UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 20-cv-22981-COOKE/GOODMAN

ACTORS PLAYHOUSE PRODUCTIONS, INC., individually and on behalf of all others similarly situated,

Plaintiff,

ORAL HEARING REQUESTED

v.

SCOR SE, and GENERAL SECURITY INDEMNITY COMPANY OF ARIZONA,

Defendants.
_______________________________________/

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Rules

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Plaintiff Actors Playhouse Productions, Inc. ("Actors Playhouse") responds in opposition to the Motion to Dismiss of Defendant General Security Indemnity Company of Arizona ("GSINDA"). (D.E. 16.)

INTRODUCTION

Actors Playhouse purchased an "all-risk" insurance policy from Defendants—with explicit, enhanced coverage for business interruption losses—to protect its business: the operation of the iconic Miracle Theatre in Coral Gables, Florida. As the name suggests, an "all-risk" policy insures against ***all*** risks of loss aside from those explicitly identified in specific written exclusions. Unlike policies issued by other insurers, Actors Playhouse's policy does not have a virus exclusion. Defendants nonetheless denied Actors Playhouse's claim for the substantial losses it suffered when it was forced to suspend its business operations as a result of the COVID-19 pandemic and related actions of various government authorities. This suit arises from Defendants' refusal to honor their contractual obligations to Actors Playhouse, as well as thousands of similarly situated policyholders, under the business income, extra expense, and civil authority provisions of their standard policy.

Defendants' motion to dismiss[1] offers several excuses for their refusal to abide by the policy they drafted, none of which has merit, particularly at this stage of the case. Ignoring the actual allegations of the Complaint, Defendants argue that the policy's coverage has not been triggered because Actors Playhouse has not alleged that its property suffered a direct physical loss or that the requirements for civil authority coverage have been met. And ignoring the ordinary meaning of the policy's actual language, Defendants contend that certain exclusions bar coverage for losses relating to a virus, even though Defendants declined to include a virus exclusion in the policy. Defendants' arguments should be rejected for several reasons.

First, Defendants' motion is premature. Courts in this District routinely decline to resolve disputed questions of contract interpretation at the motion-to-dismiss stage. The issue is better suited for summary judgment—which is why almost all of the cases on which Defendants rely arise in the summary-judgment context. Defendants' arguments are particularly premature here because they rely on contentions inconsistent with Actors Playhouse's factual allegations.

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[1] Defendant SCOR SE filed a separate Motion to Dismiss that, among other things, fully adopts Defendant GSINDA's Motion to Dismiss. *See* D.E. 17 at 2. Accordingly, this response will refer to both "Defendants" when referring to the parties moving to dismiss.

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Defendants contest, for example, the nature and extent of Actors Playhouse's losses, the effect of COVID-19 on the insured property, and the purpose and effect of various government orders. These disputed issues of fact, and thus the arguments that rely on them, cannot be resolved on a motion to dismiss. Instead, Actors Playhouse's allegations must be accepted as true. Defendants cannot shoehorn summary-judgment arguments into a Rule 12(b)(6) motion. Their motion can and should be denied on this ground alone.

Second, contrary to Defendants' arguments, Actors Playhouse has pleaded sufficient facts to trigger coverage for "direct physical loss of or damage to" its property based on the transmission of the SARS-CoV-2 coronavirus and the COVID-19 pandemic. Among other things, Actors Playhouse's inability to physically occupy or use the Miracle Theatre for its functional and intended purpose constitutes the "direct physical loss of" the property, which the policy's plain language covers. Defendants chose not to define the phrase "direct physical loss of" property in the policy they drafted and issued to Actors Playhouse. Accordingly, the phrase must be given its ordinary meaning. And contrary to Defendants' arguments, the ordinary meaning of the phrase "direct physical loss" does not include a requirement of structural alteration or destruction. Ultimately, Defendants seek to elide the meaningful difference between "loss" and "damage," an effort that cannot be reconciled with the disjunctive "or" that joins the terms in "direct physical loss of ***or*** damage to" property.

Third, Defendants' attempt to escape responsibility for the policy's civil authority coverage conflicts with the clear allegations of the Complaint. The policy extends coverage to losses from actions of a civil authority prohibiting access to the insured premises in response to dangerous physical conditions resulting from damage to property in the vicinity of the insured premises. Actors Playhouse's allegations expressly satisfy these requirements: Actors Playhouse alleges that orders issued by local and state authorities prohibited access to the Miracle Theatre, and that these orders were issued in response to dangerous physical conditions resulting from damage to property within one mile of the Theatre. Defendants argue otherwise only by disregarding the allegations in Actors Playhouse's complaint, an impermissible tactic at this stage. At most, Defendants' arguments highlight questions of fact about the effects of the civil authority orders and the reasons why they were issued. These questions cannot be resolved on a motion to dismiss.

Fourth, the exclusions on which Defendants rely—for nuclear, biological, chemical, and radiological hazards; for mold and similar microorganisms; and for pollution—do not bar coverage

for Actors Playhouse's losses. The ordinary meaning of the terms Defendants placed in the exclusions, which must be narrowly construed, does not encompass losses related to the coronavirus; by definition, the novel coronavirus is not a biological agent, not mold and not pollution. Aware that virus-related losses do not fall within these exclusions and that such losses qualify for coverage under typical "all-risk" policies, the insurance industry drafted a specific virus exclusion in 2006, following the first SARS pandemic. Although many insurers incorporated this exclusion into their policies, Defendants did not. The law does not permit Defendants to avoid the consequences of their own drafting decisions now that the loss they promised to cover has materialized.

Unfortunately, Actors Playhouse is not alone in facing a recalcitrant insurer refusing to honor its obligations to cover the devastating business interruption losses wrought by the COVID-19 pandemic. In addition to the putative class of Defendants' policyholders that Actors Playhouse seeks to represent, a growing number of businesses are suing other defiant insurers across the country. Decisions in these cases on motions to dismiss and motions for summary judgment are starting to appear, and as can be expected with litigation spanning the country, courts are not always reaching the same conclusions. So far, the most applicable and thoroughly reasoned decisions in cases most similar to this one have rejected many of the same arguments Defendants raise here in denying a similar motion to dismiss. *See*, *e.g.*, *Studio 417, Inc. v. Cincinnati Ins. Co.*, No. 20-cv-03127, 2020 WL 4692385 (W.D. Mo. Aug. 12, 2020) (the "*Studio 417* Order"). While insurers have prevailed in a few other cases, those decisions are distinguishable because they involved policies with express virus exclusions or different coverage language, concerned complaints that flatly failed to allege "direct physical loss or damage," were decided at a different stage of the litigation, or rested on a body of law that does not apply here.

For these reasons and those discussed below, Defendants' motion should be denied.

FACTUAL BACKGROUND

Plaintiff is the operator of the Miracle Theatre, a performing arts facility in the heart of Coral Gables, Florida. *See* Compl. ¶ 1. In 1995, Actors Playhouse partnered with the City of Coral Gables to renovate the Miracle Theatre. For the past twenty-five years, Actors Playhouse has staged productions and other community events at the Theatre. In April 2019, Actors Playhouse purchased an insurance policy from Defendants with the policy number 20568-02904-1902 ("the Policy"). *See id.* ¶ 3. The Policy is an "all-risk" policy, meaning that it covers ***all*** risks

of "direct physical loss of or damage to" the property unless the risk is specifically and expressly excluded.[2] The Policy also specifically provides Business Income, Extra Expense, and Civil Authority coverage. *See*, *e.g.*, *id.* ¶¶ 22, 23, 31, 32.

The Policy's grant of Business Income Coverage reads, in pertinent part, as follows:

> We will pay for the actual loss of Business Income you sustain due to the necessary "suspension" of your "operations" during the "period of restoration". The "suspension" must be caused by direct physical loss of or damage to property at premises which are described in the Declarations and for which a Business Income Limit of Insurance is shown in the Declarations.

Ex. A at 84 of 109. For purposes of Business Income Coverage, "suspension" means, among other things, a "slowdown or cessation of [the insured's] business activities." *Id.* at 92 of 109; Compl. ¶ 27. And generally speaking, the "Period of restoration"—that is, the period during which the Business Income and Extra Expense coverages apply—begins after the "direct physical loss or damage" occurs, and it ends when the property should be restored or repaired:

> "Period of restoration" means the period of time that . . . Begins: (1) 72 hours after the time of direct physical loss or damage for business income coverage; or (2) Immediately after the time of direct physical loss or damage for Extra Expense Coverage . . . [and] Ends on the earlier of: (1) The date when the property at the described premises should be repaired, rebuilt, or replaced with reasonable speed and similar quality; or (2) The date when business is resumed at a new permanent location.

Ex. A at 92 of 109; Compl. ¶ 28.

The Civil Authority coverage is an "Additional Coverage" under the Policy. It pays "for the actual loss of Business Income" and Extra Expense caused by an "action of civil authority that prohibits access" to the insured property when such action "is taken in response to dangerous physical conditions resulting from the damage or continuation of the Covered Cause of Loss." *See id.* ¶ 32. In pertinent part, the coverage provision states:

> When a Covered Cause of Loss causes damage to property other than property at the described premises, we will pay for the actual loss of Business Income you sustain and necessary Extra Expense caused by action of civil authority that prohibits access to the described premises, provided that . . . [a]ccess to the area immediately surrounding the damaged property is prohibited as a result of the damage, and . . . [t]he action of civil authority is taken

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2 The Policy is attached here as Exhibit A.

> in response to dangerous physical conditions resulting from the damage or continuation of the Covered cause of loss that caused the damage[.]

Ex. A at 85 of 109; Compl. ¶ 32.

Significantly, although the Policy expressly excludes from coverage a variety of risks ranging from civil war to asbestos, *see* Ex. A at 7 of 109 (listing policy forms and exclusions), the Policy does *not* contain any exclusions for losses related to viruses. *See* Compl. ¶¶ 35–36. Actors Playhouse duly complied with its obligations under the Policy, and timely paid premiums to Defendants. *See id.* ¶ 8.

Since March 2020, Actors Playhouse has suffered a suspension of its business operations because of COVID-19 and the resulting mandatory government orders requiring the shutdown and/or physical alteration of business at the Miracle Theatre. This suspension has included, among other things, the complete closure of the Theatre for extended periods, an inability to physically access and occupy the insured property, and a loss of the physical use and functionality of the property. *See id.* ¶¶ 38–52. As a result, Actors Playhouse has suffered significant business income losses. The Policy unambiguously covers these losses. *See*, *e.g.*, *id.* ¶¶ 22–37. But Defendants have refused to provide coverage. And in so doing, Defendants have breached their core promise under the Policy. *See*, *e.g.*, *id.* ¶ 55.

ARGUMENT

I. IT IS DEFENDANTS' BURDEN AT THIS STAGE OF THE LITIGATION TO SHOW THAT THE POLICY UNAMBIGUOUSLY DENIES COVERAGE.

Federal Rule of Civil Procedure 12(b)(6) "places the burden on the moving party." *Cohen v. Bd. of Trustees of Univ. of D.C.*, 819 F.3d 476, 481 (D.C. Cir. 2016). The sole question is whether the complaint includes "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). In answering that question, the Court must accept as true all the factual allegations in the Complaint and construe them in the light most favorable to the plaintiff. *See*, *e.g.*, *Adinolfe v. United Techs. Corp.*, 768 F.3d 1161, 1169 (11th Cir. 2014). At bottom, the question is not whether the plaintiff "will ultimately prevail . . . but whether his complaint [is] sufficient to cross the federal court's threshold." *Skinner v. Switzer*, 562 U.S. 521, 530 (2011).

Additional rules of construction—specific to the insurance context—also apply. Namely, undefined terms in an insurance policy are interpreted liberally in favor of the insured. *See State*

Farm Mut. Auto. Ins. Co. v. Pridgen, 498 So.2d 1245, 1247 n.3 (Fla. 1986). Additionally, "[i]f the relevant policy language is susceptible to more than one reasonable interpretation, one providing coverage and the [other] limiting coverage, the insurance policy is considered ambiguous." *Taurus Holdings Inc. v. United States Fid. Co.*, 913 So. 2d 528, 532 (Fla. 2005) (quotation omitted).[3] And in Florida, as elsewhere, "[a]mbiguous policy provisions . . . should be construed liberally in favor of coverage of the insured and strictly against the insurer." *Dickson v. Econ. Premier Assur. Co.*, 36 So. 3d 789, 790 (Fla. Dist. Ct. App. 2010). Moreover, ambiguous "exclusionary clauses are construed *even more strictly* against the insurer than coverage clauses." *Auto-Owners Ins. Co. v. Anderson*, 756 So. 2d 29, 34 (Fla. 2000) (emphasis added).

To be sure, a burden-shifting framework applies to ultimate issues of proof in insurance claims, under which an insured must first establish "a loss apparently within the terms of an 'all risks' policy," and then "the burden shifts to the insurer to prove that the loss arose from a cause which is excepted." *Hudson v. Prudential Prop. & Cas. Ins. Co.*, 450 So.2d 565, 568 (Fla. Dist. Ct. App. 1984). At this stage, however, the burden is on the Rule 12(b)(6) *movant*. *See* 5B Charles A. Wright et al., Federal Practice and Procedure § 1357 (3d ed. 2020) ("All federal courts are in agreement that the burden is on the moving party to prove that no legally cognizable claim for relief exist."). Thus, it is Defendants' burden to prove that Actors Playhouse has not stated a legally cognizable claim for breach of contract or for declaratory relief. Defendants do not come close to carrying this burden.

