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

MADISON SQUARE GARDEN SPORTS CORP., MSG SPORTS, LLC, MSG NYK HOLDINGS, LLC, KNICKS HOLDINGS, LLC, NEW YORK KNICKS, LLC, WESTCHESTER KNICKS, LLC, KNICKS GAMING, LLC, MSG NYR HOLDINGS, LLC, RANGERS HOLDINGS, LLC, NEW YORK RANGERS, LLC, HARTFORD WOLFPACK, LLC, MSG TRAINING CENTER, LLC, MSG ESPORTS, LLC, MSG CLG, LLC, CLG ESPORTS HOLDINGS, LLC, CLG ESPORTS, LLC, MADISON SQUARE GARDEN ENTERTAINMENT CORP., MSG ENTERTAINMENT GROUP, LLC, MSG NATIONAL PROPERTIES, LLC, RADIO CITY PRODUCTIONS LLC, THE GRAND TOUR, LLC, MSG BEACON, LLC, MSG CHICAGO, LLC, MSG ARENA HOLDINGS, LLC, MSG ARENA, LLC, MSG ENTERTAINMENT HOLDINGS, LLC, MSG LAS VEGAS, LLC, MSG SPHERE STUDIOS, LLC, MSG TG, LLC, MSG IMMERSIVE VENTURES, LLC, OBSCURA DIGITAL, LLC, MSG AIRCRAFT LEASING, LLC, MSG FLIGHT OPERATIONS, LLC, MSG AVIATION, LLC, and MSG VENTURES, LLC,

Plaintiffs,

v.

FACTORY MUTUAL INSURANCE COMPANY, AIG SPECIALTY INSURANCE COMPANY, ALLIANZ GLOBAL CORPORATE AND SPECIALTY SE and ASSICURAZIONI GENERALI SPA (UK BRANCH),

Defendants.

Index No.: 651521/2021

Motion Sequence No. 001

Hon. Joel M. Cohen

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' PARTIAL MOTION TO DISMISS

ORAL ARGUMENT REQUESTED[1]

[1] Pursuant to this Court's General Rule No. 1, MSG commits to substantive participation by female and/or diverse lawyers practicing for five years or less if the Court holds oral argument on this motion.

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"At best for [an insurer], 'physical loss or damage,' which is undefined, is susceptible of more than one reasonable interpretation and is therefore ambiguous and must be construed against [that insurer]."

~ Factory Mutual Insurance Company[2]

PRELIMINARY STATEMENT

Masks are coming off, the lights of businesses are coming back on, and vaccines are going in. But before that happened, more than 170,000,000 people tested positive for COVID-19 and more than 3,500,000 died. In March 2020, SARS-CoV-2 began its uncontrollable spread so that the only safe place was inside our homes. This courthouse, insurance company offices, and every entertainment venue was closed because the presence of SARS-CoV-2 in their airspace and on their surfaces made it unsafe to be inside them. The Mayor of New York City issued an emergency order because of "the propensity of the virus to spread from person to person and also because the virus is causing property loss and damage." That order, and the orders issued by the Governor of New York State, largely met their objective of preventing the spread of SARS-CoV-2 in entertainment venues and other businesses. But it did not prevent plaintiffs ("MSG") from sustaining "physical loss or damage" or suffering losses because of those orders and the necessary mitigation efforts, all of which are covered by the policies sold to MSG by Defendants ("Insurers").

The Insurers argue that the presence of SARS-CoV-2 unambiguously cannot constitute "physical loss or damage" to property. They rely largely on trial court decisions since the COVID-19 outbreak, many of which admittedly granted insurers'

[2] Request for Judicial Notice ("RJN") Ex. 68; Compl. ¶166.

motions to dismiss. But most of those decisions were by federal district courts involving different laws, facts, arguments, and allegations, frequently involving concessions by insureds that SARS-CoV-2 was not present on property, or policies that included the insurance industry's standard-form virus exclusion. Few involve the express coverage for "communicable disease" present in MSG's policies. The Insurers also ignore the decades of pre-pandemic appellate decisions holding that the presence of microscopic substances in air or on surfaces, and the resulting inability to use property for its intended function constitutes "physical loss or damage." Those decisions control here, particularly because the undisputed science confirms that SARS-CoV-2 physically alters air, surfaces, and personal property to which it attaches. Also absent is any reference to Factory Mutual Insurance Company's ("FM") November 2019 explicit admission in federal court that the phrase "physical loss or damage" is ambiguous and "must" be construed against insurers.

Based on MSG's unique circumstances, the scientific record before this Court demonstrating how the virus enters airspace and adheres to surfaces, the reported positive cases, and the causal nexus between the civil authority orders closing and materially altering the properties, the Insurers' motion should be denied.

FACTUAL BACKGROUND AND MSG'S ALLEGATIONS

MSG bought $1.8 billion in property and business income insurance in effect from November 16, 2019, to November 16, 2020 ("Policies"). Compl. ¶ 77. For years prior, the Insurers knew a pandemic was likely (*id.* ¶¶ 67-70); that the Policies cover loss from the presence of a virus that alters building surfaces and airspace, rendering it uninhabitable for its intended functions (*id.* ¶ 71); that this has been the

law for decades (*id.*); and that, in 2006, the insurance industry adopted a standard-form virus exclusion that the Insurers chose not to utilize. *Id.* ¶¶ 73-76. The pandemic erupted weeks after they sold the Policies (*id.* ¶ 120) and a few months after FM told a court that "physical loss or damage" is ambiguous. RJN Ex. 68.

