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In The Supreme Court

S.C. SUPREME COURT

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

The Hon. Mary Geiger Lewis, United States District Judge

Appellate Case No. 2021-001209
District Court Case No. 3:30-cv-02275

Sullivan Management, LLC,

Plaintiff,

v.

Fireman's Fund Insurance Co. and
Allianz Global Risk US Insurance Co.,

Defendants.

BRIEF OF DEFENDANTS

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I. INTRODUCTION

Sullivan bought a commercial property insurance policy from Fireman's Fund. Like virtually all such policies, Sullivan's property policy insured against direct physical loss or damage to property. It provided coverage for business income only while the physically lost or damaged property was being repaired or rebuilt (if physically damaged) or replaced (if physically lost). The certified questions seek this Court's guidance on South Carolina's interpretation of that key coverage provision, as well as others, in the context of COVID-19.

The plain meaning of "direct physical loss or damage to property" under the Policy is clear and unambiguous—it requires that loss or damage to property be both direct and *physical* in nature. That means either a distinct, demonstrable physical alteration to property, destruction, or permanent dispossession. The temporary, partial loss of use and related intangible economic harm that Sullivan alleges here is insufficient. This Court, the South Carolina Court of Appeals, and courts in the District of South Carolina have already come to that conclusion in other cases. In the context of COVID-19, every appellate court nationwide—now numbering eight federal circuits and the courts of appeals of California, Ohio, Indiana, and Michigan—agree with Fireman's Fund's position here. Trial courts in 38 states and the District of Columbia in nearly 600 decisions also concur.

Sullivan alleges that it sustained economic losses when its restaurants were required to close their dining rooms to comply with government social-distancing orders issued to prevent the spread of COVID-19. This intangible economic harm to Sullivan's business, no matter how severe or unfortunate, is not direct *physical* loss or damage *to property*. Sullivan also speculates that the virus was "more likely than not" present on surfaces at its restaurants. But even if the virus were present, there would be no coverage because COVID-19 particles harm people, not property. They are temporary, can be cleaned with a disinfectant or soap and water, and do not destroy or alter the

structure of property. Sullivan alleged nothing to the contrary. Because there has been no physical alteration, destruction, or permanent dispossession of property, there is no coverage here.

If this Court agrees with Fireman's Fund's interpretation of direct physical loss or damage, that holding will be dispositive in the district court, and this Court need not answer the remaining certified questions. However, as explained below, Fireman's Fund's response to each question is supported by a plain-meaning reading of the Policy and overwhelming authority.

II. STATEMENT OF THE QUESTIONS CERTIFIED FOR REVIEW

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?

III. STATEMENT OF THE CASE

A. Sullivan's Allegations

Sullivan pleaded that it owns various restaurants in Georgia and South Carolina that were covered by a commercial property insurance policy issued by Fireman's Fund and AGR US (the

"Policy").[1] *See* Complaint ¶¶ 13-25. Sullivan made various allegations concerning COVID-19 generally and social distancing orders issued by state and local governments to respond to the pandemic. *Id.* ¶¶ 27-53. Sullivan alleged that people in both Georgia and South Carolina were infected with COVID-19 during the initial stage of the pandemic. *Id.* ¶ 53. It also alleged that the COVID-19 virus can stay alive on surfaces for many days and that it can be spread via the air. *Id.* ¶¶ 57-58. It then speculated that, as a result of these characteristics, "[m]ore likely than not, surface contaminations occurred at [its] restaurants on or about March 11, 2020 . . . ." *Id.* ¶ 62.

Sullivan does not plead facts that plausibly establish that COVID-19 was present on its properties, nor does it explain how—even if COVID-19 were present—the virus physically altered or destroyed particular fixtures or improvements on Sullivan's properties. Sullivan attempts to cure that fatal flaw in its allegations with various conclusory statements such as "[t]he scientific community, and those personally affected by the virus, recognize COVID-19 as a cause of real and direct physical loss and damage," *id.* ¶ 56, and "[t]he foregoing 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.* ¶ 65. But Sullivan failed to provide any factual predicate for its conclusion. Sullivan did not, for example, allege facts plausibly establishing that a virus particle—which can be cleaned with a disinfectant—broke, tore, or

[1] The Policy was issued solely by Fireman's Fund; AGR US is affiliated with Fireman's Fund but is not a contracting party. AGR US, accordingly, is not a proper defendant in this action. *See Bob Hammond Constr. Co. v. Banks Constr. Co.*, 312 S.C. 422, 424, 440 S.E.2d 890, 892 (Ct. App. 1994) ("Generally, one not in privity of contract with another cannot maintain an action against him in breach of contract."); *accord De Vore v. W.S. Barstow & Co*., 166 S.C. 298, 164 S.E. 842, 843 (1932); *see also Buffalo Xerographix, Inc. v. Hartford Ins. Grp.*, 540 F. Supp. 3d 382 (W.D.N.Y. 2021) (dismissing COVID-19 coverage claims brought against non-contracting parent company); *644 Broadway LLC v. Falls Lake Fire & Cas. Co.*, No. 20-CV-08421-JST, 2021 WL 3008309, at *3 (N.D. Cal. May 21, 2021) (same).

destroyed any insured fixture or improvement, which then required repair or replacement. Nor did it allege that the presence of COVID-19 rendered its property permanently (or even temporarily) uninhabitable, unusable, or useless.

Similarly, Sullivan failed to allege that it incurred any expenses related to the repair, rebuilding, or replacement of any lost or damaged property. Instead, Sullivan alleges that it has suffered purely economic harm—namely "business interruption, extra expense, employee training loss, goodwill losses from inability to operate their restaurants, consumables and inventory damage and loss, costs for cleanings of production lines and equipment to remove contaminants, increased cleaning and sanitation costs, [and] event cancellation costs including marketing and planning losses." *Id.* ¶ 66.

Sullivan filed a claim with Fireman's Fund, which was denied for failure to trigger coverage. *Id.* ¶¶ 67-74. It then sued in the Court of Common Pleas for the Fifth Judicial Circuit for Breach of Contract (Count I), Bad Faith/Breach of Fiduciary Duty of Good Faith (Count II), and Declaratory Relief (Count III), and the case was removed to the United States District Court for the District of South Carolina. The parties agree that South Carolina law applies to the interpretation of the at-issue Policy. *See* S.C. CODE ANN. § 38-61-10 ("All contracts of insurance on property, lives, or interests in this State are considered to be made in the State and all contracts of insurance the applications for which are taken within the State are considered to have been made within this State and are subject to the laws of this State."). After receiving briefing on defendants' motion to dismiss the complaint, the district court *sua sponte* certified five questions of law to this Court, which were accepted.

B. The Relevant Policy Provisions

Sullivan seeks to recover its financial losses under Policy provisions concerning (1) business income and extra expense coverage, (2) business access coverage, (3) dependent

property coverage, (4) communicable disease coverage, and (5) civil authority coverage. Although not explicitly pleaded, in briefing to the district court, Sullivan also argued it is further entitled to loss avoidance or mitigation coverage. Relevant excerpts of the Policy are below. Critically, each of these provisions requires "direct physical loss or damage" to property either as a prerequisite to coverage or as a limitation on the scope of coverage.

Business Income and Extra Expense Coverage	If a Limit of Insurance for Business Income and Extra Expense is shown in the Declarations, then 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 30 (**bold**[2] in original; *underline italics* added). Applicable definitions include: 13. **Covered cause of loss** means risks of direct physical loss or damage not excluded or limited in this Coverage Form. 50. a. **Period of restoration** means the period of time that begins immediately after the time of direct physical loss or damage caused by or resulting from a **covered cause of loss** to property at the **location** and ends on the earlier of: (1) The date when such property at the **location** should be repaired, rebuilt, or replaced with reasonable speed and like kind and quality; or (2) The date when the business is resumed at a new permanent location. b. **Period of restoration** does not include any increased period due to the enforcement of any **ordinance or law**, including any **ordinance or law** that requires any insured or others to test for, monitor, clean up, remove, contain, treat, detoxify, or

[2] Bold indicates a defined term in the Policy.

	neutralize, or in any way respond to, or assess the effects of **pollutants**. c. The expiration date of this Policy will not cut short the **period of restoration**. 69. **Suspension** means the slowdown or cessation of your **operations**, or that a part or all of the described **premises** is rendered untenable. Policy at 76, 82, 85 (**bold** in original).
Business Access Coverage	a. 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. Such impairment or obstruction must: (1) Arise from *direct physical loss or damage to property* other than at such location; and (2) Be caused by or result from a **covered cause of loss**; and (3) Occur within the number of miles stated in the Declarations from such **location**. b. We will not pay under Business Access Coverage for **business income** loss or **extra expense** incurred caused by or resulting from action of civil authority or military authority. c. The most we will pay under this Extension of Coverage in any one occurrence or **loss event** is the Limit of Insurance shown in the Declarations applicable to Business Access Coverage. Policy at 42 (**bold** in original; *underline italics* added).
Dependent Property Coverage	a. Dependent Property Coverage (1) We will pay for the actual loss of **business income** and necessary **extra expense** you sustain due to the necessary **suspension** of **operations** during the period of restoration at a **location**. (2) The **suspension** must be due *to direct physical loss or damage* at the location of a **dependent property**, situated inside or outside of the Coverage Territory, caused by or resulting from a **covered cause of loss**.. . .

	d. With respect to Dependent Property Coverage the **period of restoration** begins immediately after the time that *direct physical loss or damage* occurs at the **location** of the **dependent property** caused by or resulting from a **covered cause of loss**. Policy at 42-43 (**bold** in original; *underline italics* added).
Communicable Disease Coverage	1. Communicable Disease Coverage a. (1) We will pay for *direct physical loss or damage* to **Property Insured** caused by or resulting from a covered **communicable disease event** at a location including the following necessary costs incurred to: (a) Tear out and replace any part of **Property Insured** in order to gain access to the **communicable disease;** (b) Repair or rebuild **Property Insured** which has been damaged or destroyed by the **communicable disease;** and (c) Mitigate, contain, remediate, treat, clean, detoxify, disinfect, neutralize, cleanup, remove, dispose of, test for, monitor, and assess the effects the **communicable disease.** Policy at 45-46 (**bold** in original; *underline italics* added). Applicable definitions include: 10. **Communicable disease** means any disease, bacteria, or virus that may be transmitted directly or indirectly from human or animal to a human. 11. **Communicable disease event** means 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. 59. **Public health authority** means the governmental authority having jurisdiction over your operations relative to health and hygiene standards necessary for the protection of the public. Policy at 76, 83 (**bold** in original).

