No. 21-1202

United States Court of Appeals
For the First Circuit

LEGAL SEA FOODS, LLC,
Plaintiff-Appellant

v.

STRATHMORE INSURANCE COMPANY,
Defendant-Appellee

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

BRIEF OF DEFENDANT-APPELLEE STRATHMORE INSURANCE COMPANY

Gregory P. Varga (CA1# 38466)
Jonathan E. Small (CA1# 1142111)
Linda L. Morkan (CA1# 1134819)
Robinson & Cole LLP
280 Trumbull Street
Hartford, CT 06103-3597
(860) 275-8200
gvarga@rc.com
jsmall@rc.com
lmorkan@rc.com

Counsel for Defendant-Appellee Strathmore Insurance Company

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Defendant-Appellee, Strathmore Insurance Company, states and represents that it is a wholly-owned subsidiary of Greater New York Mutual Insurance Company. Greater New York Mutual Insurance Company is not a publicly traded corporation. It does not have any parent corporation(s) and no publicly held corporation owns ten percent (10%) or more of its stock.

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STATEMENT REGARDING ORAL ARGUMENT

While the issues presented on this appeal are straightforward, involving application of unambiguous insurance policy provisions to the facts alleged in the operative complaint, Defendant-Appellee, Strathmore Insurance Company, respectfully suggests that the Court may be aided by oral argument.

INTRODUCTION

In response to the COVID-19 pandemic, government authorities in the jurisdictions where Plaintiff-Appellant, Legal Sea Foods, LLC ("Legal"), operates its 32 restaurants issued public health orders in the spring of 2020 that temporarily suspended on-premises dining and limited restaurant operations to takeout and delivery service (the "Orders"). Legal reacted to the Orders by closing its restaurants temporarily, and its business suffered as a result. It sued Defendant-Appellee, Strathmore Insurance Company ("Strathmore"), seeking insurance coverage for these economic losses. The District Court (Gorton, J.) dismissed Legal's Second Amended Complaint ("SAC") under Federal Rule of Civil Procedure 12(b)(6), having concluded that Legal failed to allege facts plausibly establishing that its losses are covered by the property insurance policy issued by Strathmore (the "Policy").

Legal sought coverage under the Policy's Business Income and Extra Expense provisions,[1] which apply only if "direct physical loss of or damage to property" at insured premises, caused by a Covered Cause of Loss, causes a

[1] Legal also sought coverage under the Policy's "Civil Authority" provision, and the District Court dismissed its claim for breach of contract (Count II) based on that coverage. Legal does not challenge the Court's dismissal of Count II.

suspension of operations at those premises. These coverages apply where a fire, for example, damages one of Legal's restaurants, requiring the suspension of its operations while repairs are undertaken.

The SAC asserts that Coronavirus was present in each of Legal's restaurants and caused "direct physical loss of or damage to property" there. The District Court accepted that allegation as true, but properly concluded that it does not satisfy the requirements of the Policy's Business Income or Extra Expense coverages.

First, as the District Court correctly observed, Legal attributes the suspension of its operations and the financial losses it sustained during the COVID-19 pandemic to the restrictions imposed by the Orders. The SAC does not plead facts plausibly establishing that Legal necessarily suspended any part of its operations because Coronavirus was present in its restaurants. Thus, the SAC fails to establish a key coverage requirement—a necessary suspension of operations caused by "direct physical loss of or damage to property."

Second, the District Court also correctly determined that, even if Legal had alleged a causal link between the presence of Coronavirus at its restaurants and the necessary suspension of its operations, the presence of Coronavirus on the premises neither constitutes nor causes "direct physical loss of or damage to property." This has been the unanimous conclusion reached by every

Massachusetts court that has analyzed the issue, as well as the majority of cases nationally, and it is supported by ample Massachusetts case law applying the plain meaning of that requirement.

Finally, as Legal acknowledges, it cannot state a cause of action against Strathmore under Massachusetts General Laws, Chapter 93A, Section 11 ("Chapter 93A"), where the Policy affords no coverage for its claimed losses.

For these reasons, and others addressed below, this Court should affirm.

STATEMENT OF THE ISSUES

Legal's causes of action for breach of contract (Count I), violation of Chapter 93A (Count III), and declaratory relief (Count IV) required it to establish its entitlement to coverage under the Policy's Business Income and Extra Expense provisions. The District Court concluded that it failed to do so, despite three opportunities to plead. This appeal presents three issues to the Court:

1. Did the District Court correctly dismiss Legal's claims under the Business Income and Extra Expense coverages because Legal failed to plausibly allege that the presence of Coronavirus in its restaurants caused a necessary "suspension" of its "operations" at those locations?

2. Did the District Court properly dismiss Legal's claims under the Business Income and Extra Expense coverages because Legal's allegation that

Coronavirus was present in its restaurants does not support the existence of "direct physical loss of or damage to property" at those locations?

3. Did the District Court properly dismiss Legal's cause of action for violation of Chapter 93A (Count III) where the Court correctly determined the Policy does not cover Legal's claims for Business Income or Extra Expense losses?

STATEMENT OF THE CASE

A. The Parties' Insurance Contract

Legal is a seafood restaurant chain that operates 32 restaurants in Massachusetts, Rhode Island, New Jersey, Pennsylvania, Virginia, and the District of Columbia. JA0261, ¶ 13. In early 2020, Legal purchased a policy of commercial property insurance from Strathmore for a policy term of March 1, 2020 to March 1, 2021. JA0262, ¶ 18.

The Policy's Building and Business Personal Property Coverage Form provides the primary grant of coverage, insuring Legal's Business Personal Property (such as furniture, stock, and kitchen equipment) at the locations listed in its "Designation of Premises Schedule." JA0291, ¶ 18; JA0291-0294; JA0341-0368. *Id.* The Policy covers "direct physical loss of or damage to property" that is "caused by or result[s] from any Covered Cause of Loss," such as fire or a windstorm. JA0449.

Legal does not seek coverage under the Policy's property insurance provisions. It did not claim and does not allege that it is entitled to payment for the repair or replacement of any tables, kitchen equipment, bar stools, stock, or other business personal property contained in any of its restaurants. Nor does Legal allege that any such property was physically lost, destroyed, or damaged such that repair or replacement was or is necessary.

The two coverage provisions at issue in this appeal are Business Income and Extra Expense, found in the Policy's Business Income (And Extra Expense) Coverage Form. The Business Income coverage provides that:

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

JA418 (emphasis added). The term "suspension" is defined, in relevant part, as "[t]he slowdown or cessation of your business activities," JA0426, while "operations" is defined to mean "Your business activities occurring at the described premises." *Id.* The "period of restoration" begins "[24] hours after the time of direct physical loss or damage . . . caused by or resulting from any Covered Cause of Loss at the described premises"; and ends on "[t]he date when the property at the described premises should be repaired, rebuilt or replaced with

reasonable speed and similar quality" (or "when business is resumed at a new permanent location," which did not occur here). *Id*.; *see also* JA0427.

Additionally, the Policy grants coverage for "Extra Expense," which is defined as the "necessary expenses you incur during the 'period of restoration' that you would not have incurred if there had been no ***direct physical loss of or damage to property*** caused by or resulting from a Covered Cause of Loss." JA0418 (emphasis added).

B. Legal Closed Its Restaurants in Response to the Orders, and Then Sought Coverage for Its Economic Losses under Its Policy with Strathmore

During the term of the Policy, Coronavirus spread throughout the world. JA0266, ¶ 45. In March 2020, state and local governments in the jurisdictions where Legal operates its restaurants issued public health orders designed to mitigate the spread of COVID-19. JA0270-273, ¶¶ 69-83 & nn. 21-25. In each jurisdiction, the Orders temporarily banned on-premises dining at restaurants, but allowed restaurants to continue preparing and serving food and beverages to customers through carry-out and delivery service. *Id.* While many restaurants remained open to provide carry-out and delivery service to their patrons, Legal decided to shut down its restaurants in response to the Orders because carry-out and delivery were not in keeping with its "brand" and reputation. JA0013, ¶ 47. In most locations, the restriction of on-premises dining remained in effect until June

2020, when governments allowed outdoor and limited indoor dining to resume. JA0271, ¶ 76 and n.25.

Legal submitted a claim to Strathmore seeking coverage under the Policy's Business Income, Extra Expense, and Civil Authority provisions for the economic losses allegedly sustained because of Orders closing "certain categories of businesses, including that of Legal Sea Foods, due to the Coronavirus." JA0273, ¶ 84; JA0538. After completing its investigation of Legal's claim, Strathmore declined coverage in a letter dated March 26, 2020. JA0274, ¶ 96.

C. Proceedings Before the District Court

1. Legal Sued Strathmore and Alleged that the Orders Impaired the Use of Its Restaurants

Legal commenced this action on May 5, 2020, asserting causes of action for breach of contract and declaratory judgment. Its original Complaint alleged that, by prohibiting the use and operation of the dining rooms at its restaurants, the Orders caused "direct physical loss of or damage to" Legal's property, thereby triggering the Policy's Business Income and Extra Expense coverages. JA0012-13, ¶¶ 40-48. Legal also asserted that Strathmore was obligated to pay under the Policy's Civil Authority coverage based on its allegation that the Orders prohibited access to Legal's restaurants. JA0015-16, ¶¶ 60-70. Though Legal vaguely alleged that the "Stay at Home Orders and the transmission of COVID-19 have had a devastating effect on Legal Sea Foods' business," JA0012, ¶ 45, the Complaint did not plead

that Coronavirus was physically present in—let alone physically harmed any property at—any restaurant.