On March 7, 2020, Governor Cuomo declared a state of emergency in New York (*id.* ¶ 129) followed by similar state and local civil authority orders and actions around the country. *Id.* ¶¶ 132-138. This included New York City Emergency Executive Order No. 100, in which Mayor de Blasio declared that "the virus physically is causing property loss and damage." *Id.* ¶ 132. These orders were rooted in pandemic science as detailed in the complaint. The virus remains in air and on surfaces for extended periods of time, thereby altering and damaging that air and those surfaces (Compl. ¶ 122); the aerosolized droplets are expelled through normal breathing, thereby physically altering the air and surfaces (*id.* ¶ 123); "[s]cientists have likened the ubiquitous aerosolized droplets of the virus to smoke, present in the air long after the source of its dissemination has gone" (*id.* ¶ 124); SARS-CoV-2 causes a distinct, demonstrable, physical alteration to property, thereby constituting "physical loss or damage" to property as used in the Policies (*id.* ¶ 141); the presence or threatened presence of SARS-CoV-2 prevents or impairs the use of the property, thus constituting "physical loss" to property as used in the Policies, even without structural damage (*id.* ¶ 142); and the civil authority orders rendered insured property incapable of use for its intended functions. *Id.* ¶ 156.[3]

[3] MSG requests judicial notice of these publications, orders, and facts. *See* RJN Exs.

MSG suffered significant revenue losses because of positive cases of COVID-19 (*id.* ¶ 130), by government orders forcing closure or limitation of operations (*id.* ¶¶ 131-139), and by mitigating damages. *Id.* ¶ 97.

ARGUMENT

I. STANDARD OF REVIEW

A. The Legal Standard Governing a Motion to Dismiss

"In assessing a motion to dismiss for failure to state a claim, the court must give the complaint a liberal construction, accept its factual allegations as true, and provide the plaintiff with the benefit of every favorable inference." *Fed. Home Loan Bank of Boston v. Moody's Corp.*, 68 Misc. 3d 615, 621 (N.Y. Sup. Ct. 2019), *aff'd*, 176 A.D.3d 518 (1st Dep't 2019). "'Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss.'" *Feldman v. Port Auth. of N.Y. & N.J.*, 194 A.D.3d 137, 139 (1st Dep't 2021) (citation omitted). The motion must be denied if the allegations "fit within a cognizable legal theory." *Pustilnik v. Battery Park City Auth.*, 2021 WL 1324212, at *6 (N.Y. Sup. Ct. Apr. 8, 2021).

B. The Rules Governing Insurance Policy Interpretation

> When construing insurance policies, the language of the "contracts must be interpreted according to common speech and consistent with the reasonable expectation of the average insured". Furthermore, "we must construe the policy in a way that affords a fair meaning to all of the language employed by the parties in the contract and leaves no provision without force and effect."

1-68; Affirmation of Jeffrey L. Schulman, dated June 3, 2021 ("Schulman Aff.") Exs. A-J.

Matter of Viking Pump, Inc., 27 N.Y.3d 244, 257 (2016) (citations omitted).

Ambiguity exists where there is a "reasonable basis for a difference of opinion" as to its meaning and interpretation (*id.* at 257-58) and any such "ambiguity must be resolved in favor of the Insured." *Id.* at 254. As discussed below, and as FM admitted in court, the operative policy language is ambiguous and must be construed in MSG's favor.

II. THE COMPLAINT EXCEEDS THE PLEADING STANDARD

A. SARS-CoV-2 Causes "Physical Loss Or Damage"

It is well settled that the "physical loss or damage" requirement is satisfied by the presence of, for example, bacteria, smoke, asbestos fibers, fumes, vapors, odors, and mold—all of which, like SARS-CoV-2, are invisible but damage the air and surfaces in real property. Compl. ¶¶ 71, 92, 165; *see also* Barry R. Ostrager & Thomas A. Newman, *Handbook on Insurance Coverage Disputes* § 21.02[a] (20th ed. 2020) ("A 'direct physical loss' often involves some physical alteration to the covered property. . . . Several courts have ruled that alterations at the "microscopic" or "molecular" level may constitute physical loss under a property insurance policy."); Richard P. Lewis & Nicholas M. Insua, *Business Income Insurance Disputes* § 2.04 (2d ed., 2020-2 Supp. 2012) (even "'microscopic' or 'molecular' injury is still property damage, if it affects the use of the property" (citing Ostrager & Newman)). FM admitted the same to a federal court. RJN Ex. 68.

That the "physical loss or damage" requirement is satisfied by, for example, smoke, asbestos fibers, fumes, vapors, and odors is consistent with the fact that an insured's airspace is as much a part of the property as the structure, and the

presence of a virus alters and damages the airspace. *See, e.g.*, *D'Amico v. Waste Mgmt. of N.Y., LLC*, 2019 WL 1332575, at *5 n.2 (W.D.N.Y. Mar. 25, 2019) (citing *Butler v. Frontier Tel. Co.*, 186 N.Y. 486, 491 (1906) ("space above land is real estate the same as the land itself")); *Schlamm Stone & Dolan, LLP v. Seneca Ins. Co.*, 6 Misc. 3d 1037(A), at *5 (N.Y. Sup. Ct. Mar. 4, 2005) ("the presence of noxious particles, both in the air and on surfaces in plaintiff's premises, would constitute property damage under the terms of the policy").

In the closest case to these facts, *Pepsico, Inc. v. Winterthur International America Insurance Co.*, 24 A.D.3d 743 (2d Dep't 2005), the insured was granted summary judgment under a property policy for loss based on off-tasting soft drinks caused by its raw materials. "Physical damages" was not defined and the court rejected the insurer's argument that coverage required a "distinct demonstrable alteration of [the] physical structure … by an external force." *Id.* at 744. Impairment of function and value was sufficient:

> It is sufficient under the circumstances of this case involving the unmerchantability of beverage products that the product's function and value have been seriously impaired, such that the product cannot be sold. Neither the fact that the product was not rendered unfit for human consumption nor the fact that the product's unmerchantability may have gone undetected initially, means that a physical event did not occur for which injury or damage resulted.