II. DEFENDANTS' ARGUMENTS ARE PREMATURE.

Given the parties' conflicting interpretations of the Policy, Defendants' arguments are premature. "[T]he Court 'may not engage in contract interpretation at the motion to dismiss stage, as these arguments are more appropriate for summary judgment.'" *Geter v. Galardi S. Enters., Inc.*, 43 F. Supp. 3d 1322, 1328-29 (S.D. Fla. 2014) (quoting *McKissack v. Swire Pac. Holdings, Inc.*, No. 09–22086–CIV, 2011 WL 1233370, at *3 (S.D. Fla. Mar. 31, 2011)); *see also Managed Care Solutions, Inc. v. Cmty. Health Sys., Inc.*, No. 10–60170–CIV, 2011 WL 6024572, at *8 (S.D. Fla. Dec. 2, 2011) ("A determination of the proper interpretation of the contract should be decided at the summary judgment stage, not in a ruling on a[ ] motion to dismiss."); *Ben-Yishay v.*

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[3] Because the insurance contract at issue in this case was executed in Florida, Florida law applies. *See Prime Ins. Synd. v. B.J. Handley Trucking, Inc.*, 363 F. 3d 1089, 1091 (11th Cir. 2004).

Mastercraft Dev., LLC, 553 F. Supp. 2d 1360, 1373 (S.D. Fla. 2008) ("The proper interpretation of this [contractual] provision is not a matter that can be resolved on a motion to dismiss for failure to state a claim. Interpretation of a clear and unambiguous contractual provision is a question of law properly decided on summary judgment.").

The relatively few decisions on motions to dismiss that Defendants cite often involve policies that "unambiguously reveal[] that the underlying claim is not covered." *Cammarota v. Penn-Am. Ins. Co.*, No. 17-CV-21605, 2017 WL 5956881, at *2 (S.D. Fla. Nov. 13, 2017). For example, a claim relating to an auto accident under a policy with an auto-accident exclusion, *see id.*, or a claim for medical services obtained more than 14 days after an accident under a policy that expressly excludes coverage for such services, *see Arias-Bonello v. Progressive Select Ins. Co.*, No. 0:17-CV-60897-UU, 2017 WL 7792704, at *5 (S.D. Fla. Aug. 8, 2017). The analogous circumstance here might be a policy with the specific exclusion that Defendant chose *not* to place in the Policy—an express virus exclusion.

On this ground alone, the Court can and should deny Defendants' motion to dismiss, which rests on its skewed interpretation of the Policy and counter-factual view of reality. Indeed, Defendants routinely refuse to accept the factual allegations of Actors Playhouse's Complaint, challenging, for example, allegations concerning the cause of governmental actions, the nature of Actors Playhouse's direct physical loss, the characteristics of the SARS-CoV-2 virus, and the extent of customers' access to the Theatre. *See*, *e.g.*, Mot. at 7 (alleging that government measures were not the result of physical loss or damage); *id.* at 13 (asserting that the Theatre's loss is solely economic in nature); *id.* at 18 (contending that "COVID-19 does not cause physical damage or loss to property"); *id.* at 19 (alleging that access to the Theatre was never prohibited); *id.* at 20 (contending that no "physical damage occurred due to COVID-19"); *id.* at 25 (asserting that "SARS-CoV-2 is a microorganism"). This tactic is impermissible at this stage. *See Adinolfe*, 768 F.3d at 1173 ("[Defendant] contests the accuracy of a number of the factual allegations that the plaintiffs have pled, but we must accept them as true at this stage of the case.").

As established in the authorities cited above, Defendants' arguments can only be considered, at the earliest, at summary judgment, once an adequate factual record has been developed. The Court, therefore, need not delve into the merits of Defendants' strained contractual-interpretation arguments to deny their motion. *See Geter*, 43 F. Supp. 3d at 1328-29; *McKissack*, 2011 WL 1233370, at *3; *Managed Care Solutions, Inc.*, 2011 WL 6024572, at *8.

Indeed, several courts—including at least one court applying Florida law—have recently concluded that a determination of coverage for COVID-19-related business interruption claims was inappropriate at the motion to dismiss stage. *See Urogynecology Specialist of Florida LLC v. Sentinel Ins. Co.*, No. 20-cv-1174 (M.D. Fla. Sept. 24, 2020) (the "*Urogynecology Specialist* Order").[4] *See also Optical Servs. USA/JCI v. Franklin Mut. Ins. Co.*, No. BER-L-3681-20, 2020 WL 5806576 (N.J. Super. Ct. Aug. 13, 2020);[5] *Francois Inc. v. Cincinnati Ins. Co.*, No. 20CV201416 (Ohio Ct. C.P. Sep. 29, 2020).[6]

In short, Defendants "do[] not challenge the sufficiency of the pleadings so much as the nature, scale, and scope of the alleged physical loss, including whether the actual danger posed by COVID-19 was concrete, severe, or imminent enough to prevent Plaintiffs from being able to use [their properties] for their intended purpose." *Blue Springs Dental Care, LLC v. Owners Ins. Co.*, No. 20-cv-00383, 2020 WL 5637963, at *6 (W.D. Mo. Sep. 21, 2020).[7] Those arguments are "better suited for resolution at the summary judgment stage, after the parties have had the benefit of discovery." *Id.*

III. ACTORS PLAYHOUSE'S COMPLAINT STATES VALID CLAIMS FOR RELIEF.

Beyond being premature, Defendants' arguments fail on the merits. Actors Playhouse has stated valid breach-of-contract and declaratory-relief claims. Defendants' arguments to the contrary rest on an untenable view of the law and a version of events that bears little resemblance to the facts alleged in the Complaint.

In Florida, the elements of a breach-of-contract claim are a valid contract, a material breach, and damages. *See Abbott Labs, Inc. v. Gen. Elec. Capital*, 765 So.2d 737, 740 (Fla. Dist. Ct. App. 2000); *accord Geter*, 43 F. Supp. 3d at 1328. The Complaint alleges the existence of the insurance contract and its essential terms, and the Policy itself is attached as an exhibit to the Complaint. *See*, *e.g.*, Compl. ¶¶ 5 (alleging contract and mutual promises pursuant to contract), 6–7 (alleging basic terms of the contract), 21–36 (alleging terms of the contract in exhaustive

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[4] The *Urogynecology Specialist* Order is attached to this brief as Exhibit B.

[5] The *Optical Services* Order is attached to this brief as Exhibit C. The transcript of the motion to dismiss hearing, at which the court noted that dismissal was premature at best, is attached as Exhibit D.

[6] The *Francois Inc.* Order is attached to this brief as Exhibit E.

[7] The *Blue Springs Dental Care* Order is attached to this brief as Exhibit F.

detail). The Complaint also alleges that by refusing to honor their coverage obligations, Defendants have breached specific provisions of the Policy. *See*, *e.g.*, *id.* ¶¶ 10 (alleging breach), 85–93 (detailing breach of business interruption provisions). Finally, the Complaint alleges the damages that Actors Playhouse has suffered as a result of Defendants' breaches of the contract. *See*, *e.g.*, *id.* ¶¶ 48–53, 93, 113.

Actors Playhouse's claim for declaratory relief requires a substantial and continuing controversy that is not conjectural, hypothetical, or contingent. *See Malowney v. Fed. Collection Deposit Grp.*, 193 F.3d 1342, 1346–48 (11th Cir. 2019). The Complaint alleges such a controversy. *See* Compl. ¶¶ 84, 104, 124. Specifically, the Complaint alleges a controversy regarding whether Actors Playhouse's losses are covered under the Policy's business income, extra expense, and civil authority provisions. *See*, *e.g.*, *id.* ¶¶ 55, 82, 102, 122. This is a type of controversy that federal courts routinely adjudicate under the Declaratory Judgment Act. *See*, *e.g.*, *Mt. Hawley Ins. Co. v. Tactic Sec. Enforcement, Inc.*, 252 F. Supp. 3d 1307 (M.D. Fla. 2017); *Powers v. Hartford Ins. Co. of The Midwest*, No. 8-10-cv-1279, 2010 WL 2889759, at *3 (M.D. Fla. 2010) ("We believe that declaratory judgments are and can increasingly be a valuable procedure for the resolution of insurance coverage disputes[.]").

Defendants do not seriously dispute that the Complaint sufficiently pleads the requisite elements of claims for breach of contract and declaratory relief. Indeed, the final section of Defendants' brief primarily repackages its contractual-interpretation arguments to purportedly challenge the sufficiency of Actors Playhouse's claims. *See* Mot. at 29–30.[8] Thus, if Defendants'

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[8] Defendants also half-heartedly disparage Actors Playhouse's allegations as "conclusory," but they clearly are not. Defendants fail to point to any specific deficiency in the Complaint, which contains pages and pages of detailed allegations. The authorities Defendants cite are far afield. For example, in *Timber Pines Plaza, LLC v. Kinsale Ins. Co.*, No. 8:15-CV-1821, 2016 WL 8943313 (M.D. Fla. Feb. 4, 2016), the plaintiff failed to "allege that the Policy is an all-risks policy," and the court therefore declined to consider the all-risk nature of the policy. *Id.* at *2. Indeed, in a complaint barely spanning three pages and twenty-four paragraphs, the plaintiff failed to plead anything about the policy at all, other than its existence. For reference, the *Timber Pines* complaint is attached as Exhibit G. No such issue is present here. Actors Playhouse's Complaint contains extensive allegations about the Policy and Actors Playhouse's losses, and Actors Playhouse has expressly alleged the all-risk nature of the Policy. While Defendants may disagree with Actors Playhouse on the merits of its claims, such a disagreement does not render Actors Playhouse's allegations "conclusory."

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contractual-interpretation arguments are either premature or unavailing, there is no dispute that Actors Playhouse has stated valid claims that pass muster under Rule 12(b)(6).

As explained in the sections below, Defendants' contractual-interpretation arguments cannot be reconciled with the plain language of the Policy, with countless authorities construing similar policies, or with the facts alleged in the Complaint. Indeed, Defendants do not cite to a *single* Florida authority granting a motion to dismiss based on *any* of the specific arguments raised in their motion. Nor can they: to our knowledge, no Florida court has granted a motion to dismiss based on Defendants' interpretation of "direct physical loss of or damage to" property; a nuclear, chemical, biological, or radiological hazards exclusion; a mold exclusion; or a pollution exclusion. Defendants arguments should be swiftly rejected.

A. Actors Playhouse Has Adequately Alleged "Direct Physical Loss of or Damage to" Property.

The Complaint expressly alleges that Actors Playhouse suffered "direct physical loss of [and] damage to" the insured property. *See*, *e.g.*, Compl. ¶¶ 48, 79, 99, 109 (alleging, among other things, that COVID-19 damaged the property and prevented access to and use of the property). Urging a strained interpretation of this phrase without support in Florida law, Defendants contend that these allegations are insufficient. *See* Mot. 8–15. Even if these arguments could be properly raised on a motion to dismiss—and they cannot—they are unavailing.

As a threshold matter, it bears emphasis that the phrase "direct physical loss of or damage to" property is not defined in the Policy. Nor has the meaning of this phrase been directly addressed by the Florida Supreme Court, let alone in a case related or analogous to the COVID-19 context. This key phrase, therefore, must be construed according to Florida's bedrock rule for construing insurance contracts: it must be given its plain and ordinary meaning. *See*, *e.g.*, *Homeowners Choice Prop. & Cas. v. Maspons*, 211 So. 3d 1067, 1069 (Fla. Dist. Ct. App. 2017). And if the phrase is susceptible to more than one reasonable interpretation, this Court must give the phrase the meaning that is most favorable to coverage. *See, e.g., Dickson*, 36 So. 3d at 790.

It also bears emphasis that because Actors Playhouse's Policy is an all-risk policy, its grant of coverage "extends to risks not usually covered under other insurance[.]" *Great Lakes Reinsurance (UK) PLC v. Kan-Do, Inc.*, 639 F. App'x 599, 603 (11th Cir. 2016) (citation omitted). *See also Sporting Prods., LLC v. Pac. Ins. Co., Ltd.*, No. 10-80656-CIV, 2012 WL 13018367, at *10 (S.D. Fla. Jan. 6, 2012) ("An 'all-risks' policy of insurance provides a special type of coverage that extends to risks not usually contemplated.") (citation omitted). In other words, ***all*** risks of

"direct physical loss or damage" are covered "unless the [P]olicy contains a specific provision *expressly* excluding the loss from coverage." *Great Lakes Reinsurance*, 639 F. App'x at 603 (emphasis added, citation omitted).

