CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NO. 2020-02558 DIVISION " M "

CAJUN CONTI LLC, CAJUN CUISINE 1 LLC, AND CAJUN CUISINE LLC D/B/A OCEANA GRILL

VERSUS

CERTAIN UNDERWRITERS AT LLOYD'S, LONDON, ET AL.

FILED: _____ _____

DEPUTY CLERK

PLAINTIFFS' POST-TRIAL MEMORANDUM

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I. INTRODUCTION

The evidence developed in this case clearly and convincingly demonstrates that Certain Underwriters at Lloyd's London (hereinafter "Certain Underwriters") understood that their base all-risk insurance policy forms extended coverage for viral contamination prior to March 2020. Indeed, the evidence shows that the author of the policy in question submitted to the Louisiana Department of Insurance (hereinafter "LA DOI") the mechanisms by which viral contaminations affect property and, thus, the necessity for insurers to exclude such losses with a clear virus exclusion on their all-risk forms after the SARS-CoV-1 ("SARS") pandemic in 2006.[1]

Fourteen years later, and after entering a contract of insurance with Oceana, Certain Underwriters now seek to re-define the terms of their policy in contradiction to the regulatory admission of the author of the policy and the plain, ordinary, and generally prevailing meaning of the language therein. Oceana had a reasonable expectation that Certain Underwriters would abide by the agreed terms of its policy after faithfully paying nearly $100,000 dollars a year in premiums. In the wake of the SARS-CoV-2 viral pandemic ("COVID-19"), which has ravaged our communities and paralyzed businesses, Oceana felt comfort in the fact that they had purchased an all-risk business interruption insurance policy that did not include a virus or pandemic exclusion. The trial record demonstrates this comfort was misplaced as Certain Underwriters tactically denied coverage regardless of the contents of the policy or known fact that business interruption claims arising from the loss or damage to property due to viral contamination is a covered cause of loss.

At trial, testimony from Plaintiffs' insurance industry expert and Defendants' corporate representative detailed how an all-risk policy operates. In fact, there is no dispute that Certain Underwriters issued an all-risk policy which extends coverage to all direct physical loss or damage unless excluded or limited under the policy terms. Certain Underwriters concede that Oceana's policy is "all-risk" and did not include a "Virus or Bacteria Exclusion."[2] The dispute arises from Certain Underwriters newfound 2020 definition of what constitutes a "direct physical loss or damage," which coincidentally would now exclude viral contamination. This 11th hour strategy seeks to strain the language of the policy to allow Certain Underwriters to define "direct physical loss or damage" to necessitate total ruin of property to extend any coverage. However, this 2020 definition is nowhere to be found in the language of the policy, is contrary to Louisiana law,

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[1] *See* Plaintiffs' trial exhibit marked as P35 entered and allowed into evidence at trial.
[2] *See* Certain Underwriters 1442 Deposition of Ethan Gow transcript marked as Plaintiffs' Trial Exhibit P92, which was entered into evidence at trial, and the trial testimony of Mr. Ethan Gow as Certain Underwriters' corporate representative.

conflicts with other policy terms, ignores the regulatory admissions to the LA DOI, and disregards the scientific fact that the contamination of property constitutes a loss or damage to property.[3] Therefore, coverage ought to be extended.

Even if the Court finds that Certain Underwriters' 2020 definition is reasonable, coverage must still be extended due to the ambiguity created through various reasonable interpretations of the undefined terms of the policy. Indeed, nearly every witness at trial had a different definition of "direct physical loss or damage," including Certain Underwriters own expert witnesses. This is further supported by plain and ordinary reading of the terms by unbiased courts throughout the nation who, like Oceana, define "direct physical loss or damage" to include the physical loss of intended use of property. At trial, three key fact regarding the viral contamination remained undisputed: (1) the insured premises was more likely than not contaminated by COVID-19; (2) the presence of COVID-19 on surfaces creates a dangerous physical condition; and (3) the viral contamination of the insured premises is more likely than not continuous due to human exposure. Therefore, physical loss of use of Oceana's restaurant due to viral contamination is a physical loss or damage.

As discussed below, Plaintiffs' have carried their burden of establishing, by a preponderance of the evidence, that coverage for Oceana's losses due to the viral contamination caused by COVID-19 is extended under the policy.[4]

II. ARGUMENT

a. The policy authors' regulatory admission affirms the extension of coverage for viral contamination in Certain Underwriters' base policy.

