No. 21-1202

United States Court of Appeals
For the First Circuit

LEGAL SEA FOODS, LLC,
Plaintiff-Appellant,

v.

STRATHMORE INSURANCE CO.,
Defendant-Appellee.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
CASE NO. 1:20-CV-10850-NMG
JUDGE NATHANIEL M. GORTON

OPENING BRIEF FOR PLAINTIFF-APPELLANT LEGAL SEA FOODS, LLC

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure Rule 26.1(a), the Plaintiff-Appellant Legal Sea Foods, LLC, states that: (1) it is wholly owned by Legal Sea Foods Holdings Co., Inc.; and (2) no publicly held corporation owns 10 percent or more of its stock.

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REASONS THAT ORAL ARGUMENT SHOULD BE HEARD

This case involves important questions of coverage under commercial property insurance policies for loss of and damage to property from the coronavirus pandemic. Oral argument will aid this Court's decisional process.

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JURISDICTIONAL STATEMENT

The district court had jurisdiction under 18 U.S.C. § 1332 because the parties are completely diverse in citizenship and the amount in controversy exceeds $75,000. This Court has jurisdiction under 28 U.S.C. § 1291 because the district court's decision was a final decision and this appeal is from a final order of the district court that disposed of all the parties' claims. On March 8, 2021, the district court entered judgment for the defendant. Addendum ("ADD") ADD017. In accordance with Fed. R. App. P. 4(a), the Plaintiff timely noticed its appeal on March 12, 2021. Joint Appendix ("JA") JA0952-0953.

INTRODUCTION

On March 1, 2020, with the novel coronavirus gaining ground, Strathmore Insurance Co. ("Strathmore") issued an all-risk policy ("Policy") to Legal Sea Foods, LLC ("Legal Sea Foods"). It did so without a virus exclusion because it had determined, as a business matter, that the risk from a pandemic was low and that restaurants would expect the loss and damage from a pandemic to be covered. In fact, Strathmore marketed its policy to restaurants as containing "enhanced property coverage" for risks specific to restaurants.

Soon after the Policy incepted, the contours of the pandemic's effects on life in the United States began to take form. The physical effects of the virus and

disease—not just on lives but also on property—caused schools to close and state and local governments to issue stay-at-home and shelter-in-place orders that required businesses to close and instructed residents to remain at home. Legal Sea Foods closed its restaurants and its quality-control center because, among other things, the virus was on its property rendering it unsafe. When Legal Sea Foods made a claim under the Policy for its losses, Strathmore held a perfunctory two-minute telephone call after which it issued an incomplete form letter denying the claim, which it mischaracterized as a food spoilage loss.

Legal Sea Foods therefore filed suit. Dismissing the governing complaint with prejudice, the district court measured the factual allegations *not* under the Rule 12(b)(6) standard but against its own factual beliefs. Legal Sea Foods alleged that it closed its restaurants because of the actual presence of the virus and disease on site at each of them *and* in compliance with governmental orders; the district court found that Legal Sea Foods closed *solely* because of the governmental orders. Legal Sea Foods alleged that the virus and disease are enduring on site and cannot be removed because they are constantly being spread and reintroduced; the judge found that their presence was "transient." And, Legal Sea Foods alleged that the virus and disease caused physical loss of property and damage to property; the judge found that the virus was not capable of affecting property. Finally, the judge held that, as a matter of law, the virus and disease could never cause physical loss

of or damage to property because it cannot affect the "structural integrity" of property and is not sufficiently permanent—conditions that the plain terms of the Policy do not impose.

The judge's decision must be reversed because he failed to construe the facts and inferences therefrom in a light most favorable to Legal Sea Foods, as he was required to do. He also misconstrued the Policy terms. Legal Sea Foods' allegations satisfy the plain meaning of the phrase "direct physical loss of or damage to" covered property. A policyholder suffers direct physical loss of property when a fortuitous cause renders property uninhabitable or unfit for its intended occupancy or use, which is just what happened here. A policyholder suffers direct physical damage to property when a fortuitous cause leads to a physical alteration to property that adversely affects the property's functionality; once again, that is just what happened here. At the very least, Strathmore has not shown, as it must, that its contrary interpretation of the phrase "direct physical loss of or damage to" insured property is the *only* reasonable interpretation. Courts across the country for at least 50 years have construed the phrase just as Legal Sea Foods advocates, holding that gasoline fumes, asbestos fibers, lead-paint dust, E. coli, odor from cat urine, harmless but unapproved pesticide on oats, ammonia gas, wildfire smoke, oil fumes, and carbon monoxide are all capable of causing direct

physical loss and damage. Strathmore never defined its terms, altered its language, or inserted a virus exclusion.

Legal Sea Foods' construction of the plain language of the Policy is reasonable. The district court's cramped construction is not.

STATEMENT OF ISSUE

To trigger coverage under the all-risk policy that Strathmore wrote and sold to Legal Sea Foods (without a virus exclusion) there must be "direct physical loss of or damage to" insured property. Legal Sea Foods alleged that the novel coronavirus is ubiquitous and cannot be removed from its property; that it caused physical loss of property by rendering the insured property uninhabitable and unfit for occupancy; and that it caused physical damage to its property by changing the composition of the indoor air and attaching to surfaces, thereby rendering the air and surfaces dangerous disease vectors. The issue on appeal is whether the district court erred when it (1) found the virus to be "transient" and incapable of damaging property when Legal Sea Foods' factual allegations and inferences based on those allegations plausibly stated otherwise, and (2) wrote into the Policy a requirement that the loss of or damage to property must "impact the [property's] structural integrity" even though alternative (and more reasonable) interpretations support coverage.

STATEMENT OF THE CASE

I. Factual Background.

Legal Sea Foods had its beginnings in 1950 when George Berkowitz opened a fish market in Inman Square in Cambridge, Massachusetts. JA0261, ¶ 14. The Berkowitz family started its first restaurant next door in 1968, serving food that was second to none. JA0261, ¶ 14. Word spread quickly, and Legal Sea Foods eventually owned and operated 34 restaurants in Massachusetts, the District of Columbia, New Jersey, Pennsylvania, Rhode Island, and Virginia. JA0261, ¶ 13. The freshness and quality of its food as well as its excellent customer service and the friendly and welcoming atmosphere at its restaurants are Legal Sea Foods' hallmarks. JA0262, ¶¶ 16-17.

A. Legal Sea Foods purchases a policy with an "enhanced property coverage endorsement for restaurants" from Strathmore with no virus exclusion in March 2020.

In the winter of 2020, the novel coronavirus named SARS-CoV-2 began its spread around the globe, but its trajectory and severity were still far from clear. To protect its property in the event of loss or damage and ensuing business interruption, Legal Sea Foods purchased a commercial property insurance policy from Strathmore effective March 1, 2020, to March 1, 2021. JA0262, ¶ 18. Strathmore marketed the policy, branded as "Protecto-Guard," specifically to restaurants as an "enhanced property coverage endorsement for restaurants."

JA0262, ¶ 19. When Legal Sea Foods applied for the Policy, Strathmore performed (or had the opportunity to perform) an extensive underwriting investigation into the risks associated with Legal Sea Foods' operations. JA0262, ¶ 19. Strathmore had or should have had unique insight into risks faced by restaurants generally, and Legal Sea Foods specifically. JA0262, ¶ 19.

The Policy is an all-risks policy, broadly insuring against all risks of loss of or damage to property unless specifically excluded or limited. JA0262, ¶ 20. The Policy provides:

> We will pay for direct physical loss of or damage to Covered Property at the premises described in the Declarations caused by or resulting from any Covered Cause of Loss.

JA0449. A "Covered Cause of Loss" means "Risks Of Direct Physical Loss" unless the loss is excluded or limited. JA0507. The Policy's Business Income and Extra Expense Coverage Form provides:

> 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 . . . .

JA0418. A "suspension" is defined, in part, as "[t]he slowdown or cessation of your business activities." JA0426. "Operations" is defined, in part, as "[y]our business activities occurring at the described premises." JA0426. The Policy contains other coverages: for loss of business income and extra expense caused by the action of

Civil Authority (JA0419); for Extended Business Income losses after operations are resumed (JA0418); and for loss of business income sustained because of a suspension of operations caused by direct physical loss or damage to "dependent property" (JA0417).

B. The Policy contains no virus exclusion because Strathmore affirmatively chose not to include one.

The Policy contains no exclusion or limitation for loss or damage caused by viruses or pandemics. JA0263, ¶ 33.

In 2006, after the first SARS pandemic, the Insurance Services Office ("ISO"), an industry organization that develops standardized insurance-policy programs and forms for Strathmore and other insurers, drafted a virus exclusion that excluded losses "due to disease-causing agents such as viruses and bacteria." JA0264, ¶ 35. Strathmore, through its parent Greater New York Mutual Insurance Company, told regulators that the new virus exclusion, by excluding coverage of losses from pandemic exposure, would increase the losses insureds would bear on business-interruption claims:

> The ISO initial filing of this endorsement indicated that the exclusion was appropriate due to "pandemic" exposure to loss which was not anticipated in the standard coverage forms or in development of the loss costs for Commercial Property. Therefore, we assume that this Exclusion is *deleting coverage* across the entire NY Commercial Fire and Allied book written by the ISO member companies that utilize the ISO product, unless modified by such a Company exception.

> Because the application of this Exclusion is to Commercial Property, *we anticipate losses to fall largely* in Business Personal Property ("stock") and *Business Interruption/Time Element coverage segments*.

JA0264-65 ¶ 38 (emphasis added). Strathmore calculated that the exclusion would most likely apply to food-borne illness transmitted "via ingestion or some other direct contact to an insured's products." JA0522. For that reason, Strathmore limited the exclusion's use to accounts with a "claim history indicative of recent incident loss with little remediation." JA0522. Restaurants in particular would "feel that such an event [which might otherwise be excluded under the ISO form] is well within the realm of possible fortuitous occurrences and should be covered should such an event arise." JA0522. Strathmore also acknowledged that an airborne pandemic was possible, albeit "highly unlikely." JA0522.

In other words, Strathmore appreciated the potential risk of an air-borne pandemic, anticipated that pandemic-related losses would fall within business interruption and time element coverages, understood the ISO virus exclusion would potentially "delete coverage" for such losses, and *still* decided, for whatever reason, *not to insert the ISO virus exclusion into Legal Sea Foods' Policy*. JA0265, ¶ 39. In fact, Strathmore made this decision with the explicit knowledge that its key clientele, restaurants such as Legal Sea Foods, would expect Strathmore's policies to cover losses from viruses in the absence of this exclusion. JA0266, ¶ 43.

