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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QUESTIONS PRESENTED FOR REVIEW

1. Under *Mellin v. N. Sec. Ins. Co.*, 167 N.H. 544 (2015), does the presence of SARS-CoV-2 in the air or on surfaces at a premises, if proven, satisfy a requirement under a property insurance policy of "loss or damage" or "direct physical loss of or damage to property"?

This question was raised by Plaintiffs-Appellees Schleicher and Stebbins Hotels, LLC et al. ("Plaintiffs") in their motion for partial summary judgment, Apx. II at 136, and raised by the undersigned Defendants-Appellants Starr Surplus Lines Insurance Company et al. ("Defendants") in their cross-motion for partial summary judgment, Apx. IV at 10.

2. Does the Mold, Mildew & Fungus Clause and Microorganism Exclusion endorsement in the insurance policies unambiguously preclude coverage for Plaintiffs' claimed losses?

This question was raised by Defendants in their cross-motion for partial summary judgment. Apx. IV at 10.

PERTINENT CONSTITUTIONAL OR STATUTORY PROVISIONS

This case does not involve constitutional or statutory issues.

STATEMENT OF THE CASE AND FACTS

A. COVID-19 Public Health Orders Temporarily Limited Operations at Plaintiffs' Hotels

Plaintiffs own and operate 23 hotels in Massachusetts (18), New Hampshire (4), and New Jersey (1). Apx. II at 189 ¶ 3. They purchased property insurance coverage from Defendants for the policy period of

November 1, 2019, to November 1, 2020. *Id.* ¶ 8. Each insurer accepted a specific share of the risk. Apx. II at 193.

In March 2020, as the COVID-19 pandemic reached the United States, the governors of Massachusetts, New Hampshire, and New Jersey each issued orders (the "Government Orders") adopting public health measures. Apx. II at 204-210; Apx. IV at 152-163. Hotels were temporarily restricted to providing lodging only for certain persons including "essential" workers (such as healthcare personnel), persons self-quarantining or unable to travel home, and vulnerable populations. Apx. II at 204-205, 209-210, Apx. IV at 152-153, 157.

The Government Orders were intended to reduce the person-to-person spread of COVID-19. Governor Sununu's order, for example, explained that "experts indicate that COVID-19 is most commonly spread from an infected symptomatic person to others through respiratory droplets." Apx. II at 208. The temporary restriction on hotels was imposed "to slow the spread of COVID-19, and to promote and secure the safety and protection of the people of New Hampshire." *Id.* at 209; *see also* Apx. I at 579-580, Apx. IV at 152, 155.

Plaintiffs' hotels were always open to "essential" workers and self-quarantining individuals. Beginning in June 2020, the hotels reopened to the public, with certain restrictions and safety requirements. Apx. II at 182-183.

B. Plaintiffs Made a Claim Under Their Property Insurance Policies

Plaintiffs submitted an insurance claim to certain Defendants with a reported date of loss of March 4, 2020.[1] Apx. II at 195. Plaintiffs stated that they were seeking to recover for business income losses, "but we are not currently seeking coverage for direct physical loss of or damage to insured property." *Id.* at 197. Plaintiffs indicated that "All properties are closed, in whole or in part, pursuant to the closure orders issued by the Governor[s]." *Id.* at 198. At four hotels, Plaintiffs identified two guests, one employee, and attendees of an event who reportedly tested positive for COVID-19.[2] *Id.* at 201-02. Plaintiffs asserted that the alleged presence of the Coronavirus at their premises and other non-insured premises allegedly triggered coverage by making it "dangerous for [customers] to come into contact with" the property. Apx. II at 215. Nevertheless, individuals with COVID-19 were "self-quarantining" at the hotels, and "essential" workers were staying there, with precautions taken. *Id.* at 217-218.

In May and June, 2020, several Defendants sent letters to Plaintiffs identifying relevant policy provisions, requesting additional information, and reserving their rights to deny coverage pending the ongoing claim investigation. *Id.* at 224-226, 233-241.

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[1] Some Defendants did not receive notice of a claim until this lawsuit was filed.

[2] Plaintiffs later identified additional isolated reports of a single guest or employee testing positive for COVID-19, and two instances in which "multiple guests" at two hotels reportedly tested positive. Apx. IV at 68-73.

On June 19, 2020, before Defendants completed their claim investigation, Plaintiffs sued Defendants. *Id.* at 149.

C. The Relevant Policy Provisions

To trigger coverage under any of the policy provisions at issue, Plaintiffs must establish "direct physical loss of or damage to property." Plaintiffs seek recovery under three subsections of the "Extensions of Time Element Coverage" in the insurance policies ("Policies"): the Contingent Business Interruption, Civil Authority, and Ingress/Egress coverages. Business interruption coverage, not at issue here, is a time element coverage that insures loss of business income due to a suspension of operations caused by direct physical loss of or damage to property at an insured premises.[3] The extensions of time element coverage at issue here depend on "direct physical loss of or damage to property" at the premises of certain third parties (for Contingent Business Interruption and Civil Authority coverage) or at either an insured or non-insured location (for Ingress/Egress coverage).

The provisions at issue state, in relevant part:

> Extensions of Time Element Coverage: This policy, subject to all its provisions and without increasing the amount of said policy, insures against ACTUAL LOSS SUSTAINED by the insured *resulting from loss or damage from the perils insured against*, to:
>
> …
>
> **[Contingent Business Income]** b) property that directly prevents a supplier (of any tier) of goods and/or services to the insured from receiving the insured's goods and/or

[3] The Policies include business interruption coverage, Apx. I, at 106, but Plaintiffs did not seek such coverage in their motion for partial summary judgment.

> services, or *property that prevents a receiver (of any tier) of goods and/or services from receiving the Insured's goods and/or services*; such supplier or receiver shall not be an insured under this policy. Coverage includes loss or damage to real and personal property located at Attraction properties, defined as properties not operated by the Insured, which attract potential customers to the vicinity of the Insured's locations.
>
> . . .
>
> **[Civil Authority]** d) the actual loss sustained for a period not to exceed ninety (90) consecutive days when, *as a result of a peril insured against*, access to real or personal property is impaired or hindered by order of civil or military authority irrespective of whether the property of the insured shall have been damaged.
>
> **[Ingress/Egress]** e) the actual loss sustained for a period not to exceed ninety (90) consecutive days when, *as a result of a peril insured against*, ingress to or egress from real or personal property is thereby impaired or hindered irrespective of whether the property of the insured shall have been damaged.

Apx. I at 111-112 ¶ 21.[4]

As highlighted above, the relevant provisions all require a "peril insured against," which is defined as "risks of direct physical loss of or damage to property" that are not excluded, as follows:

> PERILS INSURED AGAINST – *This policy insures against risks of direct physical loss of or damage to property described herein* including general average, salvage, and all other charges on shipments covered hereunder, *except as hereinafter excluded*.

[4] Emphasis (using italics) is added herein unless otherwise indicated. The Policies' relevant provisions are identical. Defendants cite the policy issued by Starr Surplus Lines Insurance Company.

Id. at 114 ¶ 28.

