Supreme Court Case No. S277893

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

ANOTHER PLANET ENTERTAINMENT, LLC,

Petitioner,

v.

VIGILANT INSURANCE COMPANY,

Respondent.

Request for Certification to Decide a Matter of California Law Presented in a Matter Pending in the U.S. Court of Appeals, Ninth Circuit
Case No. 21-16093

Appeal from the United States District Court
For the Northern District of California, San Francisco
Hon. Vince Chhabria
Case No. 3:20-cv-07476-VC

REQUEST FOR JUDICIAL NOTICE

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Pursuant to California Evidence Code sections 452 and 453, Petitioner Another Planet Entertainment, LLC, requests that this Court take judicial notice of the following matters:

1. The SARS-CoV-2 virus can spread between people by (i) direct person-to-person particle transmission; (ii) aerosols suspended in the air; and (iii) touching objects or surfaces contaminated by the virus.

   a. World Health Organization, *Coronavirus disease (COVID-19): How is it transmitted?*, (updated December 23, 2021), attached as Exhibit A, and available at https://www.who.int/emergencies/diseases/novel-coronavirus-2019/question-and-answers-hub/q-a-detail/coronavirus-disease-covid-19-how-is-it-transmitted

   b. Centers for Disease Control and Prevention, *Science Brief: SARS-CoV-2 and Surface (Fomite) Transmission for Indoor Community Environments*, (updated March 24, 2021), attached as Exhibit B, and available at https://www.cdc.gov/coronavirus/2019-ncov/more/science-and-research/surface-transmission.html

c. Centers for Disease Control and Prevention, *Scientific Brief: SARS-CoV-2 Transmission*, (updated May 7, 2021), attached as Exhibit C, and available at https://www.cdc.gov/coronavirus/2019-ncov/science/science-briefs/sars-cov-2-transmission.html

d. Dyani Lewis, *Why the WHO took two years to say COVID is airborne*, NATURE (April 6, 2022), attached as Exhibit D, and available at https://www.nature.com/articles/d41586-022-00925-7

2. The SARS CoV 2 virus is a physical substance.

a. Nat'l Human Genome Research Institute, *Virus*, (updated March 24, 2023), attached as Exhibit E, and available at https://www.genome.gov/genetics-glossary/Virus

b. Oswin et al., *The dynamics of SARS-CoV-2 infectivity with changes in aerosol microenvironment*, PROCEEDINGS OF THE NAT'L ACAD. OF SCI., Vol. 119 No. 27 (June 28, 2022), attached as Exhibit F, and available at https://www.pnas.org/doi/10.1073/pnas.2200109119

3. Air is a physical substance made of gases and aerosolized particles.

a. *Air*, ENCYCLOPEDIA BRITANNICA (updated Oct. 4, 2022), attached as Exhibit G, and available at https://www.britannica.com/science/air

4. There is significant scientific evidence for the fact that aerosolized SARS-CoV-2 can remain in the air for hours or days.

a. Nissen, et al., *Long-Distance Airborne Dispersal of SARS-CoV-2 in COVID-19 Wards*, NATURE, (November 11, 2020), attached as Exhibit H, and available at https://www.nature.com/articles/s41598-020-76442-2

b. Duval, et al., *Long distance airborne transmission of SARS-CoV-2: rapid systematic review*, 377 BMJ 2022, (June 29, 2022), attached as Exhibit I, and available at https://www.bmj.com/content/377/bmj-2021-068743

c. U.S. Environmental Protection Agency, *Indoor Air and COVID-19 Key References and Publications*, (updated July 18, 2022), attached as Exhibit J, and available at https://www.epa.gov/coronavirus/indoor-

air-and-covid-19-key-references-and-publications (collecting citations)

d. Prather et al., *Airborne Transmission of SARS-CoV-2*, 370 SCIENCE 303 (Oct. 16, 2020), attached as Exhibit K, and available at https://science.sciencemag.org/content/370/6514/303.2

e. Cai et al., *Indirect Virus Transmission in Cluster of COVID-19 Cases, Wenzhou, China*, *2020*, 26 EMERGING INFECTIOUS DISEASES 1343, 1345 (June 2020), attached as Exhibit L, and available at https://wwwnc.cdc.gov/eid/article/26/6/20-0412_article

5. There is significant scientific evidence for the fact that live SARS-CoV-2 can remain on surfaces for hours or days.

a. U.S. Dep't of Homeland Security, Estimated Surface Decay of SARS-CoV-2 (virus that causes COVID-19) on surfaces under a range of temperatures, relative humidity, and UV Index, (updated Dec. 20, 2022), attached as Exhibit M, and available at https://www.dhs.gov/science-and-technology/sars-calculator

b. Geng & Wang, *Stability and transmissibility of SARS-CoV-2 in the environment,* JOURNAL OF MEDICAL VIROLOGY, Vol. 95, Issue 1 (Aug. 30, 2022), attached as Exhibit N, and available at https://onlinelibrary.wiley.com/doi/full/10.1002/jmv.28103

c. Sam Meredith, *Virus that causes Covid-19 can survive for 28 days on common surfaces, research says*, CNBC, (Oct. 12, 2020), attached as Exhibit O, and available at https://www.cnbc.com/2020/10/12/virus-that-causes-covid-19-can-survive-for-28-days-on-surfaces-research-says.html

d. Riddell et al., *The effect of temperature on persistence of SARS-CoV-2 on common surfaces*, 17 VIROLOGY J., Art. No. 145 (2020), attached as Exhibit P, and available at https://virologyj.biomedcentral.com/articles/10.1186/s12985-020-01418-7

e. Xie et al., *A Nanomechanical Study on Deciphering the Stickiness of SARSCoV-2 on Inanimate Surfaces*, APPLIED MATERIALS & INTERFACES, 2020, 12 (DEC. 18, 2020) attached as Exhibit Q, and available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7770894/

6. There is significant scientific evidence for the fact that remedial measures, including cleaning and ventilation, cannot be assured to eliminate or exclude SARS-CoV-2 from a premises.

a. U.S. Environmental Protection Agency, *Indoor Air and Coronavirus (COVID-19)*, (updated Jan. 27, 2023), attached as Exhibit R, and available at https://www.epa.gov/coronavirus/indoor-air-and-coronavirus-covid-19 (linking to resources on remediating COVID-19-related risk)

b. U.S. Environmental Protection Agency, *Air Cleaners, HVAC Filters, and Coronavirus (COVID-19)*, (updated July 7, 2022), attached as Exhibit S, and available at https://www.epa.gov/coronavirus/air-cleaners-hvac-filters-and-coronavirus-covid-19

c. Centers for Disease Control, Safety Precautions When Using Electrostatic Sprayers, Foggers, Misters, or Vaporizers for Surface Disinfection During the COVID-19 Pandemic (updated Feb. 27, 2023), attached as Exhibit T, and available at

https://www.cdc.gov/coronavirus/2019-ncov/php/eh-practitioners/sprayers.html

7. That statements were made by the Insurance Services Office in ISO Circular, "New Endorsements Filed to Address Exclusion of Loss Due to Virus or Bacteria," (July 6, 2006), attached as Exhibit U, and available at https://www.propertyinsurancecoveragelaw.com/files/2020/03/ISO-Circular-LI-CF-2006-175-Virus.pdf, including the following:

a. that examples of "viral and bacterial contaminants are rotavirus, SARS, [and] influenza";

b. that "[t]he universe of disease-causing organisms is always in evolution";

c. that "Disease-causing agents may render a product impure (change its quality or substance), or enable the spread of disease by their presence on interior building surfaces or the surfaces of personal property. When disease-causing viral or bacterial contamination occurs, potential claims involve the cost of replacement of property (for example, the milk), cost of decontamination (for example, interior

building surfaces), and business interruption (time element) losses."; and

d. that "the specter of pandemic or hitherto unorthodox transmission of infectious material raises the concern that insurers employing [property] policies may face claims in which there are efforts to expand coverage and to create sources of recovery for such losses, contrary to policy intent."

8. That Chubb made statements in its Securities and Exchange Commission Form 10-K. Limited Annual Report, attached as Exhibit V, and available at https://s1.q4cdn.com/677769242/files/doc_financials/2020/ar/2019-Chubb-Limited-Annual-Report.pdf and https://www.sec.gov/Archives/edgar/data/896159/000089615920000003/cb-12312019x10k.htm, including the following:

a. "We have substantial exposure to losses resulting from . . . catastrophic events, including pandemics."; and

b. "[T]he U.S. and many other nations of the world are shutting down much of their social and economic

activity in response to the spread and threat of the coronavirus."

Courts may take judicial notice of "[f]acts and propositions that are of such common knowledge within the territorial jurisdiction of the court that they cannot reasonably be the subject of dispute" and "[f]acts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy." Cal. Evid. Code § 452 (g), (h). According to the Assembly Committee on Judiciary "Subdivisions (g) and (h) include, for example, facts which are accepted as established by experts and specialists in the natural, physical, and social sciences, if those facts are of such wide acceptance that to submit them to the jury would be to risk irrational findings." Cal. Evid. Code § 452 cmt.