Id. *See also* *Shade Foods, Inc. v Innovative Prods. Sales & Mktg., Inc.*, 78 Cal. App. 4th 847, 865 (2000) (wood splinters in cereal constituted "property damage"; "we see no difficulty in finding property damage where a potentially injurious material in a

product causes loss to other products with which it is incorporated") (cited by *Pepsico*).

The *Pepsico* case is critically important in this context as it laid the foundation for pre-pandemic and pandemic case law establishing physical loss or damage based on the impairment of function and value. *See, e.g.*, *Wakefern Food Corp. v. Liberty Mut. Fire Ins. Co.*, 968 A.2d 724, 736 (N.J. Super. App. Div. 2009) (citing *Pepsico* which "likewise accepted the view that 'damage' includes loss of function or value"); *Great Am. Ins. Co. of N.Y. v. Compass Well Servs., LLC*, 2020 WL 7393321, at *14 (Tex. App. Ct. Dec. 17, 2020) (citing *Pepsico* and *Wakefern*).[4] Indeed, FM cited to *Pepsico* (and *Shade Foods*) on this very point in federal court. RJN Ex. 68 at 4, 6.

Most New York pandemic insurance decisions come from federal courts, and no state intermediate appellate court has weighed in. The most comprehensive of the state court decisions, *Visconti Bus Service, LLC v. Utica National Insurance Group*, 71 Misc. 3d 516 (N.Y. Sup. Ct. 2021), begins with an analysis of *Roundabout Theatre Co., Inc. v. Continental Casualty Co.*, 302 A.D.2d 1 (1st Dep't 2002), which the Insurers cite. Based on *Roundabout*, the *Visconti* court imposed an "actual, demonstrable physical harm" pleading standard but noted, "there is no allegation of any physical harm whatsoever to Visconti's premises—Visconti has unequivocally asserted that its premises are not infected with the COVID-19 virus." *Visconti*, 71

[4] *Wakefern* was cited by *Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am.*, 2014 WL 6675934 (D.N.J. Nov. 25, 2014) which, in turn, was cited by courts rejecting motions to dismiss pandemic insurance claims. *See Studio 417, Inc. v. Cincinnati Ins. Co.*, 478 F. Supp. 3d 794, 803 n. 6 (W.D. Mo. 2020); *Elegant Massage, LLC v. State Farm Mut. Auto Ins. Co.*, 2020 WL 7249624, at *9 (E.D. Va. Dec. 9, 2020).

Misc. 3d at 533. Unlike those insureds, MSG alleged the presence of SARS-CoV-2 on its property, that it *is* physical loss or damage to its property, and cites to positive COVID-19 cases. Compl. ¶ 130, 141-142.

The Insurers largely rely on two New York cases, *Newman Myers Kreines Gross Harris, P.C. v. Great Northern Insurance Co.*, 17 F. Supp. 3d 323 (S.D.N.Y. 2014), and *Roundabout*. Motion at 13-14. But those cases weigh against dismissal under the facts here. The *Newman* court granted the insurer summary judgment because the insured conceded an absence of "direct physical loss or damage." 17 F. Supp. 3d at 329. But the court recognized that intangible non-structural damage is "physical loss or damage":

> But the critical policy term at issue, requiring 'physical loss or damage,' does not require that the physical loss or damage be tangible, structural or even visible. The invasions of noxious or toxic gases in *TRAVCO* and *Essex*, rendering the premises unusable or uninhabitable, were held to suffice, because even invisible fumes can represent a form of physical damage.

Id. at 330.[5]

Unlike MSG (Compl. ¶¶ 123, 130, 141-142), Roundabout's losses stemmed from off-site damage resulting in street closures that rendered its property inaccessible to the public—*not* damage to its own property. 302 A.D.2d at 4-5. Unlike MSG, the *Roundabout* policy did not provide civil authority coverage. *Id.*; *Houston Cas. Co. v. Lexington Ins. Co.*, 2006 WL 7348102, at *6 n.13 (S.D. Tex. June

[5] *Newman* tracks *Pepsico*. *Visconti*, 71 Misc. 3d at 525 n.2. (both "observed that the insured need not show a 'distinct demonstratable alteration of the physical structure' . . . to prove 'physical damage'").

15, 2006) (rejecting insurer's reliance on *Roundabout* because policy did not provide civil authority coverage).[6] Unlike those insureds, MSG alleges: (1) scientific support that SARS-CoV-2 physically alters surfaces and air (Compl. ¶ 124; RJN Ex. 68); (2) that individuals tested positive for COVID-19 (*id.* ¶ 130); and (3) the specific presence of SARS-CoV-2 on its property. *Id.* ¶ 130, 141-142.

Accordingly, *Pepsico* and its pandemic progeny are closer to the facts before this Court than the off-site property damage cases cited by the Insurers, in which civil authority coverage was not provided. That said, MSG satisfied the test under either legal standard. The Insurers' remaining New York cases (requiring "direct" loss) are distinguishable.[7] They fare no better with their authority from "courts outside of New York."[8]

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[6] The Insurers incorrectly claim that MSG advances a "so-called 'loss of use' theory" to fit the confines of *Roundabout*. Motion at 14. The loss of functionality doctrine, rooted in *Pepsico* and advanced by FM (RJN Ex. 68) applies here whereas *Roundabout* is distinguishable. If, however, *Roundabout* were to apply, MSG satisfies the pleading standard therein and as articulated in *Visconti* because it alleges the presence of the virus on MSG's properties.