Civil Authority Coverage	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**. Such prohibition of access to such **location** by a civil authority must: (1) Arise from *direct physical loss or damage* to property other than at such **location**; and (2) Be caused by or result from a **covered cause of loss**; and (3) Occur within the number of miles stated in the Declarations from such **location**. Policy at 42 (**bold** in original; *underline italics* added).
Loss Avoidance or Mitigation Coverage	We will pay the necessary expense you incur to protect, avoid, or significantly mitigate potential *covered loss or damage* that is actually and imminently threatening **Property Insured**, including: (1) Removal of ice or snow from the roof or balconies of **business real property** that has accumulated during and due to a **storm**; (2) Pumping of standing water away from **business real property** that has accumulated during and due to a **flood, hurricane, named storm**, or **storm**; (3) Application of fire retardant foam or similar fire suppression or extinguishing material to business real property as protection against an approaching fire; and (4) Boarding up or sandbagging of doors, windows, or other external openings in **business real property** as protection against an approaching **flood, hurricane, named storm**, or **storm**. However, we will not pay for any loss, damage, or expense caused by or resulting from such loss prevention actions. Policy at 39 (**bold** in original, *underline italics* added).
Virus Exclusion	A. Exclusions Applicable to all Coverages: We will not pay under Property Coverage, Business Income and Extra Expense Coverage, or any Extensions of Coverage, for any loss, damage, or expense caused directly or indirectly by or resulting from any of the following excluded causes of loss; such loss or damage is excluded

	regardless of any other cause or event that contributes concurrently or in any sequence to the loss: 1. Regardless of how the cause of loss occurs, we will not pay for direct physical loss, damage, or expense caused by or resulting from the following causes of loss: . . . h. Mortality *and Disease* Mortality, death by natural causes, disease, sickness, any condition of health, bacteria, *or virus*. Policy at 31-32 (*underline italics* added).

IV. 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." *Drury Dev. Corp. v. Found. Ins. Co.*, 380 S.C. 97, 101, 668 S.E.2d 789, 800 (2008).

V. ARGUMENT AND AUTHORITIES

"An insurance policy is a contract between the insured and the insurance company, and the terms of the policy are to be construed according to contract law." *Auto Owners Ins. Co. v. Rollison,* 378 S.C. 600, 606, 663 S.E.2d 484, 487 (2008). "The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language." *Schulmeyer v. State Farm Fire & Cas. Co.*, 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003). If the policy language is clear and unambiguous, "courts have no authority to torture the meaning of policy language to extend or defeat coverage that was never intended by the parties." *Diamond State Ins. Co. v. Homestead Indus., Inc.*, 318 S.C. 231, 236, 456 S.E.2d 912, 915 (1995); *Schulmeyer*, 353 S.C. at 495 ("Parties to a contract have the right to construct their own contract without interference from courts to rewrite or torture the meaning of the policy to extend coverage."). An insurer's obligation under a policy of insurance is "defined by the terms of the policy itself and cannot be enlarged by judicial construction." *South Carolina Ins. Co. v. White*, 301 S.C. 133, 137, 390 S.E. 2d 471, 474 (Ct. App. 1990).

An "insurance contract is read as a whole document so that 'one may not, by pointing out a single sentence or clause, create an ambiguity.'" *Schulmeyer*, 353 S.C. at 495 (quoting *Yarborough v. Phoenix Mut. Life Ins. Co.*, 266 S.C. 584, 592, 225 S.E.2d 344, 348 (1976)). Similarly, "[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." *Id.*

It is axiomatic that the party seeking coverage under an insurance policy bears the burden of proving that its claims and alleged damages fall within the policy's grant of coverage. *See Gamble v. Travelers Ins. Co*., 251 S.C. 98, 102,160 S.E.2d 523, 525 (1968).

A. Neither the presence of COVID-19 in or near Sullivan's properties nor government shut-down orders constitute "direct physical loss or damage" to insured property.

This section addresses Certified Question number 1. The answer to that question is that direct physical loss or damage to property requires more than economic harm or loss of use. As explained in detail below, it requires physical alteration, destruction, or permanent dispossession of property.

1. Policy language requiring "direct physical loss or damage" unambiguously requires "actual" or "discernable" physical damage or that property become "physically lost."

"Direct physical loss or damage to property" is not further defined in the Policy. However, the words all have commonly understood meanings, particularly when used in the context of a property insurance policy. The dictionary definitions are plain enough.

Direct	adj.: marked by the absence of an intervening agency, instrumentality, or influence
Physical	adj.: (a) having material existence: perceptible especially through the senses and subject to the laws of nature; (b) of or relating to material things.
Loss	n.: destruction; ruin
Damage	n.: loss or harm resulting from injury to person, property, or reputation

See Merriam-Webster.com/dictionary. In other words, the Policy requires destruction, ruin, or harm of a material/perceptible nature to property, which was suffered without an intervening agency, instrumentality, or influence—frequently described by courts as the direct physical destruction or "physical alteration" of property.

South Carolina law recognizes that physical losses must be physical and that economic loss alone is not enough. For example, in *Auto-Owners Ins. Co. v. Carl Brazell Builders, Inc*., 356 S.C. 156, 162-64, 588 S.E.2d 112, 115-116 (2003), this Court held that purely economic loss caused by contamination of property by a hazardous substance was not "physical" so as to trigger property insurance coverage. *Id.* As with COVID-19, the economic injury in *Auto-Owners* was purely *economic*—not physical—even though the economic injury was caused by the physical *presence* of hazardous materials. *Id.* at 115. The Court noted that its "conclusion is consistent" with "most courts" across the country. *Id.*; *cf. Pulliam v. Travelers Indem. Co*., 403 S.C. 332, 342, 743 S.E. 2d 117, 122 (Ct. App. 2013) ("economic damage" stemming from requirement to establish a cash reserve for repairs "did not result in physical damage to tangible property"); *Campbell, Inc. v. Northern Ins. Co. of New York*, 337 F. Supp. 2d 764, 769 (D.S.C. 2004) (citing *Auto-Owners* and holding policy language insuring "direct physical loss" unambiguously covered only *physical* damage or destruction).

This conclusion applies here because, as explained in more detail below, "an item or structure that merely needs to be cleaned has not suffered a 'loss' which is both 'direct' and 'physical.'" *Mama Jo's Inc. v. Sparta Ins. Co.*, 823 F. App'x 868, 879 (11th Cir. 2020). South Carolina's pre-COVID-19 caselaw is also consistent with the most widely respected insurance treatise, Couch on Insurance, which has been cited by hundreds of decisions in the context of COVID-19. As Couch explains:

> The requirement that the loss be "physical," given the ordinary definition of that term, is widely held to exclude alleged losses that are intangible or incorporeal and, thereby, to preclude any claim against the property insurer when the insured merely suffers a detrimental economic impact unaccompanied by "***a distinct, demonstrable, physical alteration of the property***."

10A Couch on Ins. § 148:46 (3d. Ed. West 1998) (emphasis added).

a. The "period of restoration" reinforces the conclusion that any loss or damage must be "physical."

Further, as Sullivan concedes, the Policy's Business Income and Extra Expense coverage and its Dependent Property coverage only provide coverage during the "period of restoration." Brief at 6-7. As noted above in Section III(B), the period of restoration is defined as:

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

Policy at 82 (**bold** in original, *italics* added). A similar clause appears in virtually every commercial property insurance policy. And, as this Court has recognized, words like "repair" and "replace" indicate a physical remedy to an actual, discernable loss:

> Generally "repair" means to mend, remedy, restore, renovate to restore to a sound or good state after decay, injury, dilapidation, or partial destruction. In the context of an insurance contract the word "replace" means the insurer will restore the [insured property] to a former place or position, or take the place of as a substitute or successor.

Schulmeyer, 353 S.C. at 497–98. Thus, the Policy provides coverage for lost business income, but only to the extent the policyholder can establish that the lost income (i) was the direct result of physical loss or damage to specific property, and (ii) the physically damaged property had to be repaired or rebuilt or the physically lost property had to be replaced.

The Policy must be construed this way. Interpreting "physical loss or damage to property" to include loss or damage that is neither actual nor discernable, as Sullivan urges, would render the Policy language relating to "repair[], rebuil[ding], or replace[ment]" mere surplusage. *See Schulmeyer*, 353 S.C. at 498 (refusing to interpret the word "repair" as including coverage for

diminished value of an automobile, noting such an interpretation "would render the limitation provision meaningless" (quotation omitted)). As the Ninth Circuit recently explained in a COVID-19 coverage dispute:

> Interpreting the phrase "direct physical loss of or damage to" property as requiring physical alteration of property is consistent with other provisions of Mudpie's Policy. For example, the Policy provides coverage for Business Income and Extra Expense only during the "period of restoration," and it defines the "period of restoration" as ending on "[t]he date when the property at the described premises should be repaired, rebuilt or replaced with reasonable speed and similar quality; or . . . [t]he date when business is resumed at a new permanent location." That this coverage extends only until covered property is repaired, rebuilt, or replaced, or the business moves to a new permanent location suggests the Policy contemplates providing coverage only if there are physical alterations to the property. To interpret the Policy to provide coverage absent physical damage would render the "period of restoration" clause superfluous.

Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am., 15 F.4th 885, 892 (9th Cir. 2021). The Eighth Circuit agrees:

> The unambiguous requirement that the loss or damage be physical in nature accords with the policy's coverage of lost business income and incurred extra expense during the "period of restoration." . . . Property that has suffered physical loss or physical damage requires restoration. That the policy provides coverage until property "should be repaired, rebuilt or replaced" or until business resumes elsewhere assumes physical alteration of the property, not mere loss of use.

Oral Surgeons, P.C. v. Cincinnati Ins. Co., 2 F.4th 1141, 1144 (8th Cir. 2021). As does the Sixth Circuit:

> Baked into this timing provision is the understanding that any covered "direct physical loss of or damage to" property could be remedied by repairing, rebuilding, or replacing the property or relocating the business. But what would that mean under Santo's Café's interpretation of the policy? It has not alleged any problem with the building. There is nothing to repair, rebuild, or replace that would allow the resumption of in-person dining operations.

Santo's Italian Café LLC v. Acuity Ins. Co., 15 F.4th 398, 403 (6th Cir. 2021). Numerous other courts of appeals agree. *See, e.g., Goodwill Indust. of Cent. Okla., Inc. v. Phila. Indem. Ins. Co.*, 21 F.4th 704, 711 (10th Cir. 2021) ("That the policy provides coverage until property 'should be

repaired, rebuilt or replaced' or until business resumes elsewhere assumes physical alteration of the property, not mere loss of use."); *Sandy Point Dental, P.C. v. Cincinnati Ins. Co.*, 20 F.4th 327, 333 (7th Cir. 2021) ("Without a physical alteration to property, there would be nothing to repair, rebuild, or replace."); *Terry Black's Barbecue, L.L.C. v. State Auto. Mut. Ins. Co.*, 22 F.4th 450, 456 (5th Cir. 2022) ("This period [of restoration] necessarily contemplates a tangible alteration to the property that requires repair, rebuilding, or replacement.").

b. Courts nationwide have overwhelmingly rejected the theory that COVID-19 can cause direct physical loss or damage.

