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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.

BRIEF OF PLAINTIFF

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INTRODUCTION

The issue(s) on certification to this Court is the proper interpretation of a contract of insurance issued by Defendants to Plaintiff. The resolution is dictated by the application of controlling South Carolina canon to this Policy, read in tandem with the COVID-19 business interruption and losses pled and suffered by Plaintiff. The insurance company Defendants insist that their constrained reading of the policy is the only reasonable one; however, when read in light of South Carolina canon, as it must be, it is entirely reasonable to interpret the all-risk commercial property Policy that Defendants drafted as including coverage for business interruption losses stemming from direct physical loss and damage caused by and resulting from the COVID-19 pandemic. At minimum, the reasonable interpretations propounded by Plaintiff create ambiguities which must be resolved in favor of Plaintiff, the insured.

Plaintiff Sullivan Management, LLC ("Sullivan")'s bar and dine in operations suffered a sudden and catastrophic interruption when SARS-CoV-2[1] contaminated the areas and property within and immediately surrounding its properties. The scientific community and governments identified SARS-CoV-2 as a highly transmissible, noxious airborne and surface-adhering particle. The physical properties and transmission dynamics of SARS-CoV-2 made its containment or eradication from Sullivan's insured properties, and the areas immediately surrounding Carolina Ale House locations, impossible. In response, the governors of South Carolina and Georgia, as well as the municipalities in which Sullivan's insured properties were located, contemporaneously issued mandatory closure orders directed specifically at Sullivan's businesses and those like it.

[1] Referred to alternatively as "COVID-19." Technically, the contaminating particle is the virus SARS-CoV-2. The resulting disease is COVID-19. However, as this distinction is rarely recognized in everyday conversation, and as one results in the other and both combine to cause the pandemic, any reference to either herein shall be a reference to both.

The closure orders prohibited on-site dining, bar services, and any on site patronage at Sullivan's restaurants, and notably included punishment for non-compliance. Not only did this "calamity" (as pled by Sullivan) render Sullivan's insured locations unfit, unsafe, and substantially uninhabitable, it completely thwarted and frustrated the principal business purposes of its insured locations. Sullivan subsequently lost thousands of dollars in business income.

Sullivan attempted to keep some of its staff employed at its restaurants by filling take-out orders, but this effort did not to cure the loss and cessation of its principal business, on site food and beverage consumption. Further, to restore its properties' fitness and ensure safe operability of its properties after closure orders were lifted, Sullivan began incurring extra expenses and costs.

Fortunately, Sullivan had purchased commercial insurance to protect each of its businesses and insured properties. Sullivan paid premiums to its insurance providers to be protected from fortuitous, direct physical losses like the SARS-CoV-2 calamity that result in lost business income, lost inventory, equipment-related expenses, event cancellations, and the like. Sullivan submitted a valid insurance claim to its insurers, Defendants, for covered losses. Defendants rejected the claim and refused to share the third-party adjustor report which allegedly supported their complete denial. This lawsuit followed. While the Carolina Ale House ("CAH") restaurants that Sullivan operates in Greenville, Columbia, Summerville, Myrtle Beach, and Fort Mill (South Carolina) and Augusta (Georgia) managed to survive Defendants' claim denial, the Charleston restaurant did not.

STATEMENT OF THE CERTIFIED ISSUES PRESENTED FOR REVIEW

The Honorable Mary Geiger Lewis of the United States District Court for the District of South Carolina certified, and this Court accepted, the following questions for review pursuant to Rule 244, SCACR:

1. Does the presence of COVID-19 in or near Sullivan's properties, and/or related governmental orders, which allegedly hinder or destroy the fitness, habitability or functionality of property, constitute "direct physical loss or damage" or does "direct physical loss or damage" require some permanent dispossession of the property or physical alteration to the property?

    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?

2. Do the Policy's Business Access and/or Civil Authority coverage require a complete prohibition of all access to Sullivan's properties?

3. Has there been a "communicable disease event" as that term is used in the Communicable Disease Coverage Extension?

4. Does Sullivan's alleged expenditures to mitigate COVID-19 qualify for Loss Avoidance or Mitigation Coverage?

5. Does the Mortality and Disease Exclusion bar all coverage or is it ambiguous and/or is it in conflict with the Communicable Disease Coverage Extension?

The accepted certified Order expressly incorporates two documents: the applicable all-risk commercial insurance policy issued by Defendants (hereinafter "Policy"), and Sullivan's Complaint. (ECF No. 76 at 3) ("[T]he Complaint and Policy are being transmitted herewith; and the allegations of the Complaint are accepted as true for the purposes of this inquiry."). As these certified questions arose in the context of Defendants' motion to dismiss, the allegations of Sullivan's complaint must be accepted as true in the consideration of these questions.

STATEMENT OF THE CASE

Sullivan filed a Complaint against Fireman's Fund and Allianz Global Risks US Insurance Company (collectively, "Allianz", the "Allianz Insurers", or "Defendants") in the South Carolina Court of Common Pleas, Richland County, on May 8, 2020. Sullivan is the first-named insured on the Policy and manages the other named insureds. Sullivan seeks to recover business interruption

benefits under the Policy, including under the Policy's Business Income and Extra Expense Coverage part. Defendants removed the lawsuit to the District of South Carolina Court allegedly in accordance with 28 U.S.C. §§ 1332 and 1441.

Defendants thereafter moved to dismiss Sullivan's Complaint per Federal Rule 12(b)(6). Defendants argued, *inter alia,* that Sullivan failed to state a claim on which relief could be granted because, among other things, SARS-CoV-2 does not, and cannot, cause "direct physical loss or damage to property." Sullivan opposed the motion, arguing, *inter alia*, that "direct physical loss" does not require structural damage or alteration to property, and dangerous particles can cause "physical loss or damage."

In spring of 2021, the parties exchanged written discovery requests. In response to Plaintiff's requests, Defendants produced one 5-inch binder's worth of documents (approximately 440 pages of which were proprietary, indecipherable materials, produced absent a legend or key). Defendants refused to otherwise produce any responsive documents to Plaintiff. Moreover, Defendants continued to fail to provide the third-party adjuster's report which Plaintiff had requested pre-suit.

After the parties fully briefed the initial motion to dismiss, both parties supplemented their briefing as decisions were reported around the country. On January 26, 2021, the District Court ordered that the pending motion to dismiss be withdrawn and an amended motion to dismiss be filed with consolidated briefing. *See* ECF No. 42. The second motion to dismiss was filed on February 16, 2021, and thereafter fully briefed by the parties. The consolidated briefings focused on the meaning of, *inter alia*, "direct physical loss". Defendants primarily pointed to the quantity of recent federal court rulings that favored insurers, while Plaintiff focused on the Policy itself,

Sullivan's allegations as pled, and to a lesser extent, the depth and quality of analysis (or lack thereof) employed by other courts in recent COVID-19 related rulings.

On May 24, 2021, the District Court entered a stay of discovery, inclusive of the ongoing discovery disputes, pending the Court's ruling on the Defendants' Motion to Dismiss.

The District Court issued an Order on June 16, 2021, noting that the parties had not briefed any South Carolina law directly on the issues presented in the Motion to Dismiss. The Order dismissed without prejudice Defendants' Motion to Dismiss. *See* ECF No. 62. The Court indicated in the Order it would certify questions to the South Carolina Supreme Court concerning interpretation of the Policy language. *Id.* On June 22, 2021, the District Court stayed the action until it ordered otherwise. ECF No. 65.

On July 9, 2021, the parties filed a joint proposed order certifying questions and a letter to the District Court concerning an additional, disputed proposed question and the parties' respective positions as to the issues on certification. *See* ECF No. 68. On July 12, 2021, the District Court ordered, *inter alia*, that counsel submit a revised joint proposed order certifying questions that "cover all issues presented in this case for which there is no controlling South Carolina Supreme Court precedent". *See* ECF No. 69. On July 19, 2021, the parties jointly submitted an amended proposed order in accordance with the District Court's directives at ECF No. 69. *See* ECF No. 70.

On October 19, 2021, the District Court filed its Order Certifying Questions to the Supreme Court. ECF No. 76. On the same date, the Court mailed its Certification Order, the Complaint, and the Policy to the South Carolina Supreme Court. *See* ECF Nos. 77.

This Court accepted all of the questions certified by Order of Judge Mary Geiger Lewis on November 10, 2021.

STATEMENT OF FACTS

Sullivan entered into a contract of insurance with Defendants, including coverage for itself and nine (9) CAH restaurant and bar locations that Sullivan owns, manages, and oversees operation of, where patrons gather to eat, drink, and view live-streamed sporting events. *See* Compl. at ¶¶ 3, 13, 15, 16, 61. The Policy that Defendants issued includes two foundational grants of coverage under its Property section: the first is for Property Insured, which Allianz refers to as "Property Coverage." The second is for Business Income and Extra Expense. (Policy at p. 6); *see also* Compl. at ¶ 66 (coverage for inventory losses, business income losses).

The Property Coverage part of the Policy states:

> I. Property Coverage
>
> A. … we will pay for the direct physical loss or damage to **Property Insured** while at a **location**, including such property in the open…within 1,000 feet of such **location**, caused by or resulting from a **covered cause of loss** during the Policy Period.

(Policy at p. 6) (**bolded** terms are **bolded** in the original Policy and indicate a word has a defined meaning in the Policy). The Business Income and Extra Expense Coverage part of the Policy states:

> II. Business Income and Extra Expense Coverage
>
> A. …we 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**, or within 1,000 feet of such **location**, caused by or resulting from a **covered cause of loss.**

(Policy at p. 6).

The Allianz Insurers define a **covered cause of loss** in the Policy as "*risks* of direct physical loss or damage to property *not excluded or limited in this Coverage Form*". (Policy at 52) (emphasis added with underline or *italics*). This means that the perils insured against are not

exhaustively listed by Allianz within the Policy's provisions; rather, all perils are covered unless they are expressly excluded.[2]

The Policy defines **suspension** as "the slowdown or cessation of your **operations**, or that a part or all of the described **premises** is rendered untenable." (Policy at p. 61). The Policy defines **operations** as "the usual and customary business activities in the conduct of **your business** occurring at the **location**, including the tenability of the **premises**. (Policy at p. 58). **Your business** is defined as "the trade, profession, or occupation in which you are engaged." (*Id.* at p. 63). In addition, the Policy defines **extra expense** as "the necessary expenses you incur during the **period of restoration**, over and above the expenses you would have normally incurred had there been no covered loss, in order to:

> a. Avoid or minimize the **suspension** of business if you cannot continue **operations** at the location or at replacement or temporary locations, including relocation expenses and costs to equip and operate such replacement or temporary locations;
> b. Minimize the **suspension** of business if you cannot continue **operations**; or
> c. Repair or replace covered property, but only to the extent it reduces the amount of loss that otherwise would have been payable under Business Income and Extra Expense Coverage.

(Policy at p. 54).

There are also a number of "Coverage Extensions" in the Policy, which expressly provide insurance coverage for additional types of situations or occurrences. The Allianz Insurers expressly added coverage for losses involving viruses and civil authority orders. (Policy at p. 18 (Civil Authority Coverage), 21-22 (Communicable Disease Coverage); 52 (defining **communicable disease** as "any disease, bacteria, or virus that may be transmitted directly or

[2] This language which distinguishes an "all-risk" policy from a "named perils" or "specific perils" policy. *See* Coverage Under All-Risk Insurance, 30 A.L.R. 5th 170, 1995 WL 900253 (1995).

indirectly from human or animal to a human"); *see also* Compl. at ¶ 22 (civil authority orders), ¶ 23 (virus). Further still, the Policy requires that its insureds take steps to mitigate its damages (*e.g.,* Policy at p. 44) and provides coverage for mitigation expenses (*e.g.,* Policy at p. 15, 54).

As seen above, the Policy expressly provides coverage for **business income** lost from a cessation or slowdown in the businesses' normal **operations** so long as they result from *risks* "of direct physical loss or damage to property not excluded or limited" within the policy. *See* Compl. at ¶¶ 21, 24. Further, the Policy expressly provides coverage for cessation, slowdown, **suspension** of the insured's "usual and customary business activities" (**operations**) when all or "a part" of the **premises** are rendered "untenable." Sullivan has pled such a circumstance, in addition to its resulting damages and mitigation expenses.[3]

STANDARD OF REVIEW

"In answering a certified question raising a novel question of law, this Court is free to decide the question based on its assessment of which answer and reasoning would best comport with the law and public policies of the state as well as the Court's sense of law, justice, and right." *Shaw v. Psychemdics Corp*., 426 S.C. 194, 197, 826 S.E.2d 281, 282 (2019).

