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January 5, 2021

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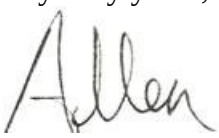
Re: Cajun Conti LLC, et al. v. Certain Underwriters at Lloyd's, London
CDC, Parish of Orleans No. 2020-2558, Div. "M-13"

Counsel:

We enclose Certain Underwriters at Lloyd's, London's Post-Trial Memorandum, with Incorporated Proposed Findings of Fact and Conclusions of Law, which we have filed today with the Court.

Very truly yours,



Allen C. Miller

ACM/pmc

Enclosure

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CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NUMBER 2020-02558 **SECTION "M-13"**

CAJUN CONTI LLC, CAJUN CUISINE 1 LLC, and CAJUN CUISINE LLC d/b/a OCEANA GRILL

VERSUS

CERTAIN UNDERWRITERS AT LLOYD'S, LONDON

FILED: _____ _____

DEPUTY CLERK

DEFENDANTS' POST-TRIAL MEMORANDUM, WITH INCORPORATED PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Defendants, Certain Underwriters at Lloyd's, London Subscribing to Policy No. AVS011221002 ("Underwriters"), respectfully submit the following Post-Trial Memorandum, With Incorporated Proposed Findings of Fact and Conclusions of Law in the above-captioned matter tried to this Honorable Court December 14, 2020 through December 16, 2020. Underwriters respectfully submit that Cajun Conti, LLC, Cajun Cuisine 1 LLC, and Cajun Cuisine LLC d/b/a Oceana Grill (collectively "Oceana") has wholly failed to sustain its burden of proof regarding the claims asserted herein. As such, a verdict in favor of Underwriters is warranted as a matter of law.

I. PRELIMINARY STATEMENT

It is impossible to overstate the impact the COVID-19 pandemic (the "Pandemic") has had on society. By the end of 2020, the Pandemic claimed the lives of nearly 350,000 Americans, to say nothing of those who fought and survived the disease's suffocating symptoms. Given the scale of human suffering the virus has inflicted, the Pandemic has affected virtually every facet of life. This disease has encroached on births, weddings, funerals, worship, and gatherings with loved ones. Of course, because of its breadth, the reach of the Pandemic extends beyond immediate concerns of health and family life.

The instability of the COVID-19 era has generated thousands of legal disputes, including this one. Despite months of litigation and creative lawyering, it is important to focus on the fundamental nature of the contractual relationship between Underwriters and Oceana. The parties entered into a property insurance contract. The contract includes coverage for the effect that the

loss of or damage to property might have on Oceana's business income and expenses. The contract is not a bond Underwriters sold to guarantee Oceana's income from any and every possible cause, including that of disease and the government's efforts to curb COVID-19. The Policy simply was not intended for this purpose.

SARS-CoV-2, the virus that can lead to the disease COVID-19, has not caused "direct physical loss of or damage to" Oceana's property. This discrete question is resolved by bedrock principles of Louisiana contract law. The interpretation of a contract is the determination of the common intent of the parties.[1] Words in a contract must be given their generally prevailing meaning.[2] Provisions in a contract must be interpreted in light of one another so that each is given the meaning suggested by the contract as a whole.[3] When the words of a contract are clear, explicit, and lead to no absurd consequences, no further interpretation or additional evidence may be employed in search of the parties' supposed intent.[4]

Despite sparring over definitions and unsupported claims concerning the virus' interaction with microscopic surfaces, Oceana failed to offer any supportable evidence that the virus physically damages inanimate objects as the words "physical damage" are commonly understood. Thus, all that remains is whether the virus caused "direct physical loss of" Oceana's property. Oceana did not physically lose a single piece of insured property as a result of the Pandemic. Stated differently, Mayor Cantrell's and Governor Edwards' restrictions on indoor dining to slow the spread of COVID-19, did not directly or physically cause loss a of a single piece of insured property. The inquiry in this case need not go any further.

Oceana has endeavored to strain the plain meaning of "direct physical loss of" property with several theories, each more tenuous than the last. First, Oceana relies on a line of homeowners insurance cases that found that a "physical loss" may arise when property is rendered "useless and/or uninhabitable."[5] Distinctions between residential and commercial property policies aside, Oceana's representatives confirmed that Oceana has continued to use the

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[1] *See* La. Civ. Code art. 2045.
[2] *See* La. Civ. Code art. 2047.
[3] *See* La. Civ. Code art. 2050.
[4] *See* La. Civ. Code art. 2046.
[5] *In re Chinese Manufactured Drywall Prod. Liab. Litig.*, 759 F. Supp. 2d 822, 832 (E.D. La. 2010).

property at all times. As Dr. Allison Stock confirmed, this use can continue safety as long as Oceana continues to adhere to city, state and CDC guidelines.

Oceana next contends that it has suffered a "loss" in the form of empty tables in an effort to comply with government orders. Ignoring that the tables physically remain inside the restaurant, this theory of loss depends on a misapplication of Louisiana law as applied to the policy. Specifically, the policy contains a provision for government orders that, among other things, prohibit access to the restaurant. At trial, Oceana stated that it was dismissing its claims under the "Civil Authority" policy provision to avoid "double-dipping." Notwithstanding, this theory of "loss" fails as a matter of law.

"Each provision in a contract must be interpreted in light of the other provisions so that each is given the meaning suggested by the contract as a whole."[6] The Court should "interpret contract provisions so as to avoid neutralizing or ignoring any of them or treating them as surplusage."[7] By urging the Court to treat the government orders as a form of "physical loss," Oceana has negated the need for civil authority coverage at all.[8] Further, Oceana seeks to double-dip the loss of use to meet two necessary components to trigger loss of income coverage: 1) direct physical loss of or damage to property and 2) a necessary suspension of Oceana's operations. While the loss of use may be a suspension, it cannot also be the "direct physical loss of or damage to property" that causes the suspension. The harsh reality is that Oceana, like so many restaurants, bars, gyms and other businesses, restricted operations because the government required them to do so to curb the spread of COVID-19. Thus, even if covered, the government acts exclusion in the policy applies to prohibit coverage related to the pandemic.

Finally, Oceana spent considerable time at trial urging the Court to consider statements made by the Insurance Services Office (a non-party) to the State of Louisiana (a non-party), as well as an exclusion found in other policies concerning viruses. It is axiomatic that a contract

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[6] La. Civ. Code art. 2050.

[7] *Clovelly Oil Co., LLC v. Midstates Petroleum Co., LLC*, 2012-2055 (La. 03/19/13), 112 So. 3d 187, 195 (footnotes, quotations omitted, and italics original).

[8] In other words, if a government order limiting access to the business could suffice to establish the "direct loss" needed for business income coverage, there would be no need to have a separate section of the policy addressing government orders limiting access to the business. However, that is exactly what the civil authority overage addresses. This defect raises another flaw in Oceana's theory: Civil authority coverage responds to a more specific scenario (prohibition of access because of government order) than does the general business income and extra expense coverage. Under Louisiana law, general provisions in a contract must yield to specific provisions in a contract. *Corbello v. Iowa Prod.*, 2002-0826 (La. 02/25/03), 850 So. 2d 686, 704 (It is "well settled law that in the interpretation of statutes and contracts, the specific controls the general.") (quotation omitted).

must be construed by the language within its four corners absent ambiguity. La. Civ. Code art. 2046. Louisiana courts have rejected arguments to rely upon other documents in other insurance policies simply because the other policy's coverage was allegedly more "clearly delineated[.]"[9] Simply, other insurers' use of a virus exclusion is irrelevant to whether Oceana suffered a "direct physical loss of" insured property.[10]

Underwriters analyze these issues in more detail below. Underwriters also offer proposed findings of fact and conclusions of law for the Court's consideration. The exigencies of the virus do not authorize Oceana to rewrite its contractual relationship with Underwriters. Thus, Underwriters respectfully request that the Court give plain meaning to the words of their contract with Oceana and to rule that Oceana's claims fail as a matter of law.

II. PROPOSED FINDINGS OF FACT

Underwriters submit the following proposed findings of fact based on the summary of evidence set forth more fully in Section IV below.

The Pandemic

1. On March 3, 2020, Governor John Bel Edwards declared a state of emergency for the state of Louisiana because "a threat of public health emergency is imminen." (D3).
2. At the time the state of emergency was declared in the state of Louisiana, the U.S. Centers for Disease Control and Prevention ("CDC") had been responding to an outbreak of respiratory disease caused by a novel coronavirus that was first detected in China and which has now been detected in many other countries, including the United States. The virus is identified as SARS-CoV-2 and the disease it causes, "COVID-19." (D3).
3. On March 11, 2020, the World Health Organization ("WHO") designated these events as a worldwide pandemic (the "Pandemic"). (D3).
4. At the time of trial, approximately 244,078 Louisiana citizens had contracted COVID-19, and 6,524 had died of the disease. (P39).[11]

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[9] *La. Ins. Guar. Ass'n v. Interstate Fire & Cas. Co.*, 630 So. 2d 759, 766 (La. 1994).

[10] Even if the Court considered Oceana's proffered parol evidence, the "circular" allegedly forwarded to the State of Louisiana states that such coverage would be "contrary to policy intent." (P35, p. 6).

[11] Plaintiffs' P39 does not identify the date of the case and death count.

5. The first presumptive positive COVID-19 patient in Louisiana was identified in Mayor Cantrell's March 11, 2020 Proclamation (D3).

6. On March 11, 2020, Mayor Cantrell issued a "Mayoral Proclamation of a State of Emergency Due to COVID-19" due to the "direct and definite public health and safety threats of COVID-19" that "are now imminent and emergency action must be taken to prevent death or injury of persons and to preserve the lives and property of the people of the City of New Orleans." (D16).

7. On March 15, 2020, Mayor Cantrell's Executive Counsel, Clifton "Cliff" Davis, III, received a text message from Roderick "Rico" Alvendia ("Mr. Alvendia"). (D19).

8. The March 15, 2020 text message included language Mr. Alvendia sought to have included in the Mayor's March 16, 2020 proclamation. (D19).

9. The language Mr. Alvendia requested suggested that SARS-CoV-2 and COVID-19 cause "property loss and damages." (D19).

10. On March 16, 2020, Mayor Cantrell issued a "Mayoral Proclamation to Promulgate Emergency Orders During the State of Emergency Due to COVID-19," which imposed restrictions on the operation of restaurants in New Orleans, such as Oceana, beginning effective March 17, 2020 at 6 a.m. (D5).

11. The Mayor's March 16, 2020 order contains the first reference to SARS-CoV-2 causing "property loss and damage in certain circumstances." (D5).

12. At no time prior to and including the date of the March 16, 2020 proclamation was Mr. Davis in possession of any scientific data to suggest that SARS-CoV-2 and COVID-19 attached to property and caused "property loss and damage" in the City of New Orleans.

