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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIFIED QUESTIONS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

Mary Geiger Lewis, United States District Court Judge

Appellate Case No. 2021-001209
District Court Case No. 3:20-cv-02275

Sullivan Management, LLC,

Plaintiff,

v.

Fireman's Fund Insurance Company,
and Allianz GLOBAL Risks US
Insurance Company,

Defendants.

PLAINTIFF'S PETITION FOR REHEARING

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PETITION FOR REHEARING

Pursuant to Rules 221 and 240 of the South Carolina Rules of Appellate Procedure ("SCACR"), Plaintiff Sullivan Management, LLC (hereinafter "Sullivan") respectfully files this Petition for Rehearing of this Court's Opinion filed August 10, 2022 (Howard Adv. Sh. No. 28 at 17, Opinion No. 28105) ("Opinion"). Plaintiff seeks a rehearing to clarify certain points of law and fact contained in the Court's Opinion.

CLARIFICATION SOUGHT

I. Did the Court err by characterizing Sullivan's claim as one for purely "loss of use" and "economic loss"?

II. Did the Court err by ignoring that the express policy provisions contemplate that viruses can cause direct physical loss and direct physical damage to property, which damage is repaired by, *e.g.*, cleaning? And did the Court's narrow interpretation of "direct physical loss or damage" potentially render other grants of coverage, which expressly contemplate cleaning as the mode of repair, illusory?

III. Did the Court err in its analysis of the terms "loss" and "damage" by failing to acknowledge that, while "loss" and "damage" are not *synonymous*, the term "loss" is rendered *superfluous* because, under the Court's proffered meaning, it will always include damage?

IV. Did the Court err in deciding Coronavirus 1) does not (and cannot) damage property (*e.g.*, because it does not "persist" and is not a contaminant) and 2) does not impact physical structures only human health and behaviors, without expert opinion or evidence, and when most contaminating particles/agents recognized by courts as constituting a "direct physical loss or damage" (*e.g.*, wildfire smoke, e-coli, spiders) impact physical structures by decreasing/eliminating/depriving humans of the ability to safely occupy structures while the particles/agents are present on or in the property?

V. In light of the foregoing, did the Court err by failing to consider that the term "direct physical loss or damage" as used in *this Policy* is, at minimum, ambiguous?

STANDARD OF REVIEW

Rule 221, SCACR, authorizes a party who believes the Court overlooked or misapprehended points of law or fact to petition for rehearing. *Arnold v. Carolina Power & Light*

Co., 168 S.C. 163, 167 S.E.2d 234 (1933). "The purpose of such a petition is to aid the court in deciding correctly a case heard by it" and a properly drawn rehearing petition must state "the points … overlooked or misapprehended by the court." *Id.* at 172-73; *Kennedy v. S.C. Retirement System*, 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001).

ARGUMENT

I. The Opinion Mischaracterizes Plaintiff's Claims

Although not entirely clear, the Opinion implies that Plaintiff's claims of "direct physical loss" and "direct physical damage" can be reduced to a mere claim of "loss of use" or "economic loss." (*See* Op. at 19; *see also* Op. at 22, n. 2). To be clear, Sullivan has alleged and argued that Coronavirus was present on surfaces throughout the insured properties, as well as on the properties' food, fixtures, tables, chairs, ventilation systems, and the like; and, furthermore, that Coronavirus not only lived on surfaces but bonded to surfaces, transforming the physical condition of the property from safe to unsafe and from uncontaminated to contaminated. As a result of this physical and material contamination and re-contamination, Sullivan's properties were rendered uninhabitable, unusable, and unsafe. The foregoing are the facts from Sullivan's Complaint which Sullivan argues constitute "direct physical loss" and "direct physical damage" to property, not merely a "loss of use" or "economic loss." Because this Policy is in part a business interruption Policy, the resulting damages are economic in nature, as they flow from the cessation or slowdown of Sullivan's business because of the direct physical loss and direct physical damage caused by the Coronavirus.

II. It was Error for the Court to Ignore this Policy's Express and Plain Language Which Contemplates that Viruses Harmful to Human Health Can Cause Direct Physical Loss and Damage to Property Insured, Which Loss and Damage is Repaired by, *e.g.*, Cleaning.

The Court concluded that the Policy's triggering language was not met because the

presence of the Coronavirus does not constitute "direct physical loss or damage." (Op. at 23).

As an initial matter, the certified question addressed by the Court ("Certified Question One") was not merely whether the presence of the Coronavirus could constitute direct physical loss or direct physical damage; rather, the question posed was whether the presence of Coronavirus *which hinders or destroys the fitness, habitability, or functionality of property* can constitute direct physical loss or direct physical damage. The subparts to Certified Question One, which are relevant, and which were not addressed, are:

a. Do other policy terms, *e.g.*, those in the Communicable Disease Coverage Extension, evidence that COVID-19 can constitute "direct physical loss or damage?"

b. Is the phrase "direct physical loss or damage to property" ambiguous?

The Court's answer to Certified Question One is erroneous, as it (1) fails to consider that the Policy's plain language contemplates that viruses can trigger coverage; and (2) could render multiple coverage parts illusory by concluding that "cleaning" does not constitute repair under the Policy's plain language.

A. The Policy's Express Grant of Communicable Disease Coverage Undermines the Court's Narrow Interpretation of "Direct Physical Loss" and "Direct Physical Damage"

The Policy's Communicable Disease Coverage Extension reads, in pertinent part:

e. Communicable Disease Coverage

> (1) We will pay for **direct physical loss or damage to Property Insured** caused by or resulting from a covered communicable disease event at a location **including the following necessary costs incurred to**:
>
> […]
>
> (b) **Repair or rebuild Property Insured which has been damaged or destroyed by the communicable disease**; and

> (c) **Mitigate, contain, remediate, treat, clean, detoxify, disinfect, neutralize, cleanup, remove, dispose of, test for, monitor, and assess the effects the communicable disease**.
>
> (2) If the Declarations show a Limit of Insurance for Business Income and Extra Expense Coverage, **then we will pay for the actual loss of business income and necessary extra expense you sustain due to [the] necessary suspension of operations during the period of restoration**. The suspension must be due to direct physical loss or damage to property at a location caused by or resulting from a covered communicable disease event.