1. The plain meaning of "direct physical loss or damage" supports coverage in this case.

Legal and lay dictionaries define the key terms in the phrase "direct physical loss of or damage to" property as follows. "Direct" means "[f]ree from extraneous influence," "immediate," and "characterized by close logical, causal, or consequential relationship."[9] "Physical" means, among other things, "[o]f, relating to, or involving the material universe and its phenomena;" "relating to the physical sciences;" and "[o]f, relating to, or involving material things."[10] "Loss" means, among other things, "[a]n undesirable outcome of a risk," "the disappearance or diminution of value," "[t]he failure to maintain possession of a thing,"[11] "deprivation" and "the act of losing possession."[12] "Damage," according to Black's Law Dictionary, means "[l]oss or injury to person or property," and "any bad effect on something."[13] Other dictionaries similarly define "damage" to mean, for example, "loss or harm resulting from injury to person, property or reputation."[14] *See also Studio 417* Order, at *4 (citing the Merriam-Webster dictionary to interpret "physical loss" in a materially similar case related to COVID-19).[15]

Critically, because the phrase uses the disjunctive "or," the Policy's all-risk coverage may

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9 Direct (adjective), Black's Law Dictionary (11th ed. 2019); Direct (adjective), Merriam-Webster Dictionary, www.merriam-webster.com/dictionary/direct (last visited Oct. 4, 2020). *Accord* Direct (adjective), Oxford English Dictionary, https://www.lexico.com/en/definition/direct (last visited Oct. 4, 2020) ("Without intervening factors or complications").

10 Physical, Black's Law Dictionary (11th ed. 2019).

11 Loss, Black's Law Dictionary (11th ed. 2019). Other dictionaries define the term similarly. *See, e.g.*, Loss, Collins English Dictionary, https://www.collinsdictionary.com/us/dictionary/english/loss (last visited Oct. 4, 2020) (defining "loss" as "the fact of no longer having something or having less of it than before").

12 Loss, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/loss (last visited Oct. 4, 2020).

13 Damage, Black's Law Dictionary (11th ed. 2019).

14 Damage, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/damage (last visited Oct. 4, 2020).

15 The court's order is attached as Exhibit H.

be triggered ***either*** by "loss" ***or*** by "damage." *See id.* at *5 (explaining that the court must give meaning to all terms in the policy and that if "physical loss" meant "physical damage," at least one of the two terms would be rendered superfluous).

The Complaint alleges physical loss of and damage to the insured property, consistent with the plain meaning of these terms. *See*, *e.g.*, Compl. ¶¶ 38–52 (alleging loss and damage due to, among other things, COVID-19 and actions of civil authority). Actors Playhouse suffered "[a]n undesirable outcome of a risk," has sustained a "diminution of value" of its property and business, has suffered a "failure to maintain possession" of its property, and has "less of something than before." Namely, Actors Playhouse partly or completely lost, among other things, the ability to access the insured property, to occupy the property, to use the property for its intended purpose, and to physically conduct its business at the property. *See*, *e.g.*, *id.* ¶¶ 48 (alleging that property was unusable and uninhabitable, causing a suspension of business operations); 49–51 (further alleging suspension of business operations).

As alleged in the Complaint, this loss of and damage to property was "physical." There is no reasonable dispute that COVID-19 and the coronavirus are, relate to, and involve material things, the material universe and/or the physical sciences. And there is no reasonable dispute that the effects of the COVID-19 pandemic and the coronavirus on the property have been physical, as well. Far from being purely "economic," Actors Playhouse's losses and damages include the complete physical closure of the Theatre and other physical alterations and restrictions to the property. *See*, *e.g.*, *id.* ¶¶ 9, 45, 79, 89, 99.[16] In other words, the losses and damages do not stem from unfavorable *economic* conditions extrinsic to the insured property, but rather from Actors Playhouse's inability to make full *physical* use of its property.

Defendants urge a strained interpretation of "direct physical loss of or damage to" property that would require inserting additional terms that are conspicuously *absent* from the Policy's plain language. For example, Defendants appear to contend that "direct physical loss of or damage to" property requires that the damage be structural and irreparable. *See* Mot. at 10 (arguing that "if the property can be cleaned and restored to its original function, no covered loss has been

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[16] Defendants' reliance on *Bahama Bay II Condo. Ass'n, Inc. v. United National Ins. Co.*, 374 F. Supp. 3d 1274, 1281 (M.D. Fla. 2019), is therefore misplaced. *Bahama Bay* stands for the unremarkable proposition that an insured's decision to hire security guards and install fencing is at most an economic loss and does not, *without more*, amount to physical loss or damage. Here, Actors Playhouse has alleged physical loss and damage, not merely economic loss.

suffered"). But nothing in the phrase "direct physical loss of or damage to" property, or elsewhere in the Policy, requires that the loss or damage be "structural" or otherwise impossible to restore. Indeed, as outlined in more detail below, courts in Florida and elsewhere have repeatedly rejected the notion that "physical loss of or damage to" property requires structural injury to the property. *See*, *e.g.*, *Three Palms Pointe, Inc. v. State Farm Fire & Cas. Co.*, 250 F. Supp. 2d 1357, 1364 (M.D. Fla. 2003), *aff'd*, 362 F.3d 1317 (11th Cir. 2004) (explaining that "under Florida law 'direct physical loss' includes more than losses that harm the structure of the covered property"). *See also Studio 417* Order at *5 (explaining that "courts have . . . recognized that even absent a physical alteration, a physical loss may occur when the property is uninhabitable or unusable for its intended purpose" and that cases to the contrary "were decided at the summary judgment stage, are factually dissimilar, and/or are nonbinding").

Defendants' restrictive view of "direct physical loss of or damage to" property also rests on ignoring the key word "or," in violation of the guiding principle that "[n]o word or part of an agreement is to be treated as a redundancy or surplusage if any meaning, reasonable and consistent with other parts, can be given to it." *Fla. Inv. Grp. 100, LLC v. Lafont*, 271 So. 3d 1, 5 (Fla. Dist. Ct. App. 2019) (internal quotation marks omitted); *see Twin City Fire Ins. Co. v. Leonel R. Plasencia, P.A.*, No. 19-80021-CV, 2019 WL 7899222, at *3 (S.D. Fla. Sept. 30, 2019) ("When interpreting a contract 'an interpretation of a contract which gives a reasonable, lawful and effective meaning to all of the terms is preferred to an interpretation which leaves a part unreasonable, unlawful or of no effect.'") (quoting *Herian v. Se. Bank, N.A.*, 564 So. 2d 213, 214 (Fla. Dist. Ct. App. 1990)). The use of the disjunctive "or" indicates that "loss" and "damage" cannot be afforded the same meaning. While "damage to" property may include structural damage to property, the "direct physical loss of" property must mean something else. *See Landrum v. Allstate Ins. Co.*, 811 F. App'x 606, 609 (11th Cir. 2020) ("Use of the disjunctive 'or' in the policy 'indicates alternatives and requires that those alternatives be treated separately[.]") (quoting *Quindlen v. Prudential Ins. Co. of Am.*, 482 F.2d 876, 878 (5th Cir. 1973), and citing Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, 116 (2012) ("Under the conjunctive/disjunctive canon, ... *or* creates alternatives.")).

Moreover, the sweeping rule that Defendants urge—that there can be no coverage under an all-risk policy where the property can be restored—is nonsensical and impossible to square with a holistic reading of the Policy. *See Talbott v. First Bank Florida, FSB*, 59 So.3d 243, 245 (Fla.

Dist. Ct. App. 2011) ("A contract should be read as a whole."); *City of Homestead v. Johnson*, 760 So. 2d 80, 84 (Fla. 2000) (explaining that courts must "read provisions of a contract harmoniously in order to give effect to all portions thereof"). Indeed, the Policy provides Business Interruption coverage during a period of time called the "Period of *restoration*." *See*, *e.g.*, Compl. ¶¶ 24, 28. The entire scheme of business interruption insurance contemplates coverage for losses sustained during an *interruption* of business, pending *recovery* or *restoration* of the property. It is therefore flatly incorrect to state, as Defendants do, that there can be "no covered loss" where "the property can be cleaned and restored." Adopting such an interpretation would render the Policy's grant of business interruption coverage a nullity, something that is expressly disfavored by Florida law. *See First Mercury Ins. Co. v. Sudderth*, 620 Fed. App'x 826, 830 (11th Cir. 2015). And it would be inconsistent with the facts alleged to deny coverage on the grounds that Actors Playhouse's property could be "cleaned and restored," as Defendants argue, because the property could not be restored for months: due to the health risks posed by having people congregate indoors during the COVID-19 pandemic, it has not been possible for Actors Playhouse to fully use or occupy the Theatre for an extended period of time. *See* Compl. ¶¶ 48, 52.

Likewise, nothing in the phrase "direct physical loss of or damage to" property, or elsewhere in the Policy, requires that the loss or damage be manifested by some "visible" alteration to the property. *Compare* Mot. at 13 (suggesting that a "physical" loss must be visible) *with Sullivan v. Standard Fire Ins. Co.*, 956 A.2d 643, at *3 (Del. 2008) (concluding that mold contamination constitutes a "physical loss" and explaining that "[m]old spores and other bacteria . . . undoubtedly have a 'material existence,' even though they are not tangible or perceptible to the naked eye"). *See also Sentinel Mgmt. Co. v. New Hampshire Ins. Co.*, 563 N.W.2d 296, 300 (Minn. Ct. App. 1997) (rejecting the argument that the requisite harm must be "tangible"); *Columbiaknit, Inc. v. Affiliated FM Ins. Co.*, No. Civ. 98-434, 1999 WL 619100, at *6 (D. Or. Aug. 4, 1999) (explaining that "physical damage can occur at the molecular level and can be undetectable in a cursory inspection"). Indeed, if the Policy provided coverage only for visible loss or damage, it would render superfluous one of the exclusions that Defendants invoke, the Mold/Microorganism Exclusion, which deals primarily with risks that are by definition invisible to the naked eye. *Cf. Anderson*, 756 So.2d at 34 (explaining that Florida law disfavors interpretations of insurance policies that render policy language superfluous).

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Defendants also contend that the words "rebuild," "repair," and "replace"—which form part of the definition of the "Period of restoration"—support their strained interpretation of "physical loss or damage." *See* Mot. at 11–12. But rather than supporting Defendants' arguments, the plain meaning of these words undermines them.[17] "Restore" means, among other things, "to put back into existence or use," "to bring back or put back into a former or original state," "to renew," and "to put back again in possession of something."[18] And "repair" means "[t]o restore to a sound or good condition . . ." or "[t]o renew, revive, or rebuild after loss, expenditure, exhaustion etc."[19] In sum, the "Period of restoration" plainly refers to the period of time until the business can physically be renewed, restored, or put back into use. Nothing in the definition of the "Period of restoration" supports Defendants' arguments that "physical loss of or damage to" property must be structural and visible.

If Defendants wanted to restrict coverage only to visible or structural loss or damage, they should have done so. But they did not. And Defendants cannot retroactively impose such limitations on the Policy's all-risk grant of coverage.

2. A holistic reading of the Policy supports coverage in this case.

Under well-settled Florida law, insurance contracts must be read as a whole. *See Talbott*, 59 So.3d at 245. And here, Defendants' proposed construction of "physical loss of or damage to" property is impossible to square with a holistic reading of the Policy. In an all-risk policy, the exclusions from coverage, by definition, encompass losses that would otherwise be covered. In other words, the categories of risks that are subject to express exclusions are risks of "direct physical loss or damage." *See, e.g., Great Lakes Reinsurance*, 639 F. App'x at 603 ("[E]xclusions

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[17] Defendants cite two cases in support of their contention that "rebuild," "repair," and "replace" suggest a narrow interpretation of "physical loss or damage." Those cases are inapposite here. *Newman Myers Kreines Gross Harris, P.C. v. Great N. Ins. Co.*, 17 F. Supp. 3d 323 (S.D.N.Y. 2014), was decided on summary judgment and concerned losses related to a power outage. Its discussion of "rebuild," "repair" and "replace" was expressly dicta. *See id.* at 332. The other case, *Philadelphia Parking Auth. v. Fed. Ins. Co.*, 385 F. Supp. 2d 280, 287 (S.D.N.Y. 2005), concerned purely economic damage resulting from the post-9/11 grounding of aircraft. Both cases were decided under foreign law. Therefore, even if the cases supported Defendants' contention that "physical loss or damage" must be structural and visible, such a requirement has no support in the law of Florida.

[18] Restore, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/restore (last visited Oct. 4, 2020).

[19] Repair (verb), Black's Law Dictionary (11th ed. 2019).

in coverage are expressly intended to modify coverage clauses and to limit their scope.") (citations omitted). *See also Allstate Ins. Co. v. Preferred Fin. Sols., Inc.*, 8 F. Supp. 3d 1039, 1053 (S.D. Ind. 2014) ("Exclusions operate to preclude coverage otherwise afforded by the indemnity provisions of the contract."). Otherwise, the exclusions would be superfluous, a result that is expressly disfavored under Florida law. *See Anderson*, 756 So.2d at 34.

Here, the Policy expressly excludes risks that, by definition, do *not* require structural injury to property. For example, the Policy excludes risks of government "seizure" of property, as well as risks related to "[t]he failure of power, communication, water or other utility service[.]" *See id.* at 75 of 109. Moreover, the Policy's Mold Exclusion, which Defendants here invoke, expressly bars coverage for "loss of use, occupancy, or functionality" due to mold or similar microorganisms. *See id.* at 35 of 109. Although, as explained below, viruses are *not* microorganisms, and thus the Mold Exclusion does not bar coverage here, its scope is nonetheless instructive. If, as Defendants urge, "physical of loss or damage to" property could *not* encompass a loss of use, occupancy or functionality of property, there would be no need for any of these exclusions. The presence and scope of these exclusions undermines Defendants' narrow and strained interpretation of "physical loss of or damage to" property, because if the phrase referred only to *structural* or *visible* damage, these exclusions would all be superfluous.