13. The phrase "property loss and damage" would not have been included in the Mayor's March 16, 2020 proclamation without the request of Mr. Alvendia. It was Mr. Davis' understanding that Mr. Alvendia sought to obtain the language to allow business owners to make business interruption claims under their existing insurance policies.

14. The language ultimately included by the Mayor in her March 16, 2020 order closely tracks the language proposed by Mr. Alvendia on March 15, 2020.

15. The orders issued by the city of New Orleans and the state of Louisiana were issued to preserve human life, not to protect property.

16. Beginning at 6 a.m. on March 17, 2020, restaurants in New Orleans were limited to take-out and delivery services. (D5).

The Policy

17. Oceana operates the Oceana Grill Restaurant ("Oceana Grill") located at 739 Conti Street in the New Orleans French Quarter.

18. Oceana is insured under Commercial Property Insurance Policy No. AVS011221002 issued for the period June 30, 2019 to June 30, 2020 ("the Policy"),[12] which provides the following limits of coverage for property located at 729, 735, 737, and 739 Conti Street, New Orleans, Louisiana 70130 (hereinafter "739 Conti Street"): $5,725,000 for Real Property, $300,000 for Business Personal Property and $800,000 for Business Income with Rental Value. (D1, p. 111).

19. The Policy provides that the Insurers "will pay for direct physical loss of or damage to Covered Property at the premises described in the Declarations caused by or resulting from any Covered Cause of Loss". (D1, p. 33, CP 00 10 10 12, p. 1 of 16).

20. The Policy provides that the Insurers "will … [p]ay the value of the lost or damaged property … [or] [p]ay the cost of repairing or replacing the lost or damaged property". (D1, p. 43, CP 00 10 10 12, p. 11 of 16).

21. The Policy, in the BUSINESS INCOME (AND EXTRA EXPENSE) COVERAGE FORM, provides:

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

(D1, p. 49, CP 00 30 10 12, p. 1 of 9).

22. "Suspension" means the "partial or complete cessation of your business activities". (D1, p. 57, CP 00 30 10 12, p. 9 of 9).

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[12] The Policy was admitted into evidence by agreement as D1 and P23.

23. "Operations" means the type of your business activities occurring at the described premises and tenantability of the described premises". (D1, p. 57, CP 00 30 10 12, p. 9 of 9).

24. The "period of restoration" means the "period of time that: [b]egins 72 hours after the time of direct physical loss or damage caused by or resulting from any Covered Cause of Loss at the described premises; and [e]nds on the earlier of: (1) The date when the property at the described premises should be repaired, rebuilt or replaced with reasonable speed and similar quality; or (2) The date when business is resumed at a new permanent location." (D1, p. 57, CP 00 30 10 12, p. 9 of 9).

25. A "Covered Cause of Loss" means "risks of direct physical loss" unless excluded or limited under the Policy. (D1, p. 58, CP 10 30 09 17, p. 1 of 10).

26. The Policy excludes from coverage, "loss or damage resulting from … [d]elay, loss of use or loss of market". (D1, p. 60, CP 10 30 09 17, p. 3 of 10).

27. The Policy excludes from coverage, "loss or damage caused by or resulting from … [a]cts or decisions … of any governmental body". (D1, p. 61, CP 10 30 09 17, p. 4 of 10).

28. The Policy is subscribed to by Certain Underwriters at Lloyd's, London, Indian Harbor Insurance Company, and HDI Global SE (collectively "Insurers"). (D1, p. 30).

29. The Certain Underwriters at Lloyd's, London that subscribe to the Policy form a limited number (10 to 15) of the total number of participants in the Lloyd's of London insurance marketplace (90-110). (D1, p. 30).

30. The Insurers are surplus lines insurers and, as such, are not required to submit forms for approval to any Department of Insurance.

31. Surplus lines insurance is insurance for risks with higher risk potential that is less regulated than that provided by "admitted" insurers.

[PARAGRAPHS 32-41: FOR CONSIDERATION ONLY IF THE COURT ELECTS TO CONSIDER PAROL EVIDENCE]

32. The Policy was issued to Oceana by Avondale Insurance Associates, Inc. ("Avondale") on behalf of the Insurers, subject to pre-negotiated terms, including forms that comprise the "base policy", CP 00 10 10 12, CP 10 30 09 17, and CP 00 30 10 12.[13]

33. The Policy is comprised of a combination of forms Avondale obtained via subscription from Insurance Services Offices, Inc. ("ISO") and forms obtained from other sources.

34. The forms in the Policy that Avondale selected and obtained from ISO contain the prefix "CP". All other forms are obtained from other sources. (D1, pp. 16-17).

35. Prior to the issuance of the Policy, Oceana had the opportunity to review—and did review—the policy forms Avondale proposed on behalf of the Insurers.

36. Oceana could have rejected the coverage Avondale proposed on behalf of the Insurers.

37. Avondale did not rely on ISO to determine what forms to include or what forms to exclude on any policy Avondale issued, including the Policy issued to Oceana.

38. ISO did not author the Policy Avondale issued on behalf of the Insurers to Oceana.

39. Avondale lets the plain words of the Policy determine their meaning.

40. Avondale never thought the risk of virus to be covered under the Policy.

41. ISO did not intend for the risk of virus or pandemic to have been covered under policies issued with its forms when it stated that claims for such events were "contrary to policy intent." (P35, p. 6).[14]

Oceana's Claim

42. Oceana filed suit on March 16, 2020 without first submitting a claim to Underwriters under the Policy.

43. At all relevant times, Oceana was acting with the safety and well-being of its staff and guests in mind in responding to the Pandemic.

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[13] Underwriters objected to the introduction of any parol evidence to interpret the plain meaning of the Policy; subject to that objection, Underwriters presented counter-evidence regarding the intent of the parties in the issuance of the Policy.

[14] Underwriters continue their objections concerning extrinsic evidence regarding intent, particularly as to the intent of a third party that did not put together the collection of forms that comprise the Policy.

44. Oceana closed in-room dining when ordered to do so by the Mayor of New Orleans and the Governor of Louisiana.

45. Despite shutting down in-room dining, Oceana's staff continued to have access to 739 Conti Street at all times.

46. At all relevant times, Oceana continued to perform take-out and delivery services, which services Oceana provided prior to the Pandemic.

47. Once Oceana was allowed to resume in-room dining, Oceana did so to the fullest extent possible, subject to maintaining the required social distancing.

48. Oceana follows the guidelines provided by the Centers for Disease Control ("CDC"), including social distancing, wearing masks and gloves, and cleaning and disinfecting Oceana Grill.

49. Oceana uses bleach, soap, water, and Lysol to clean and disinfect Oceana Grill.

50. Because Oceana follows the guidelines the CDC provides, Oceana is able to operate Oceana Grill to the fullest extent allowed while maintaining the required social distancing.

51. Oceana has not disposed of, repaired, or replaced any tables, chairs, flatware, glasses, drywall, televisions, or any property located at 739 Conti Street as a result of SARS-CoV-2 or COVID-19.

52. Oceana cleans and disinfects the property, and then continues to use it as it always has.

53. The property located at 739 Conti Street was not rendered useless as a result of the Pandemic or the presence of SARS-CoV-2.

54. The property located at 739 Conti Street was not uninhabitable as a result of the Pandemic or the presence of SARS-CoV-2.

55. Oceana followed the CDC guidelines, including its CDC Guidance for Cleaning and Disinfecting, which provides that "[t]he virus that causes COVID-19 can be killed if you use the right products" and that "Coronavirus on surfaces and objects naturally die within hours to days." (P89).

56. Liquids will reach any microscopic feature of an object that the virus can reach because of "wetting," which happens when water spreads on a paper towel.

57. Water and disinfectants will sink below any virus, meaning using water and disinfectants can eliminate any virus or viral fragment from any surface.

58. The reaction SARS-CoV-2 would have with a surface is no different than any other virus.

59. The fact that SARS-CoV-2 is on a surface does not mean it can invade human cells and replicate.

60. Humans contract COVID-19 from the invasion of human cells with replication.

61. Researchers have consistently failed to culture SARS-CoV-2 taken from various environments, including from COVID-19 hospital wards.

62. There are no documented cases of surface-to-human COVID-19 cases.

63. SARS-CoV-2 degrades quickly in higher temperature environments, in higher humidity environments, and when exposed to light.

64. SARS-CoV-2 is commonly carried in respiratory droplets large enough to be intercepted by HVAC filters.

Findings With Respect to the Claimed Loss

65. The building located at 739 Conti Street, New Orleans, Louisiana did not sustain direct physical loss of or damage to it due to SARS-CoV-2, the virus that causes COVID-19.

66. The contents located at 739 Conti Street, New Orleans, Louisiana did not sustain direct physical loss of or damage to them due to SARS-CoV-2, the virus that causes COVID-19.

67. Oceana's operations were not suspended because of direct physical loss of or damage to the building located at 739 Conti Street, New Orleans, Louisiana due to SARS-CoV-2, the virus that causes COVID-19.

68. Oceana's operations were not suspended because of direct physical loss of or damage to the contents located at 739 Conti Street, New Orleans, Louisiana due to SARS-CoV-2, the virus that causes COVID-19.

III. PROPOSED CONCLUSIONS OF LAW

Underwriters propose the following findings of law:

Interpretation and Burden of Proof

1. Under Louisiana law, "it is the burden of the insured to prove the incident falls within the policy's terms."[15]

2. An insurance policy is a contract between the parties; as such, it must be construed according to general rules of contract interpretation as provided by the Louisiana Civil Code.[16]

3. The extent of coverage provided by a policy is determined by the parties' intent, as reflected by the words of the policy.[17]

4. When the policy language is clear, unambiguous, and expressive of the parties' intent, the agreement must be enforced as written.[18]

5. The words of a contract must be given their generally prevailing meaning, while terms of art must be given their technical meaning.[19]

6. Our courts have routinely recognized that dictionaries, treatises, and jurisprudence are helpful resources in ascertaining a term's generally prevailing meaning.[20]

7. Likewise, the fact that dictionaries provide more than one definition of a term does not make a term ambiguous.[21]

8. Each provision of a contract must be interpreted in light of the other provisions so that each is given the meaning suggested by the contract as a whole.[22]

9. Insurance companies have the right to limit coverage in any manner as long as the limitations do not conflict with statutory provisions or public policy.[23]

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[15] *See Doerr v. Mobil Oil Corp.*, 00-0947 (La. 12/19/00), 774 So. 2d 119, 124, *citing Barber v. Best*, 394 So. 2d 779, 781 (La. App. 4th Cir. 1981).