The policy issued by Certain Underwriters to Oceana provides broad all-risk coverage under their Building and Personal Property coverage form and Business Income (and Extra Expense) coverage form.[5] An "all-risk policy" is an insurance policy which covers all-risks unless clearly and specifically excluded. *Dawson Farms, LLC. v. Millers Mut. Fire Ins. Co.*, 34,801 (La. App. 2 Cir. 8/1 /0 1); 794 So. 2d 949, writ denied, 803 So. 2d 34 (La. 2001). The significance of an all-risk policy here cannot be underestimated, by its virtue it provides broad coverage for

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[3] As a result of the insurance industries strategy to deny viral contamination properly afforded under policies, a tactic which was utilized by Defendants herein, by contradicting former regulatory admissions made to the LA DOI and the potential omission of civil authority language, advocates across the nation, including attorneys, contacted members of their executive branch to blow the whistle on this conduct and inform them of complaint made to the judicial branch. Evidence of such political advocacy is protected by the first amendment and does not affect the coverage determination of the policy at issue. No legal or scientific conclusions in this suit were made upon reliance of a quasi-legal conclusion made by the executive branch. Oceana seeks a legal coverage determination solely from the judicial branch.

[4] Plaintiffs dropped prior to trial any declaratory judgment issue of civil authority coverage.

[5] *See* Certain Underwriters 1442 Deposition of Ethan Gow transcript marked as Plaintiffs' Trial Exhibit P32 page 132, which was entered into evidence at trial, and the trial testimony of Mr. Ethan Gow as Certain Underwriters' corporate representative.

Oceana as opposed to a specified peril coverage with typically lower premiums. Certain Underwriters admittedly do not rely on an exclusion to support their denial of losses due to viral contamination because they cannot do so.

After the 2003 SARS outbreak, which resulted in payments for business interruption due to viral contamination, the insurance industry realized that claims for pandemics could be deemed covered under the standard coverage forms due to the extremely broad protection it provides.[6] In response, the Insurance Services Office, the author of the coverage forms utilized by Certain Underwriters, submitted virus exclusions for approval across the country, including in Louisiana.[7] Indeed, at trial, it was established that the author of the policy at issue submitted the following to the LA DOI in 2006[8]:

> **Disease causing agents may render a product impure (change its quality or substance) or enable the spread of disease by their presence on interior building or the surfaces of personal property.** When disease-causing viral or bacterial contamination occurs, potential claims involve the cost of replacement of property (for example, the milk), **costs of decontamination (for example, interior building surfaces), and business interruption (time element) losses.** (emphasis added)

This is a clear admission by the policy's author that viral contaminations cause a property loss or damage resulting in claims for the decontamination of property and business interruption absent a virus exclusion. This is not only an admission against interest but a regulatory admission as it was submitted to the LA DOI who regulates the transaction of the business of insurance in Louisiana and protects consumers such as Oceana. The virus exclusion submitted to the DOI and now routinely utilized by Certain Underwriters provides the following[9]:

> **THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.** (original emphasis)
>
> **I.** The exclusion set forth in Paragraph **B.** applies to all coverage under all forms and endorsements that comprise this Coverage Part or Policy, including but not limited to forms or endorsements that cover **property damage to buildings or personal property and forms or endorsements that cover business income, extra expense or action of civil authority.**
>
> **II.** We will not pay for **loss or damage caused by or resulting from any virus**, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease. However, this exclusion does not apply to loss or damage caused by or resulting from "fungus", wet rot or dry rot. Such loss or damage is addressed in a separate exclusion in this Coverage Part or Policy (emphasis added)

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[6] *See* Plaintiffs' Pre-Trial Memorandum Exhibit 2.
[7] *Id.*
[8] *See* Plaintiffs' trial exhibit marked as P35 entered and allowed into evidence at trial.
[9] *Id. See also,* Ethan Gow's trial testimony.

The insurance industry, and more specifically Certain Underwriters, use of this exclusion demonstrates that a virus is capable of contamination and does cause physical loss or damage to property. Indeed, this admission identifies the risk of *"loss or damage caused by or resulting from any virus."* If a virus is incapable of causing physical loss or damage, and is thereby always incapable of meeting the threshold for coverage, why do Certain Underwriters' need to specifically exclude the issue with a "virus exclusion"? Because a virus does cause a physical loss or damage. Certain Underwriters explicit decision to not modify the base policy sold to Oceana evidences their intent to provide coverage for claims arising from a virus in turn for a competitive advantage and rate against policies with a virus exclusion.

The policy authors' regulatory admission has been entered and accepted into evidence. Continued attempts by Certain Underwriters to distance themselves from the author of the policy should be denied and are illogical. Certain Underwriters' corporate representative, Mr. Ethan Gow, has testified that coverage is extended through the authors' forms, whose language they have fully incorporated and utilize.[10] At his deposition and at trial, Mr. Gow conceded that Certain Underwriters rely upon the author due to their expertise[11]:

Q. You use ISO forms?
A. That is correct.
Q. All right. And the reason is they are standardized?
A. In the United States, yes.
Q. In the U.S. Okay.
Is it another reason that those forms are vetted by insurance commissioners? Does that factor into it at all for you, for Avondale?
A. Well, I think -- I think the fact that they would be, again, used as a standard makes it -- makes us less prone to, you know, have judgement against the form itself.
Q. Correct. And what do you mean by that: judgment against the form itself?
A. Again, if -- you know, as an MGU, we would not have the expertise to draft our own forms. So having the ability to use a standardized product that many other carriers use, allows us the ability to pass that burden off on professionals.

