The State of New Hampshire

MERRIMACK COUNTY **SUPERIOR COURT**

SCHLEICHER & STEBBINS HOTELS, LLC, et al.

v.

STARR SURPLUS LINES INSURANCE COMPANIES, et al.

Docket No.: 217-2020-CV-00309

ORDER

The Plaintiffs, Schleicher and Stebbins Hotels, LLC, Renspa Place LLC, Chelsea Gateway Property LLC, OS Sudbury LLC, Monsignor Hotel LLC, SXC Alewife Hotel LLC, Lawrenceville, LLC, Second Avenue Hotel Lessee LLC, Second Avenue Hotel Owner LLC, Medford Station Hotel LLC, WDC Concord Hotel LLC, Broadway Hotel LLC, Fox Inn LLC, Melnea Hotel, LLC, Natick Hotel Lessee LLC, Superior Drive Hotel Owner LLC, Arlington Street Quincy Hotel LLC, Albany Street Hotel Lessee LLC, Albany Street Hotel LLC, Cleveland Circle Hotel Lessee LLC, Cleveland Circle Hotel Owner LLC, Worcester Trumbull Street Hotel LLC, Assembly Hotel Operator LLC, Assembly Row Hotel LLC, Parade Residence Hotel LLC, Portwalk HI LLC, Route 120 Hotel LLC, Vaughan Street Hotel LLC, and FSG Bridgewater Hotel LLC, seek declaratory judgment that they are contractually entitled to insurance coverage for losses resulting from the COVID-19 pandemic. The Defendants, Starr Surplus Lines Insurance Company ("Starr"), certain underwriters at Lloyd's of London subscribing to policy number B1263EW0040519 ("Lloyd's"), Everest Indemnity Insurance Company ("Everest"), Hallmark Specialty Insurance Company ("Hallmark"), Evanston Insurance Company ("Evanston"), AXIS Surplus Insurance Company ("AXIS"), Scottsdale

Insurance Company ("Scottsdale"), and Mitsui Sumitomo Insurance Company of America ("Mitsui"), object. The Plaintiffs now move for partial summary judgment that the terms "loss or damage" and "direct physical loss of or damage to property," as used in the parties' contract, encompass the impact of SARS-CoV-2 on the Plaintiffs' properties. They also seek to strike a number of affirmative defenses from the Answers to the Complaint. The Defendants have filed a competing motion for summary judgment. AXIS, acting in an individual capacity, filed an additional motion for summary judgment. Moreover, the Defendants move to strike as inadmissible certain exhibits attached to the Plaintiffs' supporting affidavits. The Court held a hearing on these motions with counsel for the parties on April 16, 2021. For the following reasons, the Plaintiffs' motion for partial summary judgment and to strike defenses is GRANTED, AXIS's motion for partial summary judgment is GRANTED, the remaining Defendants' motion for partial summary judgment is DENIED, and the Defendants' motions to strike are GRANTED in part and DENIED in part.

I. Standard

To prevail on a motion for summary judgment, the moving party must establish that there is "no genuine issue as to any material fact" and that it is "entitled to judgment as a matter of law." Sabato v. Fed. Nat'l Mortg. Ass'n, 172 N.H. 128, 131 (2019). In deciding the motion, the Court assesses "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits filed by the parties." RSA 491:8-a, III. However, the Court must look to the "affidavits and other evidence," and to "all inferences properly drawn from them, in the light most favorable to the nonmoving party." Clark v. N.H. Dep't of Emp't Sec., 171 N.H. 639, 650 (2019).

II. Background

The Plaintiffs own and operate twenty-three hotels, four in this State, eighteen in Massachusetts, and one in New Jersey (the "Hotels"). (Aff. Stebbins ¶ 3.)[1] For the period beginning November 1, 2019 and ending November 1, 2020 (the "Coverage Period"), the Plaintiffs purchased $600 million of insurance coverage from the Defendants. (Compl., Exs. 1–8 ("Policies").) With the exception of certain addenda, the language of the various Policies is identical. (Id.) The Policies purport to broadly extend insurance coverage, subject to enumerated exclusions, covering "direct physical loss or damage to" "all real and personal property owned, used, leased, or intended for use" by the Plaintiffs, property "for which the [Plaintiffs] may be responsible for the insurance," and "real or personal property [t]hereafter constructed, erected, installed, or acquired" by the Plaintiffs. (Policies ¶¶ 7, 28.)

As part of the Policies, the Defendants spread the risk of liability for perils insured against amongst themselves. (See Compl., Ex. 3 at 6 (the "Participation Page").) Starr, Everest, and Lloyd's respectively insured 50%, 30%, and 20% of the first $10 million dollars in risk liability. (Id.) Everest, Evanston, AXIS, and Hallmark respectively insured 30%, 25%, 25%, and 20% of the following $40 million in risk liability. (Id.) Scottsdale insured the next $50 million in liability. (Id.) Mitsui insured the following $150 million. (Id.) Two non-parties to this action, which the Plaintiffs refer to as "One Beacon/Homeland" and "RSUI," insured an additional $350 million in excess coverage. (Aff. Stebbins, Ex. A.) In exchange, the Plaintiffs have paid the Defendants approximately $1 million in premiums. (Policies; Index ## 30, 32–25 ("Answers").)