The Policies also include the following provision concerning the "Period of Restoration," which is applicable to all time element coverages, and contemplates that any covered time element loss would involve a need to "rebuild, repair, or replace lost, damaged or destroyed property":

> Loss Provisions Applicable to Time Element Coverage – The "Period of Restoration" (including but not limited to business interruption, extra expense, contingent business interruption … etc.) is defined as the length of time for which loss may be claimed, and shall commence with the date of such loss or damage and shall not be limited by the date of expiration of this policy, subject to the following provisions:
> a) The Period of Restoration shall not exceed such length of time as would be required with the exercise of due diligence and dispatch to *rebuild, repair, or replace lost, damaged or destroyed property* and to make such property ready for operations under the same or equivalent physical and operating conditions that existed prior to the loss[.]

Id. at 111 ¶ 20.

The Policies also include the following exclusion ("Microorganism Exclusion") for any loss "directly or indirectly arising out of or relating to" a "microorganism of any type, nature or description," including "any substance whose presence poses an actual or potential threat to human health":

> [T]his policy does not insure against loss, damage, claim, cost, expense or other sum *directly or indirectly arising out of or relating to*:
>
> > mold, mildew, fungus, spores *or other microorganism of any type, nature, or description, including, but not*

> *limited to any substance whose presence poses an actual or potential threat to human health*.
>
> *This exclusion applies regardless of whether there is (i) any physical loss or damage to insured property; (ii) any insured peril or cause, whether or not contributing concurrently or in any sequence; (iii) any loss of use, occupancy, or functionality; or (iv) any action required*, including but not limited to repair, replacement, removal, cleanup, abatement, disposal, relocation, or steps taken to address medical or legal concerns.

Id. at 124 ¶ B.

D. The Superior Court Granted Partial Summary Judgment to Plaintiffs on the Questions Presented

Plaintiffs moved for partial summary judgment, seeking a "ruling that any requirement under the Policies of 'loss or damage' or 'direct physical loss of or damage to property' is met where property is impacted by the coronavirus," and a ruling striking Defendants' affirmative defenses that Plaintiffs had not established "direct physical loss of or damage to property." Apx. II at 136. Plaintiffs did not seek "a factual determination of whether there has been loss or damage to specific property at the Hotels or elsewhere." Apx. II at 156 n.4.

Defendants opposed Plaintiffs' motion and cross-moved for partial summary judgment that the Contingent Business Interruption, Civil Authority and Ingress/Egress coverages did not apply, and that the Microorganism Exclusion precluded coverage. Apx. IV at 10.

After briefing and oral argument, the Superior Court issued the order on appeal ("Order"), granting Plaintiffs' motion, denying Defendants'

motion, and striking certain affirmative defenses. Addendum ("Add.") at 52-75.

Based on the admissible summary judgment evidence,[5] the Superior Court relied on the following undisputed facts about the Coronavirus: The Government Orders were "issued in an attempt to control the spread of the COVID-19 virus.'" *Id.* at 58. "According to the United States Centers for Disease Control (the 'CDC')," "most infections are spread through close contact," but "airborne transmission of [the Coronavirus] can occur under special circumstances." *Id.* Fomite transmission, i.e., the transmission of the Coronavirus by touching a surface with viral material on it and then touching one's mouth or nose, has been considered "a potential 'mode of transmission,'" but "there are no specific reports which have directly demonstrated" that it has occurred. *Id.* The CDC has recommended social distancing, using masks, washing hands, cleaning surfaces, and ventilation. *Id.* at 59.

The Superior Court stated that this Court's decision in *Mellin*, involving odors from cat urine, "held that 'physical loss' … includes 'not only tangible changes to [an] insured property, but also changes … that exist in the absence of structural damage,' provided only that such changes be both 'distinct and demonstrable.'" *Id.* at 72 (quoting *Mellin*, 167 N.H. at 550). The Superior Court acknowledged the Coronavirus "may, like cat

[5] Plaintiffs' motion attached numerous exhibits concerning the Coronavirus/COVID-19. The Superior Court granted Defendants' motion to strike those exhibits in large part, striking certain exhibits as inadmissible hearsay or as scientific studies lacking foundation in expert testimony. Add. at 62-67. Neither side seeks interlocutory review of those rulings.

urine, be removed from surfaces through cleaning and disinfection," and "certain guests might decide to stay at the Plaintiffs' Hotels despite the risks involved," but it held that this "does not prevent a conclusion that the properties have been changed in a 'distinct and demonstrable' fashion." *Id.* at 73. The Superior Court reasoned that "property contaminated with [the Coronavirus] is 'distinct' from uncontaminated property" because "[c]oming into contact with property exposed to the virus results in a *risk of contracting a potentially deadly disease*," emphasizing the "*risk ... to human health*" if, for example, "an infected guest at one of the Hotels were to infect a doorknob." *Id.* The Superior Court further suggested that the presence of the virus on property "is clearly 'demonstrable' through a series of means, including laboratory testing." *Id.* It thus concluded that "loss resulting from [Coronavirus] contamination" could satisfy the policies' requirement of a "peril insured against," i.e., "direct physical loss of or damage to property." *Id.* at 73-74.

The Superior Court only briefly addressed the Microorganism Exclusion, finding it inapplicable "because a virus is not unambiguously understood to be a 'microorganism.'" *Id.* at 74. The court acknowledged that various dictionaries and other sources specifically define "microorganism" to include viruses, but noted that another dictionary defined "microorganism" as a "living thing," and a children's textbook stated that scientists disagree about whether viruses are "alive." *Id.* at 74 n.5.

The Superior Court granted Defendants' motion for interlocutory appeal, and this Court accepted the appeal.

SUMMARY OF ARGUMENT

I. The Policies' relevant provisions all require loss or damage resulting from a "peril insured against," defined as "direct physical loss of or damage to property" at either specified non-insured locations or the insured premises. As many courts have held, the evanescent presence of the Coronavirus within a building does not constitute direct physical loss of or damage to property. It does not require repairing or replacing a doorknob or furniture, does not render a structure uninhabitable, and does not distinctly or demonstrably physically alter property. An ordinary person who contracts COVID-19 (or any other virus) and recovers at home would not say there was "direct physical loss or damage to" their *property*. The Coronavirus harms people, not property.

This Court's decision in *Mellin* was not a departure from the prevailing law on the meaning of "direct physical loss" nationwide, and *Mellin* supports reversal of the Superior Court's order. *Mellin* explained that "the term 'physical loss' requires a distinct and demonstrable alteration of the insured property," that is, "changes to the property"—"a distinct and demonstrable alteration to the [condominium] unit." *Mellin*, 167 N.H. at 550-51. Without prompt remediation, cat urine can physically damage property, saturating building materials and causing staining and a harmful and offensive odor that lingers indefinitely, requiring replacement of building materials to remedy. The building/health inspector concluded that the owners needed to vacate the property and "have a company terminate the odor," but "[r]emediation proved unsuccessful." *Id.* at 546. The odor was so pervasive and persistent that this Court held that the odor may have

altered the property itself (without conclusively resolving the issue, instead remanding to the superior court). *Id.* at 551.

