UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Essentia Health, Plaintiff, v. ACE American Insurance Company Defendant.	File No. 21-cv-207 (ECT/LIB) **MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS**

I. INTRODUCTION

ACE American Insurance Company's ("ACE") motion to dismiss presents the question of whether the coronavirus is an "irritant" or "contaminant" under the definition of "pollution condition" in ACE's "Premises Pollution Liability Portfolio Insurance Policy," providing coverage for business interruption loss resulting from a "pollution condition" "on" or "at" a "covered location." The answer is yes. The plain, ordinary meaning of the policy terms "irritant" and "contaminant" include a virus under Minnesota's controlling standards of insurance policy interpretation and Minnesota cases interpreting and applying these words. Importantly, ACE's primary coverage defense—that the meaning of "pollution condition" is "confined to environmental pollution"—has been rejected by multiple Minnesota cases interpreting the same terms "irritant" and "contaminant" at issue here in the pollution-exclusion context. The Court should similarly reject ACE's coverage defense here.

Though ACE's motion should be denied based on the ordinary meaning of its policy terms and Minnesota caselaw alone, ACE's narrow reading of its Policy is further undercut

by its own prior coverage positions, regulatory representations, and other policy definitions of the same or similar terms. Contrary to ACE's arguments, the Court's consideration of these sources is proper here, particularly on a motion to dismiss, and consistent with the way in which Minnesota courts interpret similar policy language. In this early procedural setting in particular, the case should advance to discovery so that the Court will have a full record on which to consider ACE's argument that these sources beyond the Policy terms and Minnesota caselaw may not be considered by the Court.

ACE's secondary argument that Essentia does not allege "Loss" because Essentia does not allege and seek recovery of "first-party remediation costs" fares no better. The Policy specifically defines "Loss" to include "business interruption loss," which is defined, in turn, to include "1. 'Business income'; 2. Extra expense'; and 3. 'Delay Expense.'" Here, the Complaint alleges that Essentia has suffered millions of dollars in covered business interruption loss. The analysis is as simple as that—Essentia easily makes a plausible claim of covered losses under ACE's Policy—and the Court should reject ACE's invitation to read new terms into the Policy where none exist.

The Court should deny ACE's motion to dismiss and this case should proceed to discovery.

II. BACKGROUND

A. The Parties.

Essentia is a non-profit, integrated healthcare system based in Duluth, Minnesota, with facilities in Minnesota, Wisconsin, and North Dakota. (Compl., ECF No. 1 (hereinafter "Compl.") ¶ 27.) Essentia operates 14 hospitals, 70 clinics, 6 long-term care

facilities, 3 assisted living facilities, 3 independent living facilities, 5 ambulance services, and 1 research institute. (*Id.* ¶ 28.) Essentia has 13,500 employees, including more than 2,000 physicians and credentialed practitioners. (*Id.*) ACE is a Chubb insurance company with its principal place of business in Pennsylvania. (*Id.* ¶ 2; Ex. A, ECF No. 1-1, pg. 1.)

B. ACE's Insurance Policy.

ACE sold Essentia its "Premises Pollution Liability Portfolio Insurance Policy," under Policy Number PPI *****2330 003, with a policy period of April 1, 2018 to April 1, 2021. (Compl., Ex. A, ECF No. 1-1 (hereinafter the "Policy").) Essentia is the "First Named Insured" under the Policy, and the Policy provides a "Per Pollution Condition" limit of liability of $5,000,000, with a "Self-Insured Retention / Deductible Period" of $25,000 and 5 days. (Policy at 2,[1] Declarations Items 1, 3, 4.)

Under Insuring Agreement A, ACE promised to pay for loss resulting from:

> "First-party claims" arising out of: 1) a "pollution condition" on, at, under or migrating from a "covered location" . . . provided the "insured" first discovers such "pollution condition" . . . during the "policy period." Any such "first-party claim" must be reported to the Insurer, in writing, during the "policy period" or within thirty (30) days after the expiration of the "policy period."

(*Id.* at 5, § I.A.) The term "First-party claim" means "the first-party discovery of a 'pollution condition' . . . during the policy period . . . ." (*Id.* at 10 § V.V.)

Under the Policy, the term "pollution condition" is broadly defined to include:

> The discharge, dispersal, release, escape, migration, or seepage of <u>any</u> solid, liquid, gaseous or thermal <u>irritant</u>, <u>contaminant</u>,

[1] Unless otherwise specified, page number citations are to the pagination in the ECF header.

> or pollutant, including soil, silt, sedimentation, smoke, soot, vapors, fumes, acids, alkalis, chemicals, electromagnetic fields (EMFs), hazardous substances, hazardous materials, waste materials, "low-level radioactive waste," "mixed waste" and medical, red bag, infectious or pathological wastes, on, in, into, or upon land and structures thereupon, the atmosphere, surface water, or groundwater.

(*Id.* at 12-13, § V.MM (emphasis added).)

In relevant part, the Policy's definition of "Loss" includes "business interruption loss," which is defined, in turn, to include: "1. 'Business income'; 2. 'Extra expense'; and 3. 'Delay expense.'" (*Id.* at 11 & 8, §§ V.EE & V.F.) "Business income" includes, but is not limited to, "[n]et profit or loss, before income taxes . . . that would have been realized had there been no 'business interruption.'" (*Id.* at 8, § V.D.) "Business interruption" means "the necessary partial or complete suspension of the 'insured's' operations at a 'covered location' for a period of time, which is directly attributable to a 'pollution condition . . . ." (*Id.* at 8, § V.E.) Under the Policy, a "covered location" includes "[a]ny location owned, operated, managed, leased or maintained by [Essentia Health] . . . ." (*Id.* at 9, § V.K.)

C. Essentia's Business Interruption Losses Directly Attributable To The Coronavirus And COVID-19.

COVID-19 is a communicable disease caused by a virulent strain of coronavirus called SARS-CoV2 (hereinafter "the coronavirus"). (Compl. ¶ 19.) COVID-19 leads to sickness, injury, and death. (*Id.* ¶ 20.) According to the Centers for Disease Control and Prevention ("CDC"), COVID-19 often spreads from person to person, through respiratory droplets produced when an infected person coughs, sneezes, or talks, with spread being more likely when people are in close contact to one another. (*Id.* ¶ 21.) The CDC has also

issued guidance recognizing the coronavirus can be spread through aerosols, which can linger in the air for minutes to hours and travel farther than six feet—a kind of spread referred to as airborne transmission. (*Id.* ¶ 22.) Furthermore, the World Health Organization ("WHO") has confirmed that the coronavirus that causes COVID-19 can and does exist on objects and surfaces, sometimes for weeks at a time. (*Id.* ¶ 23.)