(Policy at 21-22) (emphasis added). The bold language above plainly illustrates that, under *this* Policy, (1) communicable diseases like Coronavirus can cause loss and damage to property; (2) the costs incurred to mitigate, contain, remediate, treat, *clean*, detoxify, disinfect, neutralize, *cleanup*, etc. *the effects of the communicable disease* **is direct physical loss or damage;** and (3) that the period when Sullivan's business was suspended to remedy the foregoing loss and damage, including the time spent cleaning, detoxifying, remediating, etc., **is the period of restoration**.

The Court ignored this and other express grants of coverage when it found that, *e.g.*, cleaning does not fit into the Policy's "period of restoration" because it does not remedy something "material" or "tangible." Perhaps that interpretation could be accurate for other insurance contracts, but it is flatly contrary to the plain language of this Policy.

In issuing this Opinion, the Court has divested Sullivan of what was a clear intent of the Policy: namely, that communicable diseases can cause direct physical loss and damage. To ignore that *this Policy* expressly contemplates that contamination of property by communicable diseases triggers coverage was in error and departs from decades of South Carolina precedent concerning the interpretation of contracts of insurance. *See, e.g. Yarborough v. Phoenix Mut. Life Ins. Co*., 266 S.C. 584, 593, 225 S.E.2d 344, 349 (1976) ("[T]he meaning of a particular word or phrase is not determined by considering the word or phrase by itself, but by reading the policy as a whole

and considering the context and subject matter of the insurance contract.")

While the Court looked to another policy provision to inform its analysis of the plain language of the triggering phrase—specifically, the "period of restoration" — it did not appear to consider the triggering phrase as used anywhere else in the Policy, including in the Communicable Disease Extension. It is it prejudicial to Sullivan to take notice of a single policy provision (which provision is relevant to determine the *length* or measure of coverage, but not to whether coverage exists at all) and ignore all others, especially a bargained-for Communicable Disease Extension.

As Sullivan briefed and argued orally, this is a manuscript Policy, and the Policy's Communicable Disease Extension is, upon information and belief, largely unique to Defendants. At minimum, this Court should clarify that it did consider the triggering phrase as it was used in the Policy as a whole, including in the Communicable Disease Extension, and explain why it disregarded Sullivan's argument that the Policy, when read as a whole, contemplates that viruses like the Coronavirus can cause direct physical loss or damage.[1]

After briefing and oral arguments concluded in this case, an appellate court in California published an opinion interpreting a nearly identical policy[2] issued by Defendants. Integral to that court's ultimate decision in favor of the insured was the unique Communicable Disease Extension:

> **Fireman's Fund's argument and the trial court's conclusion that the COVID-19 virus cannot cause direct physical loss or damage to property are directly undermined by the policy's plain language establishing communicable disease coverage.** Fireman's Fund asserts the insureds must allege an obvious physical alteration, for example, 'broken chairs, dented walls, or smashed windows,' to adequately allege direct physical loss or damage. Because it is undisputed the COVID-19 virus (or presumably any communicable disease) does not cause such

[1] Defendants also admitted on brief that viruses can cause direct physical loss or damage but argue that Coronavirus does not because of "shared experience." (Def. Brief at 1-2, 25). This admission, coupled with the plain language of the Policy, requires additional consideration by this Court.

[2] The grants of coverage, period of restoration, Communicable Disease Extension, and Mortality and Disease exclusion in the *Marina Pacific* case are identical to those in Sullivan's Policy at issue here.

> damage, Fireman's Fund argues, it cannot cause property damage as defined in the policy. However, as discussed, the communicable disease coverage states Fireman's Fund will pay for "direct physical loss or damage" to insured property "caused by or resulting from a covered **communicable disease event**," including necessary costs to "[r]epair or rebuild [insured property] which has been damaged or destroyed by the communicable disease." This language explicitly contemplates that a communicable disease, such as a virus, can cause damage or destruction to property and that such damage constitutes direct physical loss or damage as defined in the policy. **Construing the policy provisions together, as we must, this language precludes the interpretation that direct physical loss or damage categorically cannot be caused by a virus.**

Marina Pac. Hotel & Suites, LLC v. Fireman's Fund Ins. Co., 81 Cal. App. 5th 96 (2022) (**underlined and bold emphasis added**, **bold text** in original). Like the plaintiffs in *Marina Pacific*, Sullivan alleged the actual presence of Coronavirus on its premises and that Coronavirus caused direct physical loss and damage to its property.

If "direct physical loss or damage" is given the narrow definition proffered by this Court, then the Communicable Disease Coverage Extension could be rendered illusory, as the now-narrowly defined trigger of coverage would "simultaneously extend and eliminate coverage, thereby excluding the very risk contemplated by the parties and rendering meaningless the Policy provision" that insures against communicable disease events. *Dudek v. Commonwealth Land Title Ins. Co*., 466 F. Supp. 3d 610, 620 (D.S.C. 2020), *reconsideration denied*, No. 2:19-CV-3237-DCN, 2021 WL 795580 (D.S.C. Mar. 2, 2021) *citing Isle of Palms Pest Control Co. v. Monticello Ins. Co.*, 319 S.C. 12, 18, 459 S.E.2d 318, 321 (Ct. App. 1994), *cert. granted, decision aff'd*, 321 S.C. 310, 468 S.E.2d 304 (1996). This Court has effectively used a constrained reading of the "period of restoration" as an exclusion to defeat coverage.

B. Torturing the Meaning of "Period of Restoration" to Limit the Trigger of Coverage Was Erroneous

The Policy's Business Income and Extra Expense Coverage provides as follows:

> [W]e will pay for the actual loss of **business income** and necessary **extra expense**

> you sustain due to the necessary **suspension** of your **operations** during the **period of restoration** arising from direct physical loss or damage to property at a **location** […] caused by or resulting from a **covered cause of loss**.