[16] *Ledbetter v. Concord General Corp.*, 95-0809 (La. 1/6/96); 665 So. 2d 1166.

[17] La. Civ. Code art. 2045.

[18] *Ledbetter, supra.*

[19] La. Civ. Code art. 2047.

[20] *See Gregor v. Argenot Great Cent. Ins. Co.*, 851 So. 2d 959, 964 (La. 2003) ("Dictionaries are a valuable source for determining the 'common and approved usage' of words."); *Cadwallader v. Allstate Ins. Co.*, 848 So. 2d 577, 581-83 (La. 2003) (looking to dictionaries, treatises, and jurisprudence to interpret an undefined term in the policy).

[21] *Comm. Union Ins. Co. v. Advance Coating Co.*, 351 So. 2d 1183, 1186 (La. 1977).

[22] La. Civ. Code. art. 2050.

[23] *Marcus v. Hanover Ins. Co.*, 98-2040 (La. 6/4/99); 740 So. 2d 603.

10. The strict construction rule does not authorize the court to create a new contract or to alter the terms of the contract which are expressed with sufficient clearness to convey the plain meaning of the parties.[24]

11. The strict construction principle "applies only if the ambiguous policy provision is susceptible to two or more *reasonable* interpretations; for the rule of strict construction to apply, the insurance policy must be not only susceptible to two or more interpretations, but each of the alternative interpretations must be reasonable."[25]

12. Whether the language of a contract is ambiguous is an issue of law for the Court to determine.[26]

13. It is a cardinal rule of Louisiana law that contracts are "subject to interpretation from the instrument's four corners without the necessity of extrinsic evidence[.]"[27]

14. Thus, "[p]arol evidence cannot be admitted against or beyond what is contained in a written contract, and is inadmissible to vary, alter or add to the contract terms."[28]

15. The requirement that the loss be "physical," given the ordinary definition of that term is widely held to exclude alleged losses that are intangible or incorporeal, and, thereby, to preclude any claim against the property insurer when the insured merely suffers a detrimental economic impact unaccompanied by a distinct, demonstrable, physical alteration of the property. *In re Chinese Manufactured Drywall Prod. Liab. Litig.*, 759 F. Supp. 2d 822, 831 (E.D. La. 2010) ("*Chinese Drywall*").

15. The meaning of the phrase "physical . . . damage" is clear. "Physical," used as an adjective in this context, means "having material existence: perceptible especially

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[24] *Reynolds, supra.*

[25] *Edwards v. Daugherty*, 03-C-2103 (La. 10/1/04), 883 So. 2d 932, 941 (*emphasis in original*), citing *Cadwallader v. Allstate Ins. Co.*, 02-1637 (al. 6/27/03), 848 So. 2d 577, 580; *Carrier v. Reliance Ins. Co.*, 99-2573 (La. 4/11/00), 759 So. 2d 37, 43-44.

[26] *French Quarter Realty v. Gambel,* 2005-0933 (La. App. 4 Cir. 12/28/05), 921 So. 2d 1025, 1027.

[27] *Id.* at 1030; *Peterson v. Schimek*, 98-1712 (La. 3/2/99), 729 So. 2d 1024.

[28] *Mathieu v. Nettles*, 383 So. 2d 1337, 1340 (La. App. 3 Cir. 1980), *writ denied*, 390 So. 2d 202 (La. 1980).

through the senses and subject to the laws of nature" and "of or relating to material things."[29] "Damage," a noun in this context, means "loss or harm resulting from injury to person, property, or reputation."[30]

16. "Direct . . . damage" means "physical damage to property, as distinguished from time element loss, such as business interruption or extra expense, that results from the inability to use the damaged property."[31]

17. "Direct . . . loss" means "loss incurred due to direct damage to property, as opposed to time element or other indirect losses."[32] The word "loss" in the policy is also modified by the word "physical," defined above.

18. Air is a "common thing" that "may not be owned by anyone[,]"[33] such that it cannot be insured property.

19. An interpretation that the phrase "direct physical loss of or damage to" property extends to temporary loss of use resulting in solely economic losses without accompanying physical damage would lead to absurd results and is therefore not a reasonable interpretation of the phrase as contained in the Policy based on a plain reading of the entirety of the Policy.

20. An interpretation that the phrase "direct physical loss of or damage to" property extends only to that which is physically altered in some way and that is in need of repair or replacement is a reasonable interpretation of the Policy.

21. The fact that the Policy could have been worded more clearly does not render a policy ambiguous.[34]

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[29] https://www.merriam-webster.com/dictionary/physical

[30] https://www.merriam-webster.com/dictionary/damage

[31] IRMI Definition of "Direct Damage."

[32] D18 (IRMI Definition of "Direct Loss").

[33] La. Civ. Code art. 449 ("Common things may not be owned by anyone. They are such as the air and the high seas that may be freely used by everyone conformably with the use for which nature has intended them.").

[34] *See Vanderbrook v. Unitrin Preferred Ins. Co. (In re Katrina Canal Breaches Litig.)*, 495 F.3d 191 (5th Cir. 2007) (court refused to consider wording available under other policy forms that made the exclusion for man-made flooding more clear), *citing La. Ins. Guar. Ass'n v. Interstate Fire & Cas. Co.*, 630 So. 2d 759, 766 (La. 1994) ("[T]hough . . . the Interstate policy could have been more clearly delineated its payment obligation, "that facts does not mandate the conclusion that the policy was legally ambiguous."; *Cadwallader v. Allstate Ins. Co.*, 848 So. 2d 577 (La. 2003) (fact that other policies defined the term "relative" but the subject policy did not result in a finding of ambiguity).

22. The reasonable expectations theory is not applicable in this case because the theory may only be applied if certain of the words in the contract are first found to be ambiguous.[35]

23. As a matter of Louisiana law, the Policy is unambiguous; thus, consideration of parol evidence is improper.[36]

24. Oceana failed to sustain its burden that any corporeal tangible property at 739 Conti Street sustained "direct physical … damage".

25. Oceana failed to sustain its burden that any corporeal tangible property at 739 Conti Street sustained "direct physical loss".

26. Oceana's property is neither "useless" nor "uninhabitable," as Oceana continues to use its property to conduct business operations, having employees on-site. *See Chinese Drywall, supra*; *Ross v. C. Adams Construction & Design*, 10-852 (La. App. 5 Cir. 6/14/11), 70 So. 3d 949, 952 ("*Ross*"), and *Widder v. Louisiana Citizens Prop. Ins. Corp.*, 2011-0196 (La. App. 4 Cir. 8/10/11), 82 So. 3d 294, 296 *writ denied*, 2011-2336 (La. 12/2/11), 76 So. 3d 1179 ("*Widder*").

27. Under Louisiana law, the efficient proximate cause doctrine is utilized to determine whether a loss is caused by an insured peril. The efficient proximate cause of the loss is the dominant, fundamental cause or the cause that sets the chain of events in motion.[37]

28. Direct physical loss of or damage to property at 739 Conti Street was not the efficient proximate cause of any suspension of Oceana's operations.

29. Even if the Policy were triggered, Oceana's financial losses were caused by the government orders, triggering the Policy's exclusion for "[a]cts or decisions . . . of any . . . governmental body." (D1, p. 61, CP 10 30 09 17, p. 4 of 10).

30. Even if the Policy were triggered, Oceana's financial losses were caused by a "[d]elay, loss of use or loss of market." (D1, p. 60, exclusion 2.b.).

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[35] *La. Ins. Guar. Ass'n*, 630 So. 2d at 764.

[36] *Avis v. Anderson*, 649 So. 2d 1089 (La. App. 4 Cir. 1995).

[37] *Lorio v. Aetna Ins. Co.*, 232 So. 2d 490, 493 (La. 1970); *Roach-Strayhan-Holland Post No. 20, Am. Legion Club, Inc. v. Continental Ins. Co. of N.Y.*, 112 So. 2d 680 (La. 1959).

IV. THE EVIDENCE PRESENTED AT TRIAL

A full transcript of the trial proceedings is not currently available. However, Underwriters submit the following summaries of the testimony and evidence presented.

A. The Plaintiff's Presentation of Evidence

1. Fact Witnesses

Plaintiffs presented two fact witnesses, Moe Bader and Tiffany Thoman, both long-time Oceana employees.

a) At All Times, Oceana was Concerned for its Staff and Guests, not Property.

Oceana's general manager, Mr. Bader, emphatically testified that the safety and well-being of his employees is his top priority, going so far as to state that his employees are the "heartbeat" and "soul" of Oceana Grill. Mr. Bader testified that he was forced to close down in-room dining because of the orders issued by the Mayor of New Orleans and the Governor of Louisiana, which were prompted by the Pandemic. During that time, he and his staff continued to have full access to the property and were allowed to (and did) provide take-out and delivery services, which were services Oceana Grill offered prior to the Pandemic. Mr. Bader testified that once he was allowed to have in-room dining, the available capacity was reduced because of measures the restaurant has had to implement to minimize the risk of the spread of SARS-CoV-2.

Mr. Bader testified that Oceana Grill does everything it can to keep its employees and guests safe. Specifically, the restaurant follows the guidelines provided by the CDC, including social distancing, wearing masks and gloves, and cleaning and disinfecting the restaurant. Mr. Bader confirmed the restaurant uses bleach, soap, water, and Lysol to clean and disinfect the property. Because Oceana follows these guidelines provided by the CDC, Mr. Bader operates the restaurant to the fullest extent possible while maintaining the required social distancing.

b) Oceana's Losses are Economic Losses, Not Repair Costs.

Although Mr. Bader testified that there was "physical damage" to the property, air, and surfaces at Oceana, no such property, including but not limited to, tables, chairs, flatware, glasses, drywall, or televisions, has been discarded, repaired, or replaced as a result of SARS-CoV-2 or COVID-19. Oceana has not performed any testing of any of its property to confirm

whether SARS-CoV-2 was present at the property (and if present whether it could viably cause COVID-19). Instead, Oceana cleans and disinfects the property, and then continues to use the property as it always has.

Ms. Tiffany Thoman, Oceana's corporate representative, confirmed the cleaning and disinfectant steps taken by Oceana. Ms. Thoman testified that she believed there was "damage" to the property based on the news and the orders from the Mayor. However, when asked why none of the property at Oceana has been discarded or replaced, Ms. Thoman testified that there was no need to replace the property because the staff cleans the property. Oceana followed the CDC guidelines, including its CDC Guidance for Cleaning and Disinfecting (P89), which provides that "[t]he virus that causes COVID-19 can be killed if you use the right products" and that "Coronavirus on surfaces and objects naturally die within hours to days."

2. Oceana's Expert Witnesses Failed to Provide Information to Assist the Court.

Oceana presented two expert witnesses, Charles Miller and Dr. Lem Moye.

a) Dr. Lem Moye's Opinions are not Supportable.

