IN THE DISTRICT COURT OF CHEROKEE COUNTY
STATE OF OKLAHOMA

CHEROKEE NATION;
CHEROKEE NATION BUSINESSES, LLC;
CHEROKEE NATION ENTERTAINMENT, LLC;

Plaintiffs,

v.

(1) LEXINGTON INSURANCE COMPANY;
(2) UNDERWRITERS AT LLOYD'S – SYNDICATES; ASC1414, XLC 2003, TAL 1183, MSP 318, ATL 1861, KLN 510, AGR 3268;
(3) UNDERWRITERS AT LLOYD'S – SYNDICATE: CNP 4444;
(4) UNDERWRITERS AT LLOYD'S – ASPEN SPECIALTY INSURANCE COMPANY;
(5) UNDERWRITERS AT LLOYD'S – SYNDICATES: KLN 0510, ATL 1861, ASC 1414, QBE 1886, MSP 0318, APL 1969, CHN 2015, XLC 2003;
(6) UNDERWRITERS AT LLOYD'S – SYNDICATE BRT 2987;
(7) 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;
(8) HOMELAND INSURANCE COMPANY OF NY (ONE BEACON);
(9) HALLMARK SPECIALTY INSURANCE COMPANY;
(10) ENDURANCE WORLDWIDE INSURANCE LTD T/AS SOMPO INTERNATIONAL;
(11) ARCH SPECIALTY INSURANCE COMPANY;
(12) EVANSTON INSURANCE COMPANY;
(13) ALLIED WORLD NATIONAL INSURANCE COMPANY;
(14) LIBERTY MUTUAL FIRE INSURANCE COMPANY;
(15) XL INSURANCE AMERICA, INC.;
(16) AXA/XL AMERICA, INC.;
(17) RSUI-LANDMARK AMERICAN INSURANCE COMPANY;
(18) CHUBB BERMUDA LTD.;
(19) UNDERWRITERS AT LLOYD'S LONDON;
(20) ABC INSURANCE COMPANIES (to be determined);

Defendants.

Case No. CV-2020-150
The Honorable Douglas Kirkley

DEFENDANTS LIBERTY MUTUAL FIRE INSURANCE COMPANY, LANDMARK AMERICAN INSURANCE COMPANY, AND ARCH SPECIALTY INSURANCE COMPANY'S MOTION FOR LEAVE TO FILE SUR-REPLIES IN OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Defendants Liberty Mutual Fire Insurance Company ("Liberty Mutual"), Landmark American Insurance Company ("Landmark"), and Arch Specialty Insurance Company ("Arch") (collectively, "Defendants") respectfully request permission to file Sur-Replies in Opposition to Plaintiffs Cherokee Nation, Cherokee Nation Businesses, LLC, and Cherokee Nation Entertainment, LLC's ("Plaintiffs") First Motion for Partial Summary Judgment on Business Interruption Coverage (Plaintiffs' "Motion"). The Sur-Replies are necessary to respond to new arguments and authorities raised in Plaintiffs' Reply briefs specifically with respect to Defendants Arch, Liberty, and Landmark. In support of this Motion, Defendants state as follows:

1. Plaintiffs filed their Motion on August 11, 2020. Defendants have filed Response briefs in opposition to Plaintiffs' Motion, and Plaintiffs have filed Reply briefs that are specific to Defendants Arch, Liberty, and Landmark.

2. After reviewing Plaintiffs' Reply briefs, Defendants request permission to file Sur-Replies in order to respond to additional arguments that are not addressed in Plaintiffs' Motion or Defendants' Responses. Defendants also seek to distinguish the arguments and authorities raised by Plaintiffs in their Reply briefs that specifically relate to Defendants Arch, Liberty, and Landmark.

3. Defendants' proposed Sur-Replies are attached as Exhibits 1-3.

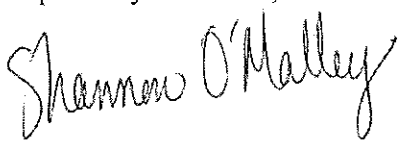
4. Defendants do not submit this Motion for purpose of delay or prejudice.

5. Plaintiffs oppose the requested relief but have supplied no reason for their opposition.

6. A proposed Order granting Defendants' Motion is attached hereto as Exhibit 4.

Based on the foregoing, Defendants Liberty Mutual Fire Insurance Company, Landmark American Insurance Company, and Arch Specialty Insurance Company respectfully request permission to file Sur-Replies in Opposition to Plaintiffs' First Motion for Partial Summary Judgment on Business Interruption Coverage.

Respectfully submitted,



Shannon O'Malley, OBA No. 33451
ZELLE LLP
901 Main Street, Suite 4000
Dallas, TX 75202-3975
Telephone: (214) 742-3000; Facsimile: (214) 760-8994
somalley@zelle.com

-and-

William W. O'Connor, OBA No. 13200
Margo E. Shipley, OBA No. 32118
HALL, ESTILL, HARDWICK, GABLE, GOLDEN & NELSON, P.C.
320 South Boston Avenue, Suite 200
Tulsa, OK 74103-3706
Telephone: (918) 594-0400; Facsimile: (918) 594-0505
boconnor@hallestill.com
mshipley@hallestillcom

ATTORNEYS FOR DEFENDANTS ARCH SPECIALTY INSURANCE COMPANY, LIBERTY MUTUAL FIRE INSURANCE COMPANY, HOMELAND INSURANCE COMPANY OF NEW YORK, AND RSUI-LANDMARK AMERICAN INSURANCE COMPANY

CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of December, 2020, a true and correct copy of the foregoing document was served via U.S. Mail and/or email to:

Michael Burrage
Reggie Whitten
Patricia A. Sawyer
Austin Vance
J. Renley Dennis
WHITTEN BURRAGE LAW FIRM
512 North Broadway Avenue, Suite 300
Oklahoma City, OK 73102
mburrage@whittenburragelaw.com
rwhitten@whittenburragelaw.com
rparrish@whittenburragelaw.com
psawyer@whittenburragelaw.com
avance@whittenburragelaw.com
jdennis@whittenburragelaw.com

Bradley E. Beckworth bbeckworth@nixlaw.com
Chad E. Ihrig cihrig@nixlaw.com
Michael Angelovich mangelovich@nixlaw.com
Bradley Beskin bbeskin@nixlaw.com
NIX PATTERSON, LLP
3600-B North Capital of Texas Highway, Ste. 350
Austin, Texas 78746

ATTORNEYS FOR PLAINTIFF

Phil R. Richards
Joy Tate
RICHARDS & CONNOR
12th Floor, Park Centre Bldg.
525 S. Main St.
Tulsa, OK 74103

-and-

Richard J. Doren
Matthew A. Hoffman
Gibson, Dunn & Crutcher LLP
333 South Grand Avenue
Los Angeles, CA 90071-3197
rdoren@gibsondunn.com
mhoffman@gibsondunn.com

ATTORNEYS FOR DEFENDANT
LEXINGTON INSURANCE COMPANY

Jack Cadenhead
CADENHEAD LAW FIRM, P.C.
P.O. Box 2067
Seminole, OK 74818-2067

-and-

Dustin L. DuBose
Mound Cotton Wollan & Greengrass, LLP
3 Greenway Plaza, Suite 1300
Houston, TX 77046
ddubose@moundcotton.com

ATTORNEY FOR DEFENDANT,
ALLIED WORLD NATIONAL ASSURANCE COMPANY

Roger N. Butler, Jr. rbutler@secresthill.com
Nathaniel T. Smith nsmith@secresthill.com
SECREST HILL BUTLER & SECREST
7134 South Yale Ave., Suite 900
Tulsa, OK 74136-6360

ATTORNEYS FOR DEFENDANT
EVANSTON INSURANCE COMPANY

Dan S. Folluo dfolluo@rhodesokla.com
Kerry R. Lewis klewis@rhodesokla.com
RHODES, HIERONYMUS, JONES, TUCKER
& GABLE, P.L.L.C.
P.O. Box 21100
Tulsa, OK 21100

ATTORNEYS FOR DEFENDANT
HALLMARK SPECIALTY INSURANCE COMPANY

Larry D. Ottaway
Amy Sherry Fischer
Jordyn L. Cartmell
FOLIART, HUFF, OTTAWAY & BOTTOM
201 Robert S. Kerr Avenue, 12th Floor
Oklahoma City, OK 73102
larryottaway@oklahomacounsel.com
amyfischer@oklahomacounsel.com

jordyncartmell@oklahomacounsel.com

-and-

ROBINS KAPLAN LLP

Amy Churan (admitted *pro hac vice*)
2049 Century Park East, Suite 3400
Los Angeles, CA 90067
Telephone: (310) 552-0130
Fax: (612) 339-4181
achuran@robinskaplan.com

Matthew P. Cardosi (admitted *pro hac vice*)
800 Boylston Street, Suite 2500
Boston, MA 02199
Telephone: (617) 859-2768
Fax: (617) 267-8288
mcardosi@robinskaplan.com

ATTORNEYS FOR LLOYD'S DEFENDANTS AND ENDURANCE WORLDWIDE INSURANCE LTD. T/AS SOMPO INTERNATIONAL

C. William Threlkeld cwthrelkeld@fentonlaw.com
Sterling E. Pratt sepratt@fentonlaw.com
FENTON. FENTON, SMITH, RENEAU & MOON
211 N. Robinson Ave., Suite 800N
Oklahoma City, OK 73102

-and-

Dan Millea
Zelle LLP
500 Washington Ave. S., Suite 4000
Minneapolis, MN 55415
Telephone: 612-336-9170
Facsimile: 612-336-9100d
dmillea@zelle.com

-and-

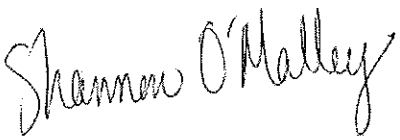
Matthew L. Gonzalez
Zelle LLP
45 Broadway

New York, New York 10006
mgonzalez@zelle.com

ATTORNEYS FOR DEFENDANTS
XL INSURANCE AMERICA, INC. AND AXA/XL AMERICA

Joe M. Hampton
Amy J. Pierce
Johnny R. Blassingame
HAMPTON BARGHOLS PIERCE, PLLC
Oklahoma Tower
210 Park Avenue, Suite 2700
Oklahoma City, OK 73102
Telephone: (405)-600-9225
Facsimile: (405)-600-6851
jhampton@hbplawok.com
apierce@hbplawok.com
jblassingame@hbplawok.com

ATTORNEYS FOR DEFENDANT
CHUBB BERMUDA INTERNATIONAL



Shannon O'Malley

EXHIBIT 1

IN THE DISTRICT COURT OF CHEROKEE COUNTY
STATE OF OKLAHOMA

CHEROKEE NATION;
CHEROKEE NATION BUSINESSES, LLC;
CHEROKEE NATION ENTERTAINMENT, LLC;

Plaintiff,

v.

(1) LEXINGTON INSURANCE COMPANY;
(2) UNDERWRITERS AT LLOYD'S – SYNDICATES; ASC1414, XLC 2003, TAL 1183, MSP 318, ATL1861, KLN 510, AGR 3268;
(3) UNDERWRITERS AT LLOYD'S – SYNDICATE: CNP 4444;
(4) UNDERWRITERS AT LLOYD'S – ASPEN SPECIALTY INSURANCE COMPANY;
(5) UNDERWRITERS AT LLOYD'S SYNDICATES: KLN 0510, ATL 1861, ASC 1414, QBE 1886, MSP 0318, APL 1969, CHN 2015, XLC 2003;
(6) UNDERWRITERS AT LLOYD'S – SYNDICATE BRT 2987;
(7) 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;
(8) HOMELAND INSURANCE COMPANY OF NY (ONE BEACON);
(9) HALLMARK SPECIALTY INSURANCE COMPANY;
(10) ENDURANCE WORLDWIDE INSURANCE LTD T/AS SOMPO INTERNATIONAL;
(11) ARCH SPECIALTY INSURANCE COMPANY;
(12) EVANSTON INSURANCE COMPANY;
(13) ALLIED WORLD NATIONAL ASSURANCE COMPANY;
(14) LIBERTY MUTUAL FIRE INSURANCE COMPANY;
(15) XL INSURANCE AMERICA, INC.;
(16) AXA/XL AMERICA, INC.;
(17) RSUI-LANDMARK AMERICAN INSURANCE COMPANY;
(18) CHUBB BERMUDA LTD.;
(19) UNDERWRITERS AT LLOYD'S LONDON; and
(20) ABC INSURANCE COMPANIES (to be determined),

Defendants.