(Policy at 6) (bold in original). "Period of Restoration" is defined as:

> the period of time that begins immediately after the time of direct physical loss or damage caused by or resulting from a **covered cause of loss** to property at the **location** and ends on the earlier of:
>
> (1) The date when such property at the **location** should[3] be repaired, rebuilt, or replaced with reasonable speed and like kind and quality; or
> (2) The date when business is resumed at a new permanent location.

(Policy at 58) (bold in original).

The Court's use of the "period of restoration" provision—specifically, the undefined phrase "repaired, rebuilt, or replaced" in one of the subparts of the definition which gives two alternatives for a temporal endpoint to coverage—to narrowly interpret the triggering phrase was erroneous for several reasons. First, the Court's narrow interpretation could lead to an absurd result by precluding coverage *entirely* under other Policy provisions, including the Communicable Disease Extension. This Court has previously held that narrowly construed definitions in an insurance policy which would make other coverage illusory should be rejected. *See S.C. Farm Bureau Mut. Ins. Co. v. Kennedy*, 398 S.C. 604, 615, 730 S.E.2d 862, 867 (2012) (discussed in further detail *infra*).

Additionally, the Court's narrow interpretation of the "period of restoration" as not including cleaning or disinfecting is directly undermined by many other Policy provisions,

[3] The inclusion of the word "should" here is instructive. It confirms that this Policy's period of restoration is theoretical, in that it measures the time it should have taken, with reasonable effort, for the insured to resume operations. *See Hampton Foods, Inc. v. Aetna Cas. & Sur. Co.*, 787 F.2d 349, 355 (8th Cir. 1986) ("It is clear that this language contemplates the *theoretical* time period it would have taken to reenter business.") (emphasis in original) (internal citations omitted).

including the Communicable Disease Extension, the Fungus Remediation Coverage, the Pollutant Cleanup Coverage, and the Contaminated Food Coverage, which (1) each contemplate that the suffered damage or loss is remedied by cleaning, and (2) were not demonstrably analyzed or considered by the Court. Lastly, the Court used a provision that is expressly intended to provide limits on the *duration* of coverage to ascertain whether coverage is triggered in the first instance. Collectively, the foregoing errors warrant rehearing.

The Court ignored that the Communicable Disease coverage, for example, expressly contemplates that communicable diseases can cause direct physical loss or damage, and further that cleaning and detoxifying property of the effects of the disease *is* what constitutes the period of restoration. (Policy at 21-22). In so doing, and even though the Communicable Disease Extension is an express grant of coverage, the Court's narrow interpretation of direct physical loss or damage could prevent Sullivan from recovering under that provision in the District Court even though the Extension expressly provides that cleaning is what restores property damaged by a communicable disease. This was in error and contrary to prevailing South Carolina law. *Fritz-Pontiac-Cadillac-Buick v. Goforth*, 312 S.C. 315, 318, 440 S.E.2d 367, 369 (1994) ("We should not torture the meaning of policy language to extend or defeat coverage that was never intended by the parties.").[4]

In addition to the Communicable Disease extension, other provisions in the Policy which expressly contemplate cleaning and other forms of remediation undercut the Court's narrow

[4] It is also improper for the duration of the "period of restoration" to factor in to whether coverage is triggered in the first instance because (1) the Policy does not define or set any minimum for the amount of time restoration must last to qualify for indemnity, and (2) Sullivan's Policy contains a bargained-for "Extended Business Income and Extra Expense Coverage" provision, which extends business income and extra expense coverage from the time of restoration up until operations and income are returned to normal levels. (Policy at 19).

interpretation of what remedial actions qualify under the "period of restoration." For example, the Fungus Remediation Coverage provision states "[s]uch increased **period of restoration** caused by the presence of **fungus** includes any increased period of time beyond the **period of restoration** required to remediate **fungus.**" (Policy at 22). Remediation, which is commonly understood to include cleaning, is far broader than this Court's interpretation of "repair, replace, or rebuild." The Pollutant Cleanup Coverage has similar language: "Such increased **period of restoration** caused by a covered loss under Pollutant Cleanup Coverage includes any increased period of time beyond the **period of restoration** required to cleanup, remove, extract, and dispose of **pollutants**." (Policy at 27).

The Policy's Contaminated Food Coverage provides that mitigating, containing, remediating, treating, cleaning, detoxifying, and disinfecting the effects of a contaminated food event **constitute covered direct physical loss or damage to Property. (**Policy at 98-99**).** The Hazardous Substances Coverage provides that "[w]e will pay for the additional cost to repair or replace **Property Insured** because of contamination by a **hazardous substance**. This includes the additional expenses to clean up or dispose of such property." (Policy at 101) ("**hazardous substance**" is defined as "any substance that is hazardous to health or has been declared to be hazardous to health by a governmental agency.")

These are only a handful of examples from *this* Policy which support Sullivan's assertion that *this* Policy contemplates that the term "repair" under the period of restoration includes any remedial measure taken to restore property to its intended use so that business can resume as normal, including *cleaning* the impaired property. All Policy provisions must be considered together to either ascertain plain meaning or to find an ambiguity. The Court ignores the many examples in the Policy which expressly include cleaning as a mode of repair, and to do so was in

error.