C. Legal Sea Foods suffers loss of or damage to insured property.

As noted, the COVID-19 pandemic was spreading throughout the world in the winter of 2020. JA0266, ¶ 45. The World Health Organization declared a pandemic on March 11, 2020. JA0266, ¶¶ 46-47. The virus that causes COVID-19, SARS-CoV-2, is highly infectious and spreads easily in three main ways. JA0266, ¶ 48. First, it spreads during close contact with infected individuals. JA0266-67, ¶ 49. When infected individuals cough, sneeze, sing, talk, or simply breathe they shed the virus in their respiratory droplets. JA0266-67, ¶ 49. Larger droplets fall out of the air because of gravity and attach to surfaces. JA0266-67, ¶ 49. Smaller droplets and particles are carried through the air. JA0266-67, ¶ 49. An individual nearby can easily become infected when in close contact with someone who is shedding the virus in this way. JA0266-67, ¶ 49.

The second main way that the virus spreads is through airborne transmission. JA0267, ¶ 50. Small aerosol droplets can linger in the air for hours even after an infected individual has left the premises, and they can spread to other areas in the building when they enter air-circulation systems. JA0267, ¶ 50. This is why experts recommend specialized air-filtration systems to remediate the presence of the virus in buildings. JA0267, ¶ 51.

The third main way the virus spreads is through fomites, which are surfaces contaminated with the virus when respiratory droplets land on them or otherwise

are transported to those surfaces. JA0267, ¶ 52. The virus then resides on the surfaces and remains for up to 28 days, serving as a vehicle for transmission that entire time, infecting individuals who touch that surface and then touch their own mouth, nose, or eyes. JA0267, ¶ 52.

Infected individuals shed the virus at all times during their illness, before, while, and after experiencing symptoms, which means they are contagious even when they feel just fine. JA0267-68, ¶¶ 53 & 54. Much about how the virus is transmitted remains unknown. JA0269, ¶ 58. But what is known is that the constant reintroduction of the virus within property, including Legal Sea Foods' sites, means the virus is ubiquitous and persistent and no amount of cleaning will remove it from the air and surfaces, especially in large commercial properties like Legal Sea Foods' insured locations. JA0270, ¶ 67.

Persons infected with COVID-19 were present on Legal Sea Foods' insured property and shedding the virus into the air and onto surfaces at each of Legal Sea Foods' locations. JA0269, ¶ 59. The infectious particles were thus present in the air and on surfaces at each of Legal Sea Foods' locations. JA0269-70, ¶ 63. The risks to Legal Sea Foods' restaurants is heightened over many other businesses because of the nature of restaurants: large, enclosed spaces where groups of people gather for long periods of time, thereby increasing the concentration of infectious particles in the air and on surfaces. JA0270, ¶ 64.

The novel coronavirus caused the physical loss of Legal Sea Foods' insured property by rendering it dangerous, unfit, and unsafe for its intended and insured use as a restaurant. JA0270, ¶ 66. It physically damaged Legal Sea Foods' insured property by changing the content of the indoor air and by attaching to surfaces, altering their character. JA0270, ¶ 65.

The grave danger that COVID-19 and SARS-CoV-2 pose to life and the physical damage to property that they cause led federal, state, and local governments to issue "stay at home" or "shelter in place" orders. JA0270, ¶ 69. These governmental orders restricted travel to, and within, the United States, required businesses to close, and instructed residents to remain in their homes unless performing essential activities. JA0270, ¶ 69. They were issued not just to decrease the risk of transmission of the virus but also to avoid the physical damage it causes. JA0270-71, ¶ 70. In any event, regardless of any orders, Legal Sea Foods' property (air and surfaces) was damaged and rendered dangerous and unusable by the actual presence of COVID-19 and SARS-CoV-2. JA0270, ¶¶ 65-68.

Legal Sea Foods made a claim under the Policy, which Strathmore received on March 23, 2020. JA0273, ¶¶ 84-85. Strathmore's claim "investigation" consisted of a single, two-minute telephone call to Legal Sea Foods' general counsel. JA0273-74, ¶¶ 87-88. A few days later, Strathmore then sent a form denial

letter, mischaracterizing Legal Sea Foods' claim as one for "business income loss [] caused by the spoilage/contamination of your food inventory stemming from the COVID-19 pandemic." JA0527. Strathmore's apathy is evidenced by the fact that the form letter is not even complete, with placeholder text left unfilled. JA0532.

II. District Court Proceedings.

Legal Sea Foods filed this action on May 4, 2020. It filed an amended complaint on June 5, 2020, adding a claim under Mass. Gen. L. c. 93A. Strathmore moved to dismiss, which Legal Sea Foods opposed. Legal Sea Foods filed the Second Amended Complaint, which is the governing pleading, on October 30, 2020, having been granted leave to do so. The parties thereafter filed memoranda supplementing the motion to dismiss briefing, on November 13 (Strathmore) and November 27 (Legal Sea Foods).

The district court (Gorton, J.) issued its decision dismissing the case with prejudice on March 5, 2021. He rejected Legal Sea Foods' allegation that it suffered direct physical loss of and damage to its property because of the actual on-site presence of SARS-CoV-2, finding instead that any loss or damage was caused solely by the governmental closure orders. ADD007. Despite Legal Sea Foods' allegations that the virus physically altered the air and surfaces and physically damaged them, the judge found that the virus "is incapable of damaging physical structures" and harms only human beings. ADD008. Ignoring Legal Sea Foods'

allegations that the virus is ubiquitous in the air and on surfaces, the judge found that it is "transient." ADD008. He imported a requirement, not found in Massachusetts law, that a covered cause of loss must "impact the structural integrity" of insured property. ADD008. He dismissed as irrelevant the fact that Strathmore affirmatively chose not to include a virus exclusion that it acknowledged could apply to an airborne pandemic. ADD011.

STATEMENT OF RELATED CASES AND PROCEEDINGS

This case has never been before this Court, and there are no other proceedings related to this case before this Court.

STANDARD OF REVIEW

This Court reviews de novo a district court's grant of a motion to dismiss under Fed. R. Civ. P. 12(b)(6). *In re Fin. Oversight & Mgmt. Bd. for Puerto Rico*, 919 F.3d 121, 127 (1st Cir. 2019), *cert. denied*, 140 S. Ct. 855 (2020).

SUMMARY OF ARGUMENT

The district court's decision should be reversed for three fundamental reasons:

First, the judge improperly measured the factual allegations in the complaint against his own beliefs rather than against the governing *Twombly-Iqbal* standard. Rather than viewing the factual allegations and the reasonable inferences from

them in the light most favorable to Legal Sea Foods, he made factual determinations at odds with those facts and inferences.

Second, the judge misconstrued the plain language of the Policy. That language, as interpreted for nearly half a century, simply requires (1) for policyholder to have suffered physical loss of property, that a fortuitous physical cause render the property uninhabitable or unfit for its intended purpose and (2) for a policyholder to have suffered physical damage to property, that a fortuitous physical cause alter property in a way that adversely affects the property's functionality. Legal Sea Foods' allegations satisfy this longstanding, plain-language understanding. The judge improperly added the requirements that the loss or damage be to the "structural integrity" of the property and be permanent, which are found nowhere in the Policy's insuring agreement.

Third, the judge disregarded the Massachusetts' policy-interpretation principle that requires that the Policy be construed in favor of Legal Sea Foods unless Strathmore shows that its interpretation of the terms is the *only* reasonable interpretation. Legal Sea Foods has advanced an interpretation that relies on the plain language of the Policy's provisions and that is supported by decades of precedent. Strathmore's contrary interpretation, even if reasonable, is not the *only* reasonable interpretation.

ARGUMENT

I. Legal Sea Foods' Complaint, Assessed Under the Proper Standard, Plausibly Alleges that It Suffered "Direct Physical Loss of or Damage to Covered Property" and Therefore Plausibly States a Claim for Business Interruption and Extra Expense Coverages.

In Massachusetts, words in an insurance policy are construed in their "usual and ordinary sense" in the context of the policy as a whole. *Surabian Realty Co. v. NGM Ins. Co*., 462 Mass. 715, 718, 971 N.E.2d 268, 271 (2012); *Boazova v. Safety Ins. Co*., 462 Mass. 346, 358, 968 N.E.2d 385, 395 (2012) (same); *Brazas Sporting Arms, Inc. v. Am. Empire Surplus Lines Ins. Co*., 220 F.3d 1, 4 (1st Cir. 2000) ("We begin with the actual language of the policies, given its plain and ordinary meaning.") (citations and quotation marks omitted). To ascertain possible meanings of policy language, Massachusetts courts look to ordinary dictionary definitions and precedent. *Dorchester Mut. Ins. Co. v. Krusell*, 485 Mass. 431, 438, 150 N.E.3d 731, 738 (2020); *Easthampton Congregational Church v. Church Mut. Ins. Co*., 916 F.3d 86, 92 (1st Cir. 2019).

The insured bears the initial burden of proving that the claim falls within the policy's coverage. *Boazova*, 462 Mass. at 351, 968 N.E.2d at 390. The burden then shifts to the insurer to show that an exclusion applies. *Id*. Any doubt about the meaning of ambiguous language "must be resolved against the insurance company that employed them and in favor of the insured." *Id*. (*quoting Aug. A. Busch & Co.*

of Mass. v. Liberty Mut. Ins. Co., 339 Mass. 239, 243, 158 N.E.2d 351, 353 (1959)). "If there are two rational interpretations of policy language, the insured is entitled to the benefit of the one that is more favorable to it." *Hazen Paper Co. v. U.S. Fid. & Guar. Co*., 407 Mass. 689, 700, 555 N.E.2d 576, 583 (1990). "Every word in an insurance contract 'must be presumed to have been employed with a purpose and must be given meaning and effect whenever practicable.'" *Metro. Life Ins. Co. v. Cotter*, 464 Mass. 623, 635, 984 N.E.2d 835, 844 (2013) (*quoting Allmerica Fin. Corp. v. Certain Underwriters at Lloyd's, London*, 449 Mass. 621, 628, 871 N.E.2d 418, 425 (2007)). This Court construes a policy de novo. *Fid. Co-op. Bank v. Nova Cas. Co*., 726 F.3d 31, 36 (1st Cir. 2013).

A. The judge was required to, but did not, accept Legal Sea Foods' allegations as true and draw all reasonable inferences in Legal Sea Foods' favor.

To survive a motion to dismiss, a complaint need only contain "a short and plain statement of the claim showing that the pleader is entitled to relief." *Ocasio-Hernandez v. Fortuno-Burset*, 640 F.3d 1, 11 (1st Cir. 2011) (*quoting* Fed. R. Civ. P. 8(a)(2)). This "short and plain statement" should provide enough detail to give the defendant "fair notice of what the . . . claim is and the grounds upon which it rests." *Id*. at 12 (*quoting Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). To "show" an entitlement to relief, the complaint "must contain enough factual

material 'to raise a right to relief above the speculative level.'" *Id*. (*quoting Twombly*, 550 U.S. at 555).

