SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

TRIUMPH HOSPITALITY LLC DBA TRIUMPH HOTELS, 47TH STREET MANAGEMENT CO. LLC, IROQUOIS HOTEL L.L.C., WASHINGTON JEFFERSON HOTEL L.L.C., BELLECLAIRE HOTEL L.L.C., NESBIT HOTEL LLC, TRIBECA HOTEL LLC, and WEST BROADWAY READE LLC, Plaintiffs, - against - THE HARTFORD FIRE INSURANCE COMPANY and ZURICH AMERICAN INSURANCE COMPANY, Defendants.	Index. No. 653853/2020 Part 48 Hon. Andrea Masley Motion Seq.: 002 **ORAL ARGUMENT REQUESTED**

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO THE HARTFORD FIRE INSURANCE COMPANY'S MOTION TO DISMISS

Jack Atkin, Esq. (NY Bar #2025658)
Christine A. Montenegro, Esq. (NY Bar #3969276)
1633 Broadway
New York, New York 10019
Tel: (212) 506-1800 / Fax: (212) 506-1800
jatkin@kasowitz.com
cmontenegro@kasowitz.com

Jerold Oshinsky, Esq. (NY Bar #012105)
2029 Century Park East, Suite 2000
Los Angeles, CA 90067
Tel: (424) 288-7900 / Fax: (424) 288-7901
joshinsky@kasowitz.com

Margaret A. Ziemianek, Esq. (*pro hac vice*)
101 California Street, Suite 3000
San Francisco, CA 94111
Tel: (415) 421-6140 / Fax: (415) 520-6452
mziemianek@kasowitz.com

Attorneys for Plaintiffs

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

Plaintiffs Triumph Hospitality LLC dba Triumph Hotels, Iroquois Hotel L.L.C., Washington Jefferson Hotel L.L.C., Belleclaire Hotel L.L.C., Nesbit Hotel LLC, Tribeca Hotel LLC, and West Broadway Reade LLC ("Triumph" or "Plaintiffs") submit this memorandum of law in opposition to Defendant Hartford Fire Insurance Company's ("Hartford") motion to dismiss the Complaint.

PRELIMINARY STATEMENT

The COVID-19 pandemic has crushed businesses across the country, contaminating their premises, suspending their operations, or both. Plaintiffs are among those victims. The insurance industry, including Hartford, has further victimized insureds by refusing to cover their losses. The Court should reject Hartford's effort to do so here, as numerous courts have done in like circumstances.

Plaintiffs purchased Hartford's ***all risk*** Special Multi-Flex policy (the "Policy"), at an annual premium of nearly $350,000, to secure business income coverage for losses related to their hotel operations. When the COVID-19 pandemic and resulting government closure orders brought New York City and its tourism industry (indeed, the world) to a halt, Plaintiffs sought coverage of their losses under the Policy's separate coverages for, *inter alia,* business interruption, civil authority, dependent properties, virus, and extra expense. But Hartford denied Plaintiffs' claims and improperly enlists this Court's help to evade all responsibility under the Policy and adopt as a matter of law its interpretation of disputed key Policy provisions – ***based on language not contained in the Policy itself***. As shown below, Plaintiffs' Complaint states valid causes of action.

Hartford argues erroneously that the operative coverage language – "direct physical loss of or direct physical damage to" Covered Property – means only ***tangible*** physical damage, not "loss of" functionality of the property. (Mot. 8.) But the Policy contains no such definition of

"physical loss." Moreover, Hartford's construction renders superfluous the term "direct physical loss ***of***" by conflating it with "direct physical damage ***to***." Well-established New York law requires the Policy be construed in a manner that gives all terms full effect. As shown below, when policies use the words "of" and "or" this way, the proper construction encompasses ***either*** deprivation of the insured property for its intended use ***or*** physical damage. Although the law dictates that Policy language be construed in ***Plaintiffs'*** favor, Hartford impermissibly asks the Court to do the opposite. Plaintiffs have adequately alleged the effective physical loss ***of***, ***and*** physical damage ***to***, their properties.

Nor should the Court accept Hartford's contention that the Policy's virus exclusion applies, because it: (i) makes no reference to pandemics; (ii) makes no reference to losses "***indirectly***" caused by a virus; and (iii) conflicts with other Policy provisions containing specific virus coverage.

Under New York law, insurance policy exclusions must be strictly and narrowly construed. Unlike other insurers, Hartford chose not to include the term "pandemic" in its virus exclusion. But the two are different: a virus impacts only those things or persons it directly contacts; a pandemic triggers unprecedented civil authority orders (i) directly restricting access to properties ***irrespective of whether the virus actually touches the property***; (ii) prohibiting prospective patrons from engaging in anything but essential activities; and (iii) depriving businesses like Triumph of their properties for their intended use – invoking the very purpose of business interruption coverage: to protect policyholders when their property cannot be used for its income-generating purpose. Hartford nonetheless seeks to rewrite the exclusion to encompass the COVID-19 pandemic, relying on cases addressing broader and more specifically worded virus provisions. But because the virus exclusion is, at a minimum, ambiguous as to whether it

encompasses the pandemic or indirect damage, the Court must construe it in Triumph's favor and deny Hartford's motion – as several other courts addressing virus exclusions in COVID-19 cases have done.

Hartford's virus exclusion is separately unenforceable under the doctrine of regulatory estoppel. When the insurance industry – led by the Insurance Services Office ("ISO") – secured regulatory approval of standard form virus exclusions, it falsely represented to regulators that the exclusions would not change existing coverage and should not reduce consumer premiums. But cases nationwide had recognized that airborne contaminants rendering property uninhabitable or unusable for its intended purpose triggers coverage under property policies. The virus exclusion is unenforceable because regulatory authorities approved it based on those misrepresentations (just as courts previously found pollution exclusions unenforceable).

Because the Complaint adequately pleads multiple bases for coverage under the Policy and raises factual issues concerning proper construction of the Policy that require discovery,[1] Hartford's motion should be denied.