The Court also ignores the commonsense notion that "cleaning" is commonly the way damaged property is restored to its former, un-damaged state. Oftentimes, to restore property after a hurricane involves only cleaning—*i.e.*, removing the mud or water that has accumulated in a building. Removing mud or water does not fit neatly into the Court's narrow interpretation of "period of restoration" as only including repairing, rebuilding, or replacing; rather, cleaning out mud from a property after a hurricane is reasonably understood to be "restoration" of the property. Remediating a hot tub after a legionella outbreak is another common-sense example. The CDC recommends cleaning and disinfecting the affected tub and piping of the invisible bacteria before returning the tub to service. Asbestos remediation similarly does not involve "repairing" or "rebuilding," and instead typically involves removing the friable fibers and cleaning the affected area. And, neither legionella bacteria nor asbestos fibers harm or physically alter property; rather, they harm humans, and render insured property uninhabitable. The restoration period for these examples do not fit into this Court's narrow interpretation of what constitutes repair, and insureds could plausibly be denied coverage for these calamities because of the Court's constrained interpretation. For this Court to hold that "cleaning" cannot constitute repair of physically affected property was in error and could have far-reaching and unintended negative effects for South Carolina insureds.

C. Binding South Carolina Precedent Cautions Against Using Strict Interpretations of Terms in Insurance Policies to Defeat Coverage

Although it dealt with interpreting definitions in an automobile policy, this Court's holding and analysis in *S.C. Farm Bureau Mutual* is relevant here, as it contains pronouncements cautioning against using strict interpretations of defined phrases in an insurance policy to defeat coverage. 398 S.C. 604, 730 S.E.2d 862 (2012). And, unlike many cases involving illusory

coverage, it did not involve an exclusion, but rather the practical interpretation of defined phrases in an explicit grant of coverage.

The insured motorist in *S.C. Farm Bureau Mutual* sought uninsured motorist ("UIM") coverage under an at-fault driver's insurance policy. The insurer denied coverage, arguing that the insured was not in actual physical contact with the vehicle when the accident occurred and therefore did not meet the policy's definition of "occupying" the vehicle. *Id.* at 607, 730 S.E.2d at 863 (2012). The trial court found in favor of the insured at a bench trial; however, the court of appeals reversed. *Id.* This Court granted the insured's petition for *certiorari*. Essentially, this Court addressed whether the definition of "occupying", which appears in the definition of "covered person" and is a prerequisite of coverage, requires actual physical contact to be maintained when facing impending danger of harm. *Id.* at 611.

The initial grant of coverage in the at-issue policy read, in pertinent part, "We will pay damages for bodily injury or property damage a covered person is legally entitled to collect from the owner or operator of an underinsured motor vehicle." *Id.* The policy defines "covered person" as a "person occupying your [] covered auto," and defines "occupying" as "having actual physical contact with an auto while in, upon, entering, or alighting from it." *Id.*

The trial court found that the insured had physical contact with the insured vehicle until he attempted to escape the at-fault driver's vehicle. *Id.* at 610. The insurer, Farm Bureau, argued that, based on the definition of "occupying" as requiring "actual physical contact," and a literal interpretation of "physical contact," there is no coverage because the insured was not in physical contact with the vehicle at the time of the accident. This Court disagreed:

> Although Farm Bureau contends this dispute can be resolved by a literal interpretation of the plain language of "physical contact," we disagree, as the Supreme Court of Rhode Island recently observed the literal interpretation of policy language will be rejected where its application would lead to unreasonable results

> and the definitions as written would be so narrow as to make coverage merely illusory.

S.C. Farm Bureau Mut. Ins. Co. v. Kennedy, 398 S.C. 604, 615, 730 S.E.2d 862, 867 (2012) (*citing Empire Fire & Marine Ins. Cos. v. Citizens Ins. Co.*, 43 A.3d 56, 60 (R.I.2012). In *S.C. Farm Bureau Mutual*, the Court found that the facts there warranted coverage to be triggered *even though* the policy in that case defined the word "occupying" as requiring "actual physical contact." *See Id.* This was the correct result, as holding otherwise would have led to unreasonable results and render meaningless the express grant of coverage in the policy.

In Sullivan's Policy, the phrase that the Court is using to essentially determine the plain meaning of the triggering phrase is "repair, replace, or rebuilt," which phrase is not defined in the Policy. The Court does not offer a definition but holds that "cleaning [is] different than restoring damaged or lost property." (Op. at 23). Constricting the meaning of this phrase so narrowly as to potentially divest other grants of coverage is just as unreasonable a result here as it would have been in *S.C. Farm Bureau*.

III. The Court Erred By Failing To Acknowledge That, While "Loss" And "Damage" Are Not *Synonymous*, The Term "Loss" Is Rendered *Superfluous* Because, Under The Court's Proffered Meaning, It Will Always Include Damage.

The Court first acknowledges that the triggering phrase is not defined and then offers many of the same dictionary definitions as those cited by Sullivan: physical as "having material existence: perceptible especially through the senses and subject to the laws of nature"; [..] loss means "'destruction; ruin'", as well as "'the disappearance or diminution of value, usually in an expected or relatively unpredictable way", and can also mean "'deprivation, the failure to keep possession, and a 'decrease in amount, magnitude, value, or degree.'" And, finally, damage means "loss or harm resulting from injury to person, property, or reputation." (Op. at 19). The Court does not indicate whether it favors one definition over another, so it appears that the Court considers

each reading to be reasonable. Using the Court's own definitions, the triggering phrase can reasonably be read to mean a direct, material deprivation of property and a direct, material loss or harm to property, each caused by a covered cause of loss.

The Court cites Sullivan's argument on the interpretation of the terms "loss" and "damage" as being, simply, that "loss and damage cannot mean the same thing, as the policy would be redundant if it did." (Op. at 22). That is incorrect. Sullivan did not argue that the two terms are synonymous; rather, Sullivan argued that to read "loss" as *only* meaning "destruction" or "ruin" of a material or perceptible nature would render that term superfluous. (*See* Pl. Br. at 16-17). It would be superfluous because, as the Court itself stated, "a property that has suffered physical loss has been damaged." (Op. at 22). If read in the narrow way this Court and Defendants would have it read, physical loss is *always* subsumed into physical damage, and so the inclusion of "loss" would be surplusage.

