

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 the June 15, 2021 Order of the
Merrimack County Superior Court on the Motion for Summary Judgment
By Defendant-Respondent AXIS Surplus Insurance Company

**BRIEF FOR DEFENDANT-RESPONDENT
AXIS SURPLUS INSURANCE COMPANY**

Kevin G. Collimore
NH Bar No. 11259
CULLENCOLLIMORE, PLLC
10 East Pearl Street
Nashua, NH 03060
(603) 881-5500
kcollimore@cullencollimore.com

Kristin V. Gallagher (*pro hac vice*)
Eduardo DeMarco (*pro hac vice*)
KENNEDYS CMK LLP
Basking Ridge, NJ 07920
(908) 848-6300
Kristin.Gallagher@kennedyslaw.com
Eduardo.DeMarco@kennedyslaw.com

Counsel for Defendant-Respondent AXIS Surplus Insurance Company

TABLE OF CONTENTS

	Page
TABLE OF CITATIONS	4
QUESTIONS PRESENTED FOR REVIEW	6
STATEMENT OF THE CASE AND FACTS	6
A. Plaintiffs Seek Coverage For Losses Resulting From The Coronavirus	6
B. The AXIS Policy’s Virus Exclusion	6
C. The Superior Court Granted Summary Judgment to AXIS On The Question Presented Here	8
SUMMARY OF ARGUMENT	9
STANDARD OF REVIEW AND APPLICABLE LEGAL STANDARD.	11
ARGUMENT	11
A. Plaintiffs’ Own Allegations Make Clear That Their Alleged Loss Falls Squarely Within The Scope Of The AXIS Virus Exclusion.....	11
B. New Hampshire Law Supports The Enforcement Of The AXIS Virus Exclusion.....	13
C. Courts Outside New Hampshire Have Overwhelmingly Enforced The Same Virus Exclusion In The Same Context Of A Coronavirus Claim	20
CONCLUSION	25
REQUEST FOR ORAL ARGUMENT.....	26

CERTIFICATION OF WORD COUNT.....27
CERTIFICATE OF SERVICE.....27

TABLE OF CITATIONS

	Page(s)
Cases	
<u>AC Ocean Walk, LLC v. Am. Guarantee and Liab. Ins. Co.,</u> No. A-1824-21, 2022 WL 2254864 (N.J. Super. Ct. App. Div. June 23, 2022).....	12, 22
<u>AFM Mattress Co., LLC v. Motorists Com. Mut. Ins. Co.,</u> 37 F.4th 440 (7th Cir. 2022)	20
<u>Bartlett v. Commerce Ins. Co.,</u> 167 N.H. 521 (2015).....	16
<u>Bates v. Phenix Mut. Fire Ins. Co.,</u> 156 N.H. 719 (2008).....	16
<u>Boscov's Dep't Store, Inc. v. Am. Guarantee & Liab. Ins. Co.,</u> 546 F. Supp. 3d 354 (E.D. Pa. 2021).....	12, 23
<u>Cam-Sam Real Estate Holding, LLC v. Merchants Mut. Ins. Co.,</u> No. 18-CV-433-SM, 2019 WL 2913689 (D.N.H. July 8, 2019).....	16
<u>Circus Circus LV, LP v. AIG Specialty Ins. Co.,</u> 525 F. Supp. 3d 1269 (D. Nev. 2021).....	12, 23, 24, 25
<u>Consolidated Mut. Ins. Co. v. Radio Foods Corp.,</u> 108 N.H. 494 (1968).....	11
<u>Cordish Companies, Inc. v. Affiliated FM Ins. Co.,</u> No. CV ELH-20-2419, 2021 WL 5448740 (D. Md. Nov. 22, 2021).....	11, 22
<u>Dana Inc. v. Zurich Am. Ins. Co.,</u> No. 21-4150, 2022 WL 2452381 (6th Cir. July 6, 2022)	12, 23
<u>Ford of Slidell, LLC v. Starr Surplus Lines Ins. Co.,</u> No. CV 21-858, 2021 WL 5415846 (E.D. La. Nov. 19, 2021)	23
<u>Goodwill Indus. of Cent. Oklahoma, Inc. v. Philadelphia Indem. Ins. Co.,</u> 21 F.4th 704 (10th Cir. 2021)	20
<u>JGB Vegas Retail Lessee, LLC v. Starr Surplus Lines Ins. Co.,</u> No. A-20-816628-B, 2020 WL 7190023 (Nev. Dist. Ct. Nov. 30, 2020).....	24, 25
<u>Lee v. State Farm Fire & Cas. Co.,</u> 2022 IL App (1st) 210105, (March 21, 2022)	20
<u>MAC Prop. Grp. LLC v. Selective Fire & Cas. Ins. Co.,</u> No. A-0714-20, 2022 WL 2196396.....	20