Dr. Lemuel Moye testified as an expert in the field of medicine, biostatistics, and epidemiology.[38] The Court denied Oceana's effort to tender him as a chemistry or physics expert. Dr. Moye conceded that he has never authored a single article, chapter, or book on viruses, much less the issue of sanitizing environments—a central issue in this case—and the associated epidemiology and materials science needed to reach those opinions.

Dr. Moye's trial testimony focused on three core assertions. First, Dr. Moye attempted to define "damage" as some version of loss of use as a result of the physical transformation of property. Second, Dr. Moye testified that no matter how carefully Oceana adheres to CDC-recommended cleaning and safety protocols, those efforts are ultimately futile due to the size of the virus and the length of time that the coronavirus remains stable in the restaurant. Third, Dr. Moye opined that Oceana Grill will become pervasively and continuously contaminated by the coronavirus during an average day of operations. None of these claims withstood cross-examination, much less Underwriters' experts' testimony.

[38] Underwriters object to Dr. Moye's acceptance as an expert in epidemiology.

(1) Dr. Moye's Opinion is Unreliable.

Dr. Moye's opinion is patently unreliable. Dr. Moye admitted that when he was contacted to provide an expert opinion in October 2020, he provided his conclusion to Oceana prior to doing any research. Oceana attempted to rehabilitate Dr. Moye by having him recast his October 2020 "conclusions" as a "hypotheses." However, a multi-decade tenured professor at the University of Texas' School of Public Health understands the difference between a hypothesis and a conclusion. Dr. Moye never testified that his conclusions were mere hypotheses, and his "clarification" only came when prompted by counsel. Given Dr. Moye's glaring admission that he reached a scientific conclusion prior to any analysis, as well as his ever-shifting definition of "damage,"[39] Dr. Moye's opinions are unreliable.

Dr. Moye has a continuously changing theory of how SARS-CoV-2 "damages" inanimate objects. Dr. Moye's trial testimony was **vastly** different from the testimony Dr. Moye offered in support of Oceana's opposition to Underwriters' motion for summary judgment. There—at a time when the Code of Civil Procedure prohibited Underwriters from supplying a factual response in reply—Dr. Moye went far further, claiming instead that the coronavirus chemically reacts with; and thus, damages surfaces. *See e.g.* Oceana's Opposition to Underwriters' Motion for Summary Judgment, p.12 ("In his expert opinion, Dr. Moye attests that . . . caused physical damage to the property by its molecular binding to the Grill's inanimate surfaces, producing a continual contamination of the property.") (footnote omitted). Dr. Moye completely abandoned this theory at trial. This change lacks expert credibility.

(2) Dr. Moye is Not Qualified to Define "Damage" in this Case.

Underwriters expect Oceana will shroud Dr. Moye's definition of "damage" as an opinion held by an expert in medicine. However, Dr. Moye's medical degree does not qualify him to define damage to inanimate objects.[40] Dr. Moye conceded as much during cross examination. When asked whether anyone shares his definition of damage, he replied: "Of course not." Dr. Moye further conceded he was, as of the date of his testimony, unaware of any

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[39] Dr. Moye conceded during cross that he defined damage differently in his deposition than he did at trial.

[40] Underwriters object to Dr. Moye's definition of the word "damage" as inadmissible parol evidence and further object to the use of a technical definition where the document does not involve a technical matter. "The words of a contract must be given their generally prevailing meaning. Words of art and technical terms must be given their technical meaning **when the contract involves a technical matter**." La. Civ. Code art. 2047 (emphasis supplied).

scholarly papers—including the papers cited in his report—that supported the claim that the coronavirus physically damages inanimate objects. Indeed, Dr. Moye failed to consider even basic factual questions like whether Oceana used tablecloths in its restaurant, even though he conceded that those tablecloths would protect the property. Complicating matters further, Dr. Moye agreed that his opinion would equally apply to all viruses (including the flu), making his definition of "damage" entirely unworkable. In sum, Dr. Moye's conception of physical damage has nothing to do with his fields of expertise, and Underwriters urge the Court to disregard it accordingly.

Dr. Moye further testified that if the harmful physical condition can be completely reversed, the underlying object has not been damaged. As established at trial, SARS-CoV-2 can be reliably removed from surfaces through basic cleaning. Thus, even if Dr. Moye's definition of "damage" were correct, the scientific evidence does not support the existence of damage.

(3) Dr. Moye's Repudiation of the CDC's Guidance is Devoid of Scientific Merit.

Next, Dr. Moye asserted that the CDC's guidance on cleaning objects is fundamentally flawed, and that the coronavirus simply cannot be reliably destroyed on flat surfaces. Dr. Moye relied upon studies concerning the amount of time the coronavirus can remain stable outside of a host cell. However, **every** source of information Dr. Moye relied upon to discuss viral stability involved studies conducted in laboratory conditions (*i.e.*, stable, moderate temperatures; controlled ~40% humidity; and, in one study, total darkness). None of these conditions are analogous to those at Oceana Grill.

Dr. Moye's second repudiation of the CDC's guidelines derives from his assertion that viruses are so small that they can reach places that disinfectants cannot. Underwriters do not concede that Dr. Moye is qualified to render this opinion. Nevertheless, the Court will recall that Oceana illustrated this concept by dusting gravel with salt; Dr. Moye explained that surface cleaning can only affect the top of the gravel, leaving the remainder of the mock virus to fester dangerously below. However, as explained by Dr. Flinn, there is nowhere a solid virus can reach that a liquid cleaner cannot follow, just as there was not a single grain of salt in Oceana's demonstrative that water could not reach.

Dr. Moye's challenge to CDC's cleaning guidance was thoroughly repudiated by Drs. Stock and Flinn. However, even ignoring Underwriters' experts, Dr. Moye does not possess the expertise required to challenge the CDC on this basic point, and Dr. Moye failed to cite a single third-party source—much less a reliable one—to support his contrarian claim. Dr. Moye's testimony on this topic is nothing more than unreliable conclusions presented solely for litigation.

(4) Dr. Moye's Continuous Exposure Testimony is Meritless.

Relatedly, Dr. Moye opined that as patrons continue to enter and exit the Oceana Grill, they bring an insurmountable tide of the coronavirus that cannot be cleaned as CDC advises. Once again, Dr. Moye's testimony ignores real-world studies regarding how long the coronavirus remains stable. The only real-world study Dr. Moye relied on was a study from China involving a building with an air conditioning unit that solely recirculated the air within the building. Dr. Moye conceded that he had **no** familiarity with the HVAC system at Oceana Grill even though the system would necessarily affect the applicability of the study to this case; and thus, his conclusions. Astoundingly, Dr. Moye also conceded that he failed to consider city and state mask mandates (which are enforced by Oceana) when he reached his trial conclusions. Dr. Moye's unsound theory of pervasive, continuous contamination lacks any scientific reliability.

b) Charles Miller Provided Nothing More Than an Unsupported Interpretation of the Insurance Policy.

Mr. Charles Miller, a California lawyer who has not worked in the insurance industry in 30 years and who has never worked on a virus or pandemic claim, was allowed to testify with respect to "insurance industry standards". However, what Mr. Miller attempted to do was to provide his legal interpretation of the Policy.[41] Mr. Miller's testimony was focused on the meaning and interpretation of the words contained in the phrase "direct physical loss of or damage to" contained in the Policy. Mr. Miller defined "direct" as "to point, extend or project in a specified line or course [*i.e.*, as a verb]," pulling from the Merriam-Webster dictionary to do so. Mr. Miller freely admitted that "whether it's an adjective, noun or verb, I didn't really consider." Miller testified that he defines the terms in the Policy by looking at the common understanding of a word, including dictionary and industry resource definitions, but that one

[41] Underwriters maintain their prior objections to the entirety of Mr. Miller's testimony.

must look at the Policy as a whole in making a final determination as to a particular word or phrase's meaning.

Mr. Miller testified that "loss" as contained in the portion of the Policy that reads "direct physical loss of or damage to" means loss of use without any requirement of accompanying physical damage. He contrasted the meaning of "loss" from "damage," relying on the definition of "direct damage" obtained from Insurance Risk Management Institute ("IRMI") (as contained in the phrase "direct . . . damage"), which is defined as "physical damage to property, as distinguished from time element loss, such as business interruption or extra expense, that results from the inability to use the damaged property".[42] Mr. Miller did not consider IRMI's definition of "direct loss" (as contained in the phrase "direct . . . loss"), which is defined as "loss incurred due to direct damage to property, as opposed to time element or other indirect losses". (D18).

Mr. Miller testified that the Policy's Covered Cause of Loss Form is "all-risk," even though the CP 10 30 09 17 form (D1, p. 58) itself states merely that coverage extends to "direct physical loss unless the loss is excluded or limited in this policy." Nowhere in this phrasing are the words "all-risk." Also missing are the words "of or damage to" as contained in the phrase Mr. Miller interpreted "direct physical loss of or damage to," as Mr. Miller admitted. Simply, Mr. Miller's attempt to interpret the Policy and supplant this Court's role fails as a matter of law.

B. Underwriters' Presentation of Evidence.

1. Fact Witnesses

Underwriters presented the testimony of three fact witnesses, Mr. Ethan Gow, Mr. Greg Donian (by deposition), and Mr. Clifton Davis (by stipulation).

a) The Policy is Authored by Avondale, on Behalf of the Underwriters and Companies on the Policy, on a Surplus Lines Basis.

Mr. Gow is an employee of Avondale Risk Services ("Avondale"), and Avondale acts on behalf of various syndicates from the Lloyd's of London marketplace, as well as companies from outside of the Lloyd's of London marketplace, which he identified by referencing Page 30 of D1. Mr. Gow noted that the Policy had 10-15 Lloyd's syndicate participants, which is much less than the 90 to 110 in the marketplace, as well as two non-Lloyd's companies, Indian Harbor

[42] Mr. Miller testified (correctly) that IRMI is a well-regarded resource for definitions of general insurance terms.

Insurance Company and HDI Global SE. Mr. Gow stated that Avondale writes insurance pursuant to agreement contracts with these syndicates and companies on a surplus lines basis, which means that Avondale is not required to submit any forms to any state's department of insurance for approval. Mr. Gow described surplus lines insurance as insurance for risks with higher risk potential that is less regulated than that provided by "admitted" insurers.

Mr. Gow testified that Avondale sends the list of insurance forms such as those found on pages 16 and 17 of D1 that would be included in the ultimate policy, if issued, to the wholesale broker, which would allow an insured to see what coverages are being offered. Mr. Gow further testified that only the forms with the "CP" designation on pages 16 and 17 were ISO forms, with all others being authored by someone other than ISO. Avondale determines which forms to include and which forms not to include in the policies it issues, subject to the agreements in place with the Lloyd's syndicates and non-Lloyd's companies.

b) Avondale Did Not Intend to Provide Coverage for the Risk of Pandemic.