3. Authorities from Florida and elsewhere interpreting and applying the phrase "direct physical loss of or damage to" property support coverage in this case.

Consistent with the plain meaning of the phrase "direct physical loss of or damage to" property, courts in Florida have expressly rejected the restrictive interpretation that Defendants urge in their motion. For example, courts have rejected the notion that "physical loss or damage" requires *structural* damage to the property. *See*, *e.g.*, *Azalea, Ltd. v. American States Ins. Co.*, 656 So. 2d 600, 602 (Fla. Dist. Ct. App. 1995). In *Azalea*, the court explained that Defendants' preferred interpretation was "not supported by the facts or law." *Id.* Rather, the key fact in that case was that "[t]he facility could not operate or exist" based on the presence of an "unknown substance." *Id.*; *see also Sentinel Mgmt. Co.*, 563 N.W.2d at 300 (explaining that the relevant inquiry is not whether "some tangible injury to the physical structure itself could be detected," but rather whether the property has been rendered "useless to its owners"). In short, "under Florida law 'direct physical loss' includes more than losses that harm the structure of the covered property." *Three Palms Pointe*, 250 F. Supp. 2d at 1364.

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When applying Florida law, this Court has likewise recognized that a loss of use or function can give rise to coverage under an all-risk policy. *See Mama Jo's, Inc. v. Sparta Ins. Co.*, No. 17-CV-23362, 2018 WL 3412974, at *9 (S.D. Fla. Jun. 11, 2018), *aff'd*, No. 18-12887, 2020 WL 4782369 (11th Cir. Aug. 18, 2020). In *Mama Jo's*—a case that Defendants rely on extensively—a road construction project allegedly caused some dust and debris to migrate onto or into the plaintiff's restaurant. The restaurant remained open, continued its normal operations and was able to serve the same number of customers as before. The insurer moved for summary judgment, and the court granted the motion, ruling that the restaurant had not suffered physical loss or damage because it "was not 'uninhabitable' or 'unusable.'" *Id.* at *9. Instead, "the restaurant remained open every day, customers were always able to access the restaurant, and there [was] no evidence that dust had an impact on the operation other than requiring daily cleaning." *Id.*

The plaintiff insured appealed, and the Eleventh Circuit affirmed the district court's grant of summary judgment to the insurer. As relevant here, the Eleventh Circuit agreed with the district court's "conclu[sion] that 'direct physical loss' . . . requires a showing that the property [was] rendered uninhabitable or unusable." 2020 WL 4782369, at *5. Therefore, "an item or structure that merely needs to be cleaned," but has not been rendered unusable, "has not suffered a 'loss' which is both 'direct' and 'physical.'" *Id.* at *9.

The key facts of *Mama Jo's* are distinguishable. Most importantly, unlike in *Mama Jo's*, the Complaint alleges not merely that the Miracle Theatre property needed to be cleaned, but rather that the property was damaged, that the Theatre was unusable and uninhabitable, that customers and patrons have been prohibited from accessing the Theatre, that the Theatre has had to physically shut down for extended periods of time, and that the Theatre's business operations were substantially impacted. *See* Compl. ¶ 48 (alleging that the property was unusable and uninhabitable, causing a suspension of business operations); *id.* ¶¶ 49–52 (further alleging suspension of business operations).

The reasoning of *Mama Jo's*, moreover, undercuts Defendants' argument, because the district court recognized that a loss of the ability to physically use the property may satisfy the requirement of "physical loss or damage." 2018 WL 3412974, at *9. As an example, the court explained that physical loss or damage can arise when an accident or other event causes the insured property "to become unsatisfactory for future use." *Id.* (citing *MRI Healthcare Ctr. of Glendale, Inc. v. State Farm Gen. Ins. Co.*, 187 Cal. App. 4th 766, 779 (Cal. Ct. App. 2010)). The court also

noted that "[s]everal courts have held that 'physical loss' occurs when property becomes 'uninhabitable' or substantially 'unusable.'" *Id.* The Eleventh Circuit, in affirming the district court's ruling, embraced this rationale. *See* 2020 WL 4782369, at *5 (noting the district court's distinction between cleaning expenses on the one hand, and the loss of a property's usability an habitability on the other).

Mama Jo's is therefore consistent with *Azalea*, *Three Palms Pointe*, and other Florida authorities in reasoning that "direct physical loss of or damage to" property can occur when a property becomes uninhabitable or unusable, even though the property itself is structurally unaltered. Indeed, courts in jurisdictions across the country have reached the same conclusion and recognized that "physical loss of or damage to" property can arise from a wide variety of risks, harms and threats. *See*, *e.g.*, *One Plaza Condo., LLC v. Travelers Prop. Cas. Co. of Am.*, No. 11 C 2520, 2015 WL 2226202, at *9 (N.D. Ill. Apr. 22, 2015) (explaining that in an all-risk policy, "'physical' damage may take the form of loss of use of otherwise undamaged property, which in turn suffices as a covered loss"); *Customized Distrib. Servs. v. Zurich Ins. Co.,* 862 A.2d 560, 566 (N.J. App. Div. 2004) ("Since 'physical' can mean more than material alteration or damage, it was incumbent on the insurer to clearly and specifically rule out coverage in the circumstances where it was not to be provided[.]")

These risks, harms and threats include the presence of unpleasant or noxious odors. *See, e.g., Farmers Ins. Co. of Oregon v. Trutanich*, 858 P.2d 1332 (Or. Ct. App. 1993).[20] They include bacterial contamination of a water well, even though the well and the insured house were unharmed. *See Motorists Mutual Ins. Co. v. Hardinger*, 131 F. App'x 823, 826 (3d Cir. 2005).[21] They include the buildup of carbon monoxide, even though the chemical is harmless to the insured property itself. *See Matzner v. Seaco Ins. Co.*, No. 96-0498-B, 1998 WL 566658, at *3 (Mass. Super. Aug. 12, 1998) (explaining that "the phrase 'direct physical loss or damage' *is* ambiguous [and can include more than] tangible damage to the structure of insured property").[22] They include smoke and ash from a wildfire, which forced the insured performing arts company to cancel future

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20 *See also Essex Ins. Co. v. BloomSouth Flooring Corp.*, 562 F.3d 399, 406 (1st Cir. 2009); *Mellin v. N. Sec. Ins. Co., Inc.*, 115 A.3d 799, 805 (N.H. 2015).

21 *See also Cooper v. Travelers Indem. Co. of Ill.*, No. C-01-2400-VRW, 2002 WL 32775680, at *5 (N.D. Cal. Nov. 4, 2002) (closure of tavern due to e-coli contamination of well).

22 *See also Western Fire Ins. Co. v. First Presbyterian Church*, 437 P.2d 52 (Colo. 1968).

performances. *See Or. Shakespeare Festival Ass'n v. Great AM. Ins. Co.*, No 1:15-CV-01932, 2016 WL 3267247 (D. Or. Mar. 6, 2017). They include the loss of merchantability of an unpleasant tasting but otherwise safe soft drink. *See Pepsico, Inc. v. Winterthur Int'l Am. Ins. Co.*, 24 A.D.3d 743, 744 (N.Y. App. 2005). They include the release of ammonia, which rendered the insured premises unfit for occupancy. *See Gregory Packaging, Inc. v. Travelers Property Cas. Co. of Am.*, No. 2:12-cv-04418, 2014 WL 6675934, at *3 (D. N.J. Nov. 25, 2014) ("While structural alteration provides the most obvious sign of physical damage, both New Jersey courts and the Third Circuit have also found that property can sustain physical loss or damage without experiencing structural alteration."). The list goes on.[23]

These risks, harms and threats also include risks related to COVID-19 and the SARS-CoV-2 virus. To date, several federal and state courts have specifically analyzed whether losses arising from the COVID-19 pandemic met the "physical loss of or damage to" requirement of all-risk insurance policies materially similar to Actors Playhouse's Policy. In *Studio 417*, a case pending in the Western District of Missouri, the plaintiffs asserted claims for breach of contract and for declaratory relief based on their insurer's denial of coverage, including business interruption coverage and civil authority coverage. The policies at issue were all-risk policies that covered "accidental [direct] physical loss or accidental [direct] physical damage." *See Studio 417 Order*

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[23] *See General Mills, Inc. v. Gold Medal Ins. Co.*, 622 N.W.2d 147, 152 (Minn. Ct. App. 2001) (oats treated with unapproved pesticide but otherwise safe to consume); *Widder v. La. Citizens Prop. Ins. Co.*, 82 So. 3d 294, 296 (La. Ct. App. 2011) (lead dust); *Stack Metallurgical Services, Inc. v. Travelers Indem. Co. of Connecticut*, No. 05-1315, 2007 WL 464715, at *8 (D. Or. Feb. 7, 2007) (lead particles, which limited commercial use of furnace); *Hughes v. Potomac Ins. Co. of D.C.*, 18 Cal. Rptr. 650, 655 (Ct. App. 1962) (landslide that caused house to be perched at edge of cliff but left house structurally undamaged was a physical loss because condition rendered the premises "useless to its owners"); *TRAVCO Ins. Co. v. Ward*, 715 F. Supp. 2d 699, 709 (E.D. VA. 2010), *aff'd*, 504 F. App'x 251 (4th Cir. 2013) (gas from a defective drywall); *Fountain Powerboat Indus., Inc. v. Reliance Ins. Co.*, 119 F. Supp. 2d 552, 557 (E.D.N.C. 2000); *Murray v. State Farm Fire & Casualty Ins. Co.*, 509 S.E.2d 1, 17 (W. Va. 1998) (threat of future rock fall from an abandoned rock quarry, even "in the absence of structural damage to the insured property"); *Dundee Mut. Ins. Co. v. Marifjeren*, 587 N.W.2d 191, 194 (N.D. 1998) ("interruption of electrical power 'damaged' the storage facilities by impairing their value or usefulness"). Countless cases have also found "physical loss or damage" resulting from asbestos, which poses risks to human health but is an otherwise harmless—indeed, intentional—feature of the insured properties. *See, e.g.*, *Port Authority of New York & New Jersey v. Affiliated FM Ins. Co.*, 311 F.3d 226, 230 (3d Cir. 2002); *U.S. Fidelity & Guar. Co. v. Wilkin Insulation Co.*, 144 Ill. 2d 64, 75 (Ill. 1991); *Sentinel Mgmt. Co.*, 563 N.W.2d at 300.

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at 2. The defendant insurer moved to dismiss the complaint, arguing that a structural alteration of the property was required to show a "physical loss." The court disagreed and denied the defendant's motion.

The reasoning of the *Studio 417* court is instructive. There, as here, the defendant urged a narrow construction of "physical loss," which would require structural alteration. But the court noted that authority from Missouri and elsewhere "recognize[s] that even absent a physical alteration, a physical loss may occur when the property is uninhabitable or unusable for its intended purpose." *Id.* at 10. There, as here, the defendant relied on out-of-circuit cases purportedly supporting its narrow interpretation of "physical loss or damage," including many of the same cases on which Defendants here rely. But the court explained that those cases "were decided at the summary judgment stage, are factually dissimilar, and/or are not binding." *Id.* There, as here, the defendant contended that the plaintiffs had alleged merely economic harm. But the court rejected this argument, reasoning that the plaintiffs' economic harm was "tethered to their alleged physical loss caused by COVID-19 and the [government] Closure Orders." *Id.* at 12.

In *Optical Services USA/JCI*, the defendants moved to dismiss and argued—as the Defendants do here—that COVID-19-related losses did not qualify as a "direct physical loss." The Superior Court of New Jersey, however, observed that this "blanket statement [was] unsupported by any common law in the State of New Jersey." Moreover, given that there had been no discovery taken at that stage of the litigation, the court explained that defendants' motion was "premature at best." *See* Ex. D at 14. *See also Urogynecology Specialist* Order at 7 (denying defendant insurer's motion to dismiss because while some case law supported defendant's argument, "none of the cases dealt with the unique circumstances of the effect COVID-19 has had on our society—a distinction this Court considers significant").

In *Blue Springs Dental Care, LLC*, the court acknowledged at least two ways in which COVID-19 could cause "direct physical loss of" the plaintiffs' properties. First, the plaintiffs alleged that the virus was physically present in their dental clinics and thereby deprived them of the use of those clinics. *See* 2020 WL 5637963 at *6. Second, the plaintiffs also alleged that they suspended business operations at the clinics to prevent the likely *additional* physical loss and harm that the properties would otherwise suffer from further spread of the coronavirus. *See id*. *See also*, *e.g.*, *Hampton Foods, Inc. v. Aetna Cas. & Sur. Co.*, 787 F.2d 349, *352* (8th Cir. 1986) (a

"commonsense meaning of [the policy provision] is that any loss or damage due to the *danger* of direct physical loss is covered") (quotation omitted).