[1] The Affidavit of Mark Stebbins is attached as an unmarked exhibit to the Plaintiffs' Motion for Partial Summary Judgment Regarding "Loss or Damage" from Coronavirus, Index # 62.

On January 9, 2020, the World Health Organization ("WHO") first identified the SARS-CoV-2 virus, which is responsible for causing COVID-19. (Aff. Gilinsky in Supp. Pl.'s Mot. Partial Summ. J. ("Aff. Gilinsky"), Ex. 4.) Reports claim the first case of a "patient . . . with confirmed COVID-19" in the United States was identified in Washington State on January 22, 2020. (Id., Ex. 5 at 3.)[2] Soon thereafter, COVID-19 had become a "pandemic" impacting "more than 117 countries" and causing thousands of deaths. (Compl., Ex. 14.) All fifty states adopted public health measures to control the spread of COVID-19. (Id., Ex. 14, Ex. D at 8.) On March 9, 2020, Governor Philip Murphy declared a public health emergency and state of emergency in New Jersey. (Id., Ex. 9 at 4.) Similarly, on March 10, 2020, Governor Charlie Baker declared a state of emergency in Massachusetts. (Id., Ex. 9 at 4.) On March 13, 2020, Governor Christopher Sununu also declared a state of emergency in this State. (Id., Ex. 11 at 3.)

Pursuant to their emergency powers, New Jersey and Massachusetts issued orders restricting the operation of the Hotels. On March 21, 2020, Governor Murphy issued Executive Order No. 107, which required "[a]ll New Jersey residents [to] remain home or at their place of residence unless" engaging in a limited set of necessary activities, such as buying groceries, going to work, seeking medical attention, or "leaving the home for an educational, religious, or political reason." (Id., Ex. 21 ¶ 3.) In addition, the order required the "brick-and-mortar premises of all non-essential retail businesses" to "close to the public as long as th[e] Order remain[ed] in effect." (Id., Ex. 21 ¶ 6.) Similarly, on March 23, 2020, Governor Baker issued COVID-19 Order No. 13, which prohibited gatherings of more than 10 people "in any confined indoor or outdoor

[2] The Court cites to this report not for the truth of the quoted assertion, but to aid in establishing a chronology of events.

space," and specifically identified as prohibited, "without limitation," any "concerts, conferences, conventions, fundraisers, . . . weddings," and other events that may otherwise ordinarily take place within the Hotels. (Id., Ex. 16 ¶ 3.) The order expressly designated certain businesses as providing "COVID-19 Essential Services," and ordered all other businesses to "close their physical workplaces and facilities ('brick-and-mortar premises') to workers, customers, and the public." (Id., Ex. 16 ¶ 2.) The definition of Essential Services, however, encompassed those services provided by "[w]orkers at hotels, motels, inns, and other lodgings providing overnight accommodation, but only to the degree th[ey] . . . [worked to] accommodate the COVID-19 Essential Workforce, other workers responding to the COVID-19 public health emergency, and vulnerable populations." (Id., Ex. 18 at 28.) Authorities in New Jersey also recognized that imposing restrictions on "Hotels, Motels, [and] Guest Homes" would be inappropriate where the restrictions "impact[ed] the ability of individuals to find necessary shelter pursuant to a State program or state or local assistance, or limit the ability of healthcare workers to find temporary housing related to their work." See, e.g., N.J. Admin. Order No. 2020-9.[3]

This State issued orders similar to those issued in New Jersey and Massachusetts. On March 26, 2020, Governor Sununu issued Emergency Order No. 17, which designated certain business activity as "Essential Services" and ordered "[a]ll businesses and other organizations that do not provide Essential Services [to] close

[3] The Court takes judicial notice sua sponte of N.J. Admin. Order No. 2020-9 and N.J. Exec. Dir. No. 20-024, below, in recognition that the Plaintiffs' hotel in New Jersey was not required to remain closed to the public throughout the pandemic. N.H. R. Ev. 201(a, c) ("A court may take judicial notice," of a fact "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned," "whether [such notice is] requested or not.").

their physical workplaces and facilities to workers, customers, and the public and cease all in person operations." (Id., Ex. 13 ¶¶ 1–2.) The order further provided that, beginning "on March 27, 2020, New Hampshire citizens shall stay at home or in their place of residence" unless engaged in a limited number of enumerated activities, such as "exercise," "employment," "essential errands," and "essential medical care." (Id., Ex. 13 ¶ 4.) Initially, workers at "hotels and commercial lodging facilities" were deemed to provide essential services and permitted to provide lodging to customers who sought their services. (Id., Ex. 13, Ex. A.) By April 6, 2020, however, the Plaintiffs, as "lodging providers," were required to restrict "lodging [to] vulnerable populations and essential workers only." (Id., Ex. 15.)