South Carolina's canons are robust and well established; the below is a collection of the controlling canons implicated by the issues on certification before this Court.

Interpretation of Insurance Policies in South Carolina

[3] *See, e.g.,* Compl. at ¶ 59 (recirculated air in restaurants exacerbating spread), ¶ 61 (contamination at insured restaurants), ¶ 62 (surface contamination at CAH restaurants), ¶ 64 (contamination "within the immediate area" of restaurants); ¶ 65 ("direct physical loss or damage to property" as a result of foregoing); *see also* Compl. at ¶ 29 (public health state of emergency declared along with orders to protect life and ***property***), ¶ 33 (local order citing confirmed cases of COVID-19 in locality), ¶ 43 (order prohibiting dine in or on-site consumption of food or beverages at bars and restaurants), ¶ 50 (ordering continued suspension of on-premises or dine-in consumption of restaurants and noting confirmed cases in all 46 counties of South Carolina).

Insurance policies are subject to the general rules of contract construction. *B.L.G. Enters., Inc. v. First Fin. Ins. Co.*, 334 S.C. 529, 535, 514 S.E.2d 327, 330 (1999). Courts interpret insurance policy language in accordance with its plain, ordinary, and popular meaning, except with technical language or where the context requires another meaning. *M & M Corp. of S.C. v. Auto-Owners Ins. Co.*, 390 S.C. 255, 259, 701 S.E.2d 33, 35 (2010). When policy language is undefined, courts must give it its plain, ordinary, and popular meaning. *Am. Credit of Sumter, Inc. v. Nationwide Mut. Ins. Co.*, 378 S.C. 623, 628, 663 S.E.2d 492, 495 (2008); *see also Strother v. Lexington Cty. Recreation Comm'n*, 332 S.C. 54, 62, 504 S.E.2d 117, 122 (1998) (holding when faced with an undefined term, the court must interpret the term in accord with its usual and customary meaning); *S.C. Farm Bureau Mut. Ins. Co. v. Oates*, 356 S.C. 378, 588 S.E.2d 643 (Ct. App. 2003) (when faced with an undefined term, "[the court] look[s] to the common meaning of [the undefined term] in conjunction with the other language of the contract to determine its meaning within the policy."). Policies are construed in favor of coverage, and exclusions in an insurance policy are construed against the insurer. *M & M Corp.*, 390 S.C. at 259, 701 S.E.2d at 35 (internal citations omitted). "Under the proper structure for analyzing any insurance policy, the analysis begins with the insuring language […], and then [courts] determine whether there is any other provision in the policy that limits or excludes what is insured." *Reeves v. S.C. Mun. Ins. & Risk Fin. Fund*, 434 S.C. 18, 29, 862 S.E.2d 248, 254 (2021), *reh'g denied* (Sept. 21, 2021) (declining to "read [the undefined term 'Coverage Limit'] as limiting coverage more than the defined term 'Liability Limit.'").

Language "susceptible of more than one reasonable interpretation" is ambiguous. *Greenville Cty. v. Ins. Reserve Fund, a Div. of S.C. Budget & Control Bd.*, 313 S.C. 546, 548, 443 S.E.2d 552, 553 (1994) (holding the policy term "sudden" to be capable of more than one

reasonable interpretation, and therefore the term must be construed in favor of the insured). The fact that "different courts have construed the language of an insurance policy differently is some indication of ambiguity." *Id.* at 548, 443 S.E.2d at 553 (noting the split of authority amongst other courts that have addressed this issue, which militated in favor of a finding of ambiguity and an interpretation in favor of the insured). When a policy's language is ambiguous or conflicting, it will be construed *liberally in favor of* the insured ***and*** *strictly against* the insurer. *Whitlock v. Stewart Title Guar. Co.*, 399 S.C. 610, 615, 732 S.E.2d 626, 628 (2012).[4]

Ambiguity

"A contract is ambiguous when it is capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the **entire integrated agreement** and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business." *Hawkins v. Greenwood Dev. Corp.*, 328 S.C. 585, 493 S.E.2d 875, 878 (S.C. Ct. App. 1997) (emphasis added). The provisions of an insurance contract should be considered within the context of the policy as a whole, "and one may not, by pointing out a single sentence or clause, create an ambiguity." *Yarborough v. Phoenix Mut. Life Ins. Co.*, 266 S.C. 584, 225 S.E.2d 344, 348 (1976).

"It is a question of law for the court whether the language of a contract is ambiguous." *S.C. Dep't of Nat. Res. v. Town of McClellanville*, 345 S.C. 617, 623, 550 S.E.2d 299, 302-03 (2001). The construction of a clear and unambiguous contract is a question of law for the court to

[4] *See also Myrtle Beach Lumber Co. v. Willoughby*, 276 S.C. 3, 8, 274 S.E.2d 423, 426 (1981) ("Ambiguous language in a contract should be construed liberally and most strongly in favor of the party who did not write or prepare the contract and is not responsible for the ambiguity; and any ambiguity in a contract, doubt, or uncertainty as to its meaning should be resolved against the party who prepared the contract or is responsible for the verbiage.") (*quoting* 17A C.J.S. Contracts §324).

determine. *Hawkins*, 328 S.C. at 592, 493 S.E.2d at 878. If the court decides the language is ambiguous, however, evidence may be admitted showing the intent of the parties, and the determination of the parties' intent becomes a question of fact for the factfinder. *Id.* at 592, 493 S.E.2d at 878-79.

A patent ambiguity is one that arises upon the words of a will, deed, or contract. *Smith v. Coxe*, 183 S.C. 509, 516, 191 S.E. 422, 425–26 (1937). A latent ambiguity exists when there is no defect arising on the face of the instrument but arises when attempting to apply the words of the instrument to the object or subject described. *Id.* (offering an example of a latent ambiguity as a named beneficiary in a will that is unambiguous on the face of the will but creates a latent ambiguity where there are two people with that name).[5]

Interpretation of an unambiguous policy, or a policy with a **patent** ambiguity, is for the court. *Hann v. Carolina Cas. Ins. Co.*, 252 S.C. 518, 526–27, 167 S.E.2d 420, 423 (1969) ("[T]his court in a long line of cases dealing with ambiguities in insurance policies, which were in fact patent ambiguities, has held, either expressly or in effect, that the construction of the particular policy was a matter for determination by the court and that no jury issue was involved."); *Cogdill v. Equity Life & Annuity Co.*, 262 S.C. 248, 253, 203 S.E.2d 674, 677 (1974) (explaining a patent ambiguity in an insurance policy is to be construed by the court); *B.L.G.*, 328 S.C. 374, 377, 491 S.E.2d 695, 697 (Ct. App. 1997), aff'd, 334 S.C. 529, 514 S.E.2d 327 (1999).[6]

[5] The conflict discussed infra between the extension of coverage for communicable disease, and the Mortality and Disease Exclusion, would appear to be a patent ambiguity; whereas, the meaning of "loss" in the phrase "physical loss or damage" would appear to be a latent ambiguity.

[6] Notwithstanding this historical distinction between patent and latent ambiguity, recent decisions appear to indicate a preference to submit all ambiguities to the jury (factfinder). *See, e.g.*, *Harbin v. Williams*, 429 S.C. 1, 837 S.E.2d 491 (2019); *Williams v. Gov't Emps. Ins. Co. (GEICO)*, 409 S.C. 586, 594, 762 S.E.2d 705, 710 (2014) (in interpreting an insurance policy, the Supreme Court

Interpretation of a policy with a **latent** ambiguity is for the jury. *Wheeler v. Globe & Rutgers Fire Ins. Co.*, 125 S.C. 320, 329, 118 S.E. 609, 612 (1923) (Cothran, J., dissenting); *Beaufort Cty. Sch. Dist. v. United Nat'l Ins. Co.*, 392 S.C. 506, 526, 709 S.E.2d 85, 95-96 (Ct. App. 2011) ("Interpretation of an unambiguous policy, or a policy with a patent ambiguity, is for the court. Interpretation of a policy with a latent ambiguity is for the jury.") (citations omitted).

When faced with conflicting or ambiguous terms, South Carolina courts must adopt the construction "most favorable to the insured, and against the insurer that drafted the policy". *Inv'r. Title Ins. Co. v. Bair*, No. CV 9:05-1434-PMD, 2006 WL 8443961, at *4 (D.S.C. Sept. 6, 2006) (emphasis added). The *Bair* Court included the following note on the underpinnings of South Carolina's approach to insurance contracts:

> The fundamental reason which explains this and other examples of judicial predisposition toward the insured is the deep-seated, often unconscious but justified feeling or belief that the powerful underwriter, having drafted its several types of insurance contracts with the aid of skillful and highly paid legal talent, from which no deviation desired by an applicant will be permitted, is almost certain to overreach the other party to the contract. *The established underwriter is magnificently qualified to understand and protect its own selfish interests*. In contrast, the applicant is a shorn lamb driven to accept whatever contract may be offered on a "take-it-or-leave-it" basis if he or she wishes insurance protection. In other words, insurance policies, while contractual in nature, are certainly not ordinary contracts, and should *not* be interpreted or construed as individually bargained for, fully negotiated agreements, but **should be treated as contracts of adhesion between unequal parties.**

Id. at *4 n.3 (citing *Williston on Contracts* § 49:15) (emphasis added).

In sum, insurance policies should be given a reasonable construction and interpretation so as to afford coverage rather than defeat it. *See, e.g., Evanston Ins. Co. v. Watts*, 52 F. Supp. 3d 761

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discussed ambiguities without distinguishing between patent and latent and held the determination of the parties' intent becomes a question of fact for the factfinder).

at 775 (D.S.C. 2014), *as amended* (Oct. 21, 2014), *aff'd sub nom. Evanston Ins. Co. v. Agape Sr. Primary Care, Inc.* 636 F. App'x 871 (4th Cir. 2016) at 775 ("[R]ules of construction require clauses of exclusion to be narrowly interpreted, and clauses of inclusion to be broadly construed. This rule of construction inures to the benefit of the insured.").

Other Contract Interpretation Principles

The use of two separate terms in a statute or other legal document, especially those joined by a disjunctive, necessarily requires that the terms be given separate meanings. *Machin v. Carus Corp*., 419 S.C. 527, 545, 799 S.E.2d 468, 477 (2017) ("The legislature's use of two separate terms makes clear that it intended two separate meanings."); *see also Loughrin v. United States*, 573 U.S. 351, 357, 134 S. Ct. 2384, 2390, 189 L. Ed. 2d 411 (2014) (Rejecting notion that two distinct phrases joined by the word "or" as requiring identical elements, explaining that "or's" "ordinary use is almost always disjunctive, that is, the words it connects are to be given separate meanings.") (internal citations omitted).

Burden Shifting

"[T]he initial burden to prove that a loss is covered under an insurance policy is on the insured". *Ex parte Builders Mut. Ins. Co.,* 431 S.C. 93, 102, 847 S.E.2d 87, 92 (2020) (*citing Gamble v. Travelers Ins. Co.*, 251 S.C. 98, 103, 160 S.E.2d 523, 525 (1968)). "[O]nce the insured has done so, the burden shifts to the insurer to prove that an exclusion applies to defeat coverage". *Id*. "[W]hen relevant, the insured [thereafter] bears the burden to prove an exception to the exclusion applies in order to restore coverage". *Id.* (*citing Helena Chem. Co. v. Allianz Underwriters Ins. Co.*, 357 S.C. 631, 642 n.5, 594 S.E.2d 455, 460 n.5 (2004)).

ARGUMENT

The Policy, read under South Carolina controlling interpretive principles, provides

coverage for the calamity that Sullivan has pled.

I. The presence of COVID-19 in or near Sullivan's properties, and/or the concurrent governmental orders, both of which hinder or damage the fitness, habitability or functionality of Sullivan's properties, constitutes "direct physical loss or damage".