The Court does not clarify whether it is accepting a definition of "physical loss" beyond "destruction" or "ruin." In one discussion of loss, the Court implies that it would require "*permanent* dispossession" to qualify as physical loss; however, in a later section, the Opinion implies that any physical loss or damage must alter the appearance, shape, color, structure, or other material dimension of the property. Reading a requirement of permanence into a plain meaning of "loss" goes against the Court's own cited meaning of the phrase "loss" and is more akin to the phrase "direct physical *total* loss" which **appears in other sections of the Policy when actually intended**.[5] This incredibly narrow interpretation ignores the Court's own cited reasonable

[5] Other provisions in this Policy undermine the Court's narrow interpretation of "loss" as only meaning "destruction" or "ruin." For example, in the Extended Warranty Coverage, Allianz saw fit to modify "direct physical loss" with "total", and then equated a "direct total physical loss" to "destruction":

meaning of loss as including deprivation and failure to keep possession, as neither physical deprivation nor physical dispossession necessarily alter structures. It also ignores the plain meaning of the phrase as used in the Policy itself because Allianz used a different phrase when it intended loss to mean a "total" loss akin to destruction or ruin. It is also improper to read language into a policy of insurance which does not exist. *See K.C. Hopps, Ltd. v. Cincinnati Ins. Co., Inc.*, 561 F. Supp. 3d 827, 838 (W.D. Mo. 2021) ("However, the Policy does not state that the "physical loss" or the "physical damage" must be permanent, and the Court refuses to read that limitation into the Policy.")

IV. Commentary and Fact Findings By the Judiciary on How the Novel Coronavirus Behaves Are Unfounded and Improper

The Court made findings in its Opinion which assume the validity and reliability of statements made by other federal district courts about the Coronavirus. This is dangerous territory. The physics, epidemiology, and properties of the Coronavirus are the subject of scientific study. These studies must be reviewed and vetted among the scientific community according to the rigors and methodology used in their respective fields before being accepted and circulated as undisputable fact by the judiciary.

The most troubling of the Court's improper comments and findings are discussed below.

A. It Was Error to Find the Coronavirus Was Not a Contaminant

The Court created a false dichotomy in its Opinion. It posited that a uniform group of

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> If a covered cause of loss results in a ***direct total physical loss*** to an item of Property Insured at a location, then we will pay the unused pro-rata portion of the non-refundable purchase price for extended warranties or service contracts which you purchased for such ***destroyed*** property.

(Policy at 13) (emphasis added). If "loss" indeed means "destruction" or "ruin", then there was no need for Defendants to further modify that phrase, as they did in the section cited above.

contaminants exists, of "substances such as gasoline particles, toxic torts, odors, smoke, and other similar substances" which "may persist and damage the covered property" on the one hand, and that all other substances were not (and could not be) contaminants, on the other. (Op. at 22 n.3). There are a range of contaminants recognized by courts as satisfying the Operable Phrase, including pesticide and bacteria. More importantly, Plaintiff alleged the Coronavirus is a contaminant; alleged it infects surfaces (porous and non-porous) and can transfer (as droplets/aerosols) through the air for varying durations; and alleged Sullivan's restaurant dining room surfaces were contaminated by the Coronavirus. Plaintiff's allegations control at this juncture. To put it plainly, the judiciary should have left the science of contamination of property by a novel particle's biochemical properties to scientists, and jurors charged with considering such scientific testimony.

B. It Was Error to Espouse the Unsupported Statement that the Coronavirus Does Not Impact Physical Structures

Similarly, whether the Coronavirus "impacts. . . physical structures" is an issue for scientists and experts to opine on, not a West Virginia District Court or any other court absent evidence in the case before it at the appropriate time. (Op. at 23). A judge or justice's opinion, understanding, or belief about disputed issues cannot be substituted for scientific/expert opinion.

C. It Was Error to Decide Coronavirus Did Not (and Could Not) Damage Sullivan's Property

The Court found that a "tangible or material component" was required for there to be "direct physical loss or damage" under any policy containing the phrase. (Op. at 23). It went on to conclude that "Sullivan had nothing to 'repair, replace, or rebuild[,]' thus further demonstrating that direct physical loss or damage requires something material and tangible." *Id.* But it is a leap to say that the Coronavirus does not meet the "something material and tangible" requirement that

the Court has imposed, prior to expert opinion and discovery. It also begs additional questions, including:

- How is the Coronavirus bonding to surfaces and transferring within the interior spaces within Sullivan's restaurants not "something material and tangible"?
- Should Sullivan not be permitted to adduce facts to show that the Coronavirus damage it has alleged to its property included both material and tangible components?
- How did the Court conclude that there is no circumstance when the Coronavirus could ever meet its "something material and tangible" requirement?

And it begs the question how the Court could read the Allianz Policy's Operable Phrase in such a severe and limiting fashion while pointing to District Court cases, namely *Kim-Chee LLC versus Philadelphia Indemnity Insurance Company*, 535 F. Supp. 3d 152, that did not consider a policy with express coverage for viruses and bacteria, like the one issued by Allianz.

1. *Kim-Chee*'s Flawed Analysis

The Opinion appears to conclude that based on *Kim-Chee*, its narrow reading of the Operable Phrase is correct. (Op. at 22 n.3). This is wrong for several reasons.

Kim-Chee purports to follow a body of New York law developed since 2002, which required that "[w]hether an incident is described as *loss* or *damage*, it is covered only if it affects the property insured under the policy." 535 F. Supp. 3d at 159 (citing to *Roundabout Theatre Co. v. Continental Casualty Co.*, 302 A.D.2d 1, 751, N.Y.S. 2d 4 (2002) as the leading New York state court case). The Coronavirus does, under the rule articulated by *Roundabout*, affect the property insured, just as "theft or misplacement of theatre property" would (an example used by the *Kim-Chee* Court of the meaning of loss, quoting *Roundabout*). *Id.*