Facts 1, 2, and 3 are medical and scientific facts not subject to reasonable dispute, as demonstrated by the illustrative source material cited in support of each. Courts have long taken judicial notice of medical facts, including with respect to ultimate issues. *See, e.g.*, *Knowles v. Workmen's Comp. App. Bd.*, 10 Cal. App. 3d 1027, 1033 (1970) ("coronary arteriosclerosis amounts to 'heart

trouble'," as used in the statute). *People v. Sanders*, 268 Cal. App. 2d 802, 805 n.1 (1969) (observing, with respect to excessive force claim, the "common knowledge . . . that any stoppage of the flow of blood to the head until one becomes unconscious is attended by serious danger"); *Agnew v. City of Los Angeles*, 97 Cal. App. 2d 557, 567 (1950) (in medical malpractice case, noticing that "[t]he failure to make use of the X-ray as an aid to diagnosis in cases of fracture amounts to a failure to use that degree of care and diligence ordinarily used by physicians of good standing"). Courts have also taken judicial notice of public health facts. *See Cantrell v. Bd. of Sup'rs*, 87 Cal. App. 2d 471, 477 (1948) ("We are further impressed that from the evidence adduced herein, the board could take judicial notice of the fact that the presence of large numbers of rats and flies is extremely detrimental to the health of the public."); *Spreckels v. City & Cnty. of San Francisco*, 76 Cal. App. 267 (1926) (the location and maritime nature of San Francisco and its attendant vulnerability to bubonic plague). There is presently no serious dispute as to the principal methods of transmission of SARS-CoV-2. Accordingly, judicial notice should be granted as to Fact 1.

This Court has also judicially noticed scientific facts, including the nature and proper description of matter. *McAllister v. Workmen's Comp. Appeals Bd.*, 69 Cal. 2d 408, 414 (1968) ("[B]oth common knowledge and ordinary language support [the] recognition that smoke is visible, and that, as a matter beyond scientific dispute, smoke is visible precisely because it contains incompletely oxidized materials."); *see Truck Ins. Exch. v. Indus. Acc. Comm'n*, 77 Cal. App. 2d 461, 466 (1946) (characteristics of lightning and factors tending to make lighting strikes more likely). It is appropriate here to take judicial notice of the nature of air and the nature of SARS-CoV-2, in accordance with Facts 2 and 3.

With respect to Facts 4, 5, and 6, this Court can readily verify the availability of scientific source material, including by reference to the example sources cited by Another Planet. Another Planet recognizes that "[t]he science concerning SARS-CoV-2 necessarily has developed very rapidly and, like the virus itself, continues to evolve." *Broadway Hospitality Venture LLC v. Indem. Ins. Co.*, Case No. 24-C-20-003737, Slip Op. at *4–5 (Md. Circuit

Ct. March 29, 2023).[1] These sources are, at minimum, "important as evidence of what was known or believed at the time of publication as for ultimate scientific conclusions." *Id.* at *5. To the extent such scientific facts are relevant to the Court's disposition of this Certified Question, Another Planet submits that it is relevant to consider what an insured such as Another Planet may be able to present regarding the nature of SARS-CoV-2.

With respect to Facts 7 and 8, courts can take judicial notice of statements made on company websites, including documents maintained. *See Ampex Corp. v. Cargle*, 128 Cal. App. 4th 1569, 1573 (2005) ("We take judicial notice that Ampex maintains a Web site at www.ampex.com. Among other things, the company posts its Securities and Exchange Commission filings on this Web site. Press releases and letters from the chairman are also available through the Web site."). The statements of ISO and Chubb on their respective websites should be judicially noticed as evidence of what those companies have said.

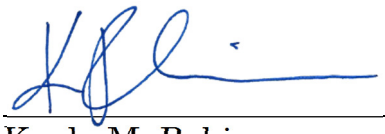
When a party requests that a court take judicial notice of a fact enumerated in Evidence Code section 452 and gives the

[1] A copy of this opinion is in the attached Appendix.

opposing party sufficient notice of the request, judicial notice is mandatory. Cal. Evid. Code § 453. Because Another Planet has complied with this requirement and furnished the Court with sufficient information to take judicial notice of the above-mentioned facts, Another Planet respectfully requests that the Court take judicial notice thereof.

DATED: April 4, 2023

PASICH LLP

By: 

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APPENDIX

APPENDIX

DESCRIPTION **PAGE**

Cases

Broadway Hospitality Venture LLC v. Indem. Ins. Co.,
Case No. 24-C-20-003737
(Md. Circuit Ct. March 29, 2023) RJN-1

BROADWAY HOSPITALITY VENTURE LLC, *et al.*, **Plaintiffs,** **v.** **INDEMNITY INSURANCE COMPANY OF NORTH AMERICA,** **Defendant.**	**IN THE** **CIRCUIT COURT** **FOR BALTIMORE CITY** **Case No. 24-C-20-003737**

MEMORANDUM OPINION

Plaintiffs in this action are operators of eight restaurants in New York and Maryland affiliated as the Fireman's Hospitality Group ("Fireman's Hospitality").[1] Fireman's Hospitality purchased an insurance policy from Defendant Indemnity Insurance Company of North America ("Indemnity"), a Chubb company, to provide commercial property and other coverage from August 1, 2019 to August 1, 2020. The global pandemic caused by the novel coronavirus, SARS-CoV-2, and COVID-19 began during this coverage period. Plaintiffs assert three claims: breach of contract (Count I), tortious failure to act in good faith (Count II), and declaratory judgment (Count III). All of Plaintiffs' claims depend on their contention that Indemnity must provide coverage for their operating losses caused by closures of or restrictions on their restaurant businesses based on governmental orders designed to stop or slow the spread of COVID-19. Indemnity denied coverage based on its interpretation of the applicable provisions of the policy. For the reasons explained here, the Court concludes that Indemnity correctly denied coverage.

[1] Plaintiffs are Broadway Hospitality Venture LLC, 57th Street Hospitality Partners LLC, The Finer Diner LLC, Brooklyn Diner USA LP, Fiorella's Roman Café Inc., Red Eye Grill LP, Red Eye/Brooklyn Associates LP, Cieli Partners LP, Peterson-Fireman Venture B45 LLC, and Peterson-Fireman Pizza Venture LLC.

This action has been assigned to the Court's Business and Technology Case Management Program. The parties cooperated with the Court in establishing a schedule to brief the issues on cross-motions for summary judgment and to conduct discovery if necessary. Following that schedule, Plaintiffs filed a Motion for Partial Summary Judgment and to Strike Affirmative Defenses (Paper No. 16). They also filed a Request for Judicial Notice of Adjudicative Facts Pursuant to Maryland Rule 5-201 (Paper No. 15). The schedule gave Defendant Indemnity a period to assess whether any discovery was needed. After Indemnity decided it would not seek discovery, it filed a Motion and Incorporated Memorandum of Law in Opposition to Plaintiffs' Motion for Partial Summary Judgment and in Support of Cross-Motion for Summary Judgment (Paper No. 16/2) and then a corrected version of the same paper (Paper No. 16/3). Indemnity also filed an Opposition to Plaintiff's Request for Judicial Notice (Paper Nos. 15/1 and 15/2). Plaintiffs filed a Reply Memorandum of Law (1) in Further Support of Plaintiffs' Motion for Summary Judgment and (2) in Opposition to Defendant's Cross-Motion for Summary Judgment (Paper No. 16/4). Plaintiffs also filed a Reply in Further Support of Their Request for Judicial Notice of Adjudicative Facts Pursuant to Md. R. Evid. 5-201 (Paper No. 15/3). Finally, Defendant filed its reply in support of its cross motion for summary judgment (Paper No. 16/5). The Court conducted a hearing on May 26, 2021 pursuant to Maryland Rule 2-802 by remote electronic means as a video/audio call using Zoom for Government. All parties appeared represented by counsel at the hearing.

After the hearing, Defendant Indemnity filed a Motion for Leave to File Notice of Supplemental Authority together with its Notice of Supplemental Authority (Paper No. 35). Plaintiffs opposed the motion (Paper No. 35/1). After the Court granted leave and accepted the

Notice of Supplemental Authority (Paper No. 35/2),[2] Plaintiffs filed their Opposition to Defendant's Notice of Supplemental Authority (Paper No. 35/4). Defendant Indemnity later filed a Motion for Leave to File Second Notice of Supplemental Authority together with its Second Notice of Supplemental Authority (Paper No. 40). Plaintiffs opposed that motion, including their arguments against the supplemental authority cited by Defendant (Paper No. 40/1). Although the Court has not formally granted this last motion, the Court will consider all of the supplemental authority cited by all parties.

Summary Judgment Standard

Summary judgment is appropriate when "the motion and response show that there is no genuine dispute as to any material fact and that the party in whose favor judgment is entered is entitled to judgment as a matter of law." Md. Rule 2-501(f). *See also White v. Friel*, 210 Md. 274, 285 (1956) ("It is essential to the entry of a summary judgment . . . that there be no genuine dispute as to any material fact and that the moving party be entitled to judgment as a matter of law."). Mere allegations and unsubstantiated assertions that do not show material disputes of fact with detail and precision are insufficient to prevent the entry of summary judgment. *Beatty v. Trailmaster Prods., Inc.*, 330 Md. 726, 738 (1993). Summary judgment is not a substitute for trial; the purpose of summary judgment is not to try the case or resolve factual disputes, but rather to determine whether a factual controversy exists requiring a trial. *Goodwich v. Sinai Hosp.*, 343 Md. 185, 205-06 (1996). All facts and inferences must be drawn in the light most favorable to the non-moving party. *Merchants Mortgage Co. v. Lubow*, 275 Md. 208, 217 (1975). In the context of cross-motions for summary judgment, this principle presents a

[2] In this Order, the Court also canceled the pre-trial conference and trial dates on the expectation that the Court would resolve all claims by summary judgment.

conundrum because both sides are both moving and non-moving parties. Because the Court ultimately accepts Indemnity's position, it construes any disputed fact in favor of Plaintiffs.

Most of the material facts, including all the facts relating to the parties' relationship and the Policy at issue, are established without dispute in Plaintiffs' Declaration of Ben Grossman (with exhibits), Fireman's Hospitality's Chief Executive Officer, submitted with their initial motion for partial summary judgment; Defendant's Declaration of Gabriela Richeimer (with exhibits), submitted with Indemnity's cross-motion for summary judgment; and the Supplemental Declaration of Gabriela Richeimer (with exhibits) (Paper No. 16/6).