On March 11, 2020, COVID-19 was declared a pandemic by the WHO. (*Id.* ¶ 24.) Thereafter, state and local governmental authorities began to issue quarantine and suspension orders across the country requiring residents to shelter in place or remain in their homes unless performing "essential" activities ("Shut Down Orders"). (*Id.* ¶ 25.) The coronavirus has resulted in over 30 million confirmed COVID-19 cases in the United States and caused more than 550,000 deaths.[2] (*See id.* ¶ 26.)

The coronavirus and COVID-19 have caused tremendous disruption and business interruption loss at Essentia's hospitals, clinics and facilities. (*Id.* ¶ 29.) The suspension of Essentia's operations at Essentia's locations has been directly attributable to the coronavirus, COVID-19, and the Shut Down Orders issued by governmental authorities, including Minnesota Governor Tim Walz. (*Id.* ¶ 30.) These Shut Down Orders in Minnesota have included the Governor's March 19, 2020 Executive Order 20-09, which required the indefinite postponement of all non-essential or elective surgeries and procedures that utilized PPE or ventilators. (*Id.* ¶¶ 30-32; Ex. B, ECF No. 1-2.)

[2] *See* CDC Covid Data Tracker, https://covid.cdc.gov/covid-data-tracker/#datatracker-home (last visited April 14, 2021) (updated with current figures).

As a result of the coronavirus, COVID-19, and Executive Order 20-09, Essentia's Minnesota operations at all of its locations were partially or completely suspended. (Compl. ¶ 37.) This has included the postponement of elective surgical procedures, mammograms, colonoscopies, and regular physical exams and doctor visits. (*Id.*) Executive Order 20-09 was not rescinded by Executive Order 20-51, until May 5, 2020. (*Id.* ¶¶ 33-36; Ex. C, ECF No. 1-3.) For just a single month, in April 2020, Essentia suffered losses across its 15 covered care-facility locations totaling an estimated $59 million. (Compl. ¶ 38.) In that month, a total of at least 24 hospitalized patients and 5 employees tested positive for COVID-19 at Essentia's Minnesota facilities. (*Id.* ¶ 39.) From March 19, 2020 forward, coronavirus and COVID-19 have been present on or at all of Essentia's covered locations under the Policy, including the various specific locations identified in the Complaint. (*Id.* ¶¶ 40 & 38 n.4.)

Essentia has specifically confirmed the presence of COVID-19 at Essentia's Duluth, Hospital location, which is a "covered location" under the Policy. (*Id.* ¶ 41.) In addition to 865 patients at the Duluth Hospital testing positive for COVID-19 as of December 31, 2020, as of January 12, 2021, an estimated 504 Essentia employees at the Duluth Hospital also tested positive for COVID-19. (*Id.*) At Essentia's other Minnesota locations, approximately 589 patients and 429 employees tested positive for COVID-19 as of December 31, 2020 and January 12, 2021 respectively. (*Id.* ¶ 42.)

D. Essentia's Insurance Claim, ACE's Denial Of Coverage, And This Insurance-Coverage Action.

On March 31, 2020, Essentia notified ACE of its claim for insurance coverage for business interruption losses resulting from the coronavirus and COVID-19. (*Id.* ¶ 43.) ACE denied coverage on May 8, 2020. (*Id.* ¶ 44.) Essentia has disputed ACE's denial of coverage and ACE has stood by its denial, leading to this insurance-coverage lawsuit for breach of contract and declaratory judgment, in which Essentia seeks to recover its damages resulting from ACE's refusal to provide coverage to Essentia. (*Id.* ¶¶ 62-73.)

III. ARGUMENT

A. Standards Of Review On ACE's Motion To Dismiss.

1. Notice Pleading Under Rule 8 And Rule 12(b)(6).

Federal Rule of Civil Procedure 8(a)(2) states that a pleading must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." "Specific facts are not necessary; the statement need only 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Erickson v. Pardus*, 551 U.S. 89, 93, (2007) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

On a motion to dismiss under Rule 12(b)(6), the Court must construe the complaint in the light most favorable to the plaintiff, with the allegations of the complaint being accepted as true and any ambiguities concerning the sufficiency of plaintiff's claims being resolved in the plaintiff's favor. *Sensient Colors, Inc. v. Kohnstamm*, 548 F. Supp. 2d 681, 686 (D. Minn. 2008). All reasonable inferences are drawn in favor of Essentia as the nonmoving party. *Yellow Brick Rd., LLC v. Childs*, 36 F. Supp. 3d 855, 865 (D. Minn.

2014). Thus, "[a] motion to dismiss should be granted as a practical matter . . . only in the unusual case in which the plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief." *Kohnstamm*, 548 F. Supp. 2d at 686 (quoting *Frey v. City of Herculaneum*, 44 F.3d 667, 671 (8th Cir. 1995)).

2. Minnesota Rules Of Insurance Policy Interpretation.

"'[T]he Minnesota rules of insurance policy interpretation require policies to be read in favor of finding coverage.'" *Bergen v. Grinnell Mut. Reinsurance Co.*, 946 F. Supp. 2d 867, 874 (D. Minn. 2013) (quoting *Gen. Cas. Co. of Wis. v. Wozniak Travel, Inc.*, 762 N.W.2d 572, 576 (Minn. 2009)). In Minnesota, it is "well established" that words of inclusion in an insurance policy are construed broadly and words of exclusion or limitation must be construed narrowly. *Cont'l Cas. Co. v. Reed*, 306 F. Supp. 1072, 1076 (D. Minn. 1969). "This is an accepted principle of insurance law and a fact of insurance life." *Id.* (internal quotation omitted). An insurer who fails "to clearly identify coverage and exclusions . . . must bear the consequences." *Safeco Ins. Co. v. Lindberg*, 380 N.W.2d 219, 222 (Minn. Ct. App. 1986).