The Court must accept as true all factual allegations in the complaint that are not legal conclusions or "[t]hreadbare recitals of the elements of a cause of action." *Id*. (*quoting Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). The Court must accept those facts as true regardless of whether the Court believes them, finds them incredible, or believes that proof of the facts is improbable. *Id*. "Rule 12(b)(6) does not countenance . . . dismissals based on a judge's disbelief of a complaint's factual allegations." *Id*. (*quoting Neitzke v. Williams*, 490 U.S. 319, 327 (1989)). "Nor may a court attempt to forecast a plaintiff's likelihood of success on the merits." *Id*. at 12-13. The Court may not engage in fact finding on a motion to dismiss. The facts alleged must be construed in favor of the plaintiff. *Id*. at 7.

The Court must also draw all reasonable inferences in favor of the plaintiff. *In re Fin. Oversight & Mgmt. Bd. for Puerto Rico*, 919 F.3d at 127. It may not choose between two plausible inferences that may be drawn from factual allegations, because it is not the Court's role, at the pleading stage, to decide which inferences are more plausible. *Evergreen Partnering Grp., Inc. v. Pactiv Corp*., 720 F.3d 33, 45 (1st Cir. 2013).

The district court judge did not follow this standard. Instead, the judge found facts contrary to Legal Sea Foods' allegations and drew inferences adverse to Legal

Sea Foods. Thus, the judge improperly held (1) that Legal Sea Foods' loss and damage were caused solely by the governmental closure orders; (2) that the virus and disease are "transient" and easily removed; and (3) that the virus and its disease are not "physical" and are incapable of damaging property. Each of these statements contradicts the allegations in the complaint and the reasonable inferences from them:

- The governmental closure orders were issued to mitigate not just the risk of infections but the physical loss of and damage to property that the novel coronavirus and its disease cause; these orders required the closure of restaurants and/or the installation of physical and structural alterations, including protective barriers and partitions; and Legal Sea Foods closed as a direct result of the governmental closure orders *and* the actual presence of SARS-CoV-2 on site at each location.

- The virus is ubiquitous; is shed when infected individuals cough, sneeze, sing, talk, or breathe, whether or not the individual is experiencing symptoms and knows that he or she is infected; and cannot simply be wiped away because it is constantly being spread and reintroduced to Legal Sea Foods' locations.

- The virus and its disease are physical agents capable of causing physical loss of and damage to property, and, in fact, they did cause physical loss

of and damage to Legal Sea Foods' restaurants, where they are especially dangerous because restaurants are enclosed spaces where groups gather for prolonged periods of time resulting in higher concentrations of the virus than in other locations.

These fundamental errors alone require that the decision be vacated and the matter remanded.

B. Legal Sea Foods alleged direct physical loss of and damage to insured property.

Legal Sea Foods plausibly alleged that it suffered direct physical loss of and damage to property under the plain meaning of those terms. A policyholder may suffer physical loss of property when a fortuitous event acting directly on the property makes the property unfit for human occupancy. That is exactly what Legal Sea Foods alleged here: the virus, residing in indoor air and on surfaces, caused Legal Sea Foods' property to become physically unfit for human occupancy. A policyholder suffers damage to property when a fortuitous event causes a physical alteration to the property that adversely affects its functionality. Once again, that is exactly what Legal Sea Foods has alleged: the virus physically altered the composition of the air and physically attached itself to surfaces. This plain-meaning interpretation of the terms physical "loss of" and "damage to" property is well supported by Massachusetts precedent on which this Court has relied and by pre-pandemic precedent from around the country.

The judge below erred (1) by limiting "loss" and "damage" to only that resulting in harm to insured property's "structural integrity," a limitation found nowhere in the policy, and (2) by finding Legal Sea Foods' loss and damage to be too "transient" to be covered. At the very least, the Policy does not *unambiguously* carry that meaning. To prevail on a Rule 12(b)(6) motion to dismiss, Strathmore was required not just to advance a reasonable interpretation of its policy terms but to prove that its interpretation is the *only* reasonable interpretation of that language. The plain language, supported by precedent, forecloses Strathmore from doing so. Under Massachusetts law, Legal Sea Foods is entitled to the interpretation resulting in coverage.[1]

1. Legal Sea Foods alleged direct physical loss of covered property because it alleged that the novel coronavirus physically rendered its property unfit for habitation and unusable for its insured purpose.

Legal Sea Foods' allegations fit comfortably within the plain meaning of the phrase "direct physical loss of" insured property, a term that Strathmore chose not to define. There is a direct physical loss of insured property when a fortuitous intervening physical force renders property uninhabitable.

[1] The parties agree Massachusetts law applies to this dispute. *Easthampton Congregational Church,* 916 F.3d at 91 (court honors parties' reasonable agreement on choice of law).

To ascertain the plain meaning of undefined terms, Massachusetts courts look to their dictionary definition. *Krusell*, 485 Mass. at 438, 150 N.E.3d at 738; *McLaughlin v. Berkshire Life Ins. Co. of Am*., 82 Mass. App. Ct. 351, 356, 973 N.E.2d 685, 689 (2012). The term "direct" means, as relevant here, "characterized by close logical, causal, or consequential relationship" or "stemming immediately from a source."[2] "Physical" means "[o]f or relating to material things"[3] or "having material existence : perceptible especially through the senses and subject to the laws of nature."[4] A "loss" includes the sense of being deprived of something, which encompasses more than dispossession as applied in the physical sense.[5]

> The word "loss," as defined in the dictionary, can mean either of two things: (1) detriment/disadvantage, or (2) something that is lost. In the context of a standard insurance policy, the word "loss" can mean either of those things. Both definitions are reasonable. Applying the first definition, therefore, when an insurance policy refers to physical loss of or damage to property, the "loss of property" requirement can

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[2] "Direct," Merriam-Webster.com, https://www.merriam-webster.com/dictionary/direct; *see also* "Direct," American Heritage Dictionary of the English Language (5th Ed. 2020), https://www.ahdictionary.com/word/search.html?q=direct ("Having no intervening persons, conditions, or agencies; immediate").

[3] "Physical," American Heritage Dictionary (5th ed. 2020), https://www.ahdictionary.com/word/search.html?q=physical.

[4] "Physical," Merriam-Webster.com, https://www.merriam-webster.com/dictionary/physical.

[5] "Loss," American Heritage Dictionary of the English Language (5th ed. 2020), https://www.ahdictionary.com/word/search.html?q=loss; "Loss," Oxford English Dictionary (online ed.), https://www.oed.com/view/Entry/110406.

> be satisfied by any "detriment," and a "detriment" can be present without there having been a physical alteration of the object.

3 Allan D. Windt, Insurance Claims & Disputes § 11:41 (6th ed. 2021 update).

Legal Sea Foods' allegations about coronavirus's effects meet all of these elements. Legal Sea Foods has alleged that the virus was present at each of its locations, and thus the virus's effects were direct. Legal Sea Foods has also alleged that the virus physically made its insured property uninhabitable and unfit for use by entering into the air and residing on surfaces, causing Legal Sea Foods to be deprived of those restaurants. These allegations, which must be credited on a motion to dismiss, aver a direct physical loss of insured property.

The governmental closure orders support these allegations. The complaint alleges that those orders were issued because of the prevalence, virulence, and destructiveness of the novel coronavirus and that Legal Sea Foods closed because of the actual presence of the virus on site *and* in compliance with those closure orders. For purposes of a motion to dismiss, these allegations are more than sufficient to satisfy the efficient proximate cause rule that Massachusetts applies in chain-of-causation cases. *Jussim v. Massachusetts Bay Ins. Co*., 415 Mass. 24, 27, 610 N.E.2d 954, 955 (1993). That rule looks to the "direct and proximate" cause, the "active efficient cause that sets in motion a train of events which brings about a result without the intervention of any force started and working actively from a new and independent source." *Id*. (*quoting Lynn Gas & Elec. Co. v. Meriden Fire*

Ins. Co., 158 Mass. 570, 575, 33 N.E. 690, 691 (1893)). Under this rule, it was the disease and virus that caused the issuance of governmental orders. That disease and virus are actually present on Legal Sea Foods' property. Both are, as alleged, the direct and proximate cause of the direct physical loss that Legal Sea Foods has suffered.

2. Legal Sea Foods alleged direct physical "damage to" covered property because it alleged that its property suffered a physical injury that altered that its functionality or use.

Legal Sea Foods' complaint is also plainly sufficient to allege direct physical damage to its property. "Physical," as noted, requires that the damage be to material property (as opposed to intellectual property, for instance). The term "damage" simply means that the insured property has suffered injury or harm.[6] Legal Sea Foods' allegations satisfy these terms. The novel coronavirus, continually and pervasively on site, physically harmed Legal Sea Foods' property: the composition of the indoor air was altered to contain deadly virus, and the surfaces were altered when those deadly virus particles physically attached to them. The altered indoor air and surfaces prevented Legal Sea Foods from having safe use of its property. This is physical damage under the plain meaning of those

[6] "Damage," Merriam-Webster.com, https://www.merriam-webster.com/dictionary/damage; "Damage," Oxford English Dictionary (online ed.), https://www.oed.com/view/Entry/47005.

terms. The extent of the physical damage, including the scope and duration of the physical changes, are factual questions that cannot and should not be decided on a Rule 12(b)(6) motion to dismiss.

3. For at least 50 years, courts across the country, including Massachusetts, have construed "physical loss" and "physical damage" just as Legal Sea Foods advocates.

The Strathmore Policy does not exist in a vacuum. Strathmore issued the Policy in a factual and legal context. In the factual context, Strathmore issued the Policy while the COVID-19 pandemic was spreading throughout the world. The legal context included at least 50 years of courts warning insurance companies that the phrase "direct physical loss of or damage to" property, or similar language, covers analogous losses or is, at a minimum, vague in similar instances. An overwhelming majority of courts, including those in Massachusetts, find that the phrase means just what Legal Sea Foods claims it means. There does *not* have to be harm to the "structural integrity" of property and that harm need *not* be permanent. This Court has relied on the Massachusetts precedent in a related context.

This line of cases began when gasoline from a fuel station leaked underground, permeating the soil underneath a church and sending gasoline vapors into the church, inundating its rooms, making a church "uninhabitable" and "making the use of the building dangerous." *W. Fire Ins. Co. v. First Presbyterian*

Church, 165 Colo. 34, 37, 437 P.2d 52, 54 (1968). This was "direct physical loss" under the property insurance policy.