Mellin requires a "distinct and demonstrable alteration" to the *property*, not merely the evanescent presence of a virus that harms *people*, not property. Unlike the cat urine in *Mellin*, the Coronavirus can be removed with basic household cleaners or allowed to dissipate on its own after a short period of time without any remediation whatsoever. *Verveine Corp. v. Strathmore Ins. Co.*, 184 N.E.3d 1266, 1276 (Mass. 2022) ("Evanescent presence of a harmful airborne substance that will quickly dissipate on its own, or surface-level contamination that can be removed by simple cleaning, does not physically alter or affect property."). Moreover, unlike in *Mellin*, Plaintiffs' hotels remained usable and inhabitable, and continued to be used.

The Policies' "period of restoration" provision, which was not part of the homeowners' policy in *Mellin*, further supports reversal. New Hampshire law requires that insurance policies be read as a whole. The "period of restoration" provision contemplates that any covered business income loss involves "rebuild[ing], repair[ing], or replac[ing] lost, damaged or destroyed property." Apx. I at 111 ¶ 20. Here, Plaintiffs admitted that the Coronavirus can simply be cleaned or disinfected. Plaintiffs did not submit any evidence that any property required repair or replacement due to the alleged presence of the Coronavirus (and it would not). In *Mellin*, in contrast, repair or replacement of property would have been required to remedy the cat urine odor.

The Superior Court's ruling is contrary to every federal and state appellate decision across the country, which has held that the presence of

the Coronavirus is not direct physical loss of or damage to property. This includes the recent Massachusetts Supreme Judicial Court decision in *Verveine*. The "distinct and demonstrable alteration" standard is not unique to New Hampshire; it was drawn from this Court's review of case law nationwide. *See Mellin*, 167 N.H. at 549-50. In COVID-19 cases, *every* state and federal appellate court to date has *unanimously* ruled for the insurer, including 9 of the 11 regional federal circuits applying the law of numerous states, two state supreme courts, and eight other states' intermediate appellate courts. Many of these decisions have applied a "distinct and demonstrable alteration" standard.

The Superior Court's ruling also creates a potential conflict between the law of Massachusetts (where 18 of the hotels are located and the Supreme Judicial Court found no coverage), New Jersey (where one hotel is located and appeals await decision), and New Hampshire (where four of the hotels are located). If the Superior Court ruling stands, a choice of law ruling will become necessary. *See* fn. 6 below.

II. The Microorganism Exclusion is an independently dispositive and straightforward ground for reversal. Broadly worded, it applies to a microorganism "of any type nature or description," including "any substance whose presence poses an actual or potential threat to human health." Apx. I at 124. The Seventh Circuit recently held that an identical Microorganism Exclusion "use[s] broad language that a reasonable reader would understand to include viruses." *Crescent Plaza Hotel Owner, L.P. v. Zurich Am. Ins. Co.*, 20 F.4th 303, 310 (7th Cir. 2021). The court found the debate about whether viruses are "alive" irrelevant because "[t]he question is how an ordinary reader or policyholder, not a scientist, would understand

the term as used in the policy," and "an ordinary reader, unversed in the nuances of classification debates in microbiology, would be unlikely to home in on viruses' lack of cellular structure." *Id.* at 309-10. This decision was fully consistent with New Hampshire's rule that insurance policy exclusions are given their "plain and ordinary meaning" "as understood by a layperson of average intelligence." *Coakley v. Me. Bonding & Cas. Co.*, 136 N.H. 402, 414-15 (1992).

STANDARD OF REVIEW AND APPLICABLE LEGAL STANDARDS

This Court reviews de novo a summary judgment decision on questions of insurance policy interpretation. *Santos v. Metro. Prop. & Cas. Ins. Co.*, 171 N.H. 682, 685 (2019). The Court "construe[s] the language of an insurance policy as would a reasonable person in the position of the insured based upon a more than casual reading of the policy as a whole." *Rizzo v. Allstate Ins. Co.*, 170 N.H. 708, 719 (2018).[6] "Where the terms of the policy are clear and unambiguous," the Court "accord[s] the language its natural and ordinary meaning," *id.*, and "where judicial precedent clearly defines a term at issue, [the Court] need look no further than that definition," *Coakley*, 136 N.H. at 409-10. This Court is "not free to rewrite

[6] Plaintiffs' motion for partial summary judgment sought a ruling on "the question of whether the impact of the coronavirus on property generally … involves loss or damage that triggers coverage *under New Hampshire law*." Apx. II at 156 n.4. Defendants did not object to the application of New Hampshire law on the cross-motions because they believed there was no conflict of law. If an actual conflict of law arises, a choice of law analysis will become necessary. *See Consol. Mut. Ins. Co. v. Radio Foods Corp.*, 108 N.H. 494, 496 (1968). The Superior Court has deferred ruling on choice of law pending this appeal. Apx. VI at 258.

[the policy's] terms by giving them a meaning which they never had." *Cath. Med. Ctr. v. Exec. Risk Indem., Inc.*, 151 N.H. 699, 702–03 (2005) (quoting *Consoli v. Commw. Ins. Co.*, 97 N.H. 224, 226 (1951)). "Insurers are free to contractually limit the extent of their liability through use of a policy exclusion provided it violates no statutory provision" and is clear and unambiguous. *Russell v. NGM Ins. Co.*, 170 N.H. 424, 429 (2017); *Mellin*, 167 N.H. at 547.

The Policies are not ambiguous, nor should any of the Policies' terms be construed against Defendants because Plaintiffs are sophisticated commercial insureds and their broker drafted the policy language. Apx. IV at 82. *See*, *e.g.*, *Oxford Realty Grp. Cedar v. Travelers Excess & Surplus Lines Co.*, 160 A.3d 1263, 1270 (N.J. 2017) ("Sophisticated commercial insureds, however, do not receive the benefit of having contractual ambiguities construed against the insurer."); *Exeter Hosp., Inc. v. Steadfast Ins. Co.*, 2018 WL 1052441, at *7-8 (N.H. Super. Ct. Jan. 10, 2018) (similar).

ARGUMENT

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

A. The Requirement of "Direct" and "Physical" Loss of or Damage to Property Is Fundamental to Property Insurance

Property insurance covers property, such as an insured's building or its business personal property (e.g., equipment, furniture), against risks of direct physical loss or damage. The Policies here cover, primarily, Plaintiffs' real and personal property, which is insured at its "replacement

cost new" if covered physical loss or damage is timely "repaired, rebuilt or replaced." Apx. I at 105-106 ¶¶ 7, 9(i). "Even when called 'all-risk' policies, as these policies sometimes are, they still cover only risks that lead to tangible 'physical' loss or damages, say by fire, water, wind, freezing and overheating, or vandalism." *Santo's Italian Café LLC v. Acuity Ins. Co*., 15 F.4th 398, 403 (6th Cir. 2021) (affirming dismissal of Coronavirus claim). "The imperative of a 'direct physical loss' or 'direct physical damage' . . . is the North Star of [a] property insurance policy from start to finish." *Id.* at 402.