On June 5, 2020, Legal amended its Complaint to add a claim for damages under Massachusetts General Laws Chapter 93A, and new allegations concerning the Orders that allegedly prompted it to close its restaurants in March 2020. JA0034-35, ¶¶ 60-72. Like the original Complaint, the First Amended Complaint ("FAC") alleged that the Orders permitted Legal to remain open to provide carry-out and delivery services to its customers, and that Legal opted to shut down its restaurants because "[c]arry out or delivery services are not feasible" given Legal's menu and "brand." JA0032, ¶ 47. Also, like the original Complaint, the FAC did not allege that Coronavirus was physically present in or damaged property at any restaurant. JA0032, ¶¶ 46, 48.

In June 2020, Strathmore moved to dismiss the FAC arguing, *inter alia*, that Legal's allegations that the Orders impaired the use of its restaurants did not establish "direct physical loss of or damage to property," as required by the Policy's Business Income or Extra Expense coverages. JA0054-73; JA0101-0111. In its supporting memoranda, and through notices of supplemental authority submitted in the ensuing weeks, Strathmore directed the District Court to numerous federal and state court decisions around the country dismissing similar

COVID-19 business interruption lawsuits on the same basis. *Id.*; JA0167; JA0200; JA0225.

2. Legal Pivoted to a New Theory of "Direct Physical Loss of or Damage to Property" in a Second Amended Complaint

In September 2020—after Strathmore's motion to dismiss was briefed and facing a torrent of decisions from around the country holding that the mere loss of use of insured property because of government COVID-19 orders does not constitute "direct physical loss of or damage to property"—Legal changed its pleading strategy. In a motion seeking leave to amend its complaint a second time, Legal represented that in the time since it filed its FAC in June 2020, it had "become aware of additional facts and information" indicating that "COVID was present on its insured property beginning in March 2020." JA0236-242; JA0253-257. Leave was granted, JA0258, and Legal filed the SAC on October 30, 2020. JA0258-59, et seq.

The SAC asserted causes of action for breach of contract based on Strathmore's failure to pay Legal's claim under the Policy's Business Income and Extra Expense coverages (Count I), and its refusal to pay Legal's claim for Civil Authority coverage (Count II). Legal also sought damages under Chapter 93A (Count III) and a "declaration of the parties' rights and duties under the Policy . . . ." (Count IV). Unlike the two prior iterations of the Complaint, the SAC alleges in support of Count I that there were known cases of COVID-19 infections at certain

of Legal's restaurants, JA0269, ¶ 61, and that Coronavirus attached to surfaces and was temporarily in the air at those locations. JA0270, ¶ 64. Legal further alleges that it is "statistically certain that additional infected individuals have been and, with the regained access to indoor dining spaces, continue to be present at each of" its restaurants. JA0270, ¶¶ 59-62.

The SAC does not plead facts suggesting that the alleged presence of Coronavirus in any restaurant caused a slowdown or total cessation of Legal's business activities, *i.e.*, a "suspension" of "operations" within the meaning of the Policy's Business Income and Extra Expense coverages. Instead, the SAC articulates facts supporting Legal's conclusion that "*[t]he Orders* caused the suspension of Legal Sea Foods' operations." JA0269-73, ¶¶ 70-78 (emphasis added).

After allowing the parties to submit supplemental briefing to address the new allegations in the SAC, JA0258, the District Court granted Strathmore's motion to dismiss.

3. The District Court's Decision

The District Court ruled that, in two critical respects, the SAC failed to plausibly allege facts establishing the requirements of coverage under the Policy's Business Income and Extra Expense provisions.

First, the District Court granted dismissal based on the conspicuous absence of any allegation that the presence of Coronavirus at Legal's restaurants caused a necessary suspension of its operations. Specifically, the District Court concluded that "Legal does not plausibly allege that its business interruption losses resulted from the presence of COVID-19 at the Designated Premises. 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." ADD007 (emphasis added).

Second, the District Court ruled that the alleged presence of Coronavirus at Legal's restaurants does not, in any event, constitute "direct physical loss of or damage to" its property. The District Court began by observing that courts in Massachusetts have narrowly interpreted the phrase "direct physical loss" to require "some kind of tangible, material loss." *Id.* (citations omitted). Agreeing with another judge of the same district, and relying on the plain meaning of the words, the District Court ruled that the phrase "direct physical loss of or damage to property" requires "'some enduring impact to the actual integrity'" of insured property and "does not encompass transient phenomena of no lasting effect.'" ADD008 (quoting *SAS Int'l Ltd. v. General Star Indem. Co.*, No. 1:20-cv-11864, 2021 WL 664043, *2 (D. Mass. Feb. 19, 2021)).

Based on its review of the SAC, the District Court ruled that Coronavirus "cannot constitute 'direct physical loss of or damage to' property" because it is

"incapable of damaging physical structures because 'the virus harms human beings, not property.'" *Id.* (quoting *Wellness Eatery LaJolla, LLC v. Hanover Ins. Group.*, No. 20-cv-1277, 2021 WL 389215 (S.D. Cal. Feb. 3, 2021)). Like many other courts throughout the country, the District Court made the common-sense observation that Coronavirus does not physically damage property because it "can be removed from surfaces with routine cleaning and disinfectant." ADD008.

The District Court was unpersuaded by Legal's citation to pre-pandemic caselaw to support the proposition that Coronavirus damages property, noting that Legal "overstate[d] the cogency of its allegations and the utility of the purportedly supporting caselaw." ADD010. The caselaw the District Court found inapposite includes many of the decisions Legal relies on in its Opening Brief, such as *Essex Ins. Co. v. BloomSouth Flooring Corp.*, 562 F.3d 399 (1st Cir. 2009) and *Matzner v. Seaco Ins. Co.*, No. 96-0498-N, 1998 WL 1998 WL 566658 (Mass. Super. Aug. 12, 1998).

Finally, the District Court found "unavailing" Legal's contention that coverage exists because Strathmore did not include a specific virus exclusion in the Policy, emphasizing that "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." ADD011.

The District Court also disposed of Legal's claim under the Policy's Civil Authority Coverage (Count II) because Legal "fails to identify any specific Order that expressly and completely prohibited access to any of the Designated Properties" and "acknowledges . . . that the Orders permitted its restaurants to continue carry-out and delivery operations." ADD013.[2]

Finally, the Court dismissed Count III (Chapter 93A) based on caselaw holding that "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." ADD0015 (quotations omitted). Having concluded that Strathmore correctly denied coverage under the Policy, the Court determined that "dismissal of the Chapter 93A claim is warranted." *Id.*

SUMMARY OF ARGUMENT

The District Court correctly granted Strathmore's motion to dismiss. Legal failed to plead facts sufficient to show that: (1) the alleged presence of Coronavirus at its restaurants caused a "necessary 'suspension' of [its] 'operations' [there] during the 'period of restoration'"; or (2) the alleged presence of Coronavirus causes or constitutes "direct physical loss of or damage to property." Each point

[2] As noted above, *supra* n.1, Legal does not challenge the District court's dismissal of its claim for Civil Authority coverage (Count II) in this appeal.

independently supports dismissal. Further, because there is no basis for coverage under the Policy, Legal's Chapter 93A claim also was properly dismissed.

On appeal, Legal ignores the District Court's first, independently dispositive basis for dismissal—that "Legal does not plausibly allege that its business interruption losses resulted from the presence of COVID-19 at the Designated Properties." ADD007. The SAC contains detailed allegations that Legal's business activities at its restaurants (*i.e.*, its "operations") ceased and/or slowed (*i.e.*, were "suspended") *because of the Orders*. By contrast, the SAC does not plead any facts indicating that Legal closed any restaurant or that its business activities slowed in any respect because persons who tested positive for COVID-19 were present in its restaurants at some point. Because Legal suspended its operations without regard to "direct physical loss of or damage to property," this Court can affirm the District Court's dismissal on that ground alone.

The District Court was also correct in its second, independently dispositive finding that the alleged presence of Coronavirus at Legal's restaurants does not constitute "direct physical loss of or damage to property." In a number of pre-pandemic cases, Massachusetts courts ruled that the same and similar provisions commonly found in property insurance policies are unambiguous and must be applied according to their usual and ordinary meaning. Construing these terms consistent with well-established Massachusetts principles of insurance contract

interpretation, the words "direct physical loss of" property connote a physical dispossession of property (such as by theft) or the total destruction of property (by fire, for example), which requires replacement or rebuilding to make the insured whole. By comparison, the plain and ordinary meaning of the phrase "direct physical damage to" property requires actual, tangible harm to property, which necessitates repair, replacement, or rebuilding to return it to satisfactory condition. This interpretation is consistent with other provisions in the Policy, including the definition of "the 'period of restoration'" and "Loss Payment" provisions that link "direct physical loss of or damage to property" with the need to repair, rebuild, or replace property.