Asbestos fibers on carpets had the same effect. They presented a threat to human life, resulting in "direct physical loss" to insured buildings, even though there was no injury to the physical structure of the buildings. *Sentinel Mgmt. Co. v. N.H. Ins. Co*., 563 N.W.2d 296, 300 (Minn. Ct. App. 1997). This was so because the buildings' function was "seriously impaired or destroyed and the property rendered useless by the presence of contaminants." *Id*. So also with lead-paint dust, which rendered a home uninhabitable until the home was gutted and the lead remediated; this was "direct physical loss" because the insured property was "rendered unusable or uninhabitable." *Widder v. La. Citizens Prop. Ins. Corp*., 82 So. 3d 294, 296 (La. App. 2011). The presence of E. coli in a well could be "direct physical loss" if "the functionality of the [insured] property was nearly eliminated or destroyed" or if that "property was made useless or uninhabitable" *Motorists Mut. Ins. Co. v. Hardinger*, 131 F. App'x 823, 826-27 (3d Cir. 2005) (unpublished).

It is not necessary that the causative agents be inherently dangerous to humans. The odor of cat urine, which made the insured property unrentable, was "direct . . . physical loss" as long as it was "distinct and demonstrable." *Mellin v. N. Sec. Ins. Co*., 167 N.H. 544, 550, 115 A.3d 799, 805 (2015). "Evidence that a change rendered the insured property temporarily or permanently unusable or

uninhabitable may support a finding that the loss was a physical loss to the insured property." *Id*. The same holds when the insured property is food rather than real property. If it was physically rendered useless for its intended purpose, it has suffered direct physical loss. Thus, when an unapproved pesticide was used on oats, rendering them unusable in the policyholder's business even though they were safe to eat, they were covered. *Gen. Mills, Inc. v. Gold Medal Ins. Co*., 622 N.W.2d 147, 150 (Minn. Ct. App. 2001).

It is not necessary that the cause of loss have a lasting impact. Thus, a policyholder suffered direct physical loss or damage where ammonia was released in an unsafe amount in a factory, requiring evacuation and temporarily incapacitating the factory until the ammonia was dissipated. *Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am*., No. 2:12-CV-04418 WHW, 2014 WL 6675934, at *7 (D.N.J. Nov. 25, 2014). Structural alteration was not required; what mattered was "the ammonia release physically transformed the air within Gregory Packaging's facility so that it contained an unsafe amount of ammonia" and "the heightened ammonia levels rendered the facility unfit for occupancy until the ammonia could be dissipated." *Id*. at *6. There was "an actual change in insured property then in a satisfactory state, occasioned by accident or other fortuitous event directly upon the property causing it to become unsatisfactory for future use or requiring that repairs be made to make it so." *Id*. (*quoting AFLAC Inc. v. Chubb*

& Sons, Inc., 581 S.E.2d 317, 319-20 (Ga. Ct. App. 2003)). In fact, courts have held that insured property suffered "direct physical loss" when there was a *threat* of damage from a rockslide though no actual damage to the home: the home "became unsafe for habitation, and therefore suffered real damage when it became clear that rocks and boulders could come crashing down at any time." *Murray v. State Farm Fire & Cas. Co*., 509 S.E.2d 1, 17 (W. Va. 1998).

The same result was reached when a theater had to cancel outside performances because of "poor air quality caused by the wildfire smoke." *Oregon Shakespeare Festival Ass'n v. Great Am. Ins. Co*., No. 1:15-CV-01932-CL, 2016 WL 3267247, at *2 (D. Or. June 7, 2016), *vacated by stipulation of parties*, 2017 WL 1034203 (D. Or. Mar. 6, 2017). There was no permanent or structural damage; the performances were cancelled solely because of the poor air quality. *Id*. at 3. The policyholder suffered "direct physical loss of or damage to" insured property because the smoke made the theater "uninhabitable" and "unusable for its intended purpose." *Id*. at *9. Even though the loss and damage was "not structural or permanent," there was coverage because "the property experienced a loss of 'essential functionality.'" *Id*.

Massachusetts courts have held the same. In *Matzner v. Seaco Ins. Co*., Suffolk No. CIV. A. 96-0498-B, 1998 WL 566658 (Mass. Super. Aug. 12, 1998), the Superior Court held that carbon-monoxide contamination is "direct physical

loss of or damage to" insured property. *Id*. at *4. In *Arbeiter v. Cambridge Mut. Fire Ins. Co*., Middlesex No. 9400837, 1996 WL 1250616 (Mass. Super. Mar. 15, 1996), another Superior Court judge held that the presence of oil fumes in a house satisfied the policy's requirement of a direct "physical loss." This Court relied on both *Matzner* and *Arbeiter* when it held, in a slightly different context, that the noxious odor from carpet could be "physical injury" under a liability policy. *Essex Ins. Co. v. BloomSouth Flooring Corp*., 562 F.3d 399, 406 (1st Cir. 2009).

This longstanding nationwide and Massachusetts precedent underscores the reasonableness of the plain-meaning construction that Legal Sea Foods has advanced. Under the plain meaning of the terms of the Policy, Legal Sea Foods has alleged direct physical loss of or damage to insured property.

4. The judge erred by (1) requiring loss or damage to the "structural integrity" of property and (2) finding SARS-CoV-2 too "transient" to be capable of causing loss or damage.

The district court judge erred in two main respects. First, he rewrote the Policy to require loss of or damage to the "structural integrity" of insured property, which is contrary to the plain language of the provision and violates the canon that the court cannot add words to a contract. Second, he found that the novel coronavirus is too "transient" to cause physical loss of and damage to property, which is contrary to the allegations in the complaint and contrary to precedent.

a. The Policy language does not require loss of or damage to the "structural integrity" of insured property.

The judge wrote: "The COVID-19 virus does not impact the structural integrity of property in the manner contemplated by the Policy and thus cannot constitute 'direct physical loss of or damage to' property." ADD008. But the Policy does not require "impact to structural integrity," and the court should not have added that requirement.

Nothing in the Policy expressly or implicitly requires that loss or damage must affect the "structural integrity" of insured property. Certainly, damage to a property's structural integrity is physical, but absolutely nothing in the Policy limits "physical" to that sense. *Gregory Packaging Inc.*, 2014 WL 6675934, at *5 ("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."). "Other courts around the country have held that damage does not have to be 'structural' to be 'physical,' as long as it renders the property unusable for its intended purpose." *Oregon Shakespeare Festival Ass'n*, 2016 WL 3267247, at *9. So too here.

Strathmore, of course, could have inserted a "structural" requirement, just as it could have inserted a virus exclusion, but it chose not to, and it made this decision in the face of ample precedent construing the Policy's language just as

Legal Sea Foods has asserted. This Court is "not free to revise" the policy language. *Cont'l Cas. Co. v. Gilbane Bldg. Co*., 391 Mass. 143, 147, 461 N.E.2d 209, 212 (1984) (deciding that term "property damage" in liability policy does not require "physical injury or destruction of property").

None of the authority the district court judge cited imposes any "structural integrity" requirement under Massachusetts law. In *Crestview Country Club, Inc. v. St. Paul Guardian Ins. Co*., 321 F. Supp. 2d 260, 264 (D. Mass. 2004), the claimed loss was *purely* economic. A tree, which served as an obstacle at a golf course, was destroyed, a loss that itself was covered. *Id*. at 263. This was the *only* "direct physical loss or damage" to insured property. *Id*. at 265. The plaintiff's claim "encompasses work necessary to return the hole *not* to its former physical appearance, but to the same subjective level of difficulty." *Id*. (emphasis added). The court construed "physical" not to require impact to "structural integrity" but in its plain sense, as meaning "material." *Id*. at 264 (*quoting* American Heritage Dictionary (2d College ed. 1982)). Alleged damage to the "psychology" of the hole did not pertain to a "material thing[]." *Id*.

The case of *Harvard St. Neighborhood Health Ctr., Inc. v. Hartford Fire Ins. Co*., No. CV 14-13649-JCB, 2015 WL 13234578 (D. Mass. Sept. 22, 2015), is also wide of the mark. The plaintiff sought coverage for embezzlement where there was no physical theft of any money; instead, the embezzler transferred the funds

electronically. *Id*. at *8. Once again applying the plain meaning of "physical" to pertain to material things, the court held that electronic funds, lacking a physical existence, were not susceptible to physical loss or damage. *Id*.

Legal Sea Foods' claim is very different. Legal Sea Foods claims that COVID-19 and SARS-CoV-2, which have physical existence, had a direct physical effect on insured property, making that property physically uninhabitable (direct physical loss of insured property) and altering the composition of the indoor air and attaching to surfaces (direct physical damage to insured property). The physical effects of the COVID-19 and SARS-CoV-2 are not something that one can determine by glancing at a door handle or a restaurant booth and deciding that it looks unaffected. Instead, these physical effects will be established through factual and expert evidence, evidence that the district court did not consider, and should not have presumed on a Rule 12(b)(6) standard.

This interpretation of "physical loss of or damage" is entirely consistent with the Policy's "period of restoration" language. Below, Strathmore argued that construing "direct physical loss of or damage to" insured property to encompass Legal Sea Foods' claim would mean that business-interruption coverage would have no end. This is absurd. The Policy covers business-income losses during the "period of restoration." JA0418. The "period of restoration" begins "after the direct physical loss or damage" and ends "when the property at the described premises

should be repaired, rebuilt or replaced with reasonable speed and similar quality" or "business is resumed at a new permanent location," whichever is earlier. JA0426.

In other words, the period of restoration is the temporal measure of a business income claim. It does not limit the *trigger* of coverage, which remains "direct physical loss of or damage to property." *In re Soc'y Ins. Co. COVID-19 Bus. Interruption Prot. Ins. Litig*., No. 20 C 02005, 2021 WL 679109, at *9 (N.D. Ill. Feb. 22, 2021); *see Verrill Farms, LLC v. Farm Fam. Cas. Ins. Co*., 86 Mass. App. Ct. 577, 584, 18 N.E.3d 1125, 1131 (2014) (describing "period of restoration" as providing "the methodology to calculate loss of business income").

The measures a business must take to respond to COVID-19 and SARS-CoV-2 on its property fit within the plain meaning of "repair," "replace," and "rebuild," respectively: "to make good," "to restore to a former place or position," or "to restore to a previous state." "Repair," "Replace," & "Rebuild" Merrian-Webster.com;[7] *see In re Soc'y Ins. Co. COVID-19 Bus. Interruption Prot. Ins. Litig*., 2021 WL 679109, at *9 ("There is nothing inherent in the meanings of those words ['repair' and 'replace'] that would be inconsistent with characterizing the Plaintiffs' loss of their space due to the shutdown orders as a physical loss.").

[7] https://www.merriam-webster.com/dictionary/repair; https://www.merriam-webster.com/dictionary/replace; https://www.merriam-webster.com/dictionary/rebuild.