As explained above, there are three "time element" coverage provisions at issue in this appeal, all requiring direct physical loss of or damage to property, either at certain non-insured premises (for Contingent Business Interruption and Civil Authority coverage) or either insured or non-insured premises (for Ingress/Egress coverage):

- Contingent Business Interruption coverage insures business income losses sustained by an insured resulting from direct physical loss of or damage to property that prevents a receiver of Plaintiffs' goods or services from receiving them. This provision can also be triggered by direct physical loss of or damage to property at attraction properties that "attract potential customers to the vicinity of the Insured's locations." Apx. I at 111-112 ¶ 21(b). Plaintiffs claim the presence of the Coronavirus at such locations would be "direct physical loss of or damage to property."
- Civil Authority coverage applies only if "as a result of a peril insured against [i.e., 'direct physical loss of or damage to property']"

at any location, "access to real or personal property is impaired or hindered by order of civil or military authority." *Id.* at 112 ¶ 21(d). Here, no "direct physical loss of or damage to property" gave rise to the Government Orders, as those orders reflect. Apx. II at 204-210; Apx. IV at 152-163.

- Ingress/Egress Coverage applies only if, "as a result of a peril insured against [i.e., 'direct physical loss of or damage to property']" at any location, "ingress to or egress from real or personal property is thereby impaired or hindered, irrespective of whether the property of the insured shall have been damaged." Apx. I at 112 ¶ 21(e). Here, no "direct physical loss of or damage to property" at Plaintiffs' hotels or any location nearby "impaired or hindered" access to the hotels.

Thus, physical harm to property is a fundamental, essential requirement for all of these coverages. *See, e.g.*, *United Talent Agency v. Vigilant Ins. Co.*, -- Cal. Rptr. 3d --, 2022 WL 1198011, at *1 (Ct. App. Apr. 22, 2022) (addressing direct physical loss or damage requirement as applied to "dependent business premises," such as those that "attract customers"); *Q Clothier New Orleans, L.L.C. v. Twin City Fire Ins. Co.*, 29 F.4th 252, 260 (5th Cir. 2022) (affirming dismissal of claim for Civil Authority coverage because "[t]here is no plausible nexus between the [civil authority] orders and any loss to property").

As explained more fully below, "[e]vanescent presence of a harmful airborne substance that will quickly dissipate on its own, or surface-level contamination that can be removed by a simple cleaning" does not

constitute "direct physical loss of or damage to property." *Verveine*, 184 N.E.3d at 1276. "The novel coronavirus did not physically affect the property in the way, say, fire or water damage would." *Santo's*, 15 F.4th at 402. Property insurance policies "do not cover losses indirectly caused by a virus that injures *people*, not property." *Id.* at 403. An ordinary person who contracts COVID-19 and recuperates with the virus in their home would not say there was "direct physical loss or damage to" their *property*.

B. *Mellin* Supports Defendants' Position

In *Mellin*, the plaintiffs sought to recover under their homeowner's policy after their condominium was affected by cat urine odor from a neighboring downstairs unit. 167 N.H. at 545. The insureds and their tenant temporarily moved out of the unit at different times due to the odor. *Id.* The building/health inspector instructed the plaintiffs to move out and "have a company terminate the odor," but "[r]emediation proved unsuccessful." *Id.* at 546. The plaintiffs ultimately sold the condominium and claimed that the sales price was reduced because of the odor. *Id.* The policy provided: "We insure against risk of direct loss to property . . . only if that loss is a *physical loss* to property." *Id.* at 547 (emphasis in original). The trial court granted summary judgment for the insurer, finding that the cat urine odor did not satisfy the "physical loss" requirement. *Id.* at 546.

This Court vacated and remanded the trial court's grant of summary judgment for the insurer on the "physical loss" issue. The Court defined "physical" as "perceived by the senses; material," and concluded that "'physical loss' need not be read to include only tangible changes to the property that can be seen or touched, but can also encompass changes that

are perceived by the sense of smell." *Id.* at 548. The Court agreed with out-of-state cases involving odors, toxic gases such as ammonia, and gasoline that saturated a church building. *Id.* at 548-49. These cases, the Court explained, "stand for the proposition that an insured may suffer 'physical loss' from a contaminant or condition that *causes changes to the property* that cannot be seen or touched." *Id.* at 549. The Court noted, however, that "the term 'physical loss' should not be interpreted overly broadly," agreeing with the Eighth Circuit that coverage would not apply "whenever property cannot be used for its intended purpose." *Id.* (quoting *Pentair v. Am. Guar. & Liab. Ins.*, 400 F.3d 613, 616 (8th Cir. 2005)).

Mellin concluded that "the term 'physical loss' requires a *distinct and demonstrable alteration of the insured property*," *id.* at 550, citing *Columbiaknit, Inc. v. Affiliated FM Ins. Co.*, No. CV-98-434-HU, 1999 WL 619100 (D. Or. Aug. 4, 1999). In *Columbiaknit*, a clothing manufacturer sustained damage to fabric and garments in its warehouse from rainwater and humidity. 1999 WL 619100, at *1. The insurer agreed to pay for water-damaged and moldy goods, but declined to pay for goods that were merely exposed to humidity. *Id.* at *2. The court noted that "[t]he 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*." *Id.* at *4 (quoting 10 *Couch on Ins.* § 148:46 (3d ed. 1998)). The court held that "[t]he decision not to sell the garment as new, *in the absence of distinct and demonstrable physical change to the garment* necessitating some remedial action that

would preclude honestly marketing as first quality goods, is not a covered loss." *Id.* at *7. Absent a "*persistent, pervasive* odor," "[t]he mere adherence of molecules to porous surfaces, without more, does not equate [to] physical loss or damage." *Id.*

Applying this "distinct and demonstrable alteration of the insured property" standard to the facts of *Mellin*, this Court explained that "physical loss" could include "*changes* that are perceived by the sense of smell and that exist in the absence of structural damage," but "[t]hese changes, however, must be distinct and demonstrable." *Mellin*, 167 N.H. at 550. In other words, the plaintiffs "must establish a *distinct and demonstrable alteration to the unit*." *Id.* at 551. The building/health inspector had advised the plaintiff to move out for remediation, and the cat urine odor had not been successfully remediated after several months. *Id.* at 545-46. Unlike a routine event such as urine from a pet being house trained that can be quickly cleaned, in *Mellin*, the pervasive, persistent odor had become an embedded attribute of the condominium unit itself. *See Verveine*, 184 N.E.3d at 1276 (distinguishing a "persistent odor," "persistent pollution," or "saturation, ingraining, or infiltration of a substance into the materials of a building" from the Coronavirus). Undoubtedly, although not stated in the opinion, the odor could not be eradicated without replacing carpet, flooring and/or other building components in the neighboring unit where the cats resided. The Court noted that "[e]vidence that a change rendered the insured property temporarily or permanently unusable or uninhabitable may support a finding that the loss was a physical loss to the insured property," but the Court "express[ed] no opinion as to the outcome of th[is] analysis,"

leaving that to the trial court. *Mellin*, 167 N.H. at 545-46. On remand, the case settled.