In determining whether insurance coverage exists, Minnesota courts apply "general principles of contract interpretation" whereby the policy is interpreted to "give effect to the parties' intent" and the policy terms are construed "according to what a reasonable person in the position of the insured would have understood the words to mean." *State Farm Fire & Cas. Co. v. ARC Mfg., Inc.*, 11 F. Supp. 3d 898, 903 (D. Minn. 2014) (internal quotations omitted). Unambiguous words in an insurance policy are given their "plain, ordinary, and popular meaning." *Wozniak Travel*, 762 N.W.2d at 575.

While unambiguous language is given its "plain and ordinary meaning," policy terms are ambiguous if they are "susceptible to two or more reasonable interpretations" and are construed in favor of coverage. *ARC Mfg.*, 11 F. Supp. 3d at 903 (quoting *Carlson v. Allstate Ins. Co.*, 749 N.W.2d 41, 45 (Minn. 2008)); *see also Brault v. Acceptance Indem. Ins. Co.*, 538 N.W.2d 144, 147 (Minn. Ct. App. 1995) ("The general rule provides that any reasonable doubt as to the meaning of the language of an insurance policy is resolved in favor of the insured."). Once an insured establishes a *prima facie* case of coverage, the burden shifts to the insurer to demonstrate that the policy excludes coverage. *See Gopher Oil Co. v. Am. Hardware Mut. Ins. Co.*, 588 N.W.2d 756, 767 (Minn. Ct. App. 1999).

B. Essentia's Complaint States A Claim Under Rule 12(b)(6).

ACE moves to dismiss Essentia's lawsuit under Rule 12(b)(6) based on two coverage defenses. First, ACE argues that Essentia does not allege a "pollution condition" under the plain language of the Policy. Second, ACE maintains that Essentia has not alleged any covered "loss" under the Policy. Both arguments fail.[3]

1. The Coronavirus Is A "Pollution Condition" As Defined In ACE's Insurance Policy.

ACE's primary argument for dismissal is that the coronavirus "does not constitute a 'pollution condition' under the Policy," because the term "pollution condition" is

[3] ACE does not dispute that the Complaint satisfies the other elements of Insuring Agreement A, alleging "discovery" of a pollution condition within the policy period and the existence of a pollution condition "on" or "at" a "covered location." (Policy at 5, § I.A.)

purportedly "confined to environmental pollution." (ACE American Insurance Company's Mem. in Support of Mot. to Dismiss, ECF No. 16 (hereinafter "ACE's Mem.") at 1.)

As set forth below, ACE's coverage defense fails because: (1) the coronavirus is an "irritant" and/or "contaminant" within the plain meaning of those terms and, thus, a "pollution condition" as defined by ACE; (2) ACE's argument that the Policy's coverage is "confined to environmental pollution" is an extra-contractual exclusionary gloss that is contrary to Minnesota law rejecting this position in the pollution-exclusion context; (3) ACE's reliance on *Seifert v. IMT Insurance Co.*, No. 20-1102 (JRT/DTS), 2020 WL 6120002 (D. Minn. Oct. 16, 2020), is misplaced; (4) ACE's reliance on the Policy's Healthcare Amendatory Endorsement lacks merit; and (5) ACE's defense is contrary to ACE's past coverage positions concerning the same policy terms such that ACE's narrow interpretation of its coverage grant should be rejected, and Essentia should have the opportunity to conduct discovery.

a. ACE's Position Ignores That The Ordinary Meaning Of "Irritant" And "Contaminant" Includes The Coronavirus.

The starting point of any coverage analysis under Minnesota law is the plain, ordinary, popular meaning of the terms of the insurance contract. *Wozniak Travel*, 762 N.W.2d at 575. ACE argues in conclusory fashion that the coronavirus cannot be an "irritant" or "contaminant" under its Policy's definition of "pollution condition."[4] (ACE's

[4] Essentia does not abandon its claim and allegations that the coronavirus comes within the additionally listed phrases used to define "pollution condition"—"pollutant" and "infectious or pathological wastes." (*See* Compl. ¶¶ 15, 51.) But for purposes of opposing

Mem. at 9.) But nowhere does ACE actually grapple with the ordinary meaning of these words that ACE chose to use to define its affirmative grant of coverage to Essentia and other policyholders. ACE's acknowledgment that its Policy's terms should be given their "plain, ordinary meaning as required by Minnesota's well-established rules of insurance policy interpretation" is mere lip service. (*Id.*) The ordinary meaning of contract terms is the best evidence of the parties' contracting intent and fully supports Essentia's coverage claim here. *BP Prod. N. Am., Inc. v. Twin Cities Stores, Inc.*, 534 F. Supp. 2d 959, 962 (D. Minn. 2007) (plain and unambiguous contract language "is deemed to be conclusive evidence of the parties' intent") (citations omitted).

In relevant part, ACE defined the key phrase "pollution condition" to include:

> The discharge, dispersal, release, escape, migration, or seepage of any solid, liquid, gaseous or thermal irritant, contaminant, or pollutant . . ., on, in, into, or upon land and structures thereupon, the atmosphere, surface water, or groundwater.

(Policy at 12-13, § V.MM.) As alleged in Essentia's Complaint, the ordinary meaning of the word "irritant" includes "anything that irritates" or "a biological, chemical, or physical agent that stimulates a characteristic function or elicits a response, especially an inflammatory response." (Compl. ¶ 49; *see* https://www.dictionary.com/browse/irritant (last accessed on April 14, 2021).) The Minnesota Court of Appeals has interpreted the word "irritant" in the same way. *Larson v. Composting Concepts, Inc.*, Nos. A07-976, A07-977, A07-979, 2008 WL 2020489, *4 (Minn. Ct. App. May 13, 2008) ("'[I]rritant' is

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ACE's motion here it is sufficient for Essentia to focus and rely on the terms "irritant" and "contaminant."

defined as 'causing irritation, especially physical irritation.' And 'irritation' is 'a condition of inflammation, soreness, or irritability of a bodily organ or part.'") (quoting dictionary definition). The Policy's use of the term "irritant" clearly contemplates something that will affect humans (or animals), as opposed to real property. *Board of Regents of Univ. of Minn. v. Royal Ins. Co. of Am.*, 517 N.W.2d 888, 892 (Minn. 1994) ("We would be doing a disservice to the English language if we were to say that asbestos fibers, *which are a health hazard because of their irritant effects on the human body*, were not an irritant.") (emphasis added); *see also Larson*, 2008 WL 2020489, at *4 (affirming on *de novo* review district court's conclusion that "living organisms, mold, bacteria, and bioaerosols" were "irritant[s]").