Kim-Chee oversimplified the range and variety of circumstances that have been found to be a "direct physical loss." *Id*. at 160. For example, *Kim-Chee* classified the Coronavirus as similar

to innocuous road dust, ignoring that road dust is not a safety hazard, like gasoline vapors in a church, brown recluse spiders in a home, and Coronavirus particles in a bar/restaurant. *Kim-Chee* reasoned that the Coronavirus contaminates for a "relatively [] short" duration," as if that somehow made the deadly virus less deadly. More importantly, there is nothing that requires a contaminant to infiltrate in a single occurrence or moment in time. There is no such policy requirement in the Allianz Policy nor is there such a reference in the contamination case law that has considered the Operable Phrase's meaning. As to Coronavirus, the "relatively short duration" also fails to consider the re-infection of Sullivan's property, as has been alleged. Perhaps the first set of SARS-CoV-19 particles to arrive within the structure attached and contaminated the property for hours (according to some scientific studies on surface adherence), but additional particles arrived, each bonding to objects and circulating in droplet form for hours, beginning at later and later points in time. That is, as a practical matter, Sullivan's dining room, its surfaces, tables, chairs etc. were repeatedly re-infected, such that the novel Coronavirus particles continuously adhered to insured property. Perhaps most importantly, whether the Coronavirus can or does meet the Opinion's newly identified "persistence" test, based on *Kim-Chee*, is a fact issue. Sullivan should have the opportunity to discover whether the Coronavirus may satisfy the test and how the Coronavirus particles did affect Sullivan's property before a trial court.

The *Kim-Chee* Court also contradicts itself. It states, as quoted in the Opinion:

> Because the presence of the virus does not alter the covered property, it is different from radiation, chemical dust and gas, asbestos and other contaminants which may persist and damage the covered property.

Kim-Chee, 535 F. Supp. 3d at 159. But the *Kim-Chee* Court later recognized that physical damage or alteration is not required for there to be a direct physical loss. *Id*. at 160 ("[T]he structure of the building remained intact, but the building was rendered unfit for occupancy due to health risks.").

Rather, *Kim-Chee* (correctly) recognized "the intrusion of chemicals or other contaminants" (*id*. at 160) or the "presence" (*id*.) of other contaminants like ammonia, cat urine, carbon monoxide, e-coli bacteria, wildfire smoke and ash, qualify as direct physical loss without physical alteration. *Kim-Chee* noted

> Since the [1968] *Western Fire Insurance* case, courts have consistently held that contamination by a persistent chemical or biological agent, not otherwise excluded from coverage, may cause a direct physical loss if it renders the insured property unusable. . . even though the contamination may be gaseous, microscopic or invisible. Covered losses are not confined to the obvious physical changes to a building caused by fire or bad weather.

Id. at 160. But *Kim-Chee* failed to complete an analysis or carry the analysis it began to its logical end. It failed to note that a structure or insured property is considered "unusable" in the context of **human** use. It is when **humans** cannot use property, as intended, or cannot safely occupy a structure that property is rendered "unusable." In fact, what is consistent among chemical or biological agents that have been found to render property unusable is that they pose serious risks **to human** health and safety. Occupancy of buildings is the most straightforward example, but use of insured property of other kinds, that are not structures to be occupied (*e.g.*, oats), suffer a direct physical loss or damage when an agent – liquid, gaseous, or of another form– infects, bonds, or adheres to property in such a way that the property becomes unsafe **for humans** to use it as intended (*e.g.*, in *General Mills*,[6] oats could not be sold because they had been treated with an unapproved pesticide, even though they could still be safely consumed).

D. The Opinion Ignores What Contamination Case Law Teaches on the Impact of Dangerous Invisible Particles/ Agents on Property and in Structures

The Opinion declares that "the pandemic impacts human health and human behavior, not

[6] *General Mills, Inc. v. Gold Metal Ins. Co.*, 622 N.W.2d 147 (Minn. Ct. App. 2001).

physical structures." (Op. at 22-23). This catchy soundbite is not only inaccurate but is a red herring. A quick study of a sampling of contamination cases is helpful because it demonstrates the themes common in the case law which have developed over decades:

Contamination (*Case Short Name*)	How Contamination Qualifies as Direct Physical Loss or Damage and Other Considerations By Courts
Seepage of gasoline onto insured property (*Western Fire*)[7]	Infiltration of chemical contaminant (gasoline) seriously impaired or destroyed structure (church)'s function – occupancy by people. Infiltration made further use of the building (by people) dangerous. Found *Hughes v. Potomac*[8] to be most analogous factual situation, where heavy rains caused a landslide which left structure (house) perched on the side of a cliff, making the structure "completely useless to owners" and too dangerous for humans to occupy – even though "no tangible injury to the physical structure itself could be detected"
Release of asbestos fibers (*Sentinel*)[9]	Release of contaminant (asbestos fibers) in insured properties (apartment buildings) a direct physical loss – because a "<u>building's function</u> may be <u>seriously impaired</u> or destroyed and the property rendered useless by the presence of contaminants" (emphasis added) Plaintiff management company "presented evidence showing that released asbestos fibers contaminated the building, <u>creating a hazard to human health</u>" (emphasis added)
Asbestos (*Wilkin Insulation*)[10]	Rejecting the insurer's arguments that the underlying complaints "do not allege *physical* injury to *tangible* property" and that "the presence of health-threatening, asbestos-containing products results only in tangible economic loss…" Citing to a Fourth Circuit Court of Appeals case, *City of Greenville versus W.R. Grace & Company*,[11] that applied South Carolina law, noting "the injury that resulted from the installation of Monokote [product containing asbestos] in this case is the contamination of the Greenville City Hall with asbestos fibers, which <u>endanger the lives and health of the building's occupants</u>" (emphasis added)
Pervasive odor from methamphetamine	Considering the evidence that the structure (house) was "physically damaged by the odor that persisted in it" and "[t]he cost of removing that odor was a direct rectification of the problem"