Plaintiffs seek to establish additional facts with their Request for Judicial Notice. Defendant disputes some of the facts advanced in that Request. The Court resolves that dispute only in general terms because the parties agree that the broader issues can and should be resolved on their motions for summary judgment. First, the Court accepts, with only partial opposition from Indemnity, judicial notice of all of the governmental actions by officials in New York and Maryland that restricted the operations of businesses. The Court takes notice of the actions and their effect, but not necessarily the existence of the facts stated in them as a predicate to governmental action. This involves items 9, 10, 12-24, and 28-37 in Plaintiffs' Request for Judicial Notice (Exhibits I, J, L-X, and 2-11).

Second, in general, the Court accepts information from governmental or respected private public health sources of information, such as the World Health Organization, the United States Centers for Disease Control and Prevention, Johns Hopkins University, *The Lancet*, and the scientific article available in pre-print at www.medrxiv.org. This involves items 1-2, 4-8, and 40-42 in Plaintiffs' Request for Judicial Notice (Exhibits A-B, D-H, and 14-16). But the Court considers these materials cautiously. The science concerning SARS-CoV-2 necessarily has

developed very rapidly and, like the virus itself, continues to evolve. These sources are perhaps more important as evidence of what was known or believed at the time of publication as for ultimate scientific conclusions. If this case turned on proof of the ultimate scientific conclusions, the Court would require expert testimony on those issues.

Third, in the limited context of this action, the Court accepts judicial notice of facts published about the closures of Carnegie Hall, the Lincoln Center Theatre, the Richard Rodgers Theatre, and the Gaylord National Resort and Convention Center. This involves items 25-27 and 39 in Plaintiffs' Request for Judicial Notice (Exhibits Y, Z, 1, and 13).

Fourth, the Court does not take judicial notice of general accounts in news media.[3] This involves items 3, 11, and 38 in Plaintiffs' Request for Judicial Notice (Exhibits C, K, and 12).[4] These may have some evidentiary value as notice of certain events, but they are hearsay with respect to the truth of the matters reported.

Finally, the Court accepts judicial notice of decisions in other courts. This involves items 43-45 of Plaintiffs' Request for Judicial Notice (Exhibits 17-22).

Facts

Plaintiffs operate six restaurants – Bond 45, the Brooklyn Diner on 43rd Street, the Brooklyn Diner on 57th Street, the Red Eye Grill,[5] Trattoria Dell'Arte, and Café Fiorello – in midtown Manhattan in New York City, New York. They operate two restaurants – Bond 45

[3] Indemnity objects to Plaintiffs' reliance on media accounts and then advances an opinion piece from the *Washington Post* in support of its position. The authors are public health or engineering professors, but the Court does not take judicial notice of that publication.

[4] Item 39 is from a general news media source, but the nature of the information fits in the category of closures of the "Leader Locations" specified in the Policy.

[5] The restaurant appears to be marketed to the public as the Redeye Grill (redeyegrill.com), but the Court will use the spelling used by Plaintiffs.

National Harbor and Fiorello's Italian Kitchen – at the National Harbor in Prince George's County, Maryland. All of the restaurants are affiliated as the Fireman's Hospitality Group. Fireman's Hospitality purchased an insurance policy from Indemnity, Policy No. MCRD38179901 (the "Policy"), that included commercial property and other coverages for August 1, 2019 to August 1, 2020. Pls.' Mot., Grossman Decl., Exh. 1 ("Policy") at FH000005.[6] The Policy lists all eight restaurants in its Schedule of Locations. *Id.* at FH000008.

The first cases of COVID-19, the disease caused by the novel coronavirus, SARS-CoV-2, were reported in Wuhan, China in late 2019. Pls.' Req. for Jud. Notice ("RJN"), Exh. F. In March 2020, with the rapid worldwide spread of the disease, the World Health Organization declared the COVID-19 outbreak a global pandemic. WHO Director-General's opening remarks (March 11, 2020) (https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020) (last viewed March 21, 2023). Plaintiffs allege that as of filing their Complaint on September 2, 2020, there had been more than 25 million confirmed COVID-19 cases, with more than 838,000 deaths, in the world and more than 6 million confirmed cases, with more than 182,000 deaths, in the United States. RJN ¶ 2.[7] That source, the Johns Hopkins Coronavirus Resource Center, stopped collecting and reporting data as of March 10, 2023. JHU Coronavirus Resource Center (https://coronavirus.jhu.edu/) (last viewed March 21, 2023). As of its last report, that source

[6] The Policy is Exhibit 1 to the Declaration of Ben Grossman submitted with Plaintiffs' Motion. For convenience, the Court will cite simply to the "Policy" and the applicable page using the parties' "FH" numbering, understanding that that page numbering was added in the litigation and is not original to the Policy.

[7] Because the information is not controverted and is material to this dispute only at a generalized level, the Court accepts the information, but the supporting paper exhibit provided in support, RJN Exh. B, is unhelpful.

reports more than 676 million confirmed cases and almost 6.9 million deaths worldwide and almost 104 million confirmed cases and more than 1.1 million deaths in the United States. *Id.* (following links).

In response to the pandemic, many governmental officials in the United States began issuing "stay-at-home" and "shelter-in-place" orders, which suspended the operations of non-essential businesses. On March 7, 2020, then New York Governor Andrew Cuomo issued Executive Order No. 202 declaring a state of emergency for New York. *Id.*, Exh. I. Governor Cuomo issued another Executive Order on March 12, 2020, Executive Order 202.1, which, among other things, suspended live performances after 5:00 p.m. for any New York theaters that could seat five hundred or more attendees. *Id.*, Exh. J. On March 16, 2020, in Executive Order 202.3, Governor Cuomo ordered that "[a]ny restaurant or bar in the state of New York shall cease serving patrons food or beverage on-premises effective at 8pm on March 16, 2020, and until further notice shall only serve food or beverage for off-premises consumption." *Id.*, Exh. L. In Executive Order 202.6, issued March 22, 2020, Governor Cuomo required all non-essential workers to work from home. *Id.*, Exh. M. The New York state closures remained in place until Governor Cuomo partially lifted them in Executive Order 202.38 on June 6, 2020. *Id.*, Exh. P. This Order allowed restaurants to serve patrons on premises but only in outdoor spaces, required all tables to be six feet apart, limited table seating to ten people per table, and restricted restaurants from selling alcohol to patrons who were not also purchasing food. *Id.* Executive Order No. 202.48 extended those restrictions through August 5, 2020, and Executive Order 202.55 extended them again until September 4, 2020. *Id.*, Exhs. Q & R.

Then New York City Mayor Bill de Blasio also issued an Emergency Executive Order on March 12, 2020, Executive Order No. 99, in which he ordered that all places used for the

gathering of any number of people for purposes such as food or drink consumption must operate at "no greater than fifty percent occupancy and no greater than fifty percent of seating capacity." *Id.*, Exh. T. On March 16, 2020, Mayor DeBlasio issued Emergency Executive Order No. 100, in which he directed all establishments that offered food or drink to close effective 8:00 p.m. on March 16, 2020. *Id.*, Exh. U. The Mayor's Order permitted restaurants to remain open for the "sole purpose of providing take-out or delivery service." *Id.* This Order also required the closure of all entertainment venues, including those with seating capacity below five hundred people. *Id.* It was not until June 22, 2020, when New York City entered Phase 2 of its reopening plan and Mayor DeBlasio issued Emergency Executive Order No. 127, that restaurants and bars were permitted to open for outdoor dining only, pursuant to the Open Restaurants Program that Mayor DeBlasio previously established. *Id.*, Exh. W.

In Maryland, then Governor Lawrence J. Hogan, Jr. by Proclamation declared a state of emergency on March 5, 2020. *Id.*, Exh. 2. On March 16, 2020, Governor Hogan issued an Order requiring all restaurants and bars to close effective at 5:00 p.m. on March 16, 2020. *Id.*, Exh. 3. Restaurants were only permitted to remain open for food and beverages taken off the premises for carry-out, drive-thru, or delivery. *Id.*, Exh. 3. On May 27, 2020, Governor Hogan issued another Order permitting restaurants and bars in Maryland to provide outdoor dining so long as all restaurant staff wore face coverings, patrons were seated six feet apart, groups larger than six did not sit together unless they were from the same household, food was not served in a buffet format, and tables were cleaned and disinfected between each seating. *Id.*, Exh. 4. Governor Hogan issued another Executive Order on June 10, 2020 permitting restaurants to provide indoor dining so long as the number of persons in the restaurant was limited to fifty percent of the restaurant's capacity, food was not served in buffet format, and restaurants did not

serve customers who were not seated. *Id.*, Exh. 5. Governor's Hogan's Executive Order issued on August 3, 2020 continued these restrictions. *Id.*, Exh. 6.

Fireman's Hospitality CEO Ben Grossman states that all of the Plaintiff restaurants closed on March 16, 2020 in response to these orders. Pls. Mot., Grossman Decl. ¶ 5. As of the date of his Declaration, February 11, 2021, Bond 45, the Brooklyn Diner on 43rd Street, and Trattoria Dell'Arte "were rendered incapable of the performance of the intended function of the restaurants – serving guests – and remain closed." *Id.* ¶ 7. Café Fiorello, the Brooklyn Diner on 57th Street, and the Red Eye Grill each had "partially reopened," respectively on June 29, July 6, and July 13, 2020, after having made physical alterations "that have left it substantially impaired and able to serve only a limited number of guests through use of a new outdoor seating area constructed in response to the actions of civil authority." *Id.* ¶¶ 8-10. Each of those restaurants had a period of about two and a half months in late 2020 when indoor dining was permitted at 25% capacity, *id.*, but that period was after the end of the coverage period at issue in this action. Bond 45 National Harbor and Fiorello's Italian Kitchen in Maryland both partially reopened in June 2020, also with physical alterations to permit limited seating. *Id.* ¶¶ 11-12. The Maryland restaurants had not been able to exceed 50% capacity of indoor seating as of the date of Mr. Grossman's Declaration. *Id.* Mr. Grossman estimated "business income losses [of] nearly $9,000,000 through June 2020," with losses continuing. *Id.* ¶ 16. He also states that the "Leader Locations" designated in the Policy – Carnegie Hall, Lincoln Center, the Richard Rodgers Theatre, and National Harbor – all were "closed indefinitely" as of the date of his Declaration. *Id.* ¶ 13.