The SAC does not allege that Legal was dispossessed of any property at its restaurants, nor does Legal plead that its property was completely destroyed by Coronavirus. Thus, the SAC fails to plead a "direct physical *loss*" of any property. Nor does Legal's allegation that Coronavirus was physically present in its restaurants satisfy the requirement of "direct physical *damage*." The District Court correctly held that Coronavirus particles that linger in the air for a few hours or that survive on surfaces for a matter of days, as alleged in the SAC, are "incapable of damaging physical structures because 'the virus harms human beings, not property.'" ADD0008. Importantly, the SAC does not allege that Legal undertook any measures to repair, rebuild, or replace any property allegedly touched by

Coronavirus, or that Legal sought coverage for expenses related to repairing or replacing any property. Thus, the District Court correctly concluded that Legal has not alleged facts sufficient to establish that it sustained any "direct physical loss of or damage to property" at its restaurants. Rather, it seeks to recover for purely economic harm, which the Policy simply does not cover.

ARGUMENT

I. This Court Should Affirm the Dismissal of Counts I (Breach of Contract) and IV (Declaratory Judgment) Because the District Court Correctly Determined that Legal Did Not Plausibly Allege the Requirements of Coverage Under the Policy's Business Income and Extra Expense Provisions

In granting Strathmore's Motion to Dismiss Counts I and IV of the SAC, the District Court accepted all of Legal's factual allegations as true and properly determined that they do not support coverage under the Policy's Business Income and Extra Expense coverages. There was no error.

A. The SAC Does Not Plausibly Allege That the Presence of Coronavirus at Legal's Restaurants Caused a Necessary Suspension of Its Operations

To state a cause of action for breach of contract based upon Strathmore's failure to pay its claim for loss of Business Income and Extra Expense, Legal was required to plead facts demonstrating not only that its "operations" were necessarily "suspended," but also that the cause of the suspension was "direct physical loss of or damage to property" caused by "a Covered Cause of Loss" at

premises insured by the Policy. JA0418, JA0426; *see Boazova v. Safe Ins. Co.*, 462 Mass. 346, 351, 968 N.E.2d 385, 390 (2012) ("An insured bears the initial burden of proving that the claimed loss falls within the coverage of the insurance policy."). Because Legal based its claim on the allegation that Coronavirus was present in its restaurants at some point, Legal had to allege that it experienced a total cessation or a slowdown of the business activities at each *caused by* the presence of Coronavirus there. This Legal failed to do.

While the SAC alleges that persons infected with the Coronavirus "deposit[ed] COVID-19 at each of Legal Sea Foods' insured locations," JA0269, ¶ 59,[3] it pleads no *factual* allegations indicating that the presence of the virus in any restaurant caused a suspension of operation at that restaurant. Legal does not even allege it closed any restaurant (or a portion thereof) to repair or replace any property allegedly touched by Coronavirus, or to remove any virus-laden "droplets" that allegedly landed on surfaces or objects or were temporarily present in the indoor air.

[3] For the reasons explained below, *infra* at 20, *et seq.*, the law amply supports the District Court's determination that the mere presence of Coronavirus at an insured premises does not constitute "direct physical loss of or damage to property" there.

Legal's failure to allege that the presence of Coronavirus in its restaurants caused a suspension of its operations—despite three opportunities to plead—is fatal. The SAC offers only the bare conclusory allegations that Legal "has experienced a slowdown or cessation of its business" because of "the direct physical loss of or damage to property," JA278, ¶ 128, and that Coronavirus "caused the 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. But these conclusions are not supported by any *factual* allegations and, as such, are insufficient to establish Legal's entitlement to coverage as a matter of law. *See Maldonado v. Fontanes*, 568 F.3d 263, 268 (1st Cir. 2009) (ruling on a motion to dismiss, this Court "need not accept as true legal conclusions from the complaint or 'naked assertion[s]' devoid of 'further factual enhancement.'") (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)); *see also Café Int'l Holding Co., LLC v. Westchester Surplus Lines Ins. Co.*, No. 20-cv-21641, 2021 WL 1803805, *9 (S.D. Fla. May 4, 2021) (dismissing allegations in restaurant owner's complaint that "COVID-19 caused direct physical loss or and damage to . . . [restaurant] resulting in 'suspensions of business operations at these premises'" as "fact-free, detail-free, wholly conclusory allegations.").

This is not to say that the SAC is devoid of factual allegations concerning the cause of Legal's suspended operations. Indeed, the SAC contains specific and

detailed factual averments that blame *the Orders* for the interruption of Legal's business. Legal identifies the Orders in paragraphs 69 to 76 of the SAC, JA270-71, and the ensuing paragraphs enumerates the ways in which they interfered with its business activities:

> 77. Although each Order has its own impact, generally speaking, the Orders have affected Legal Sea Foods' operations in the following ways:
>
> a. Mandating the closure of Legal Sea Foods' restaurant locations;
>
> b. Prohibiting access to Legal Sea Foods' restaurant locations, either in whole or in part (*i.e.*, closure of dining rooms);
>
> c. Restricting guest, vendor, and employee access to Legal Sea Foods' locations;
>
> d. Limiting guest capacity, where access is not prohibited; and
>
> e. Requiring the installation of physical and structural alterations to Legal Sea Foods' property, including protective barriers and partitions.
>
> 78. ***The Orders caused the suspension of Legal Sea Foods' operations***. The suspension is ongoing, as some Orders have been extended and other Orders introduced.

(JA0272-273) (emphasis added).

The SAC also alleges that Legal resumed its business at certain locations when government officials lifted the restrictions of on-premises dining, but that "some jurisdictions have rolled back openings, causing additional suspensions of Legal Sea Foods' operations." JA0273, ¶ 81. According to the SAC, "[t]he Orders caused and

are continuing to cause a Covered Cause of Loss, Business Income losses, and Extra Expenses." JA0273, ¶ 83. These detailed factual allegations are consistent with the insurance claim Legal submitted to Strathmore in late March 2020, which was based on the effects the Orders had on Legal's business activities, not on the alleged presence of Coronavirus in its restaurants. ADD003.

Because the SAC does not plead facts showing that Legal's "operations" were necessarily "suspended" because Coronavirus was present in its restaurants—an essential requirement of coverage—the District Court's dismissal of Counts I and IV was well-founded and should be affirmed.

B. The SAC Also Does Not Plausibly Allege That the Presence of Coronavirus at Legal's Restaurants Satisfies the "Direct Physical Loss of or Damage to Property" Requirement

Legal attacks the District Court's determination that Legal failed to plead facts sufficient to establish "direct physical loss of or damage to property" at its insured restaurants. According to Legal, the District Court misconstrued and misapplied that requirement, and also disregarded the law by failing to accept all of Legal's allegations as true. Neither contention withstands scrutiny.

Like other judges in the same district, the District Court construed the Policy according to its plain and ordinary meaning, as it was required to do under settled principles of Massachusetts law. Contrary to Legal's contention, the Court accepted as true all of the *factual* allegations of the SAC, but it did not have to

accept—and correctly declined to adopt—the unsupported *legal* conclusions in the SAC, including the conclusion that Coronavirus caused "direct physical loss of or physical damage to property" at its insured premises.

1. The District Court's Interpretation of "Direct Physical Loss of or Damage to Property" Is Consistent with the Plain Meaning of That Phrase

The interpretation of an insurance policy is a question of law, *Ruggiero Ambulance Serv. v. National Grange Mut. Ins. Co.*, 430 Mass. 794, 797, 724 N.E.2d 295, 298 (2000), and the guiding principles are well-settled. Massachusetts courts construe the terms of an insurance policy according to the general rules of contract interpretation, which begin with an examination of the "usual and ordinary meaning" of the words employed. *Hakim v. Massachusetts Insurers Insolvency Fund*, 424 Mass. 275, 281, 675 N.E.2d 1161, 1165 (1997). 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). Massachusetts courts do not construe policy terms in isolation; rather, a policy must be interpreted to give meaning to all of its terms. *Barclays Bank PLC v. Poynter*, 710 F.3d 16, 21 (1st Cir. 2013) (citing *Gen. Convention of New Jerusalem in the U.S. of Am., Inc. v. MacKenzie*, 449 Mass. 832, 836, 874 N.E.2d 1084, 1087 (2007)). Thus, the meaning of one provision often provides context for and sheds light on the meaning of another.

The requirement of "direct physical loss of or damage to property" has been fundamental to and commonly used in commercial property insurance policies for decades, and courts in Massachusetts and across the country have found that phrase to be unambiguous and have applied it to a wide variety of circumstances. *See, e.g.*, *Crestview Country Club, Inc. v. St. Paul Guardian Ins. Co.*, 321 F.Supp.2d 260, 265 (D. Mass. 2004) (finding the phrase "direct physical loss or damage . . . is simply not susceptible to more than one meaning by 'reasonably intelligent persons.'"); *Roche Bros. Supermarkets, LLC v. Continental Cas. Co.*, 35 Mass. L. Rptr. 110, 2018 WL 3404061, at *2 (Mass. Super. Mar. 16, 2018), *judgment entered sub nom. Roche Bros. Supermarkets LLC v. CNA Fin. Corp*. (Mass. Super. 2018) ("The court finds that the coverage clause here at issue, which states that the Policy insures 'against risks of direct physical loss of or damage to property,' is unambiguous."). As one Massachusetts court recently explained, property insurance policies with the "direct physical loss of or damage to property" requirement "insure[] against two types of risks: direct physical loss of property and direct damage to property, i.e., *coverage exists if property is lost completely or it is damaged*." *Roche*, 2018 WL 3404061, at *2 (emphasis in original).

a. Direct Physical Loss of Property

Decisions of the Massachusetts Appeals Court—which Legal ignores in its Opening Brief—provide valuable guidance as to the meaning of "direct physical

loss of" property. In *HRG Dev. Corp. v. Graphic Arts Mut. Ins. Co.*, 26 Mass. App. Ct. 374, 527 N.E.2d 1179 (1988), the Appeals Court addressed a claim for heavy equipment under a policy covering "all risks of physical loss or damage from any external cause." *Id*. at 376. The equipment was not destroyed or physically harmed, nor did the insured lose physical possession of it. Instead, it sought coverage based upon a defect in title. *Id*. at 375. The Appeals Court construed the coverage grant according to its "plain meaning" and ruled that a title defect did not satisfy the requirement of "direct physical loss or damage." *Id*. at 377. In a subsequent decision, the Appeals Court held that lead paint in the insured's home was not a "physical loss to your house or other property" despite evidence that lead was present in highly toxic levels and the children who lived in the home had to be evacuated. *Pirie v. Federal Ins. Co.*, 45 Mass. App. Ct. 907, 907-08, 696 N.E.2d 553, 554-55 (1998).