Here, Defendants' strained arguments fail for similar reasons, among others. As noted above, Defendants' failure to expressly include additional coverage limitations—such as "structural" or "visible"—in the Policy's coverage language bars them from invoking such limitations now. In fact, that Defendants crafted a policy lacking such limitations *despite* the above-cited case law *further* undermines Defendants' argument. After all, insurers routinely introduce or amend policy provisions in response to case law that they consider unfavorable or misguided. *See*, *e.g., Thompson v. Commercial Union Ins. Co. of New York*, 250 So.2d 259, 261 n.2 (Fla. 1971) (noting that judicial decision "precipitated changes in policy provisions by insurers to eliminate the language resulting in liability"); *Queen City Farms, Inc. v. Cent. Nat. Ins. Co. of Omaha*, 827 P.2d 1024, 1036 (Wash. Ct. App. 1992) (citing 7A J. Appleman, Insurance Law and Practice § 4491 (1979)) ("New policy language has been introduced in an attempt to clarify troublesome areas for the underwriters, or where court decisions were counter to insurer intentions."), *aff'd* 882 P.2d 703 (Wash. 1994). And for decades, courts in multiple jurisdictions have interpreted "physical loss or damage" as *not* requiring structural injury or destruction. If Defendants wanted to provide a narrower type of coverage to Actors Playhouse, they should have done so in plain terms.

Moreover, the Insurance Services Office (ISO), whose copyright is credited for numerous provisions of the Policy, has implicitly recognized that virus-related losses amount to "direct physical loss or damage." As detailed in the Complaint, "[t]he ISO is a company that drafts standard policy language for use in insurance contracts." Compl. ¶ 34. In other words, the ISO is the drafting arm of the insurance industry. Here, for example, the Business Income (and Extra Expense) Coverage Form, which contains the phrase "direct physical loss or damage," is ISO Form CP 00 30 10 12, and subject to an ISO copyright dated 2011.

As alleged in the Complaint, "[i]n 2006, the ISO drafted a new endorsement, CP 01 40 07 06[.]" Compl. ¶ 35. This endorsement, titled Exclusion of Loss due to Virus or Bacteria, was expressly intended and drafted to exclude virus-related losses from coverage under all-risk insurance policies. In other words, absent such a virus exclusion, virus-related losses are generally covered. Otherwise, the entire endorsement would be superfluous. *Cf. Anderson*, 756 So.2d at 34 (Florida law disfavors construing insurance contracts in such a way as to render a provision

superfluous). Indeed, the ISO characterized the virus exclusion form as a "New Amendatory Endorsement," making clear that its purpose was to *amend* the scope of coverage.[24]

Concurrently with the publication of the new virus exclusion, the ISO also issued a circular explaining why it was necessary to introduce the new endorsement. As the ISO explained, under a typical all-risk Policy, an insured business could make "[a]n allegation of property damage [from virus or bacteria]" which could "be a point of disagreement in a particular case." Moreover, "the specter of pandemic . . . raises the concern that insurers employing [property] policies may face claims . . . for recovery of such losses[.]" And although insurers could conceivably seek to exclude such losses under other exclusions, such as pollution exclusions, the ISO circular noted that such exclusions might not apply to losses caused by viruses or bacteria.[25] In short, since at least 2006, the ISO has understood and expressly recognized that a specific virus exclusion is necessary to unambiguously exclude virus-related losses from all-risk coverage. Therefore, not only is Defendants' narrow interpretation of "physical loss or damage" out of step with the plain meaning of the phrase and the case law, but it is also impossible to square with how the Policy language has been interpreted by the ISO. [26]

4. Defendants misread the cases on which their arguments rely.

As explained earlier, Defendants overreach in claiming that "[i]f the property can be cleaned and restored to its original function, no covered loss has been suffered." Mot. at 10. The only case Defendants cite for this proposition, *Mama Jo's*, does not support such a broad, insurance-nullifying rule. Indeed, as explained in the preceding section, *Mama Jo's* actually supports Actors Playhouse's understanding of the Policy, because it acknowledges that "direct

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[24] Notably, the ISO published this new virus exclusion in the aftermath of the SARS outbreak, an international epidemic caused by a strain of coronavirus.

[25] The circular is attached to this brief as Exhibit I.

[26] In referring to the ISO circular, Actors Playhouse does *not* adopt the ISO's reasoning wholesale. Indeed, because the ISO's customer base is comprised of insurers and reinsurers, it generally interprets coverage provisions narrowly, and exclusion provisions broadly. Nor does Actors Playhouse argue or concede that the ISO's 2006 virus exclusion would—if it *had* been part of the policy—necessarily bar coverage for Actors Playhouse's losses here. Indeed, as the District court for the Middle District of Florida recently ruled, even an exclusion that expressly contains the word "virus" may not "*unambiguously* and *necessarily*" bar coverage for COVID-19-related business interruption losses. *Urogynecology Specialist* Order at 7 (emphasis added). But Defendants' *failure* to incorporate this exclusion or any other express virus exclusion forecloses their argument that they intended to exclude virus-related losses from coverage.

physical loss of or damage to" property may occur when property "becomes 'uninhabitable' or substantially 'unusable.'" 2018 WL 3412974, at *9. *See also Mama Jo's*, 2020 WL 4782369, at *5 (explaining, on appeal, that the district court "conclud[ed] that 'direct physical loss' . . . requires a showing that the property be rendered uninhabitable or unusable").[27] And reading *Mama Jo's* to impose a structural-alteration requirement for "physical loss of or damage to" property cannot be reconciled with other Florida authorities rejecting such a requirement. *See*, *e.g.*, *Azalea*, 656 So. 2d at 602.

Defendants also rely extensively on transcripts of hearings in recent cases related to COVID-19. This reliance is misplaced. For example, Defendants cite the transcript of a hearing on a proposed order to show cause, in a district court in New York. *See* Teleconference, Order to Show Cause, *Social Life Magazine, Inc. v. Sentinel Ins. Co. Ltd.*, No. 20-CV-3311 (S.D.N.Y. July 14, 2020). That case is distinguishable in several respects. First, the court in that case *did not* dismiss the complaint. Nor did the court even hold a hearing on a motion to dismiss. Rather, Defendants' citations are to the transcript of a hearing on a proposed order to show cause why the court should not grant a preliminary injunction in the plaintiff insured's *favor*.

Second, the court's reasoning in *Social Life* is inapplicable to this case, because it turns significantly on key facts that are not present here. For example, the plaintiff in *Social Life* was a publishing business, and the insured property was an office. As the *Social Life* court noted, the business appears to have been able to maintain its overall function and generally continue its operations notwithstanding the impact of the pandemic and alleged government actions. In other words, like the restaurant in *Mama Jo's*, the publishing business was not clearly interrupted. *See id.* at 14 (district court observing that plaintiff insured's manager and even some employees could continue to go into the office). Here, in contrast, Actors Playhouse's business is a performing arts facility, whose fundamental use, purpose, and functionality is based on large physical gatherings of patrons in a closed environment, close physical proximity between occupants of the property, and physical interactions between the performers. *See* Compl. ¶ 48 (alleging a loss of use and functionality). And here, unlike in *Social Life*, the insured facility was fully closed, and Actors Playhouse was physically unable to operate its business.

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[27] Contrary to Defendants' mischaracterization, the district court in *Mama Jo's* did not "reject[ ] the notion that loss of use equates to physical damage." Mot. at 12.

Third, *Social Life* concerned a contract governed by New York law. Therefore, even if the phrase "physical loss or damage" is interpreted under New York law as narrowly as Defendants here urge, that would set New York apart from Florida and many other jurisdictions. As it happens, even New York courts do not uniformly construe "physical loss of or damage to" property as requiring a structural alteration of the insured property. *See, e.g., Pepsico*, 24 A.D. 3d at 744 (explaining that "we disagree with [the insurer] that to prove 'physical damages' the plaintiffs must prove that there has been a distinct demonstrable alteration of the physical structure of the plaintiff's products" and that it suffices "that the product's function and value have been seriously impaired") (citation and quotation marks omitted); *Schlamm Stone & Dolan, LLP v. Seneca Ins. Co.*, 800 N.Y.S. 356, at *4 (N.Y. Sup. Ct. 2005) (explaining that noxious particles present in carpet and in air inside offices constitute property damage because they "clearly impair[ ] plaintiff's ability to make use of [it]").

Defendants' reliance on *Gavrilides Mgmt. Co. v. Mich. Ins. Co.*, No. 20-000258-CB (Mich. Cir. Ct. July 1, 2020), is misplaced for similar reasons. First, in that case, it appears that the plaintiff insured never alleged any physical loss of or damage to the property.[28] Second, as Defendants here note, the Michigan Circuit Court based its ruling on the notion that "physical loss or damage" requires structural alteration to the property. *See* Mot. at 12. Indeed, counsel for the defendant insureds in that case repeatedly referred to a purported requirement under Michigan law that damage be "structural."[29] Whatever the merits of those arguments and legal standards as a matter of Michigan law, they have been rejected by courts in Florida and other jurisdictions. Finally, the *Gavrilides* case, like virtually all the cases on which Defendants here rely, was not decided at the pleading stage, but rather on a motion for summary disposition.

The other cases cited by Defendants are inapposite for similar and often overlapping reasons. First, all of the cases were governed by the laws of states other than Florida, and the court understood the governing state law to have explicitly endorsed a narrow definition of "physical loss or damage" requiring structural alteration or physical destruction. *See*, *e.g.*, *10E, LLC v. Travelers Indem. Co. of Connecticut*, No. 2:20-cv-04418, 2020 WL 5095587 (C.D. Cal. Aug. 28, 2020) (California law); *Diesel Barbershop, LLC v. State Farm Lloyds*, No. 5:20-CV-461-

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[28] *See*, *e.g.*, D.E. 16-7, Transcript of *Gavriledes* Summary Disposition Hearing, at 19.

[29] *See*, *e.g.*, D.E. 16-7 at 9, 10.

DAE, 2020 WL 4724305 (W.D. Tex. Aug. 13, 2020) (Texas law). Whatever the merits of these statements as a matter of California or Texas law, there is no such requirement in Florida. *See Malaube, LLC v. Greenwich Ins. Co.*, No. 20-cv-22615, 2020 WL 5051581 (S.D. Fla. Aug. 26, 2020) (noting that "neither party cited a binding decision on the meaning of 'direct physical loss' or 'direct physical damage' under Florida law"). *See also Mama Jo's*, 2020 WL 4782369, at *5 (affirming the district court's "conclu[sion] that 'direct physical loss' . . . requires a showing that the property [was] rendered *uninhabitable* or *unusable*") (emphasis added). To date, only *one* Florida-law case has reached a final decision on a motion to dismiss in a COVID-19-related business interruption claim. *See Urogynecology Specialist* Order.[30] And in that case, the court denied the motion.

Second, several of the cases cited by Defendants were decided on summary judgment, not a motion to dismiss. *See*, *e.g.*, *Rose's 1, LLC v. Erie Ins. Exch.*, No. 2020-CA-002424-B, 2020 WL 4589206 (D.C. Super. Ct. Aug. 6, 2020). Third, several other cases concerned policies that, unlike Actors Playhouse's Policy, contained express virus exclusions. *See*, *e.g.*, *Diesel Barbershop, LLC*, 2020 WL 4724305, at *6. And in several cases, the plaintiffs failed to meaningfully allege physical loss or damage. *Rose's 1, LLC*, 2020 WL 4589206, at *3 (rejecting the plaintiffs' argument that government orders *standing alone* constituted "direct physical loss"). The same is true of the only Florida-law case cited by Defendants that arose in the COVID-19 context. *See Malaube* 2020 WL 5051581, at *6–*7 (citing at length and approvingly the *Studio 417* Order, but distinguishing it because the *Malaube* plaintiff failed to allege physical loss or damage).

Fourth, at least one of the cases cited by Defendants concerned a policy with materially different coverage language. Whereas the Texas policy in *Diesel Barbershop* covered "direct physical loss *to* that Covered Property," *id.* (emphasis added), Actors Playhouse's Policy covers "direct physical loss *of* or damage to property," Ex. A at 12 of 109 (emphasis added). Courts have found this distinction to be "significant" in construing the meaning of "direct physical loss" in insurance disputes. *See Source Food Tech., Inc. v. U.S. Fid. & Guar. Co.*, 465 F.3d 834, 838 (8th Cir. 2006) ([T]he policy's use of the word 'to' in the policy language 'direct physical loss to

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[30] In *Malaube*, Judge Torres recommended dismissal only without prejudice, *see* 2020 WL 5051581 at n.7 (recognizing that the plaintiff could file an amended complaint). The case was voluntarily dismissed without a decision from the court on the insurer's motion to dismiss.

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property' is significant. [The insured's] argument might be stronger if the policy's language included the word 'of' rather than 'to,' as in 'direct physical loss of property' or even 'direct loss of property.'"); *Cueto v. Allstate Ins. Co.*, 544 A.2d 906, 909 (N.J. Super. Ct. Law. Div. 1987) (distinguishing between policy that covered loss "of" a vehicle from policy that covered loss "to" a vehicle").

