule 52(a) of the Federal Rules of Civil Procedure provides that

'findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.'

Thus, on this appeal, the all risk insurers have the burden of showing that the district court was clearly in error in its findings leading to the conclusion that the loss was not excluded by any term of exclusion.

The clearly erroneous standard applies not only to the district court's characterization of the events surrounding the September 6 hijacking, but also, in some rather uncertain manner, to the district court's findings as to the meaning of the terms of exclusion. The district court was obliged, as are we, to construe the exclusions as the parties would reasonably have expected them to be construed. 368 F.Supp. at 1139; see Bird v. St. Paul Fire and Marine Insurance Co., 224 N.Y. 47, 51, 120 N.E. 86, 87 (1918); Harris v. Allstate Insurance Co., 309 N.Y. 72, 75-76, 127 N.E.2d 816, 817-818 (1955); Ore & Chemical Corp. v. Eagle Star Insurance Co., 489 F.2d 455, 456-457 (2d Cir. 1973). The question of the parties' reasonable expectation is essentially a question of fact. To the extent that the district court's findings as to the scope of the exclusions depends on the intent of the parties, they may not be upset unless clearly erroneous. The legal authorities cited by the parties construing the terms at issue are relevant mainly as determinates of the parties' expectations.

The clearly erroneous rule has an implication that goes beyond the appellate process. When the all risk insurers wrote the present policies, they took the law as they found it. Premiums were set and coverages were purchased in reliance on rules of construction and procedure. The all risk insurers effectively insured against the 'peril' that a fact finder would erroneously but not clearly erroneously determine that a loss was not caused by an excluded agency.

Nevertheless, the all risk insurers now claim that at least two of the district court's findings should be reviewed by this court be novo: the finding, apropos 'insurrection,' that the Fedayeen and PFLP did not intend to overthrow King Hussein at any relevant time; and the finding, apropos 'warlike operations,' that the PFLP hijacked the 747 primarily for propaganda purposes. The all risk insurers argue that the evidence as to these two issues consists of documentary and 'third party reports' of PFLP statements. These statements, the all risk insurers argue, may be evaluated by this court de novo because a decision as to their effect does not turn on the

credibility of any witness. In support of this position they site United States ex rel. Lasky v. LaVallee, 472 F.2d 960, 963 (2d Cir. 1973) and Orvis v. Higgins, 180 F.2d 537, 539-540 (2d Cir.), cert. denied, 340 U.S. 810, 71 S.Ct. 37, 95 L.Ed. 595 (1950).

The all risk argument goes too far. In the first place, Lasky was a case in which a state prisoner was seeking federal habeas corpus relief and the state court record came cold to both the district court and the court of appeals. 472 F.2d at 963-964. Orvis stands for the proposition that a record consisting only of pleadings, depositions, and affidavits may, at the reviewing court's discretion, be reviewed de novo. It does not control a case like the present one, in which a great deal of the evidence consisted of third party testimony as to the statements and intentions of others.

An example of the evidence that the PFLP intended to overthrow King Hussein illustrates the need to accord respect ***1005** to the district court's fact findings. General Abdul Razzak El-Yahya, the Commander of the PLA during 1970, testified that at a meeting with PFLP 'leadership' at Dawson's Field 5 days after the September 6 loss, he heard a PFLP representative state that the object of the hijacking was 'to explode a revolution in the entire area.' The weight due this testimony depends on demeanor evidence and the accuracy of General El-Yahya's observational power and memory, his opportunity for knowing the facts, and his apparent bias, prejudice or interest. This testimony is completely unlike the documents considered in Orvis.

There is no basis on this record for not following the clear mandate of Rule 52. The district court heard six weeks of testimony. Its opinion reflects a detailed study of and an intimate familiarity with the record. The all risk witnesses were subjected to extensive cross-examination directed at their credibility. There is no warrant on this record for applying any standard of review other than the clearly erroneous test.

V. All Risk Exclusions

A. The All Risk Position.

The all risk insurers rely on all of the following words of exclusion in the all risk policies:

'This policy does not cover anything herein to the contrary notwithstanding loss or damage due to or resulting from:

'1. Capture, seizure . . . or any taking of the property insured or damage to or destruction thereof . . . by any military . . . or usurped power, whether any of the foregoing be done by way of requisition or otherwise and whether in time of peace or war and whether lawful or unlawful . . .;

'2. war, . . . civil war, revolution, rebellion, insurrection or warlike operations, whether there be a declaration of war or not;

'3. . . . riots, civil commotion.'

The all risk position is that the terms employed define uninterrupted overlapping areas of exclusion on a continuum of violence. They claim that in terms of approximately increasing scale and organization of violence, 'riot,' 'civil commotion,' 'insurrection,' 'military or . . . usurped power,' 'rebellion,' 'revolution,' 'civil war,' 'warlike operations,' and 'war' exhaust the possibilities, and that the cause of the loss must be described by at least one of the terms.

However, each of the exclusionary terms has dimensions besides the level of violence. For example, for there to be a 'riot' three or more actors must gather in the same place; for there to be an 'insurrection' there must be an intent to overthrow a lawfully constituted regime; for there to be a 'war' a sovereign or quasi-sovereign must engage in hostilities. The doctrine of contra proferentem shrinks the all risk 'overlapping areas' to mere points on a line of violence. The lacunae between these points include the vast number of nameless causes that are not precisely described by the terms actually employed.

The fact that the all risk insurers have chosen to rely on nearly all of the terms of these three exclusions has affected their cause adversely. The district court correctly observed that we can infer from their reliance on so large a number of exclusions that the all risk insurers recognize that each of the exclusions is ambiguous or has only uncertain application to the facts. 368 F.Supp. at 1117; see Sincoff v. Liberty Mutual Fire Insurance Co., 11 N.Y.2d 386, 390, 230 N.Y.S.2d 13, 16, 183 N.E.2d 899 (1962); Silverstein v. Commercial Casualty Insurance Co., 237 N.Y. 391, 393, 143 N.E. 231, 232 (1924). The all risk insurers' shotgun approach belies its claim that these terms have certain fixed meanings.

***1006** B. Proximate Cause.

The all risk policies exclude 'loss or damage due to or resulting from' the various enumerated perils, a phrase that

clearly refers to the proximate cause of the loss. Remote causes of causes are not relevant to the characterization of an insurance loss. In the context of this commercial litigation, the causation inquiry stops at the efficient physical cause of the loss; it does not trace events back to their metaphysical beginnings. The words 'due to or resulting from' limit the inquiry to the facts immediately surrounding the loss. Standard Oil Co. v. United States, 340 U.S. 54, 58, 71 S.Ct. 135, 95 L.Ed. 68 (1950); Airlift International, Inc. v. United States, 335 F.Supp. 442, 449 (S.D.Fla.1971), aff'd, 460 F.2d 1065 (5th Cir. 1972) (mem.). Thus, in Queen Insurance Co. v. Globe & Rutgers Fire Insurance Co., 263 U.S. 487, 492, 44 S.Ct. 175, 176, 68 L.Ed 402 (1924), Mr. Justice Holmes wrote:

'The common understanding is that in construing these policies we are not to take broad views but generally are to stop our inquiries with the cause nearest to the loss. This is a settled rule of construction, and if it is understood, does not deserve much criticism, since theoretically at least the parties can shape their contract as they like.'