Courts throughout the country have to date dismissed nearly 600 similar COVID-19 coverage disputes.[3] For example, applying Georgia law, the Eleventh Circuit concluded that economic loss caused by COVID-19 is not direct physical loss or damage:

> Gilreath has alleged nothing that could qualify, to a layman or anyone else, as physical loss or damage. Here, the shelter-in-place order that Gilreath cites did not damage or change the property in a way that required its repair or precluded its future use for dental procedures. . . . [W]e do not see how the presence of [virus] particles would cause physical damage or loss to the property.

Gilreath Family & Cosmetic Dentistry, Inc. v. Cincinnati Ins. Co., No. 21-11046, 2021 WL 3870697, at *2 (11th Cir. Aug. 31, 2021) (per curiam).

The Sixth Circuit has held the same:

> Whether one sticks with the terms themselves (a "direct physical loss of" property) or a thesaurus-rich paraphrase of them (an "immediate" "tangible" "deprivation" of property), the conclusion is the same. The policy does not cover this loss. The restaurant has not been tangibly destroyed, whether in part or in full. And the owner has not been tangibly or concretely deprived of any of it. It still owns the restaurant and everything inside the space. And it can still put every square foot of the premises to use, even if not for in-person dining use.
>
> *Santo's*, 15 F.4th at 401.

[3] *See* Covid Coverage Litigation Tracker, University of Pennsylvania School of Law, *available at* https://cclt.law.upenn.edu/ (as of February 6, 2022: 595 suits dismissed with prejudice).

Indeed, every appellate court—state and federal—to address whether COVID-19 can cause physical loss or damage has held that it does not and has affirmed the dismissal of claims like Sullivan's. *See, e.g.*,

- *Goodwill Indus. of Cent. Okla., Inc. v. Phila. Indem. Ins. Co.*, 21 F.4th 704 (10th Cir. 2021) ("Goodwill's temporary inability to use its property for its intended purpose was not a 'direct physical loss.' To conclude otherwise would ignore the word 'physical' and violate the requirement that every part of a policy be given meaning.");

- *Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.*, 15 F.4th 885, 892 (9th Cir. 2021) ("Mudpie alleges the Stay at Home Orders temporarily prevented Mudpie from operating its store as it intended, and urges us to interpret 'direct physical loss of or damage to' to be synonymous with 'loss of use.' We cannot endorse Mudpie's interpretation because California courts have carefully distinguished 'intangible,' 'incorporeal,' and 'economic' losses from 'physical' ones.");

- *Oral Surgeons, P.C. v. Cincinnati Ins. Co.*, 2 F.4th 1141, 1144 (8th Cir. 2021) ("The policy here clearly requires direct 'physical loss' or 'physical damage' to trigger business interruption and extra expense coverage. Accordingly, there must be some physicality to the loss or damage of property. . . . The policy cannot reasonably be interpreted to cover mere loss of use when the insured's property has suffered no physical loss or damage.");

- *Sandy Point Dental, P.C. v. Cincinnati Ins. Co.*, 20 F.4th 327, 335 (7th Cir. 2021) ("Sandy Point does not even attempt to describe how either the presence of the virus or the resulting closure orders physically altered its property. It points only to the loss of the property's 'intended use.' As we have explained, this is not enough. Sandy Point may have been unable to put its property to its preferred (and, we assume, its most lucrative) use. But this is a far cry from the complete physical dispossession of property . . . .");

- *Bridal Expressions LLC v. Owners Ins. Co.*, No. 21-3381, 2021 WL 5575753, at *2 (6th Cir. Nov. 30, 2021) ("Throughout the coverage period, Bridal Expressions retained possession of its property and could put it to use. The company's inability to use the property in the same way as it did before the pandemic—not unlike the situation faced by restaurants at the time—does not satisfy the policy's language. 'A loss of use simply is not the same as a physical loss.'" (quoting *Santo's*, 15 F.4th 398));

- *Terry Black's*, 22 F.4th at 456 ("A 'physical loss of property' cannot mean something as broad as the 'loss of use of property for its intended purpose.' None of those words fall within the plain meaning of physical, loss, or property. And that phrase has an entirely different meaning from the language in the BI/EE provision. 'Physical loss of property' is not synonymous with 'loss of use of property for its intended purpose.'");

- *10012 Holdings, Inc. v. Sentinel Ins. Co.*, 21 F.4th 216 (2d Cir. 2021) ("We therefore reject 10012 Holdings's argument that 'physical loss' must mean 'loss of physical possession and/or direct physical deprivation' — in other words, loss of use.");

- *Gavrilides Mgmt. Co., v. Michigan Ins. Co.*, No. 354418, 2022 WL 301555, at *1 (Mich. Ct. App. Feb. 1, 2022) ("[T]he word 'physical' necessarily requires the loss or damage to have some manner of tangible and measurable presence or effect in, on, or to the premises.");

- *Indiana Repertory Theatre v. Cincinnati Cas. Co.*, No. 21A-PL-628, 2022 WL 30123, at *1 (Ind. Ct. App. Jan. 4, 2022) ("If loss of use alone qualified as direct physical loss to the property, then the term 'physical' would have no meaning.");

- *Inns by the Sea v. California Mut. Ins. Co.*, 71 Cal. App. 5th 688, 692 (2021) ("[T]he words 'direct' and 'physical' preclude the argument that coverage arises in a situation where the loss incurred by the policyholder stems solely from an inability to use the physical premises to generate income, without any other physical impact to the property."); and

- *Nail Nook, Inc. v. Hiscox Ins. Co.*, No. 110341, __ N.E.3d __, 2021 WL 5709971 (Ct. App. Ohio Dec. 2, 2021) ("[A]ssuming all of the allegations in Nail Hook's complaint were true, Nail Nook did not have a valid claim for coverage because it could not prove 'direct physical loss of or damage to Covered Property.'").

Hundreds of lower courts from across the country also concur.

Indeed, courts in Massachusetts, Florida, California, Louisiana, Indiana, New York, New Jersey, and Virginia have considered and rejected the same arguments Sullivan makes here ***under the same Fireman's Fund insurance contract***. In the process, they have dismissed at least 21 similar complaints against Fireman's Fund, finding no coverage exists under the Policy's plain language:

- *PS Bus. Mgmt. v. Fireman's Fund Ins. Co.*, No. 21-1229, 2021 WL 4989870, at *1 (E.D. La. Oct. 27, 2021) (granting dismissal with prejudice: "The Court finds that this language is not ambiguous on its face. 'Direct physical loss or damage' requires corporeal effect.");

- *Marina Pac. Hotel & Suites, LLC v. Fireman's Fund Ins. Co.*, No. 20SMCV00952, slip op., at *7 (Sup. Ct. Cal. Oct. 5, 2021) (granting demurrer: "That the loss needs to be 'physical,' given the ordinary meaning of the term, is widely held to exclude alleged losses that are intangible or incorporeal, and, thereby, to preclude any claim against the

property insurer when the insured merely suffers a detrimental economic impact unaccompanied by a distinct, demonstrable, physical alteration of the property.");

- *Amy's Kitchen, Inc. v. Fireman's Fund Ins. Co.*, No. SCV-268104, slip. op. (Sup. Ct. Ca. Sept. 8, 2021) (granting demurrer: "[T]his Court finds that the presence of COVID-19 particles does not amount to a 'distinct, demonstrable, physical alternation of the property.'");

- *Boffo Cinemas LLC v. Fireman's Fund Ins. Co.*, No. 37-2021-5179, slip op. at *1 (Sup. Ct. Ca. Aug. 27, 2021) (granting demurrer: "'direct physical loss' is understood to mean 'a distinct, demonstrable, physical alteration of the property'");

- *Hampshire House Corp. v. Fireman's Fund Ins. Co.*, No. CV 20-11409-FDS, 2021 WL 3812535, at *5, 6 (D. Mass. Aug. 26, 2021) (granting motion to dismiss with prejudice: "Although 'physical' is not defined in the policy, taken as a whole, it is clear that the provisions do not provide coverage for financial or other intangible losses. Instead, there must be a 'physical' loss of or damage to a tangible object, such as the structure of a building.");

- *Spaghettini v. Fireman's Fund Ins. Co.*, No. SCV-266378, slip op. at *3 (Sup. Ct. Ca. Aug. 11, 2021) (granting demurrer: "[T]his Court finds that the presence of Covid-19 particles does not amount to 'distinct, demonstrable, physical alteration of the property.'");

- *Circle Block Partners, LLC v. Fireman's Fund Ins. Co.*, No. 1:20-cv-02512, 2021 WL 3187521, at *4 (S.D. Ind. July 27, 2021) (granting motion to dismiss with prejudice: "'[D]irect physical loss' to property requires a harmful alteration in the appearance, shape, color, composition, or other material dimension of the property, excluding situations in which an intervening force plays some role.");

- *Crescent Hotels & Resorts, LLC v. Zurich Am. Ins. Co. & Fireman's Fund Ins. Co.*, No. 2021-02974, slip op. at *86 (Va. Cir. Ct. Fairfax County July 2, 2021) (transcript only) (granting demurrer: "[I]t is my view that [under] a plain reading of . . . the contract, that physical loss or damage is a phrase that is not ambiguous, that it's clear on its face, and it does not reach the circumstances that we have here where there's a presence of a virus.");

- *Nguyen v. Travelers Cas. Ins. Co. of Am.*, No. 2:20-cv-00597-BJR, __ F. Supp. 3. __, 2021 WL 2184878 (W.D. Wash. May 28, 2021) (granting motions to dismiss with prejudice Washington consolidated docket including eight COVID-19 based lawsuits against Fireman's Fund or its affiliates: "[T]his Court determines that COVID-19 does not cause the physical loss or damage to property required as a condition precedent to trigger coverage in all the relevant policies.");

- *Am. Food Sys., Inc. v. Fireman's Fund Ins. Co.*, 530 F. Supp. 3d. 74, 78 (D. Mass. 2021) (granting motion to dismiss with prejudice: "Taken together, these terms require

some enduring impact to the actual integrity of the property at issue. In other words, the phrase 'direct physical loss of or damage' does not encompass transient phenomena of no lasting effect, much less real or imagined reputational harm.");