<u>Mellin v. N. Sec. Ins. Co., Inc.</u> , 167 N.H. 544 (2015)	17, 18, 19
<u>Monarch Casino & Resort, Inc. v. Affiliated FM Ins. Co.</u> , No. 20-CV-1470, 2021 WL 4260785 (D. Colo. Sept. 17, 2021)	23, 25
<u>Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.</u> , 15 F.4th 885 (9th Cir. 2021)	20
<u>Oxford Realty Grp. Cedar v. Travelers Excess & Surplus Lines Co.</u> , 160 A.3d 1263 (N.J. 2017)	19
<u>Pembroke v. Allenstown</u> , 171 N.H. 65 (2018)	8, 10
<u>Project Lion LLC v. Badger Mut. Ins. Co.</u> , No. 220CV00768JADVCF, 2021 WL 2389885 (D. Nev. May 19, 2021)	25
<u>Rizzo v. Allstate Ins. Co.</u> , 170 N.H. 708 (2018)	11
<u>Santos v. Metro. Prop. & Cas. Ins. Co.</u> , 171 N.H. 682 (2019)	11
<u>Union Mut. Fire Ins. Co. v. Hatch</u> , 835 F. Supp. 59 (D.N.H. 1993)	19
<u>Verveine Corp. v. Strathmore Ins. Co.</u> , 489 Mass. 534, 184 N.E.3d 1266 (2022)	22
<u>Weaver v. Royal Ins. Co. of Am.</u> , 140 N.H. 780 (1996)	passim
<u>Zwillo V, Corp. v. Lexington Ins. Co.</u> , 504 F. Supp. 3d 1034 (W.D. Mo. 2020)	12, 21, 23

Other Authorities

A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts (2012)	21
---	----

QUESTION PRESENTED FOR REVIEW

1. Does the Pollutants and Contaminants Exclusion in the AXIS Policy unambiguously preclude coverage for Plaintiffs' claimed losses?

Yes. This question was raised by Respondent AXIS Surplus Insurance Company's motion for partial summary judgment (Apx. IV at 283), which was correctly granted by the Superior Court in the decision below (Addendum at 1-24).

STATEMENT OF THE CASE AND FACTS

A. Plaintiffs Seek Coverage For Losses Resulting From The Coronavirus.

In this lawsuit, Plaintiffs seek a declaration of coverage under their property insurance policies for alleged losses resulting from the Coronavirus. Apx. I at 52-84. The Complaint states that "Plaintiffs bring this lawsuit for a declaration that the Policies cover Plaintiffs' business interruption losses from the coronavirus pandemic." *Id.* at 55 ¶13. The one count Complaint asserts a cause of action for Declaratory Judgment and seeks a judgment that the Policies cover Plaintiffs' "claim in connection with losses stemming from the coronavirus." *Id.* at 29 ¶118, 82-84 ¶¶131-45.

B. The AXIS Policy's Virus Exclusion.

The AXIS Policy at issue in this lawsuit is an *excess* policy that only provides coverage for covered losses in excess of \$10 million. Apx. I at 324.