When the Hotels were permitted to reopen, a number of restrictions on the Plaintiffs' business operations remained in effect. Beginning on June 5, 2020, this State permitted hotels to accept overnight reservations from in-state residents but not to provide lodging to out-of-state visitors unless those visitors completed a fourteen-day quarantine. (Id., Ex. 14, Ex. D § M.) Beginning on June 8, 2020, when Massachusetts entered what it called "Phase 2" of its "reopening" plan, the state permitted hotels to host the general public but required that "[b]allrooms, meeting rooms, function halls, and all other indoor or outdoor event facilities must remain closed." (Id., Ex. 20.) In addition, Massachusetts guidance provided that hotels were "not permitted to host weddings, business events, or other organized gatherings of any kind." (Id.) As of July 9, 2020, hotels in New Jersey had to ensure "continuous 24-hour, seven-day-a-week coverage of a Front Desk" by someone trained to "respond to a guests' inquir[ies] related to health and safety," to "ensure that every Guest Room [was] cleaned and

sanitized" pursuant to strict protocols, and to "provide their employees with anti-microbial cleaning products certified" to combat the spread of COVID-19. N.J. Exec. Dir. No. 20-024. Moreover, states and municipalities across the country issued orders requiring individuals to stay home or shelter in place and preventing them from traveling to or staying at lodging facilities like the Hotels. (See Aff. Gilinsky, Ex. 18.)

Each of the orders was issued in an attempt to control the spread of the COVID-19 virus, which primarily spreads "when an infected person is in close contact with another person." (Id., Exs. 7.) According to the United States Centers for Disease Control and Prevention (the "CDC"), "[t]ransmission of SARS-CoV-2 can occur through direct, indirect, or close contact with people through infected secretions such as saliva and respiratory secretions or their respiratory droplets, which are expelled when an infected person coughs, sneezes, talks or sings." (Id., Ex. 6.) "The epidemiology of SARS-CoV-2 indicates that most infections are spread through close contact, not airborne transmission." (Id., Ex. 9 at 2.) However, the CDC has determined that "[a]irborne transmission of SARS-CoV-2 can occur under special circumstances," such as those involving "[p]rolongued exposure to respiratory particles," "[e]nclosed spaces," or areas with "[i]nadequate ventilation or air handling." (Id., Ex. 9 at 3.) "Despite consistent evidence as to SARS-CoV-2 contamination of surfaces and the survival of the virus on certain surfaces, there are no specific reports which have directly demonstrated fomite[4] transmission." (Id., Ex. 6 at 4 (emphasis added).) Nevertheless, fomite transmission is considered, at the very least, a potential "mode of transmission," and, since the beginning of the pandemic, the CDC has consistently warned that

[4] "Fomite," as used in this exhibit, refers to any "contaminated surface[]." (Id., Ex. 6 at 4.)

"people may become infected by touching . . . contaminated surfaces." (Id., Ex. 6–7.) In view of COVID-19's potential manners of spread, the CDC recommended, at all times relevant to this action, that the general public engage in "social distancing," the "use of masks in the community, hand hygiene, [] surface cleaning and disinfection, [and the] ventilation and avoidance of crowded indoor spaces." (Id., Ex. 9 at 1, 3.)

Sometime prior to April 13, 2020, the Plaintiffs filed an insurance claim with the Defendants, requesting an advance payment for COVID-19 related losses covered under the Policies. (Aff. Stebbins, Exs. B–C, E.) In response, the Defendants had the Plaintiffs complete a questionnaire "for each location involved," repeatedly requesting examples of "direct physical loss of or damage" to property. (Id., Ex. B (emphasis in original).) After reviewing the Plaintiffs' submission, the Defendants replied with an email requesting, in part, that the Plaintiffs "elaborate regarding the following:"

> • what physical damage caused the closure or partial closure of [the Plaintiffs'] operations
> • what physical damage caused access to and from [the Plaintiffs'] hotels to be impaired or hindered
> • what physical damage triggered the order[s] o[f] civil or military authority
> • what physical damage[] prevented a supplier from supplying or a receiver from receiving goods and services

(Id., Ex. C (emphasis added).) The Plaintiffs submitted a further response to the questionnaire, following which the Defendants determined:

> It appears based on the information you have provided that your properties were not physically damaged and the loss of revenue and closures are due to the governmental orders to slow the spread of the virus, i.e. shelter in place etc.

(Id., Ex. E (emphasis added).)

On May 11, 2020, McLarens, Inc. ("McLarens"), which described itself as the insurance adjuster of at least some of the Defendants, sent a letter to the Plaintiffs

informing them that their claim was "still under investigation" and stating that the Defendants they represent "continue to reserve all rights under the [Policies]." (Id., Ex. D.)

The Policies contain a number of provisions relevant to this action. Paragraph 28, entitled "Perils Insured Against," provides the Policies insure only:

> against risks of direct physical loss of or damage to property described herein . . . [and] except as hereinafter excluded.

(Policies ¶ 28.) Despite this language, the Policies also contain two "Extensions of Time Element Coverage" provisions that provide coverage "irrespective of whether the property of the Insured shall have been damaged" (the "ETEC Provisions"). (Policies ¶ 21.) One of the ETEC Provisions (the "Civil Authority Coverage") provides:

> This policy . . . insures against . . . actual loss sustained for a period not to exceed ninety (90) consecutive days when, as a result of a peril insured against, access to real or personal property is impaired or hindered by order of civil or military authority irrespective of whether the property of the Insured shall have been damaged.

(Id. ¶ 21(d) (emphasis added).) The other ETEC Provision (the "Ingress/Egress Coverage") similarly provides:

> . . . insur[ance] against . . . actual loss sustained for a period not to exceed ninety (90) consecutive days when, as a result of a peril insured against, ingress or egress from real or personal property is thereby impaired or hindered irrespective of whether the property of the Insured shall have been damaged.