Here, the Superior Court erroneously applied *Mellin*. The Superior Court disregarded this Court's definition of "physical" as "perceived by the senses; material," and failed to correctly apply this Court's interpretation of "physical loss" as requiring "changes to the property" that amount to a "distinct and demonstrable alteration to the [insured property]." *Id.* at 550-51. Instead, the Superior Court incorrectly concluded that "property contaminated with [the Coronavirus] is 'distinct' from uncontaminated property" because "[c]oming into contact with property exposed to the virus results in a risk of contracting a potentially deadly disease." Add. at 73.

The Superior Court erred for two reasons. First, *Mellin* requires a perceptible, material "change" or "distinct and demonstrable alteration" *to the property*, such as the pervasive, persistent odor in *Mellin* potentially making the property "unusable or uninhabitable." 167 N.H. at 551. As Massachusetts' highest court recently stated in affirming dismissal of a similar COVID-19 case under a nearly identical "distinct, demonstrable, physical alteration of the property" standard, there must be "physical effects on the property itself" "that can be described as loss or damage." *Verveine*, 184 N.E.3d at 1276. In other words, "[t]he property must be changed, damaged or affected in some tangible way, making it different from what it was before the claimed event occurred." *Consol. Rest. Operations, Inc. v. Westport Ins. Corp.*, 205 A.D.3d 76, 82 (N.Y. App. Div. 2022) (affirming dismissal of similar case).

The Superior Court erroneously adopted Plaintiffs' argument that to satisfy the *Mellin* standard, the insured property merely needs to be "distinct" from other property unaffected by the alleged contaminant. Properly construed, *Mellin* requires that the property *itself* must change in a material way. It is the "change" or "alteration" of the *property* that must be "distinct and demonstrable," and persistent. As discussed further below, Plaintiffs have not established that the presence of the Coronavirus changes or alters property. And, unlike in *Mellin*, Plaintiffs' hotels were not "unusable or uninhabitable"—they housed "essential" workers and even people with COVID-19 who were quarantining. Apx. II at 217-218. Moreover, Plaintiffs reopened to the general public while the Coronavirus was still circulating extensively, and have remained opened since, despite the surges of the Delta and Omicron variants. Had the virus caused direct physical loss or damage, Plaintiffs' hotels would have remained closed and required repairs. To the contrary, "the 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*, 2022 WL 1198011, at *10.

Second, the Superior Court erred in concluding that the "distinct and demonstrable alteration" standard was satisfied because "[c]oming into contact with property exposed to the virus results in a risk of contracting a potentially deadly disease," citing the "risk that it poses to *human health*." Add. at 73. The *Mellin* standard (and property insurance in general) is focused on *property*. The Policies insure *property*, not people. *Mellin* required more than a possible "health problem existing." Rather, the plaintiffs were required to "establish a distinct and demonstrable alteration

to the [condominium] unit." 167 N.H. at 546. As a Rhode Island court recently explained, the Superior Court's decision in this case was "flawed" because it "conflated a risk to *humans* and a risk to *property*"—"[w]hether a doorknob, for example, poses a risk to human health is absolutely irrelevant to whether that doorknob is physically lost or damaged for purposes of insurance coverage." *Josephson, LLC v. Affiliated FM Ins. Co.*, No. PC-2021-03708, 2022 WL 999134, at *13 (R.I. Super. Ct. Mar. 29, 2022) (emphasis in original).

A fire, for example, is "demonstrable" and poses a risk to human health. But under *Mellin* the fire has to cause a "distinct and demonstrable alteration" to *property* for coverage to apply. A fire that remains within a fireplace, for example, is not direct physical loss or damage to property. although it is "distinct and demonstrable" and poses a potential risk to humans. The Superior Court erroneously suggested that the mere presence of the Coronavirus on insured property, if proven, would satisfy *Mellin* where no property has been physically altered.

The Superior Court also misstated the *Mellin* facts by incorrectly suggesting that "[a]reas in the vicinity of the insured property could theoretically have been cleaned such that the smell was no longer present, and a tenant could theoretically have learned to live with the smell." Add. at 72. To the contrary, in *Mellin*, the building/health inspector advised the insureds to "have a company terminate the odor," and "[r]emediation proved unsuccessful." *Mellin*, 167 N.H. at 546. The cat urine odor was so pervasive and persistent that it had effectively become an attribute of the property itself. *See*, *e.g.*, *Verveine*, 184 N.E.3d at 1276 (distinguishing cases

involving a "persistent odor," ammonia and gasoline infiltration from COVID-19).

Here, in contrast, Plaintiffs admitted that "[t]he coronavirus can be disinfected or cleaned." Apx. IV at 310. Plaintiffs introduced no evidence that the Coronavirus can harm *property*, and common sense dictates that it cannot. No one would claim that the presence of the common cold virus (another coronavirus) on furniture is "direct physical loss of or damage to property." If it were, a business could make a property insurance claim every time an employee or patron had a cold and was present at the property. While the Coronavirus is much more dangerous than the common cold for people, like other viruses it does nothing to property. As the *Columbiaknit* case relied upon by this Court for the "distinct and demonstrable alteration" standard concluded, "[t]he mere adherence of molecules to porous surfaces, without more, does not equate [to] physical loss or damage." *Columbiaknit*, 1999 WL 619100, at *7. That same Oregon federal court has applied *Columbiaknit* to the Coronavirus and found that similar policy language does not provide coverage. *Dakota Ventures, LLC v. Or. Mut. Ins. Co.*, 553 F. Supp. 3d 848, 861-62 (D. Or. 2021).

The Seventh Circuit recently affirmed the dismissal of similar cases, explaining that, "*[w]hile the impact of the virus on the world over the last year and a half can hardly be overstated, its impact on physical property is inconsequential*: deadly or not, it may be wiped off surfaces using ordinary cleaning materials, and it disintegrates on its own in a matter of days." *Sandy Point Dental, P.C. v. Cincinnati Ins. Co.*, 20 F.4th 327, 335 (7th Cir. 2021). "The mere presence of the virus on surfaces did not physically alter the property, nor did the existence of airborne particles carrying the virus," and

there is no need "to 'repair[], rebuil[d] or replace[]' any structures or items on the premises." *East Coast Entm't of Durham, LLC v. Houston Cas. Co.*, 31 F.4th 547, 551 (7th Cir. 2022).

As a Florida appellate court aptly explained, unlike a hurricane, with Coronavirus "*the property did not change. The world around it did.* And for the property to be useable again, no repair or change can be made to the property—the world must change." *Commodore, Inc. v. Certain Underwriters at Lloyd's London*, -- So. 3d --, 2022 WL 1481776, at *6 (Fla. Dist. Ct. App. May 11, 2022) (citation omitted); *see also Assocs. in Periodontics, PLC v. Cincinnati Ins. Co.*, 540 F. Supp. 3d 441, 449 (D. Vt. May 18, 2021) (same).

The *Mellin* standard requires a "distinct and demonstrable alteration" to the *property*, not merely the presence of an evanescent substance. To the extent the *Mellin* standard warrants clarification in the context of the Coronavirus, this Court should do that, consistent with the overwhelming consensus of appellate decisions nationwide discussed in Section I.D. below.

