THE STATE OF NEW HAMPSHIRE
SUPREME COURT

NO. 2022-0155

SCHLEICHER AND STEBBINS HOTELS, LLC, et al.

v.

STARR SURPLUS LINES INSURANCE COMPANY, et al.

Rule 8 Interlocutory Appeal from an Order of the Merrimack County Superior Court on the Parties' Cross-Motions for Summary Judgment

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ARGUMENT

I. THE PRESENCE OF THE CORONAVIRUS IS NOT "DIRECT PHYSICAL LOSS OF OR DAMAGE TO PROPERTY" UNDER *MELLIN*

A. Jurisdictions Relied on in *Mellin* Strongly Support Defendants' Position

Plaintiffs acknowledge that in *Mellin v. N. Sec. Ins. Co.*, 167 N.H. 544 (2015) this Court relied on cases from other jurisdictions involving asbestos, ammonia, etc., which Plaintiffs analogize to a virus. Appellees Br. 31, 46. But well-reasoned decisions in each of those jurisdictions found no coverage for COVID-19 on the same theory Plaintiffs advocate here, often distinguishing cases cited in *Mellin*. *E.g.*, *Farmington Vill. Dental Assocs., LLC v. Cincinnati Ins. Co.*, 2022 WL 2062280, at *1 (2d Cir. June 8, 2022) (Connecticut law); *AC Ocean Walk, LLC v. Am. Guar. & Liab. Ins. Co.*, 2022 WL 2254864, at *13 (N.J. App. Div. June 23, 2022) (distinguishing *Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am.*, 2014 WL 6675934 (D.N.J. Nov. 25, 2014)); *Uncork & Create LLC v. Cincinnati Ins. Co.*, 27 F.4th 926, 933 (4th Cir. 2022) (West Virginia law, distinguishing *Murray v. State Farm Fire & Cas. Co.*, 509 S.E. 2d 1 (W. Va. 1998)); *Carilion Clinic v. Am. Guar. & Liab. Ins. Co.*, — F. Supp. 3d —, 2022 WL 347617, at *4-13 (W.D. Va. Feb. 4, 2022) (distinguishing *TRAVCO Ins. Co. v. Ward*, 715 F. Supp. 2d 699 (E.D. Va. 2010)); *Tom's Urb. Master LLC v. Fed. Ins. Co.*, 2022 WL 974654, at *5-6 (D. Colo. Mar. 31, 2022) (distinguishing *W. Fire Ins. Co. v. First Presbyterian Church*, 437 P.2d 52 (Colo. 1968)); *Dakota Ventures, LLC v. Or. Mut. Ins. Co.*, 553 F. Supp. 3d 848, 861-62 (D. Or. 2021) (distinguishing *Columbiaknit, Inc. v. Affiliated*

FM Ins. Co., 1999 WL 619100 (D. Or. Aug. 4, 1999)); *Torgerson Props., Inc. v. Cont'l Cas. Co.*, 520 F. Supp. 3d 1155, 1158 (D. Minn. 2021) (distinguishing *Sentinel Mgmt. v. N.H. Ins. Co.*, 563 N.W.2d 296 (Minn. Ct. App. 1997)), *aff'd*, — F.4th —, 2022 WL 2308932 (8th Cir. June 28, 2022). Contrary to Plaintiffs' argument (Appellees Br. 49), none of the cases relied on in *Mellin* held that a need for "cleaning" demonstrated direct physical loss, and all involved repair, replacement or the equivalent. *E.g.*, *Uncork*, 27 F.4th at 933 (distinguishing *Murray*).

Just as this Court looked to other jurisdictions for guidance in *Mellin*, it should follow the overwhelming majority of appellate decisions nationwide holding that the presence of COVID-19 is not "direct physical loss of or damage to property." These jurisdictions include Massachusetts and New Jersey, where 19 of Plaintiffs' 23 hotels are located. *Verveine Corp. v. Strathmore Ins. Co.*, 184 N.E.3d 1266 (Mass. 2022); *AC Ocean*, 2022 WL 2254864, at *13; *MAC Prop. Grp. LLC v. Selective Fire & Cas. Ins. Co.*, — A.3d —, 2022 WL 2196396, at *8 (N.J. App. Div. June 20, 2022); *see also* Appellants' Br. 22 n.6 (noting potential conflict of law issue).