Case No. CV-20-150
Judge Douglas Kirkley

DEFENDANT LIBERTY MUTUAL FIRE INSURANCE COMPANY'S SUR-REPLY TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT ON BUSINESS INTERRUPTION COVERAGE

COMES NOW Defendant Liberty Mutual Fire Insurance Company ("Liberty") and files this Sur-Reply in support of its Opposition to the Motion for Partial Summary Judgment brought by Plaintiffs Cherokee Nation, Cherokee Nation Businesses, LLC, and Cherokee Nation Entertainment, LLC ("Plaintiffs") and submits this brief, which solely addresses the arguments concerning the Liberty excess policy exclusions, as follows.

I. SUMMARY

Plaintiffs Cherokee Nation, Cherokee Nation Businesses, and Cherokee Nation Entertainment's Reply briefs maintain that Liberty's exclusion for Loss Due to Virus or Bacteria (the "Virus Exclusion") does not apply to preclude their claims under, essentially, two theories: (1) there is no evidence that the virus actually contaminated Plaintiffs' property; and (2) the exclusion does not preclude coverage for pandemics. Additionally, Plaintiffs argue that Liberty's "Loss of Use" exclusion does not apply. But Plaintiffs' arguments ignore the plain terms of the Policy and rely on extrinsic evidence to attempt to create an ambiguity where none exists, in contravention of Oklahoma law.

II. ARGUMENT AND AUTHORITY

As an initial matter, Liberty maintains that this Court does not need to address the Excess Policy's Virus Exclusion and Loss of Use Exclusion. Plaintiffs cannot demonstrate that their claims trigger coverage under the Primary policy form because Plaintiffs have not alleged facts to support any business interruption claim caused by direct physical loss or damage as covered by the Policy to real and/or personal property insured by the Primary policy. In fact, the majority of courts who have addressed COVID-19 business interruption claims have found

no need to resort to applicable Policy exclusions because the virus does not cause direct physical loss or damage.[1]

Regardless, the plain language of the Liberty Policy demonstrates that Plaintiffs' claims are excluded.

A. The Policy excludes loss caused by virus regardless of the presence of the virus on the property.

Plaintiffs argue that Liberty cannot meet its burden to prove the Virus Exclusion applies because it cannot show that there was actual virus contamination at the Plaintiffs' properties. But the Virus Exclusion, which is subject to an anti-concurrent causation provision ("ACC Clause"), is broadly worded to apply to the underlying virus that caused Plaintiffs' claimed losses. Therefore, its terms demonstrate that the Virus Exclusion is not limited to physical contamination of the Plaintiffs' premises.

The Virus Exclusion states:

---

[1] There are a number of cases where the court did not address a virus exclusion at all and found no physical loss or damage. For example, business interruption lawsuits arising out of COVID-19 were wholly dismissed solely on the basis that the virus does not cause direct physical loss or damage in the following cases: *Michael Cetta, Inc. d/b/a Sparks Steak House v. Admiral Indem. Co.*, No. 20 Civ. 4612 (JPC), 2020 WL 7321405, at *13 n. 5 (S.D. N.Y. Dec. 11, 2020) ("Because the Court concludes that [the insured] fails to establish entitlement to coverage under the Policy, it need not reach the question of whether these various exclusions would apply."); *Water Sports Kauai, Inc. v. Fireman's Fund Ins. Co., et al.*, No. 20-cv-03750-WHO, 2020 WL 6562332 (N.D. Cal. Nov. 9, 2020) (finding no coverage under general policy grant of coverage with no discussion of any virus exclusion); *T & E Chicago LLC v Cincinnati Inc. Co.*, No. 20 C 4001, 2020 WL 6801845 (N.D. Ill. Nov. 19, 2020) (finding no physical loss or damage was caused by the virus with no discussion of a virus exclusion).

Similarly, the courts in the following cases only *alternatively* found that a virus exclusion applied, after first confirming there was no coverage because the virus did not cause direct physical loss or damage to insured property: *Travelers Ca. Ins. Co. of Am. v. Geragos & Geragos*, No. CV 20-3619 PSG (EX), 2020 WL 6156584, at *3 (C.D. Cal. Oct. 19, 2020) (finding no physical loss or damage was caused by the virus but also coverage was precluded by a virus exclusion)... *Raymond H Nahmad DDS PA v. Hartford Cas. Ins. Co.*, No. 1:20-CV-22833, 2020 WL 6392841, at *9 (S.D. Fla. Nov. 2, 2020) (finding no coverage under the general policy grant of coverage but further finding the virus exclusion alternatively precluded coverage); *Goodwill Indus. Of Central Okla., Inc. v. Philadelphia Indem. Ins. Co.*, No. 5:20-CV-00511, ECF No. 24 at *11 (W.D. Okla. Nov. 9, 2020) (finding no coverage under general policy grant of coverage but further finding that "the plain meaning of the Virus Endorsement expressly excludes [plaintiff's] claim for coverage."); *West Coast Hotel Mgmt., LLC, et al. v. Berkshire Hathaway Guard Ins. Co.*, No. 2:20-cv-05663-VAP-DFMx, 2020 WL 64440037, at *3-6 (C.D. Cal. Oct. 27, 2020) (finding no coverage under general policy grants of coverage but further finding the virus exclusion alternatively precluded coverage).

E. EXCLUSIONS

1. This policy does not apply to loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss. These exclusions apply whether or not the loss event results in widespread loss or damage or affects a substantial area.

* * *

EXCLUSION OF LOSS DUE TO VIRUS OR BACTERIA

This clause modifies the insurance provided under the Excess Property Policy.

The following changes apply to the exclusions contained in part 1. of Section E. EXCLUSIONS in the Excess Property Coverage Form:

A. Under exclusion E.1.k., "Fungus", Wet Rot, Dry Rot or Bacteria, all references to bacteria are deleted.

B. The following exclusion is added to Section E.1.:

Virus or Bacteria

The Company will not pay for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease, however caused.[2]

The language of the Virus Exclusion itself makes clear that the exclusion applies to preclude coverage for loss caused by or resulting from any virus that induces *or is capable of inducing* illness, *however caused.* The court in the Western District of Oklahoma in *Goodwill Industries of Central Oklahoma, Inc. v. Philadelphia Indemnity Ins. Co.* addressed an almost identical exclusion and determined that it was broad enough to preclude coverage resulting from any virus capable of inducing physical illness.[3]

---

[2] *Id.* at p. 38.

[3] *Goodwill Industries of Central Oklahoma, Inc. v. Philadelphia Indemnity Ins. Co.*, Case No. 5:20-cv-0511-R (W.D. OK. Nov. 9, 2020).

The insured in *Goodwill* made the same argument propounded here – that there was no evidence that the virus actually contaminated insured property. The virus exclusion in *Goodwill* provided that "there is no coverage under such insurance for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease."[4] The Oklahoma federal court found "by its terms, the exclusion applies because COVID-19 is a virus that 'is capable of inducing physical distress, illness or disease.'"[5] The court found that this language encompassed scenarios where suspected contamination qualifies.[6] The court further determined that the "mandated closures, which caused Goodwill to seek declaratory judgment, resulted from the ability, or capability, of COVID-19 to 'induce physical distress, illness or disease.'"[7] This same analysis applies here. Liberty's Virus Exclusion also precludes loss or damage caused by or resulting from any virus that induces or is capable of inducing physical distress, illness or disease, however caused.

Moreover, the Liberty Virus Exclusion is prefaced with language that expressly states that Liberty does not insure "loss or damage caused directly or indirectly" by virus "regardless of any other cause or event that contributes concurrently or in any sequence to the loss" and applies to exclude coverage "whether or not the loss event results in widespread loss or damage or affects a substantial area." This is known as an ACC Clause and applies to preclude losses caused by or resulting directly or indirectly from the virus.

---

4 *Id.* at * 8.
5 *Id.*
6 *Id.* at *9.
7 *Id.* at *10.

In fact, the court in *Diesel Barbershop, LLC v. State Farm Lloyds*[8] specifically found that an ACC clause, in conjunction with a virus exclusion, applies to preclude business interruption claims arising out of the virus that causes COVID-19. The court noted:

> The Policies expressly state that State Farm does 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[.]" Guided by the plain language of the Policies, the Court finds that Plaintiffs have pleaded that COVID-19 is in fact the reason for the Orders being issued and the underlying cause of Plaintiffs' alleged losses. **While the Orders technically forced the Properties to close to protect public health, the Orders only came about sequentially as a result of the COVID-19 virus spreading rapidly throughout the community. Thus, it was the presence of COVID-19 in Bexar County and in Texas that was the primary root cause of Plaintiffs' businesses temporarily closing**.[9]

Similarly, Plaintiffs have pleaded and argued in their Motion for Summary Judgment that their businesses were affected as a result of COVID-19 spreading through the community. The actions Plaintiffs took within their casinos and other properties were done to protect against the spread of the virus. Accordingly, the losses claimed here are "caused directly or indirectly" by the virus. The Liberty Virus Exclusion applies whether or not the virus-induced pandemic results in widespread loss or affects a substantial area. The exclusion, by its terms, is not restricted to loss arising out of actual contamination of the property.

Plaintiffs rely on three cases to purportedly support their argument that Liberty must show actual contamination of their property. But those cases apply different language and law and therefore are not applicable.

---

8 *Diesel Barbershop, LLC v. State Farm Lloyds*, No. 5:20-CV-461-DAE, 2020 WL 4724305, at *6 (W.D. Tex. Aug. 13, 2020).

9 *Id.* at *6 (emphasis added).

First, Plaintiffs rely on *Duensing v. Traveler's Companies*,[10] a 1993 Montana case that addressed an exclusion that precluded coverage for "the following causes of losses **to personal property**...(d)...contamination..."[11] The court found the language of this exclusion required actual contamination that caused loss to personal property. Here, though, Liberty's exclusion does not address specific property, but rather applies more generally for any "loss or damage caused by or resulting from virus...that induces or is capable of inducing physical distress, illness or disease, *however caused.*" And, as the court in *Goodwill* found, interpreting Oklahoma rather than Montana law, the fact that the virus is *capable* of inducing illness sufficiently applies to preclude coverage for the loss caused by the shutdown of businesses in reaction to the virus in the community at large.

Ignoring the avalanche of cases finding that virus exclusions preclude claims for COVID-19 losses, Plaintiffs also rely on two outlier cases with different exclusion language and different law. In *Urogynecology Specialist of Fla. LLC v. Sentinel Ins. Co., Ltd.*,[12] the court declined to dismiss a lawsuit based on a "Limited Fungi, Bacteria or Virus Coverage" section of the applicable policy because it did not have the entire policy form to analyze.[13] The court also determined it was not *clear* at the motion to dismiss stage whether the exclusion applied to the claims presented.[14]

---

10 *Duensing v. Traveler's Companies*, 257 Mont. 376, 380, 849 P.2d 203, 206 (1993).

11 *Id.* (emphasis added).

12 *Urogynecology Specialist of Fla. LLC v. Sentinel Ins. Co.*, Ltd., No. 620CV1174ORL22EJK, 2020 WL 5939172 (M.D. Fla. Sept. 24, 2020).

13 *Id.* at *4 (noting "[w]ithout 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.").