[7] *6593 Weighlock Drive, LLC v. Springhill SMC Corp.*, 2021 WL 1419049 (N.Y. Sup. Ct. Apr. 13, 2021) (virus generally in community and generally impacting economic activity); *Mangia Rest. Corp. v. Utica First Ins. Co.*, 2021 WL 1705760, at *4 (N.Y. Sup. Ct. Mar. 30, 2021) (no "proof" of virus on premises); *Visconti*, 71 Misc. 3d at 516 ("affirmed" absence of COVID-19); *Soundview Cinemas Inc. v. Great Am. Ins. Grp.*, 71 Misc. 3d 493 (N.Y. Sup. Ct. Feb. 8, 2021) (no allegation of COVID-19 on premises or resulting damage); *Mohawk Gaming Enters., LLC v. Affiliated FM Ins. Co.*, 2021 WL 1419782 (N.D.N.Y. Apr. 15, 2021) (not involving an insured premises); *Kim-Chee LLC v. Philadelphia Indem. Ins. Co.*, 2021 WL 1600831, at *2 (W.D.N.Y. Apr. 23, 2021) (alleging COVID-19 "exists everywhere"); *Rye Ridge Corp. v. Cincinnati Ins. Co.*, 2021 WL 1600475 (S.D.N.Y. Apr. 23, 2021) (no facts suggesting physical loss or damage); *Jeffrey M. Dressel, D.D.S., P.C. v. Hartford Ins. Co. of the Midwest, Inc.*, 2021 WL 1091711 (E.D.N.Y. Mar. 22, 2021) (presence of virus alleged for first time in response to motion); *Food For Thought Caterers Corp. v. Sentinel Ins. Co.*, 2021 WL 860345 (S.D.N.Y. Mar. 6, 2021) (discussing potential impact of COVID-19 in

Although many federal district courts accepted insurer arguments against COVID-19 coverage, those cases largely do not involve communicable disease coverage, allegations of "physical loss or damage" (or an insurer admission that it is ambiguous), allegations of SARS-CoV-2 on insured property, or the absence of standard virus exclusions. *See* University of Pennsylvania Carey Law School, *Covid Coverage Litigation Tracker*, https://cclt.law.upenn.edu/. The Insurers focus on the anti-coverage decisions while ignoring the stark contrast between how federal and state courts approach the issues. They also ignore MSG's particular facts, legal arguments and the extraordinarily broad coverage.[9]

The Insurers also ignore the fact that in the decades before the pandemic, many courts, including appellate courts (such as *Pepsico* and *Wakefern*), held the presence of microscopic substances constituted the requisite loss or damage to

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dicta); *DeMoura v. Cont'l Cas. Co.*, 2021 WL 848840 (E.D.N.Y. Mar. 5, 2021) (no allegation of COVID-19 on premises); *Soc. Life Magazine, Inc. v. Sentinel Ins. Co. Ltd.*, 2020 WL 2904834 (S.D.N.Y. May 14, 2020) (denying preliminary injunction based on the failure to establish—not allege—property damage)).

[8] Motion at 12 (citing *Ralph Lauren Corp. v. Factory Mut. Ins. Co.*, 2021 WL 1904739 (D.N.J. May 12, 2021) (no allegation of COVID-19 on the premises); *Out W. Rest. Grp. Inc. v. Affiliated FM Ins. Co.*, 2021 WL 1056627 (N.D. Cal. Mar. 19, 2021) (citing cases alleging loss of use with no physical damage); *Uncork & Create LLC v. Cincinnati Ins. Co.*, 498 F. Supp. 3d 878, 883 (S.D. W. Va. 2020) (no allegation of "infections")).

[9] Denying this motion would not disturb this Court's holding in *A/R Retail LLC v. Hugo Boss Retail, Inc.*, 2021 WL 2020879 (N.Y. Sup. Ct. May 19, 2021) (granting summary judgment in commercial rent dispute where tenant only sustained "non-physical damage.") NYSCEF Doc. No. 35 at 8.

property triggering coverage.[10] And, since the pandemic, many courts have rejected insurers' attempts to avoid coverage on similar facts as here.[11]

B. The Insurers Are Wrong in Arguing that There Is No Damage If Property Can Be Cleaned

The Insurers argue that "the mere presence of the COVID-19 virus does not cause or constitute "physical loss or damage" (Motion at 1) because it can simply be "cleaned." Motion at 1, 12-13. This assertion "is both wrong and answers an irrelevant question." Lewis &. Insua § 9.02. It is wrong scientifically, as established by this record, because the virus adheres to surfaces and remains in the air. Compl. ¶122-124; Schulman Aff. Exs. A-E. Airspaces are of particular concern for

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[10] *See, e.g.*, *Gregory Packaging*, 2014 WL 6675934, at *5 (ammonia release); *Or. Shakespeare Festival Ass'n v. Great Am. Ins. Co.*, 2016 WL 3267247, at *9 (D. Or. June 7, 2016) (smoke); *Essex Ins. Co. v. BloomSouth Flooring Corp.*, 562 F.3d 399, 406 (1st Cir. 2009) (odor); *Port Auth. of N.Y. & N.J. v. Affiliated FM Ins. Co.*, 311 F.3d 226, 236 (3d Cir. 2002) (asbestos); *Schlamm*, 6 Misc. 3d at *4 (particles); *Cooper v. Travelers Indem. Co. of Ill.* 2002 WL 32775680, at *5 (N.D. Cal. Nov. 4, 2002) (bacteria and E. coli).

[11] *See, e.g.*, *Kingray Inc. v. Farmers Grp. Inc.*, 2021 WL 837622, at *7 (C.D. Cal. Mar. 4, 2021) (New York law) ("physical alteration to property is not necessary to constitute a physical loss"); *Seifert v. IMT Ins. Co.*, 2021 WL 2228158, at *5 (D. Minn. June 2, 2021); *Susan Spath Hegedus, Inc. v. ACE Fire Underwriters Ins. Co.*, 2021 WL 1837479, at *8 (E.D. Pa. May 7, 2021) (denying motion to dismiss); *Cinemark Holdings, Inc. v. Factory Mut. Ins. Co.*, 500 F. Supp. 3d 565 (E.D. Tex. 2021) (denying motion for judgment on the pleadings); *Ungarean v. CNA*, 2021 WL 1164836, at *7 (Pa. Com. Pl. Mar. 25, 2021) (summary judgment for the insured); *Studio 417*, 478 F. Supp. 3d at 798; *Blue Springs Dental Care, LLC v. Owners Ins. Co.*, 488 F. Supp. 3d 867, 873 (W.D. Mo. 2020); *Cherokee Nation v. Lexington Ins. Co.*, 2021 WL 506271, at *4 (Dist. Ct. Okla. Jan. 28, 2021) (summary judgment for the insured); *Perry St. Brewing Co., LLC v. Mut. of Enumclaw Ins. Co.*, 2020 WL 7258116, at *3 (Wash. Super. Ct. Nov. 23, 2020) (summary judgment for the insured); *JGB Vegas Retail Lessee, LLC v. Starr Surplus Lines Ins. Co.*, 2020 WL 7190023, at *2 (Nev. Dist. Ct. Nov. 30, 2020); *N. State Deli, LLC v. Cincinnati Ins. Co.*, 2020 WL 6281507, at *3 (N.C. Super. Ct. Oct. 9, 2020) (summary judgment for the insured).