In asking this Court to disagree with this overwhelming authority, Plaintiffs cite trial-court decisions that have been effectively overruled by subsequent appellate decisions. Appellees Br. 52-53 & n.10; *Sweet Berry Café, Inc. v. Society Ins., Inc.*, — N.E.3d —, 2022 WL 780847, at *6, *11 (Ill. App. Ct. Mar. 15, 2022); *Ferrer & Poirot, GP v. Cincinnati Ins. Co.*, 36 F.4th 656, 658 (5th Cir. 2022); *Boardwalk Ventures CA, LLC v. Century-Nat'l Ins. Co.*, 2022 WL 2037844 (Cal. Super. Ct. May 19, 2022)

(reconsidering ruling cited by Plaintiffs and granting summary judgment for insurer based on subsequent appellate decisions).

Plaintiffs suggest that *Verveine* conflicts with *Mellin*, claiming that Massachusetts law requires "destruction" of property, whereas *Mellin* requires a "distinct and demonstrable alteration of the insured property." Appellees Br. 55. But *Verveine* did not require "destruction" of property, recognizing that circumstances other than destruction may trigger coverage. For example, the court acknowledged that a Massachusetts trial court found coverage when a blocked chimney caused carbon monoxide to infiltrate an apartment building requiring repairs. *Verveine*, like *Mellin*, also recognizes that property damage may result from "saturation, ingraining, or infiltration of a substance into the materials of a building or persistent pollution," as in *Farmers Ins. Co. v. Trutanich*, 858 P.2d 1332 (Or. Ct. App. 1993), a noxious odor case cited in *Mellin*. *Verveine*, 184 N.E.3d at 1275-76. The *Verveine* court distinguished those cases because COVID-19 does not demonstrably alter property. *Id.* at 1276.

Plaintiffs cite *Cajun Conti LLC v. Certain Underwriters at Lloyd's*, 2022 WL 2154863 (La. Ct. App. June 15, 2022), *motion for rehearing pending*, a 3-2 decision in which the plurality, acknowledging that "[i]t is unclear what would constitute 'repair' in light of a viral outbreak," *id.* at *7, relied on distinguishable pre-COVID-19 decisions from four jurisdictions, while ignoring that *all four* jurisdictions subsequently found no coverage in essentially identical COVID-19 cases. The well-reasoned dissent agreed with the overwhelming appellate authority nationwide, including from the Fifth Circuit. *Id.* at *8-10 (Belsome, J., dissenting); *Q Clothier New Orleans,*

L.L.C. v. Twin City Fire Ins. Co., 29 F.4th 252, 259–60 (5th Cir. 2022) (Louisiana law).

B. Plaintiffs Misinterpret *Mellin*

Defendants do not ask this Court to overrule *Mellin* (as Plaintiffs suggest). As Defendants have argued throughout this litigation, *Mellin* supports Defendants' position. Plaintiffs distort *Mellin*, asserting that it did not require a "material change" or "alteration" to property, Appellees Br. 41-42, that it involved "a mere unpleasant odor," and that the "smell at the Mellin's condo" only affected people rather than property. *Id.* at 46. Those assertions are all incorrect: (1) this Court expressly required "a distinct and demonstrable alteration of the insured property," i.e., "changes to the property" causing "a distinct and demonstrable alteration to the [condominium] unit"; (2) "[r]emediation proved unsuccessful"; and (3) a trier of fact potentially could conclude that the cat urine caused persistent "changes to the property," undoubtedly requiring replacement of building materials. *Mellin*, 167 N.H. at 546, 549-51.

In contrast, COVID-19 does not cause "distinct or demonstrable alteration to the [property]," nor does it render property "uninhabitable." *Mellin*, 167 N.H. at 546, 550-51. Rather, "the danger of the virus is to 'people in close proximity to one another,' not to the real property itself." *Colectivo Coffee Roasters, Inc. v. Soc'y Ins.*, 974 N.W.2d 442, 448 (Wis. 2022); *see also Consol. Rest. Operations, Inc. v. Westport Ins. Corp.*, 205 A.D.3d 76, 86 (N.Y. App. Div. 2022) (COVID-19 did not cause "any physical change, transformation, or difference in any of [the] property," or

"a single item that [plaintiff] had to replace, anything that changed, or that was actually damaged," and "the property was usable").

As to Plaintiffs' argument that COVID-19 is more dangerous to people than cat urine odor (Appellees Br. 42), the mere fact that a building contains something "dangerous" to *people* cannot be the test for direct physical loss or damage. The presence of armed criminals could create a danger, but would not trigger property coverage. Correctly applied, *Mellin* supports reversal of the Superior Court's order.