- *Saddle Ranch Sunset, LLC v. Fireman's Fund Ins. Co.*, No. 20STCV36531, Minute Order, at *1 (Cal. Sup. Ct. Feb. 8, 2021) ("The Demurrer is sustained for failure to state Cause of Action.");

- *Island Hotel Props., Inc. v. Fireman's Fund Ins. Co.*, 512 F. Supp. 3d 1323, 1326-27 (S.D. Fla. Jan. 11, 2021) (granting motion to dismiss with prejudice: "Because 'direct physical' modifies both 'loss' and 'damage,' . . . any 'interruption in business must be caused by some physical problem with the covered property' to be a covered loss." (quoting *Malaube, LLC v. Greenwich Ins. Co.*, No. 20-22615-Civ, 2020 WL 5051581, at *7 (S.D. Fla. Aug. 26, 2020));

- *Boulevard Carroll Entm't Grp., Inc. v. Fireman's Fund Ins. Co.*, CV2011771SDWLDW, 2020 WL 7338081, at *2 (D.N.J. Dec. 14, 2020) (granting motion to dismiss: "Here, Plaintiff has not alleged any facts that support a showing that its property was physically damaged. Instead, Plaintiff pleads that by forcing him to close his business, the Stay-At-Home Orders caused Plaintiff to lose income and incur expenses. This is not enough."); and

- *Water Sports Kauai, Inc. v. Fireman's Fund Ins. Co.*, 499 F. Supp. 3d 670, 673 (N.D. Cal. 2020) (granting motion to dismiss with prejudice: "I will follow the overwhelming majority of courts that have determined that the mere threat of coronavirus cannot cause a 'direct physical loss of or damage to' covered property as required under the Policy.").

2. COVID-19 and accompanying government shut-down orders do not cause physical loss or damage to property.

a. Sullivan's argument that temporary loss of patronage is sufficient is contrary to the Policy's plain language.

Sullivan argues that loss of the ability to use property is sufficient to establish direct physical loss. Yet it largely ignores that courts all over the country have rejected this same claim.

Although Sullivan argues the phrase "physical loss" must include pure economic losses, this reading of the contract language is wrong. *See Schulmeyer*, 353 S.C. at 495 (explaining the terms in insurance policies must be "understood in their plain, ordinary, and popular sense" and cautioning against "torture[d]" policy interpretations). As an initial matter, Sullivan fails to address

the Policy's requirement that any "loss" itself be "physical." As a court in the U.S. District of Massachusetts explained: "The spread of the coronavirus is of course 'physical' in the sense that is a submicroscopic organism, but under the plain language of the policy, it is the ***loss or damage itself*** that must be 'physical.'" *Kamakura, LLC v. Greater New York Mut. Ins. Co.*, 525 F. Supp. 3d 273, 281 (D. Mass. 2021) (holding policy language unambiguous) (emphasis added). Stated another way:

> The critical policy language here—"direct physical loss"—unambiguously requires some form of actual, physical damage to the insured premises to trigger coverage. The words "direct" and "physical," which modify the word "loss," ordinarily connote actual, demonstrable harm of some form to the premises itself, rather than forced closure of the premises for reasons extraneous to the premises themselves, or adverse business consequences that flow from such closure.

Sandy Point Dental, PC v. Cincinnati Ins. Co., No. 20 CV 2160, 488 F. Supp. 3d 690, 693 (N.D. Ill. 2020).

Sullivan's suggestion that "direct physical loss or damage" includes mere loss of use is based on the false premise that interpreting this phrase to only include physical harms would somehow read the word "loss" out of the Policy. But when the Policy is read correctly, the phrases "direct physical loss" and "direct physical damage" have distinct meanings, none of which is "loss of use." *See Reyhani v. Stone Creek Cove Condo. II Horizontal Prop. Regime*, 329 S.C. 206, 212, 494 S.E.2d 465, 468 (Ct. App. 1997) ("Documents will be interpreted so as to give effect to all of their provisions, if practical.").

Rather, "direct physical loss" refers to actual, demonstrable harm to property that leads to a total destruction or permanent deprivation of the property, while "direct physical damage" refers to some lesser harm that physically alters (but does not completely destroy) the property. As the Seventh Circuit explained in rejecting the same argument:

> We have no quarrel with the idea that the disjunctive indicates that "loss" means something different from "damage." But the Businesses' proposed distinction is neither the only possible reading nor a likely one. The phrase is "direct physical loss or damage." The words "direct physical" are most sensibly read as modifying both "loss" and "damage." But even if they can be divorced from "damage" (and we do not think that they can), they indisputably modify "loss." Any other interpretation would commit the same sin against which the Businesses caution us—namely making surplusage out of the word "physical." Whatever "loss" means, it must be physical in nature.

Sandy Point, 20 F.4th at 332; *see also Oral Surgeons*, 2 F.4th at 1144 ("there must be some physicality to the loss or damage of property"); *Mudpie*, 15 F.4th at 893 (favorably citing *Oral Surgeons* for the same proposition); *Bluegrass Oral Health Ctr., PLLC v. Cincinnati Ins. Co.*, No. 1:20-cv-00120, 2021 WL 1069038, at *4 (W.D. Ky. Mar. 18, 2021) ("[I]n context, 'physical loss' would mean destruction or ruin produced by the forces or operation of physics. In this light, 'physical loss' would apply to property destroyed by some force, contrasted with 'physical damage' which would cover a lesser extent of harm short of destruction or ruin.").[4]

As the Sixth Circuit explained in rejecting a similar argument, it "skates over the unrelenting imperative that the policy covers only 'physical' losses." *Santo's*, 15 F.4th at 404; *Mudpie*, 15 F.4th 892 (loss of use is not direct physical loss or damage under California law); *Oral Surgeons*, 2 F.4th at 1144 ("The policy cannot reasonably be interpreted to cover mere loss of use when the insured's property has suffered no physical loss or damage."). As the *Santo's* court

[4] Sullivan points to the Western District of Washington's opinion in *Nautilus*, which held that the theft of personal property constituted "physical loss" under a policy requiring "physical loss or damage" to insured property. Brief at 22 (citing *Nautilus Grp., Inc. v. Allianz Global Risks US*, No. C11-5281BHS, 2012 WL 760940, at *7 (W.D. Wash. Mar. 8, 2012)). But *Nautilus* supports Fireman's Fund's interpretation. Theft of tangible property, unlike COVID-19, can constitute a "physical loss" because it is a physical dispossession that permanently deprives the owner of its property and "cause[s] the inability to physically own or manipulate the property." *Nguyen v. Travelers Cas. Ins. Co. of Am.*, No. 2:20-cv-00597-BJR, 2021 WL 2184878, at *10 (W.D. Wash. May 28, 2021). Our shared experience demonstrates that COVID-19 does not cause permanent physical dispossession of property.

explained in detail, accepting Sullivan's arguments here would expand coverage beyond anything contemplated by the Policy's language.

> If we accepted the [insured's] invitation and construed any loss of use to be a physical loss of property, that would create problems of its own. What if the pandemic or a worker shortage made it difficult for the restaurant to hire cooks and waiters? Would that not prevent the restaurant from using the kitchen or offering in-person dining services? Or what if the State had taken no action in response to the pandemic, but most people had stayed home anyway for fear of catching COVID-19? Would that not prevent the restaurant from using the restaurant space as well?

Santo's, 15 F.4th at 404; *accord Bridal Expressions LLC*, 2021 WL 5575753, at *2 (per curiam) ("The company's inability to use the property in the same way as it did before the pandemic . . . does not satisfy the policy's language.").

Adopting Sullivan's interpretation here would convert property policies into guarantees of financial stability untethered to physical loss or damage. *See, e.g.*, *L-J, Inc. v. Bituminous Fire & Marine Ins. Co.*, 366 S.C. 117, 124, 621 S.E.2d 33, 36-37 (2005) (holding insurance policies do not operate as guarantees of performance). For example, any government order requiring evacuation—and related business closures—in advance of an expected hurricane would constitute direct physical loss or damage triggering property insurance coverage, regardless of whether the hurricane made landfall or caused actual property damage. The same would be true of zoning changes or fire capacity regulations. As one court noted:

> [T]he following scenarios would trigger insurance coverage under the [the insured]'s expansive view: (1) a city changes its maximum occupancy codes to lower the caps, meaning that a particular restaurant can no longer seat as many customers as it used to; (2) a city amends an ordinance requiring restaurants located in residential zones to cease operations between 1:00 a.m. and 5:30 a.m. to expand the window to 12:00 a.m. to 6:00 a.m.; (3) a city issues a mandatory evacuation order to all of its residents due to nearby wildfires (a consequence of this is that all businesses must suspend operations), but lifts the order three weeks later when the wildfires are extinguished without, fortunately, any destruction of property. The Court here agrees that to adopt [the insured]'s view would be to reach an overbroad view of "physical loss."

Park 101 LLC v. Am. Fire & Cas. Co., No. 20-cv-00972-AJB-BLM, 2021 WL 2685188, at *5 (S.D. Cal. June 30, 2021); *see also Santo's*, 15 F.4th at 402 ("It is one thing for the government to ban the use of a bike or a scooter on city sidewalks; it is quite another for someone to steal it.").

And a court in the Southern District of New York used a particularly relatable analogy to explain why loss of use is not physical loss.

> The idea that "loss of use" does not constitute a "direct physical loss of or damage to" property resonates in ordinary experience outside the context of insurance coverage. Say, for example, a teenager broke curfew, and his parents punished him by taking away the keys to his car. The teen undoubtedly lost the ability to use the car. However, we would not say that there had been a "direct physical loss of or damage to" the car. The teenager was precluded from driving it. But the car's physical condition remained unchanged, and its presence likely remained at the residence. Similarly, imagine a fisherman visits a public pond each day to cast his line. One morning he arrived and found that the pond was closed for fishing because a nearby town was hosting its annual swim race. Did the fisherman lose the use of the pond for the day? Yes. He could not enjoy the premises for his intended use (i.e., to fish). But could anyone reasonably conclude there was a "direct physical loss of or damage to" the pond because he could not fish? No. The condition of the pond was not altered physically.

Michael Cetta, Inc. v. Admiral Indem. Co., No. 20 CIV. 4612 (JPC), 2020 WL 7321405, at *6 (S.D.N.Y. Dec. 11, 2020). Put simply, limitations on the ability to use property do not cause physical loss to that property.

b. The presence of COVID-19 does not cause direct physical loss or damage.

