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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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

Mary Geiger Lewis, United States District Court Judge

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

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Sullivan Management, LLC,

Plaintiff,

v.

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

Defendants.

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**REPLY BRIEF OF PLAINTIFF**

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## INTRODUCTION

Many of Allianz's<sup>1</sup> arguments ignore the purpose of a business interruption policy, ignore the significance of an all-risk policy, ignore the plain meaning of terms in its own policy, and ignore the allegations of Sullivan's well pled Complaint.

Allianz has lost sight of the purpose of a commercial property insurance policy, to protect against business interruption of an insured's operations caused by a fortuitous event that physically renders property unstable or unsafe due to damage or contamination. Allianz fails to acknowledge that Sullivan is in the business of hosting (safe and comfortable) locations for customers to gather, eat, and drink, during sporting events, happy hours, holidays, parties, and the like. It fails to recognize that Sullivan's losses were caused by the actual presence of the virus in the air and on surfaces, and that Sullivan's locations were deprived of their ability to function and operate normally, because the virus rendered them unsafe and unfit for use.

Allianz ignores that businesses buy commercial property insurance to insure against the risk of not being able to use the insured properties for their intended business operations. It does not matter that the thing causing loss or damage preventing safe use of the property is large like a hurricane, or microscopic like noxious fumes or a deadly virus. All such things cause physical loss or damage to property and that is what insurance purchased, without a virus exclusion, is for.

Allianz refuses to recognize that Sullivan's business was suspended both because of SARS-CoV-2<sup>2</sup> and the ensuing orders of civil authority – both of which are insured causes of loss under

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<sup>1</sup> Defendants Fireman's Fund Insurance Co. and its parent company, Allianz Global Risk US Insurance Co., are collectively referred to herein as "Allianz."

<sup>2</sup> Although used interchangeably, "COVID-19" and "SARS-cov-2" are not the same thing: the latter is the virus itself, while the former is the disease caused by the virus. See World Health Organization Coronavirus Disease Information, available at: <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/technical-guidance/naming->

the policy Sullivan purchased. Allianz refuses to acknowledge that the virus is deadly. Allianz denies that COVID-19 can (and did) physically enter and change the air, surfaces, and interiors of Sullivan's properties and adjacent properties, ignoring both science and Sullivan's pleading, which must be taken as true. Allianz ignores that Sullivan's dining rooms and bars, outdoor gathering areas – and the tables, chairs, countertops, floor surfaces within them - could not be made safe because the virus had infiltrated, contaminated, and re-contaminated them over and over again. Allianz ignores that there was *no commercial means to remove, decontaminate, limit, or contain* SARS-CoV-2, or to in any way keep Sullivan's properties from being infected with the deadly virus. Within a matter of days, Sullivan's properties were transformed, from fully operational business locations into crippled ones. The extent and duration of the covered losses involves factual disputes that will be litigated by the parties, but the trigger of coverage by the physical loss and damage caused by COVID-19 is clear and alleged in the Complaint.

This basic purpose of business interruption insurance has been validated by 60 years of precedent confirming coverage for losses caused by such things as odors, fumes, smoke and gases, as well as *e coli*, bacteria and dangerous particles – none of which cause “physical alteration, destruction, or permanent dispossession of property” as Allianz attempts to require here. Allianz has known for decades that policyholders and courts interpret “physical loss or damage” to cover such losses and, if it wanted to revise the policy forms it drafts and sells to include requirements of “structural alteration,” “destruction,” or “permanent dispossession,” it could have. It did not.

In an attempt to thwart the purpose of the insurance it sold to Sullivan – without a virus exclusion – Allianz's Brief resorts to: (i) backtracking on admissions that a virus can cause

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*the-coronavirus-disease-(covid-2019)-and-the-virus-that-causes-it*. To save space, Sullivan uses COVID-19 to reference both the virus and the disease it causes.

“physical loss or damage”; (ii) mischaracterizing the allegations in Sullivan’s Complaint; and (iii) attempting to add restrictive terms that it chose not to include in the Policy at the time of sale:

- Allianz concedes that viruses *can* cause direct physical loss or damage to property, yet somehow asserts that the SARS-CoV-2 virus does not (Initial Brief of Allianz, *et al.*, hereinafter referred to as “Brief”, at 35);
- Allianz incorrectly contends that Sullivan seeks coverage for “intangible economic harm,” “purely economic harm,” and “financial losses” (*Id.* at 1, 4, 12, 19) – completely ignoring the fact that Sullivan’s Complaint clearly alleges that its losses are the result of physical loss and damage caused by COVID – just like the losses in *any* business interruption claim;
- Allianz repeatedly tries to add restrictions to coverage that were not included in the insurance contract sold to Sullivan, including supposed requirements of “physical alteration” (*id.* at 11, 12, 14, 15, 18) “destruction” (*id.* at 11, 12-13, 20-22, 29, 31) or “permanent dispossession” (*id.* at 11, 20-21, 31-33);
- Allianz argues that the Policy’s “Mortality and Disease” exclusion (“Exclusion”) is in actuality a “Virus Exclusion” that “applies to all coverages except Communicable Disease”
  - even though the Exclusion is nothing like Allianz’s own virus exclusion or the ISO virus exclusion; and
  - even though the Policy says that the Exclusion *is* applicable to the Communicable Disease extension (*Id.* at 42).

As explained below, these straw-clutching assertions either (1) ultimately serve to support Sullivan’s arguments in favor of coverage; or (2) do not withstand scrutiny.

## ARGUMENT

### **I. Allianz’s Permeating and Pervasive Errors of Fact and of Law**

There are three components attendant to a South Carolina court’s *prima facie* interpretation of whether an insured has pled into coverage under a contract of insurance: the *pleadings*, the *policy*, and whether *binding precedent* exists which can or should affect a court’s interpretation. *See generally* Sullivan Brief. Here, Allianz’s Brief to the Court either ignores,<sup>3</sup> mischaracterizes,

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<sup>3</sup> In fact, Allianz offers approximately seven (7) pages of block quotes to out of state cases with distinguishable factual circumstances and policies in lieu of analyzing these factual circumstances, its own Policy, and South Carolina law.

or misconstrues each of these three components.

**a. Allianz Repeatedly Mischaracterizes What is Pled and Sought by Sullivan**

Allianz repeatedly mischaracterizes Sullivan’s Complaint. For example, Allianz asserts that Sullivan has pled and seeks coverage for “purely economic harm” (Brief at 4), “financial losses” (*id.*), and “intangible economic harm” (Brief at 1), insinuating that Sullivan did not plead a *physical* harm or a *physical* loss. Allianz is wrong. Sullivan pled that its restaurants (as well as adjacent properties) were contaminated by SARS-CoV-2 particles and suffered direct physical loss or damage. *See, e.g.*, Compl. at ¶¶ 58 (infection of surfaces (*i.e.*, fomites), 59 (airborne spread), 60 (contamination began sooner than known cases), 62 & 64 (presence & contamination), 65 (resulting direct physical loss or damage to property); *see also* ¶ 33 (SARS-CoV-2’s arrival in South Carolina prior to March 15, 2020). The *result* of the contamination was certainly economic in nature, as is common for most physical losses or damages which need to be monetized to be addressed. This is also typical for business interruption claims.<sup>4</sup>

Allianz further states that Sullivan “failed to allege that it incurred any expenses related to the repair, rebuilding, or replacement of any lost or damaged property.” (Brief at 4). Allianz is again wrong. Allianz follows its misstatement with a quote from Sullivan’s Complaint, that debunks their statement:

Sullivan alleged (i) “consumables and inventory damage and loss,” (ii) “costs for cleaning of production lines and equipment to remove contaminants,” and (iii) “increased cleaning and sanitization costs.”

*Id.* Sullivan additionally pleads and seeks coverage for event cancellation costs, business income it lost, and extra expenses and restoration costs expended to cleanup and return its properties to a

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<sup>4</sup> “[T]he general purpose of business interruption insurance is to protect earnings which the insured would have enjoyed had no interruption occurred.” 43 Am. Jur. 2d *Insurance* § 509.

safe and fit condition for gathering and dining in. These losses and expenses include the costs to sufficiently dissipate and repeatedly de-contaminate and remove SARS-CoV-2 particles.

**b. South Carolina Law Does Not Allow An Insurer To Invent Shifting, Undisclosed Limitations To The Policy, as Allianz Does Here**

Allianz shifts its pre-requisites for coverage as it progresses through its brief. It initially states that an insured must show 1) non-temporary,<sup>5</sup> distinct and demonstrable physical alteration of property; 2) destruction of property; or 3) permanent dispossession of property (Brief at 2). Allianz later asserts that the insured must show an “actual” or “discernable” physical damage or that property has become “physically lost” (Brief at 11). Allianz then goes on to assert that the insured must show “destruction, ruin, or harm of a material/perceptible nature to property, which was suffered without an intervening agency, instrumentality, or influence.” (*id.*).