"Making good" and restoring its property to a safe and usable condition involves physical measures such as installing plexiglass barriers or updating HVAC systems.

Nothing in the Policy limits the meaning of "loss of" or "damage to" property to the sense of loss or damage to structural integrity, and the judge should not have inserted these terms into the Policy.

b. The complaint plausibly alleges that COVID-19 and SARS-CoV-2 are not transient.

The judge found that COVID-19 and SARS-CoV-2 could not cause "direct physical loss" because they are "transient phenomena of no lasting effect." ADD008 (*quoting SAS Int'l, Ltd. v. Gen. Star Indem. Co*., No. CV 20-11864-RGS, 2021 WL 664043, at *2 (D. Mass. Feb. 19, 2021), *appeal filed*, No. 21-1219 (1st Cir. Mar. 24, 2021)). The judge's statements are improper because they contradict the complaint and because they are contrary to precedent.

Legal Sea Foods has alleged that the virus, shed easily by infected individuals whether or not they know they are infected, is actually present at each of its locations. Moreover, it alleged that the virus is ubiquitous in the air and on surfaces. JA0270, ¶ 67. It is, under the allegations in the complaint, omnipresent and, for this reason, constantly reintroduced. It cannot simply be removed with disinfectant because it is continually spread and reintroduced and, thus, returns to surfaces and the air and will return until it is no longer prevalent in the community.

The judge was not free to disregard these factual allegations. *Evergreen Partnering*, 720 F.3d at 43 (district court may not find facts contrary to complaint's plausible allegations at pleading stage).

The judge cited *SAS International* for these errant conclusions, but to reach those conclusions the *SAS International* judge very explicitly operated outside the confines of Rule 12(b)(6). He was required to accept the plaintiff's allegations as true, but he did not. There is simply no other reasonable way to understand that judge's criticism of the plaintiff's pleading as containing allegations "without any corroborating expert evidence." *SAS Int'l*, *supra*, 2021 WL 664043, at *5. But "plaintiffs are not required to submit evidence to defeat a Rule 12(b)(6) motion." *Foley v. Wells Fargo Bank, N.A.*, 772 F.3d 63, 72 (1st Cir. 2014). All that is required there, as here, is that the plaintiff make factual allegations that plausibly state a claim. *Id*. Once the plaintiff does so, the judge is *required* to accept those facts as true, even if he or she believes other facts are true. *Lemelson v. Bloomberg L.P.*, 903 F.3d 19, 24 (1st Cir. 2018) ("on a Rule 12(b)(6) motion to dismiss, we do not concern ourselves with questions of evidentiary sufficiency"); *Abdallah v. Bain Cap. LLC*, 752 F.3d 114, 119 (1st Cir. 2014) ("a district court engages in no fact finding" on a Rule 12(b)(6) motion to dismiss). The court in *SAS International*, like the judge below, did not abide by this standard.

Once again, Legal Sea Foods' allegations fit well within the ample precedent from the last half-century. Thus, in *Matzner*, the presence of carbon monoxide was just as enduring as COVID-19 and SARS-CoV-2; while each individual molecule of carbon monoxide would dissipate far more easily than does a virus (opening a window suffices for carbon monoxide), it was constantly reintroduced until it was remediated, and this was "direct physical loss of or damage to" insured property. *Matzner*, 1998 WL 566658, at *1. And no remediation was necessary to rid the outdoor theater of wildfire smoke; it kept coming back whenever the winds shifted towards the theater, and it was "direct physical loss of or damage to" insured property. *Oregon Shakespeare Festival Ass'n*, 2016 WL 3267247, at *9; *see also Gregory Packaging, Inc*., 2014 WL 6675934, at *6 (direct physical loss or damage to facility where ammonia heightened levels of ammonia gas rendered facility "unfit for occupancy until the ammonia could be dissipated"); *Mellin,* 167 N.H. at 551, 115 A.3d at 805 (rejecting insurer's implication that "physical loss requires permanent uninhabitability" or "tangible physical alteration" in considering a claim for cat-urine odor).

5. At the very least, Strathmore has not shown, as it must, that its construction of the phrase "direct physical loss of or damage to" insured property, as applied to the facts in the complaint, is the only reasonable interpretation.

Legal Sea Foods' claim falls within the plain meaning of the phrase "direct physical loss of or damage to" insured property for all the reasons set forth above. At the very least, Legal Sea Foods has offered a reasonable interpretation of that language. Strathmore therefore has not shown, as it must, that its limited interpretation is the only reasonable interpretation. The Policy must be construed in favor of coverage.

Under Massachusetts law, a provision in an insurance policy is ambiguous when reasonably intelligent people could differ over the correct meaning and there is more than one rational interpretation of the language. *IDS Prop. Cas. Ins. Co. v. Gov't Emps. Ins. Co*., 985 F.3d 41, 55 (1st Cir. 2021); *Gemini Invs. Inc. v. AmeriPark, Inc*., 643 F.3d 43, 52 (1st Cir. 2011). The Court views the language "as a reasonable insured would comprehend it." *IDS Prop. Cas. Ins. Co*., 985 F.3d at 55. Ambiguities are construed against the insurer. *Allmerica Fin. Corp,* 449 Mass at 628, 871 N.E.2d at 425. "If there are two rational interpretations of policy language, the insured is entitled to the benefit of the one that is more favorable to it." *Hazen Paper Co.,* 407 Mass. at 700, 555 N.E.2d at 583.

Strathmore cannot satisfy its burden to show that its interpretation of the Policy is the *only* reasonable interpretation because Legal Sea Foods has advanced a different reasonable interpretation. Legal Sea Foods' interpretation relies on its plain meaning and is supported by Massachusetts precedent on which this Court has relied and 50 years worth of precedent nationwide. As the Third Circuit has noted, when "[i]nsurance companies continue to employ" a term despite decades of litigation over the meaning of those terms, continuing "to use the phrase without any language defining its scope," it is "instructive to ask 'why?'" *New Castle Cty., DE v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 243 F.3d 744, 755 (3d Cir. 2001) (holding phrase "invasion of the right of private occupancy" ambiguous and therefore construed in favor of policyholder).

Legal Sea Foods' interpretation is supported by a growing number of courts nationwide specifically in the context of COVID-19 and SARS-CoV-2. *See infra* n.11.

The district court's contrary interpretation is limited, cabining "loss" and "damage" to a subset of what those words mean in their plain and ordinary sense: while there can be physical loss of or damage to insured property when a fortuitous cause affects the property's structural integrity, the terms "loss" and "damage" are not *limited* to that sense. Strathmore could have so limited those terms if it wanted to, but it did not.

This understanding is underscored by Strathmore's affirmative decision not to insert a virus exclusion. The district court refused to consider this, citing the *SAS International* decision for the proposition that the absence of the exclusion could not "create" coverage. ADD011. This misapprehends Legal Sea Foods' allegations and argument. As alleged in the complaint, Strathmore expressly understood that restaurants, such as Legal Sea Foods, would reasonably believe the absence of a virus exclusion would confirm their understanding that the plain language of the policy provided coverage. JA0264-66, ¶¶ 38-43. Thus, as alleged in the complaint, Strathmore made a conscious decision not to include a *directly applicable* and well-known exclusion, a decision made for the express purpose of (1) *including* such loss and damage and (2) communicating the same breadth of coverage to the insureds.

The terms of the Policy must be construed in their context, and context includes not just internal context (the entire text of the policy), but also these surrounding circumstances. *Robert Indus., Inc. v. Spence*, 362 Mass. 751, 755, 291 N.E.2d 407, 410 (1973) (citations omitted) ("When the written agreement, as applied to the subject matter, is in any respect uncertain or equivocal in meaning, all the circumstances of the parties leading to its execution may be shown for the purpose of elucidating, but not of contradicting or changing its terms. Expressions in our cases to the effect that evidence of circumstances can be admitted only after

an ambiguity has been found on the face of the written instrument have reference to evidence offered to contradict the written terms."). By referencing the virus exclusion, Legal Sea Foods is not attempting to "create" coverage from an exclusion but to show that the plain terms of the Policy, construed in their ordinary sense, fully embrace the loss and damage that Legal Sea Foods suffered and that it is unreasonable to construe those terms narrowly as Strathmore advocates. Strathmore's (and other insurers') select use of the virus exclusion indicates that virus-caused physical loss of and damage to property is otherwise covered.

As noted, the judge cited only *SAS International* for the principle that he could ignore the exclusion, and that case cited only *Given v. Commerce Insurance Co*., 440 Mass. 207, 212, 796 N.E.2d 1275, 1279 (2003). But *Given* is inapposite because it concerned a motor-vehicle policy; uncertainties and ambiguities in these policies are *not* construed against the insurer but in accordance with state statutes that dictate their contents. *Given*, 440 Mass. at 210. And the maxim that exclusions do not create coverage, as cited by the court below, is counterbalanced by the maxim that "[a]lthough insurance provisions that are plainly expressed must be enforced, those that are conspicuously absent should not be implied." *Massachusetts Insurers Insolvency Fund v. Premier Ins. Co. of Massachusetts*, 439 Mass. 318, 323, 787 N.E.2d 550, 554 (2003) (citation omitted); *see also Kovach v. Zurich Am. Ins. Co*., 587 F.3d 323, 336 (6th Cir. 2009) ("Zurich could have easily

added an exclusion in the Plan for driving while intoxicated if it had wished to do so, but it did not."). If the Policy's insuring agreement sufficed to exclude losses due to virus, then there would be no need for the virus exclusion in the first place.

In this way, Strathmore's decision not to include a virus exclusion provides relevant context and confirms what the plain language indicates: Legal Sea Foods' interpretation of the Policy is a reasonable interpretation, requiring that the Policy be construed in favor of coverage.

6. The majority of decisions supports Legal Sea Foods' plain-language construction of the Policy language.

At the heart of Strathmore's arguments is an illusion that insurance companies and their industry allies have worked hard to create: that a majority of courts have decided that under no circumstances can COVID-19 and SARS-CoV-2 cause direct physical loss of or damage to property. This is not true. Closely examined, the decisions in fact support Legal Sea Foods. They show (1) that the plain language of the Policy carries the meaning that its plain terms describe and (2) that this plain language is self-limiting, creating no legitimate fears of runaway liability for purely economic losses.

District court decisions are of course neither binding on this Court nor precedential. They were, moreover, issued in a variety of contexts on different facts, different policy language, and different governing law. Each of these

distinctions matters. No source, to counsel's knowledge, tracks the lower-court decisions along all of these axes.