On March 21, 2020, Fireman's Hospitality filed business interruption claims with Indemnity for income losses resulting from the COVID-19 virus. *Id.*, Exh. 2.[8] Indemnity reviewed the claims and denied coverage under the Policy on April 5, 2020. *Id.* Indemnity stated two reasons for its denial of coverage. *Id.* After quoting the Policy's coverage terms for building and personal property coverage, business income coverage, and civil authority coverage, Indemnity stated:

> [Fireman's Hospitality] has provided no evidence that would indicate that any direct physical loss or damage to Covered Property has taken place in this matter. Additionally, as it relates to the policy's Additional Coverage for Civil Authority, no evidence has been provided that would indicate that any direct physical loss of or damage to other property within one mile of your premise has occurred. Rather, it is our understanding that governmental authorities ordered the captioned premises to reduce occupancy and subsequently close as a precaution to prevent spread of the COVID-19 virus. Accordingly, the terms of the quoted Business Income and Civil Authority insuring agreements have not been met, and the coverage does not apply.

Id. at 3. Second, Indemnity invoked an endorsement titled "New York – Exclusion of Loss Due to Virus or Bacteria":

> In addition, the above cited endorsement adds an exclusion applying to loss or damage caused by or resulting from any virus that induces or is capable of inducing physical distress, illness, or disease. COVID-19 is a virus that meets the criteria of this additional exclusion therefore also precluding coverage for your loss.

Id. at 3-4. Plaintiffs filed this action on September 2, 2020 to challenge Indemnity's denial of coverage under the Policy.

[8] Plaintiffs have not provided the claims themselves. The fact of the submission and date come from Indemnity's denial letter.

Discussion

A. Choice of Law

Maryland courts interpret contracts according to the law of the jurisdiction where the contract was formed – the principle *lex loci contractus*. *Allstate Ins. Co. v. Hart*, 327 Md. 526, 529 (1992). In this case, the Policy was electronically delivered to Fireman's Hospitality in New York City. Pls.' Mot. at 14. All premiums also were paid in New York. *Id.* The parties agree that the Policy should be interpreted using New York law. Pls.' Mot. at 14; Def.'s Oppos. and Cross-Mot. at 11-12. The Court therefore applies New York law to interpret the Policy.

B. The Relevant Policy Provisions

The parties agree that the Policy provides "all-risk" coverage for all of Fireman's Hospitality's restaurants, although, as discussed below, they disagree on the significance of that characterization. Overall, the Policy provides commercial property, commercial general liability, and commercial inland marine coverage. Policy at FH000005. Only the commercial property coverage is implicated in this action. Plaintiffs invoke coverage under three provisions in that part of the Policy. All three coverage provisions are in the "Business Income (and Extra Expense) Coverage" subpart of the "Commercial Property Coverage" part. Indemnity relies on limiting language in those coverage provisions and on the separate virus and bacteria exclusion. The Court also includes here the "loss of use" exclusion relied on by Indemnity and certain provisions in the Policy's Restaurant Enhancement Endorsement relied on by Plaintiffs.

1. Business Income and Extra Expense Coverage

In the general coverage provision of the "Business Income (and Extra Expense) Coverage Form," Indemnity promises:

> We will pay for the actual loss of Business Income you sustain due to the necessary "suspension" of your "operations" during the "period of restoration". The "suspension" must be caused by

> direct physical loss of or damage to property at premises which are described in the Declarations and for which a Business Income Limit Of Insurance is shown in the Declarations. The loss or damage must be caused by or result from a Covered Cause of Loss.

Id. at FH000045. "Operations" is defined in this subpart of the Policy as "[y]our business activities occurring at the described premises; and . . . [t]he tenantability of the described premises . . . ." *Id.* at FH000053. "Suspension" means "[t]he slowdown or cessation of your business activities; or . . . [t]hat a part or all of the described premises is rendered untenantable . . . ." *Id.* A "[p]eriod of restoration" under the Policy begins "72 hours after the time of direct physical loss or damage for Business Income Coverage; or . . . [i]mmediately after the time of direct physical loss or damage for Extra Expense Coverage." *Id.* A period of restoration ends on the earlier of "[t]he date when the property at the described premise should be repaired, rebuilt or replaced with reasonable speed and similar quality; or . . . [t]he date when business is resumed at a new permanent location." *Id.*

2. Civil Authority Coverage

The "Business Income (and Extra Expense) Coverage Form" includes an "Additional Coverage[ ]" for "Civil Authority." *Id.* at FH000046. Indemnity promises:

> When a Covered Cause of Loss causes damage to property other than property at the described premises, we will pay the actual loss of Business Income you sustain and necessary Extra Expense caused by action of civil authority that prohibits access to the described premises, provided that both of the following apply:
>
> (1) Access to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage, and the described premises are within that area but are not more than one mile from the damaged property; and
>
> (2) The action of the civil authority is taken in response to dangerous physical conditions resulting from the damage or continuation of the Covered Cause of Loss that caused the

> damage, or the action is taken to enable a civil authority to have unimpeded access to the damaged property.

Id.

3. Leader Location Coverage

The Policy contains a separate extension of the "Business Income (and Extra Expenses) Coverage" based on four identified "Dependent Properties" or "Leader Locations." *Id.* at FH000056, 60. A "Leader Location" is defined as a particular type of "Dependent Property" "operated by others whom you depend on to . . . [a]ttract customers to your business." *Id.* at FH000058, 62. The identified locations are Carnegie Hall, Lincoln Center, and the Richard Rodgers Theatre in New York City and the National Harbor Mall in Maryland. *Id.* Indemnity promises:

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

Id. at FH000057, 61. This coverage applies separately to each designated "dependent property." *Id.* The definitions of "suspension" and "operations" are the same as those used in the general "Business Income (and Extra Expense) Coverage." The definition of "period of restoration" is adapted to apply to dependent properties. *Id.* at FH000058, 62.

4. Virus or Bacteria Exclusion

The Policy contains an exclusion titled "NEW YORK – EXCLUSION OF LOSS DUE TO VIRUS OR BACTERIA." *Id.* at FH000104. The exclusion states that it modifies insurance under the entire "COMMERCIAL PROPERTY COVERAGE PART" and provides:

> A. The exclusion set forth in Paragraph B. applies to all coverage under all forms and endorsements that comprise

this Coverage Part, including but not limited to forms or endorsements that cover property damage to buildings or personal property and forms or endorsements that cover business income, extra expense or action of civil authority.

B. We will not pay for loss or damage caused by or resulting from any virus, bacterium or other micro-organism that induces or is capable of inducing physical distress, illness or disease.

However, this exclusion does not apply to loss or damage caused by or resulting from "fungus", wet rot or dry rot. Such loss or damage is addressed in a separate exclusion in this Coverage Part.

C. The terms of the exclusion in Paragraph B., or the inapplicability of this exclusion to a particular loss, do not serve to create coverage for any loss that would otherwise be excluded under this Coverage Part.

Id.

5. Loss of Use Exclusion

The Policy includes in the "Commercial Property Coverage" part a "Causes of Loss – Special Form" containing definitions and exclusions. *Id.* at FH000107-16. It begins with a specification that "Covered Causes of Loss means direct physical loss unless the loss is excluded or limited in this policy." *Id.* at FH000107. One of the exclusions then provides: "We will not pay for loss or damage caused by or resulting from any of the following: . . . Delay, loss of use or loss of market." *Id.* at FH000109.

6. Restaurant Enhancement Endorsement

The Policy also includes in the "Commercial Property Coverage" part a "Restaurant Enhancement Endorsement." *Id.* at FH000064-83. This Endorsement includes a "Coverage Extension" for "Food Contamination":

> If your business at the described premises is ordered closed by the Board of Health or any other governmental authority as a result of the discovery or suspicion of food contamination, we will pay:
>
> (1) The actual loss of Business Income you sustain due to the necessary "suspension" of your "operations["]; and
>
> (2) The following Extra Expenses:
>
> (a) To clean your equipment as required by the Board of Health or any other governmental authority;
>
> (b) To replace food which is, or is suspected to be, contaminated;
>
> (c) Necessary medical tests or vaccinations for your "employees"; and
>
> (d) The cost of additional advertising to restore your reputation.

Id. at FH000080-81. "Food Contamination" is defined:

> Food contamination means an incidence of food poisoning to one or more of your patrons as a result of:
>
> (1) Tainted food you purchased;
>
> (2) Food which has been unintentionally stored, handled or prepared improperly; or
>
> (3) A communicable disease transmitted through one or more of your "employees".

Id. at FH000081.