(Id. ¶ 21(e) (emphasis added).) In addition, the Policies contain a contingent business interruption clause ("CBI Coverage"), pursuant to which the Defendants:

> . . . shall cover the loss resulting from the complete or partial interruption of business conducted by the Insured including all interdependent loss of earnings between or among companies owned or operated by the Insured caused by loss, damage, or destruction by any of the perils covered herein during the term of this policy to real and personal property as covered herein . . . [I]n the event of such loss, damage or destruction [the Defendants] shall be liable for the ACTUAL

> LOSS SUSTAINED by the insured resulting directly from such interruption of business . . .

(Id. ¶ 10 (emphasis added).)

Finally, there is a list of enumerated coverage exclusions both in the text of the Policies and in addenda to each of the Policies. (Id. ¶ 29, Endorsement #1.) One of those exclusions (the "Microorganism Exclusion") provides:

> . . . [T]his policy does not insure any loss, damage, claim, cost, expense or other sum directly or indirectly arising out of or relating to:
>
> > mold, mildew, fungus, spores or other microorganism of any type, nature, or description, including but not limited to any substance whose presence poses an actual or potential threat to human health.
>
> This exclusion applies regardless whether there is (i) any physical loss or damage to insured property; (ii) any insured peril or cause, whether or not contributing concurrently or in any sequence; (iii) any loss of use, occupancy, or functionality; or (iv) any action required, including but not limited to repair, replacement, removal, cleanup, abatement, disposal, relocation, or steps taken to address medical or legal concerns.

(Id., Endorsement #1 ¶ B.) A separate exclusion, which is attached only to AXIS's policy, provides:

> As used in this endorsement . . . [p]ollutants or contaminants include, but are not limited to[,] bacteria, fungi, mold, mildew, virus or hazardous substances . . . [and] . . . [t]his policy does not cover any . . . [l]oss or damage caused by, resulting from, contributed to or made worse by actual, alleged or threatened release, discharge, escape or dispersal of pollutants or contaminants, however caused . . .

(Compl., Ex. 6, Commercial Property Exclusion Endorsement ¶ 1(A)(1–2) (the "Pollution Exclusion") (emphasis added).)

On June 16, 2020, McLarens sent a second letter to the Plaintiffs, this one on behalf of Everest and Lloyd's. (Aff. Stebbins, Ex. F.) The letter stated "[a]dditional information [was] needed as to the facts and circumstances" surrounding the claim and highlighted that the Plaintiffs did not provide sufficient "details concerning the physical

damage" the Hotels are claimed to have suffered. (Id.) Days later, on June 19, 2020, the Plaintiffs brought suit in this Court. (See Compl.)

III. Analysis

A. Motions to Strike

The Court first turns to the Defendants' motions to strike exhibits. The Defendants move to strike exhibits attached to two affidavits authored by counsel for the Plaintiffs in support of the Plaintiffs' Motion for Partial Summary Judgment: the affidavit of Marshall Gilinsky and the affidavit of Michael O'Neil. (Defs.' Mot. Strike Aff. Gilinsky ("Mot. Strike Gilinsky"); Defs.' Mot. Strike Aff. O'Neil ("Mot. Strike O'Neil").) The Defendants argue Exhibits 1–18 of Mr. Gilinsky's Affidavit and Exhibits 29–30 of Mr. O'Neil's Affidavit are not based on personal knowledge and contain inadmissible hearsay evidence. (Mot. Strike Gilinsky; Mot. Strike O'Neil.) They contend the various "news articles and articles from legal, medical, and scientific journals . . . as well as various government orders issued as a result of COVID-19" cannot constitute "independent evidence about COVID-19 and its transmission and presence in the air and on surfaces." (Mot. Strike Gilinsky ¶ 5; see Mot. Strike O'Neil ¶¶ 2–3.)

The Plaintiffs reply the motions to strike are "an attempt to have this Court ignore obvious and commonly known facts that are harmful to [the] Defendants and purge them from the record." (Pl.'s Obj. Mot. Strike Gilinsky at 1; Pl.'s Obj. Mot. Strike O'Neil at 1–2.) They argue the challenged exhibits fall under recognized hearsay exceptions, that Mr. Gilinsky and Mr. O'Neil had sufficient personal knowledge to represent to the Court that the cited authorities "are what the [affidavits] . . . say[] they are," and request for the Court to take judicial notice of the facts contained in each of the challenged

exhibits. (Pl.'s Obj. Mot. Strike Gilinsky at 3, 6–7; Pl.'s Obj. Mot. Strike O'Neil at 2–3.)

"Any party seeking summary judgment shall accompany [its] motion with an affidavit based upon personal knowledge of admissible facts as to which it appears affirmatively that the affiants will be competent to testify." RSA 491:8-a, II. "The facts stated in the accompanying affidavits shall be taken to be admitted for the purpose of the motion, unless within 30 days," the opposing party files "contradictory affidavits based on personal knowledge" or "files an affidavit showing specifically and clearly reasonable grounds for believing that contradictory evidence can be presented at a trial but cannot be furnished by affidavits." Id. Personal knowledge requires more than for the moving party or its counsel to represent that "certain third parties w[ill] testify to specific facts at trial." Proctor v. Bank of N.H., N.A., 123 N.H. 395, 401 (1983). However, counsel for the moving party has sufficient personal knowledge to file an "attorney's affidavit" where it is "clear that the attorney's affidavit refer[s]" only to the "existence, authenticity, or contents" of "specific[,] existing" written testimony, such as "depositions, and other pre-trial discovery." Id.; Lortie v. Bois, 119 N.H. 72, 75 (1979).