New York courts give especially limited scope to the causation inquiry. The leading case is Bird v. St. Paul Fire & Marine Insurance Co., 224 N.Y. 47, 120 N.E. 86 (1918) (Cardozo, J.). In Bird, the insured vessel was damaged by a concussion caused by an explosion in a freight yard about a thousand yards from the vessel. The explosion came about when a fire set off a stock of explosives. The insured sued on an insurance policy covering losses caused by 'fire.' The Court of Appeals held that the loss was not caused by fire. It ascertained that the scope of causation relevant to the insurance nature of a loss is largely a question of fact depending on the reasonable expectations of businessmen:

'The question is not what men ought to think of as a cause. The question is what they do think of as a cause. We must put ourselves in the place of the average owner whose boat or building is damaged by the concussion of a distant explosion, let us say a mile away. Some glassware in his pantry is thrown down and broken. It would probably never occur to him that within the meaning of his policy of insurance, he had suffered loss by fire. A philosopher or a lawyer might persuade him that he had, but he would not believe it until they told him. He would expect indemnity, of course, if the fire reached the thing insured. He would expect indemnity, very likely, if the fire was near at hand, if his boat or his building was within the danger zone of ordinary experience, if damage of some sort, whether from ignition or from the indirect consequences of fire, might fairly be said to be within the range of normal apprehension.' Id. at 52, 120 N.E. at 87.

Britain S. S. Co. v. The King, (1919) 2 K.B. 670 (C.A.), aff'd, (1921) 1 A.C. 99 (1920)(1921) 1 A.C. 99 (1920), illustrates how this principle has been applied by the English courts in the context of war-related losses. While on a voyage from England to Alexandria in the company and under the orders of a British escort, the Matiana went aground and was lost, because the convoy had taken a more northerly route than usual to avoid German submarines. The Court of Appeals held that the loss was due to a marine peril, running aground, rather than to a 'warlike operation.' It held that the warlike activity of the escorts did not proximately cause the loss: The Crown's naval authorities ordered the ship to take a general course fraught with maritime perils, but they did not actually order the Matiana aground. (1919) 2 K.B. at 699-700 (per Atkins, L.J.). The ***1007** House of Lords agreed. (1921) 1 A.C. at 1121-22 (per Atkinson, L.J.).

Decisions in a variety of other jurisdictions follow the same approach. When the Linwood went aground as a result of the Confederates putting out the Hatteras light, the loss was a 'consequence' of a marine peril, rather than 'hostilities.' Ionides v. Universal Marine Insurance Co., 143 Eng.Rep. 445, 456 (C.P.1863) (per Erle, C.J.). When the John Worthington collided with a minesweeper that was clearing the channel approaches to New York harbor in 1942, the loss was due to the collision, a marine peril, rather than the warlike reason for the minesweeper's presence in the harbor. Standard Oil v. United States, 340 U.S. 54, 71 S.Ct. 135, 95 L.Ed. 68 (1950). When the Napoli was lost in a head-on collision with another ship because it was sailing without running lights under British order, the loss was due to a marine peril, the collision. Queen Insurance Co. v. Globe & Rutgers Fire Insurance Co., 282 F. 976 (2d Cir. 1922), aff's, 263 U.S. 487, 44 S.Ct. 175, 68 L.Ed. 402 (1924). When an insured aircraft was lost over Vietnam in a collision with a military aircraft, the loss was due to an aviation peril, notwithstanding that the two aircraft were flying over Vietnam only because there was a war. Airlift International, Inc. v. United States, 335 F.Supp. 442, 449 (S.D.Fla.1971), aff'd, 460 F.2d 1065 (5th Cir. 1972) (mem.).

These cases establish a mechanical test of proximate causation for insurance cases, a test that looks only to the 'causes nearest to the loss.' Queen Insurance Co. v. Globe

& Rutgers Fire Insurance Co., supra at 492, 44 S.Ct. 175. This rule is adumbrated by the maxim contra proferentem: if the insurer desires to have more remote causes determine the scope of exclusion, he may draft language to effectuate that desire. Id.; Fleeney & Meyers v. Empire State Insurance Co., 228 F.2d 770, 771 (10th Cir. 1955). In the present case, events drawn from the general history of unrest in the Middle East did not proximately cause the destruction of the 747. Of course, in some attenuated 'cause of causes' sense, the loss may have resulted from the Fedayeen or PFLP pattern of military operations against Israel, from the domestic unrest in Jordan, or from the most recent of the three wars which prior to 1970 had convulsed the Middle East. But for insurance purposes, the mechanical cause of the present loss was two men, who by force of arms, diverted Flight 093 from its intended destination.

In light of the extensive references in the record to the activities of the Fedayeen and the Palestine Liberation Organization ('PLO'), it is important to bear in mind that the loss of the 747 was not proximately caused by the PLO, the Fedayeen, or Al Fatah. Evidence elicited by the all risk insurers concerning the activities of the PLO and other less homogeneous groups has no bearing on the causes of the present loss. The PFLP was a small political force that most often acted independently from other Palestinian entities. The district court found, with ample support in the record, that 'hijackings and other so called 'external operations' . . . were unique tactics of PFLP terrorism, almost uniformly opposed, . . . by the other far more numerous fedayeen groups,' 368 F.Supp. at 1110. The PFLP boycotted the PLO during 1969, and sent only one representative, an observer, to the May 30, 1970, Seventh National Council Session of the PLO. The PFLP refused to join the Palestine Armed Struggle Command or the United Command, successive military branches of the PLO. The all risk insurers concede that there were vast philosophical differences between the PFLP, which fought 'world imperialism,' and the other more moderate Fedayeen groups, which sought only to destroy Israel. A PFLP propaganda statement of September 13, 1970, stated that the PFLP did not act on behalf of the PLO when it hijacked the 747 and the various other aircraft to Dawson's Field. Other major Fedayeen groups uniformly condemned ***1008** hijacking as a tactic. As a result of the September 6 hijackings, the Central Committee of the PLO suspended the PFLP from membership.

The all risk insurers' only argument linking the Fedayeen as a group to the present loss is their assertion that when it committed the September 6 hijacking, the PLFP hoped to force the other Fedayeen to follow them. But it misses the point in cases like Bird and Ionides, and it puts the cart before the horse, to attribute the cause of a loss to the organizations which the PFLP hoped to influence by taking and destroying the 747.

Aside from the above considerations, all of the parties recognize that when a peril results in the owner's losing control over insured property, any subsequent damage to or loss of the property is attributable to the peril causing the loss of control. In other words, the proximate cause of a loss resulting from a taking followed by destruction is determined by the nature of the taking. While the events immediately preceding the taking may proximately cause a loss, the events following a taking may not. The insurance authorities uniformly support this rule, and supply examples of its application. When the Llama was taken at sea by the British government during the First World War and subsequently run aground, the loss was due to a 'taking at sea,' rather than a marine peril. Standard Oil Co. v. United States (The Llama), 267 U.S. 76, 45 S.Ct. 211, 69 L.Ed. 519 (1925). When the schooner Yankee was seized by Granadian authorities and subsequently deteriorated, the loss was caused by the seizure. Magoun v. New England Marine Insurance Co., 16 Fed.Cas. p. 483 (No. 8,961) (C.C.Mass.1840) (Storey, C.J.). When the Romulus, a neutral ship, was seized by the Japanese during the Russo-Japanese war and was subsequently lost due to a peril at sea, the House of Lords held that the owner could not recover on a marine policy with the usual F.C. & S. clause. Andersen v. Marten, (1908), A.C. 334, 338. See also General Exchange Insurance Corp. v. Kinney, 279 Ky. 76, 129 S.W.2d 1014 (1939); Dole v. New England Mutual Marine Insurance Co., 7 Fed.Cas. p. 837 (No. 3,966) (C.C.Mass.1864). Cf. J. & H. Schieffelin v. New York Insurance Co., 9 Johns. 21 (N.Y.1812); Greene v. Pacific Mutual Insurance Co., 91 Mass. (9 Allen) 217 (1864).