[7] *W. Fire Ins. Co. v. First Presbyterian Church*, 165 Colo. 34, 437 P.2d 52 (1968).
[8] *Hughes v. Potomac Ins. Co. of D.C.,* 199 Cal. App. 2d 239, 244–45, 18 Cal. Rptr. 650, 652–53 (Ct. App. 1962).
[9] *Sentinel Mgmt. Co. v. New Hampshire Ins. Co.,* 563 N.W.2d 296 (Minn. Ct. App. 1997).
[10] *US. Fid. & Guar. Co. v. Wilkin Insulation Co.,* 144 Ill. 2d 64, 578 N.E.2d 926 (1991).
[11] *City of Greenville v. W.R. Grace & Co.,* 827 F.2d 975 (4th Cir. 1987).

lab (*Trutanich*)[12]	Finding Western Fire on point, noting church's costs to remedy the infiltration and contamination problem (gas and vapors) similar to the cost of removing the odor Decision issued at the summary judgment phase; unlike the instant case, *Trutanich* Court had evidence to consider (*e.g.*, how had the odor damaged the home, what were the costs)
Intrusion of lead rendering home uninhabitable (*Widder*)[13]	Finding loss where inorganic lead in structure made it uninhabitable until remediated, similar to presence of Chinese drywall from which gaseous fumes were released No requirement of physical damage because structure was rendered unusable or uninhabitable
Ammonia discharge in packaging facility (*Gregory Packaging*)[14]	Testimony that cleaning company hired to dissipate ammonia in order to make the facility safe for occupancy Manager of building testified company had to "air the property because of the ammonia leak. The vapors...."; one-week shutdown of facility Finding there to be no genuine dispute that the ammonia release physically transformed the air within the facility so that it contained an unsafe amount of ammonia (for humans) or that the heightened ammonia levels rendered the facility unfit for occupancy (by humans) Holding ammonia discharge caused physical loss of or damage to its facility under Georgia law because there is no genuine dispute that the ammonia release physically changed the facility's condition to an unsatisfactory state needing repair
Cat urine odor in a condominium (*Mellin*)[15]	Finding under New Hampshire construction of "physical loss[,]"plaintiffs are not required to demonstrate a "tangible physical alteration" to the unit or to prove the unit was permanently uninhabitable. Rather need a distinct and demonstrable alteration to the unit. Stating "evidence that a change rendered the insured property <u>temporarily</u> or permanently <u>unusable or uninhabitable</u> may support finding that the loss was a physical loss to the insured property" (emphasis added) Remanding for further fact finding

[12] *Farmers Ins. Co. of Oregon v. Trutanich*, 123 Or. App. 6, 9-10, 858 P.2d 1332, 1335 (1993).
[13] *Widder v. Louisiana Citizens Prop. Ins. Corp.*, 2011-0196 (La. App. 4 Cir. 8/10/11), 82 So. 3d 294, *writ denied*, 2011-2336 (La. 12/2/11), 76 So. 3d 1179.
[14] *Gregory Packaging, Inc.* v. *Travelers Prop. Cas. Co. of Am.*, No. 2:12-CV-04418 WHW, 2014 WL 6675934, *1 (D.N.J. Nov. 25, 2014).
[15] *Mellin* v. *N. Sec. Ins. Co., Inc.*, 167 N.H. 544, 115 A.3d 799 (2015).

Brown recluse spider in building (*Mehl*)[16]	Denying insurer motion for summary judgment Owners discovered brown recluse spiders in home and vacated; after unsuccessful efforts to eradicate the poisonous spiders, *Mehl* plaintiffs considered the property uninhabitable *Mehl* Court noted no definition of "direct physical loss" and the policy defined "physical damage" as "physical injury to, damage of, or loss of use of tangible property" Stating "[i]n view of this definition [of physical damage] and the policy's express coverage for loss of use, to construe the term 'direct physical loss' as requiring damage not defined in the policy leads to an ambiguity in the policy[,]" adopting the policy construction most favorable to the insured Reviewing evidence and finding "genuine issues of material fact as to when the spiders were present in the home; if their presence in the home arose to such a level so as to cause a 'loss of use'; and if so, when such condition occurred."
E-coli bacteria in well (*Motorists*)[17]	Adopting the standard articulated by *Port Authority*,[18] for "physical loss or damage" to a structure: > Only if an actual release of asbestos fibers containing materials has resulted in contamination of the property such that *its function is nearly eliminated or destroyed, or the structure is made useless or uninhabitable*, or if there is imminent threat of the release of a quantity of asbestos fibers that would cause such *loss of utility* In *Motorists*, the e-coli contamination made children ill, experiencing infections, respiratory, viral and skin conditions; Hardingers (insureds) thereafter vacated the premises (home) Found "a genuine issue of fact as to whether the <u>functionality</u> of the Hardinger's property was <u>nearly eliminated</u> or destroyed, <u>or</u> whether their <u>property was made useless or uninhabitable</u>" (emphasis added) Remanded for fact determinations
Wildfire smoke and ash (*Oregon Shakespeare*	Shows were cancelled in the partially enclosed open-air facility based on perceived "levels of particulates in the air" and health risks (to humans) because of air quality

[16] *Mehl v. The Travelers Home & Marine Ins. Co.*, Case No. 4:16-cv-01325 CDP, 2018 WL 11301983 (E.D. Mo. May 2, 2018).

[17] *Motorists Mut. Ins. Co.* v. *Hardinger*, 131 F. App'x 823 (3d Cir. 2005).

[18] *Port Auth. of New York & New Jersey* v. *Affiliated FM Ins. Co.*, 311 F.3d 226 (3d Cir. 2002).

Festival)[19]	Testimony of theater employees that they cleaned up the soot and ash before performances, no special chemicals or cleaning equipment was needed Rejecting the Oregon defendant's claims, "that this period [time it took employees to clean over merely a few hours," and the several days it took for the smoke to dissipate] could not be considered 'restoration' because no *structural* repairs were necessary." Finding such an interpretation "would add the word 'structural'" and "even if such an interpretation were plausible, the text and context of the policy would preclude such a definition" Considering "the policy as a whole to determine if the terms could reasonably include the wildfire smoke that infiltrated the interior of the theater in this case" Stating the *Oregon* plaintiff's reading of the policy is the only reasonable one – taken together "direct physical loss" plainly means "any injury or harm to a natural or material thing" Finding the theater sustained physical loss or damage to property when the wildfire smoke infiltrated the theater and rendered in unusable for it intended purpose

As the above cases show, contamination often impacts both physical structures (e.g., a building's functionality, usability, uninhabitability) *and* human health and safety.