B. Actors Playhouse Has Sufficiently Alleged Coverage Under The Civil Authority Provision.

Civil Authority coverage under the Policy arises where there is "direct physical loss or damage," not to the insured property, but to one or more properties within one mile of the insured property and, in response, a governmental authority prohibits access to the insured property. Actors Playhouse has successfully pleaded such a claim. *See* Compl. ¶¶ 38–51. Defendants raise three arguments concerning Actors Playhouse's claim for Civil Authority coverage: (1) that "COVID-19 does not cause physical damage or loss to property;" (2) that "access to the Property has not been "'prohibited;'" and (3) that the subject government orders were not taken 'in response' to damaged property." Mot. at 18. None of these arguments have merit. And because the first of Defendants' three arguments is coextensive with the "physical loss or damage" arguments addressed in the preceding section, this section will address only Defendants' second and third arguments.

In the first instance, Defendants' argument that access to the Theatre was not "prohibited" fails because it is a factual argument, and therefore premature and inappropriate at this stage of the litigation. Moreover, as alleged and detailed in the Complaint, access to the Miracle Theatre *was* prohibited. The Theatre was required to fully close pursuant to at least one and often multiple overlapping government orders. This includes Miami-Dade County Emergency Order 07-20, requiring the closure of certain businesses including theaters, and Florida Executive Order 20-89, requiring counties to "restrict public access" to businesses including theaters. *See* Compl. ¶¶ 41–46. By the plain and ordinary meaning of the word "prohibit," these orders prohibited access to the Miracle Theatre.[31]

In support of their contention that these orders do not amount to "prohibitions" on access, Defendants cite to cases in which government orders never directly *closed* the insured business,

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[31] *See* Prohibit, Black's Law Dictionary (11th ed. 2019) (defined as "[t]o forbid by law" and "[t]o prevent, preclude, or severely hinder").

but rather indirectly *diverted customers* away from the insured business by, for example, closing roads and grounding flights. *See*, *e.g.*, *S. Hosp., Inc. v. Zurich Am. Ins. Co.*, 393 F.3d 1137, 1140 (10th Cir. 2004) (hotel operators lost customers who could not fly due to post-9/11 flight restrictions); *54th Street Partners v. Fid. & Guar. Ins. Co.*, 305 A.2d 67, 67 (N.Y. Super. Ct. App. Div. 2003) (government order diverted vehicular and pedestrian traffic away from insured business). Those cases are inapposite. Here, Actors Playhouse does not allege that government orders merely led to a change in customer behavior or made it more difficult for customers to reach the insured property. Rather, Actors Playhouse alleges that government orders *directly* closed the insured business itself. *See*, *e.g.*, Compl. ¶¶ 42–43. Defendants do not cite any case supporting the proposition that an order requiring the closure of a business does not amount to a "prohibition" on access, and for good reason—it would defy common sense.[32]

Indeed, in *Studio 417*, a broadly similar insurance coverage dispute related to COVID-19, the court expressly rejected an argument identical to the one Defendants raise here. In *Studio 417*, the plaintiffs alleged that access to their beauty salons and restaurants was prohibited pursuant to several government orders related to COVID-19. The defendant insurer argued that none of these orders "prohibited" access to the premises, because, as an example, some of the restaurants remained open for take-out service. The court rejected this argument and concluded that even though some of the insured businesses did not fully shut down, a government order prohibiting indoor service at a restaurant amounts to a prohibition on access. *See Studio 417* Order at 14 (noting that the policy language, materially identical to the language of Actors Playhouse's Policy, does not require that the government order prohibit "*all* access").

Defendants' second argument, that the government orders cited in the Complaint were not issued "in response" to dangerous physical conditions, also fails. In essence, Defendants' contention is that these orders were about stopping the spread of COVID-19 and were therefore *preventive* rather than *responsive* in nature. *See* Mot. at 19 (contending that orders were not

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[32] Misleadingly, Defendants' Motion refers to orders *other than* the orders cited in the Complaint. *See*, *e.g.*, Mot. at 15 (citing to curfew and "safer at home" orders issued by the City of Coral Gables). Presumably, Defendants cite these orders because they did not prohibit access to the Miracle Theatre. But even if these novel allegations could properly be considered at this stage of the litigation, they provide no support to Defendants' arguments. Simply put, the content, intent and effects of these government orders are immaterial to and have no bearing on the orders invoked in Actors Playhouse's Complaint, which clearly prohibited access to the Miracle Theatre.

responsive but rather precautionary measures). But that is a distinction without a difference. As a general matter, most actions of civil authority taken "in response to" physical loss or damage are also intended to prevent further loss or damage. In other words, they are *both* preventive *and* responsive.[33] That is no less true here.

At the time that the relevant orders were issued, COVID-19 was already widespread in Florida, including within one mile of the Miracle Theatre. Indeed, Miami-Dade County has been and remains a hotspot of COVID-19. The civil authority actions that prohibited access to the Theatre, including those cited in the Complaint, make clear that the orders were issued in response to harm and damage from COVID-19 that had already occurred and was ongoing. That the orders also had the purpose and effect of preventing *additional* damage is immaterial.

In any event, Defendants' argument is impossible to reconcile with the text of the Policy, which unambiguously provides coverage where a government takes action in response to *ongoing* risks and harms. Specifically, the Policy provides Civil Authority coverage where the relevant government action "is taken in response to dangerous physical conditions resulting from . . . the *continuation* of the Covered Cause of Loss that caused the damage." Ex. A at 85 of 109 (emphasis added).

Again, Defendants cite to cases that are inapplicable in various respects. For example, Defendants cite to *Syufy Enter. v. Home Ins. Co. of Ind.*, No. 94-0756 FMS, 1995 WL 129229 (N.D. Cal. Mar. 21, 1995). In that case, the insured businesses were movie theaters that lost some business because of curfews but, crucially, were *not* directly ordered to close. Here, the Miracle Theatre, like so many other businesses, was subject to a mandatory closure order. Moreover, in *Syufy*, the policy's civil authority coverage required that neighboring property be damaged or destroyed, and the plaintiffs failed to allege such damage or destruction. *See id.* at *1. Defendants also cite to *City of Chicago v. Factory Mut. Ins. Co.*, No. 02-C-7023, 2004 WL 549447 (N.D. Ill. Mar. 18, 2004). But in that case, the insured business, Chicago's Midway Airport, was *indirectly* harmed by a government order grounding commercial flights in response to the September 11th terrorist attacks, which took place hundreds of miles away. The order did not close the airport itself. And as the court noted, civil authority coverage in that case required that physical damage

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[33] *Cf. Narricot Indus., Inc. v. Fireman's Fund Ins. Co.*, CIV.A.01-4679, 2002 WL 31247972, at *5 (E.D. Pa. Sept. 30, 2002) (discussing the preventive and responsive nature of civil authority orders).

take place "within 1,000 feet" of the insured airport. *Id.* at *4. Here, in contrast, there is no reasonable dispute that the actions of civil authority required the closure of the Miracle Theatre and were taken in response to *local* conditions.

C. No Exclusion Bars Coverage.

Defendants crafted and sold Actors Playhouse a contract that is primarily based on ISO forms and endorsements, and expressly excludes losses ranging from asbestos, to terrorism, to the corruption of electronic data. But the Policy ***lacks*** the ISO virus exclusion form, or indeed any other virus exclusion endorsement. If Defendants wanted to exclude virus-related losses from coverage, they could and should have done so in plain terms. Since at least 2006, an ISO virus exclusion has been readily available and widely used in the industry.

But having chosen not to adopt a virus exclusion, Defendants cannot now seek to deny coverage for virus-related losses. *See Container Corp. v. Am. v. Maryland Cas. Co.*, 707 So.2d 733, 736 (Fla. 1998) ("Had Maryland wished to limit Container's coverage . . . it could have done so by clear policy language."). Indeed, the Florida Supreme Court has recognized that where an exclusion form is available and an insurer elects not to adopt that exclusion form in a policy, that itself is an argument in favor of coverage. *See U.S. Fire Ins. Co. v. J.S.U.B., Inc.*, 979 So.2d 871, 884 (Fla. 2007) (discussing, among other things, an ISO endorsement form).

Moreover, it is Defendants' burden to demonstrate that an exclusion applies *unambiguously*, because ambiguous "exclusionary clauses are construed *even more strictly* against the insurer than coverage clauses." *Anderson*, 756 So. 2d at 34 (emphasis added). Pursuant to this well-settled principle, the District Court for the Middle District of Florida recently denied a defendant insurer's motion to dismiss, despite the fact that the policy at issue contained an express virus exclusion. *See Urogynecology Specialist* Order at 7 (discussing an exclusion for "fungi, wet rot, dry rot, bacteria or virus"). The court concluded that this exclusion was ambiguous as applied to the plaintiff insured's losses, and that while the defendant cited cases concerning similar exclusions, "none of the cases dealt with the unique circumstances of the effect COVID-19 has had on our society—a distinction this Court considers significant." *Id.*

Here, Defendants' burden is significantly greater than that of the defendant insurer in *Urogynecology Specialist*, for the simple reason that Actors Playhouse's Policy does *not* contain an express virus exclusion. Unwilling to accept the consequences of its deliberate choice to not expressly exclude virus-related losses from the Policy, Defendants attempt to stretch three

inapplicable exclusions beyond recognition to make them fit. These interpretative gymnastics should be rejected.

1. The Nuclear, Biological, Chemical and Radiological Hazards Exclusion is inapplicable.

Defendants first contend that coverage is barred under the Policy's Nuclear, Biological, Chemical, and Radiological Hazards Exclusion (the "Hazards Exclusion"). *See* Ex. A at 48 of 109. In pertinent part, this Exclusion bars coverage for losses caused by or resulting from Nuclear Hazard, Chemical Hazard, Radioactive Hazard and Biological Hazard. "Biological Hazard" includes "any biological and/or poisonous or pathogenic agent, material, product, or substance, whether engineered or naturally occurring, that induces or is capable of inducing physical distress, illness or disease." *Id*. Again, this argument, like most in Defendants' motion, rests on disputed issues of fact and contractual interpretation. Accordingly, it should be rejected as premature at this stage of the litigation.

It likewise fails on the merits. It is well-settled in Florida that it is the *insurer's* burden to demonstrate the applicability of an exclusion. *See*, *e.g.*, *Mejia v. Citizens Prop. Ins. Corp.*, 161 So. 3d 576, 578 (Fla. Dist. Ct. App. 2014). Here, therefore, even if Defendants could raise the applicability of the Hazards Exclusion at this stage of the litigation, their burden would be to demonstrate that taking Actors Playhouse's allegations as true, and construing them in the light most favorable to Actors Playhouse, the exclusion unambiguously applies. *See Urogynecology Specialist* Order at 7 (defendant must show that an exclusion "unambiguously and necessarily" bars coverage).

Defendants cannot meet this burden. Defendants' specific contention appears to be that the novel coronavirus is a "biological and/or . . . pathogenic agent, material, product or substance." *See* Mot. at 21. But Defendants can cite to no case, from Florida or elsewhere, applying this Exclusion to virus-related losses, much less in the context of the COVID-19 pandemic. Instead, Defendants cite a case from another jurisdiction, concerning an environmental regulatory issue rather than an insurance coverage dispute, which notes in passing that viruses may be "biological materials" when used as pesticides. *See id.* at 22 (citing *Nat'l Cotton Council of Am. v. U.S. E.P.A.*, 553 F.3d 927, 928 (6th Cir. 2009)). They also cite to a case concerning a *different* exclusion, which declined to decide the applicability of that exclusion to pepper spray without a more developed factual record. *See Endurance Am. Specialty Ins. Co. v. Savits-Daniel Travel Ctrs., Inc.*, 26 F. Supp. 3d 1296, 1303 n. 3 (S.D. Fla. 2014). These cases do not and cannot inform the

applicability of the Hazards exclusion to Actors Playhouse's losses. That is especially so because as the District Court for the Middle District of Florida recently noted, "[t]he issues surrounding whether insurance policy virus exclusions apply to losses caused by COVID-19 are novel and complex." *See Urogynecology Specialist* Order at 4.

Absent any case law on point, the Hazards Exclusion must be construed according to Florida's well-settled interpretive principles. First, the Exclusion must be construed in a manner consistent with "reason and probability," *Vyfvinkel*, 135 So.3d at 386, as well as with its plain meaning and unambiguous intent.[34] Second, the Exclusion, like the Policy itself, must be read as a whole. *See Talbott*, 59 So.3d at 245. Third, any undefined terms in the Exclusion must be interpreted liberally in favor of the insured. *See Pridgen*, 498 So.2d at 1247 n.3. Fourth, any ambiguity in the exclusion should be construed "liberally in favor of coverage of the insured and strictly against the insurer." *Dickson*, 36 So. 3d at 790. *See also Anderson*, 756 So. 2d at 34.