The principle that the taking characterizes the loss has been applied by at least one court to an aircraft hijacking. In Sunny South Aircraft Service, Inc. v. American Fire & Casualty Co., 140 So.2d 78 (Fla.Dist.Ct.App.1962), aff'd, 151 So.2d 276 (Fla.1973), the insured aircraft was covered for theft excluding losses 'due to war . . . rebellion or revolution.' The airplane was hijacked in the United States and taken to Cuba where it was damaged by a Cuban military plane. The court found that the loss was proximately caused by theft rather than by warlike activity, and accordingly held that the loss was not excluded. If events following a hijacking were permitted to

control the insurance nature of the loss, the outcome in any case would vary according to the whim of the hijacker. In the present case the 747 might well have been destroyed in the air over London by two hijackers, rather than in Cairo by a larger group. The parties cannot have intended that the caprice of the hijackers would control the insurance consequences of the loss. It is not relevant in this case that after the aircraft was hijacked by two actors, a third came aboard, or that extensive civil disorders broke out in Jordan nine days after the hijacking.

VI. Clause 1 Exclusion

The all risk insurers claim that the destruction of the 747 was 'due to or resulting from' unrest in Jordan of a type which is fairly described by the first exclusion:

'1. capture, seizure, arrest, restraint or detention or the consequences *1009 thereof or of any attempt thereat, or any taking of the property insured or damage to or destruction thereof by any Government or governmental authority or agent (whether secret or otherwise) or by any military, naval or usurped power, whether any of the foregoing be done by way of requisition or otherwise and whether in time of peace or war and whether lawful or unlawful (this subdivision 1. shall not apply, however, to any such action by a foreign government or foreign governmental authority following the forceful diversion to a foreign country by any person not in lawful possession or custody of such insured aircraft and who is not an agent or representative, secret or otherwise, of any foreign government or governmental authority)'.

At the outset there is some controversy as to the implication of the second parenthetical of clause 1, the parenthetical beginning 'this subdivision . . ..' The all risk insurers claim that the deletion from the exclusion of acts following a 'forceful diversion' implies that 'forceful diversion' is a risk excluded by clause 1, except as to the particular case described by the parenthetical. The war risk insurers argue that because 'forceful diversion' appears in an exception to an exclusion, we must infer that the all risk policies cover 'forceful diversion.'

Both of these arguments miss the point of the second parenthetical. The all risk insurers represent that it was added to make it clear that the policy covers hijackings of aircraft to Cuba. It was intended and added, no doubt, out of an abundance of caution, to specify the outcome in a specific case. The parenthetical does not apply to the present facts, because there was no 'action by a foreign government.' The parenthetical is relevant only in that it shows that the all risk insurers were quite capable of resolving known ambiguities in concrete terms descriptive of today's events.

The all risk insurers' principal argument under clause 1 is that the loss of the Pan American 747 resulted from its destruction by a 'military . . . or usurped power' [11] in Jordan. They claim that as a matter of law military or usurped power embraces 'an organized force defying the general enforcement of the laws by force of arms,' and that this definition applies to PFLP and, more certainly, to Fedayeen activity in Jordan. Pan American argues that to be a military or usurped power, a force must control a substantial territory with trappings of state sufficient to constitute it a 'de facto government.' The opposing formulations were considered by the district court, but it did not choose between them. It found that the PFLP 'occupied' ground in Jordan at the sufferance of the Jordanian government, and held only that such occupation 'is surely insufficient' to constitute a military or usurped power. Accordingly it held that the loss was not excluded by clause 1. 368 F.Supp. at 1129-1130. We hold that in order to constitute a military or usurped power the power must be at least that of a de facto government. On the facts of this case, the PFLP was not a de facto government in the sky over London when the 747 was taken. Thus the loss was not 'due to or resulting from' a 'military . . . or usurped power.'

11 Since 1720, when these terms were first used by the London Assurance Company, see Langdale v. Mason, 1 Bennett's Fire Ins. Cas. 16, 17 (K.B.1780), the conjunction in 'military or usurped power' has been construed as if it were copulative, rather than disjunctive. Thus it is not sufficient that a loss be caused either by a military power or usurped power; it must be caused by a military and usurped power. Cf. Insurance Co. v. Boon, 95 U.S. (5 Otto) 117, 127, 24 L.Ed. 395 (1877). It is also clear that 'usurped power' refers to the power exercised by a usurping force. Cf. Page v. Home Insurance Co., 48 F.Supp. 754, 757 (S.D.N.Y.), aff'd, 139 F.2d 231 (2d Cir. 1943). The clause 1 exclusion, in plain modern English, secures the all risk insurers from losses caused by the military activities of a usurping power.

*1010 The words military or usurped power have a long history of inclusion in insurance policies, but they have received only scant judicial attention, presumably because the events necessary to bring them into play are extraordinary.

See Barton v. Home Insurance Co., 42 Mo. 156, 158 (1868). They have been considered in the context of the Irish rebellion, the American Civil War, and, hypothetically, in the context of the invasion of England by Charles Edward Stuart. The insurance meaning of military or usurped power was first considered in Drinkwater v. The Corporation of the London Assurance, 95 Eng.Rep. 863 (C.P.1767). In 1766, Drinkwater's malting house at Norwich was burned by a mob which 'arose . . . upon account of the high price of provisions.' The building was insured by a fire policy excluding fires caused by 'any military or usurped power whatsoever.' Common Pleas held that the loss was not excluded by the phrase. Mr. Justice Bathurst, in an opinion that has not gone unnoticed by American authorities, see City Fire Insurance Co. v. J. & H. P. Corlies, 21 Wend. 367, 370 (N.Y.1839), said that military or usurped power can 'only mean an invasion of the kingdom by foreign enemies . . . or an internal armed force in rebellion assuming the power of government, by making laws, and punishing for not obeying those laws . . ..' 95 Eng.Rep. at 863. Chief Justice Wilmot, whose opinion has also been cited by American authorities, see e.g., Portsmouth Insurance Co. v. Reynolds' Adm'x, 73 Va. (32 Gratt.) 613, 623 (1880), Barton v. Home Insurance Co., 42 Mo. 156, 158 (1868), was of a similar mind. A loss is due to a usurped power when the insured property is 'set fire by occasion of an invasion from abroad, or of an internal rebellion, when armies are employed to support it (,) when the laws are dormant and silent, and the firing of towns is unavoidable.' Id. at 864. Considering the events closest to the present loss, the events mechanically causing the loss, the 747 hijacking comes within no fair reading of Drinkwater.

The district court found that however PFLP activities in Jordan and Lebanon might be characterized, the PFLP did not have usurped power over London at the time of the hijacking. 368 F.Supp. at 1130. This finding is not clearly erroneous. The all risk proof as to the events closest to the loss does not indicate that the PFLP was a usurped power in Amsterdam, over London, circling Beirut, or in Cairo.

Even viewing proximate cause more broadly than cases like Bird v. St. Paul Fire & Marine Insurance Co., supra, warrant and considering the events in Jordan which were concurrent with the Pan American hijacking, the all risk insurers still do not make out a case that the loss was due to PFLP military or usurped power. The all risk insurers have not carried their burden of proving that the PFLP, as opposed to the Fedayeen or Fatah, had, at the time of the hijacking, assumed 'the power of government by giving laws and punishing for not obeying those laws.'

Thirteen years after Drinkwater was decided, Lord Mansfield charged a jury as to the insurance meaning of military or usurped power in Langdale v. Mason, 1 Bennett's Fire Ins. Cas. 16 (K.B.1780). A distillery owned by Langdale, a Catholic, was set on fire by a mob in London during the 'no popery' riot led by Lord Gordon in 1780. The distillery was covered by a fire policy issued by the Sun Fire Office, which policy excluded losses caused by 'civil commotion' and 'military or usurped power.' Lord Mansfield instructed the jury as follows:

'The words military or usurped power . . . must mean rebellion conducted by authority, as in the year 1745, when the rebels (led by Charles Edward Stuart) came to Derby; and if they had ordered any part of the town, or a single house to be set on fire, that would have been by authority of a rebellion . . .. Usurped ***1011** power takes in rebellion, acting under usurped authority.' Id. at 17.

In light of the example given by Lord Mansfield, Charles the Pretender's occupation of Derby, it is clear that he considered that a usurped power must have at least a colorable claim to governmental power, a claim that the all risk insurers do not make on behalf of the PFLP.