Certain Underwriters' cannot both depend and rely upon the policy author to issue all coverage language and also advance that the author's admissions as to the scope of the same language is

[10] *See* Certain Underwriters 1442 Deposition of Ethan Gow transcript marked as Plaintiffs' Trial Exhibit P92 pages 133-134, which was entered into evidence at trial, and the trial testimony of Mr. Ethan Gow as Certain Underwriters' corporate representative.
[11] *Id.* at 139.

irrelevant. This is particularly true as Certain Underwriters admit that the fact that the language was vetted with the LA DOI was part of the allure of using the standardized language sold to Oceana.

b. Viral contamination is a covered cause of loss that can result in a direct physical loss or damage.

1. It is undisputed that SARS-CoV-2 continuously contaminated Oceana's property, resulting in a loss of use of the property.

At trial, three key facts regarding the viral contamination remained undisputed: (1) the insured premises was more likely than not contaminated by COVID-19; (2) the presence of COVID-19 on surfaces creates a dangerous physical condition; and (3) the viral contamination of the insured premises is more likely than not continuous due to human exposure. It is well established that COVID-19 is a disease caused by the SARS-CoV-2 virus that has impacted the State of Louisiana, with thousands of cases in the City of New Orleans. In this case, Plaintiffs alleged, and the evidence at trial showed, that the virus was more likely than not present at the insured property due to continued human exposure. Indeed, Dr. Moye, an expert accepted by the Court in general medicine, biostatistics, epidemiology, and virology, testified that due to the rate of infection in the city and population, there is a scientific probability that at least one infected person entered the restaurant a day during its seventeen hours of operations a day, and likely more. Certain Underwriters provided no direct evidence or testimony disputing the likelihood of the presence of COVID-19 within the insured premises. The scope of both Dr. Stock and Dr. Flinn's testimony was limited to what occurred to the property within the insured premises once exposed to COVID-19. Indeed, as an epidemiologist, Dr. Stock's testimony at trial did not touch on any statistical data refuting the scientific likelihood of COVID-19's presence within the insured premises.[12]

Dr. Moye further discussed how the viral particles are expelled by an infected individual, who may not even know that they have COVID-19, and contaminate the surface of property. The surfaces are contaminated as billions of viral particles land on surfaces and change the surrounding environment to one of infectivity. The notion that surfaces may be contaminated by the virus is further supported by the U.S. Center of Disease Control who advise that the virus may spread from a contaminated surface and then to the nose or mouth, causing an infection.[13] Plaintiffs' corporate

[12] Dr. Stock's testimony on viability addresses durability of the virus on the surfaces of the insured property not the actual presence of the virus within the property.
[13] *See* Plaintiffs' Trial Exhibit P41, entered into evidence at trial.

representatives also testified regarding several known instances of contamination of the property as reported by individuals known to have had COVID-19 within the insured premises, including the general manager, Mr. Moe Bader. Indeed, while contaminated, it remains undisputable that there is a dangerous physical condition. Neither Dr. Stock nor Mr. Flinn denied that COVID-19 caused a dangerous physical condition via contamination. Dr. Stock opined only on the length of time the physical condition remained dangerous and her recommended mitigation strategy. Therefore, it remains undisputed that the COVID-19 contamination within the insured premises creates a dangerous physical condition.

As a result of the viral contamination, the dangerous conditions were mitigated by the insured in accordance with the city, state, and CDC guidelines. Oceana is a traditional sit-down restaurant with an approximate 500-person capacity. The intent of the commercial space is to be utilized to sit and serve customers, with two floors of dining and event rooms reserved solely for this purpose. The ability to use the commercial property in its intended manners was lost as a result of COVID-19 and its contamination of the insured property. As a response to the COVID-19 contaminations, Oceana was forced to cease all dine-in operation on or about March 16, 2020 to comply with city orders and for the safety of Oceana's employees and customers. Since March 2020, Oceana has never regained full use of its property, limited to 50% capacity as a direct result of the viral contamination. As Ms. Tiffany Thoman, Oceana's office manager, testified, the loss of use of the restaurant space has impacted the business' operations by slowing down the service of customers at full capacity and the business operations all around. She further testified that while the restaurant cleans and attempts to abide by all protocols in place, the restaurants' environment is never "repaired" as it is re-contaminated every time a new customer is served. The occurrence of a continuous contamination at the insured premises of COVID-19 remains undisputed. Neither Dr. Stock nor Mr. Flinn offered testimony to dispute the occurrence of continuous re-contamination due to human exposure.