Guided by this appellate authority, courts in Massachusetts have held that "direct physical loss" does not encompass the mere deprivation of economically valuable and intangible interests in property, such as a legal interest, a loss of value or marketability, or a change in the character of property. *See Eveden, Inc. v. Northern Assur. Co. of America*, No. 10-10061, 2014 WL 952643, *4-5 (D. Mass. Mar. 12, 2014) (defect in title and loss of legal interest in property were not "physical losses"); *Crestview Country Club*, 321 F.Supp.2d at 264-65 (changes in

slope rating, degree of difficulty and other attributes of golf course grounds after the loss of a signature tree were not "physical loss"); *Welch v. CNA Ins. Cos.*, No. 932119, 1996 WL 1353314, *3 (Mass. Super. Aug. 13, 1996) (the "loss in value or the inability to sell a piece of land" was not "direct physical loss."). Rather, a *direct physical loss of property* means a complete, tangible, and material loss of property, such as occurs through dispossession (*e.g.*, by theft) or destruction (*e.g.*, by fire or earthquake). *Accord Nguyen v. Travelers Cas. Ins. Co. of America*, No. 2:20-cv-00597, 2021 WL 2184878, at *10 (W.D. Wash. May 28, 2021) ("When combined with 'direct' and 'physical' the Court determines that, in its common usage, 'loss' means that the alleged peril must set in motion events which cause the inability to physically own or manipulate the property, such as theft or total destruction.").

b. Direct Physical Damage to Property

Massachusetts courts also have construed the phrase "direct physical damage to property" according to its plain and ordinary meaning, which requires some form of tangible, "material" harm or injury to property. *See Crestview Country Club*, 321 F.Supp.2d at 264 (quoting *American Heritage Dictionary* (Second College Ed. 1982)). This interpretation accords with decisions of other courts that have construed similar policy language. For example, the Third Circuit has held that, "[i]n ordinary parlance and widely accepted definition, *physical damage to*

property means 'a distinct, demonstrable, and physical alteration' of its structure." *Port Authority of N.Y. and N.J. v. Affiliated FM Ins. Co.*, 311 F.3d 226, 235 (3d Cir. 2002) (applying New Jersey law and citing 10 Couch on Insurance § 148:46 (3d ed.1998) (emphasis added)).

In *Mama Jo's Inc. v. Sparta Ins. Co.*, 823 Fed. App'x 868, 879 (11th Cir. 2020), *cert denied*, 2021 WL 1163753 (U.S. Mar. 29, 2021), the Eleventh Circuit recently addressed a property insurance claim arising from dust and debris that entered the interior of the insured's restaurant from nearby road construction and required daily cleaning. *Id*. at 871-72. The Circuit Court agreed with the district court that an "item or structure that merely needs to be cleaned has not suffered a 'loss' which is both 'direct' and 'physical.'" *Id.* at 879 (applying Florida law); *see also Universal Image Prods., Inc. v. Fed. Ins. Co.*, 475 F. App'x 569, 574, n.8 (6th Cir. 2012) (applying Michigan law and finding that cleaning "performed with hot water and 'Lysol type, cleaning, household things' . . . [does] not constitute physical loss or damage"); *Trinity Industries, Inc. v. Ins. Co. of N. America*, 916 F.2d 267, 270-71 (5th Cir. 1990) (applying Louisiana law) ("The language 'physical loss or damage' strongly implies that there was an initial satisfactory state that was changed by some external event into an unsatisfactory state—for example, the car was undamaged before the collision dented the bumper."). These authorities demonstrate that *direct physical damage to property* means tangible,

material harm to property (or similarly stated, a distinct, demonstrable physical alteration of property) that requires repair to return the property to a satisfactory condition.

In COVID-19 business interruption claims, courts have often used illustrations to explain the concepts of "direct physical loss of" property and "direct physical damage to" property. For instance, in *Chief of Staff LLC v. Hiscox Ins. Co. Inc.*, No. 20-cv-3169, 2021 WL 1208969 (N.D. Ill. Mar. 31, 2021), the District Court offered the following example:

> To illustrate, consider a thief who attempts to steal a desktop computer. If the thief succeeds, the computer is 'physical[ly] los[t]' but not necessarily 'physical[ly] ... damage[d].' If the thief cannot lift the computer, so instead of stealing it takes a hammer to its monitor in frustration, the computer would be 'physical[ly] ... damage[d]' but not 'physical[ly] los[t].' Yet if the thief were only to change the password on the system so that employees could not log in, there would be neither 'physical ... damage' nor 'physical loss,' though the computer would be unusable for some while. The Business Income provision might cover the first two cases, but it does not cover the third.

Id. at *3; *see also Real Hosp., LLC v. Travelers Cas. Ins. Co. of Am.*, No. 2:20-cv-00087, 2020 WL 6503405, at *6 (S.D. Miss. Nov. 4, 2020) ("[I]n a restaurant with ten tables, there could be a fire, which completely burns up five of the tables—thus, there is a 'direct physical loss of property.' The fire also could melt the tabletops or cause smoke damage to the remaining five tables—thus, there is 'damage to property.'").

The District Court here and other Massachusetts courts have interpreted and applied the "direct physical loss of or damage to property" requirement consistent with these principles. In *Verv[e]ine Corp. v. Strathmore Ins. Co.*, No. 20201378, 2020 WL 8766370 (Mass. Super. Dec. 21, 2020), Judge Sanders of the Superior Court's Business Litigation Session determined that Massachusetts appellate authority—including *HRG Dev. Corp.* and *Pirie*—is "in line" with the view that the policy requires a "distinct, demonstrable physical alteration of the property." *Id.* at *3 (citing 10 Couch on Insurance § 148:46 (3d ed. 2019)). Similarly, in *Kamakura, LLC v. Greater New York Mut. Ins. Co.*, No. 20-11350, 2021 WL 1171630 (D. Mass. Mar. 9, 2021), Chief Judge Saylor held that "there must be a 'physical' loss of or damage to a tangible object, such as the structure of a building." *Id.* at *5. Judge Stearns, citing the same Massachusetts authority, further explained that "[t]aken together, these terms [direct physical loss of or damage to property] require some enduring impact to the actual integrity of the property at issue. In other words, the phrase 'direct physical loss of or damage to' does not encompass transient phenomena of no lasting effect, much less real or imagined reputational harm." *SAS Int'l*, 2021 WL 664043, at *2; *accord Am. Food Sys., Inc. v. Fireman's Fund Ins. Co.*, No. 20-cv-11497, 2021 WL 1131640, at *5 (D. Mass. Mar. 24, 2021) (Stearns, J.) (same); *see also Select Hospitality v. Strathmore Ins. Co.*, No. 20-cv-11414, 2021 WL 1293407, at *2 (D. Mass. Apr. 7, 2021) (Gorton,

J.) (citing *SAS Int'l*, 2021 WL 664043 at *2); *Accents of Sterling, Inc. v. Ohio Sec. Ins. Co.*, No. 20-cv-11005, 2021 WL 2117180 (D. Mass. May 25, 2021) (Casper, J.) (applying Arizona law but relying upon *SAS Int'l*, 2021 WL 664043 at *2).

2. Other Provisions of the Policy Support the District Court's Interpretation

Massachusetts law requires courts to "construe policies as a whole" and to give effect and meaning to every term. *Surabian Realty Co., Inc. v. NGM Ins. Co.*, 462 Mass. 715, 718, 971 N.E.2d 268, 271 (2012). The District Court's construction of the phrase "direct physical loss of or damage to property" is consistent with and supported by other relevant provisions of the Policy.

The Policy grants Business Income and Extra Expense coverage for a time period known as "the 'period of restoration,'" which is defined to begin either "[24] hours after the time of *direct physical loss or damage*" (for Business Income coverage) or "[i]mmediately after the time *of direct physical loss or damage*" (for Extra Expense coverage). JA0426; *see also* JA0427. The "period of restoration" ends when property at the insured premises "should be *repaired, rebuilt or replaced* with reasonable speed and similar quality." *Id*. (emphasis added). For this definition to serve its function in the Policy, the "direct physical loss" or "direct physical damage" that starts the period of restoration must be caused by a Covered Cause of Loss, result in a necessary suspension of operations, and be of a type that

can be remedied through repair, rebuilding, or replacement of the property.[4] Otherwise, the "period of restoration" provision makes no sense. *Wellness Eatery La Jolla LLC*, 2021 WL 389215, at *6 (the definition of "the 'period of restoration'" gives a strong indication "that the 'physical loss' contemplated by the Policy required . . . some distinct, demonstrable, physical alteration of the property" because "without some tangible physical alteration to the property, there would be no need to restore, repair[], rebuild, or replace.").