Here, the ordinary meaning of "irritant" includes the coronavirus within its scope, because a virus is a biological agent that elicits a harmful and sometimes deadly response, causing a condition of physical irritation and irritability of the body. The Complaint alleges that the coronavirus causes the communicable disease COVID-19, leads to sickness, injury, and death, and that it has resulted in over 10 million confirmed cases in the United States and caused hundreds of thousands of deaths. (Compl. ¶¶ 19-20, 26.) It defies common sense and, more importantly, common usage, to conclude that a virus is not within the ordinary meaning of the word "irritant." *Royal*, 517 N.W.2d at 892.

In addition, as alleged in Essentia's Complaint, the ordinary meaning of the word "contaminant" includes "something that contaminates" and "contaminate" means "to make impure or unsuitable by contact or mixture with something unclean, bad, etc." (Compl. ¶ 50.) As with the term "irritant," the Minnesota Court of Appeals has interpreted the word

"contaminant" in support of the ordinary meaning advanced by Essentia. *Larson*, 2008 WL 2020489, *4 ("The term 'contaminant' means 'one that contaminates.' In turn, 'contaminate' means 'to make impure or unclean by contact or mixture.'").

Here, the allegations in the Complaint include: (i) that the coronavirus causes the COVID-19 communicable disease, leading to sickness, injury, and death; (ii) that the coronavirus spreads through respiratory droplets produced when an infected person coughs, sneezes, or talks; (iii) that the coronavirus can be spread through airborne transmission; and (iv) that the coronavirus can and does exist on objects and surfaces, in some cases, for days after its transmission. (Compl. ¶¶ 19-23.) The coronavirus is clearly a contaminant under the ordinary meaning of that term. *See Larson*, 2008 WL 2020489, at *4 ("As [the district court] concluded, 'It is difficult to imagine a more clear-cut scenario where a substance could be classified as a contaminant.' We agree. The essence of appellant's claim is that the living organisms [including bacteria] dispersed from the composting site contaminated or irritated their bodies or homes.").

Contrary to ACE's assertion that Essentia seeks to interpret these terms "in a vacuum," the surrounding contract language that ACE chose to modify the meaning of the referenced "irritant[s]" and "contaminant[s]" is all encompassing, referring to "<u>any</u>" "irritant" or "contaminant" whether in "solid, liquid, gaseous, or thermal" form, covering every possible state in which matter is found. (Policy at 12-13, § V.MM (emphasis added).) The use of the phrase "any . . . irritant" and "any . . . contaminant," in solid, liquid, gaseous, or thermal form, is at odds with ACE's argument that its coverage only applies to certain "irritant[s]" and certain "contaminant[s]" that come within what ACE considers to be

conventional "environmental pollution."[5] It was ACE that chose to define the scope of its insurance product in this expansive way, and the Policy's affirmative grant of coverage is to be interpreted broadly, in favor of coverage under Minnesota's established rules of policy interpretation. *Bergen*, 946 F. Supp. 2d at 874; *Reed*, 306 F. Supp. at 1076.

The way the Policy's definition of "pollution condition" describes how an "irritant" or "contaminant" may manifest itself relative to the physical environment is similarly all encompassing, including its presence "on, into, or upon land and structures thereupon, the atmosphere, surface water, or groundwater," leaving no impacted property or location of the insured outside of its scope and expressly including the presence of a contaminant or irritant on, within, or upon the "structures" upon the policyholder's land and locations. (Policy at 12-13, § V.MM.) Consistent with these terms, Insuring Agreement A states that the Policy provides coverage for a "pollution condition" "on, at, under or migrating from a 'covered location.'" (Policy at 5, § I.A.) This plain language of ACE's Policy and the

[5] It is telling that ACE nowhere articulates what exactly it means by "environmental pollution" or why a harmful and deadly virus that exists on surfaces and structures, and within those structures, does not count as "environmental pollution" even under the insurer-friendly gloss ACE attempts to graft onto its contract terms. In part of its brief, ACE appears to link that term to certain environmental statutes and regulations (ACE's Mem. at 11), but it is clear that ACE's Policy does not define "pollution condition" in reference to legal definitions under environmental laws and regulations. This tact for interpreting the scope of pollution terms has been rejected in Minnesota. *Auto-Owners*, 588 N.W.2d at 779 (rejecting cases "premised on a technical rather than an ordinary reading of the exclusion ascribing to the reader a knowledge of 'terms of art' in environmental law" as inconsistent with *Royal* and Minnesota cases).

surrounding context in which the words "any . . . irritant" and "any . . . contaminant" are used underscores that the goal was to leave no gap in the promised coverage.[6]

ACE argues that the Policy's language referring to where contaminants and irritants may be found—"land and structures thereupon, the atmosphere, surface water, or ground water"—"denote the environment, not the human body." (ACE's Mem. at 11.) But this ignores that the coronavirus plainly can and does exist "on" and "within" the insured's structures (Compl. ¶¶ 19-23), and also that the Policy's coverage is defined to include a pollution condition "on" or "at" "a 'covered location,'" which includes all of Essentia's hospitals, clinics and facilities, not just the natural resources on Essentia's real property. (*See* Compl. ¶¶ 17-18, 28, 38 n.4; Policy at 9, § V.K.) ACE's argument also ignores that even the "contaminant[s]" and "irritant[s]" that ACE would concede to be within the scope of "environmental pollution" can be and often are harmful to the human body upon exposure or ingestion. For example, harmful chemicals in water or air are a major environmental problem because they can cause serious bodily injury and harm, not simply because they can damage natural resources. There is no meaningful distinction in this