Plaintiffs and Dr. Moye concede that the contamination of the insured property may be cleaned with specialized chemicals. Indeed, Plaintiffs' corporate representatives detailed how the business has increased the purchasing of cleaning supplies, air filtration, cleaning procedures, and protective equipment to help mitigate. However, as evidenced, this mitigation does not stop the associated losses due to the continuous contamination through human exposure. Defendants' experts did not consider the continuous contamination of the property in their assessments. Defendants' expert in epidemiology, Dr. Stock, did not deny that the property could be

contaminated by a virus, but rather merely offered mitigation strategies such cleaning and distancing patrons to combat the dangerous of COVID-19. The use of such mitigation strategies is a physical loss or damage as they contribute to the loss of use of property. Indeed, in following such guidelines much of the property may not be used for its intended purpose to allow distancing between patrons. Due to continuous contamination from the properties' human exposure, the plaintiffs have sustained a physical loss or damage resulting in a suspension of their business operations for a period over 72-hours since the start of the viral contamination in March 2020.

2. The continuous viral contamination resulted in a "direct physical loss or damage" to Oceana.

SARS-CoV-2 causes a physical loss or damage to property through its contamination of surfaces and, without an applicable exclusion, is a covered cause of loss. Indeed, neither Dr. Stock nor Mr. Flinn, the defendants' materials experts, deny that the virus contaminates surfaces; rather, the defense experts opine that the viral contamination may be cleaned and does not alter the chemical structure of surfaces, respectively. Mr. Flinn's testimony is limited only to the structural integrity of surface materials and any chemical reactions on such materials. Mr. Flinn agreed that viral particles could be present on surfaces, contaminating the surface, and could be decontaminated thereafter. Mr. Flinn provided no testimony on how the contamination of surfaces affected the properties' environment or any loss of use due to mitigation efforts during any decontamination process. Therefore, Mr. Flinn's testimony is wholly unnecessary and only applicable if the Court finds that the only way to extend coverage under the policy is a structural destruction of property.

Dr. Stock relies solely on the belief that the property is not damaged because Oceana, in her opinion, needs to just clean how any restaurant would have prior to COVID-19 and social distance. First, Dr. Stocks' testimony ignores the reality that the level of cleaning post-COVID-19 is extra-ordinary, requiring a higher level of strategic planning by the managers, products, time, and supervision. A surface may be cleaned after a customer leaves, meaning, for the 45-minutes the customer is eating and socializing without a mask at their table, they are expelling thousands of viral particles to not just the table but surrounding air and property. This occurs continuously throughout the restaurant as new patrons enter and unmask at their tables. By Dr. Stock's own testimony, mitigation efforts are only effective "assuming we do them correctly" and is something that is not always done due to human error. An example of this was the man in her office building who did not properly wear a mask in common areas and was thereafter infected with COVID-19,

which according to Dr. Stock contracting a deadly disease "should teach him a lesson." Second, the decontamination of surfaces must be done a greater rate to attempt mitigation, which correlates to greater amounts of products and time. Third, Dr. Stock advises that social distancing is necessary, meaning Oceana must cease operations in a significant amount of square footage of the property to socially distance tables and patrons.

The dangerous physical property condition caused by SARS-CoV-2 contamination renders a great portion of the property "useless and uninhabitable" due to the nature of its toxicity and its environment. While the property may be cleaned, there are no chemicals in the current market that repel the viral contamination before it occurs, therefore, the continuous contamination of the property and its effect on the use of the property must be addressed. Indeed, Louisiana courts have followed this line of reasoning in citing and utilizing caselaw which found that a saturation of methamphetamine fumes, an infiltration of gas fumes, and presence of unpleasant odor all rendered the property useless and/or uninhabitable constituting a physical loss or damage of property. Certainly, a contamination of noxious viral particles which may lead to death also renders the property as useless and/or uninhabitable as fumes and odors that are merely offensive.

Certain Underwriters' argument that the presence of employees, vendors, and eventually a limited number of patrons, leads to the conclusion that the property is not uninhabitable or useless is a fallacy. As testified by the Plaintiffs' corporate representative, employees and vendors are risking their safety in a contaminated building for their economic survival and to provide an essential item, food. This does not negate the fact that the building and its contents are contaminated, sustaining a physical loss or damage, while these individuals worked. Similarly, a patron's decision to gain limited access during the re-opening phases was done at their own risk, with signage throughout the restaurant warning customers of the dangerous of COVID-19. Moreover, the commercial property's purpose, the ability to host a business and patrons in a traditional sit-down setting, is partially useless due to the contamination. Defendants' argument that a commercial building for a traditional sit-down restaurant is useful even though it cannot operate its normal business due to viral contamination is inherently incorrect.

Further, Plaintiffs' loss of use of the property, particularly all dining-areas, occurred due to the property loss or damage caused by COVID-19's continuous contamination at the insured premise, thus, the suspension of operations is due to a covered cause of loss. The policy provides that "suspension" means "the slowdown or cessation of your business activities", as conceded by the Defendants. Therefore, the contention that the business must have been fully closed or property

totally destroyed is inconsistent with the definition of suspension, which allows for partial operations. Similarly, the Commercial Court of Paris, our French sister court, has found that a restaurant's ability to sell food for takeout or delivery does not obviate the restriction on receiving members of the public, which is fundamental for a traditional, sit-down restaurant.[14] The court further noted that the margin that take-out sales would have generated would be considered in determining the amount or scope of coverage, not whether coverage itself exist. In parallel, the operations of Oceana's operations as a traditional sit-down restaurant were suspended due to a covered cause of loss, COVID-19, resulting in a physical loss or damage sustained to the property.