Courts have routinely relied on the same and similar provisions to support an interpretation of "direct physical loss or damage to require actual, physical damage to the insured premises [as a way to] give[] effect to all provisions of the Policy." *Newman Myers Kreines Gross Harris, P.C. v. Great N. Ins. Co.*, 17 F. Supp. 3d 323, 332 (S.D.N.Y. 2014) ("The words 'repair' and 'replace' contemplate physical damage to the insured premises . . . ."); *Verv[e]ine Corp.*, 2020 WL 8766370, at *4

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[4] When viewed in context, the plain and ordinary meaning of the terms "repair," "rebuild" and "replace" requires physical modification to address physical alterations to the condition of property. For example, the ordinary meaning of the term "repair" is "to restore by replacing a part or putting together what is torn or broken: FIX, *repair* a shoe." *Repair*, Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/repair (last visited June 2, 2021). The word "replace," in reference to property, is commonly understood to mean "to put something new in the place of – *replace* a worn carpet." *Replace*, Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/replace (last visited June 2, 2021). Finally, to "rebuild" means "to make extensive repairs to: RECONSTRUCT – *rebuild* a war-torn city. *Rebuild*, Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/rebuild (last visited June 2, 2021).

(noting that an identical definition of "the 'period of restoration'" and coverage for costs to "repair or replace property . . . contemplate that such property was, in some way, lost or damaged"); *see also Woolworth LLC v. Cincinnati Ins. Co.*, No. 2:20-cv-01084, 2021 WL 1424356, at *4 (N.D. Ala. Apr. 15, 2021) (relying on the definition of "period of restoration" and the insured's failure to allege that any of its property needed to be repaired, rebuilt, or replaced to conclude that "[a] virus can simply be wiped off the surface with disinfectant, so there is no 'physical damage,' no 'physical loss,' and no 'period of restoration' of property").[5]

The Policy's "Loss Payment" condition further supports this interpretation. Found in the Policy's Business and Personal Property Coverage Form, the Loss Payment condition grants Strathmore several options for issuing payment for covered direct physical loss of or damage to property, including the options to "[p]ay the cost of *repairing or replacing* the lost or damaged property" or to

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[5] Legal's effort to reconcile its interpretation of the "direct physical loss" requirement with the "period of restoration" is in vain. While Legal correctly notes that the "period of restoration" is a "temporal measure of a business income claim," it is wrong in arguing that it serves no role in defining the phrase "direct physical loss of or damage to property." App. Brf. at 31-32. Moreover, the Policy provides no coverage unless there is a "necessary 'suspension' of [Legal's] 'operations' *during the 'period of restoration'*." JA0418 (emphasis added). Legal offers no plausible explanation of how the end of the "period of restoration" can be determined in the absence of physical loss of or damage to property that is capable of being repaired, rebuilt, or replaced.

"[r]epair, rebuild or replace the property with other property of like kind and quality." JA0458 (emphasis added). Like the "period of restoration" definition, the Loss Payment condition helps to define what triggers Business Income and Extra Expense coverage: *loss* of property that is capable of being physically replaced or rebuilt, and *damage* to property that can be physically rebuilt or repaired.

In summary, when read in the context of the Policy as a whole, the phrase "direct physical loss of or damage to property" used in the Business Income and Extra Expense coverages connotes either a permanent physical dispossession or destruction ("loss") of property such that it must be "rebuilt" or "replaced," or tangible, material harm to property ("damage") that can be returned to satisfactory condition through repair, rebuilding, or replacement.

3. The District Court Correctly Applied the "Direct Physical Loss of or Damage to Property" Requirement

Legal argues that it satisfied the "direct physical loss of or damage to property" requirement by alleging that people who tested positive for COVID-19 were present in its restaurants at some point in 2020, JA0269, ¶ 61, and that particles of Coronavirus attached to surfaces and "linger[ed] in the air for hours" there. JA0270, ¶¶ 50, 64. While the District Court was required to and did accept Legal's *factual* allegations that Coronavirus was present in the air and on surfaces at its restaurants, ADD004, it was not bound to accept the *legal* conclusion that the presence of virus constitutes "direct physical loss of or damage to property." *See*

Boston Gas, 454 Mass. at 355, 910 N.E.2d 290, 304 (2009) ("The interpretation of an insurance contract is a question of law."); *Morin v. Metro. Prop. & Cas. Ins. Co.*, No. 16-cv-10687, 2016 WL 9053346, at *1 (D. Mass. June 7, 2016) ("In assessing the viability of a complaint the Court first must disregard conclusory allegations that merely parrot legal conclusions." (citing *Manning v. Boston Med. Ctr. Corp.*, 725 F.3d 34, 43 (1st Cir. 2013)). The Court was required to draw its own conclusion as to whether the SAC plausibly alleged the requisite "direct physical loss of or damage to property."

The District Court determined that Coronavirus has no enduring impact on the integrity of property and, therefore, "is not capable of damaging physical structures . . . ." ADD008. The allegations of the SAC amply support this conclusion. If the alleged presence of Coronavirus at Legal's restaurants had caused some tangible, physical harm to any of its property, it is reasonable to expect that Legal would have had the property repaired or replaced and claimed the associated expense under the Policy. While Legal suggests that "the measures a business must take to respond to COVID-19 and SARS-CoV-2 on its property fit within the meaning of 'repair,' 'replace' and 'rebuild,'" App. Brf. at 32, the SAC does not allege that Legal actually took any measures to repair, rebuild, or replace any property at its restaurants that allegedly came into contact with Coronavirus.

Similarly, while Legal contends in its Brief that "the composition of the indoor air was altered to contain deadly virus" for up to several hours, the SAC does not allege that any steps were taken—or even necessary—to remove the virus from the indoor environment. Legal's failure to plead such facts is unsurprising when one considers that it claims to have closed its restaurants in mid-March 2020 in response to the Orders. JA0272-73, ¶¶ 77. The absence of *factual* allegations establishing that Legal's property experienced any tangible, material harm that required its repair, rebuilding, or replacement validates the District Court's conclusion that Legal failed to plead any direct physical damage to its property.

In the section of the SAC that contains the allegations supporting its recently-abandoned claim for coverage under the Policy's Civil Authority provision, Legal alleges that the Orders impacted its business operations by requiring "the installation of physical and structural alterations to Legal Sea Foods' property, including protective barriers and partitions." (JA0273, ¶ 77). Such modifications cannot be described as the "repair" of Legal's property, as they were required by governments to protect against the further spread of Coronavirus among humans. For instance, Legal does not allege that Plexiglas partitions or other improvements were installed because virus was present in any restaurant. *See Indep. Rest. Grp. v. Certain Underwriters at Lloyd's*, No. 20-cv-2365, 2021 WL 131339, at *7 (E.D. Pa. Jan. 14, 2021) (finding no direct physical loss where the

insured argued that it "had to move equipment around, add Plexiglass, and do other things to restore the property and make it functional and reasonably safe for patrons," because "none of those activities can reasonably be described as repairing, rebuilding, or replacing" nor "can disinfecting or cleaning property that is contaminated."); *see also L&J Mattson's Co. v. Cincinnati Ins. Co.*, No. 20-cv-7784 2021 WL 1688153, at *6 n.3 (N.D. Ill. Apr. 29, 2021) (finding that "additions such as Plexiglass, hand sanitizer, air purifiers or improved HVAC systems do not constitute repairs to damaged property where a plaintiff has not alleged damage to property" but instead "constitute improvement to stop the spread of virus from one person to another").

Additionally, the SAC does not allege that Legal was physically dispossessed of any tables, chairs, silverware, stock, fixtures, kitchen equipment or other business personal property at any of restaurants, or that any such property was completely destroyed because a microscopic aerosol droplet containing Coronavirus landed on it. Thus, Legal has alleged no "direct physical loss of" any property due to the presence of Coronavirus.

Every other Massachusetts court that has considered whether the alleged presence of Coronavirus on insured premises causes "direct physical loss of or damage to" property has arrived at the same conclusion. Two of these decisions specifically address such claims. *See Am. Food Sys.*, 2021 WL 1131640, at *5

(concluding that "the phrase 'direct physical loss' does not encompass a viral infestation"); *SAS Int'l*, 2021 WL 664043, at *5 (same). Another decision issued by Chief Judge Saylor concludes that if the insured had alleged the presence of Coronavirus at its premises, such allegations would not have established "direct physical loss of or damage to property." *Kamakura, LLC*, 2021 WL 1171630, at *6 ("By contrast, as plaintiffs allege, the coronavirus does not permeate property; it lives on surfaces, either for a matter of hours or days or until those surfaces are decontaminated."); *see also Accents*, 2021 WL 2117180, at *2 ("Contamination that requires a need 'to clean surfaces that could host [a] virus does not constitute actual physical damage entitling [the insured] to coverage under the policy.'" (quoting *B. St. Grill & Bar, LLC*, No. 20-cv-01326, 2021 857361, at *5 (D. Ariz. Mar. 8, 2021)).