FACTUAL ALLEGATIONS

Plaintiffs operate six boutique hotels in New York City, five of which are insured under the Policy. Compl., ¶20. In March 2020, following a series of State and City "stay at home" orders in response to the pandemic, Triumph was forced to close its hotels to the public. *Id.*, ¶¶3, 25. New York City's March 22, 2020 order directed residents to stay home except for essential needs, and recognized that COVID-19 is "causing property loss and damage." *Id.,* ¶25. The

[1] Indeed, in pending Connecticut litigation regarding a similar Hartford policy, Hartford's effort to adjudicate the merits without discovery was recently rejected. NYSCEF 37.

majority of U.S. states and countries worldwide issued similar orders and restricted travel into New York and/or the U.S. based on high infection rates. *Id.*[2]

The COVID-19 pandemic impacted Plaintiffs' hotels in several distinct ways, including, *inter alia*, the: (i) actual contamination of Plaintiffs' hotels; (ii) inability to use Plaintiffs' hotels for their intended purpose due to the actual and/or threatened presence of the virus; (iii) civil authority orders prohibiting prospective patrons from staying at Plaintiffs' hotels; and (iv) suspension of Plaintiffs' operations due to the "direct physical loss of" premises owned and operated by others (including patrons' homes, transportation hubs and tourist attractions), on which Plaintiffs' business depends ("dependent properties" coverage). *Id.,* ¶¶31-32, 40-41. Plaintiffs allege the Policy's "virus exclusion" is inapplicable for multiple reasons. *Id.,* ¶46.

Although Plaintiffs timely provided notice of their losses to Hartford in March 2020, Hartford denied their claim without investigation. *Id.,* ¶59.

ARGUMENT

On a motion to dismiss for failure to state a claim under CPLR 3211(a)(7), the "scope of the court's inquiry… is narrowly circumscribed." *P.T. Bank Cent. Asia v. ABN AMRO Bank*, 301 A.D.3d 373, 375 (1st Dep't. 2003). The court is "not authorized to assess the merits in the complaint or any of its factual allegations." *Id.* at 376. Instead, the Court must afford the complaint a liberal construction, and "accord plaintiffs the benefit of every possible favorable inference." *Leon v. Martinez,* 84 N.Y.2d 83, 87-88 (1994). The "sole criterion is whether the pleading states a cause of action" – not whether plaintiff can ultimately establish its allegations. *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 (1977). Further, a CPLR 3211(a)(1) motion cannot be granted unless the documents submitted "conclusively establish[] a defense as a matter

[2] Governor Cuomo also issued a series of Executive Orders imposing 14-day quarantine restrictions on travelers arriving in New York. NYSCEF 38.

of law" and are "explicit and unambiguous." *5 East 59th Street Realty Holding Co., LLC v. Leahey*, No. 452192/2018, 2020 WL 4936915, *5 (Sup. Ct. N.Y. Cty. Aug. 24, 2020).

I. ALL-RISK POLICIES ARE BROADLY CONSTRUED IN FAVOR OF COVERAGE

Under New York law, "all risk" policies cover all perils not specifically excluded. *Parks Real Estate Purchasing Grp. v. St. Paul Fire & Marine Ins. Co*., 472 F.3d 33, 41 (2d Cir. 2006). The law governing interpretation of exclusionary clauses is highly favorable to the insured. *Pioneer Tower Owners Ass'n v. State Farm Fire & Cas. Co*., 12 N.Y.3d 302, 306 (2009). The insurer "bears the burden of establishing that the exclusions apply in a particular case and they are subject to no other reasonable interpretation." *Gaetan v. Firemen's Ins. Co. of Newark*, 264 A.D.2d 806, 808 (2d Dep't. 1999). Exclusions or exceptions from policy coverage "must be specific and clear in order to be enforced," and cannot be "extended by interpretation or implication, but are to be accorded a strict and narrow construction." *Seaboard Sur. Co. v. Gillette Co*., 64 N.Y.2d 304, 311 (1984).

A court construing an insurance policy "must strive to 'give meaning to every sentence, clause, and word,'" and avoid construction that would render terms superfluous. *Zurich Am. Ins. Co. v. ABM Indus., Inc.,* 397 F.3d 158, 165 (2d Cir. 2005). Any ambiguity in the insurance contract must be construed ***against the insurer*** as the drafter of the policy. *Guardian Life Ins. Co. of Am. v. Schaefer*, 70 N.Y.2d 888, 890 (1987)

Moreover, insurance policies must be construed "in light of 'common speech' and the reasonable expectations of a businessperson." *Belt Painting Corp. v. TIG Ins. Co*., 100 N.Y.2d 377, 383 (2003). Indeed, the very purpose of business interruption coverage is to ensure the insured has funds "necessary to sustain its business operation in the event disaster occur[s]." *Bi-Econ. Mkt., Inc. v. Harleysville Ins. Co. of New York*, 10 N.Y.3d 187, 194 (2008).

Applying the foregoing standards, Hartford's motion should be denied.

II. TRIUMPH ALLEGES DIRECT PHYSICAL LOSS OF ITS HOTELS FOR THEIR INTENDED PURPOSE AND DIRECT PHYSICAL DAMAGE

Hartford argues that Plaintiffs have not shown "losses from 'direct physical loss' or 'direct physical damage' to property." (Mot. 8.) The Policy, however, provides for coverage in the event of "direct physical loss ***of***" Covered Property – a critical distinction here.

A. "Direct Physical Loss of" Covered Property Is Distinct From "Direct Physical Damage to" Covered Property

Hartford urges the Court to read "direct physical loss of or direct physical damage to" as requiring tangible alteration of Plaintiffs' hotels, which makes the first clause superfluous – contrary to well-settled rules of construction[3]– and imposes a definition of "physical loss" the Policy does not contain.[4] Essentially, it seeks improperly to read "physical loss of" out of the Policy.

The reason is clear: under settled law, contamination – even invisible – of a premises ***is*** physical loss. The court in *Port Auth. of N.Y. & N.J. v. Affiliated FM Ins. Co*., 311 F.3d 226, 236 (3d Cir. 2002), applying New York law, noted when contamination of a building is "such as to make the structure uninhabitable and unusable," "there has been a distinct loss to its owner." Thus, no physical change in a property is necessary to demonstrate physical loss if the property cannot be used for its intended purpose.[5] That holding accords with decisions nationwide

[3] *Zurich*, 397 F.3d at 165.