3. Viral contamination constituting a physical loss or damage is supported by Louisiana law.

Louisiana courts, and federal district courts applying Louisiana law, have applied a liberal standard of what constitutes a direct physical loss or damage to property. In *Widder v. Louisiana Citizens Property Ins. Corp.*, the insured alleged that a lead dust intrusion into his home constituted a "direct physical loss" to the property. *Widder v. Louisiana Citizens Property Ins. Corp.*, 11-0196 (La. App. 4 Cir. 8/10/11), 82 So.3d 294, writ denied, 11-2339 (La. 12/2/11), 76 So.3d 1179. The district court disagreed and rendered summary judgment in favor of the insurer, holding that since the home was still intact, no direct physical loss had occurred therefore, there was no coverage under the policy. *Id.* at 296. The Fourth Circuit rejected that reasoning, which is the same reasoning the defendants allege in the instant case, and reversed the summary judgment. The court of appeal instead concluded that the presence of the lead on the premises rendered the property unusable and uninhabitable, thus its presence is the type of physical loss or damage for which the insurance contract provided coverage. *Id.*

The other three Louisiana decisions concern the presence of Chinese drywall in insured homes. The first of these decisions, *In re Chinese Manufactured Drywall Products Liability Litigation*, is also the most comprehensive. *In re Chinese Manufactured Drywall Products Liability Litigation*, 759 F.Supp.2d 822, 830 (E.D. La. 2010). In resolving the coverage issue, the court canvassed decisions from jurisdictions all around the country and concluded that presence of actively dangerous materials, for example gases or fibers, constitute a covered physical loss." *Id.* at 831. *See also Sentinel Mgmt. Co. v. Aetna Cas. & Surety Co.*, 563 N.W.2d 296

[14] *See* AXA Decision original: https://www.leclubdesjuristes.com/wpcontent/uploads/2020/05/Ordonnance-du-22-mai-2020_Rostang-AXA.pdf; *see also* AXA Decision English translation: https://www.aaimco.com/wp-content/uploads/AXA-France-Decision-05222020.pdf

(Minn.App.1997)(holding the release of asbestos fibers in a building constituted physical loss); *Bd. of Educ. v. Int'l Ins. Co.*, 308 Ill.App.3d 597, 242 Ill. Dec. 1, 720 N.E.2d 622 (1999)(holding asbestos contamination, i.e., release of asbestos fibers, in a building constituted a physical loss); *Farmers Ins. Co. v. Trutanich*, 123 Or.App. 6, 858 P.2d 1332 (1993)(holding the saturation of an insured dwelling by methamphetamine fumes constituted a physical loss); *W. Fire Ins. Co. v. First Presbyterian Church*, 437 P.2d 52 (Colo.1968)(holding the infiltration of a church by gas fumes constituted a physical loss); *Essex v. Bloom South Flooring Corp.*, 562 F.3d 399, 406 (1st Cir.2009)(applying Massachusetts law to find that unpleasant odor constituted a physical injury to property). The court further noted that in a number of the cases, the courts made their coverage determinations "at least partially based upon whether the material rendered the property useless and/or uninhabitable." The court also relied upon *Travco Insurance Co. v. Ward*, which held that for coverage, "physical damage to the property is not necessary, at least where the building in question has been rendered unusable by physical forces." *In re Chinese Manufactured Drywall*, 759 F.Supp.2d at 832, quoting *Travco Insurance Co.*, 715 F.Supp.2d 699, 708 (E.D. Va. 2010). The Fourth Circuit in *Widder* expressly cited the decision in *In re Chinese Manufactured Drywall* for the proposition that, under Louisiana law, where an insured property is inundated or infiltrated with foreign matter or material that renders the property unusable and uninhabitable, physical damage to the property is not necessary to establish a direct physical loss. *Id.*

The Louisiana Fifth Circuit reached a similar conclusion in *Ross v. C. Adams Construction & Design*, finding that primarily the presence of gaseous fumes emitted by the Chinese drywall constituted a direct physical loss to the property even if property was intact and functional. *Ross v. C. Adams Construction & Design,* 10–852 (La. App. 5 Cir. 6/14/11), 70 So.3d 949. Finally, the court in *Dupuy v. USAA Cas. Ins. Co.,* expressly followed the decisions in *In re Chinese Manufactured Drywall* and *Ross* to conclude that the presence of Chinese drywall caused "direct physical loss" to the insured property due to the rendering of property unusable for its intended purpose. *Dupuy v. USAA Cas. Ins. Co.,* 2012 WL 832291 (M.D.La. Mar. 9, 2012) (Brady, J.).