14 The court recognized the virus exclusion in the *Urogynecology* matter precluded "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.'"[14] The court determined that including virus in the same exclusion as fungi, wet rot, and dry rot created some question as to its intended application. Accordingly, the court found the plaintiff's claim could proceed to litigation.

The circumstances here are entirely different. Plaintiffs are seeking summary judgment and the Liberty Exclusion applies only to virus or bacteria or other microorganism that induces or is capable of inducing physical distress, illness or disease, however caused. At a minimum, this exclusion and its plain language precludes any summary judgment in favor of Plaintiffs.

Similarly, Plaintiffs rely on *Elegant Massage, LLC v. State Farm Mut. Auto. Ins. Co.*[15] to argue that Liberty's Virus Exclusion should not apply. Again, the exclusion in *Elegant Massage* is different than that in the Liberty Policy.[16] More importantly, the court concluded that the language of the exclusion as written required that the virus be the immediate cause in the chain of events causing loss, and inexplicitly found the prefatory anti-concurrent causation language "has not been established as law in this jurisdiction."[17] The court therefore did not address the fact that the exclusion was written to apply to preclude loss regardless of "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: ... j. Fungi, Virus or Bacteria."[18]

The court's analysis in *Elegant Massage* does not apply here, though. First, the two exclusions vary significantly in language. But more importantly, Oklahoma courts enforce

---

15 *Elegant Massage, LLC v. State Farm Mut. Auto. Ins. Co.*, No. 2:20-CV-265, 2020 WL 7249624, at *1 (E.D. Va. Dec. 9, 2020).

16 *Id.* at *12.

17 *Id.*

18 *Id.* at *5.

ACC clauses.[19] In fact, the court in *Above It All Roofing & Constr., Inc. v. Sec. Nat'l Ins. Co.*[20] recognized "the Oklahoma Court of Civil Appeals has twice held that Oklahoma law permits the parties to an insurance contract to contract around the efficient proximate cause doctrine through provisions commonly referred to as 'anti-concurrent cause provisions.'"[21] And, as noted, the court in *Goodwill*, applying Oklahoma law, found that a virus exclusion similar to that in the Liberty Policy unambiguously precluded coverage. Accordingly, summary judgment for Plaintiffs should be denied.

B. The Policy's exclusion is specific enough to preclude coverage for virus-caused pandemics.

Next, Plaintiffs argue Liberty's Virus Exclusion does not apply because it does not use the word "pandemic" while exclusions in other policies, not at issue in this matter, have done so. Pandemic, however, is not a separate cause of loss to be excluded. It merely addresses the geographic scope or spread of the virus. By its terms, the Liberty Policy excludes any loss or damage "caused by or resulting from any virus." Plaintiffs do not contend that the coronavirus pandemic was not caused by a virus. There is no dispute that it was. The terms of the exclusion ("any virus") captures loss or damage from a virus at a single building or nationwide. Although

---

19 *See e.g. Duensing v. State Farm Fire & Cas. Co.*, 2006 OK CIV APP 15, ¶ 21, 131 P.3d 127, 134 (holding that "the language of the lead-in clause to the earth movement exclusion is unambiguous. The only fair construction of that paragraph is that when more than one cause is involved in a loss which includes one of the excluded events named under the lead-in clause, in this case, earth movement, there is no coverage regardless of whether the causes acted concurrently or in any sequence with the excluded event."); *Nat'l Am. Ins. Co. v. Gerlicher Co., LLC*, 2011 OK CIV APP 94, ¶ 20, 260 P.3d 1279, 1287, as corrected (Sept. 29, 2011) (finding when an exclusion has an ACC clause, "the only reasonable construction of the exclusion is that when more than one cause is involved...whether directly or indirectly, there is no coverage regardless of whether the causes acted concurrently or in any combination with [the excluded cause]. When loss is caused by both covered perils and [excluded], the [] policy contains language that expressly precludes coverage."); *Thomas v. Farmers Ins. Co., Inc.*, No. 16-CV-17-TCK-JFJ, 2018 WL 701813, at *6 (N.D. Okla. Feb. 2, 2018) (finding under Oklahoma law that when an ACC clause is part of a policy, the insured must "show that no excluded causes of loss directly *or indirectly* contributed to the damages asserted") (emphasis added);

20 *Above It All Roofing & Constr., Inc. v. Sec. Nat'l Ins. Co.*, 285 F. Supp. 3d 1224, 1235 (N.D. Okla. 2018).

21 *Id.*

not required, the Liberty Policy in fact expressly addresses geographic scope, applying "whether or not the loss event results in widespread loss or damage or affects a substantial area."

Courts analyzing claims arising from COVID-19 have repeatedly rejected similar arguments that a pandemic is a different peril than the underlying virus that caused the pandemic. For example, in *Boxed Foods Co., LLC v. California Capital Ins. Co.*,[22] the court rejected an insured's argument that the absence of the word "pandemic" made the virus exclusion ambiguous. In reaching its decision that the virus exclusion unambiguously applied to preclude losses arising from COVID-19, the court reached three conclusions: (1) the absence from a policy of a word does not by itself create an ambiguity; (2) "the word 'pandemic' describes a disease's geographic prevalence, but it does not replace disease as the harm-causing agent...The Virus Exclusion's alleged failure to specify how widespread a disease must become to trigger the exclusion does not demonstrate that the exclusion is ambiguous"; and (3) applying the exclusion only to standalone viruses, but not viruses that escalate into a pandemic "nullifies the plain language of the Virus Exclusion. Courts interpreting a policy must give effect to every term in the policy so that no term is rendered meaningless."[23]

---

[22] *Boxed Foods Co., LLC v. California Capital Ins. Co.*, No. 20-CV-04571-CRB, 2020 WL 6271021, at *5 (N.D. Cal. Oct. 26, 2020), as amended (Oct. 27, 2020).

[23] *Id. See also Raymond II Nahmad DDS PA v. Hartford Cas. Ins. Co.*, No. 1:20-CV-22833, 2020 WL 6392841, at *10 (S.D. Fla. Nov. 2, 2020) (finding "Plaintiffs offer no basis for construing 'COVID-19' or the 'pandemic' as a non-virus for purposes of this exclusion. Nor can they plausibly do so, as the global spread, proliferation, and activity of 'coronavirus' is the underlying pandemic at issue" and upholding a virus exclusion); *Vizza Wash, LP v. Nationwide Mut. Ins. Co.*, No. 5:20-CV-00680-OLG, 2020 WL 6578417, at *7 (W.D. Tex. Oct. 26, 2020) (finding the virus exclusion applied to preclude coverage for the pandemic and noting "the fact that Plaintiff could have used even more specific language does not automatically render ambiguous the language that Plaintiff actually used"); *FRANKLIN EWC, INC., v. THE HARTFORD FINANCIAL SERVICES GROUP, INC.*, No. 20-CV-04434-JSC, 2020 WL 7342687, at *3 (N.D. Cal. Dec. 14, 2020) (nothing there is "nothing in the Virus Exclusion indicates it is limited to viruses arising from the insured premises rather than a pandemic" and further finding that there is "no basis for construing 'COVID-19' or the 'pandemic' as non-virus for purposes of a virus exclusion."); *10E, LLC v. Travelers Indem. Co. of Connecticut*, No. 2:20-CV-04418-SVW-AS, 2020 WL 6749361, at *3 (C.D. Cal. Nov. 13, 2020) (holding "the virus exclusion forecloses coverage where loss or damage is 'caused by or resulting from any virus.'

Further, courts recognize that "while the Virus Exclusion could have been even more specifically worded, that alone does not make the exclusion 'ambiguous.'"[24] As noted above, the plain terms of the exclusion preclude coverage for loss caused by "any virus" and applies whether or not the loss event results in widespread loss or affects a substantial area. That phrasing plainly and broadly applies to a pandemic.

Despite the plain language, and the wealth of cases rejecting similar "pandemic" arguments, Plaintiffs attempt to create an ambiguity where none exists by using extrinsic evidence of other exclusions that could have been used by Liberty from policies that are not at issue here. But courts must only examine the applicable policy and its language and should not consider extrinsic evidence to create an ambiguity where there is none. In 2005, the Oklahoma Supreme Court provided courts with "Well-Settled Oklahoma Standards for Insurance Contracts" and cautioned that "[w]hen policy provisions are unambiguous and clear, the employed language is accorded its ordinary, plain meaning; and the contract is enforced carrying out the parties' intentions. The policy is read as a whole, giving the words and terms their ordinary meaning, enforcing each part thereof. This Court may not rewrite an insurance contract to benefit either party. It is the insurer's responsibility to draft clear provisions of exclusion. **We will not impose coverage where the policy language clearly does not intend that a particular individual or risk should be covered.**"[25]

"The term "resulting from" broadly links a factual situation with the event creating liability, and connotes only a minimal causal connection or incidental relationship.'").

[24] *Diesel Barbershop, LLC v. State Farm Lloyds*, No. 5:20-CV-461-DAE, 2020 WL 4724305, at *6 (W.D. Tex. Aug. 13, 2020) *citing In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 210 (5th Cir. 2007) ("The fact that an exclusion could have been worded more explicitly does not necessarily make it ambiguous.").

[25] *BP Am., Inc. v. State Auto Prop. & Cas. Ins. Co.*, 2005 OK 65, ¶ 6, 148 P.3d 832, 835–36, *as corrected* (Oct. 30, 2006) (emphasis added); *see also* OKLA. STAT. tit. 15, §§ 151–169 (setting standards of contract interpretation by statute).

Courts therefore recognized that under Oklahoma law, "[i]f a contract is complete in itself, and when viewed as a totality, is unambiguous, its language is the only legitimate evidence of what the parties intended. That intention cannot be divined from extrinsic evidence but must be gathered from a four-corners' examination of the instrument."[26] Accordingly, it is improper for Plaintiffs to attempt to introduce extrinsic evidence from another policy form to try to create an ambiguity.[27]

Plaintiffs do not dispute that the virus ultimately caused its loss. Even if an overall pandemic affected the Plaintiffs' business, that pandemic was caused by a virus. The virus exclusion applies whether or not the loss event results in widespread loss or damage or affects a substantial area. Therefore, there is no need for a more narrow exclusion for a pandemic when the virus exclusion is broad enough to encompass the claimed loss. The fact that the term "pandemic" is not in the Liberty Policy does not diminish the applicability of the virus exclusion.

C. The Liberty Policy also excludes Loss of Use

The Plaintiffs' claims are wholly based on their inability to use their facility, without any accompanying physical loss or damage. The Liberty Policy has an exclusion that precludes coverage for "loss of use":

---

[26] *Marquis v. N. Star Mut. Ins. Co.*, No. CIV-14-1157-R, 2015 WL 13573967, at *3 (W.D. Okla. Mar. 30, 2015)

[27] *See also Hensley v. State Farm Fire & Cas. Co.*, 2017 OK 57, ¶ 38, 398 P.3d 11, 23 (reiterating that "an insured may not invoke the principle of latent ambiguity as a means to alter a term in a policy when that term may be applied in the circumstances without creating an ambiguous meaning"); *Pitco Prod. Co. v. Chaparral Energy, Inc.*, 2003 OK 5, ¶ 14, 63 P.3d 541, 546 ("If a contract is complete in itself, and when viewed as a totality, is unambiguous, its language is the only legitimate evidence of what the parties intended. **That intention cannot be divined from extrinsic evidence but must be gathered from a four-corners' examination of the instrument.**) (emphasis added); *Eureka Water Co. v. Nestle Waters N. Am., Inc.*, 690 F.3d 1139, 1149 (10th Cir. 2012) ("Under current Oklahoma common law, extrinsic evidence is not admissible to create an ambiguity in a contract that is unambiguous on its face."); *Milburn v. Life Inv'rs Ins. Co. of Am.*, No. CIV-04-0459-C, 2004 WL 7340077, at *3 (W.D. Okla. Dec. 17, 2004), rev'd and remanded, 511 F.3d 1285 (10th Cir. 2008) (holding a party "may neither use extrinsic evidence to define the disputed language, absent an ambiguity, nor use extrinsic evidence to create the ambiguity").