[4] In contrast, commercial general liability policies commonly define property damage as physical injury to "tangible" property. *See, e.g.,* Compl., Ex. B at 48.

[5] New York law also recognizes loss of merchantability as a covered property loss. *Pepsico, Inc. v. Winterthur Intern. America Ins. Co.,* 24 A.D.3d 743 (2d Dep't. 2005) (tainted soda resulting from faulty ingredients sufficient to constitute physical loss because the soda could not be sold and therefore was unusable for its intended purpose). Similarly here, the pandemic resulted in the loss of merchantability of Plaintiffs' hotel rooms. The Policy's form loss of market exclusion does not apply to such business interruption losses. *See, e.g., Duane Reade Inc. v. St. Paul Fire*

finding such contamination sufficient to trigger coverage under the term "physical loss of" an insured premises. *See Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am.*, No. 2:12–cv–04418 (WHW)(CLW), 2014 WL 6675934, **1-3 (D.N.J. Nov. 25, 2014) (granting plaintiff summary judgment because ammonia contamination constituted "direct physical loss of" property and rendered it "physically unfit for normal human occupancy"); *Yale Univ. v. Cigna Ins. Co.*, 224 F. Supp. 2d 402, 412-13 (D. Conn. 2002) (lead contamination and asbestos in building satisfied "physical loss of…property" policy requirement); *Cooper v. Travelers Indem. Co. of Illinois,* No. C-01-2400-VRW, 2002 WL 32775680 (N.D. Cal. Nov. 4, 2002) (E. coli contamination constituted direct physical damage); *Western Fire Ins. Co. v. First Presbyterian Church*, 165 Colo. 34, 40 (1968) (gasoline vapor-contaminated soil around church rendered building uninhabitable, triggering coverage); *Matzner v. Seaco Ins. Co.*, No. Civ. A. 96-0498-B, 1998 WL 566658, *4 (Mass. Super. Ct. Aug. 26, 1998) (carbon monoxide contamination constitutes direct physical loss); *Oregon Shakespeare Festival Ass'n v. Great Am. Ins. Co.*, No. 1:15-cv-01932-CL, 2016 WL 3267247, *2 (D. Or. 2016) (finding physical loss of property where wildfire smoke infiltrated covered premises), *vacated on other grounds*, 2017 WL 1034203 (D. Or. Mar. 6, 2017); *Motorists Mut. Ins. Co. v. Hardinger,* 131 F.App'x 823, 826-27 (3d Cir. 2005) (reversing summary judgment for insurer because whether E. coli contamination constituted physical loss was a jury question).

Like the contaminants at issue in these cases, the presence of COVID-19 has rendered Plaintiffs' hotels "physically unfit for normal human occupancy," because of how the virus

& Marine Ins. Co., 279 F. Supp. 2d 235, 240 (S.D.N.Y. 2003) ("The loss of market exclusion relates to losses resulting from economic changes occasioned by, e.g., competition, shifts in demand, or the like; it does not bar recovery for loss of ordinary business caused by a physical destruction or other covered peril.").

spreads and the difficulty in detecting it. As discussed in Section II-B below, the civil authority orders also deprived Plaintiffs of their properties' income-generating purposes. At least ***seventeen*** courts to date have agreed (not one, as Hartford claims).

In *Studio 417, Inc. v. Cincinnati Ins. Co.*, No. 20-cv-03127, 2020 WL 4692385, *4 (W.D. Mo. Aug. 12, 2020), the court held plaintiffs (hair salon and restaurants) "adequately alleged a direct physical loss" based on the plain meaning of the phrase because COVID-19 can attach to property "making it 'unsafe and unusable, resulting in direct physical loss'" of property. The court found defendant conflated "loss" and "damage" in arguing tangible physical alteration was required, and concluded "even absent a physical alteration, a physical loss may occur when the property is uninhabitable or unusable for its intended purpose." *Id.* at *5 (citing *Port Authority*, 311 F.3d at 236).

The court in *Blue Springs Dental Care LLC v. Owners Ins. Co.*, 4:20-cv-00383-SRB, 2020 WL 5637963, *6 (W.D. Mo. Sept. 21, 2020) similarly found plaintiff dental clinics adequately alleged a claim for "direct physical loss," and rejected defendant's argument that business income coverage could not be triggered because plaintiffs never fully suspended operations. The court found plaintiffs adequately alleged physical loss of their clinics based on COVID-19 contamination, government shutdown orders prohibiting the public from accessing their clinics and threat of loss posed by COVID-19. *Id.*

The court in *North State Deli, LLC v. Cincinnati Ins. Co.*, No. 20-CVS-02569, 2020 WL 6281508 (N.C. Super. Ct. Oct. 9, 2020) granted summary judgment *to plaintiff-insured*, holding that:

> "'direct physical loss' describes the scenario where business owners and their employees, customers, vendors, suppliers, and others ***lose the full range of rights***

> ***and advantages of using or accessing their business property***. This is precisely the loss caused by the Government Orders."

NYCSEF 19, *6 (emphasis added).

The court observed that plaintiffs were expressly forbidden by government decree from accessing and using their property for its insured income-generating purposes. *Id.*

In *Cajun Conti LLC v. Certain Underwriters at Lloyds, London*, No. 2020-02558 (Civ. Ct. La. Nov. 4, 2020) (NYSCEF 39), the court denied the insurer's motion for summary judgment, finding whether COVID-19 caused "direct physical loss or damage" to plaintiff's property and whether civil authority prohibited access to plaintiff's restaurants – in part by restricting patron presence–were issues of fact.