As a general matter, the standard for the admissibility of evidence in civil matters before this Court is relevance. N.H. R. Ev. 402. For evidence to be relevant, it must have at least some "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." State v. Plantamuro, 171 N.H. 253, 257 (2018) (citing N.H. R. Ev. 401). The Court may, however, exclude relevant evidence where "its probative value is substantially outweighed by [a] danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or

needless presentation of cumulative evidence." N.H. R. Ev. 403. Whether evidence "will be of assistance to the trier of fact and admitted is a matter within the broad discretion" of this Court. State v. Baker, 120 N.H. 773, 775 (1980).

Hearsay denotes a statement "the declarant does not make while testifying at . . . trial" which is "offer[ed] in evidence to prove the truth of the matter asserted." N.H. Evid. R. 801(c). Hearsay evidence is ordinarily inadmissible. N.H. Evid. R. 802. However, hearsay contained in "[a] record or statement of a public office," under circumstances that do not indicate a lack of trustworthiness, is nevertheless admissible where "it sets out . . . (i) the office's activities; (ii) a matter observed while under a legal duty to report . . . [or (iii)] factual findings from a legally authorized investigation." N.H. Evid. R. 803(8). Hearsay is also admissible where the statement is "contained in a treatise, periodical, or pamphlet if:"

> (A) the statement is called to the attention of an expert witness on cross-examination or relied on by the expert on direct examination; and
> (B) the publication is established as a reliable authority by the expert's admission or testimony, by another expert's testimony, or by judicial notice.

N.H. Evid. R. 803(18) (emphasis added).

As a preliminary matter, the Court notes the Defendants have filed no contradictory affidavits or exhibits, nor specifically and clearly articulated why such affidavits or exhibits cannot be furnished at this stage. RSA 491:8-a, II. In addition, none of the challenged exhibits are depositions or the result of pretrial discovery. Lortie, 119 N.H. at 75. On the contrary, the content of the challenged exhibits has not been affirmed under oath and the exhibits have been introduced for the truth of the various factual assertions they contain. However, the Court concludes, and the Defendants do not credibly dispute, that Mr. Gilinsky has established the "existence[and] authenticity"

of each cited document and, based on his personal knowledge and under oath, has provided "true and accurate" copies of each. Id.; RSA 491:8-a, II. The Court need only consider, therefore, whether the challenged exhibits' assertions of fact are admissible without expert testimony in their support.

A number of the exhibits attached to Mr. Gilinsky's affidavit are admissible. Exhibit 3 is an undisputed copy of a property policy sold by Everest filed in a separate legal action with a Federal District Court in Florida. Doc 1-2, Oxbow Hosp., Inc. v. Everest Indem. Ins. Co., No. 2:20-cv-00158 (M.D. Fla. filed Mar. 6, 2020). The exhibit is relevant to this Court's interpretation of the scope of material language in the Policies. N.H. R. Ev. 402. Moreover, no assertions of Everest quoted by the Plaintiffs from Exhibit 3 constitute hearsay, because the contents of Exhibit 3 are "offered against an opposing party . . . [and were made] by the party, in an individual or representative capacity." N.H. Evid. R. 801(d)(2). Exhibits 4, 6, 7, 9, and 15 are all statements of a public office, whether the CDC or the WHO, issued "under circumstances that do not indicate a lack of trustworthiness" concerning "factual findings from [] legally authorized investigation[s]." N.H. Evid. R. 803(8). Though the WHO is an international agency of the United Nations, the Court concludes it is a public office within the meaning of Rule 402 whose publications "show[] no sign of being unreliable." Id.; see U.S. v. Garland, 991 F.2d 328, 335 (6th Cir. 1993) (holding a foreign judgment admissible pursuant to the federal analogue to N.H. Evid. R. 803(8)). Each of these statements is relevant to the nature of SARS-CoV-2 and its manner of spread. N.H. R. Ev. 402. Finally, Exhibit 18 is a copy of a state-level executive order issued by the Governor of California. As such, it is a "record or statement of a public office" that variously sets out "the office's

activities" and contains "factual findings from a legally authorized investigation" into the state of the COVID-19 pandemic at the time the order was issued. N.H. Evid. R. 803(8). The order is relevant to the ability of prospective guests at the Hotels to engage the Plaintiffs' services. N.H. R. Ev. 402. The Court therefore considers these documents for the purposes of ruling on the pending motions.