> **2.** This policy does not apply to loss or damage caused by or resulting from any of the following:
>
> * * *
>
> **b.** Delay, loss of use or loss of market.

Plaintiffs misrepresent how Liberty applies this exclusion by arguing that Liberty intends to apply this exclusion to preclude *any* business interruption claim where the property cannot be used. Liberty has not applied the exclusion in such a broad manner. Rather, Liberty maintains that when the insured's claim is *solely* based on loss of use, without accompanying direct physical loss or damage, there is no coverage.

And courts addressing COVID claims have recognized that the "loss of use" exclusion precludes coverage for pure loss of use claims, unaccompanied by physical loss or damage.[28] Therefore, because Plaintiffs' claims are wholly based on their loss of use of their property and Liberty's Policy expressly excludes Loss of Use, Plaintiffs' claims for pure economic damages arising from the loss of use of their property fails.

D. LIBERTY DOES NOT PROVIDE COVERAGE TO CHEROKEE NATION OR CHEROKEE NATION BUSINESSES

Finally, in its Response, Liberty presented evidence that the Liberty Excess Policy provides coverage only to Cherokee Nation Entertainment. In fact, Liberty did not issue a policy and has no contract with Cherokee Nation or Cherokee Nation Businesses.[29] Neither Cherokee Nation nor Cherokee Nation Businesses presented any evidence to the contrary.

---

[28] *Selane Products, Inc. v. Continental Cas. Co.*, No. 220CV07834MCSAFM, 2020 WL 7253378, at *6 (C.D. Cal. Nov. 24, 2020) (finding the Policy precluded coverage in part because it had an exclusion for "loss of use or loss or market"); *Whiskey River on Vintage, Inc. v. Illinois Cas. Co.*, No. 4:20-CV-185-JAJ, 2020 WL 7258575, at *18 (S.D. Iowa Nov. 30, 2020) (finding in addition to the failure of the insured to demonstrate direct physical loss or damage, which requires the tangible alteration of property and that loss of use alone is insufficient, the "loss of use" exclusion applied to preclude the insured's COVID-19 claim); *Harvest Moon Distributors, LLC v. S.-Owners Ins. Co.*, No. 620CV1026ORL40DCI, 2020 WL 6018918, at *6 (M.D. Fla. Oct. 9, 2020) (applying the loss of use exclusion in part to preclude coverage).

[29] *Compare* Ex. 8, 10 to Plaintiff's Response to Motion to Dismiss *to* Ex. 9 to Plaintiff's Response to Motion to Dismiss. *See also* Park Dec. Ex. A.

Therefore, to the extent Cherokee Nation or Cherokee Nation Businesses have moved for summary judgment against Liberty, those claims fail as a matter of law. Their claims against Liberty should therefore be dismissed.

III. CONCLUSION

For all the foregoing reasons, and those incorporated by reference from Defendants' Opposition Brief, Liberty respectfully requests that the Court deny Plaintiff's Motion for Partial Summary Judgment on Business Interruption Coverage.

Respectfully submitted,

Shannon O'Malley, OBA No. 33451
ZELLE LLP
901 Main Street, Suite 4000
Dallas, TX 75202-3975
Telephone: (214) 742-3000
Facsimile: (214) 760-8994
somalley@zelle.com

-and-

William W. O'Connor, OBA No. 13200
Margo E. Shipley, OBA No. 32118
HALL, ESTILL, HARDWICK, GABLE, GOLDEN & NELSON, P.C.
320 South Boston Avenue, Suite 200
Tulsa, OK 74103-3706
Telephone: (918) 594-0400
Facsimile: (918) 594-0505
boconnor@hallestill.com
mshipley@hallestillcom

ATTORNEYS FOR DEFENDANTS HOMELAND INSURANCE COMPANY OF NEW YORK, ARCH SPECIALTY INSURANCE COMPANY, LIBERTY MUTUAL FIRE INSURANCE COMPANY, AND LANDMARK AMERICAN INSURANCE COMPANY

CERTIFICATE OF SERVICE

I hereby certify that on the _____ day of _____, 2020, a true and correct copy of the foregoing document was served via U.S. Mail and/or email to:

Michael Burrage
Reggie Whitten
Patricia A. Sawyer
Austin Vance
J. Renley Dennis
WHITTEN BURRAGE LAW FIRM
512 North Broadway Avenue, Suite 300
Oklahoma City, OK 73102
mburrage@whittenburragelaw.com
rwhitten@whittenburragelaw.com
rparrish@whittenburragelaw.com
psawyer@whittenburragelaw.com
avance@whittenburragelaw.com
jdennis@whittenburragelaw.com

Bradley E. Beckworth bbeckworth@nixlaw.com
Chad E. Ihrig cihrig@nixlaw.com
NIX PATTERSON, LLP
3600-B North Capital of Texas Highway, Ste. 350
Austin, Texas 78746

ATTORNEYS FOR PLAINTIFF

Jack Cadenhead
CADENHEAD LAW FIRM, P.C.
P.O. Box 2067
Seminole, OK 74818-2067

ATTORNEY FOR DEFENDANT,
ALLIED WORLD NATIONAL ASSURANCE COMPANY

Roger N. Butler, Jr. rbutler@secresthill.com
Nathaniel T. Smith nsmith@secresthill.com
SECREST HILL BUTLER & SECREST
7134 South Yale Ave., Suite 900
Tulsa, OK 74136-6360

ATTORNEYS FOR DEFENDANT
EVANSTON INSURANCE COMPANY

Dan S. Folluo dfolluo@rhodesokla.com
Kerry R. Lewis klewis@rhodesokla.com
RHODES, HIERONYMUS, JONES, TUCKER
& GABLE, P.L.L.C.
P.O. Box 21100
Tulsa, OK 21100

ATTORNEYS FOR DEFENDANT
HALLMARK SPECIALTY INSURANCE COMPANY

Larry D. Ottaway
Amy Sherry Fischer
Jordyn L. Cartmell
FOLIART, HUFF, OTTAWAY & BOTTOM
201 Robert S. Kerr Avenue, 12th Floor
Oklahoma City, OK 73102
larryottaway@oklahomacounsel.com
amyfischer@oklahomacounsel.com
jordyncartmell@oklahomacounsel.com

ATTORNEYS FOR LLOYD'S DEFENDANTS
AND ENDURANCE WORLDWIDE INSURANCE LTD.
T/AS SOMPO INTERNATIONAL

C. William Threlkeld cwthrelkeld@fentonlaw.com
Sterling E. Pratt sepratt@fentonlaw.com
FENTON. FENTON, SMITH, RENEAU & MOON
211 N. Robinson Ave., Suite 800N
Oklahoma City, OK 73102

ATTORNEYS FOR DEFENDANTS
XL INSURANCE AMERICA, INC. AND AXA/XL AMERICA

Shannon O'Malley

4699189.1:003439.00102

EXHIBIT 2

IN THE DISTRICT COURT OF CHEROKEE COUNTY
STATE OF OKLAHOMA

CHEROKEE NATION;
CHEROKEE NATION BUSINESSES, LLC;
CHEROKEE NATION ENTERTAINMENT, LLC;

Plaintiff,

v.

(1) LEXINGTON INSURANCE COMPANY;
(2) UNDERWRITERS AT LLOYD'S – SYNDICATES; ASC1414, XLC 2003, TAL 1183, MSP 318, ATL1861, KLN 510, AGR 3268;
(3) UNDERWRITERS AT LLOYD'S – SYNDICATE: CNP 4444;
(4) UNDERWRITERS AT LLOYD'S – ASPEN SPECIALTY INSURANCE COMPANY;
(5) UNDERWRITERS AT LLOYD'S SYNDICATES: KLN 0510, ATL 1861, ASC 1414, QBE 1886, MSP 0318, APL 1969, CHN 2015, XLC 2003;
(6) UNDERWRITERS AT LLOYD'S – SYNDICATE BRT 2987;
(7) 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;
(8) HOMELAND INSURANCE COMPANY OF NY (ONE BEACON);
(9) HALLMARK SPECIALTY INSURANCE COMPANY;
(10) ENDURANCE WORLDWIDE INSURANCE LTD T/AS SOMPO INTERNATIONAL;
(11) ARCH SPECIALTY INSURANCE COMPANY;
(12) EVANSTON INSURANCE COMPANY;
(13) ALLIED WORLD NATIONAL ASSURANCE COMPANY;
(14) LIBERTY MUTUAL FIRE INSURANCE COMPANY;
(15) XL INSURANCE AMERICA, INC.;
(16) AXA/XL AMERICA, INC.;
(17) RSUI-LANDMARK AMERICAN INSURANCE COMPANY;
(18) CHUBB BERMUDA LTD.;
(19) UNDERWRITERS AT LLOYD'S LONDON; and
(20) ABC INSURANCE COMPANIES (to be determined),

Defendants.

Case No. CV-20-150
Judge Douglas Kirkley

DEFENDANT LANDMARK AMERICAN INSURANCE COMPANY'S SUR-REPLY TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT ON BUSINESS INTERRUPTION COVERAGE

COMES NOW Defendant Landmark American Insurance Company ("Landmark") and files this Sur-Reply in support of its Opposition to the Motion for Partial Summary Judgment brought by Plaintiffs Cherokee Nation, Cherokee Nation Businesses, LLC, and Cherokee Nation Entertainment, LLC ("Plaintiffs") and submits this brief, which solely addresses the arguments concerning the Landmark excess policy exclusions, as follows.

I. SUMMARY

Plaintiffs Cherokee Nation, Cherokee Nation Businesses, and Cherokee Nation Entertainment's Reply briefs maintain that Landmark's exclusion for Loss Due to Virus or Bacteria (the "Pathogenic Materials Exclusion") does not apply to preclude their claims under, essentially, two theories: (1) there is no evidence that the virus actually contaminated Plaintiffs' property; and (2) the exclusion does not preclude coverage for pandemics. But Plaintiffs' arguments ignore the plain terms of the Policy and rely on extrinsic evidence to attempt to create an ambiguity where none exists, in contravention of Oklahoma law.

II. ARGUMENT AND AUTHORITY

As an initial matter, Landmark maintains that this Court does not need to address the Excess Policy's Pathogenic Materials Exclusion. Plaintiffs cannot demonstrate that their claims trigger coverage under the Primary policy form because Plaintiffs have not alleged facts to support any business interruption claim caused by direct physical loss or damage as covered by the Policy to real and/or personal property insured by the Primary policy. In fact, the majority of courts who have addressed COVID-19 business interruption claims have found no

need to resort to applicable Policy exclusions because the virus does not cause direct physical loss or damage.[1]

Regardless, the plain language of the Landmark Policy demonstrates that Plaintiffs' claims are excluded.

A. The Policy excludes loss caused by virus regardless of the presence of the virus on the property.

Plaintiffs argue that Landmark cannot meet its burden to prove the Pathogenic Materials Exclusion applies because it cannot show that there was actual virus contamination at the Plaintiffs' properties. But the Pathogenic Materials Exclusion, which is subject to an anti-concurrent causation provision ("ACC Clause"), is broadly worded to apply to the underlying virus that caused Plaintiffs' claimed losses. Therefore, its terms demonstrate that the Pathogenic Materials Exclusion is not limited to physical contamination of the Plaintiffs' premises.

---

[1] There are a number of cases where the court did not address a virus exclusion at all and found no physical loss or damage. For example, business interruption lawsuits arising out of COVID-19 were wholly dismissed solely on the basis that the virus does not cause direct physical loss or damage in the following cases: *Michael Cetta, Inc. d/b/a Sparks Steak House v. Admiral Indem. Co.*, No. 20 Civ. 4612 (JPC), 2020 WL 7321405, at *13 n. 5 (S.D. N.Y. Dec. 11, 2020) ("Because the Court concludes that [the insured] fails to establish entitlement to coverage under the Policy, it need not reach the question of whether these various exclusions would apply."); *Water Sports Kauai, Inc. v. Fireman's Fund Ins. Co., et al.*, No. 20-cv-03750-WHO, 2020 WL 6562332 (N.D. Cal. Nov. 9, 2020) (finding no coverage under general policy grant of coverage with no discussion of any virus exclusion); *T & E Chicago LLC v Cincinnati Inc. Co.*, No. 20 C 4001, 2020 WL 6801845 (N.D. Ill. Nov. 19, 2020) (finding no physical loss or damage was caused by the virus with no discussion of a virus exclusion).