The unanimity among Massachusetts courts on this issue follows the majority of decisions nationally that have concluded that property is not physically lost or physically damaged due to the presence of Coronavirus, because it can be addressed with routine cleaning and it "harms human beings, not property." *Wellness Eatery La Jolla*, 2021 WL 389215, at *7. For example, in *Nguyen*, a federal court addressing the consolidated lawsuits of hundreds of Washington businesses seeking coverage for lost income stemming from the COVID-19 pandemic, recently held that "an airborne virus [like Coronavirus] that can live

only briefly on non-organic surfaces, does not cause damage to those surfaces, such as the buildings, counters, dentist chairs, and other insured property of the businesses at issue." 2021 WL 2184878, at *10. The court, therefore, held that the "pleading of actual presence [of Coronavirus by visitation from an infected person] is immaterial." *Id*. The logic and reasoning of this decision and those like it are persuasive, faithful to the policy language, and directly applicable.[6] Here, as in

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[6] *See also, e.g., Kim-Chee LLC v. Philadelphia Indem. Ins. Co.*, 2021 WL 1600831, at *4 (W.D.N.Y. Apr. 23, 2021) ("Because the presence of the virus does not alter the covered property, it is different from radiation, chemical dust and gas, asbestos and other contaminants which may persist and damage the covered property."); *Woolworth LLC v. Cincinnati Ins. Co.*, 2021 WL 1424356, at *4 (N.D. Ala. Apr. 15, 2021) ("A virus does not physically alter the property it rests on. A virus does not require property to be repaired, rebuilt, or replaced. A virus can simply be wiped off the surface with disinfectant, so there is no 'physical damage,' no 'physical loss,' and no 'period of restoration' of property."); *Bel-Air Auto Auction, Inc. v. Great Northern Ins. Co.*, No. 20-cv-2892, 2021 WL 1400891, at *11 (D. Md. Apr. 14, 2021) ("In sum, "[t]he virus does not threaten the structures covered by property insurance policies, and can be removed from surfaces with routine cleaning and disinfectant."); *ILIOS Prod. Design, LLC v. Cincinnati Ins. Co.*, No. 1:20-cv-857, 2021 WL 1381148, at *7 (W.D. Tex. Apr. 12, 2021) ("The virus does not threaten the structures covered by property insurance policies and can be removed from surfaces with routine cleaning and disinfectant."); *Barbizon School of San Francisco, Inc. v. Sentinel Ins. Co. Ltd.*, No. 20-cv-08578, 2021 WL 1222161 (N.D. Cal. Mar. 31, 2021) ("The cases Plaintiffs cite are also distinguishable because this case involves a virus, which 'can be disinfected and cleaned' from surfaces."); *Bachman's Inc. v. Florists' Mut. Ins. Co.*, No. 20-cv-2399, 2021 WL 981246, at *4 (D. Minn. Mar. 16, 2021) ("[T]here can be no dispute that the virus can be easily eliminated with routine cleaning procedures."); *DZ Jewelry, LLC v. Certain Underwriters at Lloyds London*, No. 20-cv-3606, 2021 WL 1232778, at *5 (S.D. Tex. Mar. 12, 2021) ("[C]ourts considering similar claims have repeatedly stated that COVID-19 does not cause physical damage to

those cases, the District Court was correct in concluding that Coronavirus particles that allegedly remain in the air for a matter of hours and on surfaces for a matter of days do not cause "direct physical loss of or damage to property." As is the case with any virus, they can be removed with routine cleaning. ADD008.

4. Legal's Proposed Interpretation Is Unreasonable

Legal advocates for an alternative and considerably more expansive definition of the phrase "direct physical loss of or damage to property" that relies on dictionary definitions of those words viewed in isolation, ignores Massachusetts law, and disregards other key provisions of the Policy. App. Brf. at 21-22. Legal's error is evident in its suggestion that the term "loss" encompasses *any* form of "detriment" to property—even in the absence of its physical dispossession or destruction. Legal's construction of the phrase is unreasonable because it disregards the requirement that the "loss" itself must be "physical." The insurance treatise Legal relies on to support its expansive interpretation fails to mention, let

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property; it causes people to get sick."); *Promotional Headwear Int'l v. Cincinnati Ins. Co.*, 2020 WL 7078735, at *6 (D. Kan. Dec. 3, 2020) ("Moreover, even assuming that the virus physically attached to covered property, it did not constitute the direct, physical loss or damage required to trigger coverage because its presence can be eliminated."); *Uncork & Create LLC v. Cincinnati Ins. Co.*, 2020 WL 6436948, at *13-14 (S.D.W. Va. Nov. 2, 2020) ("In short, the pandemic impacts human health and human behavior, not physical structures.").

alone reconcile, the wealth of contrary authorities, including those discussed above. App. Brf. at 21-22.

Moreover, Legal's argument for a broad interpretation of the term "loss" is not even supported by the allegations of its own pleading. In its Brief, Legal argues repeatedly that the SAC alleges that the presence of Coronavirus in its restaurants caused Legal "to be deprived of those restaurants." *Id.* at 22. This is a substantial embellishment of Legal's pleading. While the SAC alleges that virus was present in its restaurants, it does not allege that Legal closed any location in March 2020 or thereafter due to the presence of Coronavirus at its premises (even if that were construed to constitute direct physical loss, which it is not). Rather, as demonstrated above, *supra* at 16-20, Legal has always claimed that it shut down its restaurants in March 2020 because of government Orders that temporarily banned on-premises dining and restricted it to carry-out and delivery service, and that it resumed its business when those restrictions were lifted. JA0271-72, ¶¶ 71-77.

Legal's interpretation of "direct physical damage" also lacks support. Legal argues that the alleged presence of virus particles in the air and on surfaces of property in its restaurants (which it closed in response to the Orders) "harmed" and "physically altered" its property, satisfying the requirement of "physical damage." This construction ignores other provisions of the Policy—including "the 'period of restoration'" and the Loss Payment condition—which make clear that to be

"physical," the harm to or alteration of property must be of a character that requires repair, rebuilding, or replacement to return it to a satisfactory condition. *Supra* at 30. Legal never claimed, and does not now allege, that any property within its restaurants had to be repaired, rebuilt, or replaced due to contact with Coronavirus. Nor does Legal allege that any measures were required or undertaken to remove the virus.

Legal also misconstrues the District Court's ruling when it attacks the use of the phrase "structural integrity." By noting that "[t]he COVID-19 virus does not impact the structural integrity of property in the manner contemplated by the Policy," the District Court did not say that "direct physical loss of or damage to property" occurs *only when* the structural integrity of a building or other property is compromised. Rather, when read in the context of surrounding statements and citations, that statement correctly observes that to satisfy that requirement of coverage, the Coronavirus would have to "impact the actual integrity" (citing *SAS Int'l*) of insured property or damage "physical structures" (citing *Wellness Eatery*). The District Court's determination that Coronavirus "does not threaten the structures . . . [and] can be removed from surfaces with routine cleaning and disinfectant" (citing *Terry Black's Barbecue*) was a reasonable conclusion to be drawn from the SAC, particularly in light of the allegations of the SAC.

5. The Authorities Cited by Legal Do Not Support Its Contention That It Sustained "Direct Physical Loss of or Damage to Property" Due to the Presence of Coronavirus

Legal and *amicus curiae*, United Policyholders ("UP"), rely on a collection of decisions involving the contamination of property with substances like toxic petroleum fumes, harmful bacteria, asbestos fibers, lead dust, and noxious odors to support their contention that the transient presence of Coronavirus in Legal's restaurants caused "direct physical loss of or damage to property" there. But a closer examination of those decisions reveals that they are readily distinguishable and fail to provide any support for Legal's strained interpretation of the Policy. Specifically, these cases involved scenarios where a dangerous substance infiltrated and attached itself to the building, requiring its evacuation, and destroying its use and function until extensive and costly repair and mitigation measures could return the property to a satisfactory and safe condition.

For example, in *Western Fire Ins. Co. v. First Presbyterian Church*, 165 Colo. 34, 37, 437 P.2d 52, 54 (1968), the Colorado Supreme Court explained that the presence of gasoline on the insured property did not, in and of itself, constitute direct physical loss or damage. Rather, a direct physical loss only occurred at the point where the gasoline physically had "infiltrat[ed] and contaminat[ed] . . . the foundation, walls and rooms of the church so as to render it uninhabitable and make the continued use thereof dangerous." *Id.* at 36-37. As several courts have

already concluded in other COVID-19 business interruption cases, *Western Fire* is "consistent with the principle that there still must be some physical intrusion that compromises the physical integrity of property." *Pez Seafood DTLA, LLC v. Travelers Indem. Co.*, 2021 WL 234355, at *4 (C.D. Cal. Jan. 20, 2021); *see also Kim-Chee LLC*, 2021 WL 1600831, at *4 (distinguishing *Western Fire* on a similar basis). Indeed, in *Western Fire*, the physical integrity of the property had to be repaired so as address the infiltration and contamination problem—an undertaking that cost the insured many thousands of dollars. *W. Fire Ins. Co.*, 165 Colo. at 37.