entertainment venues where large groups of people are inside for significant time periods. Compl. ¶127; Schulman Aff. Exs. A-E. To that end, many studies and recent CDC guidance show that wiping surfaces may reduce only the threat of surface transmission. RJN Ex. 65.

The question is legally irrelevant because the cause of business income losses can often be "cleaned" (witness mud following a flood, smoke residue after a fire, mold, asbestos removal). That does not mean the losses did not occur. *See, e.g.*, *Schlamm*, 2005 WL 600021, at *5. Furthermore, for example, orders of civil authority may prohibit access to an insured's premises long after physical damage is cleaned to prevent the ongoing presence of SARS-CoV-2 in the air and on surfaces. *See, e.g.*, *Serendipitous, LLC/Melt v. Cincinnati Ins. Co.*, 2021 WL 1816960, at *6 (N.D. Ala. May 6, 2021) ("[T]he highly contagious nature of COVID-19 caused civil authorities to temporarily limit capacity in restaurants to prevent the spread of the physical but invisible virus in restaurants. Cleaning was only one precaution for COVID-19; physical distancing was another, and that distancing…deprived the restaurants of the use of their property").

Indeed, although few cases have addressed the airspace issue, there is a growing scientific and legal consensus that viral damage to airspace should be viewed differently than surface damage, particularly as to cleaning, and because cleaning will be ineffective as long as asymptomatic and presymptomatic people enter after cleaning. *See*, *e.g.*, RJN Exs. 65, 67; Schulman Aff. Exs. A, C; *P.F. Chang's China Bistro, Inc. v. Certain Underwriters at Lloyd's of London*, 2021 WL

818659, at *1 (Cal. Super. Ct. Feb. 4, 2021); *Studio 417*, 478 F. Supp. 3d at 798 ("COVID-19 'is a physical substance,' that it 'live[s] on" and is 'active on inert physical surfaces,' and is 'emitted into the air.'"); *Blue Springs Dental*, 488 F. Supp. 3d at 874 ("COVID-19 is physically transmitted by air and surfaces through droplets, aerosols, and fomites that remain infectious for extended periods of time"); *Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.*, 487 F. Supp. 3d 834, 841 n.7 (N.D. Cal. 2020) (virus is "no less a 'physical force' than the 'accumulation of gasoline' . . . or the 'ammonia release [which] physically transformed the air'"), *appeal pending*.

As one court pointed out in denying FM's motion for judgment on the pleadings, "COVID-19 is a deadly communicable disease that spreads in several ways, including changing the content of air and the character of surfaces." *Cinemark*, 500 F. Supp. 3d 565. Distinguishing its holding from other cases, the court noted allegations, such as those here by MSG, "that COVID-19 was actually present and actually damaged the property by changing the content of the air." *Id*.[12]

C. The "Period of Liability" Is Not a Limitation or Exclusion

The Insurers deny coverage based on the Policies' "Period of Liability." Motion at 13. But that period is not a limitation or an exclusion from coverage that has any bearing on whether MSG properly pled the presence of the virus on insured property. It simply refers to the "period of time" that certain coverages are available.

[12] Although New York courts have generally not considered damage to air, their guidance aligns with *Cinemark*. *See, e.g.*, *Sharde Harvey, DDS, PLLC v. Sentinel Ins. Co.*,2021 WL 1034259, at *9 (S.D.N.Y. Mar. 18, 2021) (no mention of airspace). Given *Cinemark* and *P.F. Chang*, the science in relation to cleaning airspaces, and factual allegations identifying positive cases, MSG sufficiently alleged physical loss or damage to property.

Lewis & Insua § 5. Many pertinent coverages, such as civil authority, have their own mechanism for computing the period for which the Insurers must provide coverage. *See, e.g.*, Compl. Ex. B, Time Element §5, Civil or Military Authority.

Moreover, the term "replace," which appears in the "Period of Liability" provision, "means 'to restore to a former place or position,' which would include restoring an owner's full manifestation of possession over property to occupy and control it as intended." *Seifert*, 2021 WL 2228158 at *5 n. 13. The "Period of Liability" is simply not a basis for dismissal.

III. THE POLICIES ARE CONTRADICTORY AND RIFE WITH AMBIGUITY

In *Susan*, the court denied the insurer's motion to dismiss a complaint seeking coverage for COVID-19 losses. In words applicable here, it described the policy as "a labyrinth of pages" requiring the insured "to fall down a rabbit hole and wander through a vast thicket of verbiage that would leave even the most careful reader mystified by the mazes of pages to be pieced together and deciphered in order to determine if there is coverage on the other side." 2021 WL 1837479, at *1.

MSG has four insurance policies that should be fully integrated and harmonized but they are irreconcilable. For example, consistent with industry standards, the cases cited by the Insurers involve policies triggered by "'direct' physical loss or damage." But FM and AIG omitted "direct" from their coverage grants, thereby providing broader coverage than virtually every case they cite.