[6] ACE's reliance on the use of terms like "soil, silt, sedimentation, smoke, soot" to argue that "[t]hese examples denote pollution of the environment, not viral conditions," has been rejected in a similar context (ACE's Mem. at 11). *See Larson*, 2008 WL 2020489, at *3 (recognizing that "resort to the maxims of contract construction is not available to create ambiguity" and rejecting use of *ejusdem generis* and *expressio unius est exclusion alterius* to argue that the "identif[cation] [of] several inanimate substances as pollutants" without "refer[ence] to living organisms" meant "that the pollution exclusion applie[d] only to inorganic substances" and not living organisms, finding that living organisms, including bacteria, were within the meaning of "irritant[s]" and "contaminant[s]"). ACE's argument should be rejected here as well.

respect between the coronavirus and what ACE would call traditional "environmental pollutants," and it lacks credibility for ACE to suggest that its coverage and the meaning of "pollution condition" is somehow tied solely to potential damage to the natural environment and not potential damage to the human body. *See Royal*, 517 N.W.2d at 892; *Larson*, 2008 WL 2020489, at *4.

b. ACE's Argument That The Meaning Of "Pollution Condition" Must Be Confined To "Environmental Pollution" Is Contradicted By Established Minnesota Law.

Notwithstanding the plain meaning of the words ACE chose to define coverage in its Policy, ACE's primary argument for a narrow interpretation of the term "pollution condition" is that its coverage is "confined to environmental pollution, and does not include a virus like the one causing COVID-19." (ACE's Mem. at 9.) ACE's argument cannot be reconciled with established Minnesota law.

Minnesota courts have interpreted the policy terms "irritant" and "contaminant," with the same or substantially similar surrounding policy language, in a series of cases interpreting and applying pollution exclusions commonly found in various kinds of liability insurance policies. These Minnesota cases are instructive here, because ACE's Premises Pollution Liability Portfolio insurance product, providing both first-party and liability coverage, was specifically designed and is intended to fill the gap in the insurance market created by the rise of pollution exclusions. (Compl. ¶ 54 (alleging that the use of pollution exclusions was "the genesis of ACE's 'pollution condition' coverage").)[7]

[7] *See generally Pennzoil-Quaker State Co. v. Am. Int'l Specialty Lines Ins. Co.*, 653 F. Supp. 2d 690, 703 n.3 (S.D. Tex. 2009) ("Pollution legal liability policies and

While the meaning of these terms "irritant" and "contaminant" in the pollution-exclusion context is not necessarily identical under Minnesota law because exclusions are interpreted narrowly against the insurer while affirmative coverage grants are interpreted broadly in favor of coverage and the policyholder, the ample Minnesota caselaw interpreting pollution exclusions and the same terms at issue here make clear that ACE's argument is a non-starter. *See Acuity v. Chartis Specialty Ins. Co.*, 861 N.W.2d 533, 541-42 (Wis. 2015) (recognizing that meaning of "irritant" and "contaminant" in policy providing pollution coverage may be different than the meaning of these terms in a pollution exclusion given the different rules of construction, but concluding "our interpretation of the words 'irritant' and 'contaminant' in prior cases involving pollution exclusion clauses . . . is instructive").

"Unlike the majority of jurisdictions, Minnesota courts do not interpret pollution exclusions according to environmental terms of art, which limits them to the traditional view of pollution to the environment and does not include inside contamination. Instead, Minnesota follows the plain meaning approach to interpretation." *Continental Cas. Co. v. Advance Terrazzo & Tile Co., Inc.*, No. Civ. 03-544 (MJD/JSM), 2005 WL 1923661, at *4 (D. Minn. Aug. 11, 2005) (emphasis added). This proposition, which is directly contrary to ACE's argument that its definition of "pollution condition" should be confined to traditional "environmental pollution," has been affirmed in a multitude of Minnesota cases.

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environmental insurance policies were designed to fill gaps in insurance coverage created by pollution exclusions that appear in most forms of property and liability insurance contracts.")

See Auto-Owners Ins. Co. v. Hanson, 588 N.W.2d 777, 779-80 (Minn. Ct. App. 1999) (rejecting cases from other jurisdictions "premised on a technical rather than an ordinary reading of the [pollution] exclusion, ascribing to the reader a knowledge of 'terms of art' in environmental law and thus are inconsistent with *Royal* and inapplicable to Minnesota cases"); *Larson*, 2008 WL 2020489, at *2 ("The terms of a pollution exclusion are to be construed under a plain-meaning analysis, rather than by using a technical analysis that assumes the reader has knowledge of 'terms of art' relating to environmental law."); *Am. States Ins. Co. v. Technical Surfacing, Inc.*, 50 F. Supp. 2d 888, 890 (D. Minn. 1999) (stating that Minnesota courts "construe the absolute pollution exclusion under its plain meaning" and have rejected decisions from other states limiting the meaning of the exclusion "to the traditional view of pollution as pollution to the environment, rather than inside contamination"); *Advance Terrazzo*, 2005 WL 1923661, at *4 ("Minnesota courts do not interpret pollution exclusions according to environmental terms of art, which limits them to the traditional view of pollution to the environment . . . .").

These Minnesota cases make clear that the "environmental pollution" gloss ACE attempts to graft into its affirmative grant of pollution coverage must be rejected.

c. ACE's Reliance On *Siefert v. IMT Insurance Company* Strains Credibility And Is Misplaced.

Attempting to side step this definitive caselaw (of which ACE makes no mention), ACE argues that "[a]nother division of this Court has already concluded that COVID-19 is not a pollutant," citing to *Siefert v. IMT Insurance Company*, No. 20-1102 (JRT/DTS),

2020 WL 6120002 (D. Minn. Oct. 16, 2020). (ACE's Mem. at 8.) But ACE's suggestion that *Siefert* is controlling is misguided. *Siefert* is not on point and easily distinguishable.

In *Siefert*, the court considered a putative class-action claim made by a hair salon, seeking business income insurance under a standard business owners coverage form. *Id.* at *1. In addition to business income coverage, the policy provided civil authority coverage and included a "Virus or Bacteria Exclusion" with anti-concurrent causation language. *Id.* at *2, 4. After the onset of the pandemic and Governor Walz's executive orders mandating the closure of salons and barbershops, the plaintiff was denied insurance coverage under its policy and subsequently filed suit, specifically alleging that its business income losses were the direct and proximate result of the governmental closure orders and "not because of the presence of a virus" at the plaintiff's premises. *Id.* at *3; *see Siefert v. IMT Insurance Co.*, No. 20-1102 (JRT/DTS), Compl., ECF No. 1 ¶ 24 (May 6, 2020).