Defendants *chose* not to define "direct physical loss or damage" in their Policy. Thus, the first step is to examine what these words mean based on 1) their plain, ordinary, and popular meaning, 2) a reading of the Policy as a whole, and 3) in the context and subject matter of the Policy. *See Yarborough*, 266 S.C. at 593, 225 S.E.2d at 349 ("[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.").

Here, the plain, ordinary, and popular meaning of "direct physical loss or damage" and more specifically, *physical losse*, demonstrates that this Policy affords coverage for the claims brought by Sullivan and the business interruption losses Sullivan suffered.. At a minimum, (1) Sullivan's reading of the phrase is a reasonable one; (2) the phrase is therefore ambiguous; and (3) the phrase must be read in favor of coverage.

A. Dictionary evidence of the plain, ordinary, and popular meanings of the undefined terms supports Plaintiff's interpretation.

The dictionary definitions of the terms "physical", "loss" and "damage" are worthy of consideration. *See, e.g., Greenville Cty.*, 313 S.C. at 548, 443 S.E.2d at 553 (citing dictionary definitions of "sudden").

1. *"Physical"*

Merriam-Webster's Unabridged Dictionary defines "physical" as "of or relating to natural

or material things as opposed to things mental, moral, spiritual, or imaginary: material, natural".[7] Defendants conceded a similar definition of "physical" in their First Amended brief before the District Court: "(a) having material existence: perceptible especially through the senses and subject to the laws of nature; (b) of or relating to material things." ECF No. 45-1, at p. 20 (Defendants' First Amended Mot. to Dismiss Brief).

A reading of the Policy as a whole supports these broad definitions of "physical." For example, under the Allianz Policy, Communicable Disease Coverage exists to "[m]itigate, contain, remediate, treat, clean, detoxify, disinfect…the **communicable disease**". *See* (Policy at p. 18). Similarly, Fungus Remediation Coverage exists to "[m]itigate, contain, remediate, treat, clean, detoxify, disinfect… **fungus**". And Pollutant Cleanup Coverage exists to "cleanup, remove, extract, and dispose of **pollutants**….". *See* (Policy at p. 27). **Communicable disease[s]**, **fungus**, and **pollutants** frequently cannot be touched or smelled or tasted or seen, yet each is "material". **Communicable disease[s]** and **fungus** are also "of natural things".[8]

Moreover, the Allianz Policy was procured to principally cover Sullivan's **operations** at dine in restaurant and bar locations. *See* Compl. at ¶ 21. This is notable because putting these concepts together makes clear that Allianz intended, when drafting this Policy, for the presence of a **communicable disease**, **fungus**, **pollutants**, and other similar kinds of particles at insured locations to trigger its business interruption coverage. It follows that the plain meaning of "physical" in the Allianz Policy is "of or relating to natural or material things as opposed to things

[7] https://unabridged.merriam-webster.com/unabridged/physical.

[8] On a related note, clearly, as evidenced by 1) the plain and ordinary meaning of the word "restoration", 2) common sense, and 3) the Communicable Disease Coverage and Pollutant Cleanup Coverage, cleaning, sanitizing, disinfecting, detoxifying, and cleanup of dangerous particles and/or contaminants qualify as, and constitute, "restoration."

mental, moral, spiritual, or imaginary". At minimum, the latter is a reasonable reading of the undefined term "physical."

2. *"Loss"*

Critically, a "loss" is an "undesirable outcome of a risk; the disappearance or diminution of value, usually in an unexpected or relatively unpredictable way." *Loss*, Black's Law Dictionary (8th ed. 2004). Merriam-Webster's Unabridged Dictionary defines "loss" as "**deprivation**", the "**failure to keep possession**", and a "decrease in amount, magnitude, value, or degree". *Loss*, Merriam-Webster's Unabridged Dictionary Online (emphasis added).[9] Collins English Dictionary defines "loss" similarly, as "detriment, disadvantage, or deprivation from failure to keep, have, or get" and the "state of being deprived of or of being without something that one has had". *Loss*, Collins English Dictionary, (Complete & Unabridged 2012 Digital Ed.).

Defendants assert that "loss" in their Policy means only "destruction; ruin". ECF No. 45-1, at p. 20. However, "deprivation" and "dispossession" make sense as the meaning of "loss" within the phrase "direct physical loss or damage" in this Policy because these definitions give meaning to "physical *loss*" that is distinct from "physical *damage*". *See, e.g., State v. Sweat*, 386 S.C. 339, 351, 688 S.E.2d 569, 575 (2010) (noting the rule of construction that an instrument should be "so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous" in the statutory context); *see also* Antonin Scalia & Bryan Garner, Reading Law: The Interpretation of Legal Texts 174 (2012) (citing *United States. v. Butler*, 297 U.S. 1, 65 (1936) (Roberts, J.))[10]; *see also* Section A(3) *infra* (detailing the disjunctive's import).

[9] https://unabridged.merriam-webster.com/unabridged/loss.

[10] The "surplusage" canon of construction posits that "[i]f possible every word and every provision should be given effect (*verba cum effectu sunt accipienda*). None should needlessly be given an

The Policy, read as a whole, supports Plaintiff's definitions of "loss". For example, the Policy uses the terms **suspension** and **operations** **in dozens of clauses throughout this Policy that include business interruption coverage**. Allianz defines **suspension** and **operations** by employing the words "tenability" and "untenable"[11]; however, neither is defined in the Policy. "Tenability" is the "quality of state of being tenable". *Tenability*, Merriam Webster Unabridged Dictionary Online. And "tenable" means "capable of being occupied, possessed, held, or enjoyed, as under certain conditions". *Tenable*, Collins English Dictionary Online (Complete & Unabridged 2012 Digital Edition). Or, it is defined as "capable of being occupied or used". *Tenable*, Merriam Webster Unabridged Dictionary Online. The definitions of **suspension** and **operations** indicate that tenability (or a lack thereof, in whole or part) is included within this Policy's coverage for **business income** damages suffered by insureds and this evidences that "loss" necessarily includes the loss of intended use, in part or in whole, of the insured locations. *See, e.g.,* (Policy at pp. 58, 61).[12]

The Policy term **covered cause of loss,** defined in pertinent part as "*risks of* direct physical loss or damage not excluded…", similarly evidences that the Policy's breadth of coverage contemplates the *potential of* two, separate classes of outcomes: 1) loss and 2) damage. (Policy at

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interpretation that causes it to duplicate another provision or to have no consequence. These words cannot be meaningless, else they would not have been used."

[11] As noted in the Statement of Facts, *infra*, Allianz defines **suspension** as "the *slowdown or cessation* of your **operations**, or that a part or all of the described **premises** is rendered untenable". (Policy at 61) (emphasis added). The term **operations** is defined as "the usual and customary business activities in the conduct of **your business** occurring at the **location**, including the tenability of the **premises**". (Policy at 58) (emphasis added).

[12] Upon further reflection on the plain meaning of *tenability* and *loss* together, it becomes apparent that the Policy contemplates (in its primary grant of coverage for Business Interruption and Extra Expense) that a *deprivation* of occupancy, enjoyment, use, or *possession* of the insured location, in whole or in part, is – or at a minimum can be – a covered loss.

p. 52) (emphasis added). This definition is a critical aid in understanding the scope of coverage intended in this Policy, where the drafters chose not to limit coverage to enumerated perils.

In addition, Allianz used the word "destruction" in its Policy where it intended to reference "destruction" (as opposed to "loss").[13] And Defendants' proffered definition impermissibly collapses "loss" into "damage", as discussed below.

Given the foregoing, it is facetious and unreasonable for Defendants to assert, in a retrospective analysis of its Policy, that "loss" within the phrase "direct physical loss or damage" should mean only "destruction; ruin". Again, it is at least reasonable to interpret the word "loss", when considering the Policy as a whole, to mean "deprivation" or "dispossession."

3. *"Damage"*

"Damage" is defined by Merriam Webster's Unabridged Dictionary, as "injury or harm to person, property or reputation", "hurt, harm", and "loss due to injury". *Damage*, Merriam Webster Unabridged Dictionary Online.[14] Defendants previously asserted that "damage" should be defined as "loss or harm resulting from injury to person, property, or reputation". ECF No. 45-1, at p. 20 (emphasis added). It is perfectly reasonable for Sullivan to assert, as it has, that its physical property has been harmed or injured by COVID-19.

The context and subject matter of this Policy is also noteworthy in considering the plain meaning of "direct physical ***loss*** *or* ***damage***". An implicit requirement of a dine-in restaurant and bar (which are the principal use of the properties at issue under this Policy) is providing a safe

[13] For example, the Coverage for Animals under this Policy includes "[t]he humane destruction of covered animals if necessary". (Policy at p. 42) (emphasis added). Similarly, in an exception to its Dishonesty Exclusion, Allianz provided that there is coverage for "[a]cts of vandalism or destruction by any of your employees…but theft by any of your employees… is not covered". (Policy at p. 8) (emphasis added).

[14] https://unabridged.merriam-webster.com/unabridged/damage.

environment for customers to gather, eat, drink, and socialize without being placed in a dangerous situation. Allianz was aware of the fact that this Policy was insuring restaurant and bar locations (*e.g.,* it included a Restaurant Extension Endorsement in the Policy); it cannot now read its Policy ignoring the very business **operations** that it issued this Policy to insure.

B. Other policy terms, *e.g.,* those in the Communicable Disease Coverage Extension, evidence that COVID-19 constitutes "direct physical loss or damage".

The Allianz Insurers' use of the phrase "direct physical loss or damage" throughout the entire policy, including, *e.g.,* in the Communicable Disease Extension, shows that communicable diseases ***can*** cause direct physical loss or damage to property. Defendants allege that COVID-19 cannot and does not cause physical loss or damage because it "can be cleaned with a disinfectant wipe or inactivated by the passage of time […]"; however, this position is belied by the Defendants' *own Policy provisions*, described below. Frankly, it's a binding concession by the Defendants within the policy at issue that cannot be explained away; and, at minimum, this inconsistency supports Sullivan's reasonable interpretation of the phrase.

The Communicable Disease Coverage extends to "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: […] "mitigate, contain, remediate, treat, clean [etc.] the effects [] the **communicable disease**." (Policy at 21-22). Under Allianz's Policy, **communicable disease** means "any disease, bacteria, or virus that may be transmitted directly or indirectly from human or animal to a human." (Policy at 52). This provision confirms:

1) That a communicable disease itself can cause or result in "direct physical loss or damage to Property;" and,[15]

[15] This negates insurers' hyperbole that "Covid damages people, not property…" *See, e.g., Studio 417, Inc. v. Cincinnati Ins. Co.,* 478 F. Supp. 3d. 794, 2020 WL 4692385, at *2

2) that "necessary costs incurred" to "mitigate, contain, remediate, treat, test for" "communicable diseases" can, in fact, be "direct physical loss[es]".

If "loss" is only triggered by *permanent* dispossession of property or *permanent* uninhabitability, as Defendants have suggested, then the Communicable Disease Coverage part is also rendered illusory.

The above Policy provisions irrefutably evidence that the presence of "disease, bacteria, or virus," which can be transmitted from human to human, causes direct physical loss or damage, that is covered under the Allianz Policy. *See S.C. Farm Bureau Mut. Ins. Co. v. Kennedy,* 398 S.C. 604, 615, 730 S.E.2d 862, 867 (2012) ("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.") (emphasis added); *Isle of Palms Pest Control Co. v. Monticello Ins. Co*., 319 S.C. 12, 19, 459 S.E.2d 318, 321 (Ct. App. 1994), *writ granted in part, decision aff'd*, 321 S.C. 310, 468 S.E.2d 304 (1996) ("[T]he internal inconsistency created by [an exclusion] which purports to bar coverage for claims arising out of the very operation sought to be insured renders [the policy] ambiguous in favor of coverage.") (emphasis added); *see also Gaskins v. Blue Cross-Blue Shield of South Carolina*, 271 S.C. 101, 105 (1978) ("[I]f the policy, words and language of the policy, when considered as a whole, give rise to a patent ambiguity or are capable of two or more reasonable interpretations. . .that construction

(W.D. Mo. Aug. 12, 2020) (rejecting one New York Court's statement, in *Social Life Magazine, Inc. v. Sentinel Ins. Co., Ltd.*, 1:20-cv-03311-VEC (S.D.N.Y. 2020), that "the virus damages lungs, not printing presses", finding that "**the present case is not about whether COVID-19 damages lungs**, and the **presence of COVID-19 on premises**, as is alleged here, **is not a benign condition**…Plaintiffs here have plausibly alleged that COVID-19 particles attached to and damaged their property, which made their premises unsafe and unusable") (emphasis added); *see also* ECF No. 45-1, at p. 27.

which is most favorable to the insured must be adopted.") (emphasis added). As a result, there can be no doubt that the presence of COVID-19 in or near Sullivan's properties can plausibly constitute "direct physical loss or damage" as that phrase is used in this Policy by Allianz.