N. State Deli, 2020 WL 6281507, at *3, highlights the significance of this omission. The court considered the dictionary definition of "direct" before holding

that "direct physical loss" does not require property to be "structurally altered" and finding ambiguity, given the insured's reasonable interpretation. *Id.* *See also* *Studio 417*, 478 F. Supp. 3d at 800. Because there is no "direct" requirement here, MSG has a lower burden to satisfy in alleging a right to coverage.

Further examples of ambiguity include:

- The FM and AIG Policies provide coverage for "all risks of physical loss or damage" (Compl. Exs. B-C, Declarations) but the Allianz and Generali Policies include the word "direct." *Id.* D-E, Declarations.
- Although not identical, the FM and AIG Policies are identified as the "Master" policy. Compl. Exs. B-C, Declarations § 8.
- The Allianz and Generali Policies adopt the terms of the FM Policy. Compl. Exs. D-E, Conditions.
- The FM and AIG Policies include the same "contamination" exclusion but the AIG Policy includes a "Pollution and Contamination Endorsement" that "modified insurance provided by the [AIG] Policy" and which is not incorporated into the Allianz and Generali Policies. Compl. Exs. B-C, Exclusions § D; Ex. C, End #006.

IV. FM ADMITS THAT "PHYSICAL LOSS OR DAMAGE" IS AMBIGUOUS AND MUST BE CONSTRUED AGAINST THE INSURERS

The Insurers mainly argue that MSG can neither allege nor sustain "physical loss or damage" by the presence of SARS-CoV-2, and that this phrase clearly and unambiguously bars coverage. Yet, in *Factory Mutual Insurance Co. v. Federal Insurance Co.*, No.: 1:17-cv-00760-GJF-LF (D.N.M. Nov. 19, 2019), FM affirmatively

told another federal court that this phrase is ambiguous and "must" be construed against the Insurers, asking that court to adopt a contradictory finding to what it urges this Court to adopt:

> - "It is undisputed that the mold infestation destroyed the aseptic environment and rendered [the insured property] unfit for its intended use . . . Numerous courts have concluded that loss of functionality or reliability under similar circumstances constitutes physical loss or damage."
> - "The period of time as well as costs required to bring [insured property] to the level of cleanliness following the most infestation . . . is also physical loss or damage covered by" the policy. "The facility was damaged by stringent requirements of [New York City and New York State] to the same extent that it was damaged from the mold infestation itself as the facility was unusable as the result of a covered loss."

Compl. ¶ 166; RJN Ex. 68 at 3, 4.[13]

Given that FM told another court the opposite of what it urges here, this Court should reject the Insurers' argument that "physical loss or damage" is unambiguous. If FM can, in good faith, argue that those words are ambiguous, MSG's interpretation certainly is reasonable. Furthermore, the Insurers could have avoided this debate had they heeded a California court's warning 49 years ago. *Hughes v. Potomac Ins. Co. of D.C.*, 199 Cal. App. 2d 239, 248-49 (1962) (common sense mandates not imposing tangible injury requirement); *see also Cherokee*, 2021

[13] FM urged the court to follow *Pepsico, Western Fire*, *Gregory Packaging*, *Port Authority*, and *Essex Insurance Co.*, the same cases cited in MSG's complaint. *Id.*; Compl. ¶ 71. FM also cited *TRAVCO Ins. Co. v. Ward*, 715 F. Supp. 2d 699 (E.D. Va. 2010) (gases released from drywall rendering premises uninhabitable constitutes damage).

WL 506271, at *3 (courts "begged carriers to define the phrase to avoid the precise issue before the Court now.").

V. MSG PROPERLY ALLEGES CIVIL AUTHORITY COVERAGE

MSG need only allege an order that "limits, restricts or prohibits partial or total access" to its property. Compl. ¶ 100. The Policies do not define these terms but this is exceedingly broad coverage as it only requires, for example, a partial limitation on access. *Id.* These terms must be interpreted in accord with a layperson's understanding. To "prohibit" (the most restrictive of the words used) is to "forbid by authority" and "prevent from doing something." *Prohibit*, Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/prohibit (May 19, 2021). To "access" means "to be able to use, enter, or get near (something)." *Access, id.*

The complaint cites orders issued in every state where MSG has property (*id.* ¶¶ 131-138) and alleges that those orders "resulted in the shutdown of or curtailment of activities." *Id.* ¶ 133. Using these definitions, as MSG alleges, the orders partially or totally limited, restricted, or prohibited every patron and the individuals who work at those locations from entering or using them.

Courts so hold even with more restrictive policy language. *Studio 417*, 478 F. Supp. 3d at 804 (policy requiring prohibition of access "but does not specify 'all access' or 'any access'"); *Sylvester & Sylvester Inc. v. State Auto. Mut. Ins. Co.*, 2021 WL 137006, at *8 (Ct. Common Pleas, Stark Cty., Ohio Jan. 7, 2021) (policy does not require that order be specifically directed at the insured); *Blue Springs*, 488 F. Supp.

3d at 873 (allegations about prohibition of access triggers civil authority coverage); *cf.* *Sloan v. Phoenix of Hartford Ins. Co.* 207 N.W.2d 434, 437 (Mich. Ct. App. 1973) ("the governor imposed a curfew, and all places of amusement were closed, thus preventing access to plaintiffs' place of business").[14]

VI. THE INSURERS IGNORE THE MITIGATION COVERAGE

The Policies cover "reasonable and necessary costs incurred for actions to temporarily protect or preserve insured property" to prevent damage. Compl. Ex. B, Protection and Preservation of Property. The motion ignores those damages. *Id.* ¶¶ 5, 6, 122, 162, 163.

This duty is not only contractual. The Insurers have an implied duty to cover an insured's mitigation efforts. *Winkler v. Great Am. Ins. Co.*, 447 F. Supp. 135, 142 (E.D.N.Y. 1978) ("the duty to protect the property from further damage implies a responsibility on the insurer's part to pay for the cost of reasonable protective measures").