Critically, Allianz’s added language limits coverage by adding conditions not contained in the policy (*e.g.*, “actual,” “discernable,” “temporary,” “physical *alteration*,” “*permanent dispossession*”) (Brief at 2, 11). Allianz cannot insert additional conditions not borne out by the Policy’s plain language that favor itself over Sullivan, the policyholder.<sup>6</sup> Most troubling is Allianz’s insertion of a “permanence” requirement into “direct physical loss,” and its attempt to convert “loss” to “lost.” These points are addressed in more detail in the sections that follow.

**c. Allianz’s Restoration Arguments Are Inconsistent With The Policy They Drafted And The Plain Meaning Of Restoration**

Allianz argues that “[a]n item or structure that merely needs to be cleaned has not suffered ‘loss’ or ‘damage’ which is both ‘direct’ and ‘physical’” because “cleaning,” is not contemplated

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<sup>5</sup> See Brief, at 1 (“They [COVID-19 particles] are temporary, can be cleaned with a disinfectant or soap and water, and do not destroy or alter the structure of property.”).

<sup>6</sup> As *amicus* United Policyholder’s aptly points out, Allianz *did not* draft the Policy to include these constrained meanings of the Operable Phrase, although Allianz could have as it has been on notice of the different interpretations of this policy language for over half a century. (*See Amicus Curiae* Brief of United Policyholder’s (“*Amicus Brief*”) at 11 ).

by the Policy’s **period of restoration**, or by the undefined terms “restore” or “repair.” (Brief at 26). By this, Allianz attempts to construct another policy condition that is contrary to the plain words of their Policy. Allianz’s effort to discredit cleaning is unpersuasive for at least 5 reasons:

- Allianz ignores the common and plain meaning of “restore,” which is inclusive of cleaning. For example, Merriam Webster Dictionary—Allianz’s dictionary of choice—includes both “repair” and “clean” in the definition of “restore”. (*Restore*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/restore>.) (“to return (something) to an earlier or original condition by repairing it, *cleaning* it, etc.”) (emphasis added).
- The language of the Policy itself contemplates instances where covered physical loss or damage must be restored *via* cleaning. For example, the Policy’s Communicable Disease Coverage provides that Allianz “will pay for direct physical loss or damage to **Property Insured**.... including...costs incurred to: ..... treat, *clean*, detoxify, *disinfect*...., and assess the effects the **communicable disease**.” (Policy at 21-22).<sup>7</sup> Given the way Allianz chose to craft this and other provisions (*e.g.*, Fungus Remediation Coverage) it is clear that “restoration” encompasses costs for cleaning and other de-contamination steps.
- The **period of restoration** is used to determine the *duration* of coverage, not to limit whether coverage is triggered in the first instance.
- There is no property-that-can-be-restored-by-cleaning-does-not-constitute-physical-loss-or-damage rule recognized by South Carolina.<sup>8</sup>

According to a plain reading of the Policy, whether property suffers a “loss” or “damage” (that is “direct” and “physical”) does not turn on the degree of “cleaning” or disinfecting, necessary to restore that property to a fit, safe, useable, and habitable state.

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<sup>7</sup> The Communicable Disease Coverage also states that Allianz “will pay for... loss of **business income** and necessary **extra expense**.... during the **period of restoration**.”

<sup>8</sup> See also Plaintiff’s Opening Brief at 24-28 (citing and discussing the longstanding precedence). Contrary to Allianz’s position, a variety of cases have specifically recognized that in instances when an airborne toxin or injuring agent has arrived or infiltrated property, it has to be “cleaned”. *E.g.*, *Oregon Shakespeare Festival Ass’n v. Great Am. Ins. Co.*, No. 1:15- cv-01932, 2016 WL 3267247, at \*4-5, \*9 (D. Or. June 7, 2016), *vacated on other grounds by Oregon Shakespeare Festival Ass’n v. Great Am. Ins. Co.*, 2017 WL 1034203 (D. Or. Mar. 6, 2017) (wildfire smoke infiltration into insured theater necessitated cleaning; *Oregon Shakespeare* Court rejected insurer argument that “restoration” period of time is limited to when *structural* repairs are necessary).

**i. Allianz Ignores The Plain Meaning Of The Period of Restoration**

The period of recovery is used to determine the duration of coverage, **not** whether coverage is triggered in the first place. The question of duration clearly involves fact issues in dispute that will be determined before the trial court. But just because the loss or damage at issue might be capable of being “repaired” or “restored” in a few days does not mean there was not any “loss or damage” that triggered coverage in the first instance. Moreover, the Policy includes an extension of coverage that insures an extended period of recovery over not only the period of time it takes to “restore” physical property, but also the time it takes to restore the *business* to its pre-loss condition. (See Policy, p. 19, para. 6). And then there’s the issue of re-contamination, which obviously complicates and extends the **period of restoration**.

**d. Allianz Misapplies South Carolina Precedent, Largely Ignores South Carolina Precedent Which is Relevant, and Even Non-Binding Precedent is Premised on Couch’s Fallacy**

Allianz argues that “South Carolina law recognizes that physical losses must be physical and that economic loss alone is not enough.” (Brief at 12). The cases Allianz relies upon to support this statement (1) concern different types of policies; (2) concern wildly different factual circumstances; and (3) are selectively quoted and otherwise mischaracterized. Additionally, Allianz largely ignores cases establishing South Carolina canon on insurance policy interpretation,<sup>9</sup> and instead relies on an erroneous section of *Couch* and post-COVID-19, out-of-jurisdiction cases which have done the same.

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<sup>9</sup> Sullivan briefed South Carolina interpretive canon at length in its Opening Brief to this Court. (See Pltf. Br., at 8-15, 20, 36-37, 45-46).

**i. The South Carolina Cases Allianz Relies on Concern Third-Party Liability Policies and Inapposite Facts**

Allianz’s reliance on this Court’s opinion in *Carl Brazell*, the Court of Appeals’ decision in *Pulliam*, and the Federal district court’s opinion in *Campbell* are unpersuasive for a number of reasons, including that each case concerned the application of *defined* phrases in *third-party liability* policies. Commercial general liability (“CGL”) and other third-party liability policies insure a person or business against loss sustained by a third-party or to a third-party’s property, generally. *Isle of Palms Pest Control Co. v. Monticello Ins. Co.*, 319 S.C. 12, 459 S.E.2d 318 (Ct. App. 1994). The Policy at issue here is a *first-party*, all-risk, commercial property policy. Sullivan’s Opening Brief addressed each case in detail; however, to summarize:

- *Auto-Owners Ins. Co. v. Carl Brazell Builders, Inc.* concerned *defined words* in a CGL policy. 356 S.C. 156, 163–64, 588 S.E.2d 112, 116 (2003) (emphasis added).<sup>10</sup>
- *Pulliam* concerned *defined words* in a director’s and officer’s (“D&O”) policy. *Pulliam v. Travelers Indem. Co.*, 403 S.C. 332, 341, 743 S.E.2d 117, 122 (Ct. App. 2013).
- *Campbell* involved *defined words* in an unique cargo liability insurer’s policy. *Campbell, Inc. v. N. Ins. Co. of New York*, 337 F. Supp. 2d 764, 769 (D.S.C. 2004).

None of the foregoing cases are precedential or instructive to the instant case, as (1) the policies at issue were third-party liability policies; (2) the policies themselves each defined “property damage” (unlike the Allianz policy), which formed the basis entirely for each court’s respective ruling; and (3) the *Carl Brazell* Plaintiffs did not plead that there was any physical injury to property resulting from the contamination (unlike Sullivan). *See id.*

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<sup>10</sup> Moreover, the Plaintiff in *Carl Brazell* failed to plead loss of use in time for the Court to assess whether loss of use damages would qualify as “property damage” under the policy’s definition of the phrase, which read: “[p]hysical injury to tangible property, including all resulting loss of use of that property’ or ‘[l]oss of use of tangible property that is not physically injured.” *Id.* at notes 1 and 2 and accompanying text, 588 S.E.2d at 115.