There are other coverage parts in the Allianz Policy that would be rendered illusory if an arbitrarily narrow interpretation of "physical loss" were accepted. For example, the Money Orders and Counterfeit Currency Coverage extension would be rendered illusory. (Policy at p. 16) (providing coverage for "loss which results from your accepting counterfeit currency in exchange for goods, services, or money"). The only losses possibly contemplated by such an extension are loss of use or loss of value of property or services and economic harm related there-to. There is no way to equate this extension with physical destruction or ruin. As a result, the reading that Plaintiff propounds, which correctly recognizes the Policy's language and coverages taken together, is reasonable.

C. The phrase "direct physical loss or damage to property" is ambiguous, and therefore must be construed in the insured's favor.

At minimum, and because of the above conflict, and as illustrated by the varied way "direct physical loss or damage to property" has been interpreted throughout the country, the foregoing phrase--as used in *this* Policy and as applied to *these* allegations--is ambiguous under South Carolina law and must be interpreted in favor of Sullivan in this Policy.

The key phrases in the Allianz policy are "physical loss" *and* "physical damage". The policy covers ***both*** types of losses. The policy's use of the disjunctive "or" between the terms "loss" and "damage" necessarily means that either a "loss" or "damage" is required, and that "loss" is distinct and different from "damage" or Defendants would not have needed to use both words/phrases. As the contract must be read to give each word meaning, it is clear that "loss" and

"damage" must mean different things. *See, e.g., Stevens Aviation, Inc. v. DynCorp Int'l LLC*, 407 S.C. 407, 417, 756 S.E.2d 148, 153 (2014) ("[A]n interpretation that gives meaning to all parts of the contract is preferable to one which renders provisions in the contract meaningless or superfluous.").

Importantly, "loss" when defined *only* as "destruction" and "ruin" is synonymous with "damage". *See, e.g., Damage*, Oxford Languages Online (formerly known as Oxford Dictionaries). Those definitions of "loss" (destruction and ruin) make the term physical *loss* surplusage because it is redundant of physical *damage*. Therefore, Defendants' proffered definition of loss cannot be correct (or, cannot be the only reasonable interpretation) because Defendants themselves drafted the Policy and chose to use two separate phrases.

Long before COVID-19, courts have correctly rejected insurer attempts to define the terms "physical loss" and "damage" synonymously in denying claims. For example, in *Nautilus Grp. Inc. v. Allianz Global Risks US*, the court rejected Allianz's argument that "direct physical loss or damage," required "proof that the property at issue has been physically altered." No. C11-5281BHS, 2012 WL 760940, at *6-7 (W.D. Wash. Mar. 8, 2012). The *Nautilus* court explained:

> First, if "physical loss" was interpreted to mean "damage," then one or the other would be superfluous. The fact that they are both included in the grant of coverage evidences an understanding that physical loss means something other than damage. Second, the Policy contains an exclusion for an employee's theft of covered property. If theft was not a covered risk, then this provision would be unnecessary. Therefore, the Court finds that a reasonable person purchasing insurance would understand the contract to cover theft of covered personal property as "physical loss," and the Court denies Allianz's motion on this issue.

Id. (emphasis added).

In March of 2021, the court in *Kingray Inc., et. al. v. Farmers Grp. Inc., et. al.*, cited to the *Nautilus* Court's decision, and stated "[a]dditionally, as Plaintiff argues, Defendant's

interpretation of the contract requires 'loss' to share a meaning with 'damage,' which violates the canon that every word be given meaning." Case No. EDCV 20-963, (C.D. Cal., March 4, 2021) (interpreting policy language in the context of a COVID-19-related claim).[16]

Accordingly, Defendants' proffered meaning of the two key phrases, even if found to be reasonable, cannot disturb that Sullivan's reading is also reasonable.

Moreover, a reading of the Policy as a whole indicates that Defendants' reading is not what was intended, since it breaks several fundamental rules of insurance contract construction (*e.g.,* that every word must be given a meaning; that the use of a disjunctive between two different descriptors implies that the descriptors mean different things). *See Machin*, 419 S.C. at 545, 799 S.E.2d at 477.This necessitates a finding of ambiguity, in favor of coverage. *See Greenville Cty.,* 313 S.C. at 548, 443 S.E.2d at 553 (language susceptible of more than one reasonable interpretation is ambiguous); *Whitlock*, 399 S.C. at 615, 732 S.E.2d at 628 (ambiguous policy language will be construed liberally in favor of the insured, strictly against the insurer).

Given the foregoing, the Allianz Insurers are not entitled to escape the consequences of their decision to use the term "loss" (instead of damage or "destruction"), repeatedly, throughout the Allianz policy. This post-claim, post-receipt of premiums attempt, long after the language was unilaterally selected and included by Defendants in the contract, should be rejected.

D. "Direct physical loss or damage" does not require some permanent dispossession of the property or physical alteration to the property.

[16] *See also Nat'l Ink & Stitch, LLC v. State Auto Prop. & Cas. Ins. Co.*, 435 F. Supp. 3d 679, 686 (D. Md. 2020) ("In the instant case, State Auto seems to equate 'physical loss or damage' to Plaintiff's computer system to require an utter inability to function. The Policy language, and the relevant case law, impose no such prerequisite. The more persuasive cases are those suggesting that loss of use, loss of reliability, or impaired functionality demonstrate the required damage to a computer system, consistent with the […] language in the Policy.") (emphasis added).

Sullivan need not allege or suffer *permanent* uninhabitability or *complete* uselessness because the Allianz Policy has no such requirement. In fact, the Policy expressly includes coverage for a suspension and slowdown of operations and partial untenability. *See* (Policy 61) (providing that "**suspension** means the slowdown or cessation of your **operations**, or that a part or all of the described **premises** is rendered untenable") (underscore emphasis added). Moreover, there is no requirement under South Carolina law or analogous factual circumstances that an insured location be *permanently* or *completely* uninhabitable or un-usable for an insured's claims to trigger business interruption coverage. Therefore, even where a loss is temporary, or the reduction in a property's utility is only partial, physical loss or damage can still exist if the property is unsuitable for its intended use.

E. Pre-COVID-19 decisions support Sullivan's interpretation of "direct physical loss or damage" in the Policy as inclusive of deprivation of the insured property's function or usefulness.

Prior to the COVID-19 pandemic, five states' highest courts[17] and seven other states' intermediate appellate courts[18] held that "physical loss" and its variants included risks that rendered property unsafe and unusable, even without visible, tangible, or structural damage.

[17] *W. Fire Ins. Co.* v. *First Presbyterian Church*, 437 P.2d 52 (Colo. 1968) (gasoline vapor); *Sentinel Mgmt. Co.* v. *Aetna Cas. & Sur. Co.*, 615 N.W.2d 819 (Minn. 2000) (asbestos); *Mellin* v. *N. Sec. Ins. Co.*, 115 A.3d 799 (N.H. 2015) (urine odor); *Dundee Mut. Ins. Co.* v. *Marifjeren*, 587 N.W.2d 191 (N.D. 1998) (power outage); *Murray* v. *State Farm Fire & Cas. Co.*, 509 S.E.2d 1 (W. Va. 1998) (threat of rockfall).

[18] *Hughes* v. *Potomac Ins. Co.*, 18 Cal. Rptr. 650 (Cal. Ct. App. 1962) (erosion of land beneath a house); *Azalea, Ltd.* v. *Am. States Ins. Co.*, 656 So. 2d 600 (Fla. Ct. App. 1995) (death of bacteria colony in treatment plant); *Bd. of Educ.* v. *Int'l Ins. Co.*, 720 N.E.2d 622, 625-26 (Ill. Ct. App. 1999) (presence of asbestos); *Widder* v. *La. Citizens Prop. Ins. Corp.*, 82 So. 3d 294 (La. Ct. App. 2011) (lead contamination); *Wakefern Food Corp.* v. *Liberty Mut. Fire Ins. Co.*, 968 A.2d 724 (N.J. App. Div. 2009) (power outage); *Farmers Ins. Co.* v. *Trutanich*, 858 P.2d 1332 (Or. Ct. App. 1993) (meth fumes); *Graff* v. *Allstate Ins. Co.*, 54 P.3d 1266 (Wash. Ct. App. 2002) (meth residue).

Federal appellate courts reached the same conclusion applying the law of four other states.[19] New York is the only state that generally sides with insurers on this issue. *E.g.*, *Roundabout Theatre Co.* v. *Cont'l Cas. Co.*, 302 A.D.2d 1 (N.Y. App. Div. 2002) (coverage triggered only where there is physical damage to covered property). But not all of the time. *Pepsico, Inc.* v. *Winterthur Int'l Am. Ins. Co.*, 24 A.D.3d 743, 744 (N.Y. App. Div. 2005) (finding coverage where "the product's function and value have been seriously impaired" even without physical damage).[20]

There are many, additional pre-COVID-19 cases that similarly found coverage. *See, e.g., TRAVCO Ins. Co. v. Ward*, 715 F. Supp. 2d 699, 703, 707–08 (E.D. Va. 2010), *aff'd*, 504 F. App'x 251 (4th

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[19] *Essex Ins. Co.* v. *BloomSouth Flooring Corp.*, 562 F.3d 399 (1st Cir. 2009) (Massachusetts law) (carpet chemical odors); *Hampton Foods, Inc.* v. *Aetna Cas. & Sur. Co.*, 787 F.2d 349 (8th Cir. 1986) (Missouri law) (risk of collapse); *Alliance Ins. Co.* v. *Keleket X-Ray Corp.*, 248 F.2d 920 (6th Cir. 1957) (Ohio law) (radium contamination); *Intermetal Mexicana, S.A.* v. *Ins. Co. of N. Am.*, 866 F.2d 71 (3d Cir. 1989) (Pennsylvania law) (dispossession of property).

[20] Before the District Court, Allianz pointed to the reasoning and holdings of three South Carolina cases, which they argued supported their no-coverage position in the circumstances and damages pled by Sullivan in this case. *See* ECF 45-1, at pp. 12-13. However, all are inapposite because 1) none were in the same posture as this one (on a motion to dismiss); 2) none concerned factual circumstances like the calamity pled by Sullivan; and most importantly, 3) none concerned all-risk commercial insurance policies, which by their nature, do not exhaustively list the risks of "physical loss or damage" that will be covered. *See Campbell, Inc. v. N. Ins. Co. of New York,* 337 F. Supp. 2d 764, 769 (D.S.C. 2004) (finding that a Commercial Marine Truckmen's Cargo Owner's or Carrier's Liability Coverage Form, providing coverage for the property of others in the event of loss or damage *in transit*, did not include loss of use, when read as a whole); *Auto-Owners Ins. Co. v. Carl Brazell Builders, Inc.,* 356 S.C. 156, 162, 588 S.E.2d 112, 115 (2003) (concerning commercial general liability policies that defined "property damage" as either "[p]hysical injury to tangible property, including all resulting loss of use of that property" or "[l]oss of use of tangible property that is not physically injured", which do not purport to cover lost business income; finding that claimants did not allege "any physical injury which meets the definition of 'property damage' provided in the CGL policies" by their allegations that homebuilders failed to disclose conditions to homebuyers, resulting in diminution in value of their respective properties), and *Pulliam v. Travelers Indem. Co.,* 403 S.C. 332, 342, 743 S.E.2d 117, 122 (Ct. App. 2013) (concerning a director's and officer's policy which did not contain the term "physical loss", and defined "property damage" expressly to include loss of use and diminution of property value in the context of a breach of fiduciary duty and failure to fund reserves claims).