Reading the Hazards Exclusion as a whole, it is clear that the Exclusion is concerned with nuclear, biological, chemical and radioactive hazards that can be weaponized. Indeed, exclusions like the Hazards Exclusion in the Policy are typically concerned with such risks. *See generally* Steven Plitt, *The Changing Face of Global Terrorism and a New Look of War: an Analysis of the War Risk Exclusion in the Wake of the Anniversary of September 11, and Beyond*, in CATASTROPHE CLAIMS: INSURANCE COVERAGE FOR NATURAL AND MAN-MADE DISASTERS (May 2020 Update) (explaining that terrorism-related "chemical, biological, radiological, or nuclear risks . . . are typically addressed in [non-terrorism-specific] exclusions"). That the Hazards Exclusion enumerates "biological . . . agents," is also instructive: although the Policy does not define the term

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[34] Therefore, although the catch-all term "any . . . material, product or substance . . . that induces or is capable of inducing physical distress, illness, or disease" is potentially so broad as to be limitless, such an overbroad interpretation must be rejected as absurd and contrary to the plain text of the exclusion. Florida law strongly disfavors absurd interpretations of contracts. *See*, *e.g.*, *Vyfvinkel v. Vyfvinkel*, 135 So.3d 384, 386 (Fla. Dist. Ct. App. 2014) ("[W]here one interpretation of a contract would be absurd and another would be consistent with reason and probability, the contract should be interpreted in the rational manner.") (citation omitted). And here, an overbroad interpretation of the catch-all term in the Hazards Exclusion would give rise to the same type of absurdity discussed below, in the context of the hazardous material exclusion. After all, an enormous variety of materials, products and substances are capable of inducing distress or illness. And it would violate the plain meaning and intent of the Hazards Exclusion—as well as render much of the coverage under the Policy a nullity—to exclude losses arising from *all* such materials, products and substances.

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"agent," and although "biological agent" has different meanings in different contexts,[35] the term is typically associated with biological harms that can be weaponized.[36] There is no reasonable argument that COVID-19 or the novel coronavirus are "biological agents" in that common sense of the term.

To be sure, the Hazards Exclusion contains terms that *could* be construed very broadly, such as "material" and "substance." But at most, that would render key terms in the Exclusion ambiguous. And under well-settled principles of Florida law, ambiguous exclusionary provisions must be interpreted strictly and narrowly against the insurer. *See Anderson*, 756 So. 2d at 34. Indeed, at least one court in this Circuit has ruled that a similarly worded hazards exclusion was ambiguous as applied to claims related to the release of noxious chemicals into the environment. *See Illinois Union Ins. Co. v. William C. Meredith Co.*, No. 07-cv-1840, 2008 WL 11334594 (N.D. Ga. Sep. 29, 2008).

2. The Mold Exclusion is inapplicable.

Defendants also contend that coverage is barred by the Policy's Mold Exclusion. *See* Mot. 23–26. In pertinent part, the Mold Exclusion bars coverage for any loss or claim arising from or relating to "mold, mildew, fungus, spores or other microorganism of any type nature, or description, including but not limited to any substance whose presence poses an actual or potential threat to human health."[37] Defendants contend that this exclusion applies here because "SARS-

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[35] *See*, *e.g.*, Biological Agents, U.S. EPA, *available at https://www.epa.gov/emergency-response/biological-agents* (last visited Oct. 5, 2020) ("Biological agents are chemicals or organisms that increase the rate at which natural biodegradation occurs."); Biological Agent, National Cancer Institute, *available at* https://www.cancer.gov/publications/dictionaries/cancer-terms/def/biological-agent (last visited Oct. 5, 2020) ("[a] substance that is made from a living organism or its products and is used in the prevention, diagnosis, or treatment of cancer or other diseases").

[36] *See*, *e.g.*, Bioterrorism Agents/Diseases, Centers for Disease Control and Prevention, *available at* https://emergency.cdc.gov/agent/agentlist-category.asp (last visited Oct. 5, 2020) (describing and enumerating "biological agents," *not* including the novel coronavirus or indeed any coronavirus). *Accord* Biodefense and Bioterrorism, U.S. National Library of Medicine, *available at* https://medlineplus.gov/biodefenseandbioterrorism.html (last visited Oct. 5, 2020).

[37] As with the Hazards Exclusion, the catch-all term "any substance" must not be interpreted in a way that would be absurdly overbroad. *See*, *e.g.*, *Vyfvinkel v. Vyfvinkel*, 135 So.3d 384, 386 (Fla. Dist. Ct. App. 2014) ("[W]here one interpretation of a contract would be absurd and another would be consistent with reason and probability, the contract should be interpreted in the rational manner.") (citation omitted).

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CoV-2 is a microorganism[.]" Mot. at 25. But Defendants are simply wrong. And *even if* the exclusion actually mentioned viruses in addition to fungi—which it does not—a court applying Florida law recently concluded that such an exclusion does *not* unambiguously deny coverage for COVID-19-related losses. *See Urogynecology Specialist* Order at 7 (analyzing an exclusion for "fungi, wet rot, dry rot, bacteria, [and] virus").

A "microorganism" is, by definition, "an organism (such as a bacterium or protozoan) of microscopic or ultramicroscopic size[.]"[38] In other words, a "microorganism" is simply a very small "organism," *i.e.*, a living thing.[39] It is undisputed and uncontroversial that the types of microorganisms enumerated in the Policy's Mold Exclusion—mold, mildew, fungi, and so on—are organisms. Viruses, however, are not living things, and therefore cannot be microorganisms.[40] This fact is not only reflected in the technical scientific literature, but also taught in high-school biology classes, reported in the lay press's coverage of the COVID-19 crisis, and even detailed in the Merriam-Webster dictionary.[41] It is also a fact with important real-world implications. For example, because viruses are not living things, they cannot be eliminated using antibiotics.[42] Put

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[38] Microorganism, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/microorganism (last visited Oct. 4, 2020).

[39] *See*, *e.g.*, Microorganism, Cambridge Dictionary, https://dictionary.cambridge.org/us/dictionary/english/microorganism (last visited Oct. 4, 2020) (defining "microorganism" as "a living thing that on its own is too small to be seen without a microscope"); Organism, Oxford English Dictionary, https://www.lexico.com/en/definition/organism (last visited Oct. 4, 2020) (a "life form").

[40] *See* Taylor McNeil, *What Are Viruses and How Do They Work?*, Tufts University (Apr. 3, 2020), https://now.tufts.edu/articles/what-are-viruses-and-how-do-they-work (interview with Tufts microbiology professor John Coffin explaining that "[v]iruses are completely different from bacteria" because they are not living things); Amanda Heidt, *Giant viruses aren't alive. So why have they stolen the genes essential for life?*, Science (Apr. 16, 2020) https://www.sciencemag.org/news/2020/04/giant-viruses-aren-t-alive-so-why-have-they-stolen-genes-essential-life.

[41] *See Usage Notes - 'Virus' v. 'Bacteria': The key differences between two common pathogens*, Merriam-Webster, https://www.merriam-webster.com/words-at-play/virus-vs-bacteria-difference.

[42] *See* Denise Chow, *Why are viruses hard to kill? Virologists explain why these tiny parasites are so tough to treat*, NBC News (May 7, 2020), https://www.nbcnews.com/science/science-news/why-are-viruses-hard-kill-virologists-explain-why-these-tiny-n1202046 (explaining that compared to bacteria, viruses "are harder to target with drugs" because they "have none of the hallmarks of living things").

differently, viruses present fundamentally distinct risks and containment challenges compared to microorganisms. It therefore defies belief that viruses would be encompassed in the Mold Exclusion *sub silentio*.

To be sure, viruses are occasionally and casually grouped with "microorganisms," but the fact that viruses are ***mis***classified as microorganisms does not make them so. As the National Institutes of Health (NIH) and other federal agencies explain, viruses may be "sometimes classified as microorganisms," but to be precise, they "are not considered living organisms."[43] And although Defendants rely on the National Institutes of Health (NIH) for the supposed proposition that "SARS-CoV-2 is a microorganism," the NIH has made no such pronouncement.

Given that viruses are not microorganisms—or, at a minimum, that their occasional categorization as microorganisms is incorrect—the absence of the word "virus" from the Mold Exclusion is telling. If Defendants wanted to exclude viruses pursuant to this exclusion, they could have and should have done so expressly. Indeed, as noted above, insurers have incorporated express virus exclusions in their policies since at least 2006. But having failed to adopt a virus exclusion at the time of formation of the policy contract, Defendants cannot now rewrite the Mold Exclusion to bar coverage for "viruses," which are not expressly named in the exclusion, are unlike the other items on the list, and, in any event, are not microorganisms.[44]

Although Defendants cite to two cases concerning the applicability of microorganism exclusions to bacteria,[45] those cases are inapposite. For one thing, bacteria are not viruses. And unlike viruses, it is uncontroversial and indisputable to classify bacteria as microorganisms.

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[43] *See* Microorganism, NIH National Cancer Institute Dictionary of Cancer Terms, *available at* https://www.cancer.gov/publications/dictionaries/cancer-terms/def/microorganism. Accord Microorganism, NIH AIDS Glossary, *available at* https://aidsinfo.nih.gov/understanding-hiv-aids/glossary/456/microorganism. *See also* NIH Curriculum Supplement Series: Understanding Emerging and Re-emerging Infectious Diseases, *available at* https://www.ncbi.nlm.nih.gov/books/NBK20370/ ("Viruses, however, are not organisms[.]").

[44] Even if this Court finds reasonable Defendants' strained interpretation of the exclusion, that would merely render the exclusion ambiguous as to its application to viruses. And as noted above, in Florida, ambiguous "exclusionary clauses are construed even more strictly against the insurer than coverage clauses." *Anderson*, 756 So. 2d at 34.

[45] *See* Mot. at 23–25 (citing *Certain Underwriters at Lloyd's of London Subscribing to Policy No. SMP 3791 v. Creagh*, 563 F. App'x 209, 211 (3d Cir. 2014) and *Certain Underwriters at Lloyd's, London Subscribing to Policy No. W15F03160301 v. Houligan's Pub & Club, Inc.*, No. 2017-31808-CICI, 2019 WL 5611557 (Fla. Cir. Ct. Oct. 24, 2019)).

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Moreover, both cases—like most cited in Defendants' motion—were decided on summary judgment, rather than at the pleading stage. Defendants also cite to *Diesel Barbershop, LLC v. State Farm Lloyds*, No. 5:20-CV-461-DAE, 2020 WL 4724305 (W.D. Tex. Aug. 13, 2020) and *Martinez v. Allied Ins. Co. of Am.*, No. 2:20-cv-00401-FtM-66NPM (M.D. Fla. Sept. 2, 2020). But those cases concerned *different* exclusionary language—absent from Actors Playhouse's Policy—that *expressly* excluded viruses. In short, none of these cases provide support to Defendants here. The Mold Exclusion does not apply.

It also bears emphasis that the U.S. District Court for the Middle District of Florida recently decided that even an exclusion covering "fungi, wet rot, dry rot, bacteria [and] *virus*" does not unambiguously deny coverage for losses stemming from COVID-19. *Urogynecology Specialist* Order at 7 (emphasis added). This is because denying such coverage "does not logically align with the grouping of the virus exclusion with other pollutants such that the Policy necessarily anticipated and intended to deny coverage for [COVID-19-realted] business losses." *Id.* Here, construing the Mold Exclusion to deny coverage for COVID-19 related losses would be considerably less logical than in *Urogynecology Specialist* because here, the Mold Exclusion does not expressly extend to viruses,

3. The pollutant and hazardous material exclusions do not apply.

Defendants also contend that coverage is barred by two pollution exclusions in the Policy. *See* Mot. at 26. The first exclusion bars coverage for losses arising from "any kind of seepage or any kind of pollution and/or contamination, or threat thereof[.]" This phrase is further defined as, among other things, "seepage of, or pollution and/or contamination by, anything, including but not limited to, any material designated as 'hazardous material' by the [U.S.] Environmental Protection Agency or as 'hazardous material' by the [U.S.] Department of Transportation . . . or any substance designated or defined as toxic, dangerous, hazardous, or deleterious to persons or the environment under any . . . law, ordinance or regulation," and "the presence, existence, or release of anything which endangers or threatens to endanger the health, safety or welfare of persons or the environment." Ex. A at 32–33 of 109.

The second exclusion bars coverage for "loss or damage caused by or resulting from . . . [d]ischarge, dispersal, seepage, migration, release, or escape of 'pollutants' unless the discharge, dispersal, seepage, migration, release or escape is itself caused by any one of the 'specified causes of loss'." *Id.* at 77 of 109. For purposes of this exclusion, "pollutant" is defined, in relevant part,

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as "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals, and waste." Ex. A at 92 of 109.

Although Defendants' motion refers to both exclusions as "pollution exclusions," Defendants raise distinct arguments as to each exclusion. Therefore, for clarity, we address each exclusion separately, referring to the first exclusion as the "pollutant exclusion," and to the second exclusion as the "hazardous material exclusion." As with the Hazards Exclusion and the Mold Exclusion, Defendants' arguments regarding these exclusions are premature. But even if Defendants could properly raise these arguments at this stage, they cannot carry their burden of demonstrating that, with Actors Playhouse's allegations taken as true and construed in the light most favorable to Actors Playhouse, one or both of the exclusions applies.

a. The pollutant exclusion does not apply.