Certainly, none of these cases stand for the blanket proposition that Allianz asserts, namely: “South Carolina law recognizes that physical losses must be physical and that economic loss alone is not enough.” (Brief at 12). And, none of these cases stand for the proposition that “an item or structure that merely needs to be cleaned has not suffered a ‘loss’ which is both ‘direct’ and ‘physical,’” as Allianz implies. (*Id.*)

**ii. Allianz’s Reliance On *Couch*, And Its Reliance On 100s Of Other Courts Which Have Relied Upon *Couch* Before *Couch* Was Examined More Closely, Piles Error Atop Error and is Misleading.<sup>11</sup>**

From 1950 to 1995, courts interpreted “direct physical loss or damage” as used in property policies broadly, encompassing its commonplace and ordinary meaning, including finding “direct physical loss” when property becomes unsafe, unfit, or otherwise unusable for its intended purpose. *See, e.g., Intermetal Mexicana, S.A. v. Ins. Co. of N. Am.*, 866 F.2s 71 (3d Cir. 1989) (depriving policyholder of possession and control of property qualified as “direct physical loss”); *see also Azalea Ltd. v. Am. States Ins. Co.*, 656 So. 2d 600, 602 (Fla. Ct. App. 1995) (chemicals that destroyed a bacteria colony necessary for sewage treatment plant to operate caused “direct damage to structure”).<sup>12</sup> If Allianz disagreed with the long-standing judicial interpretation of the phrase, it had decades to revise its policy forms to qualify its language accordingly. It did not.

The view requiring “distinct, demonstrable, physical *alteration* of the property” first appeared in 1995 when *Couch on Insurance* added a new section to its treatise and wrongfully portrayed the new test as the “widely held” rule,<sup>13</sup> which it inferred from a single district court

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<sup>11</sup> *Amicus United Builders* provides additional insight into the deleterious and far-reaching effects of the *Couch* fallacy. (*See Amicus Br.* at 12-15).

<sup>12</sup> *See also* fn. 21, *infra*.

<sup>13</sup> For a detailed analysis of how *Couch Third* got it wrong, see Richard P. Lewis *et al.*, *Couch’s “Physical Alteration” Fallacy: Its Origins and Consequences*, 56 *Tort, Trial & Ins. Prac. L.J.* 621 (2021).

opinion. See 10A Couch on Ins. § 148:46 (3d Ed. West 1998) (“*Couch Third*”), citing, *Great Northern Ins. Co. v. Benjamin Franklin Federal Savings & Loan Ass’n*, 793 F. Supp. 259 (D. Or. 1990) (policy did not cover costs of asbestos removal or lost rental income where there was no evidence of physical loss, direct or otherwise). Notably, nowhere in *Benjamin Franklin* does the court require a “distinct, demonstrable, physical alteration” of property to find coverage—*Couch Third* created this erroneous summary of prior precedent.<sup>14</sup>

Three years later, the Oregon Court of Appeals **refused** to follow the decision in *Benjamin Franklin*. See *Farmers Ins. Co. v. Trutanich*, 858 P.2d 1332 (Or. Ct. App. 1993) (damages caused by odor from methamphetamine cooking represented direct physical loss covered by the policy). *Couch Third* was released two years after the *Trutanich* decision and fail to mention *Trutanich*. It also only cited cases favoring its self-proclaimed but unsubstantiated “majority” position while ignoring many significant contrary decisions. Couch’s recent updates to § 148:46 have yet to address its original error.<sup>15</sup>

Further, Allianz’s reliance on cases<sup>16</sup> that directly or indirectly rely on *Couch Third*’s flawed test for what constitutes “physical loss” is no more persuasive than relying on *Couch Third*

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<sup>14</sup> While one would assume this was originally an innocent mistake, Couch’s failure to correct this mistake or acknowledge contradictory precedent is troubling. See note 16, *infra*.

<sup>15</sup> This is not surprising as one of the Couch authors has been shown to be a practicing attorney for the insurance industry, see <https://www.cavanaghlaw.com/team/steven-plitt> (He is the current successor author of the nationally recognized and authoritative insurance coverage treatise Couch on Insurance 3d.”); <https://www.cavanaghlaw.com/practices/insurance-defense> (“We represent the interests of insurers in all areas of defense and coverage matters and maintain an active relationship with insurers nationwide.”).

<sup>16</sup> Among others, see, e.g., *Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.*, 487 F.Supp.3d 834, 839 (N.D. Ca. 2020); *Oral Surgeons, P.C. v. Cincinnati Ins. Co.*, 2 F.4th 1141, 1144 (8th Cir. 2021); *Circus Circus LV, LP v. AIG Specialty Ins. Co.*, 525 F.Supp.3d 1269, 1275 (D. Nev. 2021); *Michael Cetta, Inc. v. Admiral Indem. Co.*, 506 F.Supp.3d 168, 176 (S.D.N.Y. 2020); *Tria WS LLC v. Am. Auto. Ins. Co.*, 530 F.Supp.3d 533 (E.D. Pa. 2021); *Gilreath Fam. & Cosm. Dentistry, Inc. v. Cincinnati Ins. Co.*, 522 F.Supp.3d 1279, 1283 (N.D. Ga 2021); *Malaube, LLC v. Greenwich*

itself. Couch’s misstatement that the “widely held” rule requires “distinct, demonstrable, physical alteration” was wrong when Couch first published it and the flawed rule it does not become sound merely because more cases are citing to the original flawed analysis.

Some insurers have let on that they are aware that their policies do not require proof of physical alteration when they are the ones seeking coverage. *See Factory Mut. Ins. Co. v. Fed. Ins. Co.*, 1:17-cv-00760-GJF-LF, 2019 U.S. Dist. LEXIS 191769 (D. N. M. Nov. 5, 2019) (where insurer was arguing against another insurer to shift liability for mold contamination, the plaintiff-insurer argued their policies covered the same risks, and “direct physical loss or damage” could exist when *a physical substance renders a property unfit for its intended use, even in the absence of a physical alteration*) (emphasis added).

It is also disturbing that *Couch* and Allianz ignored other treatises contrary to their position:

The word “loss,” as defined in the dictionary, can mean either of two things: (1) detriment/disadvantage, or (2) something that is lost. In the context of a standard insurance policy, the word “loss” can mean either of those things. Both definitions are reasonable. Applying the first definition, therefore, when an insurance policy refers to physical loss of or damage to property, the “loss of property” requirement can be satisfied by any “detriment,” and a “detriment” can be present without there having been a physical alteration of the object.

§ 11:41. Loss of property, 3 Insurance Claims and Disputes § 11:41 (6th ed.) (emphasis added).

Moreover, Allianz contends that South Carolina’s pre-COVID-19 caselaw is also consistent with *Couch on Insurance* (Brief at 12) but fails to cite any cases to support this theory.

This is because there is no South Carolina caselaw stating that there must be a distinct,

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*Ins. Co.*, No. 20-22615, 2020 WL 5051581, at \*5 (S.D. Fla. Aug. 26, 2020), all of which parrot and cite Couch’s approach – which has now been shown to be erroneous.

demonstrable, physical alteration of property to trigger coverage under an all-risk property insurance policy.

To summarize, Allianz relies on a treatise containing erroneous information that has yet to be corrected over 20 years later; it then relies on cases that directly or indirectly claim support in the erroneous treatise; and it falsely claims that South Carolina caselaw is consistent with the erroneous treatise, without support.

Each of the foregoing gaffes by Allianz permeate the entirety of Allianz's Brief. In the remainder of this Reply Brief, Plaintiff will focus on Allianz's more flagrant missteps in the various certified questions, including elaboration on some of the foregoing discussion.

## **II. COVID-19 Can (And Did) Cause Direct Physical Loss Or Damage To Property.**

The presence of the virus COVID-19 in or adjacent to Sullivan's restaurants, augmented by the related government shutdown orders which perfected the loss and damage, constitutes "direct physical loss" and "direct physical damage" under the Policy for at least 3 reasons, *each* of which is sufficient to answer question 1 in favor of coverage.

First, the plain and ordinary meaning of "direct physical loss or damage" as it is used in this Policy encompasses the harm pled by Sullivan. Alternatively, Allianz's proffered plain and ordinary meaning of the Operable Phrase illustrates that the phrase is capable *at least two* reasonable interpretations and must be construed in favor of coverage. Lastly, even if this Court were to accept Allianz's constrained meaning of the Operable Phrase, whether the virus COVID-19 can or cannot cause physical loss or damage is a question of fact inappropriate for judicial notice.

**a. The Plain And Ordinary Meaning Of “Direct Physical Loss Or Damage” as it is Used in This Policy Encompasses The Harm Pled By Sullivan.**

First, the plain and ordinary meaning of the undefined Operable Phrase (“direct physical loss or damage”) as it is used in this Policy encompasses the harm pled by Sullivan. Sullivan asserts and has pled that the presence of COVID-19 in or around his restaurants caused his properties (1) direct physical loss (meaning direct, material deprivation of property insured) *and* (2) direct physical damage (meaning direct harm which rendered property insured unsafe, uninhabitable, and unfit).

**i. Allianz Admits that a Virus Can Cause Direct Physical Loss or Damage to Property Under the Policy.**

Allianz’s briefing of the Policy’s Communicable Disease Extension (“Extension”) contains a collection of statements in which Allianz emphatically concurs with Sullivan’s position regarding Certified Question Number 1; namely, that viruses *can* cause direct physical harm and/or damage to property. These concessions should be determinative of Question Number 1:

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.