The AXIS Policy has a virus exclusion contained within the Policy's Commercial Property Exclusion Endorsement. Apx. I at 352. The Endorsement states the following:

COMMERCIAL PROPERTY EXCLUSION ENDORSEMENT

1. EXCLUSIONS

A. POLLUTANTS AND CONTAMINANTS EXCLUSION

1. As used in this endorsement, Pollutants or Contaminants means:
 - a. Any solid, liquid, gaseous or thermal irritant or contaminant including smoke, vapor, soot, fumes, acids, alkalis, chemicals, and waste. Waste includes materials to be recycled, reconditioned or reclaimed.
 - b. **Pollutants or contaminants include, but are not limited to those materials that can cause or threaten damage to human health or human welfare** or cause or threaten damage, deterioration, loss of value, marketability or loss of use to property. **Pollutants or contaminants include, but are not limited to** bacteria, fungi, mold, mildew, **virus** or hazardous substances as listed in the Federal Water Pollution Control Act, Clean Air Act, Resource Conservation and Recovery Act of 1976, Toxic Substances Control Act or as designated by the U.S. Environmental Protection Agency or any other governing authority.
2. **This policy does not cover any of the following.**
 - a. **Loss 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;**

Apx. I at 352 (emphasis added).

C. The Superior Court Granted Summary Judgment To AXIS On The Question Presented Here.

AXIS moved for summary judgment on the basis that the above-referenced virus exclusion precludes coverage for Plaintiffs' alleged losses resulting from the coronavirus. Apx. IV at 283-289; Apx VI at 143-164. Plaintiffs opposed the AXIS motion (Apx. VI at 85-94), and Judge Kissinger held oral argument (Apx. VI at 165-257).

Ruling that the virus exclusion unambiguously applies to preclude coverage, Judge Kissinger issued an Order on June 15, 2021 granting AXIS' motion for summary judgment. Addendum ("Add.") at 1-24.¹ Judge Kissinger's well-reasoned Order states as follows:

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

¹ A copy of Judge Kissinger's June 15, 2021 Order is annexed as an Addendum to the opening brief of Certain Defendants-Appellants filed in this appeal on May 25, 2022.

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 [*sic*] 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.

Add. 19-20. This appeal follows.

SUMMARY OF ARGUMENT

A straightforward, textual reading of the AXIS Policy makes it clear that the virus exclusion unambiguously applies to preclude coverage for Plaintiffs’ claim because Plaintiffs specifically allege that their losses resulted from the dispersal of the coronavirus. Indeed, the exclusion specifically states that there is no coverage for loss resulting from the “actual, alleged or threatened release, discharge, escape or dispersal of” “materials that can cause or threaten damage to human health or human welfare,” including a “virus.” Apx. I at 352.

Plaintiffs do not dispute that the exclusion “textually bars coverage,” as Judge Kissinger ruled below, because they cannot. Add. 20. Instead, Plaintiffs argue that Judge Kissinger should have disregarded a plain reading of the exclusion, and they rely entirely on Weaver v. Royal Ins. Co. of Am., 140 N.H. 780 (1996) to support their argument. Pl. Brief at 76-78.

Plaintiffs’ reliance on Weaver, however, is wholly misplaced. The Weaver Court found that a “pollution exclusion [was] ambiguous when

applied to the facts of [that particular] case.” Id. at 782-83. In Weaver, the court addressed whether a homeowner – who allegedly had lead paint and dust on his clothing from his job, which was then brought into his residence – had discharged, dispersed, or released pollutants into his residence. Id. at 782. Here, the allegations and factual context are materially different than those presented in Weaver. Plaintiffs’ own allegations specifically assert that the coronavirus gets “expelled”; “shed”; “transmitted” through “airborne and aerosolized particles”; “suspended in the atmosphere” and “in air produced by normal breathing and talking”; and “deposited” on surfaces and “then resuspended.” Apx. I at 53 ¶1, 69 ¶¶81-83; Apx. IV at 57-60. Given Plaintiffs’ allegations, there is no ambiguity with respect to applying the AXIS virus exclusion in this case.

The Superior Court came to the same conclusion in the decision below. Add. 19. Judge Kissinger recognized that the “plain text” of the AXIS Policy exclusion “unambiguously excludes coverage for loss or damage caused or aggravated by the spread of SARS-CoV-2.” Id. He also recognized that an unambiguous contract must be interpreted according to its plain terms pursuant to well-settled precedent. Id. (citing Pembroke v. Allenstown, 171 N.H. 65, 71-72 (2018) (The Court cannot “change the words of a written contract” “merely because [its provisions] might operate harshly.”)). On that basis, the Superior Court found that “AXIS is not liable under its policy for any loss or damage resulting from the spread of COVID-19.” Add. 19. As noted above, Judge Kissinger was “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. Id.