Had MSG's businesses not closed in accord with the government orders, SARS-CoV-2 would have remained in and on MSG's properties. The presence of the virus constitutes covered property damage so, by suspending or reducing operations, MSG avoided actual and imminent covered property damage, as well as potential third-party claims.

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[14] The Insurers' cases are inapposite. Motion at 15 (*10012 Holdings, Inc. v. Sentinel Ins. Co., Ltd.*, 2020 WL 7360252 (S.D.N.Y. Dec. 15, 2020) (only alleged *risk* of physical presence in neighboring properties); *Food*, 2021 WL 860345, at *6 (requiring that access be "specifically prohibited")). Also noteworthy is that *Sloan* was distinguished in *Roundabout* because that policy excluded civil authority whereas the *Sloan* policy provided it. *Roundabout*, 302 A.D.2d at 8.

VII. THE INSURERS' EXCLUSIONS DO NOT APPLY

Because they elected not to include the insurance industry's 2006 standard-form "Exclusion Of Loss Due To Virus or Bacteria," the Insurers turn to a combination of contamination, pollution and "loss of use" exclusions. None have merit.

To "'negate coverage by virtue of an exclusion, an insurer must establish that the exclusion is stated in clear and unmistakable language, is subject to no other reasonable interpretation, and applies in the particular case.'" *Westview Assocs. v. Guar. Nat'l Ins. Co.*, 95 N.Y.2d 334, 340 (2000) (citation omitted). A second reasonable interpretation "[a]t the very least . . . presents an ambiguity . . . which must be resolved against the insurer, as drafter of the agreement." *Id.* at 339.

A. The "Contamination" Exclusion Is Ambiguous as a Matter of Law[15]

The Insurers cannot enforce the contamination exclusion because it is not clear and unmistakable.[16] As alleged in the complaint, it is not clearly labeled as a "virus" exclusion. Compl. ¶¶ 106-109. There is no mention of "virus" in the declarations, the listing of forms or endorsements, or the exclusion itself. One must seek out and find "virus" more than 50 pages away. The Insurers' rejoinder is that "contamination" is bolded and defined. But "virus" is neither bolded nor defined and nothing on the

[15] The Insurers improperly characterized this exclusion as "a Contamination/Virus Exclusion." Motion at 1.

[16] One academic source calls it a "hidden virus exclusion (e.g., in pollution/contamination exclusion)"—the antitheses of clear and unmistakable. *Covid Coverage Litigation Tracker*, https://cclt.law.upenn.edu/.

exclusion's face alerts an insured to the notion that the Policies exclude pandemic losses.

The scope of the exclusion is also ambiguous. "Virus" in this exclusion refers to "traditional environmental and industrial pollution and contamination that is not at issue here." *JGB*, 2020 WL 7190023, at *3 (citing the Court of Appeals ruling in *Belt Painting Corp. v. TIG Ins. Co.*, 100 N.Y.2d 377, 383 (2003)); *London Bridge Resort LLC v. Ill. Union Ins. Co. Inc.*, 2020 WL 7123024, at *4 (D. Ariz. Dec. 4, 2020) ("a virus being considered a 'contaminant' or 'pollutant' in certain instances does not render a COVID-19 outbreak 'traditional environmental pollution'"). *London Bridge* looked to New York law on these issues. *Id.* at *2 (citing *Colonial Oil Indus. Inc. v. Indian Harbor Ins. Co.*, 528 F. App'x. 71, 74-75 (2d Cir. 2013), which, in turn, relied on *Belt*).

The contamination exclusion is also ambiguous as to its scope of application. The Insurers made the same arguments here based on the same contamination exclusion that FM argued, and lost, in *Thor Equities, LLC v. Factory Mutual Insurance. Co.*, 2021 WL 1226983, at *4 (S.D.N.Y. Mar. 31, 2021) (same exclusion "is susceptible to more than one interpretation, and potentially compatible with either party's interpretation"), and *Cinemark*, 500 F. Supp. 3d 565 (denying FM's motion on the pleadings based on same exclusion).[17]

[17] FM should have disclosed this authority. *See* 22 N.Y.C.R.R. § 1200.0, Rule 3.3(a)(2); *Nachbaur v. Am. Transit Ins. Co.*, 300 A.D.2d 74, 76 (1st Dep't 2002) ("particularly disapprove" of the failure to disclose authority about which counsel is aware).

Finally, the Insurers' notion that the contamination exclusion "overlaps significantly with the ISO Virus Exclusion" (Motion at 18) is irrelevant. *See, e.g.*, *Vigilant Ins. Co. v. V.I. Techs., Inc.*, 253 A.D.2d 401, 403 (1st Dep't 1998) (noting insurer's failure to use "common language that could have been used to draft an unambiguous exclusion").

B. The AIG "Pollution and Contamination Exclusion" Does Not Apply[18]

The Insurers do not attempt to explain how the AIG Policy can have both a "contamination" exclusion *and* a "Pollution and Contamination Exclusion" that gives every word in both exclusions full force and effect, without rendering any words in either surplusage. This ambiguity alone mandates denial of the motion. Moreover, because the exclusion is found only in the AIG Policy, this means that the same is not part of the FM Policy or the Allianz or Generali Policies (which follow form to the FM Policy).

Nor does it apply on its face. The pollution exclusion was created so insurers could avoid potentially open-ended liability from environmental disasters and must be interpreted accordingly. *Belt*, 100 N.Y.2d at 387 (only applies if damage with "environmental implications" because policy language uses "terms of art in environmental law.").[19] *See also Cont'l Cas. Co. v. Rapid-Am. Corp.*, 80 N.Y.2d 640,

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[18] Improperly characterized as the "Contamination Exclusion Endorsement" (Motion at 2) and "Exclusion Endorsement" (*id.* at 17) in recognition of the fact that it is not a pollution exclusion, not a virus exclusion, or the "ISO Virus Exclusion."