C. Standards of Construction

To resolve an insurance coverage dispute under New York law, a court looks first to the language of the policy. *Selective Ins. Co. of Am. v. Cty. of Rensselaer*, 26 N.Y.3d 649, 655 (2016). If the words have a definite and precise meaning and there is no danger of misinterpretation, the words are given their plain and ordinary meaning. *Id.* If words are

susceptible of two reasonable interpretations, they are considered ambiguous and must be interpreted narrowly in favor of the insured. *Id.*; *MDW Enterprises, Inc. v. CNA Ins. Co.*, 4 A.D.3d 338, 340 (2d Dep't 2004). The policy always should be read as a whole: "Insurance policies must be 'construe[d] . . . in a way that "affords a fair meaning to all of the language employed by the parties in the contract and leaves no provision without force and effect."'" *Selective Ins. Co. of Am.*, 26 N.Y.3d at 655 (quoting *Consolidated Edison Co. of N.Y. v. Allstate Ins. Co.*, 98 N.Y.2d 208, 221-222 (2002), in turn quoting *Hooper Assoc. v. AGS Computers*, 74 N.Y.2d 487, 493 (1989)).

Plaintiffs, as the policyholder, bear the burden to show that the Policy covers their losses. *Morgan Stanley Grp. Inc. v. New England Ins. Co.*, 225 F.3d 270, 276 (2d Cir. 2000) (applying New York law). That burden shifts if the insurer asserts an exclusion that would exclude coverage of an otherwise covered loss. *Id.* at 276 n.1. In that instance, the exclusion must be "specific and clear in order to be enforceable." *MDW Enterprises, Inc.*, 4 A.D.3d at 340.

Plaintiffs put particular emphasis on the "all-risk" nature of the Policy. "An all-risk policy is one that allows recovery 'for all losses arising from any fortuitous cause, unless the policy contains an express provision excluding the loss from coverage.'" *Fabrique Innovations, Inc. v. Fed. Ins. Co.*, 354 F. Supp. 3d 340, 348 (S.D.N.Y. 2019) (quoting *Parks Real Estate Purchasing Grp. v. St. Paul Fire & Marine Ins. Co.*, 472 F.3d 33, 41 (2d Cir. 2006)). But merely "[l]abeling the policy as 'all risk' does not relieve the insured of its initial burden of demonstrating a covered loss under the terms of the policy." *Roundabout Theatre Co. v. Continental Cas. Co.*, 302 A.D.2d 1, 6, 751 N.Y.S.2d 4, 7 (N.Y. App. Div. 1st Dep't 2002). The resolution to the dispute in this action comes from the clear provisions of the Policy, not from its general nature as an all-risk policy.

D. Direct Physical Loss or Damage

As noted, Plaintiffs invoke coverage under three insuring clauses within the "Business Income (and Extra Expense) Coverage" subpart of the Policy: (1) the general business income loss coverage, (2) the additional coverage for business income loss resulting from acts of civil authority, and (3) the coverage for business income loss resulting from closure of the "leader locations." Each of these coverages has an explicit requirement that the business interruption must be caused by "direct physical loss of or damage to property." Policy at FH000045. For the general business income loss coverage, the direct physical loss or damage must be to the restaurant premises themselves. For the civil authority coverage, the action of the civil authority must be in response to "damage to property other than property at the described premises" and this other damaged property must be within one mile of the restaurant premises. *Id.* at FH000046. For the "dependent property" or "leader location" coverage, the direct physical loss or damage must be to the leader location. *Id.* at FH000057, 61. In addition, all three coverages require a "Covered Cause of Loss," and that term is defined to mean "direct physical loss unless the loss is excluded or limited in this policy." *Id.* at FH000107.

Plaintiffs argue that the insured restaurants and the leader locations suffered direct physical loss or damage in three ways:

> (1) the presence of the virus on the surfaces and in the airspace of said premises constitutes physical damage; (2) orders of civil authority causes [*sic*] physical alterations to the spaces including the erection of physical barriers and the inability to access or use space within the Insured Restaurants; and (3) actions of civil authority caused loss of use for an intended purpose – e.g., the government orders deprived Fireman's Hospitality of the ability to provide dine-in services to its customers.

Pls.' Mot. at 18. Later in their Memorandum, Plaintiffs suggest that the first of these categories is also satisfied by "the documented positive cases at the Insured Restaurants." Defendant

Indemnity argues that the phrase "direct physical loss or damage" requires actual, physical damage to the insured property and that the presence of the virus does not cause actual, physical damage. Def.'s Oppos. & Cross-Motion at 13-16.

Since the hearing in this action, there have been significant developments in the interpretation of New York law applicable to this action. The Court appreciates counsel providing this supplemental authority. The most significant decision is the first appellate decision from a New York state court on this subject, *Consolidated Restaurant Operations, Inc. v. Westport Insurance Corp.*, 205 A.D.3d 76, 167 N.Y.S.3d 15 (N.Y. App. Div. 1st Dep't), *rev. granted in part*, 39 N.Y.3d 943, 198 N.E.3d 788 (N.Y. 2022). With review granted, that case may yield a definitive answer to the questions under New York law by the New York Court of Appeals.[9] Also very important for its persuasive value is *10012 Holdings, Inc. v. Sentinel Insurance Co., Ltd.*, 21 F.4th 216 (2d Cir. 2021)(applying New York law). Finally, although much less significant in the interpretation of New York law, the Court notes that the Maryland Supreme Court has now decided the same questions under Maryland law in answering certified questions from the United States District Court for the District of Maryland. *Tapestry, Inc. v. Factory Mutual Ins. Co.*, 482 Md. 223 (2022). *See also GPL Enterprise LLC v. Certain Underwriters at Lloyd's*, 254 Md. App. 638 (2022) (same issues under Maryland law as applicable to restaurant operator), *cert. denied*, 482 Md. 538 (2023). Because the Court here is

[9] At the hearing, the Court asked whether decisions of the Appellate Division are binding on this Court in construing New York law, and, if so, which Department of the Appellate Division this Court is bound to follow. The Court treats *Consolidated Restaurant Operations, Inc.* as a federal court construing New York law would treat it: "In construing New York law, we are 'bound . . . by the law of New York as interpreted by the New York Court of Appeals,' and we 'consider the language of [state intermediate appellate] courts to be helpful indicators of how the state's highest court would rule.'" *10012 Holdings, Inc. v. Sentinel Ins. Co., Ltd.*, 21 F.4th 216, 221 (2d Cir. 2021) (quoting *Licci ex rel. Licci v. Lebanese Canadian Bank, SAL*, 739 F.3d 45, 48 (2d Cir. 2013))(alterations in original).

considering how the New York courts would apply New York law, these Maryland appellate decisions applying Maryland law are not binding on this Court in this action. The finds them persuasive, however, because Maryland law is indistinguishable from New York law on these points and because they are carefully reasoned.

The Court begins with the meaning of the phrase "direct physical loss or damage." Plaintiffs make a delayed argument that this phrase is ambiguous. In their initial motion, they accepted the phrase as clear and argued that their loss satisfied the term. In their reply, in an attempt to deal with the considerable adverse authority marshaled by Defendant Indemnity, Plaintiffs assert for the first time that this phrase is ambiguous: "At best for Indemnity, the cases it cites only demonstrate that the phrase 'direct physical loss of or damage to' is subject to multiple reasonable interpretations and, as such, is ambiguous and must be construed inn favor of coverage." Pls. Reply Mem. at 18. The effort is clever but unavailing. If divergent judicial interpretations were the test for ambiguity, virtually any core phrase in a form policy would eventually become ambiguous. If ten courts interpreted the term and only one court adopted the insured's favored interpretation, another insured could cite the disagreement, invoke ambiguity, and then argue, as Plaintiffs do here, that the far less favored interpretation must be adopted because the ambiguity doctrine interprets an ambiguous term in for the insured. For good reason, the principle does not operate that way.

In *Consolidated Restaurant Operations, Inc.*, the New York appellate court first concluded that the phrase "physical loss or damage to property" is not ambiguous. This Court agrees. The constituent words have clear meanings, and, in combination, they are not susceptible of multiple reasonable interpretations. In *Michael Cetta, Inc. v. Admiral Indem. Co.*, 506 F. Supp. 3d 168 (S.D.N.Y. 2020), the federal court applying New York law examined dictionary

definitions and concluded: "The plain meaning of the phrase 'direct physical loss of or damage to' therefore connotes a negative alteration in the tangible condition of property" and does not include simple loss of use of property.[10] *Id.* at 176 (citing *Newman Myers Kreines Gross Harris P.C. v. Great N. Ins. Co.*, 17 F. Supp. 3d 323, 331 (S.D.N.Y. 2014) and other cases).

Relying on *Roundabout Theatre Co.*, 302 A.D.2d at 7, 751 N.Y.S.2d at 8,[11] *Rye Ridge Corp. v. Cincinnati Ins. Co.*, 535 F. Supp. 3d 250, 255 (S.D.N.Y. 2021), *aff'd*, 2022 WL 120782 (2d Cir. Jan. 13, 2022), and *Kim-Chee LLC v. Philadelphia Indem. Ins. Co.*, 2022 WL 258569 at *1 (2d Cir. Jan. 28, 2022), the Appellate Division in *Consolidated Restaurant Operations, Inc.* held that this unambiguous phrase requires an element of tangible alteration of property that goes beyond "mere loss of use":

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[10] The Maryland Supreme Court has provided a particularly close examination of dictionary definitions contributing to interpretation of the phrase, leading it to the conclusion "that 'physical loss or damage' to covered property must involve tangible, concrete, and material harm to the property or a deprivation of possession of the property." *Tapestry, Inc.*, 482 Md. at 240-43. That Court further rejected plaintiff's contention that the plain language could encompass "a functional loss of use of property due to the presence of an external force." *Id.* at 243-44.