Oceana attempted to establish through Mr. Gow that Avondale's use of the ISO virus exclusion beginning in April 2020 means that Avondale knew the risk of virus was covered, a theory entirely negated by Mr. Gow. Mr. Gow testified that Avondale never thought the risk of virus to be covered under the wording in place as evidenced by the Oceana policy.[43] Mr. Gow testified that following the pandemic people were looking for coverage that was nonexistent so Avondale wanted to be as clear as possible in its wording to express the original intent of Avondale that the risk of virus was never to be covered. Avondale's premium structure did not change with the introduction of the virus exclusion in April 2020 (*i.e.*, their policies are **not** cheaper now that they include the virus exclusion, contrary to Oceana's baseless claim).

Mr. Gow's testimony is supported by that of Mr. Greg Donian, Underwriters' claims representative, who testified that the inclusion of a virus exclusion would have had no impact on a determination of coverage in this instance (P90, p. 81:18).

[43] Underwriters objected to the use of the virus exclusion at trial, which objection was denied by the Court. Underwriters maintain their position that consideration of this evidence is improper parol evidence.

c) ISO's Intent is Irrelevant to Avondale.

Underwriters' representative, Mr. Gow, testified that he had no idea what ISO said to any state's department of insurance, including Louisiana's DOI. He further testified that Avondale does not rely on ISO to interpret the words of any ISO form, instead letting the words of the entire policy speak as to the meaning of the words.[44]

Mr. Gow was questioned on the July 6, 2006 ISO Circular discussing the introduction of the CP 01 40 07 06 Exclusion of Loss Due to Virus or Bacteria (P35), which states that "the specter of pandemic or hitherto unorthodox transmission of infectious material raises the concern that insurer employing such policies may face claims in which there are efforts to expand coverage and to create sources of recovery for such losses, ***contrary to policy intent***." (emphasis supplied). Thus, the lone document Oceana relies upon to support its theory that ISO knew the policy wordings extended to virus is unfounded. Instead, the document references the possibility of *claims* being made, which would be "contrary to policy intent."

d) The Orders Were Not Issued Because of Property Damage.

The various orders introduced into evidence from the Governor's office do not reference damage to property.[45] Likewise, the Mayor's March 11, 2020 order does not reference damage to property.[46] The first reference to damage to property from Mayor Cantrell's office was on March 16, 2020.[47] Clifton M. Davis' testimony was submitted by "Joint Stipulation of Fact Concerning Testimony of Clifton M. Davis, III" (D19). Mr. Davis is currently, and was on March 15, 2020, the Executive Counsel to Mayor Cantrell. On March 15, Mr. Davis received a text message from "Mr. Alvendia that included language Mr. Alvendia sought to have included in the Mayor's March 16, 2020 proclamation. The language sought to be included by Mr. Alvendia suggested that SARS-CoV-2 and COVID-19 cause "property loss and damage." Mr. Davis testified that at no time prior to March 15, 2020 was he in possession of any scientific data to suggest that SARS-CoV-2 and COVID-19 attached to property and caused "property loss and damage" in the City of New Orleans. He further testified that the phrase "property loss and damage" would not

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[44] Underwriters have objected to the use of parol evidence, including as to ISO's alleged intent. Even so, consideration of this evidence does not help Oceana's position.

[45] Exhibits D3, D4, D6, D7 and D9.

[46] Exhibit D16.

[47] Exhibit D5.

have been included in the Mayor's March 16, 2020 proclamation without the request of Mr. Alvendia. Mr. Davis believes Mr. Alvendia requested the language to allow business owners to make business interruption claims under their existing insurance policies. Lastly, Mr. Davis testified that the Mayor's office issued a Mayoral Proclamation to Promulgate Emergency Orders During the State of Emergency Due to COVID-19 addressing the mitigation of COVID-19. The string of text messages between Mr. Davis and Mr. Alvendia were admitted as Ex. A to D19.

2. Underwriters' Experts

a) Dr. Allison Stock

Dr. Allison Stock testified for Underwriters in the field of epidemiology. Dr. Stock was, among other things, an Epidemic Intelligence Service Officer for the CDC involved in responding to the "SARS-1" and "Middle Eastern Respiratory Syndrome" betacoronavirus outbreaks. Unlike Dr. Moye, Dr. Stock is working with local clients (including major university's food services programs) to implement safe reopening plans during the Pandemic.

Dr. Stock offered two key conclusions in her testimony. First, there is not a single documented "surface-to-human" or "fomite" COVID-19 case owing, in part, to the coronavirus' relative inability to remain viable in real-world environments. Second, the CDC has issued effective mitigation strategies including guidance on effective cleaning.

(1) Oceana and Dr. Moye Overstate the Stability and Infectivity of the Coronavirus in Real-World Environments.

One of Oceana's consistent themes at trial was that efforts to clean the restaurant were, ultimately, futile given the assumption that contagious, asymptomatic COVID-19 patrons were likely entering the restaurant on a routine basis. Thus, Oceana contended that both the surfaces and the air in the restaurant would be dangerous despite cleaning, social distancing, and mask mandates.

Oceana's theory is built on a misunderstanding of the durability of the coronavirus and the science on the spread of COVID-19. As Dr. Stock explained, many viruses are capable of spreading from surfaces to humans. Indeed, some viruses like rhinoviruses spread efficiently by touch. However, other viruses—including SARS-CoV-2—do not easily spread this way, and there has yet to be a single documented COVID-19 case involving surface-to-human exposure.

Although the absence of a single documented fomite COVID-19 infection is undoubtedly important, Underwriters suggest that the more critical issue is **why** the coronavirus appears to be an ineffective "surface spreader." Dr. Stock's testimony illustrated two major divergences between Oceana's case and the relevant science:

- Oceana and Dr. Moye relied on studies involving viral stability in a laboratory; however, research in real-world conditions has proven that the virus degrades far more quickly than in laboratory environments. For example, and as relevant to any Louisiana business, SARS-CoV-2 degrades quickly in higher temperature environments, in higher humidity environments,[48] and when exposed to light. Notably, the process of degradation begins irrespective of cleaning; the virus begins to decay as soon as it is exposed to the harsh conditions outside of a human cell.

- Oceana and Dr. Moye have conflated viral **stability** with **infectivity**. As Dr. Stock explained, the fact that a virus is on a surface does not necessarily mean that it can invade a human cell and replicate (which is how viruses make people sick). Researchers have consistently failed to "culture"[49] coronaviruses taken from various environments, **including from COVID-19 hospital wards.**

There is nothing in Dr. Moye's testimony to refute Dr. Stock's testimony on these key points.

(2) The CDC's Guidance for Cleaning and Risk Mitigation is Sound.

Dr. Stock testified concerning experiments involving the cleaning of a surface contaminated by the virus. The cleaning did not "merely" break the virus apart, which alone would prevent it from causing illness. Instead, after proper cleaning using CDC guidelines, there are no remaining viral fragments **at all**. As Dr. Stock explained, if CDC-recommended cleaning was not effective, it would destroy our ability to treat COVID-19 patients, as every ventilator and hospital bed used for COVID-19 patients would have to be destroyed after a single use. This, of course, is not the case, and Dr. Stock's example demonstrates the absurdity of Dr. Moye's testimony regarding disinfection.

Dr. Stock also rejected Oceana's claim that the air in the restaurant will become dangerously infected despite capacity limits, social distancing, and mask mandates. Unlike HVAC systems in China or South Korea, western HVAC systems circulate fresh air into buildings[50]; accordingly, the air in the Oceana Grill is continuously refreshed. Notwithstanding

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[48] For example, scientists attempting to determine the outer-limit of viral stability in a laboratory maintained a constant ~40% humidity. As Dr. Moye conceded, 40% humidity in Louisiana would be "pretty good."

[49] *I.e.*, introducing a coronavirus taken from an environment to a human cell in a petri dish to see if the virus can invade the cell and replicate.

[50] As Dr. Stock noted, the Oceana Grill often keeps doors open, which further guarantees the reliable introduction of fresh air into the restaurant.

the existence of guidance from the American Society of Heating, Refrigerating and Air-Conditioning Engineers regarding the use of filters to mitigate the spread of the coronavirus through HVAC systems, the coronavirus is commonly carried in respiratory droplets that are large enough to be "intercepted" by HVAC filters. Indeed, Dr. Stock listened to Oceana's fact witnesses and concluded that Oceana is taking the necessary steps to keep its air safe.

b) Dr. Brian Flinn

Dr. Flinn testified in the field of materials science. Dr. Flinn's credentials are unparalleled. Dr. Flinn has dedicated much of his academic and professional career to the study of the behavior of liquids on the surface and has been hired by the United States Air Force to study that issue applied to the surface of the F-35 Joint Strike Fighter, *i.e.*, the most sophisticated warplane in the American arsenal.

Dr. Flinn's testimony is straightforward. Dr. Flinn testified that liquids will reach any microscopic feature of an object that the coronavirus can reach. This occurs due to "wetting," a phenomenon that anyone can observe by watching a drop of water spread on a paper towel. While water alone would reach these microscopic imperfections to dislodge the coronavirus, liquids with lower surface tensions than water—including common disinfectants like alcohol or bleach—are even more capable of spreading into microscopic features. In short, Dr. Moye's claim that CDC's cleaning guidance is lacking was refuted by Dr. Stock's discussion of testing on surfaces after cleaning, and it was further refuted by Dr. Flinn's discussion of the interaction of liquids with solids.

V. LEGAL ANALYSIS

Underwriters submit that Oceana is unable to establish coverage for its claimed financial losses for a multitude of reasons, the most important of which is simply this: the purported presence of SARS-CoV-2, the virus that causes COVID-19, even if proven, does not equate to "direct physical loss of or damage to" property as required by the unambiguous terms of the Business Income provisions.

A. Oceana Failed to Meet its Burden of Proving Coverage Under Louisiana Law

Oceana cannot meet its burden because it cannot show: 1) that it has suffered "direct physical loss of or damage to" any insured property and 2) that "direct physical loss of or damage to" caused a "necessary suspension" of Oceana's "operations".

1. Oceana Presented No Evidence that the Coronavirus Causes Physical Damage to Inanimate Objects.

Contrary to Oceana's suggestions during trial, the meaning of the phrase "physical . . . damage" is clear. "Physical," used as an adjective in this context, means "having material existence: perceptible especially through the senses and subject to the laws of nature" and "of or relating to material things[.]"[51] "Damage," a noun in this context, means "loss or harm resulting from injury to person, property, or reputation[.]"[52] Thus, to prove physical damage, Oceana must show that SARS-CoV-2 causes corporeal, material harm to the objects it lands on.