Similarly, in *Sentinel Mgmt. Co. v. N.H. Ins. Co.*, 563 N.W.2d 296 (Minn. Ct. App. 1997), the court ruled that "the release of asbestos fibers and resultant contamination of the buildings" constituted direct physical loss because its attachment to the building "impaired or destroyed" the "building's function" such that "the property [was] rendered useless by the presence of the contaminants." *Id.* at 300. The insured in that case sought to recover extensive costs incurred for the highly-regulated asbestos abatement work required to physically remove the asbestos-containing building materials from the property and replace them. *Id.; see also Kim-Chee LLC*, 2021 WL 1600831, at *4 (distinguishing *Sentinel* on this basis); *Promotional Headwear*, 2020 WL 7078735, at *6 n. 57 (same). A Louisiana court reached a similar conclusion in *Widder v. Louisiana Citizens Property Ins. Corp.*, 82 So.3d 294 (La. App. 2011), where the insured's home had

to be "gutted and remediated" to resolve the extensive contamination of the building and contents with dust containing extremely high levels of lead. *Id.* at 296; *see also Kim-Chee LLC*, 2021 WL 1600831, at *4 (distinguishing *Widder* on this basis).[7]

Legal also argues that "[i]t is not necessary that the cause of loss have a lasting impact." App. Brf. at 26. But again, the cases it cites do not support its proposition. In *Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of America*, No. 2:12-cv-04418, 2014 WL 6675934 (D.N.J. Nov. 25, 2014), the refrigeration system at a packaging plant failed and released toxic levels of ammonia, severely burning one worker and causing ammonia gas to contaminate the entire plant. *Id.* 2014 WL 6675934, at *4-5. After evacuating the facility and entire surrounding area for a one-mile radius on the order of local authorities, the insured hired an environmental remediation contractor to thoroughly clean the poisonous gas from

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[7] *See also Mellin v. N. Sec. Ins. Co.*, 167 N.H. 544, 115 A.3d 799 (2015) (insured sought to recover the cost of professional remediation to address the pervasive odor of cat urine, which court concluded would be covered only if it rose to the level of a "distinct and demonstrable alteration of the insured property"); *Motorists Mut. Ins. Co. v. Hardinger*, 131 F. App'x 823, 826-27 (3d Cir. 2005) (insureds incurred extensive costs for environmental testing and to remove *E. coli* contamination from artesian well connected to insured home); *Gen. Mills, Inc. v. Gold Medal Ins. Co.*, 622 N.W.2d 147, 150 (Minn. Ct. App. 2001) (food manufacturer sustained direct physical loss or damage to its cereal product as a result of a contractor's treating oats with an unapproved pesticide that rendered them unsalable).

all affected surfaces, neutralize the gas in the air, and dissipate the ammonia. *Id*. Only after those extensive repairs were undertaken did use and occupancy resume. *Id*.

Legal's reliance on *Oregon Shakespeare Festival Ass'n c. Great Am. Ins. Co.*, No. 1:15-cv-01932, 2016 WL 3267247 (D. Or. June 7, 2016) is also misplaced. There, smoke, ash, and dust from wildfires permeated the insured theater, coating all of the seats, HVAC equipment, lighting equipment, and electronic systems used during live performances. *Id.* at *2. Before the insured could resume its use of the theater, it had to extract the ash, soot, and smoke from interior surfaces, replace the air filters clogged with soot and ash, and dissipate the airborne smoke. *Id*. The remediation described in the court's opinion was anything but a routine cleaning. *Id.; see also Out W. Rest. Grp. Inc. v. Affiliated FM Ins. Co.*, No. 20-cv-06786, 2021 WL 1056627, at *5 (N.D. Cal. Mar. 19, 2021) (distinguishing *Gregory Packaging* and *Oregon Shakespeare* as "involv[ing] an intervening physical force which made the premises uninhabitable or entirely unusable").

Nor does the decision in *Murray v. State Farm Fire & Cas. Co.*, 509 S.E.2d 1 (W. Va. 1998), lend support to Legal. There, the insureds were ordered to evacuate their home, which sat directly beneath a cliff that was experiencing an active, progressive rockfall that had destroyed several homes and was expected to

continue. *Id*. at 17. In the court's view, the threat of continued rock fall constituted a "risk of direct physical loss" that triggered coverage under a homeowners policy. *Id*. Though Legal fails to mention it, a federal court in West Virginia recently refused to follow *Murray* in a COVID-19 business interruption case in which the insured—like Legal—alleged that Coronavirus was present in its eateries. *See Uncork & Create LLC v. Cincinnati Ins. Co.*, No. 2:20-cv-00401, 2020 WL 6436948 (S.D.W. Va. Nov. 2, 2020). The court correctly explained that in *Murray* "the homes were rendered uninhabitable by a physical threat: an unstable retaining wall loomed over the home, and experts anticipated further rockfalls likely to physically damage the home and harm inhabitants." *Id.* at *3. By contrast, "the novel coronavirus has no effect on the physical premises of a business." *Id.*

The two unreported Massachusetts Superior Court decisions cited by Legal also do not support its interpretation of the direct physical loss requirement. In *Matzner v. Seaco Ins. Co.*, 1998 WL 566658 (Mass. Super. Ct. Aug. 12, 1998), the insured apartment building was evacuated when dangerous levels of poisonous carbon monoxide gas were detected. *Id*. at *1. The building could not be reoccupied until the chimney was repaired, the gas was removed from the premises, and a ventilation system was installed. *Id*. Similarly, in *Arbeiter v. Cambridge Mut. Ins. Co.*, No. 9400837, 1996 WL 1250616 (Mass. Super. Mar. 15, 1996), fumes from a spill of heating oil beneath the insured home infiltrated and

pervaded the entire structure, destroying its function as a home and requiring extensive repairs to address the problem, including the removal of contaminated soil and the installation of a ventilation system to remove fumes from the home. *Id*. at *1; *see SAS Int'l, Ltd.*, 2021 WL 664043, at *4 (distinguishing *Matzner* and *Arbeiter* because, "[u]nlike a pleasant odor, however, COVID-19 is imperceptible; it does not endure beyond a brief passage of time or a proper cleaning, let alone render the property permanently uninhabitable."). Notably, courts have also questioned whether *Matzner* and *Arbeiter* were correctly decided, as neither "followed an earlier Massachusetts Appeals Court decision stating that the phrase 'physical loss or damage' could not be 'fairly . . . construed to mean physical loss in the absence of physical damage.'" *Kamakura*, 2021 WL 1171630, at *7, n. 8 (citing *HRG Dev. Corp.*, 26 Mass. App. Ct. at 377; *Philadelphia Pkg. Auth. v. Federal Ins. Co.*, 385 F.Supp.2d 280, 289 (S.D.N.Y. 2005) (casting doubt on *Matzner*)).

Even in *Essex Ins. Co. v. BloomSouth Flooring Corp.*, 562 F.3d 399, 406 (1st Cir. 2009)—which Legal acknowledges has little relevance here because it involved a different kind of policy (commercial general liability) and a completely different trigger of coverage ("physical injury to tangible property")—multiple attempts were made to extract the noxious odor from the newly installed carpet, requiring payment of $1,417,500 to contractors.

In the foregoing cases involving contamination of buildings with gasoline, friable asbestos, lead dust, ash and soot, poisonous ammonia, and carbon monoxide gas, the condition mandated the evacuation or closure of the insured premises, and extensive repair work was required to return the property to a satisfactory and safe condition. As one court put it, these are cases in which "the building in question [was] rendered unusable *by physical forces*." *TRAVCO Ins. Co. v. Ward*, 715 F. Supp. 2d 699, 708 (E.D. Va. 2010) (emphasis added). In contrast to those authorities, Legal's SAC fails to plead any facts suggesting that the "respiratory droplets" containing Coronavirus that "can linger in the air for hours" or that can survive on surfaces for days (JA0267, ¶¶ 50, 52) actually required any of its restaurants to close, or that repair or replacement of any property was necessary to remove the contamination and return the restaurants to a satisfactory condition. Legal's failure to plead such facts supports the District Court's determination that the alleged presence of Coronavirus at Legal's restaurants does not constitute "direct physical loss of or damage to property." Indeed, the SAC contains only the conclusory assertion that Legal's restaurants—which were reopened when governments lifted restrictions on indoor dining—were rendered "dangerous, unfit and unsafe" for its intended use because persons infected by COVID-19 were present. JA00270, ¶ 66. That is simply not a plausible allegation of direct physical loss of or damage to property. As one federal court recently observed in granting

the insurer's motion to dismiss a restaurant owner's complaint containing nearly identical allegations, Coronavirus "presents a mortal hazard to humans, but little or none to buildings which remain intact and available for use once the human occupants no longer present a health risk to one another." *Kim-Chee, LLC*, 2021 WL 1600831, at *6.

6. The District Court Correctly Disregarded Extrinsic Evidence Concerning the ISO Virus Exclusion and the New York State Regulatory Filings of Strathmore's Parent Company

Legal and *amicus curiae* argue that when construing the Policy's requirement of "direct physical loss of or damage to property," the District Court was required to consider extrinsic evidence described in the SAC. App. Brf. at 7-8, 29, 38. Specifically, Legal and UP contend that Strathmore's decision not to attach a "Virus or Bacteria Exclusion" to the Policy "provides relevant context" and demonstrates that Strathmore intended that the Policy would cover all loss and damage caused by a virus like SARS-CoV-2. App. Brf. at 40. Further, they insist that the District Court erred by failing to adopt "as fact" the content of selected New York State regulatory filings attached to and described in the SAC. The thrust of Legal and UP's argument is that this extrinsic evidence validates the interpretation advanced by Legal and required the District Court to find the phrase "direct physical loss of or damage to property" ambiguous.