The all risk insurers argue at some length that a 'rebellious mob' asserts usurped power, while a 'common mob' does not, citing Drinkwater, Langdale and Curtis & Sons v. Mathews, (1918) 2 K.B. 825, aff'd, (1919) 1 K.B. 425 (C.A.1918). They assert that a common mob commits felonies, say by going about and pulling down particular enclosures, while a rebellious mob commits high treason, say by undertaking to pull down all enclosures. See Bradshaw v. Burton's Case, 79 Eng.Rep. 1227 (Q.B.1597); Rex v. Messenger, 84 Eng.Rep. 1087, 1089-90 (K.B.1668). They claim that the common mob-rebellious mob distinction controls the present insurance case because the felony-high treason distinction was once recognized in American criminal jurisprudence. See, e.g., Bryant v. United States, 257 F. 378, 386-387 (5th Cir.), cert. denied, 40 S.Ct. 117 (1919); United States v. Hanway, 26 Fed.Cas. pp. 105, 128-129 (No. 15,299) (C.C.E.D.Pa.1851); United States v. Mitchell, 26 Fed.Cas. p. 1277 (No. 15,788) (C.C.D.Pa.1795).

The common mob-rebellious mob argument is based on a false reading of the English cases, is shot through with non sequiturs, and, in any event, does not aid the all risk insurers. All of the opinions in Drinkwater make it clear that the gravamen of usurped power is the action of an army giving

its own law, silencing the law of the land. But even accepting that a 'rebellious mob' may exercise 'usurped power,' we do not see how that fact aids the all risk case. It surely cannot be said that Diop and Gueye were a rebellious mob that set out to commit treason. Neither can it be said that they set out to hijack all airplanes in general, rather than whatever specific airplane they might chance upon. The 'rebellious mob' concept simply does not advance the all risk position.

American cases growing out of the Civil War, the most clear example of a usurped power in our history, are consistent with the rule that a de facto government is necessary to constitute a usurped power. In Insurance Co. v. Boon, 95 U.S. (5 Otto) 117, 24 L.Ed. 395 (1877), a fire was set by Union soldiers during a battle with Confederate forces at Glasgow, Missouri. The Supreme Court held that the rebels were a usurped power and indicated that usurped power is either the power exerted by invading foreign enemies or by an internal armed force in rebellion 'sufficient to supplant the laws of the land and displace the constituted authorities.' Id. at 127. Barton v. Home Insurance Co., 42 Mo. 156 (1868), a case arising out of the same Glasgow engagement, and Portsmouth Insurance Co. v. Reynolds' Adm'x, 73 Va. (32 Gratt.) 613 (1880), both cite with approval Justice Wilmot's opinion in Drinkwater and both support the proposition that military or usurped power requires the force of a quasigovernmental authority.

The all risk insurers have attempted to show that the PFLP or Fedayeen constituted a quasi-governmental entity by reciting a history of domestic convulsions suffered by Jordan. The fault with this argument lies not in its statement of historical fact, which is largely undisputed. The fault lies in the record's constant reference to the Fedayeen. As we have already observed, the Fedayeen did not cause the loss of the Pan American 747: that loss was caused by the acts of the PFLP agents.

Taking an unduly broad view of proximate cause and considering the events in Jordan and Lebanon as bearing on the insurance nature of a loss that occurred over London, the PFLP did not have sufficient incidents of a de facto government in those countries to constitute a military or usurped power. ***1012** The all risk insurers have marshalled the evidence favoring their view that the PFLP was a de facto government, but that body of evidence is so unimpressive that it is clear that the district court was not in error in holding that it was a mere political group.

The fact that Hussein negotiated with the PFLP for the release of hostages does not establish that the PFLP was being dealt with as a government. Officials may negotiate with individuals who hold hostages without according such individuals governmental status. The only power that these events reflect is the power of the PFLP to hold hostages, which, though the very essence of hijacking is surely not an incident of 'quasi-government.'

The PFLP 'occupations' of Dawson's Field and 'Salt Camp' in Jordan signify nothing. Dawson's Field was a narrow strip of land located in a trackless wasteland of desert and lava flows, devoid of life and structure. Salt Camp was a 'barren and exiguous facility containing some caves, tents, and rudimentary structures,' 368 F.Supp. at 1130. Moreover the record is devoid of particulars concerning the extent of PFLP 'control' over the Camp.

If there was a military or usurped power in Jordan in 1970, it was not the PFLP.

VII. Clause 2 Exclusions

A. War.

The district court found that the term war 'has been defined almost always as the employment of force between governments or entities essentially like governments, at least de facto.' 368 F.Supp. at 1130. The PFLP was not a de facto government in the context of 'war' for substantially the same reasons that it was not a government in the context of 'military . . . or usurped power.'

The cases establish that war is a course of hostility engaged in by entities that have at least significant attributes of sovereignty. Under international law war is waged by states or state-like entities. [12] Lauterpacht defines war as a 'contention between two or more States through their armed forces . . ..' 2 L. Oppenheim, International Law 202 (H. Lauterpacht, 7th ed. 1952). War is 'that state in which a nation prosecutes its right by force.' The Brig Amy Warwick (The Prize Cases), 67 U.S. (2 Black) 635, 666, 17 L.Ed. 459 (1862); see also Bas v. Tingy (The Eliza), 4 U.S. (4 Dall.) 32, 35-36, 1 L.Ed. 731 (1800).

12 Of course the international law definition of war does not necessarily govern the insurance meaning of the term, see Kawasaki Kisen Kabushiki Kaisha v. Bentham S.S. Co., (1939) 2 K.B. 544, 556-559;

New York Life Insurance Co. v. Durham, 166 F.2d 874, 876 (10th Cir. 1948), but it provides a starting place for our inquiry.

English and American cases dealing with the insurance meaning of 'war' have defined it in accordance with the ancient international law definition: war refers to and includes only hostilities carried on by entities that constitute governments at least de facto in character. For example, in Britain S.S. Co. v. The King, (1921), 1 A.C. 99 (1920)Britain S.S. Co. v. The King, (1921), 1 A.C. 99 (1920), an action on dovetailing marine and war risk policies, Lord Atkinson stated that 'hostilities,' a term certainly of no narrower scope than 'war,' 'connotes the idea of belligerents, properly so called, enemy nations at war with one another.' Id. at 114. In Vanderbilt v. Travelers' Insurance Co., 112 Misc. 248, 184 N.Y.S. 54 (Sup.Ct.N.Y.Cty.1920), aff'd, 202 App.Div. 738, 194 N.Y.S. 986 (1st Dep't 1922) (mem.), aff'd, 235 N.Y. 514, 139 N.E. 715 (1923) (mem.), the deceased lost his life when the Lusitania was sunk by a German submarine. His life was insured by a policy that excluded death due to 'war.' Notwithstanding the beneficiaries' protestations that the deceased was not a combatant, the New York courts held that the death was due to war, finding that the Lusitania was sunk in accordance with the instructions of a sovereign government, Germany, by naval forces of that government, ***1013** during a period when a war was in progress between Great Britain and Germany. [13]

13 The all risk insurers urge that life insurance policies are subject to different rules of construction than property policies, and that accordingly, Vanderbilt does not control the present case. We find this argument, which is based on the premise that contra proferentem is applied in life cases but not property cases, completely unconvincing.

In the present case, the loss of the Pan American 747 was in no sense proximately caused by any 'war' being waged by or between recognized states. The PFLP has never claimed to be a state. The PFLP could not have been acting on behalf of any of the states in which it existed when it hijacked the 747, since those states uniformly opposed hijacking.