As an initial matter, Fireman's Fund notes that Sullivan has not actually pleaded that COVID-19 was ever present on its property. Instead, Sullivan speculates that the prevalence of COVID-19 in South Carolina and Georgia means that "[m]ore likely than not, surface contaminations occurred at [its] restaurants on or about March 11, 2020 . . . ." Complaint ¶ 62. Such an allegation is not sufficient, and numerous courts have rejected the suggestion that the prevalence of the virus in a community means the virus must have been present on property. *See,*

e.g., *Gammon & Assocs. Inc. v. Nat'l Fire Ins. Co. of Hartford*, No. 20 Civ. 3882 (GBD), 2021 WL 3887718, at *4 (S.D.N.Y. Aug. 31, 2021) (rejecting as conclusory and speculative the "assumption that because [plaintiff's] offices are in high-density office buildings, COVID-19 must be present there"); *Promotional Headwear Int'l v. Cincinnati Ins. Co.*, 504 F. Supp. 3d 1191, 1203 (D. Kan. 2020) ("The Court declines to accept this speculative assertion [of the virus's presence], even at the motion to dismiss stage.").

Regardless, the mere presence of COVID-19 virus particles sitting atop a surface is insufficient to trigger coverage. "Common sense" shows that "the pandemic impacts human health and human behavior, not physical structures." *Uncork & Create LLC v. Cincinnati Ins. Co.*, 498 F. Supp. 3d 878, 884 (S.D. W. Va. 2020). As another federal district court construing the same Fireman's Fund Policy explained, "the Policy requires 'direct physical loss or damage *to* property,' not merely a physical substance *on* property." *Circle Block*, 2021 WL 3187521 at *7 (italics in original). And as hundreds of courts nationwide have acknowledged, the presence of COVID-19 virus particles on property does not alter the physical nature of property in a way that would give rise to coverage. *See, e.g.*, *Gilreath*, 2021 WL 3870697, at *2 ("[W]e do not see how the presence of [COVID-19] particles would cause physical damage or loss to the property."); *Sandy Point*, 20 F.4th at 335 (The virus's "impact on physical property is inconsequential: deadly or not, it may be wiped off surfaces using ordinary cleaning materials, and it disintegrates on its own in a matter of days."); *Assocs. in Periodontics, PLC v. Cincinnati Ins. Co.*, 540 F. Supp. 3d 441, 449 (D. Vt. 2021) (The "COVID-19 pandemic did not cause physical damage or loss to covered property" because the "virus posed a threat to people" only, "such danger is short-lived," and the virus ultimately leaves inanimate "property and its environment unscathed."); *100 Orchard St., LLC v. Travelers Indem. Ins. Co. of Am.*, 542 F. Supp. 3d 227, 229 (S.D.N.Y. 2021) ("[W]hile the presence

of COVID-19 may render property potentially harmful to people, it does not constitute harm *to* the property itself.").

(1) Risk of infection to humans is not property loss or damage.

While the temporary presence of virus particles on property may pose a potential risk of infecting humans, such presence does not cause direct physical loss or damage to property. *See 100 Orchard*, 542 F. Supp. 3d at 229 ("[W]hile the presence of COVID-19 [virus particles] may render property potentially harmful to people, it does not constitute harm to the property itself."); *Bourgier v. Hartford Cas. Ins. Co.*, No. 21-21053-CIV, 2021 WL 3603601, at *4 (S.D. Fla. Aug. 12, 2021) ("Coronavirus particles damage lungs, they do not damage buildings.").

The property Policy does not insure against the risk of harm to humans, and the virus does not pose a risk of injuring inanimate objects. Almost two years into the pandemic, no one has ever seen physical property damage caused by COVID-19 in our homes, for instance, despite the alleged ubiquity of the virus. Nor could anyone reasonably argue that COVID-19 rendered our homes uninhabitable or even unsafe for use. Commercial property is no different. If COVID-19 damaged property, then virtually all property has suffered damage, which presumably required repair or replacement. But the indisputable reality demonstrates the opposite. COVID-19 poses no more threat to property than the common cold, which is to say none. *Dino Drop, Inc. v. Cincinnati Ins. Co.*, No. 20-12549, __ F. Supp. 3d __, 2021 WL 2529817, at *7 (E.D. Mich. June 21, 2021) ("[T]he presence of COVID-19 at the premises is analogous to the presence of virus particles causing influenza or the common cold.").

A final obvious flaw in the theory that COVID-19 causes property damage is highlighted by the fact that widespread vaccination is likely to render COVID-19 less dangerous to humans than pathogens that are more commonplace. If damaged property could be "repaired" by mass vaccination of *people*, while the property itself remained physically unchanged, the Policy's period

of restoration would make no sense. It would also mean that the duration of the period of restoration would be dependent on community efforts to eliminate the spread of COVID-19, and not on the diligence of property owners to repair or replace their property. Such a conclusion is not supported by a plain-meaning interpretation of the Policy. *Cf. George Gordon Enters., Inc. v. AGCS Marine Ins. Co.*, No. 21STCV02950, slip op. at *8 (Cal. Super. Ct. L.A. Cnty. June 1, 2021) (dismissing with prejudice: "if fully vaccinated individuals can now enter onto [the insured]'s real property and utilize [the insured]'s personal property, [the insured] has not pled what physical change occurred to its real and personal property which enabled such patronage to resume").

(2) Property that merely needs to be cleaned has not been damaged or lost because cleaning is not repair, rebuilding, or restoration.

An item or structure that merely needs to be cleaned has not suffered "loss" or "damage" which is both "direct" and "physical." *See, e.g.*, *Mama Jo's Inc. v. Sparta Ins. Co.*, 823 F. App'x 868, 871-72 (11th Cir. 2020); *accord Universal Image Prods., Inc. v. Fed. Ins. Co.*, 475 F. App'x 569, 574 n.8 (6th Cir. 2012) ("cleaning . . . with hot water and 'Lysol type, cleaning, household cleaning things'" does not "constitute physical loss or damage"). As one court explained:

> Because routine cleaning, perhaps performed with greater frequency and care, eliminates the virus on surfaces, there would be nothing for an insurer to cover, and a covered "loss" is required to invoke the additional coverage for loss of business income under the Policy.

Uncork & Create, 498 F. Supp. 3d at 883–84.

In fact, the only reason to "clean" property on which the COVID-19 virus is suspected to be present is to inactivate the virus as a threat to humans—a process that also occurs naturally through the passage of time. But, as already explained, any threat the virus poses to humans does not equal direct physical loss or damage to property or the threat thereof. *See, e.g.*, *Oral Surgeons*, 2 F.4th at 1144 ("Property that has suffered physical loss or physical damage requires restoration."); *Kim-Chee LLC v. Phila. Indem. Ins. Co.*, 535 F. Supp. 3d 152, 161 (W.D.N.Y. 2021)

("[The COVID-19 virus] presents a mortal hazard to humans, but little or none to buildings which remain intact and available for use once the human occupants no longer present a health risk to one another."), *aff'd* No. 21-1082, 2022 WL 258569 (2d Cir. Jan. 28, 2022); *R.T.G. Furniture Corp. v. Hallmark Speciality Ins. Co.*, No. 8:20-CV-2323-T-30AEP, 2021 WL 686864, at *3 (M.D. Fla. Jan. 22, 2021) ("COVID-19 impacts human health and human behavior. COVID-19 does not impact physical structures, other than to require additional cleaning and sanitizing of those structures."); *Bel Air Auto Auction, Inc. v. Great N. Ins. Co.*, 534 F. Supp. 3d 492 (D. Md. 2021) ("Arguments that the surfaces at its premises needed to be cleaned cannot qualify as restoration."); *Moody v. Hartford Fin. Grp., Inc.*, 513 F. Supp. 3d 496, 507 (E.D. Pa. 2021) ("Nor would coverage for actual or threatened coronavirus contamination make sense in connection with the period of restoration, because cleaning surfaces cannot reasonably be described as repairing, rebuilding, or replacing.").

c. The phrase "direct physical loss or damage" is not ambiguous.

Sullivan argues, in the alternative, that the Policy language is ambiguous, so this Court must, accordingly, adopt its proposed interpretation. Brief at 21-22. But an ambiguity exists only "when the terms of the contract are reasonably susceptible of more than one interpretation." *S.C. Dep't of Natural Res. v. Town of McClellanville*, 345 S.C. 617, 623, 550 S.E.2d 299, 302 (2001). And under South Carolina law, Sullivan cannot "by pointing out a single sentence or clause, create an ambiguity." *Schulmeyer*, 353 S.C. at 495.

The phrase "direct physical loss or damage to property" in a property insurance policy is not *reasonably* susceptible to more than one interpretation. Fireman's Fund has already explained why Sullivan's proposed interpretation is unreasonable. Namely, it requires the Court to (1) delete the word "physical" from the Policy, (2) insert "of use" after the word "loss," and (3) ignore the period of restoration. Such an interpretation is not permitted. *USAA Prop. & Cas. Ins. Co. v. Clegg*,

377 S.C. 643, 655, 661 S.E.2d 791, 797 (2008) ("[C]ourts must enforce, *not write*, contracts of insurance, and their language must be given its plain, ordinary and popular meaning." (emphasis added)); *Stonhard, Inc. v. Carolina Flooring Specialists, Inc.*, 366 S.C. 156, 161, 621 S.E.2d 352, 354 (2005) ("[T]he very act of adding a [contract] term not negotiated and agreed upon by the parties violates public policy."); *see also, e.g.*, *Santo's*, 15 F.4th at 405 (holding policy requiring "direct physical loss or damage" is "not ambiguous"); *Terry Black's*, 22 F.4th at 458 ("The BI/EE provision unambiguously requires a *loss of property*, not the loss of *use* of property." (emphasis in original)).

d. Sullivan's cited outlier cases are distinguishable.

Sullivan cites to the few COVID-19 courts that have denied insurers' motions to dismiss, but these cases are outliers, and the majority of courts throughout the country have rejected their reasoning. The principal federal case Sullivan cites, *Studio 417*, has been repeatedly rejected by other courts, including by another judge in the *same district* in Missouri. *Zwillo V, Corp. v. Lexington Ins. Co.*, 504 F. Supp. 3d 1034, 1043 (W.D. Mo. 2020) ("To the extent this Court's ruling—finding the language in the policy plainly and unambiguously does not cover the claims—conflicts with *Studio 417*, *K.C. Hopps*, and *Blue Springs Dental Care*, this Court respectfully disagrees with those cases."); *see also Sandy Point*, 20 F.4th at 333 (rejecting *Studio 417* and noting it is part of a "small minority of district-court decisions [that] have adopted [plaintiffs'] loss-of-use theory"); *Uncork*, 498 F .Supp. 3d at 883 (declining to follow *Studio 417*; "[W]hile factual allegations drive the analysis of a motion to dismiss, courts are not required to set aside common sense, and neither *Studio 417*, which relied in part on the allegation of presence of the virus, nor the instant case, involve actual allegations of employees or patrons with infections traced to the business."); *West Coast Hotel Mgmt. LLC v. Berkshire Hathaway Guard Ins. Cos.*, 498 F.