Courts nationwide have refused to dismiss COVID-19 business interruption cases on similar grounds.[6]

The cases Hartford cites are, in contrast, inapplicable. The policy in *Newman Myers Kreines Gross, P.C. v. Great Northern Ins. Co.*, 17 F. Supp. 3d 323 (S.D.N.Y. 2014) – not involving contamination and decided on summary judgment – concerned "direct physical loss or

[6] *Best Rest Motel Inc v. Sequoia Ins. Co.*, No. 37-2020-00015679-CU-IC-CTL (San Diego Sup. Ct. Sept. 30, 2020) (finding issues of fact) (NYSCEF 40); *Francois Inc. v. Cincinnati Ins. Co.*, No. 20CV201416 (Ohio Ct. Com. Pl. Sept. 29, 2020) (same) (NYSCEF 41); *Somco, LLC v. Lightning Rod Mut. Ins. Co.*, No. CV-20-931763, 2020 WL 1897326, *1 (Ohio Com.Pl. Aug. 12, 2020) (same); *780 Short North LLC v. Cincinnati Ins. Co.*, No. 20CV003836 (Ohio Ct. Com. Pl. Sept. 8, 2020) (finding factual issues and converting to summary judgment) (NYSCEF 42); *SSF II, Inc. v. Cincinnati Ins. Co.*, No. 20CV201416 (Ohio Ct. Com. Pl. Sept. 8, 2020) (same) (NYSCEF 43); *K.C. Hopps, Ltd. v. Cincinnati Ins. Co., Inc.*, No. 4:20-cv-00437, 2020 WL 6483108, *1 (W.D. Mo. Aug. 13, 2020) (finding claims adequately alleged); *Hill and Stout PLLC v. Mut. of Enumclaw Ins. Co.,* No. 20-2-07925-1 (Wash. Sup. Ct. Nov. 13, 2020) (finding "physical loss of" ambiguous because it is fairly susceptible to two reasonable interpretations) (NYSCEF 44); *Dino Palmieri Salons, Inc. v. State Auto. Mut. Ins. Co.*, No. CV-20-932117, *11 (Ohio Ct. Com. Pl. Nov. 17, 2020) (plaintiffs adequately alleged physical presence of COVID-19 on their premises and suffered physical loss or damage directly stemming from COVID-19) (NYSCEF 45); *see also infra,* pp. 13-14 (cases denying motions to dismiss despite virus exclusions).

damage" policy language, not, as here, "direct physical loss ***of***" covered property. *Id.* at 326. *See also Total Intermodal Servs. v. Travelers Prop. Cas. Co. of Am.*, No. 2:17-cv-04908-AB-KS, 2018 WL 3829767, *4 (C.D. Cal. July 11, 2018) (distinguishing *Newman* because its policy omitted the preposition "of"). Moreover, *Newman* expressly acknowledged that physical loss or damage "***does not require that the physical loss or damage be tangible, structural or even visible***," and "even invisible fumes can represent a form of physical damage." *Newman,* 17 F. Supp. 3d at 330 (emphasis added). While *Newman* found a power-outage did not constitute "physical loss or damage," the presence and threatened presence of COVID-19 ***is*** "a form of physical damage" to Plaintiffs' hotels. *See also Schlamm Stone & Dolan LLP v. Seneca Ins. Co.,* No. 603009/2002, 2005 WL 600021, *5 (Sup. Ct. N.Y. Cty. Mar. 4, 2005) (noxious particles in air and on surfaces constitutes physical damage); B. Ostrager & T. Newman, *Handbook on Insurance Coverage Disputes* §21.02[a] (12th ed. 2004) (direct physical loss includes alteration to covered property at microscopic or molecular level).

Like *Newman, Roundabout Theatre Co. v. Cont'l Cas. Co.*, 302 A.D.2d. 1, 2 (1st Dep't. 2002), was decided on summary judgment, and the policy covered "direct physical loss or damage," omitting the key preposition "of." Moreover, the policy did not include civil authority coverage – a critical distinction because plaintiff's claim was based on orders prohibiting access to its property due to nearby collapsed scaffolding, not on its own property damage. *Id.* at 8-9.[7] Here, however, Triumph alleges damage to its hotels from COVID-19, its policy *does* contain a "civil authority" provision, and it claims damages based on damage to dependent properties on

[7] *Social Life Magazine, Inc. v. Sentinel Ins. Co., Ltd.*, No. 20:cv-03311-VEC (S.D.N.Y. 2020) (Mot. 12) (NYSCEF 25) ignores this critical distinction and the points above regarding *Newman.* The decision is also procedurally inapposite because it addressed plaintiff's preliminary injunction motion.

which it depends to attract guests – tourist attractions, transportation hubs and guest homes. Unlike plaintiff in *Roundabout*, Plaintiffs' Policy covers its losses.

While the cases Hartford cites (Mot. 13-14) adopt Hartford's proposed construction of physical loss, they are contrary to numerous decisions holding precisely the opposite (*see* footnote 6) and not binding on this Court.[8]

Hartford's "period of restoration" argument (Mot. 16) has been rejected by several courts. *See Cajun Conti*, (NYSCEF 39); *Blue Springs*, 2020 WL 5637963, *6.

Finally, Hartford's argument based on its vague "loss of use" exclusion (Mot. 12, n.4) fails because Hartford's interpretation would void the purpose of the Policy. In *Oregon Shakespeare Festival,* 2016 WL 3267247, *6, the court rejected the insurer's reliance on an identically worded exclusion, explaining:

> …loss of use of the theater for performance was caused by smoke. Thus it was caused by the claimed damage. In any other situation, if a delay or loss of use of covered property was caused by a claimed damage to the property, yet was excluded from coverage, that exclusion would void the entire purpose of the policy. This interpretation is unreasonable."

The same reasoning applies here.

B. Civil Authority Coverage Is Triggered

Hartford's civil authority arguments fail for the same reason as its physical loss arguments: "invisible [aerosolized droplets] can represent a form of physical damage." *Newman,* 17 F. Supp. 3d at 330. The orders issued in response to COVID-19-related physical losses in

[8] *Mudpie, Inc. v. Travelers Casualty Ins. Co. of America*, No. 20-cv-03213-JST, 2020 WL 5525171 (N.D. Cal. Sept. 14, 2020) does not support Hartford because plaintiff – unlike Triumph – did not allege any actual contamination. *Id*. at **4-6. Triumph's case is analogous to the cases *Mudpie* ***distinguished***, including *Studio 417*. *Id*. The policies at issue in *Sandy Point Dental PC v. The Cincinnati Ins. Co*., No. 20 CV 2160, 2020 WL 5630465, *1 (N.D. Ill. Sept. 21, 2020), and *Rose's 1 LLC v. Eerie Ins. Exch*., No. 2020 CA 002424 B, 2020 WL 4589206, *1-5 (D.C. Super. Ct. Aug. 6, 2020) do not appear to include the preposition "of" like the Policy here.