The facts of the present case closely parallel those in Welts v. Connecticut Mutual Life Insurance Co., 48 N.Y. 34 (1871). In Welts, the insured deceased was killed while working on a civilian railroad crew about thirty miles to the rear of General Thomas's union army. Four armed men, who carried only revolvers and who wore no insignia or uniforms, robbed the crew and murdered the deceased. The court held that these facts did not present a case for the jury on the issue of whether the loss was caused by 'war or rebellion.' It found that there was no evidence that the four robbers were acting under the authority of the Confederacy. While recognizing that a war or rebellion involving the Confederacy may have remotely caused Welts's death, the court held that the proximate cause was a murder committed by highway robbers. Id. at 40. In the present case, the criminal acts of Diop and Gueye were the proximate cause of the loss of the 747, not a remote conflict between warring states.

In any event, the present record discloses that there was no 'war' in the Middle East on September 6. A cease fire had been negotiated early in August, and was being observed at the time of the loss. In Shneiderman v. Metropolitan Casualty Co., 14 A.D.2d 284, 220 N.Y.S.2d 947 (1st Dep't 1961), the Appellate Division held that for the purpose of a life insurance war exclusion, the decedent's death from artillery fire in Egypt was not caused by 'war' because it occurred after the 1956 cease fire. See also New York Life Insurance Co. v. Durham, 166 F.2d 874 (10th Cir. 1948); Mutual Life Insurance Co. v. Davis, 79 Ga.App. 336, 53 S.E.2d 571 (1949).

The all risk insurers' claim that the loss was due to a 'war' thus stands or falls on the proposition that it was caused by a PFLP 'guerrilla war' waged against either or both Israel and the United States. War can exist between quasi-sovereign entities. Cf. Hamdi & Ibrahim Mango Co. v. Reliance Insurance Co., 291 F.2d 437, 442 (2d Cir. 1961). And of course an undeclared de facto war may exist between sovereign states. See New York Life Insurance Co. v. Bennion, 158 F.2d 260, 263 (10th Cir. 1946), cert. denied, 331 U.S. 811, 67 S.Ct. 1202, 91 L.Ed. 1871 (1947); cf. Arce v. State, 83 Tex.Cr.R. 292, 202 S.W. 951 (1918). But the all risk insurers propose to push the meaning of war much further. Central to their argument is the proposition that war a it is used in property insurance policies includes conflicts waged by guerrilla groups regardless of such groups' lack of sovereignty. For authority, they rely primarily on three cases, Montoya v. United States, 180 U.S. 261, 21 S.Ct. 358, 45 L.Ed 521 (1901); Curtis & Sons v. Mathews, (1918) 2 K.B. 825, aff'd, (1919) 1 K.B. 425 (C.A.1918); and Pesquerias y Secaderos de Bacalao de Espana, S.A. v. Beer, 1 All E.R. 845 (H.L. 1949), aff'g 80 Lloyd's List L.R. 318 (C.A.1947), rev'g 79 Lloyd's List L.R. 417 (K.B.1946). Our understanding of these cases is that to the limited extent that they are relevant to these facts, they

imply that a guerrilla group must have at least some incidents of sovereignty before its activity can properly be styled 'war.'

***1014** In Montoya v. United States, supra, the issue was not the insurance meaning of war, but the meaning of the terms 'band (or) tribe . . . in amity with the United States,' as they were used in a federal claims act which indemnified persons whose property was destroyed by Indians. The Court held that the Indians causing the loss belonged to such a band or tribe, a holding consistent with the congressional intent that a mere 'tribe' could be 'in amity' with the United States. The all risk insurers rely heavily on statements in Montoya as to the meaning of 'war,' an issue that was clearly not before the Court.

Curtis & Sons v. Mathews, supra, arose out of the 1916 'Easter Rebellion' in Dublin, during which the rebels occupied the Dublin General Post Office. British forces shelled the Post Office with 18 pound guns. A fire started by the shelling reached the insured building about 100 yards from the Post Office. The building was covered by a policy insuring against losses 'caused by war, bombardment, military or usurped power.' The King's Bench Division held that the loss was caused by war. However, the Irish rebels had more of a claim to the incidents of statehood in Ireland in 1916 than the PFLP had in Jordan in 1970. The Court of Appeals in affirming merely held that the loss was proximately caused by 'bombardment' by the 18 pounders, without considering the war issue. (1919), K.B. at 429.

The third of the cases relied upon by the all risk insurers in Pesquerias y Secaderos, supra. In October of 1936, the Spanish government authorized Basque independence. A force of from eight to ten thousand men was organized into a 'Basque Militia,' which the House of Lords found constituted 'an organised force recognized by the government.' 1 All E.R. at 847. In the course of a complex sequence of events, insured trawlers owned by the plaintiff were taken by the Basque forces for the use of the Republican government. The ships were armed and their trawling gear was removed. The Lords concluded that the loss of the trawlers' gear was proximately caused by the Spanish Civil War, and that losses due to 'civil war' were excepted from coverage by a 'war risk' exclusion. The all risk insurers argue that in 1970 the PFLP was a guerrilla force 'more substantial and organized' than the Basque Militia which, in Pesquerias y Secaderos, was found to have engaged in war. But compared with the Basque Militia, the PFLP is a relatively minute entity. The PFLP has never acted on behalf of a recognized government, while the Basque Militia was under the command of the short-lived but duly formed Basque Republic.

The all risk insurers support their contention that 'war' includes the acts of guerrillas lacking the incidents of statehood with citations to civil law authority. They point to a group of cases which hold that losses incident to the activities of resistance movements during World War II were excluded by war exclusions applicable to insurance policies. For example, in Beccarini v. Societa La Sicurta, (1950) Ann.Dig. 352 (No. 111) (Ct.Cass., Italy), it was determined that a loss caused by terrorist activity in Italy during the period from 1943 through 1945 was a 'war' loss under section 1912 of the Italian Civil Code.[14] This case illustrates the particular difficulty of relying on continental authority. It interprets a provision in a national code, with which we are entirely unfamiliar, rather than an insurance policy. As a common law court we do not know what weight is due the statements of these civil law judges, ***1015** statements which under the civil law system probably do not have the force of positive law.

14 Section 1912 of the Civil Code reads as follows: 'Earthquake, war, insurrection, riots. Unless otherwise agreed, the insurer is not liable for damage caused by earthquake, war, insurrection or riots.' Section 1912 Italian Civil Code of 1942 (Beltramo, et al., eds. 1969).

The rationale of the occupation cases cited by the all risk insurers, cases such as Drenthina v. Nieuwe Eerste Nederlandsche Insurance Co., (1948) Ann.Dig. 435 (No. 132) (Dist.Ct.Rotterdam), and Van Hoeve de Feyter v. Fire Insurance Co. of 1859, Ltd., (1947) Ann.Dig. 169 (No. 81) (Dist.Ct.Dordrecht Neth.), was that civilian conduct in an occupied land may partake of the nature of war. This rationale simply does not apply to the present facts. Jordan was not occupied by a foreign power resisted by the Fedayeen.

A holding that a loss caused by the Algerian FLN was due to 'guerre civile' comes as no surprise, and surely can be of little aid to the all risk cause. See Societe 'Purfina francaise' v. Cie d'assur. La Nationale, (1962) D.Jur. 247 (Cass.civ.1re).

Aside from our hesitation to rely on cases decided in a foreign system of jurisprudence, there is good reason for giving little or no weight to continental authority. Decided authorities are relevant to the issue of the intended scope of the all risk exclusions only to the extent that the parties' expectations were shaped by them. Surely the parties to the

all risk insurance policies did not rely on civil law cases to predict the meaning of ancient words originating, for the most part, in English maritime insurance practice.

The evidence shows that Middle Eastern states did not accord the PFLP the rights of a government. Jordan and Lebanon 'negotiated' with the PFLP only in the sense that any government 'negotiates' with a terrorist who holds hostages. Jordan 'negotiated' the release of Morris Drper, an American diplomat kidnapped by the PFLP, by insisting on his release and by planning to utilize the Army against the Fedayeen unless he was released. The government of Lebanon did not meet with the Fedayeen as equals. It forced them to attend meetings with the Lebanese Minister of Interior so it could keep tabs on them. No Arab state recognized the PFLP. The fact that the PFLP received financial support from several states does not give it the status of a 'quasisovereign.'