(Brief at 35). Allianz admits to this Court that yes, in fact, disease causing pathogens *can* cause direct physical loss or damage to property. However, Allianz continues to assert that COVID-19 does not and cannot cause direct physical loss or damage to property. In support of this COVID-19 ‘carve out,’ Allianz does not cite to any source or Policy provision. Instead, Allianz relies on “common experience” and “shared experience.” (Brief at 35).

The Policy does not condition coverage for loss or damage on “common experience;” in fact, the phrase does not appear anywhere in the record before this Court *except* for Allianz’s brief. Allianz is asking this Court to take judicial notice of the “fact” that the disease-causing pathogen, COVID-19, does not and cannot cause direct physical loss or damage to property, even though Sullivan has adequately pled that COVID-19 has done just that. Allianz’s bold assertion of common knowledge regarding COVID-19 does not meet the threshold for judicial notice under South Carolina jurisprudence:

Judicial notice takes the place of proof. It simply means that the court will admit into evidence and consider, without proof of the facts, matters of common and general knowledge. The test is whether sufficient notoriety attaches to the fact involved as to make it proper to assume its existence without proof.

*Moss v. Aetna Life Ins. Co.*, 267 S.C. 370, 377, 228 S.E.2d 108, 112 (1976) (internal quotations omitted). In fact, what “common experience” *has* shown over the past two years is that everything about COVID-19 (its virulence, spread, effects, damage, harm, remedy, etc.), is anything but a “matter of common and general knowledge.” And, because this Court must accept Sullivan’s pleadings at true, it also must accept that a credible expert in virology or a similar discipline can and will provide credible testimony in support of Sullivan’s claims, such that they survive.<sup>17</sup> For an example of scientific evidence which contradicts Allianz’s “common knowledge” ploy, see *K.C. Hopps, Ltd. V. Cincinatti Ins. Co., Inc.*, --- F.Supp.3d ---, 2021 WL 4302834 (W.D. Mo Sept. 21, 2021).<sup>18</sup>

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<sup>17</sup> As an aside, it is inappropriate for Allianz to argue (and for this Court to consider) the “current” state of the scientific community’s knowledge regarding the characteristics of COVID-19 in defense of the bad faith claim as Allianz’s denial occurred in March of 2020.

<sup>18</sup> Plaintiffs in *K.C. Hopps* retained an academic expert on molecular epidemiology who reported as to SARS-CoV-2’s physical presence and how it can exist in the air and be transformed from the air and surfaces into the human body, and an expert professor of Chemistry and Bioengineering who reported as to how viruses stay on surfaces and are difficult to completely remove, even with robust and comprehensive routine cleaning protocols.

**ii. Allianz's Attempt to Limit the Effect of its Own Policy Language Contained in the Communicable Disease Coverage Fails.**

Allianz's admission that bacteria and viruses "can" cause direct physical loss or damage to property, as Sullivan has alleged, is determinative as to Question 1. None of Allianz's red-herring arguments to the contrary are persuasive because they ignore the undeniable fact the Policy itself contemplates, and Allianz confirms in its Brief, that viruses can cause direct physical loss or damage to property, damage which must be "mitigate[d], contain[ed], remediate[d], treat[ed], clean[ed], disinfect[ed]," etc. (Policy at 22). Whether the Extension is broad, narrow (as argued by Allianz), triggered, untriggered, is of no moment to Sullivan's argument as to Question Number 1.

For example, Allianz insists that the Extension is a narrow coverage extension which is not triggered by direct physical loss or damage to property. (Brief at 34). Allianz appears to forget the cadence of its own drumbeat, as Allianz states *earlier in this very Brief*:

[c]ritically, each of these [coverage] provisions requires 'direct physical loss or damage' to property either as a prerequisite to coverage or as a limitation on the scope of coverage.

(Brief at 5) (listing "Communicable Disease Coverage" at p. 7). Based on the language of the Extension itself, coverage is absolutely conditioned on "direct physical loss or damage"; the Extension simply adds the "**Event**" itself as a specific "covered cause of loss." (Policy at 21).

As to the breadth of the Extension, the Policy itself states that the Extension is applicable to "Property, Business Income, and Extra Expense Coverages." (Policy at 21). The Extension is not narrow as it applies to *all* grants of coverage contained in the all-risk Policy.

The Policy language, standing alone or coupled with Allianz's statements in its Brief, illustrate that it is reasonable to interpret the Policy as providing coverage for direct physical loss

or damage caused by a virus. SARS-CoV-2 is a virus. As Allianz states in one of its few correct references to South Carolina law, an insurer's obligation is defined by the terms of the policy itself and cannot be enlarged or restricted by judicial review. *It also cannot be enlarged or restricted by "common" or "shared" experience proffered without support by the party who drafted the insurance contract.*

**iii. The Plain Meaning of "Direct Physical Damage" Encompasses the Harm Pled by Sullivan**

Using Allianz's own proffered plain meaning of "damage" ("harm resulting from injury to person, property, or reputation"),<sup>19</sup> COVID-19 plainly qualifies. COVID-19 in the air or on surfaces turns property that is safe and usable into property that is unsafe, unusable, and even deadly.<sup>20</sup> The contamination is, for a time, perpetual, in that as soon as the property is decontaminated, and use is permitted again, more likely than not the property is contaminated again, and the cycle of contamination and damage starts over and perpetuates itself (recall that there was and is no commercially available method for eradicating the pathogen). Again, even under Allianz's own proffered meaning of "direct physical damage", COVID-19 contamination of property qualifies and triggers coverage under this Policy.<sup>21</sup>

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<sup>19</sup> See Brief, p. 11.

<sup>20</sup> See, e.g. *S. Wallace Edwards & Sons, Inc. v. Cincinnati Ins. Co.*, 353 F.3d 367, 374 (4th Cir. 2003) (agreeing with district court's plain reading of undefined term "damage" in a property policy as meaning 'impairment of the usefulness or value of person or property; or harm.')

<sup>21</sup> There are dozens of other cases discussed or cited in the Lewis and Knutsen articles that support Sullivan's coverage position. See, e.g., *Schlamm Stone & Dolan LLP. v. Seneca Ins. Co.*, 800 N.Y.S.2d 356 (Super. Ct. 2005) (In action for losses caused by conditions following the collapse of the World Trade Center on 9/11, Court found that "the presence of noxious particles, both in the air and on surfaces of the plaintiff's premises, would constitute property damage under the terms of the policy"); *In re Chinese Mfr'd Drywall Prods. Liab. Litig.*, 759 F. Supp. 2d 822, 831 (E.D. La. 2010) (In action for loss resulting from odor and damages to metal and electrical elements from Chinese-manufactured drywall, the Court found that "the presence of Chinese-

#### iv. The Plain Language of the Policy Does Not Require that a “Direct Physical Loss” Be Permanent

Allianz concedes that “dispossession” (or “deprivation”) of property is covered, but reads in a requirement that property must be *permanently* “lost” (attempting to change loss to “lost”) for dispossession (or deprivation) to fall within the bounds of coverage:

‘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.

(Brief at 11, 20). A “plain reading” of the Operable Phrase does not support Allianz’s theory that any physical “loss”—whether defined as dispossession, deprivation or something else—must also be “permanent” or “total.” Defendants’ permanence-or-no-coverage theory tortures the Policy’s plain meaning, and even tortures its *own* proffered dictionary definitions of the words in the Operable Phrase.

First and most importantly, the Policy’s language does not support this theory. The principal grants of coverage contain no such limitation; neither do any other coverage provisions. Second, a harm or loss to property need not be permanent to constitute a physical loss or damage. *See, e.g.,* Erik S. Knutsen, Jeffrey W. Stempel, *Infected Judgment: Problematic Rush to Conventional Wisdom and Insurance Coverage Denial in A Pandemic*, 27 Conn. Ins. L.J. 185, 244

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manufactured drywall in a home constitutes a physical loss” because it “renders the [policyholders’] homes useless and/or uninhabitable”); *Hetrick v. Valley Mut. Ins. Co.*, 1992 WL 524309, at \*3 (Pa. Comm. Pl. May 28, 1992) (In an action where neighboring fire caused fuel pollution of ground water, the Court found coverage as the house was uninhabitable for lack of clean water in the house); *Cherokee Nation v. Lexington Ins. Co.*, No. CV-20-150, 2021 WL 506271, at \*6 (Cherokee Cnty., Okla. Jan. 28, 2021) (In an action for losses sustained during the COVID-19 pandemic, the Court held that “direct physical loss” included property rendered unusable for its intended purpose and did not require physical alteration; noting that insurers were on notice that a pandemic would happen).

(2020). As documented by the legal scholars in this article:

The long list of cases that have considered various external forces' impact on property as "direct physical loss" demonstrate that courts are willing to find coverage if the force is a disease-causing agent or poison, if it is purely airborne, and if it does not permanently affect or even alter in any way the physical property insured.