New York effectively prohibited access to Plaintiffs' hotels. Hartford's argument to the contrary (Mot. 18) is inaccurate, because the orders prohibit prospective patrons from leaving their homes except for essential needs.

Hartford's cases (several of which arose on summary judgment) are inapposite. In contrast to the orders here, the order grounding flights after September 11th – addressed in *S. Hospitality, Inc. v. Zurich Am. Ins. Co.,* 393 F.3d 1137, 1139-41 (10th Cir. 2004) – made access to hotels more difficult, but not prohibited by stay-at-home orders. Likewise, in *St. Paul Mercury Ins. Co. v. Magnolia Lady, Inc.,* No. CIV.A. 297CV153BB, 1999 WL 33537191 (N.D. Miss. Nov. 4, 1999), access was made more difficult by a bridge closure, not prohibited. In *Syufy Enters v. Home Ins. Co. of Indiana*, No. 94-0756 FMS, 1995 WL 129229, *2 (N.D. Cal. Mar. 21, 1995) the policy language limited civil authority coverage to orders issued "as a direct result of damage to or destruction" to ***adjacent*** property, whereas there was no causal link between damage to adjacent property and restricted access. Here, the civil authority provision applies if there is a "covered Cause of Loss to property in the immediate area of your 'Insured Premises,'" not only to "adjacent" property. Policy at 49.[9]

Unlike the speculative harm from a future terrorist attack at issue in the ***summary judgment*** opinions Hartford cites (Mot. 19),[10] the threat of COVID-19 remains concrete until an effective vaccine is administered widely. The damage on which COVID-19 orders are based is real and present, not speculative. Indeed, after a period of loosened restrictions, new civil authority orders have been issued in New York and nationwide due to a surge in infections.

[9] The Policy is Exhibit A to the Complaint.

[10] *Paradies Shops, Inc. v. Hartford Fire Ins. Co.,* No. 1:03–CV–3154–JEC, 2004 WL 5704715, *9 (N.D. Ga. Dec. 15, 2004) (addressing cross motions for summary judgment); *S. Tex. Med. Clinics, P.A. v. CNA Fin. Corp.*, No. H–06–4041, 2008 WL 450012, *13 (S.D. Tex. Feb. 15, 2008) (same).

Issues of fact concerning applicability of the civil authority provision – like those presented here – preclude dismissal. *See Zurich,* 397 F.3d at 171 (reversing summary judgment for Zurich on claim that civil authority orders restricting access to defendant's work sites triggered policy coverage because factual disputes remained); *Massi's Greenhouses, Inc. v. Farm Family Mut. Ins. Co*., 233 A.D.2d 844 (4th Dep't. 1996) (denying summary judgment as to applicability of "civil authority" coverage because issue of fact remained regarding whether plaintiff's losses stemmed from bacterial contamination itself or state quarantine order).

III. THE POLICY PROVIDES VIRUS COVERAGE

The "Property Choice Elite Coverage Form" specifically provides coverage for "direct physical loss or direct physical damage to Covered Property caused by….virus." Policy at 26, §12(b). The "Property Choice Elite Business Income Coverage Form" also provides business income coverage when business interruption is "necessary due to the loss or damage to property caused by….virus." Compl., ¶43; Policy at 51.

Hartford inaccurately argues that the virus coverage only applies if the virus arises from "water or windstorms." (Mot. 9.) ***But "aircraft" is also "specified cause of loss" under the Policy*** (Policy at 20), and it is highly likely that COVID-19 was introduced from China to this country via aircraft, triggering coverage under these provisions.

These coverage provisions conflict with the Policy's statement that it "will not pay for loss or damage caused by or resulting from any virus" (Policy at 89), making the Policy ambiguous at a minimum, and precluding dismissal. *See Massi's,* 233 A.D.2d at 844 (affirming denial of insurer's summary judgment motion, because whether losses were caused by bacterial contamination (an excluded cause of loss) or quarantine (not excluded) was question of fact); *see also Urogynecology Specialist of Fla. LLC v. Sentinel Ins. Co., Ltd.*, No. 6:20-cv-1174-Orl-

22EJK, 2020 WL 5939172, **3-4 (M.D. Fla. Sept. 24, 2020) (denying motion to dismiss where virus coverage and virus exclusion rendered policy ambiguous); *Indep. Barbershop LLC v. Twin City Fire Ins. Co.*, No. A-20-CV-00555-JRN, 2020 WL 6572428, *4 (W.D. Tex. Nov. 4, 2020) (denying motion to dismiss based on virus coverage provision);[11] *Ridley Park Fitness LLC v. Philadelphia Indem. Ins. Co. et al.*, No. 01093, **1-2 (Pa. Civ. Ct. Aug. 31, 2020) (factual issues precluded dismissal based on virus exclusion), NYCSEF 46; *Taps & Bourbon on Terrace, LLC v. Underwriters at Lloyds London and Main Line Ins. Offices, Inc.*, No. 00375, 2020 WL 6380449, **1-2 (Pa. Civ. Ct. Oct. 26, 2020) (same); *Optical Services USA/JC1 et al. v. Franklin Mutual Ins. Co.*, No. BER-L-3681-20, 2020 WL 5806576 (N.J. Super. L. Div. Aug. 13, 2020) (same), NYCSEF 49.

IV. THE VIRUS EXCLUSION DOES NOT BAR TRIUMPH'S CLAIMS

Hartford's virus exclusion is neither "straightforward" nor does it preclude coverage, because it: (i) does not encompass pandemics; (ii) does not apply to losses indirectly caused by virus; and (iii) is unenforceable under the doctrine of regulatory estoppel.