[11] There is an important difference between this action and *Roundabout Theatre Co.* Roundabout Theatre had to cancel thirty-five performances because a construction accident at the nearby Conde Nast tower closed the street in front of the theater where it was staging its production. 302 A.D.2d at 2-3, 751 N.Y.S.2d at 4-5. There was minor damage to the roof of the theater, but that damage was repaired in one day and was not the cause of the cancelations. *Id.* at 3, 751 N.Y.S.2d at 5. The plaintiff's insurance policy provided coverage for "all risks of direct physical loss or damage to the property," but plaintiff did not have separate coverage if damage to a property nearby resulted in an interruption of its ability to do business. *Id.* at 3-4, 751 N.Y.S.2d at 5-6. Indeed, one of its claims was against its insurance broker for failing to secure that separate coverage. *Id.* The court's interpretation of the key policy language – "all risks of direct physical loss or damage to the [insured's] property," 302 A.D.2d at 6-7, 751 N.Y.S.2d at 8 – is applicable to all of the coverages at issue in this action. But it should be noted that Roundabout Theatre likely would have been covered if it had the same coverages as Plaintiffs here because the street closure was caused by direct physical damage to the nearby Conde Nast tower.

> The property must be changed, damaged or affected in some tangible way, making it different from what it was before the claimed event occurred. If the proffered facts do not identify any physical (tangible) difference in the property, then the complaint fails to state a cause of action.

Consolidated Restaurant Operations, Inc., 205 A.D.3d at 82. The court also adopted the reasoning of *10012 Holdings, Inc.*, where the Second Circuit concluded:

> We therefore hold, in accord with *Roundabout Theatre* and every New York state court to decide the issue, that under New York law the terms "direct physical loss" and "physical damage" in the Business Income and Extra Expense provisions do not extend to mere loss of use of a premises; those terms instead require actual physical loss of or damage to the insured's property.

21 F.4th at 222, *cited in Consolidated Restaurant Operations, Inc.*, 205 A.D.2d at 83, 167 N.Y.S.3d at 22. The Second Circuit collected a series of decisions of both New York and federal trial courts interpreting New York law and endorsed the observation of one of those judges:

> "[A]ll New York courts applying New York law . . . have soundly rejected the argument that business closures . . . due to New York State Executive orders constitute physical loss or damage to property."

21 F.4th at 221 (collecting cases and quoting *Benny's Famous Pizza Plus Inc. v. Sec. Nat'l Ins. Co.*, 72 Misc. 3d 1209(A), slip op. at *4 (N.Y. Sup. Ct., King's Cnty. July 1, 2021)).

This restriction in the key insuring phrase is reinforced by other policy terms. First, all three coverages claimed by Plaintiffs depend on the occurrence of a "Covered Cause of Loss." The Policy includes a "Causes of Loss – Special Form" containing definitions and exclusions. Policy at FH000107-16. It begins with a specification that "Covered Causes of Loss means *direct physical loss* unless the loss is excluded or limited in this policy." *Id.* at FH000107 (emphasis added). One of the exclusions then provides: "We will not pay for loss or damage caused by or resulting from any of the following: . . . Delay, *loss of use* or loss of market." *Id.* at

FH000109 (emphasis added). Second, both the Business Income and Extra Expense Coverage and the Leader Location Coverage are specifically linked to the "period of restoration." A "[p]eriod of restoration" under the Policy begins "72 hours after the time of *direct physical loss or damage* for Business Income Coverage; or . . . [i]mmediately after the time of *direct physical loss or damage* for Extra Expense Coverage." *Id.* at FH000053 (emphasis added). It ends on the earlier of "[t]he date when the property at the described premise should be repaired, rebuilt or replaced with reasonable speed and similar quality; or . . . [t]he date when business is resumed at a new permanent location." *Id.* The reference to repairing, rebuilding, or replacing the premises would be meaningless if "direct physical loss or damage" could include mere loss of use or some other effect that did not result in tangible alteration of the property. *Michael Cetta, Inc.*, 506 F. Supp. 3d at 177 (quoting *Phila. Parking Auth. v. Fed. Ins. Co.*, 385 F. Supp. 2d 280, 288 (S.D.N.Y. 2005)).

Plaintiffs advance *Pepsico, Inc. v. Winterthur International America Ins. Co.*, 24 A.D.3d 743, 806 N.Y.S.2d 709 (N.Y. App. Div. 2d Dep't 2005), as an example of a court recognizing physical damage coverage based on the functional impairment of a product. Pepsico successfully established insurance coverage of its losses when faulty raw materials provided by a third-party supplier resulted in Pepsico's soft drink products becoming "off-tasting" and therefore unmerchantable. *Id.* at 743-44, 806 N.Y.S.2d at 710-11. In a brief opinion, the court rejected the insurer's argument that the products were not "physically damaged" and held that "[i]t is sufficient *under the circumstances of this case* involving the unmerchantability of beverage products that the product's function and value have been seriously impaired, such that the product cannot be sold." *Id.* at 744, 806 N.Y.S.2d at 711 (emphasis added). Whatever broader application *Pepsico* may have in other situations, New York courts have not found it

persuasive in cases involving pandemic closure-related claims. *See, e.g.*, *Consolidated Restaurant Operations, Inc.*, 205 A.D.3d at 86, 167 N.Y.S.3d at 24 (*Pepsico* "is unhelpful because the product (soda) was, in fact, physically altered so as to render it unsellable to consumers."); *10012 Holdings, Inc.*, 21 F.4th at 222 ("[T]he product had sustained physical damage."). This Court also finds it unpersuasive in this context.

Plaintiffs argue that the necessary tangible physical aspect of damage or effect on their property is the physical presence of the novel coronavirus on the surfaces and in the airspaces of their restaurant premises.[12] They further try to deflect the convincing force of more recent decisions by arguing that courts have not yet considered these allegations in fully developed form. Considering the facts in the light most favorable to Plaintiffs, the Court assumes that Plaintiffs could prove that the SARS-CoV-2 virus was present on surfaces in each of the restaurants at some point during the Policy period; that the SARS-CoV-2 virus was present in the airspaces of each of the restaurants at some point during the Policy period; and that employees and/or customers who were positive for the presence of the SARS-CoV-2 virus were present in each of the restaurants at some point during the Policy period. Although Plaintiffs do not explicitly emphasize the facts, the Court further assumes that Plaintiffs could prove the same three facts with respect to each of the four leader locations and with respect to some unidentified other properties within less than one mile of each of the restaurants. Plaintiffs have certainly

[12] In their reply arguments, Plaintiffs contend that the requisite physical impact is or at least includes the steps Plaintiffs have taken in reaction to governmental closure orders: "Fireman's Insured Restaurants and Leader Locations were physically altered *by* the orders of Civil Authority. All of the Insured Restaurants and Leader Locations have undergone and will continue to undergo physical and structural alterations and impairment of access." Pls.' Reply Mem. at 13 (emphasis added). This reverses the necessary causal sequence. The direct physical loss or damage must occur first. If anything, Plaintiffs' measures taken in response to the pandemic and to governmental restrictions on their operations would be extra expenses incurred as a result of a covered loss.

tendered evidence that they made physical alterations to their restaurants in response to the various governmental restrictions and that those civil authority orders curtailed their restaurant operations significantly during the Policy period.

Citing *Port Auth. of N.Y. & N.J. v. Affiliated FM Ins. Co.*, 311 F.3d 226 (3d Cir. 2002), Plaintiffs liken the effect of the novel coronavirus here to the effect of asbestos or other noxious or harmful substances. In *Port Auth. of N.Y. & N.J.*, numerous facilities filed suit against their first-party property insurers to recover expenses incurred for the abatement of asbestos-containing materials in their buildings. *Id.* at 230. The plaintiffs argued that physical damage to the structures occurred as a result of the presence of asbestos, the threat of release of asbestos fibers, and the actual release of those fibers. *Id.* The Third Circuit affirmed the trial court's grant of summary judgment in favor of the insurers, adopting as "reasonable and realistic" a distinction of degree:

> In the case before us, the policies cover "physical loss," as well as damage. When 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 loss to its owner. However, if asbestos is present in components of a structure, but is not in such form or quantity as to make the building unusable, the owner has not suffered a loss. The structure continues to function – it has not lost its utility.

Id. at 236.[13] This analogy has not gained any following in New York cases involving property insurance claims for pandemic-caused closures. *See, e.g., Consolidated Restaurant Operations, Inc.*, 205 A.D.3d at 85-86, 167 N.Y.S.3d at 23-24; *10012 Holdings, Inc.*, 21 F.4th at 222. The

[13] It is unclear what state's contract law the court applied. It noted that the plaintiffs owned large facilities in both New York and New Jersey, that "the law of either state could be applicable to various structures," that there was little difference in the law of both states, and that "the parties do not advance conflict of laws issues." *Id.* at 233. On the basic principles for interpreting insurance policies, the court cited New Jersey cases. *Id.* at 235.

Court is not aware of any decision construing New York law in this specific context that has adopted this argument. The Maryland Appellate Court observed that "GPL's restaurant did not become unusable for in-person dining because of the harmful effects of a noxious gas or of some physical form of physical contamination; it became unusable for in-person dining because the Governor entered an order prohibiting in-person dining." *GPL Enter., LLC*, 254 Md. App. at 658.

Claims essentially identical to Plaintiffs' arguments have been made and rejected as a matter of law based on interpretation of indistinguishable insurance policies. In *Consolidated Restaurant Operations, Inc.*, plaintiff claimed that "the actual or threatened presence of the virus in and on its property (i.e. the ambient air and internal surfaces) eliminated the functionality of the restaurants for their intended purpose." 205 A.D.3d at 79, 167 N.Y.S.3d at 19. That plaintiff sought to distinguish arguments of the insureds in other cases by "its claim that the virus was physically present in and physically altered its premised" and "that COVID-19 inflicts physical damage on property, even if such damage is invisible or intangible." *Id.* at 80, 167 N.Y.S.3d at 19. Plaintiff requested an opportunity to amend its complaint so it could develop these allegations further, including the existence of "'fomites' in the surfaces of its restaurants, and . . . the virus infiltrate[ing] the premises." *Id.* at 86, 167 N.Y.S.3d at 24. The court found these arguments to be "a distinction without any meaningful difference." *Id.* at 84, 167 N.Y.S.3d at 23. Although the decision was on a motion to dismiss rather than a motion for summary judgment, the court properly accepted all of plaintiff's non-conclusory factual allegations as true, *id.* at 81, 167 N.Y.S.3d at 20, but concluded that plaintiff had not and could not allege the necessary "tangible, ascertainable damage, change or alteration of the property so as to plausibly state a claim the damage was 'physical'. . .," *id.* at 87, 167 N.Y.S.3d at 24.