*Id.* A variety of poisons and injuring agents have been recognized as causing physical loss or damage, even though the loss or damage suffered was transitory.<sup>22</sup>

Additionally, Allianz's permanence-or-no-coverage theory tortures its own proffered definition of the Operable Phrase. To remind the Court, Allianz argues that the ordinary meaning of "loss" is "destruction; ruin." (*See* Chart, Brief at 11). At various times, Allianz adds "deprivation" and "dispossession" to its acceptable meanings of "loss," albeit with a qualifier of "permanent." (*Id.* at 20). As Sullivan points out *infra*, "deprivation" is a commonly understood meaning of "loss," but it was not one that was included in Allianz's proffered, definition chart. (*Id.* at 11).

Presumably, Allianz adds "deprivation" to the acceptable definitions because, *e.g.*, a "theft," which the Policy covers in one form or another, is neither "destruction" nor "ruin," and instead a "dispossession" or "deprivation." As Allianz argued before the trial court:

[Theft]—that is, the permanent physical deprivation of tangible property—is entirely compatible with a common-sense definition of 'loss.' Of course loss encompasses permanent physical deprivation.

(*See* ECF 51-1 at 6). Allianz is contradicted by its policy definitions. "**Theft**" means "any act of stealing, including robbery or burglary." (Policy at 61). Allianz *itself* did not define "theft"—which

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<sup>22</sup> *See, e.g., Gregory Packaging, Incorporated v. Travelers Property Casualty Company of America*, No. 2:12-CV-04418 WHW, 2014 WL 6675934, at \*3 (D.N.J. Nov. 25, 2014) (ammonia release in juice packaging plant) & *Oregon Shakespeare Festival Ass'n v. Great Am. Ins. Co.*, No. 1:15-CV-01932-CL, 2016 WL 3267247, at \*1 (D. Or. June 7, 2016) (wildfire smoke infiltration in open air theater), at Section I(E), Plaintiff's Brief, at 26.

it concedes is a “loss”—as requiring permanence. Indeed, ten years ago, Allianz itself did not believe “loss” encompassed a “deprivation”—whether permanent or not. (*See Nautilus, infra*, where Allianz argued that “theft” was not synonymous with “loss.”).

**v. The Policy Itself Reflects that Physical Loss and “Total” Physical Loss are Different Terms, Contrary to Allianz’s Arguments.**

Allianz’s arbitrary insertion of “total” into the meaning of the Operable Phrase is belied by other coverage parts in this very Policy. For example, in the “Extended Warranty Coverage” part, Allianz purposefully inserted the word “total” into the Operable Phrase, confirming that “loss,” when used without “total,” implies something short of a state of permanence:

4. Extended Warranty Coverage

- a. If a **covered cause of loss** results in a *direct total physical loss* to an item of **Property Insured** at a location, then we will pay for [...]

(Policy at 13) (italics added; bold in original); *see also (id. at 32)* (“If there is a *total* loss to a building that is **business real property**, then[...].”) (italics added; bold in original). Again, Allianz’s asserted “plain meaning” of the Operable Phrase is belied by language from the Policy itself.

**vi. Allianz’s Proffered Definition of ‘Direct Physical Damage’ Swallows its Proffered Definition of ‘Direct Physical Loss’ Thereby Rendering the Latter Surplusage, While Sullivan’s Proffered Definition Gives Meaning to Both Words.**

Allianz asks this Court to accept a definition of “damage” which is inclusive of a “loss”:

Loss:	n.: destruction; ruin
Damage:	n.: <i>loss</i> or harm resulting from injury to person, property, or reputation.

(Brief at 11) (emphasis added). According to Allianz’s definition chart cited above, the definition of “damage” completely swallows the definition of “loss,” which would violate South Carolina’s

interpretive canon disfavoring surplusage. *See Stevens Aviation, Inc. v. DynCorp Int’l LLC*, 407 S.C. 407, 417, 756 S.E.2d 148, 153 (2014).

Therefore, this Court should accept Sullivan’s construction of the word “loss” as meaning “deprivation” or “dispossession” as it is far more reasonable. Sullivan’s plain reading of “loss” gives meaning to the phrase “physical loss” that is distinct from “physical damage,” as is required by South Carolina rules of construction.

**vii. Allianz’s Proffered “Plain Meaning” of “Direct Physical Loss or Damage” Illustrates That The Phrase is Capable of More Than One Reasonable Interpretation**

Allianz argues that the Operable Phrase in the Policy’s coverage part-- “direct”; “physical”; “loss”; and “damage”— is not ambiguous. In support thereof, Allianz cites to dictionary definitions. (Brief at 11). Allianz’s proffered plain and ordinary meaning of the Operable Phrase illustrates that the phrase is capable of *at least two* reasonable interpretations and must be construed in favor of coverage.

**1. Allianz’s Cherry-Picked Dictionary Definitions of the Operable Phrase Support a Finding of Ambiguity**

Allianz tries to inform this Court of the plain, ordinary, and popular meanings of the Operable Phrase using its hand-picked definitions, or “senses,” from Merriam-Webster, asserting that Allianz’s chosen meaning of the words in the Operable Phrase are “plain enough.” (Brief at 11). Later, in its attempt to distinguish one of Sullivan’s cited “state-court” cases,<sup>23</sup> *North State Deli*, Allianz asserts that “*North State Deli* also ignored **the first and primary** definition of loss in the very dictionary it cited to: ‘destruction; ruin.’” (Brief at 29) (emphasis added).

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<sup>23</sup> As noted in Sullivan’s Opening Brief, Allianz’s disregard for “state court” decisions is disturbing, as it is a state’s highest court which is the ultimate arbiter of contract (*i.e.*, insurance policy) interpretation, as it has been since 1945 when the U.S. Congress enacted the McCarran-Ferguson Act, 15 U.S.C.A. §1011 *et seq.*, which relegates the “business of insurance” to the states.

Sullivan would first point out that, if Allianz believed the “first” definition cited in a dictionary is the “primary” definition, then its other wordsmithing is impeached: Allianz chose to cite the sixth listed definition of the adjective “direct” and the third listed definition of the adjective “physical.” (See Merriam-Webster.com/dictionary).<sup>24</sup> Allianz chose alternate definitions of “direct” and “physical,” as opposed to the alleged “first” or “primary” definition. While Allianz’s chosen definitions of the words “direct” and “physical” may be reasonable; however, as Allianz’s arbitrary selection of secondary, non-primary definitions of “direct” and “physical” illustrates, the first listed definition is not the *only* reasonable one.

In fact, dictionary publishers have vastly different policies on the ordering of their definitions. The first-listed meaning varies greatly between: the “most commonly sought meaning,” the “most established... literal and central meaning,” or *the first-known and/or historical meaning*. For example, the American Heritage Dictionary of the English Language, at xxiv (5th ed. 2011) indicates:

Entries containing more than one sense are arranged for the convenience of the reader with the central and often the most commonly sought meaning [appearing] first.

In contrast, the New Oxford American Dictionary, at xv (3d ed. 2010) indicates:

[T]he first definition given is the core sense.... Core meanings represent typical, central uses.... It is the meaning accepted by native speakers as the one that is most established as literal and central.

Webster's Third New International Dictionary Unabridged 17a (3d ed. 2002) (emphasis added) indicates:

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<sup>24</sup> As to “direct,” there are at least six (6) senses listed in Merriam-Webster which precede that chosen by Allianz, including: “natural”; “straightforward”; “stemming immediately from a source”; and “lineal.” As to “physical,” there are at least three (3) senses which precede that chosen by Allianz, including: “of or related to natural science”; “of or relating to physics”; and “characterized or produced by the forces and operations of physics.” *See id.*

*The order of senses is historical: the one known to have been first used in English is entered first.*

As for Merriam-Webster's online edition, the first-listed meaning is *not* the most common usage or sense; rather, it is the historical and/or first known meaning:

The order of senses within an entry is historical: the sense known to have been first used in English is entered first.

(See <https://www.merriam-webster.com/help/explanatory-notes/dict-definitions>, accessed Feb. 9, 2022). And Merriam-Webster's online edition contains an additional caution against considering the first-listed sense as being the "primary" or "correct" one:

**The one thing you should remember, however, is that the first sense presented to you is not, as is commonly assumed, the most 'important,' or 'correct' meaning.** Some senses may be archaic, slang, or rare, but none are better than the others. All the senses of a word that are listed are equal, and not in a George-Orwellesque all-words-are-equal-but-some-are-more-equal-than-others sort of way.

(See <https://www.merriam-webster.com/words-at-play/dictionary-facts-and-trivia/the-order-of-the-definitions-may-not-mean-what-you-think>, accessed on Feb. 9, 2022) (emphasis added).