Legal and UP's argument is at odds with Massachusetts principles of insurance policy interpretation. When the words of a contract are clear, they must be construed in their usual and ordinary sense. *Gen. Convention of New Jerusalem in the U.S. of Am., Inc. v. MacKenzie*, 449 Mass. 832, 835, 874 N.E.2d 1084, 1087 (2007). Only where a provision is deemed ambiguous will a court resort to further rules of construction. Determining whether a provision is ambiguous is a question of law for the Court. *Boazova*, 462 Mass. at 351. In deciding whether a provision is ambiguous, a court "must first examine the language of the contract by itself, independent of extrinsic evidence concerning the drafting history or the intention of the parties." *Bank v. Thermo Elemental, Inc.*, 451 Mass. 638, 648 888 N.E.2d 897, 907 (2008) (citation omitted); *Gen. Convention of New Jerusalem in the U.S.*, 449 Mass. at 835 ("[W]e do not admit parol evidence to create an ambiguity when the plain language is unambiguous").

In light of these principles, UP and Legal are simply wrong in arguing that the District Court was obligated to consider Legal's allegations concerning extrinsic evidence when interpreting the Policy's "direct physical loss" requirement.[8] Indeed, the District Court would have committed error had it done

[8] This argument is predicated on a handful of decisions that stand for the proposition that extrinsic evidence bearing upon the parties' contracting intent is admissible when a provision is deemed ambiguous. App. Brf. at 38; UP Brf. at 17,

so. The District Court astutely recognized Legal's argument as an attempt to manufacture an ambiguity and expand the Policy's coverage, and it correctly pointed out that "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*." ADD011 (emphasis added); *see also Kamakura*, 2021 WL 1171630, at *8 (rejecting the same argument raised by Legal here because "the absence of an express exclusion does not operate to create coverage" (citing *Given v. Commerce Ins. Co.*, 440 Mass. 707, 712, 802 N.E.2d 64 (2003), and finding "the plain language of the policy does not create any ambiguity; therefore, they must be enforced according to that language" (citing *High Voltage*, 981 F.2d at 600)); *SAS Int'l*, 2021 WL

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n. 27. These decisions are clearly inapposite. Two of the decisions cited by UP arose from disputes between an insurer and its reinsurer over the interpretation of facultative reinsurance certificates, which are not resolved by the same rules of construction. *Comm. Union Ins. Co. v. Seven Provinces Ins. Co., Ltd.*, 217 F.3d 33 (1st Cir. 2000); *Aff. FM Ins. Cp. v. Constitution Reins. Corp.*, 416 Mass. 839, 626 N.E.2d 878 (1994). The third decision, issued by the Commonwealth's lowest-tier trial court, contradicts precedent of the Supreme Judicial Court concerning the canons of insurance policy interpretation. *See Cohen v. Union Warren Sav. Bank*, 1991 Mass. App. Div. 95, 97 (1991). Similarly, Legal misplaces its reliance on *Robert Industries, Inc. v. Spence*, 362 Mass. 751, 755, 291 N.E.2d 407 (1973), which involved the interpretation of a lease, not a commercial insurance policy.

664043, at *4 (same).[9] This Court should likewise reject Legal and UP's attempt to manufacture ambiguity out of policy language that is certain of meaning.

C. Legal Has Abandoned on Appeal Its Original Contention That the Orders Impaired Its Use of the Restaurants

Legal's Opening Brief purports to distinguish this case from other Coronavirus-related business interruption insurance cases in which the insureds do not allege the presence of virus on their premises, but instead argue that government restriction of on-premises dining caused "direct physical loss" by depriving them of the full use of their property. App. Brf. at 41-42. While Legal's original and First Amended Complaint cited government orders as the basis for its claim for Business Income and Extra Expense coverage, it has since abandoned that theory in favor of new allegations that Coronavirus was present in and damaged property at all of its restaurants. *Id.* ("That is not at issue here . . . The

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[9] *See also Kim-Chee, LLC*, 2021 WL 1600831 at *8 (holding that the phrase "direct physical loss of or damage to" property, and that the insurer's "decision to forego the virus exclusion does not alter the limits the direct physical loss clause places on the coverage."); *Boxed Foods Co., LLC v. California Cap. Ins. Co.*, 497 F. Supp. 3d 516, 522 (N.D. Cal. 2020), as amended (Oct. 27, 2020) (concluding that absence of a virus exclusion does not create an ambiguity); *Advance Watch Co. v. Kemper Nat. Ins. Co.*, 99 F.3d 795,805 (6th Cir. 1996) ("[T]he absence of an exclusion cannot create coverage; the words used in the policy must themselves express an intention to provide coverage for liability for the kind of occurrence or injury alleged by the claimant against the insured.").

orders-only cases do not pertain.").[10] Thus, to the extent UP, as amicus, raise this argument supporting reversal (UP Brief at 25-30), it should be disregarded as waived. *See U.S. v. Mayendía-Blanco*, 905 F.3d 26, 32 (1st Cir. 2018) ("Relevant here, it is a well-settled principle that arguments not raised by a party in its opening brief are waived.").

Legal's abandonment of its argument that the Orders caused direct physical loss of or damage to its property is likely explained by the fact that Massachusetts courts and an overwhelming majority of state and federal courts throughout the country have roundly rejected it. *See Verv[e]ine Corp.*, 2020 WL 8766370, at *3 ("In line with these principles, a majority of courts across the country called upon to decide insurance coverage claims involving losses occasioned by COVID-19 have concluded that restrictions on the use of an insured's property due to government orders are not 'physical losses or damage' within the meaning of provisions similar to the one before this Court.").[11]

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[10] As Strathmore argued below, Legal's original position that the Orders caused "direct physical loss of or damage to property" at its premises implicated the Policy's Ordinance or Law Exclusion, which applies to all loss or damage caused directly or indirectly by enforcement of any ordinance or law that—like the Orders—"regulates the use" of any property. JA0558; *see Newchops Rest. Comcast LLC v. Admiral Indem. Co.*, No. 20-cv-1949, 2020 WL 7395153, at *7 (E.D. Pa. Dec. 17, 2020) (holding that a similar Ordinance or Law exclusion applied to the insureds' COVID-19 business interruption claim).

[11] *See also Kamakura, LLC*, 2021 WL 1171630 at *6 ("But the *Verv[e]ine* decision reflects the position of an increasingly large majority of courts across the country,

II. Legal's Chapter 93A Claim Fails as a Matter of Law

The District Court's finding that Strathmore correctly denied coverage for Legal's insurance claim compelled the corresponding dismissal of Legal's Chapter 93A claim against Strathmore, which was "based on the allegedly unfair and deceptive investigation and denial of Legal's claim to insurance coverage." ADD014. On appeal, Legal concedes that its Chapter 93A claim cannot survive in the absence of coverage. Moreover, under well-established Massachusetts law, Chapter 93A requires something more than a mere good faith disagreement about the meaning of policy terms to impose liability for unfair or deceptive acts or practices. *See Zurich American Ins. Co. v. Watts Regulator Co.*, 796 F. Supp. 2d 240, 244 (D. Mass. 2011) ("It is well settled that 'the mere breach of a contract, without more, does not amount to a [Chapter] 93A violation.'" (quoting *Madan v. Royal Indemnity Co.*, 26 Mass. App. Ct. 756, 532 N.E.2d 1214 (1989)); *Boston Symphony Orchestra, Inc. v. Commercial Union Ins. Co.*, 406 Mass. 7, 15, 545 N.E.2d 1156, 1160 (1989) (finding no violation of Chapter 93A because "[i]n good

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which is that restrictions on the use of property by government orders due to the threat or presence of coronavirus do not constitute 'direct physical loss' of property."); *Travelers Cas. Ins. Co. v. Geragos & Geragos*, No. 20-cv-3619, 2021 WL 1659844, at *5 (C.D. Cal. Apr. 27, 2021) ("The Court agrees with the overwhelming majority of courts that have considered the issue and similarly finds that direct physical loss of property does not include the temporary loss of use due to New York's civil orders in response to the COVID-19 pandemic.").

faith, [the insurer] relied upon a plausible, although ultimately incorrect, interpretation of its policy.").

III. This Court Should Not Certify the Question Proposed by Legal to the Massachusetts Supreme Judicial Court

For the reasons stated in Strathmore's Opposition to Legal's Motion to Certify a Legal Question to the Massachusetts Supreme Judicial Court ("SJC")—including that Legal seeks an advisory opinion on the particular facts alleged in its SAC; the proposed issue on which Legal seeks a ruling is not outcome determinative; Legal wrongly claims this Court cannot properly apply Massachusetts law on the proposed question without an advisory opinion from the SJC; and Legal failed to raise the certification issue with the District Court below—this Court should reject Legal's request for certification to the SJC.

CONCLUSION

The SAC fails to allege facts sufficient to establish a plausible entitlement to coverage under the Policy for Legal's economic losses from the COVID-19 pandemic. The District Court, therefore, properly dismissed the SAC under Federal Rule of Civil Procedure 12(b)(6), and its ruling should be affirmed on appeal.

Respectfully submitted,

DEFENDANT-APPELLEE
STRATHMORE INSURANCE
COMPANY,

By its attorneys,

/s/ *Jonathan E. Small*
Gregory P. Varga (CA1# 38466)
Jonathan E. Small (CA1# 1142111)
Linda L. Morkan (CA1# 1134819)
Robinson & Cole LLP
280 Trumbull Street
Hartford, CT 06103-3597
(860) 275-8200
gvarga@rc.com
jsmall@rc.com
lmorkan@rc.com

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 12,957 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/ *Jonathan E. Small*
Jonathan E. Small

CERTIFICATE OF SERVICE

On June 2, 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/ *Jonathan E. Small*
Jonathan E. Small