Similarly, the courts in the following cases only *alternatively* found that a virus exclusion applied, after first confirming there was no coverage because the virus did not cause direct physical loss or damage to insured property: *Travelers Ca. Ins. Co. of Am. v. Geragos & Geragos*, No. CV 20-3619 PSG (EX), 2020 WL 6156584, at *3 (C.D. Cal. Oct. 19, 2020) (finding no physical loss or damage was caused by the virus but also coverage was precluded by a virus exclusion)... *Raymond H Nahmad DDS PA v. Hartford Cas. Ins. Co.*, No. 1:20-CV-22833, 2020 WL 6392841, at *9 (S.D. Fla. Nov. 2, 2020) (finding no coverage under the general policy grant of coverage but further finding the virus exclusion alternatively precluded coverage); *Goodwill Indus. Of Central Okla., Inc. v. Philadelphia Indem. Ins. Co.*, No. 5:20-CV-00511, ECF No. 24 at *11 (W.D. Okla. Nov. 9, 2020) (finding no coverage under general policy grant of coverage but further finding that "the plain meaning of the Virus Endorsement expressly excludes [plaintiff's] claim for coverage."); *West Coast Hotel Mgmt., LLC, et al. v. Berkshire Hathaway Guard Ins. Co.*, No. 2:20-cv-05663-VAP-DFMx, 2020 WL 64440037, at *3-6 (C.D. Cal. Oct. 27, 2020) (finding no coverage under general policy grants of coverage but further finding the virus exclusion alternatively precluded coverage).

The Pathogenic Materials Exclusion states:

> We will not pay for loss or damage caused directly or indirectly by the discharge, dispersal, seepage, migration, release, escape or application of any pathogenic or poisonous biological or chemical materials. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss.

The language of the Pathogenic Materials Exclusion itself makes clear that the exclusion does not require the actual presence of the virus on an insured's premises. This is because the exclusion applies to preclude coverage for loss caused directly **or indirectly** by pathogenic material. And as noted in Landmark's Supplemental Opposition Brief, the dictionary defines the term "pathogenic" as "causing or *capable of causing* disease."[2] The court in the Western District of Oklahoma in *Goodwill Industries of Central Oklahoma, Inc. v. Philadelphia Indemnity Ins. Co.* addressed a similar exclusion and determined that it was broad enough to preclude coverage resulting from any virus *capable of* inducing physical illness.[3]

The insured in *Goodwill* made the same argument propounded here – that there was no evidence that the virus actually contaminated insured property. The virus exclusion in *Goodwill* provided that "there is no coverage under such insurance for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease."[4] The Oklahoma federal court found "by its terms, the exclusion applies because COVID-19 is a virus that 'is capable of inducing physical distress, illness or disease.'"[5] The court found that this language encompassed scenarios where suspected contamination qualifies.[6] The court further determined that the "mandated closures,

---

2 https://www.merriam-webster.com/dictionary/pathogenic

3 *Goodwill Industries of Central Oklahoma, Inc. v. Philadelphia Indemnity Ins. Co.*, Case No. 5:20-cv-0511-R (W.D. OK. Nov, 9, 2020).

4 *Id.* at * 8.

5 *Id.*

6 *Id.* at *9.

which caused Goodwill to seek declaratory judgment, resulted from the ability, or capability, of COVID-19 to 'induce physical distress, illness or disease.'"[7] This same analysis applies here. Landmark's Pathogenic Materials Exclusion also precludes loss or damage caused by or resulting from any pathogenic material, which is something capable of causing illness or disease.

Moreover, the Landmark Pathogenic Materials Exclusion is prefaced with language that expressly states that Landmark does not insure "loss or damage caused directly or indirectly" by pathogenic material "regardless of any other cause or event that contributes concurrently or in any sequence to the loss". This is known as an ACC Clause and applies to preclude losses caused by or resulting directly or indirectly from the virus (*aka* pathogen).

In fact, the court in *Diesel Barbershop, LLC v. State Farm Lloyds*[8] specifically found that an ACC clause, in conjunction with a virus exclusion, applies to preclude business interruption claims arising out of the virus that causes COVID-19. The court noted:

> The Policies expressly state that State Farm does 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[.]" Guided by the plain language of the Policies, the Court finds that Plaintiffs have pleaded that COVID-19 is in fact the reason for the Orders being issued and the underlying cause of Plaintiffs' alleged losses. **While the Orders technically forced the Properties to close to protect public health, the Orders only came about sequentially as a result of the COVID-19 virus spreading rapidly throughout the community. Thus, it was the presence of**

---

7 *Id.* at *10.

8 *Diesel Barbershop, LLC v. State Farm Lloyds*, No. 5:20-CV-461-DAE, 2020 WL 4724305, at *6 (W.D. Tex. Aug. 13, 2020).

COVID-19 in Bexar County and in Texas that was the primary root cause of Plaintiffs' businesses temporarily closing.[9]

Similarly, Plaintiffs have pleaded and argued in their Motion for Summary Judgment that their businesses were affected as a result of COVID-19 spreading through the community. The actions Plaintiffs took within their casinos and other properties were done to protect against the spread of the virus. Accordingly, the losses claimed here are "caused directly or indirectly" by the virus. The Landmark Pathogenic Materials Exclusion applies whether or not the virus-induced pandemic results in direct damage to Plaintiffs' property or indirectly causes Plaintiffs' losses. The exclusion, by its terms, is not restricted to loss arising out of actual contamination of the property.

Plaintiffs rely on three cases to purportedly support their argument that Landmark must show actual contamination of their property. But those cases apply different language and law and therefore are not applicable.

First, Plaintiffs rely on *Duensing v. Traveler's Companies*,[10] a 1993 Montana case that addressed an exclusion that precluded coverage for "the following causes of losses **to personal property**...(d)...contamination..."[11] The court found the language of this exclusion required actual contamination that caused loss to personal property. Here, though, Landmark's exclusion is more broadly worded to apply to loss caused directly or indirectly by a virus.

Ignoring the avalanche of cases finding that virus exclusions preclude claims for COVID-19 losses, Plaintiffs also rely on two outlier cases with different exclusion language and different law. In *Urogynecology Specialist of Fla. LLC v. Sentinel Ins. Co., Ltd.*,[12] the court

---

9 *Id.* at *6 (emphasis added).

10 *Duensing v. Traveler's Companies*, 257 Mont. 376, 380, 849 P.2d 203, 206 (1993).

11 *Id.* (emphasis added).

12 *Urogynecology Specialist of Fla. LLC v. Sentinel Ins. Co.*, Ltd., No. 620CV1174ORL22EJK, 2020 WL 5939172 (M.D. Fla. Sept. 24, 2020).

declined to dismiss a lawsuit based on a "Limited Fungi, Bacteria or Virus Coverage" section of the applicable policy because it did not have the entire policy form to analyze.[13] The court also determined it was not clear at the motion to dismiss stage whether the exclusion applied to the claims presented.[14]

The circumstances here are entirely different. Plaintiffs are seeking summary judgment and the Landmark Exclusion applies to preclude coverage for loss caused directly or indirectly by pathogenic materials. At a minimum, this exclusion and its plain language precludes any summary judgment in favor of Plaintiffs.

Similarly, Plaintiffs rely on *Elegant Massage, LLC v. State Farm Mut. Auto. Ins. Co.*[15] to argue that Landmark's Pathogenic Materials Exclusion should not apply. Again, the exclusion in *Elegant Massage* is different than that in the Landmark Policy.[16] More importantly, the court concluded that the language of the exclusion as written required that the virus be the immediate cause in the chain of events causing loss, and inexplicitly found the prefatory anti-concurrent causation language "has not been established as law in this jurisdiction."[17] The court therefore did not address the fact that the exclusion was written to apply to preclude loss regardless of "whether other causes acted concurrently or in any sequence with the excluded event to produce the loss; or (d) whether the event occurs suddenly

---

13 *Id.* at *4 (noting "[w]ithout 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.").

14 The court recognized the virus exclusion in the *Urogynecology* matter precluded "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.'"[14] The court determined that including virus in the same exclusion as fungi, wet rot, and dry rot created some question as to its intended application. Accordingly, the court found the plaintiff's claim could proceed to litigation.

15 *Elegant Massage, LLC v. State Farm Mut. Auto. Ins. Co.*, No. 2:20-CV-265, 2020 WL 7249624, at *1 (E.D. Va. Dec. 9, 2020).

16 *Id.* at *12.

17 *Id.*

or gradually, involves isolated or widespread damage, arises from natural or external forces, or occurs as a result of any combination of these: ... j. Fungi, Virus or Bacteria."[18]

The court's analysis in *Elegant Massage* does not apply here, though. First, the two exclusions vary significantly in language. But more importantly, Oklahoma courts enforce ACC clauses.[19] In fact, the court in *Above It All Roofing & Constr., Inc. v. Sec. Nat'l Ins. Co.*[20] recognized "the Oklahoma Court of Civil Appeals has twice held that Oklahoma law permits the parties to an insurance contract to contract around the efficient proximate cause doctrine through provisions commonly referred to as 'anti-concurrent cause provisions.'"[21] And, as noted, the court in *Goodwill*, applying Oklahoma law, found that a virus exclusion similar to that in the Landmark Policy unambiguously precluded coverage. Accordingly, summary judgment for Plaintiffs should be denied.

B. The Policy's exclusion is specific enough to preclude coverage for virus-caused pandemics.

Next, Plaintiffs argue Landmark's Pathogenic Materials Exclusion does not apply because it does not use the word "pandemic" while exclusions in other policies, not at issue in this matter, have done so. Pandemic, however, is not a separate cause of loss to be excluded.

---

18 *Id.* at *5.

19 *See e.g. Duensing v. State Farm Fire & Cas. Co.*, 2006 OK CIV APP 15, ¶ 21, 131 P.3d 127, 134 (holding that "the language of the lead-in clause to the earth movement exclusion is unambiguous. The only fair construction of that paragraph is that when more than one cause is involved in a loss which includes one of the excluded events named under the lead-in clause, in this case, earth movement, there is no coverage regardless of whether the causes acted concurrently or in any sequence with the excluded event."); *Nat'l Am. Ins. Co. v. Gerlicher Co., LLC*, 2011 OK CIV APP 94, ¶ 20, 260 P.3d 1279, 1287, as corrected (Sept. 29, 2011) (finding when an exclusion has an ACC clause, "the only reasonable construction of the exclusion is that when more than one cause is involved...whether directly or indirectly, there is no coverage regardless of whether the causes acted concurrently or in any combination with [the excluded cause]. When loss is caused by both covered perils and [excluded], the [] policy contains language that expressly precludes coverage."); *Thomas v. Farmers Ins. Co., Inc.*, No. 16-CV-17-TCK-JFJ, 2018 WL 701813, at *6 (N.D. Okla. Feb. 2, 2018) (finding under Oklahoma law that when an ACC clause is part of a policy, the insured must "show that no excluded causes of loss directly *or indirectly* contributed to the damages asserted") (emphasis added);

20 *Above It All Roofing & Constr., Inc. v. Sec. Nat'l Ins. Co.*, 285 F. Supp. 3d 1224, 1235 (N.D. Okla. 2018).

21 *Id.*

It merely addresses the geographic scope or spread of the virus. By its terms, the Landmark Policy excludes any loss or damage caused directly or indirect by the discharge, dispersal, seepage, migration, release, escape or application of any pathogenic…materials." Plaintiffs do not contend that the coronavirus pandemic was not caused by a pathogen. There is no dispute that it was. The terms of the exclusion ("any pathogenic material") captures loss or damage from a virus at a single building or nationwide.