The plaintiff in *Tapestry, Inc.*, a major national and international retailer, advanced similar claims with even more detail. The Court accepted as true the detailed allegations contained in the federal court's certification order. 482 Md. at 234-37. These allegations supported the plaintiff's contentions "that Coronavirus damaged the air in its covered properties," "that respiratory particles expelled by individuals infected with Coronavirus physically alter the composition of the air and can remain airborne for indefinite periods unless removed by a ventilation system," that the ventilation system "may itself become a transmission vector by spreading the infected particles through vents," and that infected particles "are reintroduced into the air every time a new infected person enters the store." *Id.* at 249. The Court also considered the plaintiff's contentions "that Coronavirus rested on and adhered to surfaces of property at its stores, which 'alter[ed] these objects to become vectors of disease,'" that when the Coronavirus-infected particles settle on a surface, that surface becomes a 'fomite' and may remain infectious for days," that "if the fomite is disturbed, those particles may reenter the air and then settle on other property, creating more fomites," "that removing Coronavirus from surfaces requires harsh chemical cleaning and the effectiveness of such cleaning is unknown because of the toxicity and microscopic nature of the particles." *Id.* at 250-51. The Court also considered the plaintiff's assertion "that Coronavirus particles 'altered' objects like doorknobs and purses into 'vectors of disease' by landing on, adhering to, and being subject to becoming dislodged from them." *Id.* at 251. In the Court's judgment, none of these allegations could "constitute damage to property [within the coverage language of the applicable policies] in the absence of a physical or structural alteration of the property." *Id.* The Court also rejected the argument that there were factual disputes or developing science that should cause the Court not to resolve the issues without a jury trial:

> [O]ur decision is that, assuming the truth of all the non-conclusory factual allegations in the Complaint about how Coronavirus operates and how it impacted Tapestry's properties and operations, the presence of Coronavirus in the air and on surfaces at Tapestry's properties did not cause "physical loss or damage" as that phrase is used in the Policies.

Id.

This Court agrees. The Court assumes that Plaintiffs could and would prove that the novel coronavirus was present in the air and on surfaces of their properties during the Policy period and that that presence posed risks to human health. For the reasons considered in these decisions, however, that presence, as a matter of law, does not amount to the "direct physical loss or damage" necessary to trigger coverage under the Policy. It was not the actual presence of the virus at any specific location that caused the governmental actions resulting in dramatic limitations on Plaintiffs' operations. The government officials in New York and Maryland did not react to instances of COVID-19 transmission occurring at Plaintiffs' individual restaurants. Rather, the governmental actions were preventive and generalized. It was the threat of harm to humans, not the potential effect on any property, that caused government officials to restrict the operations of Plaintiffs' and all similar businesses in an effort to slow or stop the spread of COVID-19. This generalized response to an extraordinary public health emergency simply cannot be equated with specific, tangible harm to property covered by this Policy.

Plaintiffs' inability as a matter of law to establish the requisite "direct physical loss or damage" defeats their claims for coverage under all three pathways to business interruption coverage under the Policy, but there is also a further flaw in their claim under the Civil Authority Coverage. All three separate coverages require "direct physical loss or damage" to property. For the primary Business Income and Extra Expense Coverage, the harm is directly to the insured's properties. For the Leader Location Coverage, the harm is to the Leader Locations,

with secondary effect on the insured's properties. For the Civil Authority Coverage, the harm is to nearby properties, with secondary effect on the insured's properties, but there is an extra causal requirement. The loss or damage to the nearby property must cause a governmental authority to take action, which action causes restricted access to the insured's property. There is no sense in which the Civil Authority Coverage could be triggered here because any effect on Plaintiffs' properties had nothing to do with application of the governmental orders to other restaurants or businesses within one mile of Plaintiffs' properties. Put another way, the actions of civil authority in this case have had direct impacts on Plaintiffs. The fact that the governmental orders also closed another restaurant next door or down the block from any of Plaintiffs' locations had no effect on Plaintiffs' ability to operate.

E. Restaurant Enhancement Endorsement

The Court does not understand Plaintiffs to be asserting coverage specifically under one of the extended or enhanced coverage provisions of the Restaurant Enhancement Endorsement, but Plaintiffs' position is not entirely clear. They cite the existence of the Restaurant Enhancement Endorsement as one of the "five critical components" of the "Policy's pertinent coverages," Pls.' Mot. at 8, and in presenting that provisions they state that "Indemnity is obligated to pay coverage for communicable disease transmission in the context of food contamination," *id.* at 11. To the extent Plaintiffs claim coverage specifically under that Endorsement, the argument fails on the plain language of the Endorsement.

The Restaurant Enhancement Endorsement includes a "Coverage Extension" for "Food Contamination":

> If your business at the described premises is ordered closed by the Board of Health or any other governmental authority as a result of the discovery or suspicion of food contamination, we will pay:

> (1) The actual loss of Business Income you sustain due to the necessary "suspension" of your "operations["]; and
>
> (2) [Certain] Extra Expenses . . . .

Id. at FH000080-81. "Food Contamination" is defined:

> Food contamination means an incidence of food poisoning to one or more of your patrons as a result of:
>
> (1) Tainted food you purchased;
>
> (2) Food which has been unintentionally stored, handled or prepared improperly; or
>
> (3) A communicable disease transmitted through one or more of your "employees".

Id. at FH000081 (emphasis added).

This extended coverage is triggered by "the discovery or suspicion of food contamination." "Food contamination" in turn is defined to be "an incidence of food poisoning" that may be caused, in addition to two other means, by a "communicable disease transmitted through one or more of your 'employees'." *Id.* at FH000080-81. This is not generalized coverage for business closures resulting from communicable diseases. Rather, an employee's communicable disease may cause an instance of food poisoning in a patron, which is considered "food contamination" causing a business closure. The Court accepts that Plaintiffs could prove that one or more of their employees had COVID-19 during the policy coverage period, but Plaintiffs have not alleged any instance of an employee's COVID-19 causing food poisoning of a patron through food contamination, nor could they allege that any such instance was the reason for any of the generalized governmental actions restricting their operations. The Restaurant Enhancement Endorsement therefore is not itself a source of coverage in this action.

F. New York Virus Exclusion

The New York Virus Exclusion in the Policy provides an independent, alternative justification for Defendant Indemnity's denial of coverage. For an insurer to invoke a policy exclusion, the exclusion must be stated in clear and unmistakable language that is not subject to any other reasonable interpretation. *Broome County v. Travelers Indem. Co.*, 125 A.D.3d 1241, 1241 (2015). In determining the meaning of any part of a policy, the policy must be read and considered as a whole, so that an insurance contract is not read to render certain provisions meaningless. *Id.* at 1242. To determine if an ambiguity exists, courts should be guided by the "reasonable expectations of the average insured upon reading the policy." *Id.*

Plaintiffs assert three arguments against application of the virus exclusion: (1) that there is a fatal inconsistency between "communicable disease" used in the Restaurant Enhancement Endorsement and "virus" in the New York Virus Exclusion; (2) that the virus exclusion lacks broad causation language, which results in it not applying to multiple potential causes present in this action; and (3) that it applies at most to the Plaintiffs' restaurants located in New York and not to the two Maryland restaurants.

As quoted in full just above, the Restaurant Enhancement Endorsement includes a reference to an employee's "communicable disease" within its specific definition of "food contamination" as one means by which a covered instance of food poisoning and food contamination could occur. *Id.* at FH000080-81. The New York Virus Exclusion provides in part:

> A. The exclusion set forth in Paragraph B. applies to all coverage under all forms and endorsements that comprise this Coverage Part, including but not limited to forms or endorsements that cover property damage to buildings or personal property and forms or endorsements that cover business income, extra expense or action of civil authority.

> B. We will not pay for loss or damage caused by or resulting from *any virus*, bacterium or other micro-organism that induces or is capable of inducing physical distress, illness or *disease*.

Id. at FH000104 (emphasis added).

Plaintiffs argue these provisions are somehow inconsistent because the Restaurant Enhancement Endorsement refers to "communicable disease," which COVID-19 is, and the Virus Exclusion refers to "any virus." The Court does not see any inconsistency at all. Plaintiffs' premise this argument on the assertion that "the New York Exclusion makes no mention of 'disease' and the Restaurant Enhancement does not refer to a 'virus.'" Pls. Mot. at 36. The premise is false. As quoted above, the Virus Exclusion does mention disease; it refers to "*any virus*, bacterium or other micro-organism that induces or is capable of inducing physical distress, illness or *disease*." Policy at FH000104. Thus, it specifically links viruses to any "other micro-organism that induces or is capable of inducing . . . disease." This is a more specific elaboration of at least one mechanism of a "communicable disease." More fundamentally, the terms occur in different parts of the Policy, and each term has clear meaning within the provision in which it occurs.