In the instant case, Dr. Moye testified as to how the virus changes the environment, transforming it to one of infectious stability, i.e., the environment remains noxious and static for days. The entire breathable and touchable environment is physically impacted and infected by the continuous noxious current of the virus and transformed. Dr. Moye further testified that only restoration with specific cleaning treatments to all surfaces to denature the billions of virus particles will restore the environment. This decontamination is the repair. None of Certain

Underwriters' witnesses denied this fact, on the contrary, Dr. Stock advised that such specialized cleaning, as advised by the CDC, was how you decontaminate the property. However, Certain Underwriters' experts did not comment on how the continuous contamination directly affected the use of all the property in terms of physical loss or damage. Rather, Dr. Stock's mitigation strategy of restricting property use to advance social distancing directly demonstrates how the Plaintiffs have sustained a physical loss or damage of property. This is precisely the type of loss of use prescribed in Louisiana law, whereby the property is rendered unusable or uninhabitable due to the noxious environment, a dangerous property condition. This type of viral decontamination was also previously considered and acknowledged as a covered cause of loss by the author of the policy as evidenced by the 2006 regulatory admission.

c. If Certain Underwriters' newfound definition of "direct physical loss or damage" is reasonable, the policy is, at a minimum, ambiguous and coverage must be extended.

At the 11th hour, the Defendants, in stride with the industry, strategized means to deny coverage for viral contamination in policies where the base policy was not modified to clearly and unambiguously exclude losses caused by virus. Defendants' position that viral contamination is not a physical loss or damage to property because the terms should only apply to total destruction of property is an absurd conclusion. Indeed, this newfound definition of property loss and damage attempts to unilaterally change the 2006 regulatory admission that virus contaminates surfaces, which gives rise to claims under the policy.

Insofar as Defendants contend that the total ruin of property is a reasonable interpretation, although found nowhere in the policy terms, Plaintiffs' interpretation that loss of use of the property also constitutes a physical loss or damage is reasonable and renders the policy ambiguous. The finding of ambiguity requires the extension of coverage to be granted in favor of the insureds. On this basis alone, coverage is extended; however, coverage is also extended through the terms of the policy as the virus indeed causes a physical loss or damage to property.

An insurance policy is a contract between the parties and should be construed using the general rules of interpretation of contracts set forth in the Civil Code. *Cadwallader v. Allstate Ins. Co.*, 02–1637, p. 3 (La.6/27/03), 848 So.2d 577, 580; *Louisiana Ins. Guar. Ass'n v. Interstate Fire Casualty Co.*, 93–0911, p. 5 (La.1/14/94), 630 So.2d 759, 763. Words and phrases used in an insurance policy are to be construed using their plain, ordinary and generally prevailing meaning, unless the words have acquired a technical meaning. La. C.C. art.2047; *Cadwallader*, 02–1637 at p. 3, 848 So.2d at 580; *Carbon v. Allstate Ins. Co.*, 97–3085, p. 4 (La.10/20/98), 719 So.2d 437,

439. An insurance policy should not be interpreted in an unreasonable or a strained manner so as to enlarge or to restrict its provisions beyond what is reasonably contemplated by its terms or so as to achieve an absurd conclusion. *Carrier v. Reliance Ins. Co.*, 99–2573, pp. 11–12 (La.4/11/00), 759 So.2d 37, 43 (quoting *Louisiana Ins. Guar. Ass'n*, 93–0911 at p. 5, 630 So.2d at 763). If ambiguity remains after the application of the general rules of construction, ambiguous contractual provisions are to be construed against the insurer and in favor of coverage. *Cadwallader*, 02–1637 at p. 3, 848 So.2d at 580; *Carrier*, 99–2573 at p. 12, 759 So.2d at 43–44. Under this rule of strict construction, equivocal provisions seeking to narrow an insurer's obligation are strictly construed against the insurer. *Louisiana Ins. Guar. Ass'n*, 93–0911 at p. 6, 630 So.2d at 764; *Garcia,* 576 So.2d at 976. This applies where the policy term is susceptible to two or more reasonable interpretations. *Cadwallader*, 02–1637 at p. 3, 848 So.2d at 580; *Carrier*, 99–2573 at p. 12, 759 So.2d at 43–44.

It is an undisputable fact that the undefined terms of "direct physical loss or damage" may be read in various reasonable manners and are, therefore, ambiguous. *McAvey v. Lee*, 260 F.3d 359, 365 (5th Cir. 2001). Unbiased courts across the nation have recently demonstrated this fact as they have determined, as a matter of law, that the distinct terms "direct physical loss or damage" include the loss of use of property for its intended purpose. *Perry Street Brewing Co., LLC v. Mutual of Enumclaw Ins. Co.*, No. 20-2-02212-32, Order Granting Plaintiffs' Motion for Partial Summary Judgment Re: Coverage Grant (Wash. Sup. Ct. Nov. 23, 2020); *North State Deli, LLC dba Lucky's Delicatessen et al. v. The Cincinnati Ins. Co, et al.,* No. 20-CVS-02569, Order Granting Plaintiffs' Rule 56 Motion for Partial Summary Judgement (N.C. Sup. Ct Oct. 9, 2020). Considering the full plain, ordinary, and popular meaning of "loss," the plaintiffs, an ordinary lay reader compared to courts, similarly reasonably understood that a "direct physical loss" includes the inability to use property for its intended purpose, i.e., the plaintiffs suffered a loss of its property because it was deprived from using it due to the dangerous property conditions caused by COVID-19 and the subsequent civil authority orders.