Courts analyzing claims arising from COVID-19 have repeatedly rejected similar arguments that a pandemic is a different peril than the underlying virus that caused the pandemic. For example, in *Boxed Foods Co., LLC v. California Capital Ins. Co.*,[22] the court rejected an insured's argument that the absence of the word "pandemic" made exclusions that apply to viruses ambiguous. In reaching its decision that a virus exclusion unambiguously applied to preclude losses arising from COVID-19, the court reached three conclusions: (1) the absence from a policy of a word does not by itself create an ambiguity; (2) "the word 'pandemic' describes a disease's geographic prevalence, but it does not replace disease as the harm-causing agent…The Virus Exclusion's alleged failure to specify how widespread a disease must become to trigger the exclusion does not demonstrate that the exclusion is ambiguous"; and (3) applying the exclusion only to standalone viruses, but not viruses that escalate into a pandemic "nullifies the plain language of the Virus Exclusion. Courts interpreting a policy must give effect to every term in the policy so that no term is rendered meaningless."[23]

---

[22] *Boxed Foods Co., LLC v. California Capital Ins. Co.*, No. 20-CV-04571-CRB, 2020 WL 6271021, at *5 (N.D. Cal. Oct. 26, 2020), as amended (Oct. 27, 2020).

[23] *Id. See also Raymond H Nahmad DDS PA v. Hartford Cas. Ins. Co.*, No. 1:20-CV-22833, 2020 WL 6392841, at *10 (S.D. Fla. Nov. 2, 2020) (finding "Plaintiffs offer no basis for construing 'COVID-19' or the 'pandemic' as a non-virus for purposes of this exclusion. Nor can they plausibly do so, as the global spread, proliferation, and activity of 'coronavirus' is the underlying pandemic at issue" and upholding a virus exclusion); *Vizza Wash, LP v. Nationwide Mut. Ins. Co.*, No. 5:20-CV-00680-OLG, 2020 WL 6578417, at

Further, courts recognize that "while the Virus Exclusion could have been even more specifically worded, that alone does not make the exclusion 'ambiguous.'"[24] As noted above, the plain terms of the exclusion preclude coverage for loss caused directly or indirectly by a virus and applies regardless of any other cause or event that contributes concurrently or in any sequence to the loss. That phrasing plainly and broadly applies to a pandemic.

Despite the plain language, and the wealth of cases rejecting similar "pandemic" arguments, Plaintiffs attempt to create an ambiguity where none exists by using extrinsic evidence of other exclusions that could have been used by Landmark from policies that are not at issue here. But courts must only examine the applicable policy and its language and should not consider extrinsic evidence to create an ambiguity where there is none. In 2005, the Oklahoma Supreme Court provided courts with "Well-Settled Oklahoma Standards for Insurance Contracts" and cautioned that "[w]hen policy provisions are unambiguous and clear, the employed language is accorded its ordinary, plain meaning; and the contract is enforced carrying out the parties' intentions. The policy is read as a whole, giving the words and terms their ordinary meaning, enforcing each part thereof. This Court may not rewrite an insurance contract to benefit either party. It is the insurer's responsibility to draft clear provisions of

---

*7 (W.D. Tex. Oct. 26, 2020) (finding the virus exclusion applied to preclude coverage for the pandemic and noting "the fact that Plaintiff could have used even more specific language does not automatically render ambiguous the language that Plaintiff actually used"); *FRANKLIN EWC, INC., v. THE HARTFORD FINANCIAL SERVICES GROUP, INC.*, No. 20-CV-04434-JSC, 2020 WL 7342687, at *3 (N.D. Cal. Dec. 14, 2020) (nothing there is "nothing in the Virus Exclusion indicates it is limited to viruses arising from the insured premises rather than a pandemic" and further finding that there is "no basis for construing 'COVID-19' or the 'pandemic' as non-virus for purposes of a virus exclusion."); *10E, LLC v. Travelers Indem. Co. of Connecticut*, No. 2:20-CV-04418-SVW-AS, 2020 WL 6749361, at *3 (C.D. Cal. Nov. 13, 2020) (holding "the virus exclusion forecloses coverage where loss or damage is 'caused by or resulting from any virus.' 'The term "resulting from" broadly links a factual situation with the event creating liability, and connotes only a minimal causal connection or incidental relationship.'").

[24] *Diesel Barbershop, LLC v. State Farm Lloyds*, No. 5:20-CV-461-DAE, 2020 WL 4724305, at *6 (W.D. Tex. Aug. 13, 2020) *citing In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 210 (5th Cir. 2007) ("The fact that an exclusion could have been worded more explicitly does not necessarily make it ambiguous.").

exclusion. **We will not impose coverage where the policy language clearly does not intend that a particular individual or risk should be covered.**"[25]

Courts therefore recognized that under Oklahoma law, "[i]f a contract is complete in itself, and when viewed as a totality, is unambiguous, its language is the only legitimate evidence of what the parties intended. That intention cannot be divined from extrinsic evidence but must be gathered from a four-corners' examination of the instrument."[26] Accordingly, it is improper for Plaintiffs to attempt to introduce extrinsic evidence from another policy form to try to create an ambiguity.[27]

Plaintiffs do not dispute that the virus ultimately caused its loss. Even if an overall pandemic affected the Plaintiffs' business, that pandemic was caused by a virus. And the Policy unambiguously excludes loss or damage caused directly or indirectly by pathogenic materials, regardless of any other cause or event that contributes concurrently or in any sequence to the loss. Therefore, there is no need for a more narrow exclusion for a pandemic when the Pathogenic Materials Exclusion is broad enough to encompass the claimed loss. The fact that the term "pandemic" is not in the Landmark Policy does not diminish the applicability of the Pathogenic Materials Exclusion.

---

[25] *BP Am., Inc. v. State Auto Prop. & Cas. Ins. Co.*, 2005 OK 65, ¶ 6, 148 P.3d 832, 835–36, *as corrected* (Oct. 30, 2006) (emphasis added); *see also* OKLA. STAT. tit. 15, §§ 151–169 (setting standards of contract interpretation by statute).

[26] *Marquis v. N. Star Mut. Ins. Co.*, No. CIV-14-1157-R, 2015 WL 13573967, at *3 (W.D. Okla. Mar. 30, 2015)

[27] *See also Hensley v. State Farm Fire & Cas. Co.*, 2017 OK 57, ¶ 38, 398 P.3d 11, 23 (reiterating that "an insured may not invoke the principle of latent ambiguity as a means to alter a term in a policy when that term may be applied in the circumstances without creating an ambiguous meaning"); *Pitco Prod. Co. v. Chaparral Energy, Inc.*, 2003 OK 5, ¶ 14, 63 P.3d 541, 546 ("If a contract is complete in itself, and when viewed as a totality, is unambiguous, its language is the only legitimate evidence of what the parties intended. **That intention cannot be divined from extrinsic evidence but must be gathered from a four-corners' examination of the instrument.**) (emphasis added); *Eureka Water Co. v. Nestle Waters N. Am., Inc.*, 690 F.3d 1139, 1149 (10th Cir. 2012) ("Under current Oklahoma common law, extrinsic evidence is not admissible to create an ambiguity in a contract that is unambiguous on its face."); *Milburn v. Life Inv'rs Ins. Co. of Am.*, No. CIV-04-0459-C, 2004 WL 7340077, at *3 (W.D. Okla. Dec. 17, 2004), rev'd and remanded, 511 F.3d 1285 (10th Cir. 2008) (holding a party "may neither use extrinsic evidence to define the disputed language, absent an ambiguity, nor use extrinsic evidence to create the ambiguity").

III. CONCLUSION

For all the foregoing reasons, and those incorporated by reference from Defendants' Opposition Brief, Landmark respectfully requests that the Court deny Plaintiff's Motion for Partial Summary Judgment on Business Interruption Coverage.

Respectfully submitted,

Shannon O'Malley, OBA No. 33451
ZELLE LLP
901 Main Street, Suite 4000
Dallas, TX 75202-3975
Telephone: (214) 742-3000
Facsimile: (214) 760-8994
somalley@zelle.com

-and-

William W. O'Connor, OBA No. 13200
Margo E. Shipley, OBA No. 32118
HALL, ESTILL, HARDWICK, GABLE, GOLDEN & NELSON, P.C.
320 South Boston Avenue, Suite 200
Tulsa, OK 74103-3706
Telephone: (918) 594-0400
Facsimile: (918) 594-0505
boconnor@hallestill.com
mshipley@hallestillcom

ATTORNEYS FOR DEFENDANTS HOMELAND INSURANCE COMPANY OF NEW YORK, ARCH SPECIALTY INSURANCE COMPANY, LIBERTY MUTUAL FIRE INSURANCE COMPANY, AND LANDMARK AMERICAN INSURANCE COMPANY

CERTIFICATE OF SERVICE

I hereby certify that on the _____ day of _____, 2020, a true and correct copy of the foregoing document was served via U.S. Mail and/or email to:

Michael Burrage
Reggie Whitten
Patricia A. Sawyer
Austin Vance
J. Renley Dennis
WHITTEN BURRAGE LAW FIRM
512 North Broadway Avenue, Suite 300
Oklahoma City, OK 73102
mburrage@whittenburragelaw.com
rwhitten@whittenburragelaw.com
rparrish@whittenburragelaw.com
psawyer@whittenburragelaw.com
avance@whittenburragelaw.com
jdennis@whittenburragelaw.com

Bradley E. Beckworth bbeckworth@nixlaw.com
Chad E. Ihrig cihrig@nixlaw.com
NIX PATTERSON, LLP
3600-B North Capital of Texas Highway, Ste. 350
Austin, Texas 78746

ATTORNEYS FOR PLAINTIFF

Jack Cadenhead
CADENHEAD LAW FIRM, P.C.
P.O. Box 2067
Seminole, OK 74818-2067

ATTORNEY FOR DEFENDANT,
ALLIED WORLD NATIONAL ASSURANCE COMPANY

Roger N. Butler, Jr. rbutler@secresthill.com
Nathaniel T. Smith nsmith@secresthill.com
SECREST HILL BUTLER & SECREST
7134 South Yale Ave., Suite 900
Tulsa, OK 74136-6360

ATTORNEYS FOR DEFENDANT
EVANSTON INSURANCE COMPANY

Dan S. Folluo dfolluo@rhodesokla.com
Kerry R. Lewis klewis@rhodesokla.com
RHODES, HIERONYMUS, JONES, TUCKER
& GABLE, P.L.L.C.
P.O. Box 21100
Tulsa, OK 21100

ATTORNEYS FOR DEFENDANT
HALLMARK SPECIALTY INSURANCE COMPANY

Larry D. Ottaway
Amy Sherry Fischer
Jordyn L. Cartmell
FOLIART, HUFF, OTTAWAY & BOTTOM
201 Robert S. Kerr Avenue, 12th Floor
Oklahoma City, OK 73102
larryottaway@oklahomacounsel.com
amyfischer@oklahomacounsel.com
jordyncartmell@oklahomacounsel.com

ATTORNEYS FOR LLOYD'S DEFENDANTS
AND ENDURANCE WORLDWIDE INSURANCE LTD.
T/AS SOMPO INTERNATIONAL

C. William Threlkeld cwthrelkeld@fentonlaw.com
Sterling E. Pratt sepratt@fentonlaw.com
FENTON. FENTON, SMITH, RENEAU & MOON
211 N. Robinson Ave., Suite 800N
Oklahoma City, OK 73102

ATTORNEYS FOR DEFENDANTS
XL INSURANCE AMERICA, INC. AND AXA/XL AMERICA

Shannon O'Malley

4699189.1:003439.00102

EXHIBIT 3

IN THE DISTRICT COURT OF CHEROKEE COUNTY
STATE OF OKLAHOMA

CHEROKEE NATION;
CHEROKEE NATION BUSINESSES, LLC;
CHEROKEE NATION ENTERTAINMENT, LLC;

Plaintiff,

v.