The record discloses that the PFLP may or may not have conducted guerrilla warfare against Israel. However it stretches the notion of proximate cause too far to suppose that a guerrilla war against Israel, if there was such a war, caused the hijacking over London of an American aircraft owned by a carrier that serves no routes to Israel. See Bird v. St. Paul Fire & Marine Insurance Co., supra.

The all risk insurers' alternate theory that the loss resulted from a guerrilla war between the PFLP and the United States, is wholly untenable. The only evidence that the PFLP and the United States were at war consists of the PFLP's self-serving propaganda, propaganda claiming that the PFLP was effectively at war with the entire Western World. Such radical rhetoric cannot affect the outcome of this insurance case.

The loss of the Pan American 747 was not caused by any act that is recognized as a warlike act. The hijackers did not wear insignia. They did not openly carry arms. Their acts had criminal rather than military overtones. They were the agents of a radical political group, rather than a sovereign government.

B. Warlike Operations.

While finding the term warlike operations to be somewhat broader than war, the district court distinguished warlike operations from non-warlike operations on the following basis:

'There is no warrant in the general understanding of English, in history, or in precedent for reading the phrase 'warlike operations' to encompass (1) the infliction of intentional violence by political groups (neither ***1016** employed by nor representing governments) (2) upon civilian citizens of non-beligerent powers and their property (3) at places far removed from the locale or the subject of any warfare. (4) This conclusion is merely reinforced when the evident and avowed purpose of the destructive action is not coercion or conquest in any sense, but the striking of spectacular blows for propaganda effects.' 368 F.Supp. at 1130.

The all risk insurers attack seriatim each of the four branches of the district court's formulation as inconsistent with decided cases establishing the insurance meaning of warlike operations. As to the first branch, they argue that Montoya v. United States, supra, Curtis & Sons v. Mathews, supra, and Hamdi & Ibrahim Mango Co. v. Reliance Insurance Co., supra, all illustrate that political groups not employed by governments may engage in warlike operations. They claim that International Dairy Engineering Co. v. American Home Assurance Co., 352 F.Supp. 827 (N.D.Cal.1970), aff'd, 474 F.2d 1242 (9th Cir. 1973), Hamdi & Ibrahim Mango, supra, and Banque Sabbag S.A.L. v. Hope, (1972) 1 Lloyd's L.R. 253 (Q.B.), aff'd, (1973) 1 Lloyd's L.R. 233 (C.A.), all illustrate that attacks on property of citizens of non-belligerents may be warlike operations. They advance Atlantic Mutual Insurance Co. v. King, (1919) 1 K.B. 307 (1918), Societe 'Purfina francaise,' supra, and Vanderbilt v. Travelers' Insurance Co., supra, for the proposition that warlike operations may occur at places far removed from the locale or subject of warfare. They attempt to discredit the fourth branch of the district court's formula by arguing that propaganda is a means of waging war. They also attack the district court's finding that the PFLP was motivated primarily by a propaganda purpose when it hijacked the Pan American 747.

The district court's holding is, nevertheless, supported by the weight of authority. In Henry & MacGregor (Ltd.) v. Marten, 34 T.L.R. 504, 505 (K.B.1918), the Express was damaged on a voyage from Fecamp to Southampton, because its master ordered it to ram a semi-submerged object which he took to be a German submarine. The King's Bench held that the loss was a 'consequence' of 'warlike operations . . . against the King's enemies,' within the meaning of the relevant policies. The ship belonged to an English subject during a period when England was a belligerent power. It was on a voyage between two belligerents and was damaged while on the English Channel, a site of frequent naval combat. When the master rammed the object, his action was warlike—ramming is one means by which naval vessels prosecute war— and was aimed at destroying German naval property. Mr. Justice Bailhache stated that

'it is clear that the captain . . . honestly believed the object to be a submarine and thought it his best course to destroy it before it could destroy him . . .. His action, though offensive, was the best defensive method, and was clearly a warlike operation . . ..' 34 T.L.R. at 505.

Atlantic Mutual Insurance Co. v. King, supra, involved an explosion in the hold of the Tennyson five days out of Bahia, Brazil. The explosion was caused by a bomb placed on board by one Niewerth, who was specifically found by the court to be an agent of the German government. Id. at 311-14. The court held that the loss was a result of 'hostilities' as the term was used in an F.C. & S. clause. The bomb was planted to destroy belligerent property by an agent of a hostile power. The considerable effort exerted by the court to support its fact-finding on this latter point, see Id., suggests its importance.

New York cases also support the district court's criteria. In Vanderbilt v. Travelers' Insurance Co., supra, it will be remembered that the deceased's death was caused by the attack of a German submarine upon a British ship, the Lusitania, in a strategic shipping lane during ***1017** a time of declared war. Swinnerton v. Columbian Insurance Co., 37 N.Y. 174, 186-188 (1867), involved the loss of a schooner the Lawrence Waterbury, which was seized and sunk in March, 1861, in Hampton Roads. The New York court held that the F.C. & S. clause in the marine policy covering the ship excluded the loss, finding that there was a de facto government in the South at the time of the loss, and that there was a war in fact, even though war had not yet been declared.

In International Dairy Engineering Co. v. American Home Assurance Co., 352 F.Supp. 827 (N.D.Cal.1970), aff'd, 474 F.2d 1242 (9th Cir. 1973), the plaintiff's stock of box material, which was stored in a warehouse at Thu Duc Village, South Vietnam, was destroyed by a fire set when an aerial parachute flare deployed by United States forces fell on the warehouse. The court held that the loss was not covered by a fire policy excluding losses caused 'by a hostile act by or against a belligerent power.' The court considered the Vietcong to be a 'belligerent.' The loss was at the site of hostilities, it was caused by a warlike agency, and the lost property was the property of a belligerent national. In Hamdi & Ibrahim Mango Co. v. Reliance Insurance Co., 291 F.2d 437 (2d Cir. 1961), the plaintiff's automotive parts were lost due to mortar fire during the Battle of Haifa. Arguably, the loss was not caused by fighting between governments, but all of the other indicia of warlike operations were present. Accordingly, the district court, relying on Swinnerton v. Columbian Insurance Co., supra, held, and the court of appeals affirmed, that the loss was excluded from coverage by the terms 'hostilities or warlike operations.'

In the present case, there is no basis whatsoever for any claim that the insured Pan American was involved in a warlike operation. It carried no cargo of military stores. See Clan Line Steamers, Ltd. v. Liverpool & London War Risks Insurance Ass'n, Ltd., (1943) 1 K.B. 209, 212 (1942). It carried no cargo destined for a theater of war. Id. Its owner was not the national of any Middle Eastern belligerent. Pan American serves no routes to any Middle Eastern belligerent. When the loss occurred, the aircraft was not near or over the territory of any belligerent or any theater of war.

C. Insurrection.

In the district court the all risk insurers relied on every term in clause 2 except 'invasion.' Thus, aside from 'war' and 'warlike operations,' they claimed that the loss was excluded from coverage by each of 'civil war,' 'revolution,' 'rebellion,' and 'insurrection.' Their efforts soon focused on the last of these terms, because all parties agreed that if the loss was not caused by an 'insurrection,' then it could not have been caused by any of the other clause 2 terms relating to civil disorders. 'Insurrection' presents the key issue because 'rebellion,' 'revolution,' and 'civil war' are progressive stages in the development of civil unrest, the most rudimentary form of which is 'insurrection.' See Home Insurance Co. v. Davila, 212 F.2d 731, 736, (1st Cir. 1954); cf. The Brig Amy Warwick (The Prize Cases), 67 U.S. (2 Black) 635, 666, 17 L.Ed. 459 (1862). The district court accordingly confined its inquiry to insurrection, see 368 F.Supp. at 1123-1124, and we shall do the same.