Because Merriam-Webster's listed senses do not proceed from most popular to least used, it is perhaps more helpful to turn to a dictionary which does list senses in such a manner: the American Heritage Dictionary.<sup>25</sup> According to the order of senses for the word "loss" in the American Heritage Dictionary, "loss" is far more commonly defined as "the condition of being deprived or bereaved of something or someone" than it is defined as "destruction."<sup>26</sup>

Allianz's failing to appreciate that the first listed definition is not always the most plain or common illustrates, at minimum, that the Operable Phrase is capable of at least two reasonable

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<sup>25</sup> See American Heritage Dictionary Online, "How to Use the Dictionary," available at <https://www.ahdictionary.com/word/howtouse.html>, accessed on Feb. 17, 2022.

<sup>26</sup> See American Heritage Dictionary Online, "Loss," available at <https://www.ahdictionary.com/word/search.html?q=loss>, accessed on Feb. 17, 2022.

interpretations and must be construed in favor of coverage. Allianz’s selected senses of the words in the Operable Phrase are not *per se* incorrect; rather, it illustrates the fallacy of Allianz’s suggestion that they are the *only* reasonable meanings of the words in the Operable Phrase.

## **2. Allianz *Itself* Has Changed its Opinion of what the Operable Phrase Means, Further Supporting a Finding of Ambiguity**

Allianz itself has defined “direct physical loss” differently in pre-COVID-19 cases than it does now, which further substantiates a finding of ambiguity. For example, in *Nautilus Grp., Inc. v. Allianz Global Risks US*, Allianz argued to the district court that “theft or misappropriation of property cannot constitute ‘physical loss or damage’ ” because there was no evidence [in that case] that the property was “damaged, destroyed, physically changed, or physically altered.” (See Dkt. No. 25, filed Dec. 2, 2011, *Nautilus Grp., Inc. v. Allianz Global Risks US*, Case No. 3:11-5281-BHS). Put simply, in 2011, Allianz argued that misappropriation or deprivation (whether permanent or not), was not a reasonable reading of the phrase “direct physical loss.”

Now, in direct contravention of its own position years earlier, Allianz claims that “[t]heft 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 [...]” (Brief at 21, fn. 4). When the drafter of an insurance policy itself shifts what its Policy terms “reasonably” mean, then an ambiguity must exist.

## **viii. Questions Of Fact Abound, Including Whether SARS-CoV-2 Can Or Did Cause Physical Loss Or Damage**

Defendants argue that “COVID-19 virus particles do not alter the physical nature of property in a way that would give rise to coverage” and that “particles sitting atop a surface is insufficient to trigger coverage.” (Brief at 24). These arguments contain clear error.

How the novel SARS-CoV-2 (and COVID-19) particles interact with property (or any physical surroundings) is an issue of fact. It is ripe for examination by those with specialized knowledge as to particle behavior and attributes (e.g., physicists) to opine on, not attorneys or courts in the absence of qualified expert opinion(s) on the subject. It would be error for the Court to rule on whether and how the pathogens behave on a certified question; this dispute should be resolved by the trial court, after discovery. Allianz essentially asks this Court, as well as the trial court, to accept as a widely known fact Allianz’s contention that “COVID-19 damages lungs, not property” or, to take judicial notice of Allianz’s argument. How SARS-CoV-2 interacts—or does not interact-- with property is not a settled “fact,” and certainly not one appropriate for judicial notice under South Carolina jurisprudence. *See Moss v. Aetna Life Ins. Co., supra.*<sup>27</sup>

**III. The Answer to Certified Question Number Two is “No, The Plain Language of the Policy Does Not Require Complete Prohibition.”**

Allianz wants this Court to find that “everyone” must be prohibited access and to find that “all” access must be prohibited. Each request would require the Court to add language into the policy that Allianz itself chose not to add. *See Torrington Co. v. Aetna Cas. Ins. Co.*, 264 S.C. 636, 643, 216 S.E.2d 547, 550 (1975) (it is not the Court’s function to rewrite or torture the meaning of policy language to extend coverage that was never intended by the parties).

First, Allianz maintains that the policy requires *everyone* be prohibited access to the property for Civil Authority coverage to be triggered. (Brief at 36). However, the word “everyone” is not in the actual policy language, although Allianz could have included it. *See Policy* at 18.

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<sup>27</sup> Nearly 1.0m people have died of Covid, many in their homes. How can Allianz responsibly assert (Brief p. 25) that none of these deaths arose from contaminated buildings or residences ? It can’t.

Second, the policy language requires a prohibition of access, not a *complete* prohibition of access. Policy at 18. If Allianz intended to mean a complete prohibition of access, they could have included that language in their policy. *See Ungarean, DMD v. CNA*, No. GD-20-006544, 2021 WL 1164836, at \*10 (Pa. Com. Pl.) (Mar. 22, 2021) (“The contract merely requires that ‘an action of civil authority . . . prohibits access to’ Plaintiff’s property. It does not clearly and unambiguously state that any such prohibition must completely and totally bar all persons from any form of access to Plaintiff’s property whatsoever.”).

Therefore, the Policy’s Business Access and/or Civil Authority coverage do not require a complete prohibition of all access to Sullivan’s properties.

#### **IV. There Has Been a ‘Communicable Disease Event’ as That Term is Used in the Policy**

Allianz mischaracterizes Sullivan’s Brief and Complaint, stating first that Sullivan used only the government orders as sufficient to qualify as a communicable disease event and second that these Orders were not issued from a public health authority. (Brief at 39).

First, in addition to using the government orders to further support the existence of a communicable disease event, Sullivan also sufficiently pled the existence of the continuous presence of coronavirus in, on, and/or within the immediate area of its restaurants and how that resulted in direct physical loss or damage to the insureds’ locations.

Second, the Orders were issued by the South Carolina and Georgia governors and mayors, and Sullivan has pled ample facts to support their authority to declare a public health emergency. Noteworthy is the context – the governors and mayors are the ultimate authority in their political jurisdictions, and they were following guidance from international, national, and state public health officials such as the World Health Organization (“WHO”), the center for Disease Control (“CDC”), and South Carolina Department of Health and Environmental Control (“DHEC”).

Moreover, Allianz points out the Governors' emergency power to prevent, among other things, property damage, but wrongfully states that the Orders make no mention of protecting property (Brief at 39). In fact, the Orders specifically mention S.C. Code §§ 1-3-420 and 1-3-430, giving the Governor authority to act to prevent or minimize danger to life, limb, or *property* (emphasis added). Executive Order No. 2020-10 specifically orders that all *restaurants* suspend services. Thus, there is a lack of basis for Allianz to suggest that these Orders were issued solely to minimize the spread of COVID-19 from person to person.

Allianz cites to *Dakota Girls* for support, but Sullivan's case is distinguishable.<sup>28</sup> In *Dakota Girls*, the plaintiff did not allege the presence of COVID-19 in or on its premises (perhaps because the policy had a tru virus exclusion). Here, Sullivan has pled the presence of COVID-19 at the insureds' premises. Moreover, Allianz cannot prove that COVID-19 was not on Sullivan's premises, even if this was the proper context to consider such proof. *See Treo Salon, Inc. v. W. Bend. Mut. Ins. Co.*, 538 F.Supp.3d 859, 866 (S.D. Ill. 2021) ("How can [Defendant] or anyone else be so certain that COVID-19 was not on [Plaintiff's] premises?"). Therefore, Sullivan has properly and plausibly pled there has been a communicable disease event as the term is used in the Communicable Disease Coverage Extension.

**V. Sullivan's Pled Expenditures to Mitigate COVID-19 Qualify for Loss Avoidance or Mitigation Coverage.**

The relevant policy provisions provide coverage for the "necessary expense" incurred to "protect, avoid, or significantly mitigate potential covered loss or damage" that is actually and imminently threatening, "including:"

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<sup>28</sup> Notably, the Defendants in *Dakota Girls* conceded that COVID-19 is a communicable disease under the policy (which, arguably, Allianz should have done here). *Dakota Girls, LLC v. Philadelphia Indem. Ins. Co.*, 17 F.4th 645, 649 n.2 (6th Cir. 2021).

- (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 15) (emphasis in original). Allianz wrongfully states that each of the examples listed under the “Loss Avoidance or Mitigation” provision contemplate coverage only for a physical loss or damage such as fire and water damage,

“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 . . . And each of the examples clearly contemplates coverage for an imminent threat of *physical* loss or damage to property (fire damage, water damage, etc.).

(Brief at 41) (emphasis in original). First, Allianz’s argument here runs contrary to its assertion earlier in the Brief that viruses and disease-causing pathogens *can* cause direct physical loss or damage to property, so any expenditures Sullivan may have incurred to “protect” or “avoid” that loss or damage is plainly covered. Sullivan has pled such and is thus entitled to Loss Avoidance or Mitigation coverage.