(1) LEXINGTON INSURANCE COMPANY;
(2) UNDERWRITERS AT LLOYD'S – SYNDICATES; ASC1414, XLC 2003, TAL 1183, MSP 318, ATL1861, KLN 510, AGR 3268;
(3) UNDERWRITERS AT LLOYD'S – SYNDICATE: CNP 4444;
(4) UNDERWRITERS AT LLOYD'S – ASPEN SPECIALTY INSURANCE COMPANY;
(5) UNDERWRITERS AT LLOYD'S SYNDICATES: KLN 0510, ATL 1861, ASC 1414, QBE 1886, MSP 0318, APL 1969, CHN 2015, XLC 2003;
(6) UNDERWRITERS AT LLOYD'S – SYNDICATE BRT 2987;
(7) 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;
(8) HOMELAND INSURANCE COMPANY OF NY (ONE BEACON);
(9) HALLMARK SPECIALTY INSURANCE COMPANY;
(10) ENDURANCE WORLDWIDE INSURANCE LTD T/AS SOMPO INTERNATIONAL;
(11) ARCH SPECIALTY INSURANCE COMPANY;
(12) EVANSTON INSURANCE COMPANY;
(13) ALLIED WORLD NATIONAL ASSURANCE COMPANY;
(14) LIBERTY MUTUAL FIRE INSURANCE COMPANY;
(15) XL INSURANCE AMERICA, INC.;
(16) AXA/XL AMERICA, INC.;
(17) RSUI-LANDMARK AMERICAN INSURANCE COMPANY;
(18) CHUBB BERMUDA LTD.;
(19) UNDERWRITERS AT LLOYD'S LONDON; and
(20) ABC INSURANCE COMPANIES (to be determined),

Defendants.

Case No. CV-20-150
Judge Douglas Kirkley

DEFENDANT ARCH SPECIALTY INSURANCE COMPANY'S SUR-REPLY TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT ON BUSINESS INTERRUPTION COVERAGE

COMES NOW Defendant Arch Specialty Insurance Company ("Arch") and files this Sur-Reply in support of its Opposition to the Motion for Partial Summary Judgment brought by Plaintiffs Cherokee Nation, Cherokee Nation Businesses, LLC, and Cherokee Nation Entertainment, LLC ("Plaintiffs") and submits this brief, which solely addresses the arguments concerning the Arch excess policy exclusions, as follows.

I. SUMMARY

Plaintiffs Cherokee Nation, Cherokee Nation Businesses, and Cherokee Nation Entertainment's Reply briefs maintain that Arch's Pollution and Contamination Exclusion Endorsement (the "Virus Exclusion") does not apply to preclude their claims under, essentially, two theories: (1) that the Virus Exclusion is limited to claims for physical damage; and (2) the exclusion does not preclude coverage for pandemics. But Plaintiffs' arguments ignore the plain terms of the Policy and rely on extrinsic evidence to attempt to create an ambiguity where none exists, in contravention of Oklahoma law.

II. ARGUMENT AND AUTHORITY

As an initial matter, Arch maintains that this Court does not need to address the Excess Policy's Virus Exclusion and Loss of Use Exclusion. Plaintiffs cannot demonstrate that their claims trigger coverage under the Primary policy form because Plaintiffs have not alleged facts to support any business interruption claim caused by direct physical loss or damage as covered by the Policy to real and/or personal property insured by the Primary policy. In fact, the majority of courts who have addressed COVID-19 business interruption claims have found no

need to resort to applicable Policy exclusions because the virus does not cause direct physical loss or damage.[1]

Regardless, the plain language of the Arch Policy demonstrates that Plaintiffs' claims are excluded.

A. The Virus Exclusion broadly applies to any loss, damage, cost or expense caused by a virus.

Plaintiffs argue that Arch's Virus Exclusion only applies to claims for *physical damage*. The plain language of the exclusion belies that argument, however.

In particular, Arch's Virus Exclusion states, in relevant part:

> **POLLUTION AND CONTAMINATION EXCLUSION ENDORSEMENT**
>
> ***
>
> This policy does not cover any loss, damage, cost or expense caused by, resulting from, contributed to or made worse by actual, ***suspected, alleged or threatened presence***, discharge, dispersal,

---

[1] There are a number of cases where the court did not address a virus exclusion at all and found no physical loss or damage. For example, business interruption lawsuits arising out of COVID-19 were wholly dismissed solely on the basis that the virus does not cause direct physical loss or damage in the following cases: *Michael Cetta, Inc. d/b/a Sparks Steak House v. Admiral Indem. Co.*, No. 20 Civ. 4612 (JPC), 2020 WL 7321405, at *13 n. 5 (S.D. N.Y. Dec. 11, 2020) ("Because the Court concludes that [the insured] fails to establish entitlement to coverage under the Policy, it need not reach the question of whether these various exclusions would apply."); *Water Sports Kauai, Inc. v. Fireman's Fund Ins. Co., et al.*, No. 20-cv-03750-WHO, 2020 WL 6562332 (N.D. Cal. Nov. 9, 2020) (finding no coverage under general policy grant of coverage with no discussion of any virus exclusion); *T & E Chicago LLC v Cincinnati Inc. Co.*, No. 20 C 4001, 2020 WL 6801845 (N.D. Ill. Nov. 19, 2020) (finding no physical loss or damage was caused by the virus with no discussion of a virus exclusion).

Similarly, the courts in the following cases only *alternatively* found that a virus exclusion applied, after first confirming there was no coverage because the virus did not cause direct physical loss or damage to insured property: *Travelers Ca. Ins. Co. of Am. v. Geragos & Geragos*, No. CV 20-3619 PSG (EX), 2020 WL 6156584, at *3 (C.D. Cal. Oct. 19, 2020) (finding no physical loss or damage was caused by the virus but also coverage was precluded by a virus exclusion)... *Raymond H Nahmad DDS PA v. Hartford Cas. Ins. Co.*, No. 1:20-CV-22833, 2020 WL 6392841, at *9 (S.D. Fla. Nov. 2, 2020) (finding no coverage under the general policy grant of coverage but further finding the virus exclusion alternatively precluded coverage); *Goodwill Indus. Of Central Okla., Inc. v. Philadelphia Indem. Ins. Co.*, No. 5:20-CV-00511, ECF No. 24 at *11 (W.D. Okla. Nov. 9, 2020) (finding no coverage under general policy grant of coverage but further finding that "the plain meaning of the Virus Endorsement expressly excludes [plaintiff's] claim for coverage."); *West Coast Hotel Mgmt., LLC, et al. v. Berkshire Hathaway Guard Ins. Co.*, No. 2:20-cv-05663-VAP-DFMx, 2020 WL 64440037, at *3-6 (C.D. Cal. Oct. 27, 2020) (finding no coverage under general policy grants of coverage but further finding the virus exclusion alternatively precluded coverage).

> seepage, migrations, introduction, release or escape of "Pollutants or Contaminants", all ***whether*** direct or indirect, proximate or remote or in whole or in part caused by, contributed to or aggravated by any physical damage insured by this policy, except as specifically referenced below.
>
> ***
>
> "Pollutants or Contaminants" means any material, whether solid, liquid, gaseous or otherwise, which can cause or threaten damage to human health or human welfare or causes or threatens damage, deterioration, loss of value, marketability or loss of use to property insured hereunder. "Pollutants or Contaminants" include, but are not limited to, foreign substances, impurities, hazardous materials, poisons, toxins, pathogens or pathogenic organisms, bacteria, ***virus***, and any disease causing or illness causing agents.[2]

Plaintiffs appear to argue that the exclusion's phrase "*whether direct or indirect, proximate or remote or in whole or in part caused by, contributed to or aggravated by any physical damage insured by this policy*" somehow limits the application of the exclusion to claims arising from physical damage. But that interpretation is unreasonable and misapplies its plain language.

The referenced phrase starts with the term "whether", which indicates alternative conditions or possibilities.[3] In particular, the Virus Exclusion makes clear that it does not cover loss, damage, cost or expense caused by, resulting from, contributed to or made worse by suspected or threatened presence of a virus, *whether* caused by any physical damage or not. Accordingly, the plain language of Arch's Virus Exclusion demonstrates that the threat of the virus that causes COVID-19 and any loss sustained by Plaintiffs therefrom is excluded.

---

[2] Emphasis added.

[3] Merriam-Webster defines the term "whether" as "used as a function word usually with correlative *or* or with *or whether* to indicate (1) until the early 19th century a direct question involving alternatives; (2) an indirect question involving stated or implied alternatives; (3) alternative conditions or possibilities." https://www.merriam-webster.com/dictionary/whether

B. The Policy's exclusion is specific enough to preclude coverage for virus-caused pandemics.

Next, Plaintiffs argue that Arch's Virus Exclusion does not apply because it does not use the word "pandemic" while exclusions in other policies, not at issue in this matter, have done so. Pandemic, however, is not a separate cause of loss to be excluded. It merely addresses the geographic scope or spread of the virus. By its terms, the Arch Policy does not "cover any loss, damage, cost or expense caused by, resulting from contributed to or made worse by actual, suspected, alleged or threatened presence" of a virus. Plaintiffs do not contend that the coronavirus pandemic was not caused by a virus. There is no dispute that it was. The terms of the exclusion ("virus") captures loss or damage from a virus at a single building or nationwide.

Courts analyzing claims arising from COVID-19 have repeatedly rejected similar arguments that a pandemic is a different peril than the underlying virus that caused the pandemic. For example, in *Boxed Foods Co., LLC v. California Capital Ins. Co.*,[4] the court rejected an insured's argument that the absence of the word "pandemic" made the virus exclusion ambiguous. In reaching its decision that the virus exclusion unambiguously applied to preclude losses arising from COVID-19, the court reached three conclusions: (1) the absence from a policy of a word does not by itself create an ambiguity; (2) "the word 'pandemic' describes a disease's geographic prevalence, but it does not replace disease as the harm-causing agent...The Virus Exclusion's alleged failure to specify how widespread a disease must become to trigger the exclusion does not demonstrate that the exclusion is ambiguous"; and (3) applying the exclusion only to standalone viruses, but not viruses that escalate into a

[4] *Boxed Foods Co., LLC v. California Capital Ins. Co.*, No. 20-CV-04571-CRB, 2020 WL 6271021, at *5 (N.D. Cal. Oct. 26, 2020), as amended (Oct. 27, 2020).

pandemic "nullifies the plain language of the Virus Exclusion. Courts interpreting a policy must give effect to every term in the policy so that no term is rendered meaningless."[5]

Further, courts recognize that "while the Virus Exclusion could have been even more specifically worded, that alone does not make the exclusion 'ambiguous.'"[6] As noted above, the plain terms of the exclusion preclude coverage for loss, damage, cost or expense caused by, resulting from, contributed to or made worse by actual, suspected, alleged or threatened presence, discharge, introduction, release, etc. of a virus. That phrasing plainly and broadly applies to a pandemic.