C. Plaintiffs Misread Other Relevant Policy Provisions

Period of Restoration: Plaintiffs cite *K.C. Hopps, Ltd. v. Cincinnati Ins. Co.*, 561 F. Supp. 3d 827, 838 (W.D. Mo. 2021), which interprets the "period of restoration" in a manner contrary to Eighth Circuit precedent. *Oral Surgeons, P.C. v. Cincinnati Ins. Co.*, 2 F.4th 1141, 1144 (8th Cir. 2021). Plaintiffs argue that the "period of restoration" can be extended beyond the time needed to "rebuild, repair, or replace lost, damaged or destroyed property" (Appellees Br. 60-61), but those extensions do not apply if there is nothing to repair, rebuild, or replace. Apx. I at 111; *SA Palm Beach, LLC v. Certain Underwriters at Lloyd's*, 32 F.4th 1347, 1361 (11th Cir. 2022) (applying similar provision). Contrary to Plaintiffs' argument (Appellees Br. 61-62), courts have consistently held that "cleaning and disinfecting" does not constitute a repair. *E.g.*, *Sweet Berry Café*, 2022 WL 780847, at *8; *Verveine*, 184 N.E.3d at 1275-76.

"Perils Insured Against": Plaintiffs incorrectly assert that the coverages at issue require "only 'loss or damage,' and not 'physical loss.'" Appellees Br. 64. The Policies expressly require "loss or damage *from the*

perils insured against," defined as "risks of direct physical loss of or damage to property described herein … except as hereinafter excluded." Apx. I at 111, 114; *see Pentair, Inc. v. Am. Guar. & Liab. Ins. Co.*, 2003 WL 21804874, at *2 (D. Minn. July 31, 2003), *aff'd*, 400 F.3d 613 (8th Cir. 2005) (applying similar provision). Plaintiffs' focus on the word "physical" in Paragraph 21(f) is misplaced because "insurance policies often use overlapping provisions to provide greater certainty on the scope of coverages and exclusions." *Crescent Plaza Hotel Owner, L.P. v. Zurich Am. Ins. Co.*, 20 F.4th 303, 311 (7th Cir. 2021). Thus, "direct physical loss of or damage to property" is a foundational requirement of every coverage Plaintiffs seek.

Civil Authority Coverage: Plaintiffs argue that the Orders "were issued in part because of the risk of physical loss or damage to property from COVID-19." Appellees Br. 21. But the Orders were issued for public health reasons, and identify no property damage. Apx. I at 579-580, Apx. II at 208-209, Apx. IV at 152, 155.

Ingress/Egress Coverage: Plaintiffs assert that "loss or damage from COVID-19 away from the Hotels 'impaired or hindered' access to the Hotels." Appellees Br. 21. But Plaintiffs introduced no evidence of any such impairment of access resulting from viral particles being present at any location.

Causation: Plaintiffs allege that COVID-19 was present at airports and train stations (Appellees Br. 21), but they have not established that this *caused* any claimed losses. The scope of Plaintiffs' operations was regulated by the Orders and Plaintiffs reopened when permitted. This is an alternative ground for reversal, as Defendants argued (Appellants' Br. 37-

38), strongly supported by *Inns by the Sea v. Cal. Mut. Ins. Co.*, 286 Cal. Rptr. 3d 576, 589-90 (Ct. App. 2021), *rev. denied* (Cal. Mar. 9, 2022).

Absence of Virus Exclusion: Contrary to Plaintiffs' arguments (Appellees Br. 18-19, 38-39), the absence of a virus exclusion cannot create coverage. *Verveine*, 184 N.E.3d at 1277; *Inns by the Sea*, 286 Cal. Rptr. 3d at 593; *Holden Eng'g & Surveying, Inc. v. Pembroke Rd. Realty Tr.*, 137 N.H. 393, 396 (1993) (extrinsic evidence cannot be used to contradict unambiguous contract).