The district court held that the word insurrection means '(1) a violent uprising by a group or movement (2) acting for the specific purpose of overthrowing the constituted government and seizing its powers.' 368 F.Supp. at 1124. It based this definition on the opinion of Chief Judge Magruder in Home Insurance Co. v. Davila, supra, which, so far as we can find, is the chief case on the insurance meaning of insurrection. Davila's buildings were insured under a fire policy which excluded loss or damage caused by 'insurrection.' The buildings were burned 'as an incident ***1018** of the uprising staged . . . by a little band of extremists calling themselves the Nationalist Party of Puerto Rico.' 212 F.2d at 732. The Nationalist party had a rudimentary military organization with cadets, officers, and a training program. Id. at 734.

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On October 30, 1950, the Nationalists initiated violent actions at various places in Puerto Rico. One scene of violent fighting was the town of Jayuya, in which the insured property was located. Four carloads of Nationalists arrived at the town, and after fighting with the police, set fire to various buildings and prevented firemen from putting out the flames. They raised the Nationalist flag over the city. Judge Magruder did not decide whether there was an insurrection under the facts. He held that if the Nationalist leaders had the 'maximum objective' of overthrowing the government, then a jury might find that the loss was caused by an insurrection. Id. at 738. He remanded the cause for a new trial because the district court had given an instruction more favorable to the insured than was justified under the above rule, an instruction that effectively directed a verdict against the insurer.

Under Davila, the revolutionary purpose need not be objectively reasonable. Any intent to overthrow, no matter how quixotic, is sufficient. While doubting 'whether destruction wrought by SDS or Weathermen's bombs, however intended subjectively, would be deemed losses from 'insurrection' for insurance purposes (,)' 368 F.Supp. 1124 n. 30, the district court nevertheless applied the purely subjective rule to the present facts and found that the all risk insurers did not support their burden of proving that at the time of the loss the PFLP intended to overthrow King Hussein. The court found that if the PFLP was fighting Hussein, it was fighting for its survival rather than Hussein's overthrow. Alternatively, it found that any insurrection in Jordan did not proximately cause the loss of the 747.

We hold that the district court's findings as to lack of intent and lack of causal connection are not clearly erroneous.

The evidence that the Fedayeen, the PLO, and the PFLP did not intend to overthrow King Hussein supports the district court's finding in this regard. For example, it was brought out on the cross-examination of John Cooley, an all risk witness who was a correspondent for the Christian Science Monitor, that he had reported on August 31 that the PLO had rejected a motion calling for the overthrow of King Hussein. On cross-examination, Eric Rouleau, a correspondent for Le Monde and an all risk witness, confirmed that he had reported that 'Fatah did not want to take power and in fact they didn't have the resources to govern if they had gotten power.' General El-Yahya of the Palestine Armed Struggle Command testified that Fatah never called for the overthrow of Hussein, and that Fatah 'always stayed that it would not intervene in the domestic affairs of any regime.' General Meir Amit, Chief of Israel's military intelligence in 1970, testified that prior to September 6, 1970, Fatah 'didn't have any intention to overthrow King Hussein.' Ghassan Kannfani, founding editor of the PFLP weekly newspaper, in an interview following the September events stated that the 'aim of the Palestinian resistance was not to overthrow the Jordanian regime, but merely to put pressure on it.' None of the demands made by the PFLP as to ransom for the passengers held at Dawson's Field involved Jordan, strong evidence that the September 6 hijackings were aimed at obvious external targets rather than King Hussein.

From the welter of conflicting evidence, reasonable men might draw any of a number of conflicting conclusions about the PFLP's motives on September 6. One of those reasonable conclusions is that the PFLP did not intend to overthrow King Hussein when it hijacked ***1019** the Pan American 747. The hijacking was designed to attract world attention to the Palestinian cause and to accumulate 'victories' as an example to other groups. It was a 'symbolic blow' in the PFLP's fight against the United States. The all risk insurers failed to carry the burden of proving the crucial element of PFLP intent.

The district court held in the alternative that the loss of the 747 was not 'due to or resulting from' an insurrection: 'Even if there was (an insurrection in Jordan,) the loss by a hijacking from London to Beirut to Cairo was not one 'due to or resulting from' any Jordanian insurrection or rebellion.' 368 F.Supp. at 1124. The aircraft was taken not at the site of a rebellion but while flying over a domestically stable area. The hijacking had nothing to do with Jordan, it was a blow struck by the PFLP against the United States. [15]

15 This statement is not inconsistent with the district court's finding on war. The fact that the PFLP was fighting the United States does not mean that there was a 'war' between the United States and this tiny non-governmental entity.

The all risk insurers argue— without considering the implication of this argument for their own case— that the only relevant evidence relates to Diop's and Gueye's states of mind at the time of the hijacking. They infer that Diop and Gueye intended to overthrow Hussein at the time of the hijacking from the fact that they originally intended to take the 747 to Dawson's Field. But the fact that they intended to take the aircraft to Jordan is no more evidence of an intent to overthrow Hussein than the fact that they actually took it to Beirut and Cairo is evidence of an intent to overthrow the Lebanese and Egyptian governments. The

hijackers' contemporaneous statements indicate that their purpose had nothing to do with Hussein; they believed that they were protesting the sale of Phantom jets to Israel by the United States.

VIII. Clause 3 Exclusions

The all risk insurers finally rely on clause 3 of the exclusions of avoid liability as to about 14 million dollars of the agreed upon value of the 747. Clause 3 excludes from coverage loss or damage 'due to or resulting from . . . strikes, riots, civil commotion.' These terms have a domestic flavor that contrasts sharply with the sense of the terms employed in the other clauses—terms such as 'capture, seizure, arrest, restraint or detention,' or 'war, invasion' or 'warlike operations'— all of which admit of application to occurrences with international contexts. The domestic nature of the clause 3 exclusions is illustrated by the fact that while American all risk insurers do not write insurance for war-related perils, they were willing to underwrite the clause 3 risk to the extent of about $10,000,000 in excess of $14,000,000.

Insurance authorities are in accord on the local nature of these perils. 'Civil commotion . . . import(s) occasional local or temporary outbreaks of unlawful violence.' 11 G. Couch, Cyclopedia of Insurance Law 42:487 (2d ed. 1963); Boon v. Aetna Insurance Co., 3 Fed.Cas. p. 871 (No. 1,639) (C.C.D.Conn.1874), rev'd on other grounds, 95 U.S. 117, 5 Otto 117, 24 L.Ed. 395 (1877); Adel Salah El Din, Aviation Insurance Practice, Law & Reinsurance 112-13 (1971). Riots and civil commotion are purely 'domestic disturbances.' Rogers v. Whittaker, (1917) 1 K.B. 942, 944. There is no authority for the proposition that riots or civil commotion are other than local, domestic disturbances.

A. Civil Commotion.

The district court held that 'civil commotion' is 'essentially a kind of domestic disturbance,' referring to disorders 'such as occur among fellow-citizens or within the limits of one community.' It found that

'it is not easily imaginable that any ordinary man, business or other, would *1020 have supposed a hijacking over London of an airplane that never went or was intended to go to Jordan would be deemed the result of 'civil commotion in Jordan." 368 F.Supp. at 1139.

For the proposition that the loss of the 747 was due to civil commotion the all risk insurers have offered no argument or authority which was not duly considered and rejected by the district court. The district court clearly applied the correct rule of law: civil commotion does not comprehend a loss occurring in the skies over two continents. Cf. Langdale v. Mason, supra; London & Manchester Plate Glass Co. v. Heath, (1913) 3 K.B. 411 (C.A.); Hartford Fire Insurance Co. v. War Eagle Coal Co., 295 F. 663 (4th Cir. 1924); Wong Chow v. Transatlantic Fire Insurance Co., 13 Hawaii 160 (1900). The all risk argument that the 747 hijacking, taken together with the other September 6 hijackings to Dawson's Field constituted a single civil commotion is fanciful. For there to be a civil commotion, the agents causing the disorder must gather together and cause a disturbance and tumult. Hartford Fire Insurance Co., supra, 295 F. at 665. We hold that the present loss was not caused by civil commotion for essentially the reasons set out in the district court's opinion.