A. The Virus Exclusion Does Not Apply to Pandemics

Unlike other insurers, Hartford chose not to include pandemics in its virus exclusion. *See, e.g., Meyer Nat. Foods, LLC v. Liberty Mut. Fire Ins. Co.*, 218 F. Supp. 3d 1034, 1038 (D. Neb. 2016) (virus exclusion expressly included "any epidemic, pandemic, influenza plague, SARS, or Avian Flu."). As the drafter, Hartford's choice of wording is paramount: if Hartford intended to include pandemics within its virus exclusion, it should have specifically included them – instead of enlisting the Court to broaden the exclusion for it. *See, e.g., Maison Rostang v.*

[11] The court found the virus exclusion applied to some claims based on specific language in the virus exclusion regarding concurrent and contributing causation not present here, and specifically rejected Defendant's "conflation of COVID-19 and the 'virus.'" *Id.* at *3.

AXA France, (Commercial Tribunal of Paris, RG No. 2020017022, May 22, 2020) (rejecting insurer's reliance on virus exclusion because exclusion did not reference pandemic) (NYSCEF 47).

The term "virus" is not defined, requiring that it be given its ordinary dictionary definition – which notably does not include a "pandemic."[12] Contrary to Hartford's contention, a pandemic and a virus are in fact distinct. An ordinary virus impacts only those it directly contacts. A pandemic, in contrast, triggers a wide variety of containment measures, impacting people and properties that the virus ***never directly reaches***. Put differently, a pandemic sets off numerous ***indirect*** consequences, such as government orders and access restrictions, affecting property and its usability.

Indeed, Hartford's SEC filings, dating back to February 23, 2010, demonstrate it is well aware of the difference: it specifically cited the possibility of a "pandemic" – not a "virus" –as a threat to its profitability. *See* NYSCEF 48 (February 23, 2010 Form 10-K, p. 39) (stating "Our property and casualty insurance operations expose us to claims arising out of catastrophes…[and] losses resulting from … disease pandemics ….").[13] Notably, the pre-COVID filings make no mention of Hartford's virus exclusions as a factor mitigating this exposure.

Whatever Hartford's reasons for not including the term "pandemic" in its exclusion – perhaps because it could not charge such high premiums if it disclosed that it intended to deny

[12] https://www.merriam-webster.com/dictionary/virus

[13] The Court can and should take judicial notice of Hartford's SEC filings. *See, e.g., Brown v. Sentinel Investigation Service*, 39 Misc.2d 635, 636 (Sup. Ct. Kings Cty. 1963) ("Matters of public record, are treated as if they were embodied in the complaint"); *In re Avon Products, Inc.*, No. 651087/2012, 2013 WL 4022625 (Sup. Ct. N.Y. Cty. Mar. 5, 2013) (court may consider on a motion to dismiss publicly available documents like SEC filings).

coverage for such devastating losses– the term is not included, and cannot be implied here. *See Seaboard*, 64 N.Y.2d at 311 (exclusions "are not to be extended by interpretation or implication, but are to be accorded a strict and narrow construction"); *Seneca Ins. Co. v. Kemper Ins. Co*., No. 02 Civ. 10088 (PKL), 2004 WL 1145830, *10 (S.D.N.Y. May 21, 2004) (insurer bears "burden of proving that the claim falls within the scope of an exclusion ... [by] establish[ing] that the exclusion is stated in clear and unmistakable language, is subject to no other reasonable interpretation, and applies in the particular case.").

MDW Enters., Inc. v. CNA Ins. Co., 4 A.D.3d 338 (2d Dep't. 2004) is analogous. There, the insured, vacant property was destroyed by arson. The insurer relied on a vacancy exclusion, which excluded coverage for loss or damage during vacancy caused by "vandalism." *Id.* at 340. The court rejected the argument, finding "vandalism" ambiguous in context of the policy as a whole, therefore construing it in the insured's favor. *Id.* at 341. The court noted "vandalism" was not defined, and that the "nature or scale of the damage of the other bases for exclusion listed with 'vandalism' are rather minor, which would be more consistent with an interpretation of 'vandalism' that focused on its petty nature." *Id*. The court criticized the lower court for "overlook[ing] the fact that ordinary businesspeople generally view 'vandalism' and 'arson' as distinct perils" and held if the insurers "wanted to exclude coverage for arson they should have said so clearly…just as they listed theft and attempted theft separately." *Id.*

MDW's holdings apply here. Just as the arson in *MDW* was necessarily related to vandalism, the pandemic is related to the virus – but the court can and should separate the two. And just like vandalism and arson in *MDW*, ordinary businesspeople would view a common virus such as the common cold or flu and the COVID-19 pandemic as distinct perils. If Hartford wanted to exclude coverage for pandemics, it "should have said so clearly," just as other insurers

have done. *Id.* at 341; *see also United Capital Corp. v. Travelers Indem. Co. of Illinois*, 237 F. Supp. 2d 270, 275 (2002) (rejecting insurer's argument that "vandalism" should be construed to include arson, noting insurer could have specifically defined it as such, notwithstanding that arsonists broke into the subject property).

Hartford cannot sustain its burden of proving that the virus exclusion applies to Plaintiffs' losses and the Court should not expand the virus exclusion to include a term Hartford chose to exclude.

B. The Virus Exclusion Does Not Apply to Losses Indirectly Caused by Virus

Hartford's virus exclusion specifically provides that it only excludes loss or damage "caused by or resulting from" virus. In contrast, the cases Hartford cites address far broader language. For example, the virus exclusion in *Boxed Foods Co. v. Cal. Cap. Ins. Co*., No. 20-cv-04571, 2020 WL 6271021, *3 (N.D. Cal. Oct. 26, 2020) excluded coverage for loss or damage caused by "the actual, alleged or threatened presence of any pathogenic organism…whether direct ***or indirect, proximate or remote, or in whole or in part caused by, contributed to or aggravated by*** any physical damage insured by this policy." (Emphasis added). The court held the inclusion of indirect consequences of virus encompassed the effects of the pandemic. *Id*. at *5

The court specifically distinguished this language from a Hartford virus exclusion in another case:

> ***The Court's holding should not be construed to necessarily apply to all virus exclusions***. The Virus Exclusion [at issue] casts an exceptionally wide net relative to other virus exclusions because it lacks relevant limitations and ambiguous language.