D. Plaintiffs' Remaining Arguments Lack Merit

Property Rights Cases: Plaintiffs cite irrelevant cases far afield from insurance law concerning the scope of real property rights in the contexts of search and seizure, easements, tax foreclosure, and eminent domain. Appellees Br. 34-36. "[D]irect physical loss of or damage to property" requires "physical effects on the property itself." *Verveine*, 184 N.E.2d at 1276-77. Property insurance does not cover intangible rights such as "loss of legal ownership" due to a title defect. *Id.* at 1274-1275 (discussing *HRG Dev. Corp. v. Graphic Arts Mut. Ins. Co.*, 527 N.E.2d 1179 (Mass. App. Ct. 1988)); *see also Dae Assocs., LLC v. AXA Art Ins. Corp.*, 158 A.D.3d 493, 494 (N.Y. App. Div. 2018) (property policy did not cover gallery's liability for stolen artwork); *Commercial Union Ins. Co. v. Sponholz*, 866 F.2d 1162, 1163 (9th Cir. 1989) (marine policy did not cover loss of a trawler seized due to defective title); *Source Food Tech., Inc. v. U.S. Fid. & Guar. Co.*, 465 F.3d 834, 836 (8th Cir. 2006) ("impairment of function and value of a food product caused by government regulation" was not "direct physical loss"). If regulatory changes such as rezoning triggered

property coverage, it would become virtually unlimited. *See Santo's Italian Café LLC v. Acuity Ins. Co.*, 15 F.4th 398, 402 (6th Cir. 2021).

Extraneous/Excluded Materials: Plaintiffs improperly cite material outside the record, and exhibits *excluded* by the Superior Court. Appellee Br. at 22, 28, 45; Add. 67. Based largely on excluded exhibits and outside material, Plaintiffs and their amici suggest that the "presence of COVID-19" makes property "dangerous and unusable." *E.g.*, Appellees Br. at 27; NHLRA Amicus Br. at 16-17. But hotels have been *open* through the Delta and Omicron waves of the pandemic, reportedly earning $3.3 billion in New Hampshire in 2021. NHLRA Amicus Br. at 6; *see also AC Ocean*, 2022 WL 2254864, at *13 (noting that casino "resumed all activities at its premises when government orders allowed it do so, even while the COVID-19 virus was still circulating"). Plaintiffs' hotels were open for at least some guests throughout the pandemic. Appellants' Br. at 11-12. "[T]he presence of the virus does not render a property useless or uninhabitable, even though it may affect how people interact with and within a particular space." *United Talent Agency v. Vigilant Ins. Co.*, 293 Cal. Rptr. 3d 65, 79 (2022).[1]

[1] *Marina Pacific Hotel and Suites, LLC v. Fireman's Fund Ins. Co.*, 2022 WL 2711886 (Cal. Ct. App. July 13, 2022), applying California pleading rules, distinguished *United Talent* based on alleged site-specific evacuation orders and an allegation that the policyholder was "required to dispose of property damaged by COVID-19." *Id.* at *3, *10. The court relied heavily on a communicable disease coverage provision not at issue here, and strongly hinted that the insurer would be entitled to summary judgment.

Even the CDC article Plaintiffs' amicus cites states that "each contact with a contaminated surface has less than a 1 in 10,000 chance of causing an infection," and thus recommends merely "[r]outine cleaning performed effectively with soap or detergent, at least once per day." New Hampshire Medical Society (NHMS) Amicus Br. 13 n.7.[2] And viral particles in indoor air last "for minutes to hours," depending on ventilation and other factors. *Id.* That is why Massachusetts' highest court properly characterized the virus as "evanescent" and held that it "does not physically alter or affect property," *Verveine*, 184 N.E.3d at 1276—a question of law not science, on which NHMS appropriately takes no position. NHMS Amicus Br. at 10. *See SAS Int'l, Ltd. v. Gen. Star Indem. Co.*, 36 F.4th 23, 28 (1st Cir. 2022) (applying *Verveine*, explaining that more extensive allegations about virus would not change outcome); *Paradigm Care & Enrichment Ctr., LLC v. W. Bend Mut. Ins. Co.*, 33 F.4th 417, 421–22 (7th Cir. 2022) ("the COVID-19 virus does not cause physical loss (or damage) in any plain or ordinary sense").

On Plaintiffs' theory, every hospital treating COVID-19 patients could make an insurance claim for damage to its property every day since March 2020, continuing indefinitely. That makes no sense. *Conn. Children's Med. Ctr. v. Cont'l Cas. Co.*, 2022 WL 168786, at *5 (D. Conn. Jan. 19, 2022) (noting absurdity of theory that virus damages property

[2] NHMS' brief inappropriately cites numerous sources outside the record that are similar to materials excluded by the Superior Court. Add. 67. Contrary to its current position, in September 2020, the NHMS stated that masks, social distancing and "handwashing/sanitizing" were adequate to reopen schools. *See* https://www.nhms.org/News/Presidents-Blogs/ArtMID/123866/ArticleID/581.

when applied to medical facility); *Northwell Health, Inc. v. Lexington Ins. Co.*, 550 F. Supp. 3d 108, 117-18 (S.D.N.Y. 2021) (similar).