C. The Period of Restoration Provision Further Supports Reversal

This Court construes an insurance policy "as a whole" to ascertain "the plain and ordinary meaning of the policy's words in context." *Russell*, 170 N.H. at 428; *see also Cath. Med. Ctr.*, 151 N.H. at 702 (policy terms are not interpreted "in isolation" but rather "in context").

Here, the "period of restoration" provision (Paragraph 20) provides context that numerous courts have relied on in finding no coverage in similar COVID-19 cases. As quoted on p. 15 above, this provision, applicable to all the "time element" coverages, governs the "length of time

for which loss may be claimed," which "shall not exceed such length of time as would be required with the exercise of due diligence and dispatch to *rebuild, repair, or replace lost, damaged or destroyed property*." Apx. I at 111 ¶ 20. For example, if there was "direct physical loss of or damage to property" due to a fire at an "attraction property" near one of Plaintiffs' hotels, giving rise to coverage under Paragraph 21(b), coverage would exist only for the time reasonably necessary to repair or replace the damaged property.

As recent appellate decisions across the country have repeatedly held, under the "period of restoration" provision "there needs to be active repair or remediation measures to correct the claimed damage or the business must move to a new location." *Verveine*, 184 N.E.3d at 1275. "Any alternative meaning of the terms 'physical loss' or 'physical damage' that does not require a material alteration to the property would render meaningless this pre-condition to coverage." *Uncork & Create LLC v. Cincinnati Ins. Co.*, 27 F.4th 926, 932 (4th Cir. 2022) (finding no coverage based on alleged presence of Coronavirus); *see also, e.g., Brown Jug, Inc. v. Cincinnati Ins. Co.*, 27 F.4th 398, 403 (6th Cir. 2022); *Sandy Point Dental*, 20 F.4th at 333; *Goodwill Indus. of Cent. Okla., Inc. v. Phila. Indem. Ins. Co.*, 21 F.4th 704, 711 (10th Cir. 2021); *GPL Enterprise, LLC v. Certain Underwriters at Lloyd's*, -- A.3d --, 2022 WL 1638787, at *7 (Md. App. May 24, 2022); *Inns by the Sea v. Cal. Mut. Ins. Co.*, 71 Cal. App. 5th 688, 707-08 (2021).

The Illinois Appellate Court also cited the "period of restoration" provision in holding that the alleged presence of the Coronavirus did not trigger coverage because the insured's café continued to operate, the

insured was not "required to hire specialized contractors to clear its premises of the virus," "the virus did not physically alter the property," and "routine cleaning or the mere passage of a brief period eliminates it." *Sweet Berry Café, Inc. v. Society Ins., Inc.*, No. 2-21-0088, -- N.E.3d --, 2022 WL 780847, at *11 (Ill. App. Ct. Mar. 15, 2022); *see also Commodore*, 2022 WL 1481776, at *6 (similar analysis by Florida court of appeal). Thus, there was no "period of restoration" during which coverage might be implicated.

These decisions by appellate courts across the country are consistent with New Hampshire law, under which insurance policies must be read as a whole, *Russell*, 170 N.H. at 428, and this Court "will not presume language in a policy to be mere surplus." *Int'l Surplus Lines Ins. Co. v. Mfrs. & Merchants Mut. Ins. Co.*, 140 N.H. 15, 19 (1995); *see also Calabraro v. Metro. Prop. & Cas. Ins. Co.*, 142 N.H. 308, 311 (1997) (rejecting proposed interpretation of insurance policy that would render language meaningless). Finding coverage where there is no need to "rebuild, repair, or replace lost, damaged or destroyed property" would render the "period of restoration" provision meaningless. *Uncork & Create*, 27 F.4th at 932.

D. Overwhelming Authority Nationwide Supports Reversal

The Superior Court's ruling that the presence of the Coronavirus can satisfy the requirement of "direct physical loss of or damage to property" conflicts with *every* federal and state appellate decision to address that issue to date, and countless trial court decisions nationwide that have applied a legal standard substantially equivalent to the *Mellin* standard. In essentially-identical COVID-19 cases, *every* state and federal appellate decision to date has *unanimously* ruled for the insurer, including 9 of the 11 regional federal

circuits applying the law of numerous states; the supreme courts of Massachusetts, Iowa and Virginia; and intermediate state appellate courts in eight additional states. *See SA Palm Beach, LLC v. Certain Underwriters at Lloyd's London*, No. 20-14812, -- F.4th --, 2022 WL 1421414, at *8 (11th Cir. May 5, 2022) (collecting federal and state appellate decisions); *Verveine*, 184 N.E.3d at 1275-76 (discussed above); *Wakonda Club v. Selective Ins. Co. of Am.*, -- N.W.2d --, 2022 WL 1194012, at *6 (Iowa Apr. 22, 2022) ("possibility of the COVID-19 virus being present" was "insufficient to trigger coverage … because there was no imminent physical threat to the insured's property"); *Crescent Hotels & Resorts LLC v. Zurich Am. Ins. Co.*, 2022 WL 1124493 (Va. Apr. 14, 2022) (finding "no reversible error" in similar case); *GPL Enterprise*, 2022 WL 1368787, at *3 (agreeing with "every appellate court that has considered the question").

The New York Appellate Division recently rejected coverage based on allegations of "fomites" and the Coronavirus in the air. Distinguishing cases cited in *Mellin*, it explained that "plaintiff fails to identify any physical change, transformation, or difference in any of its property," or "a single item that it had to replace, anything that changed, or that was actually damaged at any of its properties." *Consolidated Rest. Ops.*, 205 A.D.3d at 86. Rather, "[n]othing stopped working" and the plaintiff's restaurants were used for take-out and delivery services, demonstrating that "the property was usable, and not physically damaged, despite the presence of the virus." *Id.*

The Illinois Appellate Court reached the same result, reasoning that "no property needed to be repaired or replaced," and "unlike a noxious gas, for example, the virus's presence is easily remediated by routine, not

specialized or costly, cleaning and disinfecting or will die off after a few days." *Sweet Berry Café*, 2022 WL 780847, at 8. The court distinguished cases involving "noxious gas contamination" and "persistent cat urine odor" (alluding to *Mellin*) because "unlike here, the substances rendered the premises unusable." *Id.* Ohio and Florida appellate courts have agreed. *Sanzo Enters., LLC v. Erie Ins. Exch.*, 182 N.E.2d 393, 406 (Ohio Ct. App. 2021) ("Even if appellant had alleged the presence of COVID-19 on the premises, the presence of it did not cause the damage to the property such that repair, rebuilding, or restoration was necessary."); *Commodore*, 2022 WL 1421414, at *11 ("surfaces not tangibly altered or harmed can be cleaned without requiring repair"; insured's "need to clean or disinfect stores to get rid of COVID-19 does not constitute direct physical loss or damage").