On the insurers' motion to dismiss, the court evaluated whether the plaintiff had plausibly alleged the suspension of business operations "because of 'direct physical loss of or damage to property at the described premises'"—an issue not presented here. *Siefert*, 2020 WL 6120002, at *3. The *Siefert* court held the plaintiff "ha[d] not pleaded any facts demonstrating his businesses were . . . contaminated by the novel coronavirus" and had "only assert[ed] that he suffered an economic loss unrelated to an actual infiltration and contamination of the properties." *Id.* In so holding, the court specifically relied on the plaintiff's affirmative allegation that his losses were not "because of the presence of a virus" at the premises. *Id.* In addition, the court held that the policy's virus exclusion with anti-concurrent causation language extending the exclusion to "all losses where a virus is

a part of the causal chain" precluded coverage for the policyholder. *Id.* at *4. Neither of these coverage issues is implicated here, however, where ACE's Policy's affirmative coverage grant provides insurance for loss resulting from a "pollution condition" as defined in the Policy and where ACE's Policy does not include a virus exclusion.

In the portion of the *Seifert* decision ACE seizes on in its motion, the *Seifert* court addressed, in *dicta* and in a footnote, the insurer's argument that the "Pollution Exclusion" of its policy applied to preclude coverage, in addition to the policy's virus exclusion. *Id.* at *4 n.6. The court recognized that "exclusions are to be construed narrowly and strictly against the insurer" under Minnesota law and reasoned that "[a]s such, [the insurer's] attempt to place the coronavirus in the same category of pollutants as 'smoke, vapor, soot, fumes, acids, alkalis, chemicals, and waste' is unavailing." *Id*. In contrast, here, Essentia does not ask the Court to interpret any of these quoted terms, and the issue is whether the coronavirus comes within ACE's affirmative grant of coverage and definition of "pollution condition" under the Policy, pursuant to which policy terms are construed broadly and in favor of coverage, not "narrowly and strictly against the insurer" as in *Seifert*. *Id.*; *see also W. Bend Mut. Ins. Co. v. Milwaukee Mut. Ins. Co*., 372 N.W.2d 438, 441 (Minn. Ct. App. 1985) ("Coverage clauses are interpreted broadly to afford the greatest possible protection to the insured, while exclusionary clauses are interpreted narrowly against the insurer.") Accordingly, *Siefert's* analysis and express reliance on Minnesota's established standards of insurance policy interpretation actually favors Essentia here, not ACE.[8]

[8] Even if *Siefert* were on point (it is not), *Siefert* is not binding or precedential. *See Se. Stud & Components, Inc. v. Am. Eagle Design Build Studios, LLC*, 588 F.3d 963, 967 (8th Cir.

In sum, *Siefert* involved a different kind of insurance policy presenting a different coverage issue, involved a policy with a virus exclusion, analyzed different complaint allegations, and in a footnote applied Minnesota rules of policy interpretation in *dicta* to state that exclusionary terms not at issue here could not be interpreted in the insurer's favor. If anything, *Siefert* illustrates why Essentia's complaint seeking insurance under ACE's affirmative coverage grant, under a Policy without a virus exclusion, and making well-founded allegations of the infiltration and dispersion of the coronavirus at Essentia's covered locations (Compl. ¶¶ 37-42, 65), states a credible claim for coverage and survives ACE's motion to dismiss.

d. ACE's Argument Based On The Healthcare Amendatory Endorsement Lacks Merit And Improperly Attempts To Turn The Endorsement Into A Hidden Exclusion.

ACE also invokes the Policy's Healthcare Amendatory Endorsement (under which Essentia does not seek coverage) to argue that the Endorsement's specific use of the word "virus" in describing its coverage makes it a "fair inference, that omission of the word 'virus' from the definition of 'pollution condition' means that 'pollution conditions' do not include viruses." (ACE's Mem. at 9.) This argument should be rejected for several reasons.

First, in this procedural context, it is Essentia, not ACE, that gets the benefit of all "fair inference[s]." *Yellow Brick*, 36 F. Supp. 3d at 865 ("All reasonable inferences must

2009) ("[O]ne district court is not bound by the holdings of others, even those within the same district.") It is also contrary to the foregoing Minnesota precedent.

be drawn in favor of the nonmoving party."). ACE's argument is incompatible with the standard of review on this motion.

Second, ACE's position is unfounded as a matter of insurance policy construction. In relevant part, the plain language of Insuring Agreement A makes clear that the Policy covers loss resulting from "First-party claims" arising out of (1) a "pollution condition" on, at, under or migrating from a covered location "or" (2) an "indoor environmental condition" at a "covered location." (Policy at 5 § I.A (emphasis added).) The listed types of first-party claims in Insuring Agreement A are all potential sources or coverage. ACE's position is essentially that the coverage promised in subpart (2) for an "indoor environmental condition" limits and carves back the "pollution condition" coverage promised in subpart (1). But the Policy does not say that. And the specific use of the word "virus" in an added Endorsement to the Policy does not nullify the broader terms "irritant" and "contamination" used to define coverage. *Larson*, 2008 WL 2020489, at *3 (citing *Auto-Owners* and *Royal* for the proposition that the policy's failure to "specifically refer to asbestos or lead did not preclude a determination that those substances were included within the ordinary meaning of pollutants"). Nor does the Policy include any mutually-exclusive distinction between indoor and outdoor events—in fact, the definition of "pollution condition" expressly defines "pollution condition" to include "any . . . irritant" or "any . . . contaminant" "on, in, into, or upon land and structures thereupon." (Policy at 12-13 § V.MM (emphasis added).) ACE's construction of its Policy essentially attempts to turn the affirmative grant of coverage ACE promises in its Healthcare Amendatory Endorsement with respect to an "indoor environmental condition" if "first party

remediation costs" are sought into a hidden exclusion, modifying the scope of the Policy's independent "pollution condition" coverage, which is disfavored under Minnesota law. *Atwater Creamery Co. v. Western Nat'l Mut. Ins. Co.*, 366 N.W.2d 271, 276-78 (Minn. 1985) (where policy language is confusing, exclusion was within the definition section of the policy, insurer could not rely on hidden exclusion to preclude coverage). It was ACE's burden to clearly define its coverage and exclusionary terms. ACE in no manner limited virus coverage to the "first party remediation costs" coverage granted in the Healthcare Amendatory Endorsement, an endorsement that expressly references only claims for remediation costs and does not include language expanding its scope to other non-remediation types of pollution claims if involving a virus.[9] The risk of ACE's failure to do so cannot fall to Essentia.