Factual representations in the remainder of the challenged exhibits, however, constitute inadmissible hearsay. Exhibit 1 to Mr. Gilinsky's Affidavit is a scholarly article written by Christopher C. French, a professor of law at Pennsylvania State University. The Court has considered the legal authority cited by Professor French, but no factual statements contained in his article are admissible for their truth under Rule 803(18). Although the Court finds the publication a reliable authority on legal matters, the Plaintiffs do not provide or contend that they expect to provide an expert to testify on matters of fact quoted by the Professor. N.H. Evid. R. 803(8)(A). Exhibit 2 is a document issued by the National Association of Insurance Commissioners ("NAIC") which purports to present aggregate national data on the prevalence of certain coverage provisions in insurance policies. However, NAIC is not a public office and no expert testimony has been offered by either party regarding the factual matters reported in the exhibit. N.H. Evid. R. 803(8, 18). The remaining exhibits, Exhibits 5, 8, 10–13, and 16–17, are each scientific studies published in reputable scientific journals, and they constitute "reliable authorit[ies]" on matters of science. N.H. Evid. R. 803(18)(B). Yet, once more, no expert affidavit or testimony is offered by either party regarding the results of these studies. N.H. Evid. R. 803(18)(A). The role of the Court is to "say what the law is," not to engage in an armchair interpretation of scientific publications

unsupported by expert testimony. See Claremont Sch. Dist. v. Governor, 143 N.H. 154, 158 (1998); see also Appeal of Conservation Law Found., 127 N.H. 606, 616 (1986) (the courts must approach the "complex scientific issues presented [to them] . . . with some diffidence.") Finally, because they are also unsupported by expert testimony, both of the challenged exhibits to Mr. O'Neil's affidavit are inadmissible. N.H. Evid. R. 803(18)(A).

For purposes of ruling on the pending motions, the Court does not allow the introduction into evidence, for the truth of the matters there asserted, of Exhibits 1, 2, 5, 8, 10–13, and 16–17 to Mr. Gilinki's Affidavit and 29–30 to Mr. O'Neil's Affidavit. Nevertheless, the parties may seek to introduce the content of the challenged exhibits at a later stage of the proceedings for another purpose, provided that purpose is relevant to the case.

B. Motions for Summary Judgment

The Court next turns to the parties' competing motions for summary judgment. A declaratory judgment provides a means "to question the validity" or application of a law, rule, or regulation. Avery v. N.H. Dep't of Educ., 162 N.H. 604, 607 (2011). To prevail on a motion for declaratory judgment, a petitioner is not required to show "proof of a wrong committed by one party against the other." Id. Rather, the "distinguishing characteristic" of declaratory judgment is that it "can be brought before an actual invasion of rights has occurred." Carlson, Tr. v. Latvian Lutheran Exile Church of Boston and Vicinity Patrons, 170 N.H. 299, 303 (2017) (citing Portsmouth Hosp. v. Indemnity Ins. Co., 109 N.H. 53, 55 (1968)) (emphasis added); cf. 26 C.S.J. § 30 (declaratory judgment may be sought as "a prophylactic measure before a breach [of

duty] occurs.") The Court will not, however, award declaratory judgment where a petitioner has a "purely subjective or speculative fear of future harm." Carlson, 170 N.H. at 304 (citing Prasco, LLC v. Medicis Pharm. Corp., 537 F.3d 1329, 1339–42 (Fed. Cir. 2008)). A petitioner must assert a right "inherently adverse" to the respondent's and show that the respondent is "likely to overburden or otherwise interfere with [the petitioner]'s right." Id. at 303 (emphasis added). Ultimately, "standing requires parties to have personal legal or equitable rights that are adverse to one another, with regard to an actual, not hypothetical, dispute, which is capable of judicial redress." Censabella v. Hillsborough County Atty., 171 N.H. 424, 427 (2018).

"A valid, enforceable contract requires offer, acceptance, consideration, and a meeting of the minds." Poland v. Twomey, 156 N.H. 412, 414 (2007). For a meeting of the minds to occur, the parties must have "the same understanding of the essential terms of the contract and manifest an intention to be bound by the contract." Id. A "[m]ere mental assent is not sufficient; a 'meeting of the minds' requires that the agreement be manifest." Durgin v. Pillsbury Lake Water Dist., 153 N.H. 818, 821 (2006) (citing Tsiatsios v. Tsiatsios, 140 N.H. 173, 178 (1995)). Absent ambiguity, "intent will be determined from the plain meaning of the language used in the contract." In re Liquidation of the Home Ins. Co., 166 N.H. 84, 88 (2014). Where, however, "the parties to the contract could reasonably disagree as to the meaning of that language," the language is deemed ambiguous, and the Court must determine, "under an objective standard, what the parties, as reasonable people, mutually understood the ambiguous language to mean." Found. for Seacoast Health v. Hosp. Corp. of Am., 165 N.H. 168, 172 (2013). The Court's objective analysis examines "the contract as a whole, the

circumstances surrounding execution and the object intended by the agreement, while keeping in mind the goal of giving effect to the intentions of the parties." See id.

Here, the Plaintiffs have the requisite standing to seek the declaratory relief requested in their motion for partial summary judgment. Whether "loss or damage" and "direct physical loss of or damage to property" are necessary for the Plaintiffs to recover under the Policies, and whether such loss or damage in fact occurred, are material to whether the Plaintiffs have a legal right to insurance coverage from the Defendants. Censabella, 171 N.H. at 427. The Plaintiffs' asserted right to coverage is "inherently adverse" to the Defendants' interest in their financial assets and regards an "actual, not hypothetical, dispute," as the Defendants claim the Policies do not entitle the Plaintiffs to any coverage at all. Id.; Carlson, 170 N.H. at 304. Finally, the issue raised by the Plaintiffs' motion for partial summary judgment concerns a pure question of law capable of judicial redress. Claremont, 143 N.H. at 158 (It is the duty of the judiciary "to interpret the constitution and say what the law is."); Duncan v. State, 166 N.H. 630, 643 (2014). The Court, therefore, proceeds to consider the merits of the parties' cross motions for summary judgment.