Businesses have faced "singular challenges" during the pandemic, but insurance "is not a general safety net for all dangers," and courts "must honor" insurance policy terms. *Santo's*, 15 F.4th at 407.

II. THE MICROORGANISM EXCLUSION PRECLUDES COVERAGE

Plaintiffs offer no answer to the Seventh Circuit's decision in *Crescent Plaza*, which held that an identical Microorganism Exclusion[3] unambiguously applies to COVID-19. Appellees Br. 74. Plaintiffs assert only that "other courts" have agreed with the trial court that the exclusion is ambiguous, but in fact *no other court* has so ruled. *Id.* Plaintiffs cite *Ungarean v. CNA*, 2021 WL 1164836, at *3 & n.6, *12–13 (Pa. Ct. Common Pleas Mar. 25, 2021), *appeal pending*, but that unpublished trial-court order addressed a "microbes" exclusion lacking what the Seventh Circuit highlighted as the "deliberately broad" language covering "microorganisms 'of any type, nature, or description.'" *Crescent Plaza*, 20 F.4th at 30. Moreover, *Ungarean* departed from the principles this Court and the Seventh Circuit have followed. *Cf. Bergeron v. State Farm Fire & Cas. Co.*, 145 N.H. 391, 395 (2000) (focusing on context rather than dictionaries); *Coakley v. Me. Bonding & Cas. Co.*, 136 N.H. 402, 414–15 (1992) (rejecting reliance on specialized knowledge).

[3] Although the endorsement calls its part B the "Microorganism Exclusion," Plaintiffs refer to it as the "Mold, Mildew Exclusion" based on the "Mold, Mildew & Fungus Clause" in its part A. Apx. I at 124.

Under long-standing New Hampshire precedent, the modifying phrase "of any type nature, or description" defeats Plaintiffs' invocation of the *ejusdem generis* canon to avoid the exclusion's plain language and limit "microorganism" to species like "mold, mildew or fungus" that are caused by "water damage." Appellees Br. 66–68. This Court held that *ejusdem generis* did not apply where a specific list was followed by a similarly broad reference to furniture of "whatever name and character, and wheresoever situated in said house," which showed an intent "to give the largest meaning to the word 'furniture.'" *Sumner v. Blakslee*, 59 N.H. 242, 243 (1879) ("[I]t may be presumed that the piano, billiard-table, and pictures" were furniture."). Moreover, Plaintiffs' "water damage" argument is belied by pre-pandemic cases applying the identical Microorganism Exclusion to bacteria from a tenant's decomposing corpse, rather than "a hurricane" or "an old, rusted out pipe." Appellees Br. 66. *See, e.g.*, *Certain Underwriters at Lloyd's v. Creagh*, 563 F. App'x 209, 211 (3d Cir. 2014).

Plaintiffs conflate the scientific debate over whether viruses are "living" with whether they are considered by ordinary people to be a "microorganism of any type, nature, or description." Appellees Br. 68–74. Defendants' opening brief addressed Plaintiffs' dictionaries and scientific texts. Appellants' Br. 43. Plaintiffs ignore the many government websites, public health resources, New Hampshire legislation, and other sources (including Plaintiffs' own) that describe viruses as "microorganisms." *Id.* at 42-43. As *Crescent Plaza* held, the Microorganism Exclusion unambiguously encompasses viruses, as it is not necessary to specify viruses or bacteria as among "microorganism[s] of any type, nature, or description." *Cf.* Appellants' Br. at 18–20, 73.

CONCLUSION

The Superior Court's order should be reversed with direction to enter summary judgment for Defendants.

CERTIFICATE OF SERVICE

I certify that I have delivered the *Reply Brief for Certain Defendants-Appellants* to all other parties in this case by New Hampshire Supreme Court E-Filing.

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CERTIFICATION OF WORD COUNT

Pursuant to Supreme Court Rule 26(7) this reply brief contains 2,992 words, exclusive of the coverage page, signatures, and pages containing the table of contents and table of citations. This word count was made using the word count feature of Microsoft Office 365 Pro Plus, Microsoft Word Version 1808.

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Respectfully submitted,

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