At trial, Oceana largely abandoned its claim that SARS-CoV-2 causes "physical damage" to property. Setting aside that Dr. Moye's medical degree gives him no special insight into this issue, Dr. Moye admitted that he was not aware of a single study that concluded that SARS-CoV-2 damages inanimate objects. This admission aside, Dr. Moye testified that SARS-CoV-2 reacts with a surface in precisely the same manner *as any other virus, including the seasonal flu.* Dr. Flinn—a materials scientist that studies damage to surfaces—also testified that he was not aware of any evidence that SARS-CoV-2 physically damages the inanimate objects it touches. Underwriters respectfully submit that this inquiry into "physical damage" can and should end here. Oceana failed to offer a shred of evidence at trial to support the claim that SARS-CoV-2 damaged inanimate objects within Oceana Grill.

2. Oceana Failed to Present Evidence of a Physical Loss of Property.

Underwriters expect that Oceana will rely on *In re Chinese Manufactured Drywall Prod. Liab. Litig.*, 759 F. Supp. 2d 822, 831 (E.D. La. 2010) ("*Chinese Drywall*"), *Ross v. C. Adams Construction & Design*, 10-852 (La. App. 5 Cir. 6/14/11), 70 So. 3d 949, 952 ("Ross"), and *Widder v. Louisiana Citizens Prop. Ins. Corp.*, 2011-0196 (La. App. 4 Cir. 8/10/11), 82 So. 3d 294, 296 *writ denied*, 2011-2336 (La. 12/2/11), 76 So. 3d 1179 ("*Widder*"). Even assuming those

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[51] https://www.merriam-webster.com/dictionary/physical

[52] https://www.merriam-webster.com/dictionary/damage

cases apply here, the evidence presented at trial overwhelmingly demonstrates that those cases do not afford coverage to Oceana.

By way of summary, *Chinese Drywall* (a case involving Louisiana law decided by Judge Fallon) described a "physical loss" by citing 10A Couch on Ins. § 148:46 (3d ed. 2010) as follows:

> The requirement that the loss be 'physical,' given the ordinary definition of that term is *widely held* to exclude alleged losses that are intangible or incorporeal, and, thereby, to preclude any claim against the property insurer when the insured merely suffers a detrimental economic impact unaccompanied by a distinct, demonstrable, physical alteration of the property.

759 F. Supp. 2d at 831 (italics and underlining supplied).

Taken at face value, this definition defeats Oceana's claim that it has endured a "direct physical loss of" insured property. Time and again at trial, Oceana stressed that the "loss of use" it endured was that it could not use its property as it wanted by virtue of governmental orders. Moe Bader testified that the property was "useless" if the government ordered him to close the restaurant. This is precisely the type of "detrimental economic impact unaccompanied by a distinct, demonstrable, physical alteration of the property" that is not captured by the phrase "physical loss." *Chinese Drywall*, 759 F. Supp. 2d at 831.

Judge Fallon also observed a second notion of "physical loss" in *Chinese Drywall*, and Underwriters expect Oceana will invoke that notion here. Specifically, the *Chinese Drywall* court recognized a second line of "physical loss" cases where "material rendered the property useless and/or uninhabitable." *Id.* at 832. In that case, the subject drywall was "releasing elemental sulfur gases throughout the home[]" that rendered the homes "useless and/or uninhabitable due to the damage to the electrical wiring, appliances, and devices, as well as the ever-present sulfur gases[,]" which constituted a direct "physical loss." *Id.* at 832. The *Ross* court followed *Chinese Drywall* in an almost identical factual scenario. *Ross*, 70 So. 3d 949, 952. In *Widder*, the Louisiana Fourth Circuit Court of Appeal was presented with a claim for the cost to repair a home that was completely contaminated with dangerous levels of inorganic lead. In *Widder*, it was undisputed that "Ms. Widder and her children had to move from the home due to the dangerous level of lead contamination." *Id.* at 295. Citing *Chinese Drywall* and *Ross*, the Court

concluded that the extensive lead contamination rendered the home "uninhabitable until it has been gutted and remediated[,]" thus constituting a "direct physical loss[.]" *Id.* at 296.

However, the "useless or uninhabitable" standard does not apply to Oceana's claim. First, unlike here, the policies at issue in *Chinese Drywall*, *Ross*, and *Widder* were all homeowners' policies with policy wording that is distinctly different from the commercial property insurance policy issued by Underwriters. In *Chinese Drywall*, the Court noted that [unlike here] all of the homeowners' insurance policies at issue defined "property damage" to include loss of use of tangible property. 759 F. Supp. 2d at 832.[53] After noting that courts are required to interpret each provision in a contract in light of other provisions so that each is given the meaning suggested by the contract as a whole, the *Chinese Drywall* Court found "that the inclusion of 'loss of use' as a type of property damage in the policies suggests that the damage caused by the Chinese-manufactured drywall in Plaintiffs' homes constitutes a covered physical loss since the drywall prevented Plaintiffs from fully using and enjoying their homes."[54] The Court further justified its more expansive interpretation of "physical loss" by distinguishing the "deeply personal" nature and purpose of a homeowners' policy from the nature and purpose of commercial policies, noting that in the latter context courts have adopted the definition of "physical loss" as requiring a distinct, demonstrable, physical alteration of property. *Id.* at 833 and FN1.

The Policy here does not contain the phrase "property damage" at all. Instead, the Policy contains the phrase "direct physical loss of or damage to" property, a distinctly different phrase. Additionally, the Policy expressly states that Underwriters "will not pay for loss or damage caused by or resulting from . . . loss of use or loss of market." (D1, p. 60, exclusion 2.b.) In addition, the interpretation of "direct physical loss" that Oceana advances here as requiring only a loss of use unaccompanied by any physical alteration of property is incompatible with and cannot be read *in pari materia* with the phrase "period of restoration"—a defined term in the very insuring agreements at issue, which limit coverage to the period of time necessary to "rebuild, repair, or replace" the damaged property. Oceana's suggested interpretation of "direct physical loss" would render the "period of restoration" clause meaningless and should be

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[53] Likewise, both *Ross* and *Widder* involved homeowners' policies. Despite Oceana's efforts to introduce parol evidence at nearly every phase of the trial, it is telling that they did not ask the Court to review the actual contracts involved in the cases they rely on.

[54] 759 F. Supp. 2d at 833.

rejected. *See Chinese Drywall*, *supra* ("The Court is required to interpret each provision in a contract in light of other provisions, so that each is given the meaning suggested by the contract as a whole."), citing La. Civ. Code art. 2050.[55]

Second, and putting these fundamental contractual distinctions aside, the "useless and/or uninhabitable" line of cases are inapplicable as a matter of fact. To begin with the obvious, Oceana Grill is currently in use and is physically inhabited. Moreover, the state of Louisiana and the city of New Orleans have expressly authorized this use through their respective phased reopening orders. This alone renders *Chinese Drywall*, *Ross*, and *Widder* inapplicable.

The evidence presented at trial further undermines Oceana's claim that "COVID-19 has rendered property unsafe and unusable for ordinary use[.]"[56] Consider the many errors in Dr. Moye's testimony (Oceana's lone expert in epidemiology) as well as the often-unrebutted testimony from Drs. Stock and Flinn. Moreover, Oceana's claim depends on the misapplication of scientific evidence:

- Contrary to Oceana's claims, SARS-CoV-2 does not survive for days—much less weeks—outside of human cells except in laboratory conditions, even in the absence of cleaning;
- Contrary to Oceana's claims (and wholly unaddressed by Oceana), there is a distinct epidemiological difference between the mere stability of the virus on a surface and that virus' ability to infect a human cell (a fact proven from unsuccessful efforts to culture SARS-CoV-2 viruses taken from COVID-19 wards in hospitals);
- Contrary to Oceana's claims, the presence of the virus on surfaces presents a low risk of infection as demonstrated by the absence of a single documented case of COVID-19 anywhere in the world caused by surface-to-human transmission;
- Contrary to Oceana's claims, CDC guidelines for cleaning allow for the **total** elimination of SARS-CoV-2 on tables where patrons are eating with common disinfectants, which

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[55] *See also Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.*, 2020 WL 5525171 (N.D. Cal. Sept. 14, 2020) (the definition of "period of restoration" as including the words "rebuild" "repair" and "replace" suggest that insured's inability to occupy its storefront due to government shutdown orders does not fall within the Business Income and Extra Expense coverage of the policy). *See also Mark's Engine Co. No. 28 Rest., LLC v. Travelers Indem. Co. of Conn.*, 2020 WL 5938689, *4 (C.D. Cal. Oct. 2, 2020) and *Michael Cetta, Inc. v. Admiral Indem. Co.*, 2020 WL 7321405, *6 (S.D.N.Y. Dec. 11, 2020), which both held that interpreting the phrase "direct physical loss" as encompassing the deprivation of property without physical change in the condition of the property would deprive the phrase of any "manageable bounds." *Mudpie*, *Mark's*, and *Cetta* are "COVID-19" coverage cases like this one.

[56] Second Amended Petition, ¶ 60.

was established as a matter of epidemiology through Dr. Stock and as a matter of material science through Dr. Flinn;

- Contrary to Oceana's claims and its grossly misleading "demonstrative" videos,[57] and ignoring the fact that Dr. Moye somehow ignored mask mandates and HVAC modeling when reaching his conclusions, modern HVAC systems dilute the restaurant's air with fresh outside air to mitigate against the airborne viral "stew" shown in Oceana's videos.

Given the above, and without any pretension that there is a 0 % chance of contracting COVID-19 in **any** public space (including the very courtroom where trial occurred), there is no reasoned comparison between *Chinese Drywall*, *Ross*, and *Widder* and this case. In *Chinese Drywall* and progeny, the threat to human health made the environments **unusable** or **uninhabitable**. The Oceana Grill fits neither description. On this ground, too, Oceana has failed to prove its case under the outermost definition of "physical loss" recognized in Louisiana law.

B. Oceana's Loss of Use Theory Using Government Orders Violates the Civil Code Cardinal Rule of Contract Construction as Applied to the Policy.

On the first day of trial, Oceana dismissed its Civil Authority claims with prejudice because its invocation of that coverage would lead to "double-dipping." This claim calls for immediate suspicion by the Court: "Each provision in a contract must be interpreted in light of the other provisions so that each is given the meaning suggested by the contract as a whole." La. Civ. Code art. 2050. As the Louisiana Supreme Court elaborated:

> A cardinal rule of contract construction is that a contract must be interpreted in light of the other provisions so that each is given the meaning suggested by the contract as a whole. We have recognized that this rule should be applied to interpret contract provisions *so as to avoid neutralizing or ignoring any of them or treating them as surplusage*.