Defendants argue that SARS-CoV-2 is a "pollutant." *See* Mot. at 28. In support of this contention, Defendants rely extensively on *Nova Cas. Co. v. Waserstein*, 424 F. Supp. 2d 1325 (S.D. Fla. 2006). That case concerned a pollutant exclusion that, like the exclusion here, defined "pollutant" to mean "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot fumes, acids, alkalis, chemicals and waste." In *Waserstein*, the losses at issue resulted from, among other things "living organisms," "microbial populations," "microbial contaminants," and "indoor allergens," and the court considered whether the losses were excluded from coverage because they resulted from "pollutants." *Id.* at 1329. The court concluded that the exclusion was unambiguous and barred coverage for the losses claimed. *See id.*

The *Waserstein* case is distinguishable in at least two important respects. First, it was a decision reached on summary judgment. Second, *Waserstein* did not involve a communicable virus and pandemic, but rather other harmful substances that were negligently released and dispersed throughout a property and injured individuals. *See J.S.U.B., Inc.*, 979 So.2d at 882–83 (explaining that "whether a decision is binding on another is dependent upon there being similar facts and legal issues" and that "where the [insurance] policies and underlying facts are different, then a previous decision should not be binding"). Here, in contrast, Actors Playhouse's covered losses do not rest solely on the presence of SARS-CoV-2 on its property, but instead *also* arise from the forced deprivation of the physical use and occupancy of the property due to the risks of having people congregate indoors during the COVD-19 pandemic. The risk that using the property

will cause some people to injure other people and property cannot reasonably be construed as "pollution."

Moreover, at least one other federal court applying Florida law has rejected the reasoning of *Waserstein* and reached the opposite conclusion. *See Westport Ins. Corp. v. VN Hotel Group, LLC*, 761 F. Supp. 2d 1337, 1344 (M.D. Fla. 2010). In *VN Hotel*, the District Court for the Middle District of Florida "respectfully disagree[d] with [*Waserstein*'s] conclusion" that "living organisms, microbial populations, microbial contaminants, and indoor allergens" are pollutants. *Id*. As the court explained, the reasoning "in *Waserstein* would permit any living organism with a contaminating effect—including bacteria, insects, rodents, and the like—to be 'pollutants' triggering the Pollution Exclusion." *Id*. Such a result, the court reasoned, would be "too far afield from the enumerated examples of 'pollutants'—smoke, vapor, soot, fumes, acids, alkalis, chemicals, and waste[.]" *Id*. Therefore, the court ruled that the insured's losses, which were related to the Legionnaire bacteria, were *not* encompassed by the pollutant exclusion.

To the extent that there is a tension between the interpretation of "pollutant" in the two cases, *VN Hotel* is more persuasive. Expanding the pollutant exclusion to "any . . . irritant," no matter how dissimilar to smoke, vapor, soot, fumes, and so on, would not comport with the plain language of the exclusion and render it absurdly overbroad. Consistent with the reasoning of *VN Hotel*, other courts have similarly concluded that standard pollutant exclusions do not apply viruses and/or bacteria. *See*, *e.g.*, *Keggi v. Northbrook Prop. & Cas. Ins.*, 199 P.3d 785, 789 (Ariz. 2000) (holding that water-borne bacteria are not "pollutants"); *Motorists Mutual Ins. v. Hardinger*, 131 F. App'x 823, 828 (3d Cir. 2005) (Ambro, J., concurring). And even if the interpretation in *Waserstein* were reasonable, so, too is that of *VN Hotel*. That would render the exclusion ambiguous as to its application to viruses. And when an exclusion is ambiguous, it must be interpreted *particularly* strictly against the insurer. *See Anderson*, 756 So. 2d at 34.

Indeed, as even the *Wasterstein* court acknowledged, to the extent that the definition of "pollutant" is ambiguous, it must be interpreted using the interpretive canon of *ejusdem generis*. *See Waserstein*, 424 F. Supp. 2d at 1336 (citing *Jacobo v. Bd. of Trustees of the Miami Police*, 788 So.2d 362, 364 (Fla. Dist. Ct. App. 2001)). As relevant here, this canon provides that the general word "pollutant" must be construed to refer to things of "the same kind or species as those [things] specifically enumerated." *Green v. State*, 604 So.2d 471, 473 (Fla. 1992). In other words, "pollutant" must be construed to refer to things of the same kind as smoke, vapor, soot, fumes and

so on. And because all the enumerated things here are fundamentally dissimilar from viruses—among other things, the enumerated pollutants are not transmitted and spread by humans—the catch-all term "pollutant" cannot reasonably be construed to refer to viruses.

It also bears emphasis that the pollutant exclusion encompasses *only* losses caused by the "[d]ischarge, dispersal, seepage, migration, release, or escape of 'pollutants.'" Those terms make perfect sense as applied to the enumerated examples of pollutants. In other words, chemicals, smoke and fumes regularly seep, migrate and escape. *See Landrum*, 811 F. App'x at 609 (examining definitions of "seepage" and "leakage"). But the terms are inapposite to Actors Playhouse's losses, which were not caused by the discharge, dispersal, seepage, migration, release, or escape of *anything*, let alone a "pollutant." To the extent that Defendants' apparent theory is that the SARS-CoV-2 virus is a pollutant, it would be a strained reading of the Policy language to say that the virus "migrated," "seeped," or "escaped." Indeed, Defendants cite to no case expressly applying these terms to a virus. Therefore, these terms, no less than the term "pollutant" itself, are at most ambiguous as applied to the facts here and must be construed strictly against Defendants.

Other cases cited by Defendants are distinguishable for similar reasons. For example, *James River Ins. Co. v. Epic Hotel, LLC*, No. 11-CV-24292, 2013 WL 12085984 (S.D. Fla. 2013), concerned the Legionnaire bacteria, not a virus. And the pollutant exclusion at issue in that case expressly barred coverage for losses related to "biological infectants." The exclusion in Actors Playhouse's Policy contains no such language.[46] Similarly, in *U.S. Fire Ins. Co. v. City of Warren*, 87 F. App'x 485 (6th Cir. 2003), the insured's losses were caused by "the escape of sewage waste onto the [insured] property" and therefore clearly fell under a pollutant exclusion that expressly excluded losses due to "waste." *See also Certain Underwriters at Lloyd's London v. B3, Inc.*, 262 P.3d 397, 400 (Okla. Ct. App. 2011) (summary-judgment case concerning application of exclusion to sewage from wastewater treatment plant). Here, there is no reasonable argument that Actors Playhouse's losses arise from "waste," or any other expressly enumerated "pollutant." The pollution exclusion thus does not apply.

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[46] Defendants cite to one Florida-law case applying a similarly-worded pollution exclusion to the Coxsackie virus. *See First Specialty Ins. Corp. v. GRS Mgmt. Assocs., Inc.*, No. 08-81356, 2009 WL 2524613 (S.D. Fla. Aug. 17, 2009). But that case simply relied on the reasoning of *Waserstein* and, like *Waserstein*, was decided on a motion for summary judgment.

b. The hazardous material exclusion does not apply.

Defendants also contend that Actors Playhouse's losses are barred under the hazardous material exclusion. Defendants' strained argument for the application of this exclusion is that "SARS-CoV-2 has been 'designated or defined' as 'dangerous' by both Federal and State ordinances or regulations." Mot. at 29 (quoting the Policy). This argument lacks merit.

To fit a virus within the "hazardous material" exclusion requires giving its terms a boundless interpretation that would yield absurd results. For example, the exclusion defines "any kind of seepage or any kind of pollution and/or contamination" to include, but not be limited to, "the presence, existence, or release of *anything* which endangers or threatens to endanger the health, safety, or welfare of persons or the environment." (emphasis added). Under Defendants' preferred interpretation, the exclusion could be read bar coverage for an unlimited universe of risks, from bacteria, insects, and rodents; to fire; to negligent, violent, or otherwise dangerous persons; to defective products and machinery; to inclement weather. This would allow the exclusion to effectively consume and nullify the entirety of the "all-risk" Policy.

This Court must reject such absurd interpretations. *See*, *e.g.*, *Vyfvinkel*, 135 So.3d at 386. Indeed, Florida law *specifically* disfavors interpretations of insurance exclusions so broad as to effectively render a policy's grant of coverage a nullity. *See Sudderth*, 620 Fed. App'x at 830. And here, an overbroad interpretation of the hazardous material exclusion's catch-all term—which is required to stretch the exclusion to fit a virus—would nullify much of the coverage under the Policy. After all, virtually everything that can cause "direct physical loss or damage" is also something the presence or existence of which "endangers or threatens to endanger the healthy, safety or welfare of persons or the environment."

Florida law also disfavors interpretations that would render other policy language superfluous. *See*, *e.g.*, *Universal Prop. and Cas. Ins. Co. v. Johnson*, 114 So.3d 1031, 1036 (Fla. Dist. Ct. App. 2013). And here, an overbroad interpretation of the hazardous material exclusion would render many other exclusions under the Policy superfluous, including but not limited to the Mold Exclusion, the Asbestos Exclusion, and the War and Military Action Exclusion. After all, because mold, asbestos, and war are things that "threaten[ ] to endanger the health, safety, or welfare of persons or the environment," there would be no need to specifically exclude those risks under Defendants' interpretation of the hazardous materials exclusion.

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Therefore, the hazardous materials exclusion must be construed in a manner consistent with "reason and probability," *Vyfvinkel*, 135 So.3d at 386, as well as with its plain meaning and unambiguous intent. Here, although it refers to "any substance designated or defined as . . . dangerous," the exclusion, like the Policy itself, must be read as a whole. *See Talbott*, 59 So.3d at 245. And a holistic reading of the exclusion makes clear that its scope is limited to "hazardous materials" or similar substances, and it is ultimately confined to the ordinary meaning of "pollution and/or contamination," of which it is a part. Indeed, the enumerated examples of excluded risks are quite narrow and specific, referring to materials and substances designated as "hazardous" or "toxic" under the *environmental protection* laws of the U.S. and Canada. It also refers to the potential of such materials and substances to undergo "seepage." These examples are instructive as to the exclusion's scope, because an exclusion in an insurance policy must not be interpreted so as to stray "too far afield from [its] enumerated examples." *VN Hotel Group*, 761 F. Supp. 2d at 1344.[47]

Generally speaking, materials that are designated "hazardous" or "toxic" by environmental agencies are used or transported in the regular course of business or in industrial processes. Often, they are manmade. The exclusion's reference to "seepage," which is "[t]he slow escape of a liquid or gas through porous material or small holes," similarly indicates that the exclusion contemplates materials that are in storage or transit.[48] So construed, the exclusion does not and cannot encompass naturally occurring viruses. Indeed, although the U.S. agencies enumerated in the exclusion, the EPA and the Department of Transportation, designate an enormous variety of substances as "hazardous" or "dangerous," *none* of these designated substances is a virus.[49]

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[47] Although the exclusion also refers to substances designated by government agencies as "toxic, dangerous, hazardous or deleterious to persons or the environment," interpreting this phrase without regard to the exclusion's enumerated examples would lead to absurd consequences. For example, governments routinely declare dangerous or deleterious an enormous variety of substances, from alcoholic beverages to trans fats. *See*, *e.g.*, Food and Drug Administration, Trans Fat, https://www.fda.gov/food/food-additives-petitions/trans-fat (last visited Oct. 4, 2020). But for the reasons noted in this section, to exclude all losses related to that broad universe of substances would render many exclusions in the Policy superfluous, render much of the Policy's grant of coverage a nullity, and fail to comport with reason and probability.

[48] *See* Seepage, Oxford English Dictionary, https://www.lexico.com/en/definition/seepage (last visited Oct. 4, 2020).

[49] *See* U.S. Dep't of Transp., Check the Box: Is it Hazmat?, *available at* https://www.transportation.gov/check-box/check-box-it-hazmat (last visited Oct. 4, 2020); EPA,

Moreover, Defendants do not cite any case—and we are not aware of any case—extending the scope of this type of hazardous materials exclusion to encompass risks related to viruses.

Finally, like the first pollutant exclusion, the hazardous material exclusion does not bar coverage because Actors Playhouse's claim does not solely rest on the presence of a dangerous substance on the property. Instead, it also arises from the inability to use the property safely at all due to the risks it would create during the COVID-19 pandemic. The risk of a pandemic is not excluded from coverage, and the hazardous material exclusion cannot be stretched under any reasonable interpretation of the language to encompass such a risk.

CONCLUSION

Defendants' coverage arguments should be disregarded as premature. They also lack merit. Defendants' interpretation of the Policy's coverage and exclusion provisions is unreasonable and unsupported by Florida law. At worst, Defendants' arguments, along with Actors Playhouse's response, point to multiple reasonable interpretations of the Policy, with Actors Playhouse's view favoring coverage and Defendants' view barring coverage. Under such circumstances, Florida law compels adoption of the interpretation that favors coverage. *See*, *e.g.*, Dickson, 36 So. 3d at 790. Accordingly, this Court should deny Defendants' motion to dismiss.

REQUEST FOR HEARING

Plaintiff respectfully requests a hearing before this Court due to the complexity of the questions at issue, the parties' apparent disputes about the applicable law, and the dispositive nature of the Defendant's motion. Plaintiff estimates that approximately one hour of argument, in total, will be sufficient.

Defining Hazardous Waste: Listed, Characteristic and Mixed Radiological Wastes, *available at* https://www.epa.gov/hw/defining-hazardous-waste-listed-characteristic-and-mixed-radiological-wastes (last visited Oct. 4, 2020).

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 5, 2020, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to all counsel of record and any other electronic filer as of the time of the filing.

/s/ Steven C. Marks
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