[19] AIG previously argued that the exclusion should be so interpreted. *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Am. Re-Ins. Co.*, 351 F. Supp. 2d 201, 206 (S.D.N.Y. 2005) (arguing that it does not apply to "indoor exposure to fumes from

654 (1993) (same). This concept applies with equal force to first-party property claims. *See, e.g.*, *Vigilant Ins. Co. v. V.I. Techs., Inc.*, 253 A.D.2d 401, 402 (1st Dep't 1998) (rejecting argument that pollution exclusion applies only to liability policies); *Pepsico*, 13 A.D.3d at 600.[20]

This rule is applied to the pandemic because the Insurers have

> not shown that it is unreasonable to interpret the Pollution and Contamination Exclusion to apply only to instances of traditional environmental and industrial pollution and contamination that is not at issue here, where JGB's losses are alleged to be the result of a naturally-occurring, communicable disease. This is the case, even though the Exclusion contains the word "virus."

JGB, 2020 WL 7190023 at *3. *See also* *Urogynecology Specialist of Fla. LLC v. Sentinel Ins. Co.*, Ltd., 489 F. Supp. 3d 1297, 1302 (M.D. Fla. 2020) (COVID-19 losses do "not logically align with the grouping of the virus exclusion with other pollutants such that the Policy necessarily anticipated and intended to deny coverage for these kinds of business losses."); *Seifert v. IMT Ins. Co.*, 495 F. Supp. 3d 747, 752 n.6 (D. Minn. 2020) (COVID-19 not "in the same category of pollutants as 'smoke, vapor, soot, fumes, acids, alkalis, chemicals, and waste'"); *London*, 2020 WL 7123024, at *3-*4 ("the types of incidents courts have found to be traditional environmental pollution are substantially different than a virus outbreak" and COVID-19 not "traditional environmental pollution").

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routine industrial work"). Apparently, the Insurers are not troubled by saying different things to different courts.

[20] The Insurers cite the Third Department for this notion in *Broome County v. Travelers Indemnity Co.*, 125 A.D.3d 1241 (3d Dep't 2015). Motion at 20. But that is not the rule in the First Department. *V.I. Techs.*, 253 A.D.2d at 402.

The Insurers recast the actual words of the exclusion to fit their narrative. Motion at 19. It does not exclude anything that damages "human health or human welfare" as the Insurers argue. It only excludes coverage for a "solid, liquid, gaseous or thermal irritant or contaminant . . . which *after* its release" (emphasis added) can cause that damage and COVID-19 does not qualify.

C. The "Loss of Use" Exclusion Does Not Apply

The "loss of market or loss of use" exclusion applies only "to losses resulting from economic changes occasioned by, e.g., competition, shifts in demand, or the like; it does not bar recovery for loss of ordinary business" caused by physical loss. *Duane Reade, Inc. v. St. Paul Fire & Marine Ins. Co.*, 279 F. Supp. 2d 235, 240 (S.D.N.Y. 2003), *aff'd as modified*, 411 F.3d 384 (2005).[21] Its application here would render the business interruption coverages illusory. *See, e.g.*, *Henderson Rd. Rest. Sys., Inc. v. Zurich Am. Ins. Co.*, 2021 WL 168422, at *16 (N.D. Ohio Jan. 19, 2021) (the exclusion "would vitiate" the business interruption coverage); *Seifert*, 2021 WL 2228158 at *5 n. 15 ("interpreting 'loss of use' to sweep in [business] income would undermine the central purpose of the policy provisions in dispute"). *Wright v.*

[21] *See also* *Ocean Walk, Ltd. v. Those Certain Underwriters at Lloyd's of London*, 2005 WL 8160992, at *2 (E.D.N.Y. Mar. 16, 2005) (applying to "loss of rental income and loss of buyer"); *Hold Bros, Inc. v. Hartford Cas. Ins. Co.*, 357 F. Supp. 2d 651, 659-660 (S.D.N.Y. 2005) (exclusion only bars coverage "for certain kinds of losses" and is ambiguous); *Schneider Equip., Inc. v. Travelers Indem. Co. of Ill.*, 2005 WL 1565006, at *9 (D. Or. June 29, 2005) ("delay," "loss of market," and "loss of use" refers to "economic losses, not the type of tangible, direct damages resulting from direct physical loss").

Evanston Ins. Co., 14 A.D.3d 505, 506 (2d Dep't 2005) (illusory coverage is against public policy).[22]

VIII. MSG DOES NOT ALLEGE DUPLICATIVE CAUSES OF ACTION

Years after every New York State case cited by the Insurers, the Court of Appeals in *Bi-Economy Market, Inc. v. Harleysville Insurance Co. of New York*, 10 N.Y.3d 187, 191 (2008), held that causes of action for breach of contract and breach of the duty of good faith and fair dealing were not necessarily duplicative. *See also D.K. Prop., Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 92 N.Y.S.3d 231, 234 (1st Dep't 2019) (citing under *Bi-Economy*). MSG should be permitted to prove that the Insurers' conduct gives rise to both causes of action.

IX. CONCLUSION

For these reasons, the Insurers' motion to dismiss should be denied in its entirety. If the Court is inclined to grant the Insurers' Motion in whole or in part, MSG respectfully requests leave to amend its complaint to cure any perceived pleading defect.

[22] The Insurers' cases are distinguishable. *Visconti*, 71 Misc.3d at 516 (loss caused solely by governmental order); *Paul Glat MD, P.C. v. Nationwide Mut. Ins. Co.*, 2021 WL 1210000, at *6 (E.D. Pa. Mar. 31, 2021) (insured "did not respond to [the loss of use] argument"); *Whiskey River on Vintage, Inc. v. Ill. Cas. Co.*, 2020 WL 7258575, at *16 (S.D. Iowa Nov. 30, 2020) (insurer "alleged facts . . . sufficient to demonstrate" applicability).

Dated: New York, New York
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CERTIFICATE OF COMPLIANCE

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