Cir. 2013) (release of sulfuric gas into house from defective drywall constituted "direct physical loss"); *Motorist Mut. Ins. Co. v. Hardinger*, 131 F. Appx. 823, 826-27 (3d Cir. 2005) (holding that "direct physical loss" can be satisfied when a property is rendered "useless or uninhabitable"); *Oregon Shakespeare Festival Ass'n v. Great Am. Ins. Co.,* No. 1:15- cv-01932, 2016 WL 3267247, at *4-5, *9 (D. Or. June 7, 2016), *vacated on other grounds by Oregon Shakespeare Festival Ass'n v. Great Am. Ins. Co.*, 2017 WL 1034203 (D. Or. Mar. 6, 2017) ("physical loss or damage" to property occurred when wildfire smoke infiltrated theater and rendered it "unusable for its intended purpose… [e]ven though the loss or damage was not structural or permanent" because the property experienced "a loss of essential functionality"); *Arbeiter v. Cambridge Mut. Fire Ins. Co.*, No. 94-00837, 1996 WL 1250616, at *2 (Mass. Super. Mar. 15, 1996) (oil fumes "may be a physical loss" in light of "persuasive[]" argument that "fumes are a physical loss which attaches to the property"); *Mehl v. The Travelers Home & Marine Ins. Co.,* Case No. 4:16-cv-01325 CDP, 2018 WL 11301983 (E.D. Mo. May 2, 2018) (brown recluse spider infestation of house, rendering the house uninhabitable, constituted a direct physical loss)[21]; *Gregory Packaging, Inc. v. Travelers Prop. Cas. Co.*, No. 2:12-cv-4418 WHW, 2014 WL 6675934 (D.N.J. Nov. 25, 2014) (ammonia release into factory physically transformed the air within the facility rendering it unusable for a period of time); *Matzner v. Seaco Ins. Co.*, No. 96-0498-B, 1998 WL 566658, at *3 (Mass. Super. Aug. 26, 1998) ("I find and rule that the phrase 'direct physical loss or damage' ***is*** ambiguous in that it is susceptible of at least two different interpretations. One includes only tangible damage to the structure of insured property. The second includes a wider array of losses . . . Thus, I find and rule that carbon monoxide contamination constitutes 'direct physical loss of or damage to' property.");

[21] All unpublished opinions not available on Westlaw or Lexis Nexis, are appended hereto, for the Court's ease of reference.

General Mills, Inc. v. Gold Metal Ins. Co., 622 N.W.2d 147, 152 (Minn. Ct. App. 2001) (FDA ban on selling contaminated oats caused "physical loss"); *Stack Metallurgical Servs. v. Travelers Indem. Co.*, No. CIV. 05-1315-JE, 2007 WL 464715, at *1–2 (D. Or. Feb. 7, 2007) ("[T]he physical change in the furnace resulting from a release of lead particles, which prevented it from being used for its ordinary expected purpose, is fairly characterized as a 'direct physical loss of or damage to' the furnace."). *See also, e.g., Mellin v. N. Sec. Ins. Co.* 167 N.H. 544, 548-49, 115 A.3d 799, 803-04 (2015) (holding when "physical loss" was undefined in the policy, "that 'physical loss' need not be read to include only tangible changes to the property that can be seen or touched" and noting that its interpretation of "physical loss" is "supported by a substantial body of case law in which a variety of contaminating conditions, including odors, have been held to constitute a physical loss to property.") (citations omitted)); *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) (recognizing that "the majority of cases [from other jurisdictions] appear to support [the] position that physical damage to the property is not necessary, at least where the building has been rendered unusable by physical forces") (emphasis added). The conclusion that physical damage is not necessary makes sense because:

> To accept [the insurance company's] interpretation of its policy would be to conclude that a building which has been overturned or which has been placed in such position as to overhang a steep cliff has not been "damaged" so long as its paint remains intact and its walls adhere to one another. Despite the fact that a "dwelling building" might be rendered completely useless to its owners, [the insurer] would deny that any loss or damage had occurred unless some tangible injury to the physical structure itself could be detected. ***Common sense requires that a policy should not be so interpreted in the absence of a provision specifically limiting coverage in this manner.***

Id. (*citing Hughes*, 18 Cal. Rptr. at 655) (emphasis added).

The circumstances here bear a notable likeness to the "loss of the function of the insured property" in *General Mills*. 622 N.W.2d at 152 (reasoning that the losses the insured suffered satisfied the undefined requirement of "direct physical loss" in the policy when General Mills was unable to sell its oats for human consumption in accordance with FDA requirements after a contractor applied the wrong pesticide to oats, even though the oats could still be safely consumed by humans, noting a "loss of function" of insured property had occurred). Applying a similar analytical approach here, this Court should conclude "direct physical loss or damage" reasonably encompasses the "loss of function" suffered by Sullivan's insured properties, when the properties were made unsafe and unfit for their intended use (gathering, dining) by *inter alia*, the arrival and presence of dangerous, surface-adherent and noxious, airborne particles. *See* Compl. at ¶¶ 33, 38, 41, 42, 47, 53, 59, 60, 61, 62, 64; *see also* Compl. at ¶¶ 29, 50. The deprivation was perfected by concurrent closure orders.

Having failed to define "direct physical loss or damage" as Allianz argues it should be interpreted, Allianz must honor its promise of coverage. South Carolina courts are not in the business of rescuing insurance companies who regret their choice to sell broadly worded insurance policies.

1. *Defendants have been on notice of this interpretation and/or the ambiguity in their January 2013 Insurance Form and have continued to lay in the grass (failed to clarify their policy provisions), taking advantage of the unwary.*

The foregoing cases were decided intermittently over the last six decades. Defendants wrote or modified their current ambiguous coverage form in January 2013, and reissued it in 2019 knowing these types of losses could be interpreted as "physical losses" and did nothing to clarify their policy form/coverage before publishing it in January of 2013 or any time since. The *Matzner*

case above is notable for a second reason – the Defendants have been on notice from *Matzner* twenty-three (23) years ago that the phrase "direct physical loss or damage" is be ambiguous – but the Defendants have failed to correct this with a policy definition. This failure can only be construed against the Defendants.

Either "physical loss" must be construed in accordance with Sullivan's interpretation, or an ambiguity needs to be found and construed against the Allianz Insurers; either way, there is coverage.

F. Three notable, recent opinions, employing rules of construction similar to South Carolina's, correctly found that COVID-19 can or does constitute a "direct physical loss or damage".

As an important threshold matter, none of the COVID-19, trial court opinions regarding insurance coverage for COVID-19 business interruption claims, which apply out-of-state law (cited here or anticipated in Defendants' briefing) are binding, and many should not be considered as persuasive. It can be misleading to cite to *any* of these decisions without qualifying that there are, or may be, (1) differences between the policies at issue; (2) differences between applicable state law; and (3) varying factual circumstances as pled. Considering these important distinctions would require a thorough reading of each policy, Complaint, and a comparison of each jurisdiction's canons on interpreting insurance contracts. s Sullivan's certified questions should be resolved in favor of coverage by applying existing South Carolina interpretive canon to this Policy and Complaint.

However, three recent COVID-19 decisions, applying Virginia, North Carolina, and Nevada law, have taken the approach advocated above (applying the jurisdiction's interpretive canon to the policy at issue and the facts as pled) in rejecting insurer's contentions that, as a matter

of law, COVID-19 and/or the related government orders can *never* trigger coverage under an all-risks property policy.

1. *Elegant Massage*

In *Elegant Massage, LLC v. State Farm Mut. Auto. Ins. Co., et al*., the Honorable Raymond A. Jackson examined how to interpret the phrase "direct physical loss", while applying the insurance contract jurisprudence of the State of Virginia, which largely mirrors South Carolina's. Case. No. 2:20-CV-265, 2020 WL 7249624, at *7-10 (E.D. Va. Dec. 9, 2020) (interpreting the phrase "direct physical loss" "most favorably to the insured") (emphasis added). The *Elegant Massage* Court reasoned that while the insured spa was not structurally damaged,

> it is plausible that Plaintiffs experienced a direct physical loss **when the property was deemed *uninhabitable, inaccessible, and dangerous to use*** by the Executive Orders ***because of*** **its high risk for spreading COVID-19, an invisible but highly lethal virus**.

Id. (emphasis added). The *Elegant Massage* Court further found

> **the facts of this case are similar to those where** courts found that **asbestos, ammonia, odor from methamphetamine lab, or toxic gasses from drywall *which caused*** **properties [to be deemed] *uninhabitable, inaccessible, and dangerous to use***, constituted a direct physical loss.

Id. (emphasis added). The policy at issue in *Elegant Massage* differs from that at issue here in a number of respects, but most notably that (1) the *Elegant Massage* policy contained an unambiguous virus exclusion more akin to that found in the standard ISO exclusion[22]; and (2) the

[22] The Insurance Services Office, or "ISO," introduced a standard "virus" exclusion in 2006 following the SARS outbreak. INSURANCE SERVICES OFFICE, ISO FORM CP 01 40 07 06 - EXCLUSION OF LOSS DUE TO VIRUS OR BACTERIA 8 (ISO Circular July 6, 2006) (https://www.propertyinsurancecoveragelaw.com/files/2020/03/ISO-Circular-LI-CF-2006-175-Virus.pdf). In contrast, Sullivan's Policy is comprised of proprietary (custom, non-standard) forms, as opposed to standard-issue ISO forms, and does not contain the ISO standard virus exclusion.

operable phrase triggering coverage was "direct physical loss to property" as opposed to "direct physical loss or damage to property." (*Id.*). The claims made there by the insured differed, as well.

Regardless, the measured reasoning adopted by the court in *Elegant Massage* follows the same logical sequence as that advocated here: the phrase "direct physical loss [or damage]" was undefined in the all-risk policy; the plain and ordinary meaning of the phrase supported more than one reasonable interpretation; and, therefore, the interpretation favoring coverage was adopted. *See id.* at 376 ("[T]he Court finds that it is plausible that a fortuitous "direct physical loss" could mean that the property is uninhabitable, inaccessible, or dangerous to use because of intangible, or non-structural, sources.").

2. *North State Deli*

In a pair of opinions issued on the same date, the Honorable Orlando F. Hudson, Jr. granted partial summary judgment in favor of coverage and the insureds under all risk property insurance policies in *North State Deli, LLC et al. v. The Cincinnati Ins. Co. et a*l., Case No. 2-cvs-02569 (Durham County, N.C., Super. Court Div. Oct. 9, 2020). Employing rules of construction like those applied by South Carolina courts, the *North State Deli* Court stated as follows:

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

> Finally, "loss" is defined as "the act of losing possession," "the harm of privation resulting from loss or separation," or the "failure to gain, win, obtain, or utilize." *Loss,* Merriam-Webster (Online ed. 2020). Another dictionary defines the term as "the state of being deprived of or of being without something that one has had." *Loss,* Random House Unabridged Dictionary (Online ed. 2020).
>
> Applying these definitions reveals that the ordinary meaning of the phrase "direct physical loss" includes the inability to utilize or possess something in the real, material, or bodily world, resulting from a given cause without the intervention of other conditions. **In the context of the Policies, therefore, "direct physical loss" describes the scenario where businessowners and** their employees, **customers**, vendors, suppliers, and others **lose the full range of rights and advantages of using or accessing their business property**. This is precisely the loss caused by the Government Orders. Plaintiffs were expressly forbidden by government decree from accessing and putting their property to use for the income-generating purposes for which the property was insured. These decrees resulted in the immediate loss of use and access without any intervening conditions. In ordinary terms, this loss is unambiguously a "direct physical loss," and the Policies afford coverage.
>
> The parties sharply dispute the meaning of the phrase "direct physical loss." Cincinnati argues that "the policies do not provide coverage for pure economic harm in the absence of direct physical loss to property, which requires some form of physical alteration to property." Even if Cincinnati's proffered ordinary meaning is reasonable, the ordinary meaning set forth above is also reasonable, rendering the Policies at least ambiguous. Accordingly, in giving the ambiguous terms the reasonable definition which favors coverage, the phrase "direct physical loss" includes the loss of use or access to covered property even where that property has not been structurally altered. *See Accardi,* 373 N.C. at 295, 838 S.E.2d at 456 (" [A]ny ambiguity or uncertainty as to the words used in the policy should be construed against the insurance company and in favor of the policyholder or beneficiary.").