The California Court of Appeal also recently agreed, applying a "distinct, demonstrable, physical alteration of the property" standard, and reasoning that "the virus exists worldwide wherever infected people are present, it can be cleaned from surfaces through general disinfection measures, and transmission may be reduced or rendered less harmful through practices unrelated to the property," and "the presence of the virus does not render a property useless or uninhabitable." *United Talent Agency*, 2022 WL 1198011, at *10. Another California Court of Appeal decision, applying the same standard, distinguished *Mellin* (and other cases cited in *Mellin*), reasoning that the plaintiff "cannot reasonably allege that the presence of the COVID-19 virus on its premises is what *caused* the premises to be uninhabitable or unsuitable for their intended purpose" where the government orders "were issued because the COVID-19 virus

was present throughout San Mateo and Monterey Counties, not because of any particular presence of the virus on Inns' premises." *Inns by the Sea*, 71 Cal. App. 5th at 702-03. Moreover, "the presence of COVID-19 on Plaintiff's property did not cause damage to the property necessitating rehabilitation or restoration efforts similar to those required to abate asbestos or remove poisonous fumes which permeate property." *Id.* (citation omitted). The court of appeal also emphasized that the government orders would have restricted the hotels' operations and the "normal functioning of society" even if the plaintiff had "thoroughly sterilized its premises to remove any trace of the virus." *Id.* at 590; *see also GPL Enterprise*, 2022 WL 1638787, at *8 (similar analysis). The rationale in *Inns by the Sea* and *GPL Enterprise* is fully applicable here—the Government Orders were not issued because the Coronavirus was present at any particular location, and they applied irrespective of the presence of the virus. Apx. II at 204-210; Apx. IV at 152-163.

Similarly, the Second, Fourth, Seventh and Eleventh Circuits, several of them discussing case law cited in *Mellin*, found no coverage based on the alleged presence of the Coronavirus because, for example, "neither the closure order nor the Covid-19 virus caused present or impending material destruction or material harm that physically altered the covered property requiring repairs or replacement." *Uncork & Create*, 27 F.4th at 933[7]; *see also Sandy Point Dental*, 20 F.4th at 334 (distinguishing cases cited in *Mellin* because "the gas infiltration in these cases led to more

[7] *Uncork & Create* distinguished *Murray v. State Farm Fire & Cas. Co.*, 509 S.E.2d 1 (W. Va. 1998), cited in *Mellin*, 167 N.H. at 549-50; *see also Verveine*, 184 N.E.3d at 1277 n.15 (distinguishing *Murray*).

than a diminished ability to use the property" — "[i]t was so severe that it led to complete dispossession," and "the gas infiltration made physical entry impossible"); *Kim-Chee LLC v. Phila. Indem. Ins. Co.*, No. 21-1082-cv, 2022 WL 258569, at *2 (2d Cir. Jan. 28, 2022) (similar; unpublished); *SA Palm Beach*, 2022 WL 1421414, at *10-12 (same result under similar standard); *GPL Enterprise*, 2022 WL 1638787, at *8 ("unlike the gasoline vapors that contaminated [a] church, the virus itself did not render [plaintiff's] restaurant unsafe and unusable for any and all purposes whatsoever").

As this Court has done before, it should rule consistent with the "clear majority of our sister States which have considered this issue." *Cutter v. Me. Bonding & Cas. Co.*, 133 N.H. 569, 573 (1990). Courts throughout the nation "give unambiguous words their ordinary meaning," "[a]nd it is quite unlikely that the 'average' [New Hampshirite] would interpret the phrase 'direct physical loss' in an insurance policy differently from, say, the average Ohioan, New Yorker, or Iowan." *Estes v. Cincinnati Ins. Co.*, 23 F.4th 695, 701 (6th Cir. 2022).

II. THE MICROORGANISM EXCLUSION PRECLUDES COVERAGE

The Microorganism Exclusion (quoted at pp. 15-16 above) provides an independent, dispositive ground for reversal. It excludes "any loss, damage, claim, cost, expense or other sum *directly or indirectly arising out of or relating to*: mold, mildew, fungus, spores or *other microorganism of any type, nature, or descriptio*n, including but not limited to *any substance whose presence poses an actual or potential threat to human health*." Apx. I at 124 ¶ B. The Seventh Circuit, in an opinion devoted to the identical

Microorganism Exclusion, held that the exclusion is unambiguous and bars coverage for "losses [that] arose from and were related to the coronavirus," because "the virus qualifies as a 'microorganism' under the terms of the exclusion." *Crescent Plaza Hotel Owner, L.P., v. Zurich Am. Ins. Co.*, 20 F.4th 303, 309 (7th Cir. 2021). This Court recently concluded that an insurance policy's exclusionary language was unambiguous by looking to a federal court's interpretation of "a nearly identical insurance policy." *Cincinnati Specialty Underwriters Ins. Co. v. Best Way Homes, Inc.*, No. 2021-0280, — N.H. —, 2022 WL 1234269, at *4 (N.H. Apr. 27, 2022) (citing *Cincinnati Specialty U/W Ins. v. Milionis Constr., Inc.*, 352 F. Supp. 3d 1049, 1055 & n.5 (E.D. Wash. 2018)). As shown below, the Seventh Circuit's analysis is consistent with this Court's approach to interpreting insurance policies.

The Seventh Circuit recognized that "the context and language signal clearly that the exclusion applies to losses caused by viruses." *Crescent Plaza*, 20 F.4th at 310; *see also Best Way Homes*, 2022 WL 1234269, at *3 ("When determining whether an ambiguity exists, we look to the claimed ambiguity and consider it in its appropriate context."); *Mellin*, 167 N.H. at 547 (construing policies "in context, and in the light of what a more than casual reading of the policy would reveal to an ordinarily intelligent insured") (cleaned up). The Seventh Circuit explained: "The relevant language is deliberately broad, covering microorganisms 'of any type, nature, or description,' and applying broadly to 'any substance whose presence poses an actual or potential threat to human health,' which the coronavirus undeniably does," and "a reasonable reader would understand [this language] to include viruses." *Crescent Plaza*, 20 F.4th at 310. Here,

the Superior Court acknowledged in its decision that the Coronavirus "poses" a "risk … to human health" Add. at 73, bringing this case squarely within the exclusion.

The Seventh Circuit squarely rejected the reasoning on which the Superior Court erroneously relied below. In the sole paragraph of its order addressed to the exclusion, the Superior Court held that "[t]he Microorganism Exclusion is not applicable to [the Coronavirus], because a virus is not unambiguously understood to be a 'microorganism.'" Add. at 74. The court cited a children's textbook stating that "scientists differ as to whether viruses are alive or not," along with an online dictionary distinguishing viruses from bacteria on the basis that viruses are not "living organisms" while bacteria are. *Id.* at 74 n.5; Apx. V at 667. But the Seventh Circuit made clear that the scientific "alive or not" controversy is irrelevant to whether a virus is a "microorganism of any type, nature, or description" as an "ordinary reader or policyholder" would understand that phrase. *Crescent Plaza*, 20 F.4th at 309. The Seventh Circuit assumed that biologists disagree about "whether viruses are appropriately categorized as microorganisms for various scientific purposes" (as some argue viruses "are not alive and do not have cells"). *Id.* Nevertheless, "an ordinary reader, unversed in the nuances of classification debates in microbiology, would be unlikely to home in on viruses' lack of cellular structure" and would not be expected to understand such "gossamer distinctions." *Id.* at 309-10 (cleaned up). Instead, "the average policy holder would be puzzled by [the plaintiff's] theory that the exclusion bars losses caused by bacteria but not those caused by viruses." *Id.* The context of the exclusion further

demonstrates this: a substance need not be "alive" to "pose[] an actual or potential threat to human health." Apx. I at 124 ¶ B.