Supp. 3d 1233, 1239 n.4 (C.D. Cal. 2020) (declining to follow *Studio 417*); *T & E Chicago LLC v. Cincinnati Ins. Co.*, 501 F. Supp. 3d 647, 652 (N.D. Ill. 2020) (noting *West Coast Hotel*'s decision not to follow *Studio 417* and following suit); *Catlin Dental v. The Cincinnati Indemnity Co.*, No. 20-CA-004555, slip op. at 10 (Fl. Cir. Ct. Dec. 11, 2020) ("Catlin relies on [*Studio 417* and *North State Deli*] . . . . [T]he Court finds that neither of these cases is persuasive or well-reasoned.").

There are similar problems with Sullivan's reliance on *North State Deli, LLC, et al., v. Cincinnati Ins. Co., et al.*, Case No. 20-CVS-05269 (N.C. Super. Ct. Oct. 7, 2020), a state court decision from North Carolina that was decided in the insured's favor. The *North State Deli* court entertained an interpretation of "direct physical loss or damage to property" that dozens of state and federal courts have already rejected. It also erroneously concluded that "direct physical loss or damage" was ambiguous under North Carolina law. But nearly every court in the country construing the same language has found it to be ***unambiguous*** in requiring actual tangible harm to property. And, of course, the same Fireman's Fund language at issue here has repeatedly and consistently been held to be unambiguous. *Boulevard Carroll*, 2020 WL 7338081, at *2 ("The Policy unambiguously limits its coverage to physical loss or damage to Plaintiff's commercial property."); *Water Sports Kauai*, 499 F. Supp. 3d at 673 ("I will follow the overwhelming majority of courts that have determined that the mere threat of coronavirus cannot cause a 'direct physical loss of or damage to' covered property as required under the Policy.").

North State Deli also ignored the first and primary definition of loss in the very dictionary it cited to: "destruction, ruin." *See Loss*, Meriam Webster (Online), available at http://www.Merriam-Webster.com/dictionary/loss. The court also crucially failed to account for the word "physical" which qualifies both "damage" and "loss." What's more, the *North State Deli*

court also ignored the Policy's period-of-restoration requirement which, like the Policy here, expressly requires repairs or replacement damages in order to qualify for business interruption coverage. *See, e.g.*, *Tria WS LLC v. Am. Auto. Ins. Co.*, 530 F. Supp. 3d 533, 544 n.5 (E.D. Pa. 2021) (rejecting *North State Deli* and noting the court "did not [] attempt to reconcile [its] interpretation [of "direct physical loss] with the rest of the polices' coverage provisions—such as their 'repair, rebuild, or replace' language—which, again militate against Plaintiffs' proffered definition"); *Goodwood Brewing, LLC v. United Fire Grp.*, No. 3:20-CV-306-RGJ, 2021 WL 2955913, at *6 n.3 (W.D. Ky. July 14, 2021) (noting *North State Deli* has been "rejected by numerous courts" and declining to follow it); *Kevin Barry Fine Art Assocs. v. Sentinel Ins. Co., Ltd.*, 513 F. Supp. 3d 1163, 1171 n.1 (N.D. Cal. 2021) ("Due to its lack of analysis and the vast majority of courts contradicting this finding, the Court finds *North State Deli* is not persuasive.").

Sullivan's reliance on *Elegant Massage* is flawed for many of the same reasons. For example, the Court in *Elegant Massage* disregarded the word "physical" in the phrase "direct *physical* loss" and did not address the period of restoration. *See Elegant Massage, LLC v. State Farm Mut. Auto. Ins. Co.*, 506 F. Supp. 3d 360, 373 (E.D. Va. 2020). *Elegant Massage* has also been rejected by more than 30 citing authorities, including every other COVID-19 coverage decision from the Virginia state and federal courts. *See, e.g.*, *Carilion Clinic v. Am. Guarantee & Liab. Ins. Co.*, No. 7:21-cv-00168, __F. Supp. 3d __, 2022 WL 347617, at *11 (W.D. Va. Feb. 4, 2022) (noting "[a]mong the Virginia decisions, the decision in *Elegant Massage* stands alone" and holding losses caused by COVID-19 "are not direct physical losses covered under the property insurance policy"); *Adorn Barber & Beauty LLC v. Twin City Fire Ins. Co.*, No. 3:20CV418, 2021 WL 4851062, at *8 (E.D. Va. Oct. 18, 2021) (rejecting *Elegant Massage* and noting "a growing body of federal courts have determined that 'physical loss' does not incorporate viruses");

Crescent Hotels, No. 2021-02974 (Virginia state trial court decision sustaining demurrer to hotel's COVID-19 insurance claim and disagreeing that the presence of the virus creates a physical loss or damage); *Hamilton Jewelry, LLC v. Twin City Fire Ins. Co., Inc.*, No. 8:20-CV-02248-PWG, __ F. Supp. 3d __, 2021 WL 4214837, at *9 (D. Md. Sept. 16, 2021) (*Elegant Massage* and *North State Deli* "are clear outliers that do not meaningfully weigh against the overwhelming authority that supports the conclusion that 'direct physical loss or direct physical damage' requires a showing of 'actual or tangible harm to or intrusion on the property itself'"); *Golden Corral Corp. v. Illinois Union Ins. Co.*, No. 5:20-CV-349-D, __ F. Supp. 3d __, 2021 WL 4097684, at *10 (E.D.N.C. Sept. 8, 2021) (noting *Elegant Massage*, but holding "the court agrees with those courts holding that provisions requiring 'direct physical loss, damage or destruction'. . . require a showing of actual, tangible harm or loss").

Sullivan's citations to the few other COVID-19 coverage opinions ruling for insureds fare no better. *See, e.g., P.F. Chang's China Bistro, Inc. v. Certain Underwriters at Lloyd's of London*, No. 20STCV17169, 2021 WL 818659, at *1 (Cal. Super. Ct. L.A. Cnty. Feb. 4, 2021) (same holding subsequently rejected by Ninth Circuit in *Mudpie* and the California Court of Appeals in *Inns by the Sea*); *see also Circus Circus LV, LP v. AIG Specialty Ins. Co.*, 525 F. Supp. 3d 1269, 1277 (D. Nev. 2021) (refusing to follow *JGB Vegas*, explaining it "is an unpublished, trial-court opinion decided under Nevada Rule of Civil Procedure 12(b)(5), which articulates a lenient 'notice' pleading standard").

Sullivan also relies on a number of pre-COVID-19 cases that it claims stand for the proposition that direct physical loss or damage need not be physical. They do not. Virtually all of those cases involved actual physical harm to property requiring repair or replacement, and each has been distinguished by recent COVID-19 coverage decisions. *See, e.g.*,

- *Murray v. State Farm Fire & Cas. Co.*, 509 S.E.2d 1, 17 (W. Va. 1998) (unstable retaining wall was physically damaged and physically threatened homes);

- *Hampton Foods, Inc. v. Aetna Cas. & Sur. Co*., 787 F.2d 349, 351-52 (8th Cir. 1986) (falling plaster and other "physical damage" and signs of imminent collapse required evacuation of building);

- *Motorists Mut. Ins. Co. v. Hardinger*, 131 F. App'x 823, 824 (3d Cir. 2005) (physical presence of e-coli physically harming the water supply; repeated attempts at physical remediation failed);

- *Mellin v. N. Sec. Ins. Co.*, 115 A.3d 799, 805 (N.H. 2015) (pervasive odor of cat urine in condominium could not be successfully remediated; court found potential coverage only if there was a "distinct and demonstrable alteration of the insured property");

- *Sentinel Mgmt. Co. v. Aetna Cas. & Sur. Co*., 615 N.W.2d 819, 823 (Minn. 2000) (physical release of asbestos fibers required removal of building components costing over $4 million);

- *General Mills, Inc. v. Gold Medal Ins. Co.*, 622 N.W.2d 147 (Ct. App. Minn. 2001) (pesticide misuse physically contaminated oats so as to render them physically unsuitable for consumption and, accordingly, worthless requiring their physical replacement);

- *Farmers Ins. Co. v. Trutanich*, 858 P. 2d 1332, 1336 (Or. Ct. App. 1993) (methamphetamine cooking physically damaged building components);

- *Pepsico, Inc. v. Winterthur Int'l Am. Ins. Co.*, 24 A.D.3d 743 (N.Y. 2d Dep't 2005) (spoiled raw materials physically contaminated soft drink, rendering it unmerchantable and, accordingly, worthless requiring its physical replacement);

- *TRAVCO Ins. Co. v. Ward*, 715 F. Supp. 2d 699 (E.D. Va. 2010) (noxious fumes from Chinese-sourced drywall rendered the premises uninhabitable and required the home to be repaired or replaced);

- *Nat'l Ink & Stitch, LLC v. State Auto Prop. & Cas. Ins. Co.*, 435 F. Supp. 3d 679, 686 (D. Md. 2020) (ransomware attack constituted physical loss or damage where electronic data and software were "covered property" under the policy and plaintiff "sustain[ed] a loss of its data and software," was "left with a slower system, which appear[ed] to be harboring a dormant virus," and was "unable to access a significant portion of software and stored data");

- *Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am.*, No. 2:12-cv-04418, 2014 WL 6675934, at *6 (D.N.J. Nov. 25, 2014) (ammonia leak required evacuation and extensive remediation);

- *Matzner v. Seaco Ins. Co.*, No. Civ. A. 96-0498-B, 1998 WL 566658 (Mass. Sup. Ct. Aug. 12, 1998) (apartment building evacuated due to carbon monoxide gas, requiring repairs to chimney and ventilation system);

- *Oregon Shakespeare Festival Ass'n v. Great Am. Ins. Co.*, No. 1:15-cv-01932, 2016 WL 3267247 (D. Or. Jun. 7, 2016), *vacated on other grounds* 2017 WL 1034203 (D. Or. Mar. 6, 2017) (wildfire caused "smoke, soot, and ash to accumulate on the surface of the hard plastic seats and concrete ground of [plaintiff's] open-air theater");

- *Stack Metallurgical Servs., Inc. v. Travelers Indem. Co. of Conn.*, No. 05-1315-JE, 2007 WL 464715, *8 (D. Or. Feb. 7, 2007) (involving "physical change in the furnace resulting from a release of lead particles");

- *American Alliance Ins. Co. v. Keleket X-Ray Corp.*, 248 F.2d 920, 922 (6th Cir. 1957) (capsule containing "highly radioactive radium salt" "exploded," resulting in "[l]arge quantities of stock and material [being] contaminated and rendered unsalvageable");

- *Western Fire Ins. Co. v. First Presbyterian Church*, 437 P.2d 52 (Colo. 1968) ("gasoline and vapors thereof infiltrated and contaminated the foundation and halls and rooms of the church building" requiring over $21,000 spent on repairs, including repairing a gas leak); and

- *Hughes v. Potomac Ins. Co.*, 199 Cal. App. 2d 239 (1962) (insured house "suffered real and severe damage when the soil beneath it slid away and left it overhanging a 30-foot cliff," requiring that "such damage [be] repaired and the land beneath the building stabilized.").