This Honorable Court has consistently denied the Defendants' multiple motions attempting to establish that there is no ambiguity in their policy and ought to maintain its previous decisions. The Court has received multiple filings and heard oral arguments relating to the ambiguity found in the Defendants' policy on several occasions.[15] Indeed, the Court acknowledged that the terms

[15] *See* ¶66 of Plaintiffs' Second Amended Petition; p. 19 of Plaintiffs' Opposition to Defendants' Motion for Summary Judgment; p.2 of Plaintiffs' Opposition to Lloyd's Motion to Exclude Charles Miller; and p. 2 of Plaintiffs' Opposition to Lloyd's Motion for Protective Order.

are ambiguous in finding that there is a genuine issue of material fact regarding "direct physical loss or damage" – meaning the Defendants' narrow interpretation of the undefined terms cannot be the only interpretation possible, and in denying the Defendants' Motion in Limine to exclude parol evidence on the basis that no ambiguity exists. Indeed, at trial, parol evidence was introduced by both sides through their use of experts and devices such as dictionaries.

1. Ambiguity is highlighted by the multitude of "physical loss or damage" definitions provided by the varying witnesses and evidence.

Nearly every witness at trial had their own definition of what "direct physical loss or damage" is, including Certain Underwriters own experts. Indeed, Mr. Flinn testified that his definition of physical damage, "an undesirable measurable change in physical property or structure of object not related to wear and tear of regular use," was influenced by his area of study. Mr. Flinn conceded that other experts, specifically Dr. Moye, may have a different definition due to their area of study. Dr. Moye defined damage as a physical transformation that leads to loss of use. Dr. Stock defines damage to include a permanent change. These are three separate experts with three separate definitions.

Likewise, dictionaries, the most basic resource on words of a language and their meaning, do not have a universal definition of the words loss and damage. Merriam-Webster Dictionary defines loss as "(1) Destruction, Ruin; (2)(a) the act of losing possession: Deprivation; (2)(b) the harm or privation from loss or separation; (2)(c) an instance of losing" and damage as "loss or harm resulting from injury to person, property, or reputation."[16] Oxford Dictionary defines loss as "the state of no longer having something or as much of something; the process that leads to this" and damage as "(1) physical harm caused to something which makes it less attractive, useful or valuable; (2) harmful effects on somebody/something."[17] Two leading dictionaries have vastly different definitions on two words Certain Underwriters allege may only have one universal meaning – total ruin and destruction to a structure. Indeed, even in layman's terms there is no universal definition of loss or damage.

Certain Underwriters decision to leave the terms undefined opens the door to such a multitude of interpretations, insofar as they are reasonable. Therefore, Defendants' contention that "direct physical loss or damage" may only be interpreted to mean destruction or ruin of property fails. To Oceana, the terms may therefore be ambiguous, defined by Merriam Webster as "capable

[16] *See* Plaintiffs' Trial Exhibits P48 and P50 entered into evidence at trial.
[17] *See* Plaintiffs' Trial Exhibits P153 and P154.

of being understood in two or more possible senses or ways."[18] Similarly, with multiple reasonable interpretations, the terms are legally ambiguous under Louisiana law and coverage must therefore be affected in favor of the insureds.

2. Certain Underwriters concession that the 2006 virus exclusion modifies policy language demonstrates the extension of coverage under the base policy.

In his deposition and at trial, Certain Underwriters' corporate representative admits that redundancy and clear language is needed for a policyholder, who is not an insurance expert, to understand the terms of the policy.[19] Indeed, it would be important for both parties to understand the contract, particularly when its terms are undefined and susceptible to multiple interpretations.

> THE WITNESS:
> Certainly, I think, you know, when we are working business-to-business, you know, there is certainly an expectation that when we work with insurance professionals that people understand how a policy reads.
> I think it is -- it is certainly a challenge for an insured to understand a policy. [20]
>
> So, you know, insurance terms, insurance language, you know, it is not always, you know, the way that people talk. As much as it tries to be, it is just not. [21]

At the time of contracting, the Defendants offered insurance coverage to Plaintiffs through a proposal and quote, which included the would be limits of insurance, premiums, and a list of the policy coverage forms and exclusions endorsement forms.[22] The list of forms did not include the Virus or Bacteria Exclusion Endorsement established in 2006, which clearly provided in its title and contents that loss and damage resulting from virus was excluded. Indeed, Plaintiffs would not have agreed to a policy with such an exclusion endorsement as a seafood restaurant that routinely serves raw oysters. Plaintiffs accepted the Defendants' offer of insurance without the Virus or Bacteria Exclusion Endorsement and understood that viral contamination was covered cause of loss under the terms of the policy.