Despite the plain language, and the wealth of cases rejecting similar "pandemic" arguments, Plaintiffs attempt to create an ambiguity where none exists by using extrinsic evidence of other exclusions that could have been used by Arch from policies that are not at issue here. But courts must only examine the applicable policy and its language and should not consider extrinsic evidence to create an ambiguity where there is none. In 2005, the Oklahoma Supreme Court provided courts with "Well-Settled Oklahoma Standards for Insurance Contracts" and cautioned that "[w]hen policy provisions are unambiguous and clear, the

---

5 *Id. See also Raymond H Nahmad DDS PA v. Hartford Cas. Ins. Co.*, No. 1:20-CV-22833, 2020 WL 6392841, at *10 (S.D. Fla. Nov. 2, 2020) (finding "Plaintiffs offer no basis for construing 'COVID-19' or the 'pandemic' as a non-virus for purposes of this exclusion. Nor can they plausibly do so, as the global spread, proliferation, and activity of 'coronavirus' is the underlying pandemic at issue" and upholding a virus exclusion); *Vizza Wash, LP v. Nationwide Mut. Ins. Co.*, No. 5:20-CV-00680-OLG, 2020 WL 6578417, at *7 (W.D. Tex. Oct. 26, 2020) (finding the virus exclusion applied to preclude coverage for the pandemic and noting "the fact that Plaintiff could have used even more specific language does not automatically render ambiguous the language that Plaintiff actually used"); *FRANKLIN EWC, INC., v. THE HARTFORD FINANCIAL SERVICES GROUP, INC.*, No. 20-CV-04434-JSC, 2020 WL 7342687, at *3 (N.D. Cal. Dec. 14, 2020) (nothing there is "nothing in the Virus Exclusion indicates it is limited to viruses arising from the insured premises rather than a pandemic" and further finding that there is "no basis for construing 'COVID-19' or the 'pandemic' as non-virus for purposes of a virus exclusion."); *10E, LLC v. Travelers Indem. Co. of Connecticut*, No. 2:20-CV-04418-SVW-AS, 2020 WL 6749361, at *3 (C.D. Cal. Nov. 13, 2020) (holding "the virus exclusion forecloses coverage where loss or damage is 'caused by or resulting from any virus.' 'The term "resulting from" broadly links a factual situation with the event creating liability, and connotes only a minimal causal connection or incidental relationship.'").

6 *Diesel Barbershop, LLC v. State Farm Lloyds*, No. 5:20-CV-461-DAE, 2020 WL 4724305, at *6 (W.D. Tex. Aug. 13, 2020) *citing In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 210 (5th Cir. 2007) ("The fact that an exclusion could have been worded more explicitly does not necessarily make it ambiguous.").

employed language is accorded its ordinary, plain meaning; and the contract is enforced carrying out the parties' intentions. The policy is read as a whole, giving the words and terms their ordinary meaning, enforcing each part thereof. This Court may not rewrite an insurance contract to benefit either party. It is the insurer's responsibility to draft clear provisions of exclusion. **We will not impose coverage where the policy language clearly does not intend that a particular individual or risk should be covered.**"[7]

Courts therefore recognized that under Oklahoma law, "[i]f a contract is complete in itself, and when viewed as a totality, is unambiguous, its language is the only legitimate evidence of what the parties intended. That intention cannot be divined from extrinsic evidence but must be gathered from a four-corners' examination of the instrument."[8] Accordingly, it is improper for Plaintiffs to attempt to introduce extrinsic evidence from another policy form to try to create an ambiguity.[9]

Plaintiffs do not dispute that the virus ultimately caused its loss. Even if an overall pandemic affected the Plaintiffs' business, that pandemic was caused by a virus. And the Policy unambiguously excludes loss, damage, cost or expense caused by, resulting from, contributed to or made worse by actual, suspected, alleged or threatened presence, discharge, dispersal,

---

7 *BP Am., Inc. v. State Auto Prop. & Cas. Ins. Co.*, 2005 OK 65, ¶ 6, 148 P.3d 832, 835–36, *as corrected* (Oct. 30, 2006) (emphasis added); *see also* OKLA. STAT. tit. 15, §§ 151–169 (setting standards of contract interpretation by statute).

8 *Marquis v. N. Star Mut. Ins. Co.*, No. CIV-14-1157-R, 2015 WL 13573967, at *3 (W.D. Okla. Mar. 30, 2015)

9 *See also Hensley v. State Farm Fire & Cas. Co.*, 2017 OK 57, ¶ 38, 398 P.3d 11, 23 (reiterating that "an insured may not invoke the principle of latent ambiguity as a means to alter a term in a policy when that term may be applied in the circumstances without creating an ambiguous meaning"); *Pitco Prod. Co. v. Chaparral Energy, Inc.*, 2003 OK 5, ¶ 14, 63 P.3d 541, 546 ("If a contract is complete in itself, and when viewed as a totality, is unambiguous, its language is the only legitimate evidence of what the parties intended. **That intention cannot be divined from extrinsic evidence but must be gathered from a four-corners' examination of the instrument.**) (emphasis added); *Eureka Water Co. v. Nestle Waters N. Am., Inc.*, 690 F.3d 1139, 1149 (10th Cir. 2012) ("Under current Oklahoma common law, extrinsic evidence is not admissible to create an ambiguity in a contract that is unambiguous on its face."); *Milburn v. Life Inv'rs Ins. Co. of Am.*, No. CIV-04-0459-C, 2004 WL 7340077, at *3 (W.D. Okla. Dec. 17, 2004), rev'd and remanded, 511 F.3d 1285 (10th Cir. 2008) (holding a party "may neither use extrinsic evidence to define the disputed language, absent an ambiguity, nor use extrinsic evidence to create the ambiguity").

etc. of a virus. Therefore, there is no need for a more narrow exclusion for a pandemic when the Virus Exclusion is broad enough to encompass the claimed loss. The fact that the term "pandemic" is not in the Arch Policy does not diminish the applicability of the Virus Exclusion.

III. CONCLUSION

For all the foregoing reasons, and those incorporated by reference from Defendants' Opposition Brief, Arch respectfully requests that the Court deny Plaintiff's Motion for Partial Summary Judgment on Business Interruption Coverage.

Respectfully submitted,

Shannon O'Malley, OBA No. 33451
ZELLE LLP
901 Main Street, Suite 4000
Dallas, TX 75202-3975
Telephone: (214) 742-3000
Facsimile: (214) 760-8994
somalley@zelle.com

-and-

William W. O'Connor, OBA No. 13200
Margo E. Shipley, OBA No. 32118
HALL, ESTILL, HARDWICK, GABLE, GOLDEN & NELSON, P.C.
320 South Boston Avenue, Suite 200
Tulsa, OK 74103-3706
Telephone: (918) 594-0400
Facsimile: (918) 594-0505
boconnor@hallestill.com
mshipley@hallestillcom

ATTORNEYS FOR DEFENDANTS HOMELAND INSURANCE COMPANY OF NEW YORK, ARCH SPECIALTY INSURANCE COMPANY, LIBERTY MUTUAL FIRE INSURANCE COMPANY, AND LANDMARK AMERICAN INSURANCE COMPANY

CERTIFICATE OF SERVICE

I hereby certify that on the _____ day of _____, 2020, a true and correct copy of the foregoing document was served via U.S. Mail and/or email to:

Michael Burrage
Reggie Whitten
Patricia A. Sawyer
Austin Vance
J. Renley Dennis
WHITTEN BURRAGE LAW FIRM
512 North Broadway Avenue, Suite 300
Oklahoma City, OK 73102
mburrage@whittenburragelaw.com
rwhitten@whittenburragelaw.com
rparrish@whittenburragelaw.com
psawyer@whittenburragelaw.com
avance@whittenburragelaw.com
jdennis@whittenburragelaw.com

Bradley E. Beckworth bbeckworth@nixlaw.com
Chad E. Ihrig cihrig@nixlaw.com
NIX PATTERSON, LLP
3600-B North Capital of Texas Highway, Ste. 350
Austin, Texas 78746

ATTORNEYS FOR PLAINTIFF

Jack Cadenhead
CADENHEAD LAW FIRM, P.C.
P.O. Box 2067
Seminole, OK 74818-2067

ATTORNEY FOR DEFENDANT,
ALLIED WORLD NATIONAL ASSURANCE COMPANY

Roger N. Butler, Jr. rbutler@secresthill.com
Nathaniel T. Smith nsmith@secresthill.com
SECREST HILL BUTLER & SECREST
7134 South Yale Ave., Suite 900
Tulsa, OK 74136-6360

ATTORNEYS FOR DEFENDANT
EVANSTON INSURANCE COMPANY

Dan S. Folluo dfolluo@rhodesokla.com
Kerry R. Lewis klewis@rhodesokla.com
RHODES, HIERONYMUS, JONES, TUCKER
& GABLE, P.L.L.C.
P.O. Box 21100
Tulsa, OK 21100

ATTORNEYS FOR DEFENDANT
HALLMARK SPECIALTY INSURANCE COMPANY

Larry D. Ottaway
Amy Sherry Fischer
Jordyn L. Cartmell
FOLIART, HUFF, OTTAWAY & BOTTOM
201 Robert S. Kerr Avenue, 12th Floor
Oklahoma City, OK 73102
larryottaway@oklahomacounsel.com
amyfischer@oklahomacounsel.com
jordyncartmell@oklahomacounsel.com

ATTORNEYS FOR LLOYD'S DEFENDANTS
AND ENDURANCE WORLDWIDE INSURANCE LTD.
T/AS SOMPO INTERNATIONAL

C. William Threlkeld cwthrelkeld@fentonlaw.com
Sterling E. Pratt sepratt@fentonlaw.com
FENTON. FENTON, SMITH, RENEAU & MOON
211 N. Robinson Ave., Suite 800N
Oklahoma City, OK 73102

ATTORNEYS FOR DEFENDANTS
XL INSURANCE AMERICA, INC. AND AXA/XL AMERICA

Shannon O'Malley

4702043.1:003439.00102

EXHIBIT 4

IN THE DISTRICT COURT OF CHEROKEE COUNTY
STATE OF OKLAHOMA

CHEROKEE NATION;
CHEROKEE NATION BUSINESSES, LLC;
CHEROKEE NATION ENTERTAINMENT, LLC;

Plaintiffs,

v.

(1) LEXINGTON INSURANCE COMPANY;
(2) UNDERWRITERS AT LLOYD'S – SYNDICATES; ASC1414, XLC 2003, TAL 1183, MSP 318, ATL 1861, KLN 510, AGR 3268;
(3) UNDERWRITERS AT LLOYD'S – SYNDICATE: CNP 4444;
(4) UNDERWRITERS AT LLOYD'S – ASPEN SPECIALTY INSURANCE COMPANY;
(5) UNDERWRITERS AT LLOYD'S – SYNDICATES: KLN 0510, ATL 1861, ASC 1414, QBE 1886, MSP 0318, APL 1969, CHN 2015, XLC 2003;
(6) UNDERWRITERS AT LLOYD'S – SYNDICATE BRT 2987;
(7) 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;
(8) HOMELAND INSURANCE COMPANY OF NY (ONE BEACON);
(9) HALLMARK SPECIALTY INSURANCE COMPANY;
(10) ENDURANCE WORLDWIDE INSURANCE LTD T/AS SOMPO INTERNATIONAL;
(11) ARCH SPECIALTY INSURANCE COMPANY;
(12) EVANSTON INSURANCE COMPANY;
(13) ALLIED WORLD NATIONAL INSURANCE COMPANY;
(14) LIBERTY MUTUAL FIRE INSURANCE COMPANY;
(15) XL INSURANCE AMERICA, INC.;
(16) AXA/XL AMERICA, INC.;
(17) RSUI-LANDMARK AMERICAN INSURANCE COMPANY;
(18) CHUBB BERMUDA LTD.;
(19) UNDERWRITERS AT LLOYD'S LONDON;
(20) ABC INSURANCE COMPANIES (to be determined);

Defendants.

Case No. CV-2020-150
The Honorable Douglas Kirkley

ORDER

The Court has for its consideration Defendants Liberty Mutual Fire Insurance Company, Landmark American Insurance Company, and Arch Specialty Insurance Company's Motion for Leave to File Sur-Replies in Opposition to the Partial Motion for Summary Judgment of Plaintiffs Cherokee Nation, Cherokee Nation Businesses, LLC, and Cherokee Nation Entertainment, LLC. Upon consideration, and for good cause shown, the Motion is **GRANTED**.

IT IS HEREBY ORDERED that Defendants may file the Sur-Replies attached as Exhibits 1-3 to their Motion for Leave within five (5) days of the date of this Order.

SO ORDERED THIS ___ day of December, 2020.

HONORABLE DOUGLAS KIRKLEY
JUDGE OF THE DISTRICT COURT

4701970.1:003439.00102