In 2010, the Fourth Circuit Court of Appeals cited to the well-established body of contamination case law across jurisdictions, in the absence of a clear answer under Virginia law on the meaning the Operable Phrase. *See TRAVCO Ins. Co. v. Ward*, 715 F. Supp. 2d 699, 708 (E.D. Va. 2010), *aff'd*, 504 F. App'x 251 (4th Cir. 2013). TRAVCO recognized that the majority position was that no physical change to the property is required. *Id*. at 708. ("Since *U.S. Airways* does not provide a clear answer to the question presented, the Court must look to precedent from

[19] *Oregon Shakespeare Festival Ass'n v. Great Am. Ins. Co.*, No. 1:15-CV-01932-CL, 2016 WL 3267247, at *2 (D. Or. June 7, 2016), *vacated at parties' request*, No. 1:15-CV-01932-CL, 2017 WL 1034203 (D. Or. Mar. 6, 2017).

other jurisdictions. The majority of cases appear to support [the insured]'s position that physical damage to the property is not necessary, at least where the building in question has been rendered unusuable by physical forces."). The Fourth Circuit rejected the cases cited by the insurer in support of its argument that "physical damage requires some physical alteration or injury to the property's structure[,]" finding that in instances where property in question was rendered unusable or uninhabitable, no physical alteration or injury to the structure is required. *Id*. at 708-09. ("The cases [the insurer] cites are all readily distinguishable… in that they do not involve situations in which the property in question was rendered unusable."). This Court erred in its Opinion by conflating and muddying the standards set forth in settled contamination cases.

Further, Sullivan would be remiss not to note that the Allianz Policy contains no pandemic exclusion. *See Cherokee Nation v. Lexington Ins. Co.*, 2021 WL 506271 at *10 (2021) (finding that "Defendant Insurers could have included language that would have clarified any ambiguity regarding pandemic coverage, but they chose not to do so. Indeed, Defendant Insurers' choice to add the 'Communicable Disease Exclusion' (discussed above) underscores the conclusion that the policy at issue does not clearly and distinctly exclude pandemics.") Insurers have long made clear what falls outside of the scope of a policy with an endorsement excluding specific circumstances. Mold and Fungus exclusions abound for this very reason. The absence of an exclusion for pandemics coupled with the express for communicable diseases, cleaning, and similar remediation of invisible substances and agents, should be given additional consideration and addressed in a revised Opinion.

V. The Court Erred By Failing To Consider That The Term "Direct Physical Loss Or Damage" As Used In *This Policy* Is, At Minimum, Ambiguous

At minimum, when this Policy is read as a whole, it is reasonable to conclude that the Coronavirus can cause direct physical loss and/or direct physical damage to property, not only

because Allianz concedes that viruses can trigger coverage, but because the plain language of the Policy explicitly contemplates that a calamity like Coronavirus can do so. That cleaning, detoxification, remediation, alteration of HVAC systems, and the like, constitute restoration of property to its former undamaged state is at minimum a reasonable interpretation of what qualifies as the endpoint of the period of restoration. To hold otherwise would run counter to nearly a century of this Court's jurisprudence:

> It becomes the duty of this court to construe the policy. In construing an insurance policy such as this, certain principles are well established. […] [I]t is said that insurance contracts which are in any respect ambiguous or capable of two meanings must be construed in favor of the insured.

Reynolds v. Wabash Life Ins. Co., 251 S.C. 165, 168, 161 S.E.2d 168, 169 (1968); *see also Walker v. Com. Cas. Ins. Co.*, 191 S.C. 187, 4 S.E.2d 248, 249 (1939) ("'Printed insurance contracts prepared by experts in any respect ambiguous or capable of two meanings must be construed in favor of the assured.'") *quoting Jennings v. Clover Leaf Life & Cas. Co.*, 146 S.C. 41, 143 S.E. 668, 670 (1928). The Court did the exact opposite here by construing all terms with more than one reasonable interpretation in favor of Defendants.

CONCLUSION

Sullivan purchased a business interruption, all-risk Policy which clearly provides that direct physical loss and direct physical damage can occur in the absence of "physical alteration, destruction, or permanent dispossession of property." Sullivan purchased a Policy which specifically provides that communicable diseases injurious to human health can cause direct physical loss or damage. And Sullivan purchased a Policy which clearly contemplates that, *e.g.*, disinfecting contaminated property by way of cleaning is properly included within the Policy's period of restoration. Sullivan is not asking for a broad pronouncement on whether Coronavirus triggers coverage writ large across all spectrums of property insurance policies; rather, Sullivan is

asking for this Court to recognize the express provisions of his custom, manuscript Policy and to adhere to its own maxims requiring that a contract of insurance be interpreted as a whole so that no one phrase is interpreted to defeat coverage which was intended to exist by the parties. Sullivan respectfully submits that this Court not previously doing so was in error.

Additionally, given the plain language of the Policy coupled with Sullivan's pleadings, it was error for the Court to summarily decide that Coronavirus is not a contaminant capable of damaging physical structures. It was error to adopt, as settled fact, any statement that the coronavirus does not (and cannot) impact structures, in the absence of scientific testimony and evidence on the novel particles' properties. Sullivan should be permitted to adduce facts showing how the coronavirus impacts property, persists, and rendered its property unusable, as the contamination law has long recognized. Sullivan respectfully requests that the Court grant this Petition for Rehearing in full. Alternatively, the Court could find that the plain language of Sullivan's Policy allows for the possibility that Coronavirus can cause direct physical loss and/or direct physical damage and return it to the District Court for additional factfinding.

Respectfully submitted,

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