Second, Plaintiffs argue the New York Virus Exclusion lacks broad causation language and therefore is defeated "because there are potentially multiple concurrent causes for the losses and SARS-CoV-2 is not the proximate cause." Pls. Mot. at 37. This leads to an argument that the Court finds baffling:

> Fireman's Hospitality's losses were the direct result of the presence and spread of SARS-CoV-2, COVID-19, the resulting actions and orders of state and local civil authorities, the resulting closure of properties (such as Broadway theatres and the National Mall [*sic*]) that the restaurants depend on for customers, and the

> need to mitigate losses. Thus, the virus SARS-CoV-2 is only one of many causes of Fireman's Hospitality's losses.

Id. at 38-39. Plaintiffs seem to be confusing a causal chain with multiple steps with multiple contributing causes.[14] As discussed more fully above, the causal sequence starts with the existence of SARS-CoV-2 and COVID-19 and its broad threat to public health. Government officials responded to that generalized threat with generalized restrictions that were not related to actual instances of the presence or spread of the novel coronavirus at any specific location. Those restrictions affected both Plaintiffs' operations at their individual restaurants (and operations at all restaurants within the same jurisdictions) and the operations at the Leader Locations (and at all similar entertainment venues within the same jurisdictions). The same actions would have been taken whether the virus was or was not actually present in the air and on the surfaces of Plaintiffs' restaurants. Those governmental actions both caused Plaintiffs' business losses and caused them additional expense to cope with or reduce those business losses. Plaintiffs cannot succeed in somehow divorcing the public health measures taken from the public health threat that prompted them.

Third, Plaintiffs argue that the New York Virus Exclusion does not apply to the Maryland restaurants because it is titled "NEW YORK – EXCLUSION OF LOSS DUE TO VIRUS OR BACTERIA." Policy at FH000104. Defendant argues that the Court should look beyond the title of the Exclusion to its body, where it provides:

> The exclusion set forth in Paragraph B. applies to *all* coverage under all forms and endorsements that comprise this Coverage Part [Commercial Property], including but not limited to forms or endorsements that cover property damage to buildings or personal

[14] Plaintiffs' stated sequence also is faulty. They suggest that the closures of Leader Locations is an essential step in causation, but that step is necessary only for coverage based on the Leader Locations. If Plaintiffs were correct, their losses would be covered without this causal step based on direct physical loss or damage to their restaurant premises themselves.

> property and forms or endorsements that cover business income, extra expense or action of civil authority.

Policy at FH000104 (emphasis added). Defendant argues that there is crucial distinction in the titles of various endorsements. When an endorsement is meant to make changes limited to a particular state, the title contains either "New York Changes" or "Maryland Changes." The virus exclusion is different because it states only "New York" in the title, not "New York Changes." Def.'s Oppos. & Cross-Mot. at 42-43.

The Court has identified twenty endorsements or other separate sections of the Policy that contain either "New York" or "Maryland" in their title:

1. Notice to Applicants in Maryland Regarding Cancellation and premium Recalculation, Policy at FH000003;

2. New York Changes – Fraud, *id.* at FH000016;

3. New York Changes – Calculation of Premium, *id.* at FH000017;

4. Maryland Changes (concerning cancelation and nonrenewal), *id.* at FH000018-20;

5. New York Changes – Cancellation and Nonrenewal, *id.* at FH000021-25;

6. New York Changes (concerning miscellaneous provisions in Commercial Property Coverage Part), *id.* at FH00098-101;

7. New York Changes – Fungus, Wet Rot and Dry Rot, *id.* at FH000102-03;

8. New York – Exclusion of Loss Due to Virus or Bacteria, *id.* at FH000104;

9. New York Changes – Premium Audit, *id.* at FH000176;

10. New York Changes – Commercial General Liability Coverage Form, *id.* at FH000177;

11. Maryland Changes (concerning cancelation and nonrenewal), *id.* at FH000180-81;

12. New York Changes – Liquor Liability Coverage Form, *id.* at FH000182-83;

13. Maryland Changes – Premium Audit Condition, *id.* at FH000184;

14. New York Changes – Products/Completed Operations Liability Coverage Form, *id.*, at FH000197-98;

15. New York Changes – Transfer of Duties When a Limit of Insurance is Used Up (as to Commercial General Liability Coverage Part), *id.* at FH000199;

16. New York Changes – Transfer of Duties When a Limit of Insurance is Used Up (as to Liquor Liability Coverage Part), *id.* at FH000200;

17. Exclusion – Lead – New York, *id.* at FH000202;

18. New York Employee Benefits Liability, *id.* at FH000203-04;

19. New York Changes (concerning Inland Marine Coverage Part), *id.* at FH000208; and

20. New York Changes (concerning appraisals under Inland Marine Coverage Part), *id.* at FH000210.

The Court has not seen in any of these any specific language that limits the endorsement or provision either to the New York restaurant locations or to the Maryland restaurant locations. Instead, all of these provisions by their terms, separate from any possible implication in their titles, apply generally to the Policy or to specific coverage parts under the Policy.

The parties have provided little caselaw as authority on this issue, and the Court does not claim to have done comprehensive independent research. Some courts have recognized that state-specific endorsements typically are used when an insurance policy covers risks in multiple states and the endorsements are needed to ensure compliance with the state law applicable to the

particular risks covered. *See, e.g., In re DPH Holdings Corp.*, 2013 WL 3948683, at *8 (S.D.N.Y. 2013) (examining endorsement in workers' compensation policy required by Michigan statute and applicable only to Michigan employers under policy), *aff'd*, 580 F. App'x 10 (2d Cir. 2014); *Kamp v. Empire Fire & Marine Ins. Co.*, 570 F. App'x 350, 352 (4th Cir. 2014) ("State-specific endorsements, the final component of the supplemental policy, modify the master document as it applies to particular states."). There is at least one case in the specific context of pandemic-related claims that construed an amendment to an exclusion that had a specific state in its title to apply more broadly to properties outside that state. *Novant Health Inc. v. Am. Guarantee & Liab. Ins. Co.*, 563 F. Supp. 3d 455, 460-62 (M.D.N.C. 2021).[15] *But see Firebirds Int'l, LLC v. Zurich Am. Ins. Co.*, ___ N.E.3d ___, 2022 WL 1604438, at *4-5 (Ill. App. 2022) (distinguishing *Novant Health Inc.* and applying similar provision narrowly to state named in title). In *John Akridge Co. v. Travelers Companies*, 837 F. Supp. 6, 8 (D.D.C. 1993), the court construed a "Maryland Changes" endorsement to apply to all covered property because there was no other limiting language and the effect was to construe the policy against the insurer as its drafter.

The Court rejects Defendant Indemnity's rationale that the twenty endorsements or other sections with a state name in their titles may be neatly sorted into those with or without

[15] This Court does not find the reasoning in *Novant Health Inc.* to be convincing. The policy at issue had a general contamination exclusion that included viruses. 563 F. Supp. 3d at 460. It also had several "Amendatory Endorsements" that modified the contamination exclusion to exclude viruses from the exclusion and therefore broaden the coverage. *Id.* at 460-61. One of those Amendatory Endorsements had "Louisiana" in its title but no limiting text; others had specific states in their title and text limiting the changes to risks in those states. *Id.* At the motion to dismiss stage of that case, the court construed the Louisiana endorsement against the insurer to apply to all coverages under the policy and therefore to negate the virus exclusion. The court did not attempt to harmonize that provision with the other amendatory endorsements that clearly did have limited application.

"changes" attached to the state name in the title. One example belies that superficial approach. The endorsement immediately before the New York Virus Exclusion in the Policy is titled, "New York Changes – Fungus, Wet Rot and Dry Rot" Policy at FH000102-03. Under Indemnity's approach, this endorsement would affect New York properties only because "New York Changes" is in the title. The very next endorsement, "New York – Exclusion of Loss Due to Virus or Bacteria," *id.* at FH000104, would apply to all the properties simply because the word "changes" is not in its title. But the two endorsements both affect the Commercial Property Coverage Part and both concern the scope of coverage for conditions of similar types on the properties. The much more sensible explanation of the distinction in the titles is that the Fungus, Wet Rot and Dry Rot endorsement refers to "changes" because it actually replaces certain existing provisions in the Policy. In contrast, the Virus Exclusion adds new language to the Policy without striking any existing provision. The Court concludes that the difference in the titles cannot determine the contractual scope of the provisions.[16]

The Court finds the answer in the plain words of the New York Virus Exclusion. By its terms, the exclusion "applies to *all* coverage under all forms and endorsements that comprise this Coverage Part." *Id.* at FH000104 (emphasis added). Even if the Court accepted Plaintiffs' argument that an ambiguity exists in the title of the exclusion considered alone, this specific language in the first line of the exclusion resolves that ambiguity. The Court concludes that the New York Virus Exclusion is not ambiguous as a matter of law and applies to all of the properties included in the Policy. That provision therefore precludes coverage for any loss or

[16] The Court is construing only the New York Virus Exclusion. Others of the twenty endorsements listed above may deal with the same topic, for example, items 4 and 5 above dealing with cancelation and renewal. Those provisions would have to be construed together, and any inconsistencies might be resolved by applying them as state-specific modifications limited only to certain properties.

damage resulting from a virus and provides a separate reason for denial of coverage under the Policy.

Conclusion

For these reasons, the Court will (1) grant in part and deny in part Plaintiffs' Request for Judicial Notice (Paper No. 15); (2) deny Plaintiffs' Motion for Partial Summary Judgment and to Strike Affirmative Defenses (Paper No. 16); and (3) grant Defendant's Motion and Incorporated Memorandum of Law in Opposition to Plaintiffs' Motion for Partial Summary Judgment and in Support of Cross-Motion for Summary Judgment (Paper No. 16/2). The Court will enter a Final Declaratory Judgment in favor of Defendant.

Judge Fletcher-Hill's signature appears on the original document in the court file.

March 29, 2023

_____
Judge Lawrence P. Fletcher-Hill

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

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Date

/s/Kayla Robinson

Signature

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