Id., at fn. 8 (emphasis added) (comparing policy to policy at issue in *Urogynecology*, 2020 WL 5939172, finding the latter "contained ambiguous language and potentially permitted the

plaintiff's claim").

Similarly in *Vizza Wash, LP v. Nationwide Mut. Ins. Co.*, No. 5:20-cv-00680-OLG, 2020 WL 6578417, *13 (W.D. Tex. Oct. 26, 2020) (NYSCEF 15), the policy excluded "loss or damages caused directly or ***indirectly*** by any….virus or bacteria." (Emphasis added.) So too, the virus exclusion in *Wilson v. Hartford Cas. Co.*, No. CV 20-3384, 2020 WL 5820800, *7 (E.D. Pa. Sept. 30, 2020) states: "will not pay for loss or damage caused directly or ***indirectly*** by...[p]resence, growth, proliferation, spread or any activity of 'fungi', wet rot, dry rot, bacteria or virus." (Emphasis added.)[14] Indeed, Hartford included the same virus exclusion language in the Policy (at 40-41), but ***deleted*** it in the virus exclusion endorsement. *See* Policy at 88, ¶G.[15] Having deliberately excluded the term "indirectly" from the operative virus exclusion, Hartford cannot ask the Court to reinsert it.

Accordingly, even if the virus exclusion is enforceable – and it is not – it could only potentially exclude damages caused by the virus such as the costs of decontaminating the property,[16] *not* damages caused by the pandemic such as lost functionality of the property for its intended use. *See, e.g., Great Northern Ins. Co. v. Dayco Corp.*, 637 F. Supp. 765, 780

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[14] *See also Franklin EWC, Inc. v. Hartford Financial Servs. Grp.,* No. 3:20-cv-04434-JSC, 2020 WL 5642483, *2 (N.D. Cal. Sept. 22, 2020) (addressing same exclusion); *Founder Institute Inc. v. Hartford Fire Ins. Co.,* No. 5:20-cv-04466-NC, 2020 WL 6268539, *1 (N.D. Cal. Oct. 22, 2020) (same). *Mauricio Martinez, DMD, P.A. v. Allied Ins. Co. of Am.*, No. 2:20-cv-00401, 2020 WL 5240218, *3 (M.D. Fla. Sept. 2, 2020) similarly addressed an exclusion containing the term "indirectly."

[15] Even this wording – addressed in *Urogynecology*, 2020 WL 5939172, *4– was deemed ambiguous because the losses "stemming from COVID-19" do 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 these kinds of business losses." The court distinguished another virus case because it did not deal "with the unique circumstances of the effect of COVID-19….on our society – a distinction this Court considers significant." *Id.*

[16] However, even that is unclear given that the Policy specifically provides for limited virus coverage and Contaminant Clean-up coverage. Policy at 11, 30.

(S.D.N.Y. 1986) ("Where a policy expressly insures against direct loss and damage by one element but excludes loss or damage caused by another element, the coverage extends to the loss even though the excluded element is a contributory cause.").

At a minimum, the virus exclusion itself is ambiguous as to whether it includes pandemics and indirect consequences of a virus.

C. The Virus Exclusion Is Unenforceable Based on the Doctrine of Regulatory Estoppel

The virus exclusion is also unenforceable based on the doctrine of regulatory estoppel. In the insurance industry, the doctrine of regulatory estoppel is best known in the context of pollution exclusions.

In the 1970s and 1980s, industry representatives described the intended scope of pollution exclusions as mere "clarifications" in coverage, in securing approval of the exclusions with no reduction in premiums. Thereafter, policyholders proved that insurers misrepresented the existing coverage and courts accordingly deemed the exclusions unenforceable. *See, e.g., Morton Int'l Inc. v. Gen. Accident Ins. Co*., 629 A.2d 831 (N.J. 1993); *Joy Technologies v. Liberty Mut. Ins. Co.,* 421 S.E.2d 493, 499-500 (W. Va. 1992) (reversing summary judgment for insurer with instructions to consider regulatory estoppel); *St. Paul Fire Ins. Co. v. McCormick & Baxter Creosoting Co*. 923 P.2d 1200 (Or. 1996); *Sunbeam Corp. v. Liberty Mut. Ins. Co.,* 781 A.2d 1189, 1192-93 (Pa. 2001) (having represented that new pollution exclusions would not "involve a significant decrease in coverage from the prior language, the insurance industry will not be heard to assert the opposite position when claims are made by the insured policyholders.").

In strikingly similar fashion, the insurance industry pushed through virus exclusions in 2006, representing them to be mere clarifications of coverage. Specifically, ISO – acting as

Hartford's agent – submitted circular LI-CF-2006-175 (July 6, 2006) to insurance regulators in various states, including New York, falsely stating "…property policies ***have not been a source of recovery for losses involving contamination by disease-causing agents***…" NYSCEF 50 (emphasis added).[17] To the contrary, courts nationwide had concluded property policies covered contamination-related loss (*see supra* pp. 6-7). Just as courts estopped insurers from relying on the pollution exclusions they secured through misrepresentation, courts can and should estop insurers from relying on virus exclusions they secured through misrepresentation.

Hartford's only support for its claim that New York does not recognize regulatory estoppel (apart from a Texas case) is *dicta* from *Sher v. Allstate Ins. Co*., 947 F. Supp. 2d 370 (S.D.N.Y. 2013) (Mot. 10), in which the court specifically noted that "plaintiffs do not allege that Allstate made actual representations to NYSID" regarding the provision at issue, but "demand regulatory estoppel based upon alleged omissions from documents sent to NYSID for approval." *Id*. at 390. Plaintiffs' allegation here is that the insurance industry made affirmative misrepresentations regarding the virus exclusion, not omissions. Compl, ¶6.[18]

Hartford's reliance on *Turek Enters., Inc. v. State Farm Mut. Auto. Ins. Co.,* No. 20-11655, 2020 WL 5258484 (E.D. Mich. Sept. 3, 2020) is also misplaced. There, the court appeared to misunderstand the argument, focusing on the fact that the ISO circular says it is

[17] The Court can and should take judicial notice of the ISO circular. *See Mass. Bay Ins. Co. v. Penny Preville, Inc*., No. 95 Civ. 4845 (RPP), 1996 WL 389266, *9 (S.D.N.Y. July 10, 1996) (taking judicial notice of ISO publication relating to scope of coverage); *see also Med. Malpractice Ins. Ass'n v. Superintendent of Ins. of State of N.Y.*, 72 N.Y.2d 753, 764-65 (1988) (taking judicial notice of regulatory impact statement submitted in connection with rate approval).