1. AXIS's Motion for Partial Summary Judgment

AXIS argues it is undisputed that SARS-CoV-2 is a "virus," and that any claim attributed to a virus is expressly excluded from coverage under the Pollution Exclusion. It cites to language from the Plaintiffs' Complaint explicitly stating the Plaintiffs seek coverage "in connection with losses stemming from" SARS-CoV-2. (AXIS's Mot. Partial Summ. J. at 3–6; Compl. ¶ 118.) The Plaintiffs reply (1) that pursuant to the Pollution Exclusion, the pollutant or contaminant giving rise to an excluded claim must "escape"

or be "release[d], discharge[d] . . . or disperse[d]," (2) that each of those verbs is a "term[] of art in environmental law pertaining to the improper disposal or containment of hazardous waste," and (3) that it is therefore ambiguous whether a respiratory virus like SARS-CoV-2, which is unrelated to hazardous waste disposal or containment, is covered by the Pollution Exclusion. (Pls.' Obj. Def. AXIS's Mot. Partial Summ. J.)

The Court finds the language of the Pollution Exclusion unambiguously excludes coverage for loss or damage caused or aggravated by the spread of SARS-CoV-2. The Plaintiffs seek coverage for losses resulting from the ongoing COVID-19 pandemic's various "impact[s]" to their properties. Pursuant to the "plain text" of the Pollution Exclusion, however, AXIS's policy "does not cover any . . . [l]oss or damage caused by, resulting from, contributed to, or made worse by" the "release, discharge, escape or dispersal of" a "virus." Pembroke v. Allenstown, 171 N.H. 65, 71 (2018). The Court is unconvinced by the Plaintiffs' arguments that SARS-CoV-2 is not, at the very least, "dispers[ed]" when an infected individual "coughs, sneezes, talks[,] [] sings," or engages in any of the behavior the CDC warns contributes to the spread of the virus. (See Aff. Gilinsky, Ex. 6.); see Webster's Third New International Dictionary 653 (unabridged ed. 2002) (emphasis added) (defining "to disperse" as "to cause to become spread widely."). Because COVID-19 is caused by infection with the SARS-CoV-2 virus, and "[b]ecause the plain text of" the Pollution Exclusion expressly excludes coverage of loss or damage resulting from the dispersal of a virus, AXIS is not liable under its policy for any loss or damage resulting from the spread of COVID-19. Allenstown, 171 N.H. at 71–72 (The Court cannot "change the words of a written contract" "merely because [its provisions] might operate harshly."). The Court accordingly GRANTS AXIS's motion for

partial summary judgment on the basis that AXIS's Pollution Exclusion textually bars coverage of the Plaintiffs' asserted claim.

2. Remaining Motions for Partial Summary Judgment

The Plaintiffs' motion for partial summary judgment seeks a declaratory ruling that: "Any requirement under the Policies of 'loss or damage' or 'direct physical loss of or damage to property' is met where property is impacted by the coronavirus." (Pl.'s Mot. Partial Summ. J. at 2.) In addition, the Plaintiffs move for summary judgment on their motion to strike the following affirmative defenses: (1) Mitsui's second affirmative defense, (2) Starr and Lloyd's joint second affirmative defense, (3) Everest's third, sixth, ninth, and tenth affirmative defenses, and (4) Scottsdale's fourth affirmative defense. Each of the challenged defenses concerns the Plaintiffs' alleged failure to sufficiently establish "loss or damage" to property. (See Mitsui's Answer to Compl. at 27; Starr's and Lloyd's Answer to Compl. and Demand Tr. Jury at 32; Everest's Answer to Compl. at. 24–26; and Scottsdale's Answer and Demand Tr. Jury at 17.)

In support of their requests, the Plaintiffs argue the Policies' references to "loss or damage" or "direct physical loss of or damage to property" are ambiguous, so they must be construed in favor of the insured. (Pl.'s Mot. Partial Summ. J. at 11–12.) Moreover, they contend the New Hampshire Supreme Court has interpreted "physical loss" not to require structural damage but only a showing of a "distinct and demonstrable alteration of the insured property," and add that property contaminated with SARS-CoV-2 is both "distinct" from unaffected property and "demonstrabl[y]" so. (Id. at 12–15 (citing Mellin v. N. Sec. Ins. Co., Inc., 167 N.H. 544, 550 (2015)).)

The Defendants reply that impacts to the Hotels' operations from COVID-19 do

not trigger any provision of the policy without a showing of direct physical loss of or damage to property. (Defs.' Cross-Mot. Partial Summ. J., at 10–11, 21–31.) They agree the standard applicable for determining the existence of "direct physical loss" under a property policy is that articulated in Mellin, 167 N.H. at 550, but argue that a "distinct and demonstrable alteration" must be readily perceptible by one of the five senses, must not be capable of remediation, and must result "in some dispossession." (Id. at 11–16.) They argue COVID-19 cannot be said to effect a distinct and demonstrable alteration because it cannot be perceived without sophisticated equipment, may be eliminated with proper sanitation measures, and does not by itself require the Hotels to "close properties." (Id.) Finally, the Defendants argue the Microorganism Exclusion "applies to COVID-19 because viruses are commonly understood to be 'microorganisms.'" (Defs.' Cross-Mot. Partial Summ. J., at 31–37.)