Like the Seventh Circuit, this Court and others have rejected use of specialized professional or scientific knowledge to inform the meaning of an undefined insurance policy term. *See Coakley*, 136 N.H. at 414–15 (rejecting legal definition of "damages" because "[t]he average insured … has not attended law school, much less a law school remedies class"); *Robinson v. Liberty Mut. Ins. Co.*, 958 F.3d 1137, 1141 (11th Cir. 2020) (holding that exclusion for "insects" applied to losses from spiders, though "the scientific community distinguishes between arachnids and insects," because "an ordinary person would still understand the term 'insect' to include spiders, and "not every adult recalls the basics of their childhood science lessons as well as they should") (citing *Nix v. Hedden*, 149 U.S. 304, 307 (1893) (following "the common language of the people" in holding that tomatoes should be statutorily classified as "vegetables" rather than "fruit," although "[b]otanically speaking, tomatoes are the fruit of a vine")).

The record further establishes that whether viruses are alive does not change the fact that they are commonly described as "microorganisms." The National Institutes of Health's website explains that viruses are considered "microbes …, also called microorganisms," whether or not they are, "strictly speaking, living organisms." Apx. VI at 116. Plaintiffs quoted a children's biology text as stating that "living things are made of cells, and viruses are not made from cells," but the same page of that text states, "Viruses are *microscopic organisms* that can be found just about everywhere on Earth." Apx. V at 617.

The Seventh Circuit recognized that "many dictionaries include viruses within their definitions of 'microorganism,'" while "other dictionary definitions of 'microorganism' do not mention viruses," but "competing dictionary definitions … [are] not necessarily enough to render the exclusion ambiguous." *Crescent Plaza*, 20 F.4th at 309-10; *see also Bergeron v. State Farm Fire & Cas. Co.*, 145 N.H. 391, 395 (2000) ("question[ing] the usefulness of dictionaries in interpreting terms" and preferring to focus on "the context of the term in the policy"). That was borne out in this case: many dictionaries and encyclopedias expressly define "microorganism" to include viruses. *See, e.g.*, *Webster's New World College Dictionary* (Apx. IV at 167); *Oxford English Dictionary* (Apx. IV at 169); *Encyclopedia Britannica* (Apx. IV at 183).

Plaintiffs pointed to three families of dictionaries (*Merriam-Webster*, *American Herit*age, and *Random House*), but none stated that viruses are not "microorganisms." Instead, most merely cited bacteria or protozoans as examples of microorganisms, with such introductory terms as "such as," "as," or "especially." The most-recent *Merriam-Webster* dictionary cited by Plaintiffs recognizes that viruses are "regarded either as *extremely simple microorganisms* or as extremely complex molecules," and its explanatory notes list "Virus Nomenclature" as a subsection of "**Names of Plants, Animals & Microorganisms**." *Merriam-Webster's Collegiate Dictionary* 21a, 23a, 1397-98 (11th ed. 2020).

Beyond dictionaries and encyclopedias, Defendants submitted a compendium of numerous sources including government websites and popular web health sites demonstrating that the ordinarily intelligent

insured would understand the term "microorganism" to include viruses. Apx. IV at 164-282. Illustrative examples include the following:

- The New Hampshire legislature recognized that "pathogenic microorganisms" include viruses. N.H. RSA § 141-G:8(III).
- NIH's website defines "microorganism" as "microscopic organisms, including bacteria, *viruses*, fungi, plants, and animals," Apx. IV at 237, while the CDC's website refers to viruses as "organisms," *id.* at 245, and defines "microbes" as "[l]iving organisms, like bacteria, fungi, or *viruses*, which can cause infections or disease." *Id.* at 251.
- *WebMD* defines a virus as a "microscopic organism that invades living cells," *id.* at 270, *MedicineNet* defines a virus as a type of "microorganism," *id.* at 273, and the Mayo Clinic website lists viruses as among the "organisms" that cause infectious diseases. *Id.* at 276.

The record in this case thus firmly supports the Seventh Circuit's conclusion that the "ordinary reader or policyholder" would understand the Microorganism Exclusion as applying to losses caused by viruses. *Crescent Plaza*, 20 F.4th at 309. New Hampshire law requires the same analysis—interpreting the exclusion "in context, and in the light of what a more than casual reading of the policy would reveal to an ordinarily intelligent insured." *Mellin*, 167 N.H. at 547 (internal quotation marks and citation omitted). This Court should reach the same conclusion.

CONCLUSION

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

REQUEST FOR ORAL ARGUMENT

Defendants respectfully request oral argument before the full Court with 15 minutes per side, and designate Wystan M. Ackerman to argue.

RULE 16(3)(i) CERTIFICATION

Pursuant to Supreme Court Rule 16(3)(i), the undersigned certifies that a copy of the Superior Court's order on appeal is attached in an addendum hereto.

/s/ Megan A. Sigur_____
Megan A. Sigur, Esq.

CERTIFICATION OF WORD COUNT

Pursuant to Supreme Court Rule 26(7) this Brief contains 9,430 words, exclusive of the cover page, signatures, pages containing the table of contents, tables of citations, and the addendum. The word count was made using the word count feature of Microsoft Office 365 Pro Plus, Microsoft Word Version 1808.

/s/ Megan A. Sigur_____
Megan A. Sigur, Esq.

Respectfully submitted,

STARR SURPLUS LINES INSURANCE COMPANY AND CERTAIN UNDERWRITERS AT LLOYD'S AND LONDON COMPANIES SUBSCRIBING TO POLICY NUMBER EW0040519

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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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ADDENDUM TO BRIEF FOR CERTAIN DEFENDANTS-APPELLANTS

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ADDENDUM TO BRIEF FOR CERTAIN DEFENDANTS-APPELLANTS

The State of New Hampshire

MERRIMACK COUNTY **SUPERIOR COURT**

SCHLEICHER & STEBBINS HOTELS, LLC, et al.

v.

STARR SURPLUS LINES INSURANCE COMPANIES, et al.

Docket No.: 217-2020-CV-00309

ORDER

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

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

I. Standard

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

II. Background

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(Id. ¶ 10 (emphasis added).)

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

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

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

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

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

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

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

III. Analysis

A. Motions to Strike

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. Motions for Summary Judgment

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

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

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

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

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

1. AXIS's Motion for Partial Summary Judgment

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

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

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

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

2. Remaining Motions for Partial Summary Judgment

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IV. Conclusion

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

SO ORDERED.

6/15/21
Date

John C. Kissinger, Jr.
Presiding Justice

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