B. Riots.

The all risk insurers' contention under this head is that the bare facts of the hijacking, without reference to the Middle Eastern situation, establish that the loss was caused by a riot. They claim that there is a body of authority establishing that riot as an insurance exclusion takes a meaning which derives from the ancient common law criminal definition of the term:

'the insurance term 'riot' includes any gathering of three or more persons with a common purpose to do an unlawful act and with an apparent intention to use force or violence against anyone who may oppose this purpose.'

They claim that when riot is used in an insurance context, it need not be accompanied by any uproar or tumult. They argue that the acts of PFLP members hijacking the Pan American 747 satisfy their technical definition.

Only two actors, Diop and Gueye, assembled to take the Pan American 747. The all risk definition of riot requires that there be an assembly of at least three actors. Thus, there was no riot, in any sense of the word, on board the flight when it was hijacked. Events subsequent to the hijacking, as when additional PFLP members came on board the aircraft in Beirut, may have constituted a common law riot, but these events do not color the initial taking. The district court was entirely correct when it wrote:

'The definitions (proffered by the all risk insurers) give serious trouble at the outset, and probably would not serve even if there were sound reason to use them. Plaintiff's airplane was hijacked by two people, not three. There was, to be sure, a stop at Beirut as the improvised operation unfolded,

and as many as nine others came aboard temporarily. Then, still meeting the minimum, a third man stayed aboard to Cairo. But the notion of a flying riot in geographic installments cannot be squeezed into the ancient formula. Among its other attributes, as the cases reflect, a riot is a local disturbance, normally by a mob, not a complex, traveling conspiracy of the kind in this case.' 368 F.Supp. at 1133.

The all risk insurers argue that the acts of Diop and Gueye must be taken in connection with the simultaneous acts of PFLP members in Amsterdam, who directed them to take the 747, with the acts of PFLP ground contacts in Beirut, and with the acts of PFLP members at Dawson's Field. They claim that this international assortment of ***1021** individuals is a single riot. But Diop and Gueye were the only law breakers 'assembled,' to use the all risk insurers' term, at the time and site of the hijacking. The fact that these two men received instructions from and expected to meet third parties does not alter the fact that there were only two of them. The gist of the offense of riot at common law is the in terrorem populi effect of the assembly. See Brous v. Imperial Assurance Co., 130 Misc. 450, 224 N.Y.S. 136 (Sup.Ct.N.Y.C.o.1927), aff'd, 223 App.Div. 713, 227 N.Y.S. 777 (1st Dep's 1928) (mem.); cf. Commonwealth v. Runnels, 10 Mass. 518 (1813). Riot is not like conspiracy. It may not be conducted by mail, by telephone, or as in the present case, by radio. No matter how many persons were involved behind the scenes, the hijacking was accomplished by only two persons.

Leaving aside the issue of causation, the authority as to the insurance meaning of 'riot' is in some disarray. There is one body of authority that at least nominally supports the all risk non-availing technical definition of riot. But there is a second body of authority that a common law riot must be accompanied by a tumult or commotion, a rule under which the taking of the 747 would not be a riot since there was no tumult at the time of the taking. And there is a third, also respectable, body of authority that in insurance the term 'riot' takes its meaning from common speech, namely a tumultuous assembly of a multitude of people. In that sense, the sense adopted by the district court, the loss of the 747 was surely not caused by a riot. We would be hard pressed to choose between these three formulations were we required to do so. But recalling that the insured has the benefit of contra proferentem, the all risk insurers have the burden of showing that their definition is the only reasonable formulation. They have not discharged this burden. The war risk insurers have clearly established that the two definitions requiring tumult are at least reasonable.

The meaning of 'riot' that the district court determined was intended by these parties is its popular and usual meaning, 368 F.Supp. at 1136. Under this formula, a riot occurs when some multitude of individuals gathers and creates a tumult. A substantial weight of authority supports this formulation. It is the definition of riot that most accords to common sense. It is unlikely that these parties expected their dealings to be governed by an artificial and technical definition of riot.

Various cases dealing with the insurance meaning of riot have adopted the ordinary meaning of the word. In Hartford Fire Insurance Co. v. War Eagle Coal Co., supra, the court held that a fire set at night by five stealthy conspirators was not caused by a riot, 'for there was no tumult nor disturbances, nor even a demonstration before the fire.' 295 F. at 665; see also Kirshenbaum v. Massachusetts Bonding & Insurance Co., 107 Neb. 368, 186 N.W. 325 (1922). Couch states that 'riot, when used in an exception clause, is given its popular and usual meaning.' 11 G. Couch, supra, at § 42:485. Appleman states that riot 'is to be given its popular and usual meaning, as constituting a disturbance of the peace by several persons or more . . . in a violent and noisy manner.' 5 J. Appleman, Insurance Law & Practice 3111, at 377 (1970).

Some feeling for the 'ordinary meaning' of riot can be gathered from the holdings in the decided riot cases. In Kirshenbaum, a tumultuous gathering of 'many individuals' was a riot. In Spring Garden Insurance Co. v. Imperial Tobacco Co., 132 Ky. 7, 116 S.W. 234 (1909), a lynch mob of '100 men or more' was a riot. In Luckett-Wake Tobacco Co. v. Globe & Rutgers Fire Insurance Co., 171 F. 147 (C.C.W.D.Ky.1908) a riot was a 'mob' of 'night riders.' The criminal law in effect at the time of a putative riot is some evidence of the ordinary meaning of the term. See ***1022** Insurance Co. of North America v. Rosenberg, 25 Fed.2d 635, 636 (2d Cir. 1928). The Practice Commentary to the present text of the New York Penal Law proscribing riots states that the Penal Law was revised to conform the definition of riot to the popular concept by requiring a number greater than three, and requiring a tumult or violent conduct. See 368 F.Supp. at 1136.[16]

16 The all risk insurers argue that considering changes in New York penal law violates the principle of Van Vechten v. American Eagle Fire Insurance Co., 239 N.Y. 303, 146 N.E. 432 (1925) (per Cardozo, C.J.). In Van Vechten, the court held that the fact that the legislature had affixed a novel definition to the word 'larceny' did not affect

> the intended scope of the word 'theft' as it was used in an insurance policy; the latter term was to be interpreted 'as common thought and common speech would now . . . describe it.' This holding has no bearing on the present case, because the penal law as to riot was changed to reflect, rather than depart from, the current understanding of that term.

IX. Conclusion

We hold that the district court did not clearly err when it found that none of the all risk exclusions, considered in a light most favorable to the insured, fairly describes the cause of the present loss. Terms like 'military . . . or usurped power,' 'war,' 'insurrection' and the other terms found in clause 1 and clause 2 simply do not describe a hijacking committed by two men far from the site of any larger scale violence. The all risk insurers sought to show that the hijacking was a part of PFLP schemes for waging war or insurrection, thus linking the acts of the hijackers to the larger Middle Eastern situation. The crucial element in this effort was the intent of the PFLP. The all risk insurers had the burden of proving that the PFLP intended Diop's and Gueye's acts to be a part of a war in the Middle East or an insurrection in Jordan. But as to the PFLP intent, there is little evidence of any probative weight on the record. That record consists of hearsay, propaganda, unbridled speculation, and a great mass of evidence relating to entities other than the PFLP at times other than September 6, 1970. We agree with the district court's conclusion that the all risk insurers failed to discharge their burden of proof.

Affirmed.

Costs will be assessed against the defendants-appellants.

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