Id. at 5-6 (emphasis added) (footnote omitted).

Again, the methodical consideration by the court in *North State Deli* of the plain and ordinary meaning of the operable phrase "direct physical loss or damage" led it to the proper conclusion: the interpretation proffered by the insured was, at minimum, a reasonable one.

3. *JGB Vegas*

In *JGB Vegas Retail Lessee, LLC v. Starr Surplus Lines Ins. Co.*, Case No. A-20-816628-B, at *5 (D. Nev. Nov. 30, 2020), the Court recognized, *inter alia*, that allegations (i) of COVID-

19 at or in close proximity of the insured locations; (ii) of the known facts including COVID-19's spread, harm to objects, and survival on surfaces; and (iii) of COVID-19's presence and government orders that forced closure or severe limitation of operations and resulting losses, were sufficient allegations of losses stemming from direct physical loss and/or damage to property to trigger the insurer's obligations and general business interruption and civil authority coverage. In so ruling, the *JGB Vegas* Court cited to *Studio 417*,[23] among other United States District Court opinions, as exemplars. *Id.* A number of other courts have additionally seen fit to adopt the sound reasoning of the *Studio 417* decision.[24]

In Defendants' briefing in front of the District Court, their refrain was clear: South Carolina should do what the "vast majority" of other district courts have done and find no coverage exists

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[23] *Studio 417, Inc. v. Cincinnati Ins. Co.*, No. 20-cv-03127, 2020 WL 4692385, at *2, *4 (W.D. Mo. Aug. 12, 2020) (noting that the *Studio 417* complaint alleged direct physical loss, because it alleged that the virus "is a physical substance," which "live[s] on" and is "active on inert physical surfaces" and that "it is likely that customers, employees, and/ or other visitors to the insured properties were infected with COVID-19 and thereby infected the insured properties with the virus" and "the presence of COVID-19 renders physical property in their vicinity unsafe and unusable").

[24] *See, e.g., Blue Springs Dental Care, LLC v. Owners Ins. Co.*, No. 20-CV-00383-SRB, 2020 WL 5637963, at *4 (W.D. Mo. Sept. 21, 2020) (finding "Plaintiffs have adequately stated a claim for a direct physical loss…" and electing "to adopt the definition of "physical loss" used in *Studio 417* and, upon applying that definition to the factual allegations in the complaint, finds Plaintiffs have adequately alleged a claim for a direct physical loss. *See Studio 417*, 2020 WL 4692385, at *4 (discussing dictionary definitions of "direct" ("characterized by a close logical, causal, or consequential relationship"), "physical" ("having material existence: perceptive especially through the senses and subject to the laws of nature"), and "loss" ("the act of losing possession" and "deprivation") in determining the plain and ordinary meaning of the phrase "direct physical loss")"); *see also NeCo, Inc. v. Owners Ins. Co.*, No. 20-CV-04211-SRB, 2021 WL 601501, at *7 (W.D. Mo. Feb. 16, 2021) (finding plaintiff adequately alleged a period of restoration, like the *Studio 417* and *Blue Springs* complaints, because plaintiff "alleges it suspended its operations, its store was not permitted to open for more than five weeks, and that the suspension was, at least in part, due to a direct physical loss. Discovery will ultimately show whether Plaintiff's alleged closure was the "actual date when the alleged physical loss occurred, the duration of that alleged physical loss, at what point in time the insured propert[y] could or should have been repaired, rebuilt, or replaced, and whether Plaintiff [ ] took those restoration measures.").

for COVID-19 related insurance claims. Defendants are correct in that there have been numerous decisions so holding; there have also been numerous decisions which have held the opposite. When faced with a similar split of authority when construing an insurance policy, this Court has previously considered the very existence of the varied interpretations employed by sister courts as evidencing an ambiguity. *Greenville Cty.*, 313 S.C. at 548, 443 S.E.2d at 533. ("In view of the holding by numerous jurisdictions, along with the definitions found in both Webster's and Black's, we find the term is ambiguous and susceptible of more than one reasonable interpretation. Construing the ambiguity, as we must, in favor of the insured, we hold that 'sudden' is to be interpreted as 'unexpected.'")

Defendants previously (and will likely again) characterized these and other favorable-to-insureds opinions as being "wrong" *because* they were contrary to the "dozens" of federal court opinions which held that the phrase was not ambiguous.[25] Fortunately for these insureds, and for Sullivan, state law controls the interpretation of insurance contracts, and the jurists in the above three cases saw fit to employ a reasoned analysis based upon their respective state's canons of interpretation instead of ruling in a manner simply because "everyone else is doing it." That is not how the law works.

II. The Policy's Business Access and/or Civil Authority coverage do not require a complete prohibition of all access to Sullivan's properties.

[25] As an aside, it is patently absurd (and flatly erroneous) for courts to have determined as a matter of ***law*** (in the absence of factual discovery) that SARS-CoV-2 cannot cause loss or damage to property because SARS-CoV-2's attributes and nature, including the extent it causes physical loss or damage, are issues of ***fact***, for epidemiologists, physicists, bioengineers, chemists, opining on behalf of the parties. *See, e.g., K.C. Hopps, Ltd. v. Cincinnati Ins. Co., Inc.*, No. 20-CV-00437-SRB, 2021 WL 4302834, at *8-*10, *14 (W.D. Mo. Sept. 21, 2021) (quoting from reports of experts, a professor of chemistry and bioengineering and a molecular epidemiologist, addressing the particles' attributes).

The Policy's "Business Access Coverage" and "Civil Authority Coverage" are each an extension of coverage applicable to the Business Income and Extra Expense Coverage. (Policy at pp.17-18). According to the plain language of the Policy, neither requires a complete prohibition of all access to the insured dine-in restaurants and bars. At minimum, Sullivan's interpretation of the undefined term "access" (as used in the context of these coverage parts) as including something less than a *complete* prohibition of *all* or *any* access is a reasonable one.

a. Business Access Coverage

The Business Access Coverage provides, in relevant part:

> We will pay for the actual loss of **business income** and necessary **extra expense** you sustain due to the necessary **suspension** of **operations** at a **location** if access to such **location** is impaired or obstructed.

(*Id.* at p. 18). As noted above, the Policy definitions of **suspension** and **operations** are revealing, as they contemplate a *slowdown* in addition to a *cessation* of business activities; lack of *tenability*; and circumstances where **premises** are rendered partially *untenable*, within the Policy's coverage. *See* Statement of Facts, *infra*; *see also* (*Id.* at 58 & 61).

The Policy does not define "impaired"; however, the commonly used definition of the term is "diminished in function or ability." (*Impaired*, Merriam-Webster Dictionary Online). Important too is the word "untenable," which means not "tenable." *See* Section A(2), *infra*, (noting "tenable" is commonly used to mean "capable of being occupied, possessed, held, or enjoyed, as under certain conditions"). The noun "access," also undefined, is commonly understood to mean "the right to enter, approach, or use." *Access*, Collins English Dictionary Online (Complete & Unabridged 2012 Digital Edition).

The policy's plain language, *i.e.*, a "slowdown" of operations, and a "part" of premises being rendered "untenable", clearly contemplates something less than a complete prohibition of

operations; and the modifier "impaired" likewise contemplates diminished access, rather than a "total prohibition" of access. To interpret this provision as requiring (1) a complete cessation of operations; (2) untenability of the entire premises; and/or (3) a complete prohibition of access of any kind would ignore the Policy's own definitions and the common usage of the undefined terms.

b. Civil Authority Coverage

The Civil Authority Coverage provides, in relevant part:

> We will pay for the actual loss of **business** income and necessary **extra expense** you sustain due to the necessary **suspension** of your **operations** caused by action of civil authority that prohibits access to a **location**.

(Policy at 18). Again, the terms "suspension" and "operations" are specifically defined by the Policy, as cited *supra*. "Prohibit" is commonly used to mean "to refuse to permit; forbid by law or by an order" or "to prevent; hinder." (*Prohibit*, Collins English Dictionary Online (Complete & Unabridged 2012 Digital Edition)). To interpret this provision as requiring "complete" or "total" prohibition of access (or, prohibition of "all" or "any" access) would be reading-in adjectives which were not included in this section of the Policy by Defendants. Inserting an otherwise absent word or phrase into a grant of coverage which would in turn limit or preclude that coverage runs contrary to basic norms of contractual interpretation in South Carolina. *See Bell v. Progressive Direct Ins. Co*., 407 S.C. 565, 579, 757 S.E.2d 399, 406 (2014) ("[W]e […] should not torture the meaning of policy language in order to extend or defeat coverage that was never intended by the parties."). Based upon this premise, courts in other jurisdictions have declined to write in "all" or "any" for this exact reason. *See, e.g., Studio 417*, 478 F. Supp. 3d at 804 ("This is particularly true insofar as the Policies require that the 'civil authority prohibits access,' but does not specify 'all access' or 'any access' to the premises."); *see also Blue Springs Dental Care,* 488 F. Supp. 3d at 879 (holding same); *Ungarean, DMD v. CNA*, 2021 WL 1164836 (Pa. Com. Pl.) (Mar. 22, 2021)

(accepting Defendant's "cramped interpretation of the phrase 'prohibits access,' would result in businesses being precluded from coverage in nearly every instance where an action of civil authority effectively closes the business to the vast majority of the general public, but does not necessarily preclude employees, or certain other individuals, from entering the premises . . . which, while important, remain secondary to the activities that actually generate business income."); *Dino Palmieri Salons, Inc., et al. v. State Auto. Mut. Ins. Co.*, No. CV-20-932117, at *7, *10-11 (Ct. Com. Pl., Cuyahoga Cnty. Ohio Nov. 17, 2020) (finding that plaintiffs' allegations "plausibly allege that access to their premises was prohibited to such a degree as to trigger the civil authority coverage", and "the policy here does not specify that *all* access to the premises be absolutely prohibited").[26]

Based on the foregoing, Sullivan's reading of the Civil Authority coverage part is entirely reasonable. First, the plain language of the Policy requires a "prohibition" and Sullivan alleges that the closure orders constituted a prohibition. Second, an executive order disallowing patron access to Plaintiff's business is a prohibition of access in the context of civil authority coverage. *See, e.g., Southlanes Bowl, Inc. v. Lumbermen's Mut. Ins. Co.*, 46 Mich. App. 758, 760, 208 N.W.2d 569, 570 (1973) (insurer was obligated to pay for losses resulting from business closures mandated by the Governor's executive order following the assassination of Dr. Martin Luther King, Jr.). Third, the orders alleged in the Complaint did not mandate a partial closure of Plaintiff's establishment to patrons, but rather mandated a complete and total disallowance of patron on site access to restaurants and bars. *See, e.g.,* Compl. at ¶ 40 (order barring dine-in services and on-premises consumption of food and beverages of restaurants).

Moreover, the Allianz Insurers did not specify in the Policy *who* must be prohibited from access, thus creating an ambiguity. *See Diamond State Ins. Co. v. Homestead Indus. Inc.*, 318 S.C. 231, 236, 456 S.E.2d 912, 915 (1995) (citation omitted) (ambiguous terms in an insurance policy must be construed liberally in favor of the insured and strictly against the insurer); *see also Gaskins*, 271 S.C. at 108, 245 S.E.2d at 602 (when a policy is susceptible to more than one reasonable interpretation, one of which would provide coverage, the Court must hold in favor of coverage). While the Defendants have offered support that Plaintiffs must be prohibited access,[27] it is Sullivan's position that the customers[28] must be the ones who are prohibited access. Interpreting "access" as meaning anything *other* than access by a businesses' intended consumer, customer, or patron would vitiate the purpose of business interruption insurance, which is "to protect earnings which the insured would have enjoyed had no interruption occurred." 43 Am. Jur. 2d Insurance § 509. The access which matters to a business is the access which produces profits; the access which a business normally enjoys, and for which said business is intended to operate.[29]

If the Policy were construed to mean that insureds could not recover as long as they themselves could access the premises, then that would defeat the reason for offering the coverage

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[27] *See* ECF 41-1, at p. 25 of Def.'s Memo in Supp. of First Am. Mot. To Dismiss.