Without any provision excluding or limiting losses due to virus or a definition of direct physical loss or damage, it was reasonable for Oceana to interpret "direct physical loss or damage"

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[18] *See* Plaintiffs' Trial Exhibit P52.
[19] *See* Certain Underwriters 1442 Deposition of Ethan Gow transcript marked as Plaintiffs' Trial Exhibit P92, which was entered into evidence at trial, and the trial testimony of Mr. Ethan Gow as Certain Underwriters' corporate representative.
[20] *See* Certain Underwriters 1442 Deposition of Ethan Gow transcript marked as Plaintiffs' Trial Exhibit P92 at p. 164, which was entered into evidence at trial, and the trial testimony of Mr. Ethan Gow as Certain Underwriters' corporate representative.
[21] *Id.* at 168.
[22] *See* Defendants' Proposal and Quote Form attached as Appendix 2 of Plaintiffs' Pre-Trial Memorandum.

to include viral contamination, which was anticipated by the policy's author in their 2006 regulatory admission. There was no means for the insured to understand that Certain Underwriters required a total destruction of property to extend coverage, particularly as a total closure of the business is not even necessary to constitute a suspension of business and payment of busines income losses.

3. Certain Underwriters present use of the 2006 Virus Exclusion to deny COVID-19 viral contaminations evidences the extension of coverage under the base policy.

In the face of the Plaintiffs' reasonable interpretation of the terms of the contract, Certain Underwriters newfound definition attempts to hide their authors regulatory admissions and the subsequent 2006 Virus Exclusion used to modify the base policy, which was available to Certain Underwriters at the time of contracting with Oceana. At trial, Certain Underwriters conceded the fact that they now utilize the 2006 Virus Exclusion. While Certain Underwriters' corporate representative initially urged that the exclusion was merely "redundant" and only being utilized because of insureds "times of desperation," he could not deny that the 2006 form clearly modified the existing coverage[23]:

COMMERCIAL PROPERTY
CP 01 40 07 06

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

EXCLUSION OF LOSS DUE TO VIRUS OR BACTERIA

This endorsement modifies insurance provided under the following:

COMMERCIAL PROPERTY COVERAGE PART
STANDARD PROPERTY POLICY

Certain Underwriters further conceded at trial that utilizing the exclusion, which had been available for years, helped provide clarity to the policy terms and put Certain Underwriters in a stronger coverage position. This echoed the same sentiment provided in Mr. Gow's deposition:

Q. Okay. The question is: Do you use it now?
A. We do.
Q. When did you start using it?
A. April of 2020. [24]

[23] See Plaintiffs' trial exhibit marked as P35 entered and allowed into evidence at trial.
[24] *See* Certain Underwriters 1442 Deposition of Ethan Gow transcript marked as Plaintiffs' Trial Exhibit P92 at p. 157, which was entered into evidence at trial, and the trial testimony of Mr. Ethan Gow as Certain Underwriters' corporate representative.

Q. Okay. You are aware now that that form existed at the time that this policy was issued?
A. That is correct. [25]

Q. Can you read the first sentence after Commercial Property Form CP01400706? What does the first sentence say?
A. "This endorsement changes the policy. Please read it carefully." [26]

This is further evidence that viral contamination can cause physical loss or damage to property and such claims are a covered cause of loss unless the policy is modified to exclude loss or damage caused by virus.

III. CONCLUSION

Plaintiffs present a reasonable interpretation of the undefined terms of the policy, which provides that viral contamination is a covered cause of loss that results in a physical loss or damage of property. This conclusion is not only scientifically supported but was also submitted to the LA DOI by the policy's author in 2006. The 2006 regulatory admission provides that coverage under Certain Underwriters' base policy form is extended for viral contamination unless otherwise modified. Coverage exists for Oceana's losses resulting from COVID-19, a viral pandemic which is a covered cause of loss, that resulted in direct physical loss or damage to Oceana. It is undisputed that SARS-CoV-2 continuously contaminated Oceana's property, resulting in a loss of use of the property. Further, established Louisiana law supports a finding that viral contamination constitutes a physical loss or damage in the absence of a definition in the policy.

Nevertheless, if Certain Underwriters' newfound definition of physical loss or damage requiring structural ruin to extend coverage is found reasonable by the Court, the policy is, at a minimum, ambiguous and coverage must be extended. Certain Underwriters concede that the Plaintiffs' interpretation is reasonable, and the base policy extends coverage for loss or damage caused by viral contamination, insofar as Certain Underwriters acknowledge the need for a provision to modify the base policy to exclude loss or damage by virus and utilize the 2006 virus exclusion to modify the base policy issued to Oceana today. Accordingly, the Court should find that coverage under Certain Underwriters' property and business income policy is extended for Oceana's losses related to the COVID-19 viral contamination.

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[25] *Id.* at 158.
[26] *Id.* at 160.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing has been served on all known counsel of record by either hand-delivery, electronic delivery, facsimile transmission, or U.S. Mail, postage prepaid, this 5th day of January 2021.

JENNIFER PEREZ