Courts across the county have overwhelmingly reached the same conclusion when applying virus exclusions to COVID claims, even when those exclusions are contained within a pollution or contamination exclusion. Infra AXIS Br. at 20-24.

Based on the foregoing, the judgment below should be affirmed.

**STANDARD OF REVIEW AND
APPLICABLE LEGAL STANDARD**

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).²

ARGUMENT

A. Plaintiffs’ Own Allegations Make Clear That Their Alleged Loss Falls Squarely Within The Scope Of The AXIS Virus Exclusion.

Virus exclusions must be enforced to preclude coverage when the insureds’ own allegations make clear that they seek coverage for a virus released, dispersed, and discharged into the atmosphere. This was the

² Plaintiffs’ motion for partial summary judgment sought a ruling “under New Hampshire law.” Apx. II at 156 n.4. Like the other Defendants, AXIS did not object to the application of New Hampshire law when making its motion for summary judgment because AXIS believed there was no conflict of law. If an actual conflict of law arises, a choice of law analysis will become necessary. See Consolidated 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 282.

conclusion reached by Judge Kissinger in his well-reasoned decision below. Add. 18-20. It also has been the conclusion reached by courts outside New Hampshire in similar COVID-19 insurance coverage decisions that have interpreted a virus exclusion with the same wording as the exclusion at issue in the AXIS Policy. See Dana Inc. v. Zurich Am. Ins. Co., No. 21-4150, 2022 WL 2452381, at *4 (6th Cir. July 6, 2022); Circus Circus LV, LP v. AIG Specialty Ins. Co., 525 F. Supp. 3d 1269, 1277–78 (D. Nev. 2021), aff'd, No. 21-15367, 2022 WL 1125663 (9th Cir. Apr. 15, 2022) (enforcing exclusion that defined “contaminants or pollutants” to include “virus”); Zwillo V, Corp. v. Lexington Ins. Co., 504 F. Supp. 3d 1034, 1041–42 (W.D. Mo. 2020), appeal dismissed, No. 21-1015, 2021 WL 2792962 (8th Cir. Mar. 18, 2021) (holding same); Cordish Companies, Inc. v. Affiliated FM Ins. Co., No. CV ELH-20-2419, 2021 WL 5448740, at *19–20 (D. Md. Nov. 22, 2021), aff'd, No. 21-2055, 2022 WL 1114373 (4th Cir. Apr. 14, 2022) (holding same); Boscov's Dep't Store, Inc. v. Am. Guarantee & Liab. Ins. Co., 546 F. Supp. 3d 354, 368–70 (E.D. Pa. 2021) (holding same); AC Ocean Walk, LLC v. Am. Guarantee and Liab. Ins. Co., No. A-1824-21, 2022 WL 2254864 (N.J. Super. Ct. App. Div. June 23, 2022) (holding same).

Here, Plaintiffs’ allegations plainly seek coverage for a loss resulting from the “release, discharge, escape or dispersal of” of a human-health-harming virus. Indeed, the Complaint includes the following allegations:

- The transmission of the severe acute respiratory syndrome coronavirus [] (SARS-CoV-2), commonly known as the coronavirus, has caused a pandemic affecting millions of people around the world.

Plaintiffs' business has suffered enormously as a result. Apx. I at 53, ¶1.

- The coronavirus is transmitted through both person-to-person contact and contact by persons with fomites, which are surfaces of objects or materials on which coronavirus is present. Id. at 69, ¶81.
- The World Health Organization (“WHO”) explains that the disease caused by coronavirus infection, COVID-19, “spreads primarily from person to person through small droplets from the nose or mouth, which are expelled when a person with COVID-19 coughs, sneezes, or speaks...People can catch COVID-19 if they breathe in these droplets from a person infected with the virus...” Id. ¶83.