1. *Different facts*. Each of the district court decisions involves different facts. Some of these differences are critical. Many, perhaps the majority, of lower-court decisions dismissing cases are orders-only cases. In these cases, the policyholder does not allege the presence of COVID-19 or SARS-CoV-2 on its property *or* the policyholder affirmatively claims that neither of these was present on its property, the loss or damage being caused *solely* by governmental closure orders.[8] These courts, rightly or wrongly, hold that without any physical presence of a fortuitous agent, there is no physical loss or damage and the loss is purely economic. That is not at issue here because Legal Sea Foods has alleged (1) that the virus and disease

[8] *E.g.*, *Colgan v. Sentinel Ins. Co.*, No. 20-CV-04780-HSG, 2021 WL 472964, at *4 (N.D. Cal. Jan. 26, 2021); *Protégé Rest. Partners LLC v. Sentinel Ins. Co.*, No. 20-CV-03674-BLF, 2021 WL 428653, at *1 (N.D. Cal. Feb. 8, 2021); *Kevin Barry Fine Art Assocs. v. Sentinel Ins. Co.*, No. 20-CV-04783-SK, 2021 WL 141180, *5 (N.D. Cal. Jan. 13, 2021); *Palmdale Ests., Inc. v. Blackboard Ins. Co.*, No. 20-CV-06158-LB, 2021 WL 25048, at *3 (N.D. Cal. Jan. 4, 2021); *Johnson v. Hartford Fin. Servs. Grp., Inc.*, No. 1:20-CV-02000-SDG, 2021 WL 37573, at *5 (N.D. Ga. Jan. 4, 2021); *Pappy's Barber Shops, Inc. v. Farmers Grp., Inc.*, 487 F. Supp. 3d 937, 943 n.2 (S.D. Cal. 2020); *Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.*, 487 F. Supp. 3d 834, 841 (N.D. Cal. 2020); *Real Hosp., LLC v. Travelers Cas. Ins. Co. of Am.*, No. 2:20-CV-00087-KS-MTP, 2020 WL 6503405, at *7 n.12 (S.D. Miss. Nov. 4, 2020); *W. Coast Hotel Mgmt., LLC v. Berkshire Hathaway Guard Ins. Cos.*, No. 220CV05663VAPDFMX, 2020 WL 6440037, at *4 (C.D. Cal. Oct. 27, 2020).

were actually present on site and (2) that the harm they caused to Legal Sea Foods' property directly caused physical loss and damage to insured property. The orders-only cases do not pertain.

2. *Different policy language*. Policies differ in sometimes subtle, sometimes conspicuous ways. Many of the district court decisions involve policies with unambiguous virus exclusions.[9] Each of these cases "counts" toward the overall "overwhelming" number of cases the insurers trumpet, but a decision that turns on a true virus exclusion says nothing about whether the virus and/or disease is capable of causing physical loss or damage (in fact, the necessity of the exclusion would suggest that that loss and damage is otherwise covered).

3. *Different governing law*. Differences in governing law should not be overlooked. It is settled that *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), requires courts to attempt a forecast of how their forum states would decide a

[9] *E.g.*, *Kingray Inc. v. Farmers Grp. Inc.*, No. EDCV20963JGBSPX, 2021 WL 837622, at *6 (C.D. Cal. Mar. 4, 2021); *Palmdale Ests., Inc.,* 2021 WL 25048, at *3; *Karen Trinh, DDS, Inc. v. State Farm Gen. Ins. Co.*, No. 5:20-CV-04265-BLF, 2020 WL 7696080, at *3 (N.D. Cal. Dec. 28, 2020); *LJ New Haven LLC v. AmGUARD Ins. Co.*, No. 3:20-CV-00751 (MPS), 2020 WL 7495622, at *4 (D. Conn. Dec. 21, 2020); *HealthNOW Med. Ctr., Inc. v. State Farm Gen. Ins. Co.*, No. 20-CV-04340-HSG, 2020 WL 7260055, at *2 (N.D. Cal. Dec. 10, 2020); *Natty Greene's Brewing Co. v. Travelers Cas. Ins. Co. of Am.*, No. 1:20-CV-437, 2020 WL 7024882, at *3 (M.D.N.C. Nov. 30, 2020); *AFM Mattress Co., LLC v. Motorists Com. Mut. Ins. Co.*, No. 20 CV 3556, 2020 WL 6940984, at *2 (N.D. Ill. Nov. 25, 2020); *Border Chicken AZ LLC v. Nationwide Mut. Ins. Co.*, No. CV-20-00785-PHX-JJT, 2020 WL 6827742, at *4 (D. Ariz. Nov. 20, 2020); *W. Coast Hotel Mgmt., LLC,* 2020 WL 6440037, at *4.

question of state law. *Guar. Tr. Co. of N.Y. v. York*, 326 U.S. 99, 111 (1945). Federal courts sitting in diversity are not excused from making this prediction simply because there is no binding precedent from the highest state court; they *must* examine a panoply of forum-state sources to make their *Erie* prediction. *West v. Am. Tel. & Tel. Co*., 311 U.S. 223, 237 (1940); *see Gooding v. Wilson*, 405 U.S. 518, 525 n.3 (1972); *Comm'r v. Bosch's Estate*, 387 U.S. 456, 465 (1967). Federal courts must not do what *they* think is best but what their forum state supreme court would think best. *See West*, 311 U.S. at 237. But many, if not most, of the "overwhelming majority" of decisions do not do so. Some of them, expressly disregard state precedent. Others simply cite their sister district courts, impermissibly developing a federal general common law of insurance coverage.[10]

When the proverbial tares are separated from the wheat, the tally that the insurers proclaim is severely reduced. Again, no known source tracks the decisions along the metrics that matter, but the sheer number of decisions that can be

[10] *Geragos & Geragos Engine Co. No. 28, LLC v. Hartford Fire Ins. Co*., No. CV 20-4647-GW-MAAX, 2020 WL 7350413, at *3 (C.D. Cal. Dec. 3, 2020); *T & E Chicago LLC v. Cincinnati Ins. Co*., No. 20 C 4001, 2020 WL 6801845, at *4 (N.D. Ill. Nov. 19, 2020); *see also Palmdale Ests., Inc.,* 2021 WL 25048, at *3); *Jonathan Oheb MD, Inc. v. Travelers Cas. Ins. Co. of Am*., No. 220CV08478-JWHRAOX, 2020 WL 7769880, at *3 (C.D. Cal. Dec. 30, 2020); *Sun Cuisine, LLC v. Certain Underwriters at Lloyd's London*, No. 1:20-CV-21827, 2020 WL 7699672, at *4 (S.D. Fla. Dec. 28, 2020); *SA Palm Beach LLC v. Certain Underwriters at Lloyd's, London*, No. 9:20-CV-80677-UU, 2020 WL 7251643, at *4 (S.D. Fla. Dec. 9, 2020).

identified as inapposite (*supra* at nn. 8-10) shows that there can be no "overwhelming majority" supporting Strathmore's position and the district court's decision. When the decisions are closely surveyed, a different picture emerges.

First, there are many well-reasoned decisions from across the country that deny motions to dismiss on similar facts, similar policy language, and a close analysis of state law. The insurers call these "outliers," a term that they assign to any decision they dislike, but it is difficult to see why a decision should be called an outlier when it has so much company.[11]

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[11] *E.g.*, *S. Dental Birmingham LLC v. Cincinnati Ins. Co*., No. 2:20-CV-681-AMM, 2021 WL 1217327, at *5 (N.D. Ala. Mar. 19, 2021) (holding policyholder sufficiently alleged direct physical loss or damage where policyholder alleged that COVID-19 was on site and caused business to close); *Scott Craven DDS PC v. Cameron Mut. Ins. Co*., No. 20CY-CV06381, 2021 WL 1115247, at *2 (Mo. Cir. Mar. 09, 2021) ("The ordinary person of average understanding, purchasing protection under the Policy would understand the inability to use the property due to a physical condition—here, the actual and/or threatened presence of COVID-19—is physical loss covered under the Policy."); *Kingray Inc.,* 2021 WL 837622, at *7 ("Plaintiff compellingly contends that under both California and New York law, physical alteration to property is not necessary to constitute a physical loss."); *Derek Scott Williams PLLC v. Cincinnati Ins. Co*., No. 20 C 2806, 2021 WL 767617, at *4 (N.D. Ill. Feb. 28, 2021) ("a reasonable factfinder could find that the term 'physical loss' is broad enough to cover . . . a deprivation of the use of [plaintiff's] business premises"); *In re Soc'y Ins. Co. COVID-19 Bus. Interruption Prot. Ins. Litig*., 2021 WL 679109, at *7; *NeCo, Inc. v. Owners Ins. Co*., No. 20-CV-04211-SRB, 2021 WL 601501, at *4 (W.D. Mo. Feb. 16, 2021) (plaintiff sufficiently alleged direct physical loss where it alleged COVID-19 on-site caused premises to become unsafe and unusable); *Henderson Rd. Rest. Sys., Inc. v. Zurich Am. Ins. Co*., No. 1:20 CV 1239, 2021 WL 168422, at *13 (N.D. Ohio Jan. 19, 2021) (holding that plain-language construction of phrase "direct physical loss of or damage to" property to encompass loss and damage from novel coronavirus was

Second, the divergence of this authority itself shows, at least, that reasonable minds can differ on the meaning of the governing language. *Macheca Transp. v. Philadelphia Indem. Ins. Co*., 649 F.3d 661, 668 (8th Cir. 2011) (fact that several jurisdictions reached divergent conclusions on meaning of term is evidence of term's ambiguity); *Scott Craven DDS PC,* 2021 WL 1115247, at *2 ("While the Court concludes that Defendant's cases are factually and legally distinguishable for the reasons explained by the Plaintiffs, at minimum, it is proof of ambiguity that jurists are reaching different conclusions in applying the similar policy language to this unique set of circumstances."); *see* C.C. Marvel, Annotation, *Division of opinion among judges on same court or among other courts or jurisdictions*

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reasonable interpretation); *Elegant Massage, LLC v. State Farm Mut. Auto. Ins. Co*., No. 2:20-CV-265, 2020 WL 7249624, at *10 (E.D. Va. Dec. 9, 2020) ("Based on the case law, the Court finds that it is plausible that a fortuitous 'direct physical loss' could mean that the property is uninhabitable, inaccessible, or dangerous to use because of intangible, or non-structural, sources."); *Blue Springs Dental Care, LLC v. Owners Ins. Co*., 488 F. Supp. 3d 867, 874 (W.D. Mo. 2020) ("Taking Plaintiffs' fact allegations as true, as the Court must at this stage, and after drawing reasonable inferences from those facts in their favor, Plaintiffs plausibly allege that COVID-19 physically attached itself to their dental clinics, thereby depriving them of the possession and use of those insured properties."); *Studio 417, Inc. v. Cincinnati Ins. Co*., 478 F. Supp. 3d 794, 801 (W.D. Mo. 2020) (holding that under plain meaning of phrase "direct physical loss" plaintiff adequately stated claim because physical loss may occur when property is uninhabitable or unusable for intended purpose); *see also Ungarean, DMD v. CNA*, No. GD-20-006544, 2021 WL 1164836, at *6 (Pa. Com. Pl. Mar. 25, 2021); *P.F. Chang's China Bistro, Inc. v. Certain Underwriters at Lloyd's*, No. 20STCV17169 (Calif. Super. Ct., Los Angeles, Feb. 4, 2021); *Goodwill Indus. of Orange Cnty. Calif. v. Philadelphia Indem. Ins. Co*., No. 30202001169032 CUICCX, 2021 WL 476268, at *3 (Cal. Super. Ct. Jan. 28, 2021).

considering same question, as evidence that particular clause of insurance policy is ambiguous, 4 A.L.R. 4th 1253 (1981 & supp. 2021).