Additionally, Allianz prefaced the list in its brief with the phrase “including, for example:”. Prefacing a list with the word “including” means that what follows are examples and not an exhaustive list. *See United States v. Hawley*, 919 F.3d 252, 256 (4th Cir. 2019) (“the term ‘including’ is not one of an all-embracing definition, but connotes simply an illustrative application of the general principle.”) (quoting *Federal Land Bank of St. Paul v. Bismarck Lumber Co.*, 314 U.S. 95, 62 S.Ct. 1 (1941); *see also* Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* 132 (2012) (“The verb *to include* introduces examples, not an

exhaustive list.”). Accepting Allianz’s argument that the list infers there must be threat of a physical loss similar to fire and water damage would require reading words into the policy, which South Carolina law does not allow. *See Torrington*, 264 S.C. at 643, 216 S.E.2d at 550. Allianz is just plain wrong.

**VI. The Mortality And Disease Exclusion Does Not Unambiguously Bar Loss Or Damage Caused By A Virus, Facially, Or In Light Of The Communicable Disease Extension, And Other Coverage Parts.**

First, Allianz erroneously calls the Mortality and Disease Exclusion (“Exclusion”) a “virus exclusion.” (Brief at 42). Allianz is perfectly aware that the Exclusion is *not* a “virus exclusion,” and any attempt to categorize it as such is deceptive. Make no mistake, there *are* standard-issue virus exclusions produced by the ISO,<sup>29</sup> and even proprietary ones used by Defendants themselves;<sup>30</sup> however, this is not such an exclusion. If it *were*, Allianz would have led with that exclusion in its briefing both in the trial court and here, in this Court.<sup>31</sup>

Allianz contends that the Exclusion applies to “all coverages except” the Communicable Disease Extension (Brief at 42). By the Policy’s own terms, Allianz’s statement is patently false.

The preamble to the section in which the Exclusion is contained reads:

Exclusions applicable to all Coverages: . . . Property Coverage, Business Income and Extra Expense Coverage, or **any Extension of Coverage**

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<sup>29</sup> See Amicus Brief at 4 for an explanation that 83% of all business interruption policies have a standard ISO virus exclusion which ends the issue of coverage for most of the 83% of policy holders (and causes many policy holders to avoid pleading that the virus caused physical damage).

<sup>30</sup> Allianz’s predecessor company, Defendant Fireman’s Fund, submitted its proprietary virus exclusion, entitled “**Communicable Diseases and Viruses—Absolute Exclusion**”, form no. 145965-09-07, to the South Carolina Department of Insurance for approval in 2007. (*Available at* doi.sc.gov, “Online Services”).

<sup>31</sup> This is because true virus exclusions have been resulting in less assailable, case dismissals, as Plaintiffs have tried to plead themselves out of the virus exclusion by, *e.g.*, only relying on the government orders, as opposed to the presence of the virus itself, as causing the loss or damage. *See* Amicus Brief at 16.

(Policy at 7) (emphasis added). The Extension is clearly applicable to “Business Income, and Extra Expense Coverages” (Policy at 21) (emphasis added). Thus, by the very terms of the Policy, the Exclusion is applicable to the Extension.<sup>32</sup>

Allianz does not say which “terms” clearly show that the Exclusion does not apply to the Extension. Without more information from, *e.g.*, discovery, Sullivan must assume that Allianz’s logic flows something like this: “This Exclusion, which excludes any loss or damage caused by a virus, cannot possibly apply to an express grant of coverage for damage caused by viruses because it would render the express grant of coverage meaningless.” Allianz’s *ipse dixit* ends up supporting Sullivan’s position: if the Exclusion is read in the way that Allianz would have it read (as excluding any damage resulting from “virus,” as opposed to from “death by [...] virus”), then it would expressly conflict with the Extension coverage part, and therefore prove an ambiguity.

Additionally, if, as Allianz asserts, COVID-19 “harms people, not property,” (Brief at 1), then including a provision purporting to exclude damages caused by viruses in a property policy would seem unnecessary. This is one of a myriad of areas ripe for discovery in the trial court.

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<sup>32</sup> Notably, Allianz does not cite any language from the Policy to support its contention that the Exclusion applies to all coverages *except* for the Extension; rather, it cites to its own assertions previously briefed to the trial court. (*See* Brief at 44) (“But by its own terms, the virus exclusion does not apply to Communicable Disease coverage.”).

Importantly, the exclusions immediately preceding and following the Exclusion, specifically note which coverage parts are carved out from the reach of the exclusion, *e.g.*,

g. Fungus

**Fungus.** This Fungus exclusion does not apply to **fungus** caused by or resulting from fire, explosion, or lightning, provided that such causes of loss are **covered causes of loss** under this Coverage Form.

h. Mortality and Disease

Mortality, death by natural causes, disease, sickness, any condition of health, bacteria, or virus.

i. Ordinance or Law

The enforcement of any **ordinance or law**, except to the extent such coverage may be specifically provided by Item V.F.5. Ordinance or Law Coverage in this Coverage Form, if the Declarations show that you have such coverage.

(Policy at 8). Clearly, as evidenced by the above policy terms, Allianz knows how to expressly set forth an exception to an exclusion—it did so in the exclusions above and below the Exclusion.

Allianz did not except the Extension from the Exclusion.

Therefore, there are three possible outcomes from the application of the Exclusion:

1. The Policy's extension of coverage for loss and damage caused by viruses *via* the Extension conflicts with the Exclusion, creating an ambiguity;
2. That Sullivan's proffered reading of the Exclusion is correct, and the Exclusion only applies to mortality caused by virus. (*See* Pl. Brief at 47); or,
3. That Sullivan's reading of the Policy, is at least as reasonable as Allianz's, and therefore the Exclusion is ambiguous and must be construed in favor of Sullivan.<sup>33</sup>

Therefore, the Exclusion is either ambiguous, or it only applies to death by virus, a situation which is not at issue here; either way, there is coverage for Sullivan.

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<sup>33</sup> Sullivan briefed ambiguity and conflicting provisions at length in its Opening Brief. Some key points bear repeating. South Carolina courts are clear regarding this type of internal inconsistency within an insurance policy—it must be construed in favor of the insured and against the drafter. *M & M Corp. of S.C. v. Auto-Owners Ins. Co.*, 390 S.C. 255, 259, 701 S.E.2d 33, 35 (2010) (policies are construed in favor of coverage, and exclusions in an insurance policy are construed against the insurer); *Diamond State Ins. Co. v. Homestead Indus. Inc.*, 318 S.C. 231, 236, 456 S.E.2d 912, 915 (1995) (ambiguous terms in an insurance policy must be construed liberally in favor of the insured and strictly against the drafter).

## VII. Allianz's Fireman's Fund Decisions Are Not Applicable

Allianz argues that courts in other states “have considered and rejected the same arguments Sullivan makes here under the same Fireman's Fund insurance contract” (Brief at 17), suggesting that pleadings similar to Sullivan's have previously been considered under *this* Policy. Not so. Allianz's “supporting” caselaw (at Brief pages 17-19) is unavailing.<sup>34</sup>

As an initial matter, at least two of the policies at issue in the cited Fireman's Fund cases are not remotely the “same” as the Policy at issue here. Allianz's statement to the contrary—whether borne of ignorance or a hope that Sullivan would not find the differences-- provides a prescient illustration of why it is dangerous to blindly “follow the leader.” The policy at issue in *Hampshire House Corp. v. Fireman's Fund Ins. Co.* is markedly different from the one at issue here. The *Hampshire House* policy contains a completely different Coverage Form from the Policy here. (*Compare* Property-Gard Pinnacle Coverage Form 14200-12-88<sup>35</sup> *with* Property-Gard Pinnacle Coverage Form 250000-01-13 in Sullivan's Policy, at p. 5). The Coverage Form and Endorsements in the *Hampshire House* policy are largely printed on ISO forms; the Coverage Form itself contains only eleven (11) definitions, as opposed to Sullivan's manuscript<sup>36</sup> Policy

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<sup>34</sup>Allianz also omits a Fireman's Fund decision where the result was favorable to the insured. *See Hotel Adventures, LLC v. Fireman's Fund Ins. Co.* No. 30-2021-01188889-CU-CO-CJC (Cali. Super. Sept. 24, 2021) (Notice of Ruling) (where Fireman's Fund argued that “the Covid-19 virus is undoubtedly a disease” when attempting to preclude coverage in that policy's Disease Exclusion, but the Court found the undefined term ambiguous; the Court also held the Communicable Disease Extra Expense provision ambiguous, supporting insureds' interpretation for coverage; and the Crisis Event Business Income provision could support insureds' interpretation for coverage).

<sup>35</sup> *See* Case 1:20-cv-11409-FDS Document 1-1 Filed 07/27/20 Page 33 of 212.