[28] *See, e.g.*, *St. Paul Mercury Ins. Co. v. Magnolia Lady, Inc.,* No. CIV.A. 297CV153BB, 1999 WL 33537191, at *3 (N.D. Miss. Nov. 4, 1999) (where the Court ruled on civil authority coverage based on *customer* access) (emphasis added); *Ski Shawnee, Inc., v. Commonwealth Ins. Co.*, No. 3:09-CV-02391, 2010 WL 2696782, at *5 (M.D. Pa. July 6, 2010) (same). These Plaintiffs are distinguishable from Sullivan because while those courts found customers were able to access the business from alternate routes, here there was a government Order prohibiting customers from all access. Compl. at ¶ 40. *See also JGB Vegas* at Section A.3.d.iv., *supra* (finding COVID-19 allegations triggered civil authority coverage).

[29] *See e.g., Ungarean,* 2021 WL 1164836, at *10 (although plaintiffs' business was technically permitted to remain open for limited operations, the Court noted, "this does not change the fact that an action of civil authority effectively prevented, or forbade by authority, citizens … from accessing plaintiff's business in any meaningful way for normal, non-emergency procedures; procedures that likely yield a significant portion of Plaintiff's business income.")

in the first place – for lost income from their customers, their main income source. Allianz could have specified who must be prohibited access, but they did not. As a result, coverage must be construed in favor of Sullivan. Indeed, the Policy provisions at issue here each involve extensions of coverage related to lost business income in the event the business' normal operations are suspended.

III. Plaintiff has Adequately Pled that there has been a "communicable disease event" as that term is used in the Communicable Disease Coverage Extension.

As explained in greater detail below, and using South Carolina as an example, the ultimate public health authority in South Carolina during a public health emergency is the Governor; the Governor possesses the statutory authority to evacuate businesses because of a public health emergency; and the Governor did so here because of the actual outbreak of COVID-19 in the locations where Sullivan's restaurants were located. Sullivan has pled each of the foregoing, and therefore has plausibly alleged that there has been a "Communicable Disease Event" as that phrase is used in this Policy.

a. Relevant Provisions

The Policy defines "**communicable disease event**" as follows:

> **"**an event in which a **public health authority** has ordered that a location be evacuated, decontaminated, or disinfected due to the outbreak of a **communicable disease** at such location."

(Policy at 52). The Policy defines "**public health authority**" as:

> the governmental authority having jurisdiction over your **operations** relative to health and hygiene standards necessary for the protection of the public.

(*Id.* at 59). The Policy defines "**communicable disease**" as "any disease, bacteria, or virus that may be transmitted directly or indirectly from human or animal to a human." (*Id.* at 52). The "Location Schedule" lists nine (9) locations of Sullivan's restaurants, including locations in eight

(8) counties in South Carolina and one county in Georgia. (Policy, "Common Policy Declarations", at 2 of 5).

b. The Pled Facts Establish a Communicable Disease Event

Regarding this coverage extension, Sullivan pled the following facts which must be taken as true at this stage of the litigation:

- In early January 2020, the WHO recognized the Coronavirus as a "global threat to human health." Compl. at ¶ 27. The CDC stated a pandemic is a "global outbreak of disease" and happens when "a new virus engages to infect people and can spread between people sustainably." *Id.* CDC reports indicate COVID-19 strains physically infect and can stay alive on surfaces for at least 17 days, rendering property exposed to the contagion unsafe and dangerous. *Id.* at ¶ 58.
- Governor McMaster issued Exec. Order No. 2020-10, barring on-premises or dine-in consumption services at South Carolina restaurants. *Id.* at ¶ 36. The City of Charleston issue similar Emergency Ordinances. *Id.* at ¶ ¶ 36-37. Further, the single Georgia CAH location was subject to the same dine-in service mandate. *Id.* at ¶ 36.
- In the final days and weeks immediately prior to the national and international imposition of emergency procedures, hundreds of customers patronized each CAH restaurant location. *Id.* at ¶ 61. The continuous presence coronavirus in, on, and/or within the immediate area of Sullivan's restaurants rendered them unsafe. *Id.* at ¶ 64. This resulted in direct physical loss or damage to property at the named insureds' scheduled locations and/or within 1,000 feet and/or within one mile, resulting in coverage under the policy. *Id.* at ¶ 65.

As exhibited by the statutes and related orders described below and as pled in more detail in Plaintiff's Complaint, Sullivan has more than adequately alleged that a "public health authority" ordered the "evacuation" of Sullivan's locations due to the outbreak of COVID-19, a communicable disease.

c. Governor McMaster Declared that the 2019 Novel Coronavirus Poses an Actual Public Health Emergency; Declared a State of Emergency Based Thereon; and Ordered Evacuation of Dine-In Restaurants Based on the Outbreak

On March 13, 2020, the Governor of South Carolina issued Executive Order No. 2020-08 in which he declared a State of Emergency for the State of South Carolina due to the COVID-19 pandemic.[30] When the Governor declares a State of Emergency, he can:

> order and direct any person or group of persons to do any act which would in his opinion prevent or minimize ***danger to life, limb or property***, or prevent a breach of the peace; and he may order any person or group of persons to refrain from doing any act or thing which would, in his opinion, ***endanger life, limb or property***, or cause, or tend to cause, a breach of the peace, or endanger the peace and good order of the State or any section or community thereof, and he shall have full power by use of all appropriate available means to enforce such order or proclamation.

[30] Each municipality and/or county seat, in turn, also issued similar mandates pursuant to statutory authority, adding another layer of mandatory closure orders on top of those issued by the governors of each state. *See, e.g.*, the City of Greenville's Closure Orders, Greenville, S.C., Code of Ordinances ch. 12, §§ 12-30 through 12-40 (empowering the Mayor to issue a proclamation declaring a state of emergency and placing certain restrictions on businesses within the City); *see also* the City of Augusta's Closure Orders, stating the Mayor:

> shall have the emergency power to declare an emergency to exist when, in the Mayor's opinion, there is an actual or threatened occurrence of a disaster or emergency, which may result in the large-scale loss of life, injury, property damage or destruction or in the major disruption of routine community affairs, business or governmental operations in Augusta.

The Order further states the Mayor shall have the right to exercise any or all of the following operations after such declaration of emergency:

> (1) To *close or restrict areas* to preserve, protect, or sustain life, health, welfare or safety of persons or their property,
> (2) To *impose re-entry restrictions* on those areas to promote order and protect lives.
> (3) To perform and exercise such other functions, powers, and duties as may be deemed necessary to promote and secure the safety and protection of the civilian population[.]

Augusta, Georgia Code, §§ 3-3-41(a) through 3-3-45 (emphasis added) [both Orders attached for the Court's convenience].

Hence forward, to simply and shorten matters, any reference to the South Carolina Governor's actions shall constitute a reference to the same and similar action by all relevant governing jurisdictions, including Georgia and municipalities.

S.C. Code Ann. § 1-3-430 (2005) (emphasis added). Moreover, during a State of Emergency, the Governor "is responsible for the safety, security, and welfare of the State and is empowered with the following additional authority to adequately discharge this responsibility: […] (2) declare a state of emergency for all or part of the State if he finds a disaster or a ***public health emergency***, as defined in Section 44-4-130, has occurred, or that the threat thereof is imminent and extraordinary measures are considered necessary to cope with the existing or anticipated situation." S.C. Code Ann. § 25-1-440 (emphasis added). [31] Furthermore, as the "Chief Executive of the State," Governor McMaster is authorized pursuant to statute to "direct and compel ***evacuation*** of all or part of the populace from any stricken or threatened area if this action is considered necessary for the preservation of life or other emergency mitigation, response, or recovery[…]." (S.C. Code Ann. § 25-1-440 (7)). On March 16, 2020, the South Carolina Department of Health and Environmental Control ("DHEC") reported that there were 33 confirmed cases of COVID-19 in South Carolina, including cases in Lexington, Horry, Kershaw, Anderson and Greenville counties; and, on the same day, DHEC reported the first known death in the state from COVID-19. By March 23, 2020, the number of confirmed cases ballooned to 298 reported from 34 counties, including each of the counties in South Carolina where Sullivan operated.

Citing each of these powers granted to him by South Carolina law, as well as the outbreak and spread of COVID-19 and the "existing and anticipated situation" therefrom, Governor McMaster issued Executive Order No. 2020-10 on March 17, 2020, which directed that "any and

[31] Section 44-4-130 defines "Public Health Emergency" as "the occurrence or imminent risk of a qualifying health condition"; and "[q]ualifying Health Condition" is defined as "an illness or health condition that may be caused by terrorism, epidemic or pandemic disease, or a novel infectious agent or biological or chemical agent and that poses a substantial risk of a significant number of human fatalities, widespread illness, or serious economic impact to the agricultural sector, including food supply." S.C. Code Ann. § 44-4-130.

all restaurants or other food-service establishments […] which prepare, produce, or otherwise offer or sell food or beverages of any kind for on-premises consumption in the State of South Carolina, shall suspend services for, and may not permit, on-premises or dine-in consumption […]."

During the State of Emergency, the Governor had exclusive authority to direct the operations of Sullivan's businesses—and he did so—based upon a Public Health Emergency. There can be no greater "public health authority" over Sullivan's businesses in South Carolina, as defined by the Policy, than the Governor during a Public Health Emergency.[32]

d. Similar cases with communicable disease coverage also support Sullivan's position that the government shutdown was due to a communicable disease at the insured premises

Other courts have agreed with insureds that the outbreak of COVID-19 and the related evacuation orders specifically targeting restaurants and personal-care business (like salons) are sufficient to trigger communicable disease coverage, at least at the motion to dismiss stage. For example, in *Treo*, the Plaintiffs argued because their premises were included geographically in the government shut down orders, coverage under the communicable disease provision was triggered. *Treo Salon, Inc. v. W. Bend Mut. Ins. Co.*, --- F.Supp.3d ---, No. 20-CV-1155-SPM, 2021 WL 1854568 (S.D. Ill. May 10, 2021) (the Plaintiffs further contended the communicable disease coverage is "meant to protect small businesses such as theirs against government infringement.").

[32] South Carolina's Office of the Attorney General agreed:

> The General Assembly granted the Governor the power to declare a state of public health emergency. This Office previously opined that only the Governor is empowered to exercise extraordinary emergency powers under Section 25-1-440. It remains this Office's opinion that only the Governor, and his interim successors if he is unavailable, is authorized to issue such a declaration.

2021 WL 3737125, at *2 (S.C.A.G. Aug. 16, 2021) (internal citations omitted).

The court agreed, concluding the Plaintiffs *sufficiently pled* a cause of action and *plausibly alleged* they were entitled to coverage from shutdown or suspension *due to* a communicable disease outbreak at the insured premises, surviving a motion to dismiss. *Id.* (emphasis added).

Additionally, in *Salon XL*, the court accepted Plaintiffs' argument that the Governor issued an Order *due to* the spread of COVID-19 throughout the state, including their premises and at a property within a one-mile radius of the insured premises. *Salon XL Color & Design Grp., LLC v. W. Bend Mut. Ins. Co.*, 517 F.Supp.3d 725 (E.D. Mich. Feb. 4, 2021) (plaintiffs' claim under communicable disease coverage survives motion to dismiss). The court in *Salon XL* reasoned that the Plaintiffs sufficiently pled a "causal nexus between the Executive Order and COVID-19's presence at the insured property and properties within a one-mile radius of it." *Id.* The same is true for Sullivan. Therefore, Sullivan has sufficiently alleged that the government shutdown was due to COVID-19, a communicable disease, at the insured premises.

IV. Sullivan's expenditures to mitigate COVID-19 qualify for Loss Avoidance or Mitigation Coverage.

No physical loss or damage is required for the "Loss Avoidance or Mitigation Coverage" provided by the policy:

> **a.** We will pay the necessary expenses you incur to protect, *avoid,* or significantly mitigate *potential* covered loss or damage that is actually and imminently threatening **Property Insured**, including…

Policy p. 15, para. 9 (emphasis added in italics, bold in original). As the policy provides coverage for mitigation of "potential covered loss", by its own terms, there is coverage even if the threatened loss does not materialize, whether because of the mitigation efforts or other factors. Additionally, as the policy provides coverage for expenditures to "avoid" a "potential covered loss", by its own terms, there is coverage even if the covered loss is avoided. (Policy at

p. 54).