[9] If ACE had wanted to limit virus-related contamination coverage in the Policy only to the remediation costs coverage addressed in the Healthcare Amendatory Endorsement, ACE knew how to do so. For example, Endorsement No. 011 to the Policy provides that "[n]otwithstanding anything identified in Item **4.** of the Declarations to this Policy that might be construed to the contrary, **$50,000** shall be the 'self-insured retention' for each and every 'indoor environmental condition' to which this insurance applies." (Policy at 40, Self-Insured Retention Amendatory (Indoor Environmental Conditions) Endorsement.) Although Item 4. of the Policy Declarations identifies a $25,000 "per Pollution Condition or Indoor Environmental Condition" self-insured retention, (*id.* at 2, Declarations), ACE made certain that its Endorsement primed over anything "that might be construed to the contrary." ACE could also have stated that "virus coverage provided by this endorsement supersedes any coverage with respect to 'pollutants'," the type of limiting language often found in standard virus or bacteria exclusions, which affirmatively state that "such exclusion supersedes any exclusion with respect to 'pollutants'." *LJ New Haven LLC v. Amguard Ins. Co.*, No. 3:20-cv-00751 (MPS), 2020 WL 7495622 at *6 (D. Conn. December 21, 2020). ACE, however, chose not to restrict the Policy's coverage to the virus remediation costs addressed in the Healthcare Amendatory Endorsement, an endorsement that ends with the contrary assurance that "[a]ll other terms and conditions of this Policy remain unchanged." (Policy at 30, Healthcare Amendatory Endorsement.)

Third, Essentia's interpretation of "irritant" and "contaminant," consistent with a wealth of Minnesota caselaw, does not make the Healthcare Amendatory Endorsement superfluous, as ACE argues. (ACE's Mem. at 9.) Under the terms of the Endorsement, the amended definition of "Indoor environmental condition" to include "viruses in a building or structure" applies "solely with respect to coverage for "'claims' seeking 'remediation costs'" and "first party remediation costs," which has a $2 million sublimit. (Policy at 29-30.) The scope of coverage promised for a "pollution condition," on the other hand, is more expansive and goes beyond such remediation categories of expense. Furthermore, canons of construction cannot be used to create ambiguity in the Policy and alter the ordinary meaning of the contract's plain language. *Larson*, 2008 WL 2020489, at *3 ("[R]esort to the maxims of contract construction is not available to create ambiguity."). It was ACE that unilaterally chose the terms of its insurance policy and, thus, ACE that bears the risk of ambiguity created by the conflicts within its policy language.

e. ACE's Coverage Positions, Regulatory Representations, Other Policy Definitions, And Revisions To Its Policy Language Contradict Its Position.

Based on the foregoing analysis, at best for ACE, its Policy is ambiguous as to whether a virus constitutes an "irritant" or "contaminant" under the Policy's definition of "pollution condition." The Policy's terms, construed under Minnesota law, are reasonably susceptible to Essentia's interpretation, which means the Policy must be interpreted in favor of coverage. *ARC Mfg.*, 11 F. Supp. 3d at 903; *Brault*, 538 N.W.2d at 147.

In addition, as alleged in Essentia's Complaint, a variety of sources beyond the ordinary meaning of the Policy's language (which, as discussed above, favors coverage)

contradict ACE's narrow construction of "irritant" and "contaminant" within its Policy. The Complaint alleges generally that "ACE has previously acknowledged to courts and regulators that a virus constitutes a contaminant and/or pollutant," and that "discovery is likely to reveal other evidence that the term 'pollution condition' as defined in the Policy includes viruses within its scope." (Compl. ¶¶ 52, 60.) For example:

- In a 2015 case in this District, *Rembrandt Enterprises, Inc. v. Illinois Union Insurance Company*, ACE conceded that the avian flu virus was, in fact, a "pollution condition," which was defined using the same or substantially policy terms as those used in ACE's Policy at issue here. No. 15-2913, ECF No. 210 (D. Minn.) ("Nor does it dispute that Rembrandt's farms were impacted by a 'pollution condition.'") (Compl. ¶ 53).

- In a regulatory filing submitted to the Wisconsin Office of the Commissioner of Insurance, ACE made a series of representations for the proposition that the term "contaminant" embraces "viral and bacterial contamination" and that viruses are "[d]isease-causing agents [that] may render a product impure (change its quality or substance), or enable the spread of disease by their presence on interior building surfaces or the surfaces of personal property," consistent with the ordinary meaning of "contaminant." (Compl. ¶ 55.)

- In other ACE insurance policies involving similar risks, ACE has expressly defined the term "contaminant" as including a virus. (Compl. ¶ 56.)

- ACE's advertising and promotional communications and materials related to the insurance coverage at issue here have characterized contaminants to include viruses. (Compl. ¶ 57.)

- ACE's proposed renewal of the Policy at issue in this case, seeks to add a "COMMUNICABLE, INFECTIOUS OR CONTAGIOUS DISEASES EXCLUSIONARY ENDORSEMENT," precluding coverage for loss arising out of viruses and other diseases, irrespective of the means of transmission, including "airborne transmission, bodily fluid or discharge transmission, or transmission from or to any surface, object, solid, liquid or gas, or between or among humans and other organisms." (Compl. ¶ 58.) This proposed amendment of the Policy is a clear reflection of the lack of clarity in the Policy as to ACE's position that a virus like the coronavirus is not a "pollution condition." (*Id.* ¶ 59.)

All of these public sources contradict and undermine ACE's narrow construction of the term "pollution condition" in the context of this case, and Essentia should have the opportunity to fully develop a record regarding ACE's representations and admissions, including as to the history related to ACE's drafting of the Policy.