As another court interpreting the same Fireman's Fund policy at issue here explained in addressing this line of cases:

> the presence of COVID-19 . . . did not cause damage to the property necessitating rehabilitation or restoration efforts similar to those required to abate asbestos or remove poisonous fumes which permeate property. Instead, all that is required for Plaintiff to return to full working order is for the Governor to lift the decrees and restrictions.

First & Stewart Hotel Owner, LLC v. Fireman's Fund Ins. Co., No. 2:21-cv-00344-BJR, 2021 WL 3109724, at *4 (W.D. Wash. July 22, 2021); *accord Kim-Chee LLC v. Philadelphia Indem. Ins. Co.*, No. 21-1082-CV, 2022 WL 258569, at *2 (2d Cir. Jan. 28, 2022) ("[T]he virus's inability to physically alter or persistently contaminate property differentiates it from radiation, chemical dust,

gas, asbestos, and other contaminants whose presence could trigger coverage under [the] policy."). So too here.

3. The Communicable Disease coverage extension does not establish that COVID-19 can cause "direct physical loss or damage," nor does it render that Policy language ambiguous.

Sullivan argues that the Policy's Communicable Disease coverage extension, "shows that communicable diseases ***can*** cause direct physical loss or damage to property." Brief at 19 (emphasis in original). Sullivan argues that, because Communicable Disease coverage provides for reimbursement to repair, rebuild, or replace property that has been damaged or destroyed by a virus, the Policy acknowledges that a virus can cause property damage or destruction.

That argument misunderstands the Policy provisions. Communicable Disease coverage is a wholly separate, narrow coverage extension with its own sublimit. It is not triggered by direct physical loss or damage to property, but rather by the occurrence of a "communicable disease event." "Communicable disease event" is a defined term that means "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 76. Although Communicable Disease coverage pays only for direct physical loss or damage to property, that physical loss or damage is not the *trigger* for coverage and need not have been caused by the communicable disease itself. Rather, covered physical loss or damage can arise from the insured's efforts to decontaminate or disinfect the property to comply with the order that gave rise to a communicable disease event. *Id.* at 45. By contrast, business income coverage is a separate provision which, as explained above, is triggered by "a suspension of . . . operations during the period of restoration arising from direct physical loss or damage to property." *Id.* at 30. It thus requires direct physical loss or damage to property as a triggering event and conditions its payment on the expeditious repair, rebuilding, or replacement of such property.

Further, the fact that communicable disease coverage pays for (among other things) direct physical loss or damage caused by a disease-causing pathogen does not mean that all such pathogens cause physical loss or damage. Common experience shows that the vast majority do not. Although there may be a virus that could cause direct physical loss or damage to property, COVID-19 does not. More than two years of shared experience bears this out. *See Dino Drop*, __ F. Supp. 3d __, 2021 WL 2529817, at *7 ("[T]he presence of COVID-19 at the premises is analogous to the presence of virus particles causing influenza or the common cold.").[5]

B. The Policy's Business Access and Civil Authority coverages have not been triggered.

This section addresses Certified Question number 2. If the Court agrees that COVID-19 does not cause direct physical loss or damage, the Court need not answer this question at all because, like the other at-issue Policy provisions, both the Business Access and Civil Authority coverages require a showing of direct physical loss or damage. Policy at 42. As explained above, the Policy's direct physical loss or damage prerequisite requires an actual, discernable alteration to property, which COVID-19 does not cause. However, if the Court addresses this question, it should conclude the Civil Authority provision requires a complete prohibition of access to Sullivan's property and the Business Access requires a physical impairment or obstruction of access to property.

[5] Relatedly, Sullivan argues that Fireman's Fund's construction of direct physical loss or damage would render the "Money Orders and Counterfeit Currency" coverage extension illusory. Brief at 21. But that argument makes no sense because that coverage extension is not triggered by direct physical loss or damage. *See* Policy at 40. It is, instead, triggered by "your loss which directly results from you accepting" counterfeit currency in exchange for goods or services. *Id.* "Loss" as used here is not a "physical loss." It is thus wholly consistent with Fireman's Fund's interpretation and, for obvious reasons, also contradicts Sullivan's interpretation that a "physical loss" need not be physical.

The Civil Authority provision, by its plain terms, requires that Sullivan be *prohibited* from accessing its restaurants. Policy at 42 (requiring an "action of civil authority that *prohibits access* to a **location**" (italics added)). "Prohibit" means to "to forbid [access] by authority or command." *730 Bienville Partners, Ltd. v. Assurance Co. of Am.*, 67 F. App'x 248 (5th Cir. 2003); *see also Prohibit*, Meriam Webster (Online), available at http://www.Merriam-Webster.com/dictionary/prohibit (defining "prohibit" as "to forbid by authority"). Indeed, Sullivan's own brief admits this definition is correct. Brief at 36 ("'Prohibit' is commonly used to mean 'to refuse to permit; forbid by law or by an order' or 'to prevent; hinder.'" (quoting *Prohibit*, Collins English Dictionary Online)). Under a plain-meaning reading of the policy, "[t]he clause requires complete prohibition of access." *Lafayette Bone & Joint Clinic v. Transp. Ins. Co.*, No. 6:21-cv-00317, 2021 WL 1740466, at *4 (W.D. La. May 3, 2021); *Wild Eggs Holdings, Inc. v. State Auto Prop. & Cas. Ins. Co.*, No. 3:20-CV-501-RGJ, __ F. Supp. 3d __, 2021 WL 4234940, at *11 (W.D. Ky. Sept. 16, 2021) (plain meaning of civil authority coverage required an order that plaintiff was "'not permitted' to 'enter' the 'described premises'" (quoting Merriam-Webster, www.merriam-webster.com/dictionary)); *Windber Hosp. v. Travelers Prop. Cas. Co. of Am.*, No. 3:20-CV-80, 2021 WL 1061849, at *5 (W.D. Pa. Mar. 18, 2021) (civil authority coverage did not apply because there "was not a complete prohibition on access" to insured property").

Recognizing that it was not prohibited from accessing its restaurants during the pandemic, Sullivan instead claims the Civil Authority coverage nevertheless applies because its customers were supposedly prevented from accessing the property. Brief at 37. But that is not what the Policy requires. Civil Authority coverage is triggered only where a civil authority *prohibits* everyone from accessing the property. Policy at 42.

Regardless, even if Sullivan's reading of the Policy were correct, it makes no difference. Sullivan's Complaint is clear that the government *did not prohibit anyone* from accessing its property. Although Sullivan has pleaded that government orders limited in-restaurant dining, it readily admits that its restaurants were allowed to remain open for takeout and delivery, meaning the properties were fully accessible to Sullivan, its employees, and its customers. Complaint ¶ 40; *see, e.g., Michael Cetta, Inc.*, 506 F. Supp. 3d at 184 (denying civil authority coverage in COVID-19 coverage dispute because plaintiff could not plead "access was ever denied completely to [plaintiff's] restaurant"); *TAQ Willow Grove, LLC v. Twin City Fire Ins.*, 513 F. Supp. 3d 536, 546 (E.D. Pa. 2021) ("[T]hat [plaintiff] could have provided carry-out and/or delivery services at its insured property under the Civil Authority Orders reveals that a prohibition on access to the properties—a prerequisite to coverage under its policy—is absent here and precludes coverage under the civil authority provision."); *Wild Eggs*, 2021 WL 4234904, at *11 ("Because the Orders allowed Wild Eggs personnel to 'enter' the 'described premises' to prepare food for carry-out, drive-through, and delivery services, Wild Eggs has failed to plausibly allege that it was prohibited from accessing them."); *B St. Grill & Bar LLC v. Cincinnati Ins. Co.*, 525 F. Supp. 3d 1008, 1017 (D. Ariz. 2021) (no civil authority coverage because government orders "did not prohibit access to the insured premises, but merely stated that on-site dining was prohibited").

In claiming it is entitled to Business Access coverage, Sullivan focuses on its alleged "suspension of operations," but ignores that the Business Access provision only applies where access to Sullivan's property "is impaired or obstructed." Policy at 42. The plain meaning of this clause requires some actual, physical impediment to property access. *See* Merriam-Webster.com/dictionary (defining "obstruct" as "to block or close up by an obstacle; to hinder from passage, action, or operation" and defining "impair" as "to diminish in function, ability, or

quality"). But Sullivan has not pleaded that access to its properties was physically obstructed or impaired at any time. Although Sullivan suggests the at-issue government orders impaired its *operations*, Brief at 35-36, the provision is clear that *access to property* must be impaired. Policy at 42. As noted above, Sullivan's restaurants were allowed to remain open throughout the pandemic and remained fully accessible to its employees and patrons for takeout and delivery service. Accordingly, Sullivan cannot establish a plausible claim for Business Access coverage.

C. Communicable Disease coverage requires a "communicable disease event," which has not occurred here.

This section addresses Certified Question number 3. Again, the Court need not answer this question if it agrees with Fireman's Fund on the interpretation of physical loss or damage because Communicable Disease coverage, like the other coverages under which Sullivan has sued, requires a showing of direct physical loss or damage, albeit as a limitation on damages and not as a triggering event. If the Court chooses to address this question, the answer is no.

As noted above, communicable disease coverage is only triggered upon the occurrence of a "communicable disease event," defined in the Policy as "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 76 (emphasis added). "Location" is a defined Policy term meaning "the legal boundaries of a parcel of property at the address described in the Declarations." Policy at 79 (definition), 5-6 (listing the insured locations). "Public health authority" is defined as "the governmental authority having jurisdiction over your **operations** relative to health and hygiene standards necessary for the protection of the public." Policy at 83 (emphasis in original).