There does not appear to be any South Carolina case law addressing this type of coverage extension, either in the COVID-19 context or otherwise. Other cases have discussed the issue of COVID-19 being a potentially covered loss, as the policy language at issue suggests. *See P.F. Chang's China Bistro, Inc. v. Certain Underwriters at Lloyd's of London*, 2021 WL 818659 (Feb. 4, 2021) (holding "[a]ny physical loss of … property" includes the *actual or potential presence of the coronavirus* in various forms in the air surrounding the restaurants, the necessity to implement social distancing and other modified physical behaviors, and the need to *mitigate the threat or actual presence of the virus* on their property, which sufficiently satisfies the policy's requirement of "physical loss of or damage to" property to trigger coverage) (emphasis added); *see also Novant Health, Inc. v. Am. Guarantee and Liab. Ins. Co.*, --- F.Supp.3d ---, No. 21-cv-309, 2021 WL 4340006 (M.D.N.C. Sept. 23, 2021) (denying defendant's motion to dismiss, stating the plaintiff adequately alleged that COVID-19 has caused physical damage and losses *potentially covered* by the policy) (emphasis added).

Therefore, pursuant to the plain language of the policy, Sullivan's pled expenditures to mitigate or avoid COVID-19 losses qualify for Loss Avoidance or Mitigation Coverage.

V. The Mortality and Disease Exclusion does not bar all coverage, as it is ambiguous and/or in conflict with the Communicable Disease Coverage Extension.

Any attempt to use the Mortality and Disease Exclusion ("Exclusion") to bar "all coverage" available under the "all-risk" *property* Policy issued to Sullivan is absurd for at least three reasons. First, it is entirely reasonable to read the Exclusion as providing a list of excluded causes of mortality, or of how 'death' might ensue, as opposed to excluding disease or virus. Second, this reading becomes even more reasonable when one considers that this is a *property* policy, and the

only live property which is covered by the policy is an animal held as stock.[33] Third, the reasonableness of Sullivan's reading is supremely bolstered by the fact that, if read to exclude all losses caused by any condition of health, disease or virus, the Exclusion conflicts on its face with the Policy's Communicable Disease coverage for interruptions caused by human communicable diseases and various other coverages for livestock.[34] In any event, the result should be the same: interpretation in favor of the insured, in light of Plaintiff's allegations. *See Watts*, 52 F. Supp. 3d at 775 (In general, "rules of construction require clauses of exclusion to be narrowly interpreted, and clauses of inclusion to be broadly construed. This rule of construction inures to the benefit of the insured.").[35]

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[33] For property insurance cases involving claims for disease or death to poultry, *see Reichley v. Pennsylvania Dep't of Agric.*, 427 F.3d 236, 240 (3d Cir. 2005) (plaintiff-appellants received compensation for their loss when poultry flocks tested positive for influenza); *Rose Acre Farms, Inc. v. United States*, 373 F.3d 1177, 1183 (Fed. Cir. 2004) (plaintiff sued after salmonella outbreaks were traced to three of plaintiffs' farms and hens had to be removed for organ testing).

[34] Upon a reading of the policy as a whole, it becomes apparent that this provision was intended to apply to coverage for animals, which may constitute insured property under the Policy. The Policy provides coverage for animals that are owned by others while in your care, custody, or control; or animals you sell as **stock**. (Policy at 7). "Direct physical loss or damage" to covered animals is insured when caused by or resulting from a **covered cause of loss**. (Policy at 41). The coverage includes veterinary services for medical treatment of an injured animal and "necessary euthanasia of an animal" for "humane reasons" when an "excessive" injury is suffered. (Policy at 42). The Mortality and Disease provision, at page 8 of the Policy, appears to address whether other circumstances causing death of an animal in your care or sold as **stock** (*e.g.,* a kind of covered property under the policy) are covered. The answer appears to be yes if an animal (*e.g.,* "property" that can experience death) is "injured" and "necessary euthanasia" is performed. The answer appears to be no if the animal or **stock**'s death results from "natural causes, disease, sickness, any condition of health, bacteria, or virus." (Policy at 8). If read to forestall coverage for a loss caused by, *e.g.*, "any condition of health" of an animal, then such a reading would vitiate coverage for an injured animal (which is, of course, a "condition of health.").

[35] *See also Bell v. Progressive Direct Ins. Co.*, 407 S.C. 565, 579–81, 757 S.E.2d 399, 406–07 (2014). ("[C]onsistent with the general rules of construction, to which we have referred, that is, the Court will look to the reasonable expectations of the insured at the time when he entered into the contract if the terms thereof are ambiguous or conflicting, or if the policy contains a hidden trap or pitfall, or if the fine print takes away that which has been given by the large print."); *Boggs v. Aetna Cas. & Sur. Co.*, 272 S.C. 460, 464, 252 S.E.2d 565, 568 (1979) (coverage exclusions are

Here, the Exclusion at issue reads "[…] we will not pay for direct physical loss, damage, or expense caused by or result from […]: ""[m]ortality, death by natural causes, disease, sickness, any condition of health, bacteria, or virus." (Policy at 8) (emphasis added). It is patently reasonable to read this as excluding *mortality*; *death* by natural causes; *death* by disease; *death* by sickness; *death* by any condition of health; *death* by bacteria; or *death* by virus – none of which are at issue here. (Emphasis added in *italics*). Sullivan's reading of the exclusion is a reasonable one, and thus it must be resolved in favor of coverage. *Millstead v. Life Ins. Co. of Virginia*, 256 S.C. 449, 182 S.E.2d 867 (1971) (ambiguity in exclusion should be resolved in favor or coverage); *Gaskins*, 271 S.C. at 108, 245 S.E.2d at 602 (when a policy is "susceptible to more than one reasonable interpretation, one of which would provide coverage, this Court must hold as a matter of law in favor of coverage.").

Not only is Sullivan's reading reasonable, to read the exclusion in the manner advocated by the Defendants would directly conflict with a specific grant of coverage. The Communicable Disease Coverage part of the Policy, cited in full in Section I(B), *supra*, provides coverage for direct physical loss or damage to property caused by a communicable disease, which definition explicitly includes "any disease, bacteria, or virus that may be transmitted directly or indirectly from human or animal to a human." (Policy at 52).

If this Exclusion is read in the way the Insurers propose, as barring coverage for "all" damage caused by a virus,[36] the Exclusion would then *clearly* conflict with the Communicable

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construed against the insurer, which bears the burden of establishing the exclusion) (emphasis added).

[36] *See* ECF No. 45-1, at p. 28 of Def.'s Memo in Supp. of First Am. Mot. to Dismiss, where they state "[m]ost coverage is barred by the virus exclusion." *See also* ECF No. 45-1, at p. 14 of Def.'s Reply in Supp. of its First Am. Mot. to Dismiss, where they then state, "[a]ll damages caused by a virus are excluded." This not only directly conflicts with their own argument but also with the

Disease Coverage, as it purports to exclude coverage for the very same risk it also extends coverage to – a virus. Therefore, because of the Exclusion is internally ambiguous and conflicts with the Communicable Disease Coverage, the Exclusion must be construed in favor of coverage.

South Carolina courts consistently refuse to enforce insurance policy exclusions that render the coverage "virtually meaningless." *See Monticello*, 319 S.C. at 19, 459 S.E.2d at 321 (refusing to interpret an exclusion in a way that "would render the policy virtually meaningless, because it would exclude coverage for ... the very risk contemplated by the parties"); *Kennedy*, 398 S.C. at 615, 730 S.E.2d at 867 (noting "the literal interpretation of policy language will be rejected whe[n] its application would lead to unreasonable results and the definitions as written would be so narrow as to make coverage merely 'illusory'"); *B.L.G.*, 334 S.C. at 537 n.5, 514 S.E.2d at 331 n.5 (recognizing an "illusory" exclusion is unenforceable).

Moreover, where an insurance policy contains an internal inconsistency created by an exclusion which purports to bar coverage for claims arising out of the very operation sought to be insured, the policy is rendered ambiguous, and the court must resolve that ambiguity in favor or coverage. *Monticello*, 319 S.C. at 12, 459 S.E.2d at 321, *aff'd* by 321 S.C. 310, 468 S.E. (emphasis added); *see also S.C. Budget & Control Bd. v. Prince*, 304 S.C. 241, 403 S.E.2d 643 (1991) (policy purporting to provide coverage yet also deny coverage resolved in favor of the insured due to inconsistency in policy definitions); *K.C. Hopps*, 2021 WL 4302834 (where the policy provided coverage for contaminants like smoke and fungi, but chose to exclude other contaminates like viruses, narrowly interpreting the policy to where a physical contamination could never constitute a loss would render the exclusions meaningless).

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policy's provisions and definitions. *See* Policy at pp. 52 (extending coverage to "any disease, bacteria, or virus . . .)."

There appears to be no South Carolina case law that addresses this exclusion or anything like it. Regardless, as Plaintiff's reading of the exclusionary language is reasonable, Defendants cannot carry their burden of demonstrating that the Mortality and Disease Exclusion must apply here to preclude all coverage under its all-risk policy. The Policy recognizes **covered causes of loss** arising from viruses, communicable diseases and losses resulting from the effects of contaminants or vapors. *See, e.g., JGB Vegas*, Case No. A-20-816628-B, at *5 (denying the insurer's motion to dismiss, noting, *inter alia*, that the insurer "has not shown that it is unreasonable to interpret the Pollution and Contamination Exclusion to apply only to instances of traditional environmental and industrial pollution and contamination that is not at issue here, where JGB's losses are alleged to be the result of a naturally-occurring, communicable disease. This is the case, even though the Exclusion contains the word "virus."); *see also Urogynecology Specialist of Florida LLC v. Sentinel Ins. Co., LTD.*, 489 F.Supp.3d 1297, 1303 (M. D. Fla., Orlando Div., Sept. 24, 2020) (noting the absence of any "binding case law on the issue of the effects of COVID-19 on insurance contracts and [purported] virus exclusions", finding "Plaintiff alleged the existence of the insurance contract, losses which may be covered under the insurance contract, and Sentinel's failure to pay for the losses. These allegations, when read in the light most favorable to Plaintiff, are facially plausible."); *Serendipitous, LLC/Melt v. Cincinnati Ins. Co.*, No.: 2:20-cv-00873-MHH, --- F.Supp.3d ---, 2021 WL 1816960, at *5 (N.D. Ala. May 6, 2021) ("The policy language indicates that the insurer understands that an insured may suffer physical loss without physical alteration of property because the policy excludes from coverage some expenses incurred because of invisible substances like vapor and fumes. [Defendant] could have excluded invisible substances like viruses but did not."); *Novant Health*, --- F.Supp.3d ---, No. 21-cv-309, 2021 WL 4340006 (holding the defendant insurers did not meet their burden of showing the virus exclusion

was applicable considering the contradictory language in the policy).

CONCLUSION

While the foregoing conclusively establishes Sullivan's insurance coverage for his COVID-19 business interruption claim, it is worth a final revisit to *Yarborough*'s instruction that policy interpretation must consider the context and subject matter of the insurance contract.[37] The Allianz Policy was written to insure business interruptions. It expressly has coverage for losses caused by viruses, communicable diseases, public health emergencies, governmental orders, loss of access, partial untenability, and suspension of operations, to name a few. The calamity is not only exhaustively pled, but it has also been witnessed world-wide and is capable of judicial recognition. The clear intent of the parties was that there would be coverage for events such as that which commenced in March of 2020. This Court should resolve all ambiguities in favor of coverage, in favor of the insured, and against the drafter, as it must do, and should find coverage for Sullivan as a matter of law – as occurred in *North State Deli*[38] – or at the very least, declare Sullivan's entitlement to have the question of intent submitted to a jury of its peers.

Respectfully submitted,

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[37] *Yarborough v. Phoenix Mut. Life Ins. Co.*, 266 S.C. at 593, 225 S.E.2d at 349 ("[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.").

[38] *North State Deli, LLC et al. v. The Cincinnati Ins. Co. et al.*, Case No. 2-cvs-02569 (Durham Cty., N.C., Super. Court Div. Oct. 9, 2020).