ACE responds to these admissions by arguing that "they are wholly irrelevant" and not properly considered here. (ACE's Mem. at 13-14.) While Essentia agrees it is not necessary to go beyond the ordinary meaning of the Policy to conclude that a virus fits within the ordinary meaning of "irritant" and "contaminant" under Minnesota law, there is nothing improper about considering these admissions in light of the reasonable Policy interpretation set forth by Essentia. *See Hickman v. SAFECO Ins. Co. of Am.*, 695 N.W.2d 365, 369 (Minn. 2005) ("If there is ambiguity, extrinsic evidence may be used, and construction of the contract is a question of fact for the jury unless such evidence is conclusive."); *Am. Cas. Co. v. Bank of Mont. Sys.*, 675 F. Supp. 538, 543-44 (D. Minn. 1987) (concluding policy language was ambiguous, and to underscore ambiguity of policy, citing fact that some insurers revised policies to remove ambiguous language).[10] These

[10] This evidence is certainly relevant in the discovery context. *See Rembrandt Enterprises, Inc. v. Illinois Union Ins. Co.*, No. 15-CV-2913 (RHK/HB), 2016 WL 6997108, at *2 (D. Minn. Jan. 13, 2016) ("When a court will be tasked with interpreting an insurance policy, documents regarding similar claims of other insureds, the drafting history of a policy, and claims manuals, for example, are relevant and discoverable.") (quotations omitted); *Hoechst Celanese Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pennsylvania*, 623 A.2d 1128, 1131 (Del. Super. Ct. 1992) (pollution coverage and exclusion drafting history was relevant to "aid in the interpretation of language at issue in this policy" and "may contain admissions regarding the construction of language at issue."). ACE's responses to these materials, trying to explain away the relevance and import of the representations, go to

public record sources are relevant, on point, and properly considered by the Court, particularly at this early pleadings stage. *See Enter. Tools, Inc. v. Exp.-Imp. Bank of U.S.*, 799 F.2d 437, 439 (8th Cir. 1986) ("Ascertaining the parties' intent as expressed in the policy is the object of construction of the document" and considering "the language of the insurance policy and the extrinsic evidence bearing on the parties' intent concerning the nature and extent of coverage").

2. Essentia Alleges Covered "Loss" Under The Policy.

ACE's second, fallback argument is that even if Essentia alleges a "pollution condition" under the Policy (it does), "the Policy does not cover the particular losses alleged here." (ACE's Mem. at 17.) ACE is wrong.

To start, Essentia's Complaint clearly alleges covered "loss." Under the Policy, "business interruption loss" is one of three independent forms of covered "loss," which is defined to mean:

> 1. "First-party remediation costs" and associated "legal defense expense";
>
> 2. "Catastrophe management costs"; and
>
> 3. Solely with respect to "pollution conditions" on, at, under or migrating from, or "indoor environmental conditions" at, a "covered location", "business interruption loss."

(Policy at 11 § V.EE. (emphasis added).) This plain language makes clear that "remediation costs" are independent from "business interruption loss," which is defined to

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weight and cannot be accepted in this motion context in which the allegations of Essentia's Complaint are accepted as true, with reasonable inferences drawn in Essentia's favor.

include "Business income," "Extra expense," and "Delay expense." (Policy at 8 § V.F.) "Business income" in turn includes "[n]et profit or loss . . . that would have been realized had there been no 'business interruption'" and "business interruption" is defined in relevant part to mean "the necessary partial or complete suspension of [Essentia's] operations at a 'covered location' for a period of time, which is directly attributable to a "pollution condition" or "indoor environmental condition" to which Coverage A. of this Policy applies." (Policy at 8 §§ V.D. & V.E.)

Here, Essentia's allegations track these Policy terms, alleging that the "coronavirus and COVID-19 [have] caused tremendous disruption and business interruption loss at Essentia's various hospitals, clinics and facilities" and that the "partial or complete suspension of Essentia's operations at Essentia's covered locations under the Policy has been directly attributable to the coronavirus, COVID-19, and the Shut Down Orders issued by governmental authorities," leading to losses in excess of approximately $59 million in the month of April 2020 alone. (Compl. ¶¶ 29-30, 37-38.) It lacks credibility for ACE to argue that "Essentia alleges no 'business interruption loss'" (ACE's Mem. at 19), when Essentia expressly does just that, consistent with the terms of the Policy.

ACE nevertheless argues that "[t]here is no 'business interruption loss' without remediation" and that "'business interruption' requires remediation costs" as a coverage prerequisite.[11] (ACE's Mem. at 17-18.) This is not what the Policy says.

[11] Essentia does not seek remediation costs under the Policy – its $59 million business interruption loss in April 2020 alone dwarfs the Policy's $8 million aggregate limit.

First, there simply is no such requirement in the plain language of the Policy, as set forth above. "Remediation costs" and "business interruption loss" are separate and independent categories of covered "loss." (Policy at 11 § V.EE.) Second, ACE's argument improperly attempts to seize on the portion of the Policy's definition of "business interruption" defining the "period of time" over which the insured's operations are suspended and turn that timing provision into an affirmative coverage requirement. The Policy terms ACE relies on state that the suspension time period "shall extend from the date that operations are necessarily suspended and end when such 'pollution condition' or 'indoor environmental condition' has been remediated to the point at which the 'insured's' normal operations could reasonably be restored." (Policy at 8, § V.E.) This language regarding "remediation" clearly addresses the "end" point of the maximum possible suspension period, which is the time when the "insured's normal operations could reasonably be restored." (*Id.*) This timing Policy language—nested within the third layer of loss definitions—cannot be used to graft a new coverage requirement into the Policy's coverage grant in Insuring Agreement A, and the Court should reject ACE's approach. The Complaint amply alleges covered business interruption loss, and any issues that may arise with respect to the method for calculating the beginning and end time for Essentia's business interruption loss are for fact development and discovery, not a motion to dismiss.

IV. CONCLUSION

For all of these reasons, Essentia requests that the Court deny ACE's motion to dismiss. If the Court were to grant ACE's motion to dismiss, Essentia requests that any dismissal be without prejudice and with leave to replead in an amended complaint.

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