[18] Plaintiffs' regulatory estoppel allegations are sufficient to satisfy New York's notice pleading standards, but if the Court disagrees (on this point or any other), leave to amend should be granted to allow Plaintiffs to include additional allegations to support their claims. Hartford's reliance on *Prospect Funding Holdings, LLC v Paiz*, 183 A.D.3d 486, 487 (1st Dep't. 2020) (Mot. 11) is disingenuous because that case was decided on summary judgment.

introducing a virus exclusion. *Id*. at *9, n.13. Plaintiffs do not contend the ISO circular concealed the virus exclusion, but rather misrepresented that the exclusion merely clarified, rather than materially changed, coverage.

V. HARTFORD'S ARGUMENTS REGARDING THE IMPLIED DUTY OF GOOD FAITH AND GEN. BUS. L. §349 ARE PREMATURE

Hartford's arguments regarding Triumph's claims for breach of the implied duty of good faith and consumer fraud under Gen. Bus. Law §349 are premature and misguided, again relying on summary judgment decisions. *Zurich Ins. Co. v. Texasgulf,* 233 A.D.2d 180 (1st Dep't. 1996). Hartford's argument wrongly presumes there is no coverage, at a minimum a matter to be determined.

Mirabelli v. Merchants Ins. Co., No. 020998/2004, 2005 WL 6318256 (Sup. Ct. Suff. Cty. May 9, 2005) is inapposite because plaintiff actually pled a claim for violation of New York Insurance Law, § 2601. Here, Plaintiffs merely rely on § 2601 for the examples of Hartford's bad faith conduct. *See, e.g., Joannou v. Blue Ridge Ins. Co.,* 289 A.D.2d 531, 532 (2d Dep't. 2001) ("An insurance carrier's failure to pay benefits allegedly due its insured under the terms of a standard insurance policy can constitute a violation of General Business Law § 349"); *Riordan v. Nationwide Mut. Fire Ins. Co.*, 977 F.2d 47, 51-52 (2d Cir. 1992) (rejecting argument that Insurance Law § 2601 precludes invocation of GBL §349 against insurance companies because "GBL §349 applies to the acts or practices of every business operating in New York" and "contains no exceptions or exemptions for regulated industries").

VI. THE ISSUES RAISED BY HARTFORD'S MOTION REQUIRE DISCOVERY

Because resolution of Hartford's arguments hinge on the proper construction of its ambiguous policy, discovery is necessary before any dispositive treatment. *See Cantor v. Levine*, 115 A.D.2d 453, 454 (2d Dep't. 1985) ("[w]hen knowledge of facts is necessary for a party to

properly oppose a motion to dismiss, and those facts are within the sole knowledge or possession of the movant, discovery is sanctioned if it has been demonstrated that such facts may exist"); *Bd. of Ed. v. CNA Ins. Co*., 647 F. Supp. 1495, 1502 (S.D.N.Y. 1986) (ambiguities present disputed issues of fact that must be resolved by finder of fact). Triumph served document requests on Hartford concerning the proper interpretation of the ambiguous Policy terms discussed herein.[19] Triumph also has prepared a subpoena to ISO.

Discovery is also necessary (and has been requested) regarding the Policy's liberalization clause, which provides: "if we adopt any revision that would broaden this Coverage Part, without additional premium…during this policy period, the broadened coverage will immediately apply to you." Compl., ¶36; Policy at 16. Thus, if any versions of the Policy provide broader virus coverage, or omit the virus exclusion, Triumph is entitled to the benefit of those broader provisions. *See Government Emp. Ins. Co. v. Wilson*, 69 Misc.2d 1020, 1024 (Sup. Ct. Erie Cty. 1972) ("if there is any ambiguity in regard to the liberalization clause of the insurance policy, it must be construed strictly against the insurer"); *Mattis v. State Farm Fire & Cas. Co*., 454 N.E.2d 1156, 1160 (Ill. App. 1983) (liberalization clause in original policy made broader coverage provisions in amended policy applicable to property damage claim).

[19] If, for example, Hartford sought reinsurance for pandemic-related claims, such evidence would be probative of Hartford's understanding that its policy potentially included coverage for pandemics.

CONCLUSION

For the foregoing reasons, Hartford's motion should be denied.

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Respectfully submitted,

KASOWITZ BENSON TORRES LLP

By: */s/ Jack Atkin*

Jack Atkin, Esq. (NY Bar #2025658)
Christine A. Montenegro, Esq. (NY Bar #3969276)
1633 Broadway
New York, New York 10019
Tel: (212) 506-1800 / Fax: (212) 506-1800
jatkin@kasowitz.com
cmontenegro@kasowitz.com

Jerold Oshinsky, Esq. (NY Bar #012105)
2029 Century Park East, Suite 2000
Los Angeles, CA 90067
Tel: (424) 288-7900 / Fax: (424) 288-7901
joshinsky@kasowitz.com

Margaret A. Ziemianek, Esq. (*pro hac vice*)
101 California Street, Suite 3000
San Francisco, CA 94111
Tel: (415) 421-6140 / Fax: (415) 520-6452
mziemianek@kasowitz.com

Attorneys for Plaintiffs

Certification of Word Count

The undersigned hereby certifies that the forgoing PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO THE HARTFORD FIRE INSURANCE COMPANY'S MOTION TO DISMISS contains 6,945 words according to the word count of the word-processing software used to prepare the document, excluding the caption, table of contents, table of authorities, signature block, and this certification.

/s/ Jack Atkin
Jack Atkin
Attorney for Plaintiffs