Sullivan does not argue this Policy provision is ambiguous or claim it means anything but what it plainly says. Instead, Sullivan asserts that the general South Carolina and Georgia

government orders designed to curb the spread of COVID-19 in the community are sufficient to qualify as communicable disease events. Brief at 40-44. Sullivan argues that the Governor of South Carolina has emergency power to prevent property damage, but the executive orders make no mention of protecting property. They are general, statewide prophylactic orders designed to minimize the spread of COVID-19 from person to person. *See, e.g.*, S.C. Executive Order No. 2020-08 (concluding COVID-19 constituted a "actual or imminent public health emergency" because the disease "poses a substantial risk of a significant number of human fatalities [or] widespread illness"); S.C. Executive Order No. 2020-09 (noting closure orders issued in response to "community spread" of COVID-19); Executive Order No. 2020-10 (same).

And, of course, none of the orders was issued by a public health authority, nor did they result from an outbreak *at Sullivan's restaurants*, nor did they require that the restaurants be "evacuated, decontaminated or disinfected." To the contrary, the government orders specifically allowed restaurants to remain open and serve customers throughout the pandemic. In fact, in a section of South Carolina Executive Order 2020-10 that Sullivan omits from its brief, the Governor actually *encouraged* restaurants like Sullivan's to remain open, even though in-person dining was suspended:

> I hereby order and direct that any and all restaurants or other food-service establishments (collectively, "Restaurants"), as set forth below . . . shall suspend services for, and may not permit, on-premises or dine-in consumption, beginning Wednesday, March 18, 2020, and through Tuesday, March 31, 2020. Notwithstanding the foregoing directive and prohibition, *I hereby authorize, permit, and encourage, Restaurants to prepare, produce, or otherwise offer or sell food or beverages for off-premises consumption* to the extent currently authorized, permitted, or otherwise allowed by law, whether via delivery, carry-out or drive-thru distribution, curbside pick-up, or other alternate means.

S.C. Executive Order No. 2020-10 (emphasis added).

As several other courts have held, general, statewide prophylactic orders do not meet the requirements of communicable disease coverage. As one court explained:

> The orders . . . were based on whether a business was "essential," *not* on whether there was confirmed presence of COVID-19 at the business. Put another []way, [plaintiff's] properties would have been affected by the orders whether or not any COVID-19 had been confirmed at its locations; the orders, therefore, were not "regulating the actual not suspected presence of communicable disease," as required to trigger coverage under the Policy. . . . Under the plain language of the Policy, it is not enough for [plaintiff] to cite a government order limiting, restricting, or prohibiting access to its properties base[d] on the possible, or even suspected, presence of COVID-19; an order based on the actual presence of COVID-19, absent here, is required.

Spirit Realty Capital, Inc. v. Westport Ins. Corp., No. 21-CV-2262 (JMF), 2021 WL 4926016, at *5 (S.D.N.Y. Oct. 21, 2021); *see also Dakota Girls, LLC v. Phila. Indem. Ins. Co.*, 17 F.4th 645, 651 (6th Cir. 2021) (affirming denial of coverage under communicable disease provision because the at-issue state shutdown orders were not due to the presence of COVID-19 at insured property and there was "no allegation that Ohio's Director of Health had ever even heard of [plaintiffs]").

Sullivan cites to *Treo Salon, Inc. v. West Bend Mutual Insurance Company* and *Salon XL Color & Design Group, LLC v. West Bend Mutual Insurance Company*, Brief at 43-44, but those cases involved a communicable disease coverage materially different from the Fireman's Fund coverage at issue here. They did not, as here, require "that ***a location*** be evacuated, decontaminated, or disinfected due to the outbreak of a communicable disease ***at such location***." Policy at 76; *compare Treo*, 538 F. Supp. 3d 859, 865-66 (S.D. Ill. 2021); *Salon XL*, 517 F. Supp. 3d 725, 728 (E.D. Mich. 2021). Further, the salons at issue in *Treo* and *Salon XL* were both non-essential businesses actually ordered to close in the early days of the pandemic, whereas Sullivan's restaurants were permitted (and encouraged) to remain open for take-out and delivery. *See* S.C. Executive Order No. 2020-10.

D. The Loss Avoidance or Mitigation coverage provision does not cover Sullivan's alleged COVID-19-related expenditures.

This section addresses Certified Question number 4. As detailed below, Sullivan's alleged expenditures to mitigate COVID-19 do not qualify for Loss Avoidance or Mitigation coverage.

Sullivan argues that it has alleged a "potential covered loss" under Loss Avoidance or Mitigation coverage. *See* Brief at 44-45. This provision provides coverage for "necessary expense[s]" incurred to protect against an actual, imminent threat of a "potential covered loss or damage," including, for example:

> (1) Removal of ice or snow from the roof or balconies of **business real property** that has accumulated during and due to a **storm**;
>
> (2) Pumping of standing water away from **business real property** that has accumulated during and due to a **flood, hurricane, named storm,** or **storm**;
>
> (3) Application of fire retardant foam or similar fire suppression or extinguishing material to **business real property** as protection against an approaching fire; and
>
> (4) Boarding up or sandbagging of doors, windows, or other external openings in **business real property** as protection against an approaching **flood, hurricane, named storm,** or **storm**.

Policy at 39 (bold in original). Setting aside that Sullivan failed to plead that such coverage applies, *see generally* Complaint, in order to have *covered loss or damage*—potential or otherwise—logically the loss or damage must be direct physical loss or damage to property. After all, those are the only losses covered. *See* Section III.B. And each of the examples clearly contemplates coverage for an imminent threat of *physical* loss or damage to property (fire damage, water damage, etc.).

As explained above, COVID-19 does not cause physical loss or damage to property. Although Sullivan highlights that the Loss Avoidance or Mitigation coverage extends to "potential" covered losses, there was simply no potential that COVID-19 could have physically harmed its property. Sullivan's cited case law does not disagree. Brief at 45. Neither *P.F. Chang's*

nor *Novant* even considered Loss Avoidance or Mitigation coverages like the one at issue here. Rather, both are outlier cases denying insurers' dismissal motions based on a conclusion that COVID-19 could cause physical loss or damage, which were wrongly decided for the reasons stated above. COVID-19 does not and cannot physically impact property in a way that causes direct physical loss or damage, and Sullivan, accordingly, is not entitled to Loss Avoidance or Mitigation coverage.

E. The Policy's virus exclusion bars loss or damage caused by a virus.

This section addresses the final Certified Question presented to this Court, which concerns the interpretation of the Policy's virus exclusion. But the question of whether an exclusion prevents coverage for Sullivan's losses is only relevant if Sullivan has suffered a covered loss. As explained above, Sullivan has not, as a matter of law, experienced direct physical loss or damage to its property and, accordingly, has not suffered a covered loss under the Policy. If this Court agrees, its analysis can end there, and the Court need not address the Certified Question number 5 at all.

But even if Sullivan were able to demonstrate coverage, the virus exclusion applies to all coverages except Communicable Disease. The virus exclusion provides that Fireman's Fund will not pay for

> any loss, damage, or expense caused directly or indirectly by or resulting from any of the following excluded causes of loss: . . . Mortality, death by natural causes, disease, sickness, any condition of health, bacteria, or ***virus***.

Policy at 31-32 (emphasis added). Sullivan admits that COVID-19 is a virus and that its alleged damages arose from the COVID-19 pandemic. *See, e.g.*, Brief at 1-2. The virus exclusion thus applies. *See B.L.G. Enterprises, Inc. v. First Fin. Ins. Co*., 334 S.C. 529, 535-36, 514 S.E.2d 327, 330 (1999) ("[I]nsurers have the right to limit their liability and to impose conditions on their obligations provided they are not in contravention of public policy or a statutory prohibition.")

Despite the exclusion's clear language excluding losses caused by a virus, Sullivan argues the exclusion is ambiguous and should be read as a *mortality* exclusion that only excludes losses resulting in death. Brief at 47 (claiming, without citation, "[i]t is patently reasonable to read [the virus exclusion] as excluding *mortality*" (emphasis in original)). As Sullivan's brief readily acknowledges, such a reading requires the addition of words into the exclusion. Brief at 47 (urging the Court to read the virus exclusion as excluding "*death* by natural causes; *death* by disease; *death* by sickness; *death* by any condition of health; *death* by bacteria; or *death* by virus" (emphasis in original)). This tortured interpretation of the Policy's plain language would rewrite the Policy's "Mortality and Disease" provision into a "Mortality-only" provision, thus violating established South Carolina principles of contract interpretation. *See Diamond State*, 318 S.C. at 236 ("[C]ourts have no authority to torture the meaning of policy language to extend or defeat coverage that was never intended by the parties."); *Schulmeyer*, 353 S.C. at 495 ("Parties to a contract have the right to construct their own contract without interference from courts to rewrite or torture the meaning of the policy to extend coverage."); *South Carolina Ins.*, 301 S.C. at 137 (explaining a policy's meaning is "defined by the terms of the policy and cannot be enlarged by judicial construction").

Other courts have held the identical exclusion in the same Fireman's Fund policy form unambiguously bars claims like those Sullivan makes here. *See, e.g., Boulevard Carroll*, 2020 WL 7338081, at *2 ("In addition, the Policy clearly excludes coverage for damage, loss or expense arising from a virus."); *Marina Pacific*, 20SMCV00952, slip op. at *9 ("This provision expressly excludes coverage of any direct physical loss or damage resulting from a virus; it is beyond dispute that COVID-19 is a virus.").

Sullivan counters that the Court must adopt its interpretation of the virus exclusion to avoid an "internal inconsistency" between Communicable Disease coverage extension and the virus

exclusion. But by its own terms, the virus exclusion does not apply to Communicable Disease coverage. Indeed, the Court need not even address this alleged "inconsistency" because Fireman's Fund does not claim that the virus exclusion applies to Communicable Disease coverage. *See* ECF No. 45-1 at 28 (Fireman's Fund's brief before the district court, stating "[the virus] exclusion is applicable to all coverages *except Communicable Disease*").

There is no inconsistency or ambiguity in the Policy. By its plain terms, the virus exclusion applies to bar losses caused by COVID-19. *See B.L.G.*, 334 S.C. at 537 ("First Financial chose to exclude from coverage bodily injury and property damage by reason of the distribution of alcoholic beverages by BLG. The language in the policy clearly and unambiguously reflects this exclusion. Accordingly, the exclusion should be enforced.").

VI. CONCLUSION

For the reasons detailed above, this Court should hold under South Carolina law that the presence of COVID-19 in or near Sullivan's properties, and/or related governmental orders, does not cause direct physical loss or damage. This question is fully dispositive of Sullivan's claims, and the Court's analysis can end there. To the extent the Court answers the remaining certified questions, they should be resolved in Fireman's Fund's favor, as detailed above.

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