<sup>36</sup> A manuscript policy differs from one based upon standard ISO forms in that it is custom drafted by or for the issuing insurance carrier. One can tell the difference as Allianz policy forms do not contain the ISO form number in the lower left-hand corner; rather, they contain an Allianz copyright notice. Because it was using manuscript forms, it would have been easy for Allianz to insert its additional coverage conditions as these issues arose in previous contexts over the last five to seven decades.

forms and its eighty-two (82) definitions; and the *Hampshire House* policy does not contain coverage for Communicable Disease.<sup>37</sup> The policy at issue in *Crescent Hotels & Resorts, LLC v. Zurich Am. Ins. Co., et al.*, No. 2021-02974, slip op. at \*86 (Va. Cir. Ct. Fairfax County July 2, 2021) (transcript only), does not even concern the same insurer. Counsel for Allianz appeared on behalf of Interstate Fire & Casualty Company (*id.* at \*42) and argued the applicability of a “pollution contamination” exclusion, containing entirely different language than the Sullivan Exclusion. *See, e.g., id.* at \*42 (Attorney Ingerman arguing the meaning of the word “dispersal” under an Interstate Fire policy, which is not found in the “Mortality and Disease” exclusion that Allianz argues applies here).

Moreover, the losses and damages pled by other plaintiffs in these cases (at Brief 17-19) are not the same as Sullivan’s. *E.g., PS Bus. Mgmt. v. Fireman’s Fund Ins. Co.*, No. 21-1229, 2021 WL 4989870, at \*2 (E.D. La. Oct. 27, 2021) (citing “a shrunken shirt after first washing, a bumper sticker with curled edges due to water/cleaner penetration into the glue, a faded cap due to the application of cleaner” as possible examples of damage suffered, unlike Sullivan whose exemplar

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<sup>37</sup> Importantly, many of the materials which Allianz apparently has copies of are not readily accessible and have not been provided. For example, Sullivan has not been able to locate some of the policies (that Allianz describes as being “the same” as its Policy here, at Brief 17-19), within the respective federal dockets of these cases or otherwise. As such, Sullivan has not been able to assess the accuracy (or lack thereof) of Allianz’s statements as to the state court cases, principally out of California, to which Allianz cites. However, those opinions, if applying California law, are unavailing because California courts previously established a meaning of the Operable Phrase, that can be traced back to the *Couch* treatise error. *See, e.g., Simon Marketing, Inc. v. Gulf Ins. Co.* (2007) 149 Cal. App. 4th 616, 622-624 (quoting the *Couch* treatise in concluding that loss of business due to cancelled contracts after employees perpetrated a fraud did not constitute physical loss of insured property); *MRI Healthcare Ctr. Of Glendale, Inc. v. State Farm Gen. Ins. Co.*, 115 Cal. App. 4th 766 (2010) (“For a loss to be covered, there must be a ‘distinct, demonstrable, physical alteration’ of the property” quoting 10A *Couch on Insurance* (3d ed. 2010) § 148:46, p. 148-81); *Doyle v. Fireman’s Fund Ins. Co.* (2018) 21 Cal. App. 5th 33, 38-39 (quoting *Simon Marketing*’s citation to the *Couch* treatise in concluding that a wine collector did not suffer loss to property when he purchased counterfeit wine).

damages include contamination of entire floor spaces (indoor and out), food and beverage delivery systems, dining tables, and bar tops at its locations due to SARS-CoV-2 infiltration; lost perishable consumables (e.g., beer kegs), *inter alia*). The pleadings and arguments of these plaintiffs also vary widely and are, contrary to Allianz's representations, distinct from Sullivan's. *Island Hotel Props., Inc. v. Fireman's Fund Ins. Co.*, 512 F. Supp. 3d 1323, 1326-27 (S.D. Fla. Jan. 11, 2021) (finding the *Island Hotel* plaintiff ultimately "allege[d] solely that the COVID-19 pandemic generally caused the County to issue emergency directives effectively closing Plaintiff's businesses" because its allegation of COVID-19's presence was not accompanied by allegations that the *Island Hotel* plaintiff's business loss "was caused by any physical problem, nor that the Properties suffered a diminution of value in some way," unlike Sullivan) (emphasis in original); *Water Sports Kauai, Inc. v. Fireman's Fund Ins. Co.*, 499 F. Supp. 3d 670, 673 (N.D. Cal. 2020) (concerning premises in Hawaii where the *Water Sports Kauai* plaintiff alleged losses arising solely from government closure orders, unlike Sullivan); *Boulevard Carroll Entm't Grp., Inc. v. Fireman's Fund Ins. Co.*, CV2011771SDWLDW, 2020 WL 7338081, at \*2 (D.N.J. Dec. 14, 2020) (the two-page decision applies New Jersey law and reveals that the plaintiff alleged losses arising solely from government orders, unlike Sullivan).

In addition, several of the Fireman's Fund opinions base their rulings on the erroneous *Couch* treatise (discussed extensively *supra*). E.g., *PS Bus. Mgmt. v. Fireman's Fund Ins. Co.*, No. 21-1229, 2021 WL 4989870, at \*2 (E.D. La. Oct. 27, 2021) (premising its ruling on the *Couch* treatise error – that the Operable Phrase is "widely held" to mean that no "physical" loss has occurred unless there is "a 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) (citing to the erroneous *Couch* conclusion in support, further appearing

influenced by the fact that other courts ruled based on the *Couch* error); *Am. Food Sys., Inc. v. Fireman's Fund Ins. Co.*, 530 F. Supp. 3d 74, 79 (D. Mass. 2021) (same). Most, if not all, contain a number of the analytical shortcomings discussed at length by scholar-law professors Knutsen & Stempel in *Infected Judgment*, 27 Conn. Ins. L.J. 185, 244 (2020). *E.g.*, *Nguyen v. Travelers Cas. Ins. Co. of Am.*, No. 2:20-cv-00597-BJR, 541 F. Supp. 3. 1200, 1236-37, 2021 WL 2184878 (W.D. Wash. May 28, 2021) (issuing a “general ruling”). Lastly, many of these trial court decisions are on appeal.<sup>38</sup>

## CONCLUSION

Sullivan’s Opening Brief, additionally supported herein, evidences that the presence of COVID-19 in and around Sullivan’s properties can and did cause direct physical loss and damage to property, as that phrase is used in this proprietary, Allianz Policy.

Allianz asks this Court (1) to ignore the plain language of the Policy; (2) to ignore decades of pre-COVID-19 case law interpreting similar coverage provisions; and (3) to rely on a myriad of non-binding, COVID-19-era decisions which pivoted on a virus exclusion, poor pleading, or an erroneous treatise.

The plain language of this Policy does not require that loss or deprivation be permanent or total; nor does it require that damage be structural. The Policy does not provide that any purported damage which can merely be cleaned or disinfected is not actually damage, or that Allianz’s

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<sup>38</sup> *E.g.*, *Am. Food Sys., Inc. v. Fireman's Fund Ins. Co.*, 530 F. Supp. 3d 74 (D. Mass. 2021) (on appeal to the First Circuit Court of Appeals); *Boulevard Carroll Entm’t Grp., Inc. v. Fireman's Fund Ins. Co.*, CV2011771SDWLDW, 2020 WL 7338081, at \*2 (D.N.J. Dec. 14, 2020) (on appeal to the Third Circuit Court of Appeals); *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) (on appeal to the Seventh Circuit Court of Appeals); *PS Bus. Mgmt. v. Fireman's Fund Ins. Co.*, No. 21-1229, 2021 WL 4989870, at \*2 (E.D. La. Oct. 27, 2021) (on appeal to the Fifth Circuit Court of Appeals); *Nguyen v. Travelers Cas. Ins. Co. of Am.*, 541 F. Supp. 3d 1200, 1209 (W.D. Wash. 2021) (on appeal to the Ninth Circuit Court of Appeals).

indemnity obligations are not governed by the plain language of the Policy but are instead governed by “common experience.”

Sullivan respectfully requests that the Court answer the Certified Questions as follows:

1. Yes, the presence of COVID-19 in or near Sullivan’s properties, and related governmental orders, which hinder or destroy the fitness, habitability, or functionality of Sullivan’s properties, constitute “direct physical loss or damage;”
2. No, the Policy’s Business Access and/or Civil Authority coverage do not require a complete prohibition of all access to Sullivan’s properties;
3. Yes, there has been a “communicable disease event” as that term is used in the Communicable Disease Coverage Extension;
4. Yes, Sullivan’s expenditures to mitigate COVID-19 qualify for Loss Avoidance and Mitigation Coverage; and,
5. No, the Mortality and Disease Exclusion does not bar coverage for Sullivan’s claim.

Respectfully submitted,

*/s/ Justin Lucey*

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