Clovelly Oil Co., LLC v. Midstates Petroleum Co., LLC, 2012-2055 (La. 03/19/13), 112 So. 3d 187, 195 (footnotes and quotations omitted, italics original). Accordingly, Oceana's stated basis for dismissing its claim violates "cardinal" presumptions of contractual interpretation.

Reliance on Civil Authority coverage was bound to fail in this case because that coverage requires complete prohibition of access to the insured property.[58] Notwithstanding the

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[57] *See e.g.* P148, showing a single infected patron sitting at a table for ~14 hours or, as Dr. Moye explained, a static "plume" of SARS-CoV-2 that went unaffected by gravity or air currents for ~14 hours.

[58] D1, p. 50 (civil authority coverage). *See also 730 Bienville Partners, Ltd. v. Assurance Co. of Am.*, 2002 WL 31996014 (E.D. La. 2002), *aff'd* 67 F. App'x 248, *2 (5th Cir. 2003); *Kean, Miller, Hawthorne, D'Armond,*

government restrictions on capacity featured prominently in Oceana's case in chief as its loss of use of its property. Oceana's counsel repeatedly pointed to pictures of tables that could not be used due to government orders.

However, if government orders could cause a direct physical loss of property via temporary loss of use because of government orders, there would be no point in including civil authority coverage at all. This, by definition, violates the cardinal rule of contract construction set forth in the Louisiana Civil Code. There is no dispute that Oceana cannot use every table in its restaurant to seat customers until the government orders related to the Pandemic are removed. But this coverage theory is flawed to the core, as it demands that the Court erroneously ignore civil authority coverage as a "surplusage." *See Clovelly Oil*, 112 So. 3d at 195. Similarly, it ignores the fact that the policy contains a specific provision on the effect of government orders restricting access to the property while seeking coverage under the general business interruption and extra expense endorsement. *But see Corbello v. Iowa Prod.*, 2002-0826 (La. 02/25/03), 850 So. 2d 686, 704 (It is "well settled law that in the interpretation of statutes and contracts, the specific controls the general.") (quotation omitted). Accordingly, Oceana's "loss through government order" theory fails as a matter of hornbook Louisiana contract law.

C. Oceana's Interpretation Would Lead to Absurd Results and is Therefore an Unreasonable Interpretation.

Oceana offers yet another strained interpretation of "direct physical loss of or damage to" through Mr. Miller's testimony. However, when the entire Policy is read as a whole, it is exceedingly apparent that Mr. Miller's interpretation is not a reasonable interpretation, in part because it would lead to absurd results.

Mr. Miller testified that the words "loss" and "damage" must have different meanings because of the placement of the word "or" between them. However, his interpretation fails to recognize that the word "damage" is nowhere in the Policy's Covered Cause of Loss Form, which extends only to "direct physical loss." If the Court were to accept Mr. Miller's interpretation, property damaged (such as that from a fire) but still usable (so not a loss of use) would not trigger the Covered Cause of Loss Form, meaning an insured in such a scenario would

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McCowan & Jarman, LLP v. Nat'l Fire Ins. Co. of Hartford, 2007 WL 2489711, *4 (M.D. La. Aug. 29, 2007); *Commstop v. Travelers Indem. Co.*, 2012 WL 1883461, *9 (W.D. La. May 17, 2012) (all requiring total prohibition of access to trigger civil authority coverage).

not be able to secure coverage for a loss due to fire. This interpretation would lead to an absurd result, making Mr. Miller's interpretation entirely unreasonable.

In order to establish coverage for a loss of Business Income, Oceana must prove, among other things, each of the following:

(1) Oceana sustained "direct physical loss of or damage to" insured property;

(2) that "direct physical loss of or damage to" insured property resulted in a necessary "suspension" of Oceana's "operations"; and

(3) the "suspension" occurred during the "period of restoration" (which does not commence until 72 hours after the direct physical loss of or damage to insured property occurs and ends when the property reasonably can be repaired, replaced or rebuilt).

Oceana attempts to prove step (1) with the argument that "direct physical loss of" insured property is the temporary loss of use it sustained because of the Pandemic. Even if one can accept that interpretation (which Underwriters do not), Oceana's reliance on this argument to sustain its burden with respect to step (1) fails to consider that the "direct physical loss of" insured property must then lead to a necessary "suspension," *i.e.*, a slowdown of its operations as seen in step (2). Oceana cannot double-dip its reliance on temporary loss of use to sustain its burden to establish both a "suspension" **and** the "direct physical loss of" insured property, which is exactly what it is attempting to do. Oceana's interpretation is not a reasonable interpretation.

Oceana's interpretation also fails to consider step (3), which allows for recovery only during a "period of restoration," which by definition ends when the property reasonably can be repaired, replaced or rebuilt. If there is no accompanying physical damage, there can be no repair sufficient to trigger a period of restoration. This is exceedingly different than a loss of income due to a theft, which results in a permanent loss of use due to the property's physical absence from the insured's possession but which can be "replaced" thereby potentially triggering a period of restoration. That is simply not the case here. Again, this interpretation is exceedingly strained and evidences a refusal to consider the entirety of the words in the Policy.

The absurd interpretation offered by Oceana must be taken one step further. If temporary loss of use without accompanying physical damage is sufficient to trigger "direct physical loss of" insured property for purposes of the Business Income (and Extra Expense) Coverage Form,

then it must have the same meaning in the Building and Personal Property Coverage Form where the exact same phrase is utilized ("We will pay for direct physical loss of or damage to Covered Property . . . caused by any Covered Cause of Loss"). If temporary loss of use without accompanying physical damage were accepted as covered, the Loss Payment provision for the "cost of repairing or replacing the lost or damaged property" would have no application to a claim solely for financial loss. Unlike a theft, a temporary loss of use has nothing that can be valued for purposes of replacement.

Mr. Miller defined "direct" as "to point . . .", ignoring the fact that the definition he selected from the Merriam-Webster dictionary was the verb (action) definition of the word, further evidencing his strained interpretations. He then defines "direct . . . damage" precisely as found in IRMI but then fails to use that same resource for "direct . . . loss" because it does not provide him the result he wants. The IRMI definitions for these terms are virtually identical and evidence the fact that these terms indeed have the exact same meaning. Although Mr. Miller concedes that the word "physical" means something corporeal, he fails to explain how financial losses due to temporary loss of use are "physical" in nature.

Last, Mr. Miller inserts a word not present into the Policy, specifically "use." The coverage is triggered by "direct physical loss of or damage to" **insured property**, not direct physical loss of **use** or damage to insured property.

D. The Overwhelming Majority of National Decisions Agree that the Pandemic and its Related Government Orders Do Not Cause "Direct Physical Loss of or Damage to" Property.

This Court will be the first in Louisiana to determine whether SARS-CoV-2 causes "direct physical loss of or damage to" property. Accordingly, Underwriters have presented their defenses thus far by relying almost exclusively on Louisiana law. This said, courts around the country have analyzed this issue and provided written reasons for their conclusions. By a wide margin—those courts have rejected claims like Oceana's, often at the motion to dismiss phase of litigation.

These decisions include[59]: *Infinity Exhibits, Inc. v. Certain Underwriters at Lloyd's London Known as Syndicate PEM 4000*, 2020 WL 5791583, *4 (M.D. Fla. Sept. 28, 2020)[60];

[59] To avoid redundancy, Underwriters will not cite opinions from one state more than once.

Emerald Coast Restaurants, Inc. v. Aspen Specialty Ins. Co., No. 3:20-cv-5898 (N.D. Fla. Dec. 18, 2020)[61]; *Terry Black's Barbecue, LLC v. State Automobile Mutual Insurance*, 2020 WL 7351246, *5 (W.D. Tex. Dec. 14, 2020)[62]; *Real Hosp., LLC v. Travelers Cas. Ins. Co. of Am.*, 2020 WL 6503405, *4 (S.D. Miss. Nov. 4, 2020)[63]; *Travelers Cas. Ins. Co. of Am. v. Geragos & Geragos*, 2020 WL 6156584, *4 (C.D. Cal. Oct. 19, 2020)[64]; *Hillcrest Optical, Inc. v. Cont'l Cas. Co.*, 2020 WL 6163142, *8 (S.D. Ala. Oct. 21, 2020)[65]; *Henry's Louisiana Grill, Inc. v. Allied Ins. Co. of Am.*, 2020 WL 5938755 (N.D. Ga. Oct. 6, 2020)[66]; *Rose's 1, LLC v. Erie Ins. Exch.*, 2020 WL 4589206, *2-5 (D.C. Super. Ct. Aug. 6, 2020)[67]; *Sandy Point Dental, PC v. Cincinnati Ins Co.*, No. 20 CV 2160, 2020 WL 5630465, *2 (N.D. Ill. Sept. 21, 2020)[68]; *Promotional Headwear International v. The Cincinnati Ins. Co.*, 2020 WL 7078735, *6 (D. Kan. Dec. 3, 2020)[69]; *Zwillo V, Corp. v. Lexington Ins. Co.*, 2020 WL 7137110, *4 (W.D. Mo. Dec. 2, 2020)[70]; *Santo's Italian Cafe LLC v. Acuity Ins. Co.*, 2020 WL 7490095, *7-12 (N.D. Ohio Dec. 21, 2020)[71]; *Newchops Rest. Comcast LLC v. Admiral Indem. Co.*, 2020 WL 7395153, *4-6 (E.D. Pa. Dec. 17, 2020)[72]; *1210 McGavock St. Hospitality Partners, LLC v. Admiral Indem. Co.*, 2020 WL 7641184, *7 (M.D. Tenn. Dec. 23, 2020)[73]; and Michael Cetta, Inc. v. Admiral

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[60] (There is no coverage for "COVID-19 government shutdown orders under a policy that limits coverage to losses caused by direct physical loss or damage to the property.").

[61] ("[D]irect physical loss of or damage to" property "clearly and unambiguously requires actual physical damage to the property.").

[62] (Plaintiffs' [interpretation of policy to argue that the Pandemic triggers coverage] is unreasonable because it focuses on the word 'loss' while ignoring the Policy's unambiguous requirement that there must be a 'direct physical loss of or damage *to property*' in order to trigger coverage.") (italics original).

[63] (Under Mississippi law, suspension of dine-in service at insured's restaurant as a result of executive orders by governor and mayor during COVID-19 pandemic was not caused by "direct physical loss of or damage to property," and, thus, the policy provided no coverage for business income or extra expense).

[64] ("[L]osses from inability to use property do not amount to 'direct physical loss of or damage to property' within the ordinary and popular meaning of that phrase. Physical loss or damage occurs only when property undergoes a 'distinct, demonstrable, physical alteration.'")