The Court rejects the arguments of the Defendants that "distinct and demonstrable" changes to property must be readily perceptible by one of the five senses, be incapable of remediation, or result in dispossession. In Mellin, the New Hampshire Supreme Court held that "physical loss," when used in an insurance agreement, includes "not only tangible changes to [an] insured property, but also changes . . . that exist in the absence of structural damage," provided only that such changes be both "distinct and demonstrable." 167 N.H. at 550. The Mellin appellants argued they "'experienced a direct physical loss' caused by 'toxic odors originating outside of [their insured property].'" 167 N.H. at 550. Areas in the vicinity of the insured property could theoretically have been cleaned such that the smell was no longer present, and a tenant could theoretically have learned to live with the smell. Yet, the

New Hampshire Supreme Court did not uphold the trial court's ruling that no physical loss occurred. That SARS-CoV-2 may, like cat urine, be removed from surfaces through cleaning and disinfection, and that certain guests might decide to stay at the Plaintiffs' Hotels despite the risks involved, does not prevent a conclusion that the properties have been changed in a "distinct and demonstrable" fashion. Like the cat urine in Mellin, SARS-CoV-2 did not originate in the Plaintiffs' properties and cannot be seen or touched. Although cat urine may be smelled while a virus may not, the presence of SARS-CoV-2 is detectable, was found by various government authorities to be widespread in the regions in which the Hotels were located, and has been "consistent[ly]" determined to "surviv[e] . . . on certain surfaces" of the kind available within and around the Hotels. (Aff. Gilinsky. Ex. 6 at 4.)

The Court concludes the Policies' use of the terms "loss or damage" and "direct physical loss of or damage to property" encompasses the kind of damage caused by the spread of SARS-CoV-2 to the Plaintiffs' properties. First, property contaminated with SARS-CoV-2 is "distinct" from uncontaminated property. Coming into contact with property exposed to the virus results in a risk of contracting a potentially deadly disease. During the April 16, 2021 hearing, counsel for the Defendants argued:

> If someone with COVID[-19] sneezes on my doorknob, I can walk over and open that door—the doorknob turns.

(Hr'g at 11:21:53–22:02 (emphasis added).) Yet, in the event an infected guest at one of the Hotels were to infect a doorknob, that the doorknob turns in no way lessens the now very different risk that it poses to human health. Moreover, whether the Plaintiffs' property is or has been infected is clearly "demonstrable" through a series of means, including laboratory testing. The Policies' references to "direct physical loss of or

damage to property" in Paragraph 28, therefore, do not prevent classification of loss resulting from SARS-CoV-2 contamination as a "peril insured against." (Policies ¶ 28.) Nor do the use of the words "loss" and "damage" in the CBI Coverage prevent recovery for any actual loss sustained due to the presence of SARS-CoV-2. Finally, because both ETEC Provisions expressly provide coverage for an actual "loss" sustained "irrespective of whether the property of the insured shall have been damaged," proof of physical damage to the Hotels, including of the kind that results from the presence of SARS-CoV-2 on hotel surfaces, is not required for recovery under either provision.

The Defendants' invocation of the Microorganism Exclusion does not change the Court's analysis. The Microorganism Exclusion is not applicable to SARS-CoV-2, because a virus is not unambiguously understood to be a "microorganism." On the contrary, the parties' briefing on the issue reveals a divergence of opinion[5] that "reasonably may be interpreted more than one way." High Country Assocs. v. New Hampshire Ins. Co., 139 N.H. 39, 42 (1994). The Court is consequently required to construe the exclusion in favor of the Plaintiffs, "and against the insurer[s]," and conclude the Microorganism Exclusion does not bar coverage of loss occasioned by a virus. Id.

Accordingly, the Court GRANTS the Plaintiffs' and DENIES the Defendants' motion for partial summary judgment. The Court is satisfied that any requirement under

[5] See, e.g., (Sigur Aff. Ex. 10 (defining microorganism as ""[a] microscopic organism, especially a bacterium, virus, or fungus."); Sigur Aff. Ex. 11 (describing "[t]he major groups of microorganisms, [to include] bacteria, uchaea, fungi (yeasts and molds), algae, protozoa, and viruses.")); but see (O'Neil Aff. Ex. 40 at 14 (Educational dictionary defining "microorganism" as "a living thing (as a bacterium) that can only be seen with a microscope)); Merriam-Webster Dictionary (Online), Usage Notes (2021) ("Viruses are not living organisms, bacteria are.") (available at https://www.merriam-webster.com/words-at-play/virus-vs-bacteria-difference); (O'Neil Aff. Ex. 40 at 11 (Children's textbook asserting, "The opinions of scientists differ as to whether viruses are alive or not.").

the Policies of "loss or damage" or "direct physical loss of or damage to property" is met where property is contaminated by SARS-CoV-2. Accordingly, each of the challenged defenses is STRICKEN.

IV. Conclusion

For the foregoing reasons, the Defendants' motions to strike are GRANTED in part and DENIED in part, AXIS's motion for partial summary judgment is GRANTED, the remaining Defendants' motion for summary judgment is DENIED, and the Plaintiffs' motion for partial summary judgment and to strike defenses is GRANTED.

SO ORDERED.

6/15/21
Date

John C. Kissinger, Jr.
Presiding Justice

Clerk's Notice of Decision
Document Sent to Parties
on 06/15/2021