Finally, this authority shows that construing the Policy in the plain-language way Legal Sea Foods advocates opens no floodgates because the language that Strathmore selected for the Policy is self-limiting. The terms require that any loss or damage be *physical*. In this way, they exclude purely economic losses. Courts have dismissed cases seeking purely economic losses, that is, losses caused solely by the governmental closure orders because those complaints alleged no *physical* loss or damage. Legal Sea Foods' claim is different because, as described above, it *has* alleged that the virus and disease was present on-site and caused physical loss and damage in the ways described. Under the construction that Legal Sea Foods advocates, the "physical" requirement properly cabins claims under the policy to those which allege loss or damage that is *physical*. For the reasons discussed above, the actual presence of COVID-19 and SARS-CoV-2 on site satisfies these requirements without fear that claims for purely economic losses will become viable.

II. LSF Alleged a Claim under Chapter 93A.

The sole reason the district court judge dismissed Legal Sea Foods' Chapter 93A claim was its conclusion that Strathmore correctly denied coverage under the

Policy. ADD015. Because that conclusion was incorrect, it follows that Legal Sea Foods has stated a viable Chapter 93A claim.

III. This Court Should Certify a Question of Law to the Supreme Judicial Court of Massachusetts.

Legal Sea Foods continues to believe, as it did below, that the facts alleged in the complaint adequately state a claim for relief under Massachusetts law. Alternatively, Legal Sea Foods asks this Court to certify the following question to the Massachusetts Supreme Judicial Court:

> Under Massachusetts law, does the phrase "direct physical loss of or damage to" to insured property unambiguously require an impact to the "structural integrity" of insured property, so as to preclude coverage for loss or damage from COVID-19 and SARS-CoV-2 as alleged in the Second Amended Complaint?

Legal Sea Foods respectfully relies on its accompanying Motion to Certify Question of Law to the Massachusetts Supreme Judicial Court in support of this request.

CONCLUSION

The decision of the district court should be reversed. Alternatively, this Court should certify the question of law to the Massachusetts Supreme Judicial Court.

***

Respectfully submitted,

/s/ Nicholas D. Stellakis

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Dated: May 3, 2021

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

(1) this brief contains 11,471 words excluding the parts of the brief exempted by Fed. R. App. 32(f); and

(2) this brief complies with the typeface requirements of Fed. R. App. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in 14 point proportionally spaced using Times New Roman font.

/s/ Nicholas D. Stellakis
Nicholas D. Stellakis

ADDENDUM

ADDENDUM TABLE OF CONTENTS

United States District Court
District of Massachusetts

Legal Sea Foods, LLC,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Civil Action No. 20-10850-NMG**
	)	
Strathmore Insurance Company,	)	
	)	
Defendant.	)	
	)	

MEMORANDUM & ORDER

GORTON, J.

This case arises out of a dispute between Legal Sea Foods, LLC ("Legal") and Strathmore Insurance Company ("Strathmore") over insurance coverage for business interruption losses suffered by the insured during the COVID-19 pandemic. Pending before the Court is defendant's motion to dismiss plaintiff's second amended complaint.

I. Factual Background

Legal is a seafood restaurant chain that owns and operates dozens of restaurants in the eastern United States. Thirty-two of its restaurants located in Massachusetts, the District of Columbia, New Jersey, Pennsylvania, Rhode Island and Virginia ("the Designated Properties") are covered by a commercial

property insurance policy ("the Policy") issued by Strathmore for a one-year term beginning on March 1, 2020.

The Policy provides for Business Income (and Extra Expense) Coverage for income lost and expenses incurred during a necessary "suspension" of operations caused by "direct physical loss of or damage to" the Designated Properties. The loss or damage must also be caused by or result from a "Covered Cause of Loss," which is defined in the Policy as a "Risk[] Of Direct Physical Loss unless the loss is: [excluded] or [limited]." The Policy also provides additional coverage for business income losses and expenses that are "caused by action of civil authority that prohibits access" to the Designated Properties when a Covered Cause of Loss "causes damage to property other than" the Designated Properties as long as two additional conditions are met.

During the term of the Policy, state and local governments nationwide issued various orders in response to the COVID-19 pandemic ("the Orders"). The Orders mandated, inter alia, that residents remain in their residences unless performing certain essential activities and temporarily prohibited on-premises dining at restaurants.

In late March, 2020, Legal submitted a claim to Strathmore seeking insurance coverage under the Policy for its business interruption losses purportedly caused by the Orders. Although the substance of each Order varies by state and locality, Legal alleges that the Orders caused many of its restaurants to close or required it to limit guest capacity and to install protective barriers to reduce the spread of the virus. Legal declares that it has experienced a significant adverse impact on its business even where its restaurants have been permitted to continue delivery and take-out operations. It also avers that the virus has been physically "present" at its restaurants, outlining a "handful of examples" of individuals who were known, or suspected, to be infected at various Designated Properties.

Following an investigation of plaintiff's claim, which Legal purports consisted of a single, brief telephone call, Strathmore denied the claim. It also denied a subsequent request by Legal to reconsider its coverage determination.

II. Procedural Background

Plaintiff filed its complaint against defendant in this Court on May 4, 2020, alleging two counts of breach of contract and one count seeking a declaratory judgment. It filed its

first amended complaint ("FAC") on June 5, 2020, in which it added a claim for a violation of M.G.L. c. 93A ("Chapter 93A").

Defendant filed its motion to dismiss the FAC pursuant to Fed. R. Civ. P. 12(b)(6) on June 19, 2020, which plaintiff timely opposed.

In September, 2020, plaintiff moved for leave to file a second amended complaint ("SAC"), which this Court allowed the following month. In the SAC, Legal alleges the same four counts as in the FAC: breach of contract for failure to pay business interruption and extra expense coverage (Count I); breach of contract for failure to pay civil authority coverage (Count II); unfair or deceptive acts or practices in violation of Chapter 93A; and declaratory judgment (Count IV). Legal also alleged the actual presence of the COVID-19 virus at the Designated Properties and the purported resulting damage.

The parties subsequently filed short, supplemental memoranda in support of their positions with respect to the motion to dismiss.

III. Motion to Dismiss

A. Legal Standard

To survive a motion to dismiss, a claim must contain sufficient factual matter, accepted as true, to "state a claim

to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). In considering the merits of a motion to dismiss, the Court may only look to the facts alleged in the pleadings, documents attached as exhibits or incorporated by reference and matters of which judicial notice can be taken. Nollet v. Justices of Trial Court of Mass., 83 F. Supp. 2d 204, 208 (D. Mass. 2000), aff'd, 228 F.3d 1127 (1st Cir. 2000).

Furthermore, the Court must accept all factual allegations in the claim as true and draw all reasonable inferences in the claimant's favor. Langadinos v. Am. Airlines, Inc., 199 F.3d 68, 69 (1st Cir. 2000). If the facts in the claim are sufficient to state a cause of action, a motion to dismiss must be denied. See Nollet, 83 F. Supp. 2d at 208.

Although a court must accept as true all the factual allegations in a claim, that doctrine is not applicable to legal conclusions. Ashcroft v. Iqbal, 556 U.S. 662 (2009). Threadbare recitals of legal elements which are supported by mere conclusory statements do not suffice to state a cause of action. Id.

B. Application

The instant dispute, like many others to have been adjudicated across the country in recent months, primarily turns on the meaning of the phrase "direct physical loss of or damage to" property, which is a prerequisite to coverage under the business income and extra expense provisions of the Policy.

The interpretation of an insurance policy is a question of law. See Ruggerio Ambulance Serv. v. Nat'l Grange Mut. Ins. Co., 430 Mass. 794, 797 (2000). The parties agree, and this Court concurs, that Massachusetts law governs the interpretation of the Policy and under Massachusetts law, courts are to

> construe an insurance policy under the general rules of contract interpretation, beginning with the actual language of the polic[y], given its plain and ordinary meaning.

Easthampton Congregational Church v. Church Mut. Ins. Co., 916 F.3d 86, 91 (1st Cir. 2019) (internal citation omitted). Although ambiguous words or provisions must be resolved against the insurer, id. at 92,

> provisions [that] are plainly and definitely expressed in appropriate language must be enforced in accordance with [the policy's] terms.

High Voltage Eng'g Corp. v. Fed. Ins. Co., 981 F.2d 596, 600 (1st Cir. 1992) (internal citation omitted).

1. Breach of Contract – Business Income & Extra Expense Coverage (Count I)

Strathmore contends that Count I should be dismissed because Legal cannot plead facts sufficient to show "direct physical loss of or damage to" property at any of the 32 Designated Properties. Legal rejoins, however, that its allegations in the SAC, namely that COVID-19 was present on its properties and caused physical loss or damage to those properties resulting in the suspension of its operations, are more than enough to survive dismissal at this stage.

First, Legal does not plausibly allege that its business interruption losses resulted from the presence of COVID-19 at the Designated Properties. Instead, it indicates in the SAC that "[t]he Orders caused and are continuing to cause" the losses for which it claims entitlement to coverage.

Second, even if Legal had properly alleged that COVID-19 caused business interruption losses due to its presence at the Designated Properties, it would not be entitled to coverage under the Policy. Courts in Massachusetts have had occasion to interpret the phrase "direct physical loss" and have done so narrowly, concluding that it requires some kind of tangible, material loss. See, e.g., Harvard St. Neighborhood Health Ctr.,

Inc. v. Hartford Fire Ins. Co., No. 14-13649-JCB, 2015 U.S. Dist. LEXIS 187495, at *18 (D. Mass. Sept. 22, 2015) ("Intangible losses do not fit within th[e] definition [of 'direct physical loss']."); Crestview Country Club, Inc. v. St. Paul Guardian Ins. Co., 321 F. Supp. 2d 260, 264-65 (D. Mass. 2004) (collecting cases). Accordingly, the plain meaning of "direct physical loss"

> require[s] some enduring impact to the actual integrity [of the insured premises and] does not encompass transient phenomena of no lasting effect.