[65] (Shutdown orders do not cause a "direct physical loss of property" in the ordinary sense of the phrase).

[66] (Policy responding to "direct physical loss of or damage to property" not triggered by the Pandemic).

[67] (Finding that dictionary definitions and the weight of caselaw support the interpretation that direct physical loss requires a physical change to the insured property).

[68] (Finding direct physical loss requires "some form of actual, physical damage to the insured premises to trigger coverage.").

[69] (Noting that the "overwhelming majority" of COVID-19 coverage cases considering this or similar coverage language have found that coverage is not triggered).

[70] ("Plaintiff's allegations concerning the impact of the COVID-19 virus and stay-at-home orders do not plausibly allege 'direct physical loss of or damage to' property.").

[71] (Finding that the Pandemic and its related shutdown orders do not cause "direct physical loss of or damage to" property).

[72] (accord).

[73] ("The plaintiff cannot show that the closure orders—or the coronavirus itself—caused 'direct physical loss of or damage to Covered Property.'")

Indem. Co., 2020 WL 7321405, *6 (S.D.N.Y. Dec. 11, 2020).[74] In sum, courts in Florida, Texas, Mississippi, California, Alabama, Georgia, the District of Columbia, Illinois, Kansas, Missouri, Ohio, Pennsylvania, Tennessee, and New York have examined this very issue and rejected the assertion that the Pandemic causes a direct physical loss of or damage to property.

In Oceana's pre-trial memorandum, it argued that "[u]nbiased courts across the nation" agree with its position.[75] It is not clear what Oceana means by "unbiased," as there is no reason to suspect that courts from the fourteen jurisdictions listed above were "biased" against policyholders. Oceana surely does not want the Court to decide this case based on the body of national jurisprudence. Indeed, Oceana's "courts across the nation" claim was supported by only two cases: *Perry Street Brewing Co., LLC v. Mutual of Enumclaw Ins. Co.,* No. 20-2-02212-32 (Wash. Sup. Ct. Nov. 23, 2020) and *North State Deli, LLC, dba Lucky's Delicatessen et al. v. The Cincinnati Ins. Co, et al.*, No. 20-CVS-02569 (N.C. Sup. Ct Oct. 9, 2020). But neither case is persuasive. In short, both cases read the word "physical" out of the phrase "physical loss" by finding that a physical loss of commercial use is a "physical loss." *Perry Street,* p. 6; *Lucky's*, p. 6. Of course, if the policies were intended to cover loss of use, the insuring agreement would read "direct physical loss **of use** of or damage to" property. This is simply not how the Policy is written. As one court noted when rejecting a similar attempt to equate loss of use to a physical loss, policies like Oceana's "insure[] property, . . . not [the insured's] business itself." *Pappy's Barber Shops, Inc. v. Farmers Grp., Inc.*, 2020 WL 5847570, at *6 (S.D. Cal. Oct. 1, 2020).

E. The Efficient Proximate Cause of Oceana's Economic Loss is Due to the Risk to Human Life, not Property Damage.

Even if one can accept that the actual presence of SARS-CoV-2 on surfaces occurred at any time at Oceana and that somehow the property was altered or changed in any way (all of which is denied), the overwhelming evidence is that Oceana's temporary loss of use is not related to such fact but is instead entirely due to the need to save human life. Therefore, the efficient proximate cause of Oceana's suspension is not due to direct physical loss of or damage to insured property.

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[74] ("The plain meaning of the phrase 'direct physical loss of or damage to' therefore connotes a negative alteration in the tangible condition of property. . . . [T]he phrase 'direct physical loss or damage' 'unambiguously requires some form of actual, physical damage to the insured premises'") (citations and formatting omitted).

[75] Oceana Pre-Trial Memorandum, p. 5.

Under Louisiana law, the efficient proximate cause doctrine is utilized to determine whether a loss is caused by an insured peril. The efficient proximate cause of the loss is the dominant, fundamental cause that sets the chain of events in motion. *See Lorio v. Aetna Ins. Co.*, 232 So. 2d 490, 493 (La. 1970); *Roach-Strayhan-Holland Post No. 20, Am. Legion Club, Inc. v. Continental Ins. Co. of N.Y.*, 112 So. 2d 680, 980 (La. 1959).

The March 16 order clearly and unequivocally states that COVID-19 presents "a serious public health threat" that was "imminent," and, as a result, "the New Orleans Health Department, the Louisiana Department of Health, and other City partners have been working successfully and diligently to implement CDC guidelines and assist with the ongoing and developing threat of COVID-19," all of which resulted in the Mayor's restrictions issued.

The March 16 order goes on to acknowledge that the "first presumptive positive case of COVID-19" was announced a mere 7 days before March 16 (on March 9) at a hospital in New Orleans and that as of March 15, "there were 103 presumptive positive cases of COVID-19 in the State of Louisiana, 75 of which are in the City of New Orleans" and that two of those diagnosed in New Orleans had passed from COVID-19. Immediately following this paragraph, the Mayor states that "there is reason to believe that COVID-19 may be spread amongst the population by various means of exposure, including the propensity to spread person to person and the propensity to attach to surfaces for prolonged periods of time, thereby spreading from surface to person and causing property loss and damage in certain circumstances."

Notwithstanding Oceana's counsel's efforts to obtain wording in the civil authority orders referencing damage to property, it is illogical (and insulting) to suggest that Oceana's business, as well as the economies around the world, have been restricted to protect property.

F. The Governmental Acts and Loss of Use Exclusions Prohibit Coverage.

Even if coverage were found to initially apply, two exclusions are implicated, including the exclusion for loss or damage resulting from "[a]cts or decisions . . . of any governmental body."[76] Oceana's financial losses stem entirely from the government's decision to restrict Oceana's operations, first by limiting Oceana to take out, then to restricting capacity at 25%,

[76] D1, p. 61, CP 10 30 09 17, p. 4 of 10.

50% and currently 75%. There can be no other reasonable interpretation that such actions fall within this exclusion.

Similarly, the Policy excludes loss or damage resulting from "loss of use." By definition, Oceana's claims are for loss of use. Indeed, Charles Miller defines the loss as loss of use without accompanying physical damage. There can thus be no other reasonable interpretation that such actions fall within this exclusion.

G. Oceana's Reliance on the Introduction of the Virus Exclusion Changes Nothing.

Instead of looking to the words "direct physical loss of or damage to property," Oceana repeatedly urges the Court to consider words not in the Policy—specifically, a virus exclusion. Underwriters have repeatedly objected to the consideration of any such parol evidence. After the Pandemic began, Avondale began including a virus exclusion in subsequent policies it issued. Oceana argues that this is evidence the policy wording was ambiguous before the inclusion of the virus exclusion. Such attempts have been repeatedly rejected by courts interpreting Louisiana law and should not be allowed here.

In *Vanderbrook v. Unitrin Preferred Ins. Co. (In re Katrina Canal Breaches Litig.)*, 495 F.3d 191 (5th Cir. 2007), a number of plaintiffs sought to recover under property insurance policies for flood damage following Hurricane Katrina, arguing that man-made flood was not explicitly excluded by the various water exclusions. In *Vanderbrook*, some of the plaintiffs pointed to evidence that the insurers involved knew about the availability of policy forms that "more explicitly excluded floods caused in part by man but that they elected not to amend their policies' language accordingly". *Id.* at 209. The Fifth Circuit rejected this notion, stating that "the fact that an exclusion could have been worded more explicitly does not necessarily make it ambiguous." *Id.*, citing *La. Ins. Guar. Ass'n v. Interstate Fire & Cas. Co.*, 630 So. 2d 759, 766 (La. 1994) ("[T]hough . . . the Interstate policy could have been more clearly delineated its payment obligation, that fact does not mandate the conclusion that the policy was legally ambiguous.") (quotations omitted). The Fifth Circuit further looked to the Louisiana Supreme Court's decision in *Cadwallader v. Allstate Ins. Co.*, 848 So. 2d 577 (La. 2003), where the Court there stated:

> The appellate court further erred in reaching a conclusion that because some insurance policies specifically include foster children in their policy definition of

> "relative" or "family member", the term "relative" is somehow rendered ambiguous in the policy at issue. In making this assumption, the appellate court ignored the fundamental precept that it was required to interpret the term using its plain, ordinary and generally prevailing meaning as set forth in the policy at hand. ... It is the particular insurance policy of the insured that establishes the limits of liability and it is well established that this contract of insurance is the law between the parties. When we find the contract of insurance is clear and unambiguous ... we must enforce the policy as written.

848 So. 2d at 583. One year later, the Louisiana Supreme Court upheld the Fifth Circuit's interpretation that "flood" extended to all floods, no matter the cause. *See Sher v. Lafayette Ins. Co.*, 2007-2441 (La. 4/8/08), 988 So. 2d 186. Thus, whether adding a virus exclusion makes the determination of coverage for viruses easier does not alter the Court's task, which is to determine the meaning of the actual words of the Policy.

H. The Reasonable Expectations Doctrine does not Apply.

Cajun has suggested it reasonably expected coverage would apply and therefore coverage should be found. However, the reasonable expectations theory can only be considered and utilized if certain words are first found to be ambiguous.[77] Only at that point may the Court consider the reasonable expectations of the parties in defining the Policy's terms.

Further, as the above interpretation offered by Oceana would lead to unreasonable results, the reasonable expectations doctrine should provide no relief. Likewise, Avondale did not reasonably expect the Policy would apply to the risk of a virus or pandemic and, therefore, the reasonable expectations of coverage doctrine with respect to both the insured and the insurer cannot be satisfied.

VI. CONCLUSION

Oceana is not entitled to coverage under the Policy because, among other things, it cannot show that it has suffered a "direct physical loss of or damage to" any insured property. This conclusion holds both as a question of fact as shown at trial and as a question of Louisiana contract law. Accordingly, Underwriters ask the Court to reject Oceana's claim that the Policy affords coverage for the claims asserted in this litigation.

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[77] *La. Ins. Guar. Ass'n* , 630 So. 2d at 764 ("Ambiguity will also be resolved by ascertaining how a reasonable insurance policy purchaser would construe the clause at the time the insurance contract was entered. The court should construe the policy to fulfill the reasonable expectations of the parties in the light of the customs and usages of the industry. In insurance parlance, this is labelled the reasonable expectations doctrine. Yet, if the policy wording at issue is clear and unambiguously expresses the parties' intent, the insurance contract must be enforced as written.") (citations, quotations, and paragraph break omitted) (underlining supplied).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have on this 5th day of January, 2021, delivered a copy of the foregoing to all known counsel of record by United States Mail, proper postage prepaid, Electronic Mail and/or Facsimile.

_____