SAS Int'l, Ltd. v. General Star Indem. Co., No. 1:20-cv-11864, 2021 U.S. Dist. LEXIS 31093, at *10 (D. Mass. Feb. 19, 2021).

The COVID-19 virus does not impact the structural integrity of property in the manner contemplated by the Policy and thus cannot constitute "direct physical loss of or damage to" property. A virus is incapable of damaging physical structures because "the virus harms human beings, not property." Wellness Eatery La Jolla LLC v. Hanover Ins. Grp., No. 20cv1277, 2021 U.S. Dist. LEXIS 23014, at *16 (S.D. Cal. Feb. 3, 2021). The presence of the virus at insured locations

> would not constitute the direct physical loss or damage required to trigger coverage under the Policy because the virus can be eliminated. The virus does not threaten the structures covered by property insurance policies, and can be removed from surfaces with routine cleaning and disinfectant.

Terry Black's Barbecue, LLC v. State Auto. Mut. Ins. Co., No. 1:20-CV-665, 2020 U.S. Dist. LEXIS 234939, at *20 (W.D. Tex. Dec. 14, 2020) (also observing that "[p]laintiffs have not pled any facts showing that the coronavirus caused physical loss, harm, alteration, or structural degradation to their property").

Many other courts have concluded likewise and have dismissed complaints containing similar allegations. See, e.g., SAS Int'l, Ltd., 2021 U.S. Dist. LEXIS 31093, at *8 n.4 (D. Mass. Feb. 19, 2021) ("[N]o reasonable construction of the phrase 'direct physical loss,' however broad, would cover the presence of a virus."); Uncork & Create LLC v. Cincinnati Ins. Co., 2020 U.S. Dist. LEXIS 204152, at *13-14 (S.D.W. Va. Nov. 2, 2020) (stating that "even actual presence of the virus would not be sufficient to trigger coverage for physical damage or physical loss to the property [and] the pandemic impacts human health and human behavior, not physical structures"); Pappy's Barber Shops, Inc. v. Farmers Grp., Inc., No. 20-CV-907-CAB-BLM, 2020 U.S. Dist. LEXIS 182406, at *2-3 (S.D. Cal. Oct. 1, 2020) (denying motion for leave to amend the complaint to include allegations that COVID-19 was present on plaintiffs' premises because "the presence of the virus itself . . . do[es] not constitute direct physical loss[] of or damage to property").

Legal attempts to distinguish the SAC from the cited cases but overstates the cogency of its allegations and the utility of purportedly supporting caselaw. Many of the decisions cited by Legal have subsequently been distinguished or refuted. For instance, Legal relies on the decisions in Essex Ins. Co. v. BloomSouth Flooring Corp., 562 F.3d 399 (1st Cir. 2009) and Matzner v. Seaco Ins. Co., No. 96-0498-B, 1998 Mass. Super. LEXIS 407 (Mass. Super. Aug. 12, 1998) for the proposition that a virus can cause physical damage. Another session of this Court addressed those cases, however, and held that COVID-19 fundamentally differs from the unpleasant odors and fumes at issue in those cases. See SAS Int'l, Ltd., 2021 U.S. Dist. LEXIS 31093, at *7-8.

Similarly, Legal has brought to the Court's attention the oft-cited decisions in Studio 417, Inc. v. Cincinnati Ins. Co., 478 F. Supp. 3d 794 (W.D. Mo. 2020) and Blue Springs Dental Care, LLC v. Owners Ins. Co., No. 20-CV-00383-SRB, 2020 U.S. Dist. LEXIS 172639 (W.D. Mo. Sept. 21, 2020) to demonstrate that dismissal is inappropriate. Multiple courts have considered those decisions of United States District Judge Stephen Bough and have found them to be outliers. See SAS Int'l, Ltd., 2021 U.S. Dist. LEXIS 31093, at *10-11 n.8 (observing that "courts have either tiptoed around [the] holding [in Studio 417, Inc.],

criticized it, or treated it as the minority position); Cafe Plaza De Mesilla, Inc. v. Cont'l Cas. Co., No. 2:20-cv-354, 2021 U.S. Dist. LEXIS 29163 (D.N.M. Feb. 16, 2021) ("Blue Springs Dental Care, LLC, represents an outlier case and [] the weight of recent authority, created by the deluge of coronavirus-related insurance disputes, favors [the insurer's] position in almost uniformly rejecting [the insured's] reasoning."). It is clear that the weight of legal authority supports dismissal of Count I.

Legal also attempts to avoid dismissal of Count I by contending that Strathmore chose not to include a specific virus exclusion in the Policy. That argument is, however, unavailing. The "absence of an express [virus] exclusion does not operate to create coverage" for pandemic-related losses. SAS Int'l, Ltd., 2021 U.S. Dist. LEXIS 31093, at *9 (quoting Given v. Commerce Ins. Co., 440 Mass. 207, 212 (2003)). Under the express terms of the relevant provision of the Policy, Legal was entitled to coverage only for losses resulting from "direct physical loss of or damage to" the Designated Properties and the absence of a virus exclusion does not insinuate the expansion of such coverage.

Accordingly, Count I of the complaint will be dismissed.

2. Breach of Contract – Civil Authority Coverage (Count II)

Strathmore also seeks dismissal of Legal's claim of breach of contract for failure to provide coverage under the civil authority provision.

That provision of the Policy requires Strathmore to pay for Legal's business interruption losses resulting from an action of civil authority only if that action "prohibits access" to the Designated Properties. Many courts that have addressed equivalent civil authority provisions have drawn a clear line between actions that "prohibit" access to insured properties and those that merely "limit" such access. See, e.g., Riverside Dental of Rockford, Ltd. v. Cincinnati Ins. Co., No. 20 CV 50284, 2021 U.S. Dist. LEXIS 20826, at *12-13 (N.D. Ill. January 19, 2021) (dismissing claim for civil authority coverage because the relevant government orders "did not forbid or prevent the ability to enter" the insured premises but rather "limited the types of services that could be provided"); Brian Handel D.M.D., P.C. v. Allstate Ins. Co., No. 20-cv-3198, 2020 U.S. Dist. LEXIS 207892, at *9-10 (E.D. Pa. Nov. 6, 2020) (dismissing claim for civil authority coverage because "the [Pennsylvania COVID-19] orders limit, rather than prohibit, access to the property");

Sandy Point Dental, PC v. Cincinnati Ins. Co., No. 20-cv-2160, 2020 U.S. Dist. LEXIS 171979, at *7-8 (N.D. Ill. Sept. 21, 2020) (dismissing claim for civil authority coverage because "coronavirus orders have limited plaintiff's operations, [but] no order issued in Illinois prohibits access to plaintiff's premises").

Although Legal alleges that the Orders mandated the closure of and prohibited access to some of its insured restaurants, plaintiff fails to identify any specific Order that expressly and completely prohibited access to any of the Designated Properties. In fact, Legal acknowledges in both the SAC and its memoranda opposing the instant motion that the Orders permitted its restaurants to continue carry-out and delivery operations. Consequently, Legal cannot establish a necessary prerequisite of coverage under the civil authority provision of the Policy. See 4431, Inc. v. Cincinnati Ins. Cos., No. 5:20-cv-04396, 2020 U.S. Dist. LEXIS 226984, at *32 (E.D. Pa. Dec. 3, 2020) ("Plaintiffs' ability to continue limited takeout and delivery operations at the premises precludes coverage under the Civil Authority provision: a prohibition on access to the premises, which is a prerequisite to coverage, is not present.").

To the extent Legal suggests that dismissal of its civil authority coverage claim is inappropriate because it would have suffered greater financial loss by keeping its restaurants open for carry-out and delivery services, it does so in vain. It is immaterial whether it is economically feasible for Legal to continue restaurant operations solely for carry-out and delivery sales. Rather, the relevant inquiry is whether the Orders prohibited access to the Designated Properties, which they clearly did not for the reasons stated above.

Because the Orders limit, rather than prohibit, access to the Designated Properties, Legal is not entitled to civil authority coverage under the Policy and Count II of the complaint will be dismissed.

3. Chapter 93A Claim (Count III)

Strathmore seeks to dismiss Legal's Chapter 93A claim, which is based on the allegedly unfair and deceptive investigation and denial of Legal's claim to insurance coverage.

Chapter 93A prohibits "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce," M.G.L. c. 93A, § 2(a). In the insurance context, specifically, an insurer does not violate Chapter 93A in denying coverage "so long as [it] made a good faith

determination to deny coverage" even if the insurer's interpretation of the policy was incorrect. Ora Catering, Inc. v. Northland Ins. Co., 57 F. Supp. 3d 102, 110-11 (D. Mass. 2014). Furthermore,

> [w]hen coverage has been correctly denied . . . no violation of the Massachusetts statutes proscribing unfair or deceptive trade practices may be found.

Harvard St. Neighborhood Health Ctr., Inc. v. Hartford Fire Ins. Co., No. 14-13649-JCB, 2015 U.S. Dist. LEXIS 187495, at *24 (D. Mass. Sept. 22, 2015) (quoting Transamerica Ins. Co. v. KMS Patriots, 52 Mass. App. Ct. 189, 197 (2001)).

The Court has concluded that Strathmore correctly denied coverage under the Policy. Therefore, dismissal of the Chapter 93A claim is warranted.

4. Declaratory Judgment (Count IV)

Finally, Strathmore contends that Count IV, which seeks a declaratory judgment that the Policy covers Legal's claim and that no exclusion applies to bar or limit coverage for its claim, must also be dismissed.

Because the Court has determined that Legal has failed to plead facts sufficient to demonstrate that it is entitled to coverage under the Policy, dismissal of Count IV is appropriate.

ORDER

For the foregoing reasons, the motion of defendants to dismiss plaintiff's complaint (Docket No. 16) is **ALLOWED.**

So ordered.

/s/ Nathaniel M. Gorton
Nathaniel M. Gorton
United States District Judge

Dated March 5, 2021

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Legal Sea Foods, LLC
Plaintiff

V.

Strathmore Insurance Company
Defendant

CIVIL ACTION

NO. 20-cv-10850 – NMG

ORDER OF DISMISSAL

Gorton, D. J.

In accordance with the Court's Memorandum and Order dated March 5, 2021, it is hereby ORDERED that the above-entitled action be and hereby is dismissed.

By the Court,

3/8/2021
Date

/s/ Leonardo T. Vieira
Deputy Clerk

CERTIFICATE OF SERVICE

On May 3, 2021, a copy of the foregoing brief was electronically filed with the Clerk of the Court for the United States Court of Appeals for the First Circuit by using the Court's appellate CM/ECF system, and that service will be accomplished by the appellate CM/ECF system.

/s/ Nicholas D. Stellakis
Nicholas D. Stellakis