(emphasis added). In their answers to interrogatories, Plaintiffs further allege the following:

- [T]he coronavirus was on surfaces and suspended in the atmosphere in all of the Hotels since the earliest days of the arrival of the coronavirus to the United States, and no later than March 2020.
- Transmission of the coronavirus is possible through aerosols, which are fine water droplets suspended in air produced by normal breathing and talking which can remain suspended for hours at a property before they settle on surfaces with the viral material they carry.
- The World Health Organization (the “WHO”) recognizes several possible modes of transmission of the coronavirus, including person-to-person contact, airborne and aerosolized particles, and surfaces impacted by the virus, also known as “fomites.”

- The WHO explains that when the virus is shed by an infected person onto objects and surfaces
- Scientific studies have . . . conclude[d] that viral droplets fall from the air onto the surface of physical objects and remain there for weeks.
- Another study determined that the virus travels up to 13 feet in the air.
- Another study conducted in two hospitals in Wuhan, China concluded that coronavirus particles are deposited on floors and clothing and are then resuspended as people move around the building.

Apx. IV at 57-60 (emphasis added).

The fact that Plaintiffs seek coverage for the “release, discharge, escape or dispersal of” a human-health-harming virus is further established by the purported studies on which Plaintiffs rely to support their allegations. For example, in support of their motion for summary judgment, and in their answers to interrogatories quoted above, Plaintiffs relied on an article from the Environment International Journal, which states the following:

- In Section 1.2. regarding “Evidence of SARS-CoV-2 aerosol transmission,” the article states that “***it is established that infectious SARS-CoV-2 may be discharged into the surrounding environment*** through respiratory emissions, body fluids or excreta.”;
- That same section states that “[a] cough can produce approximately 3000 droplets *while a sneeze releases* about 40,000”;
- In Section 1.1. regarding “Characteristics of viral aerosol transmission,” in reference to the Coronavirus, the article states that “[a]erosols are generally poly-*dispersed* droplets and particles which have many different sizes.” in reference to the virus.”

Song Tang, et al., *Aerosol transmission of SARS-CoV-2? Evidence, prevention and control*, Environ. Int'l (found at Apx. III at 202-213; and quoted by Plaintiffs at Apx. IV at 57-60) (emphasis added).³

Even Plaintiffs' amicus supporters implicitly undermine Plaintiffs' argument on appeal. One amicus brief states that "due to its continuous reintroduction into businesses that remain open to the public, the physical invasion by deadly SARS-CoV-2 virions that spread COVID-19 into such a business is a **continuous discharge event** that does not stop." Amicus Brief of N.H. Medical Society at pg. 17. The same brief relies upon an article about the "Long-distance airborne **dispersal** of SARS-CoV-2 in COVID-19 wards." *Id.* at pg. 14, n.11 (emphasis added).

The foregoing makes clear that Plaintiffs' alleged loss falls squarely within the scope of the AXIS Policy's virus exclusion and belies their argument in this appeal. On the one hand, Plaintiffs allege that the Coronavirus is "transmitted," "expelled," "shed," "suspended in the atmosphere," "deposited" onto surfaces and "then resuspended as people move." *Id.* On the other hand, Plaintiffs unconvincingly contend that the Coronavirus is incapable of being "releas[ed]" dispers[ed]," or "discharg[ed]," even though Plaintiffs and their amicus supporters rely on

³ This *Environmental International Journal* article was part of the exhibits that were stricken from the record when Judge Kissenger granted Defendants' motion to strike. Add. 16 (striking Exhibit 16, among others). Nevertheless, the fact remains that Plaintiffs relied on this article to support their allegations, and Plaintiffs continue to rely on this article in this appeal. Pl. Br. at 22, 28, 45. Therefore, the article serves to further demonstrate that Plaintiffs seek coverage for the "release, discharge, escape or dispersal of" human-health-harming virus.

that same terminology to support their argument in this appeal. Plaintiffs cannot have it both ways.

Because the record so clearly establishes that Plaintiffs seek coverage for a virus that was released, dispersed, and discharged into the atmosphere, the AXIS Policy's virus exclusion precludes coverage and the Order below should be affirmed.

B. New Hampshire Law Supports The Enforcement Of The AXIS Virus Exclusion.

New Hampshire law supports the enforcement of an insurance policy, as written, when the insureds' own allegations make clear that they seek coverage for a loss that falls within a policy exclusion. The terms of an insurance policy must be interpreted according to their plain and ordinary meaning. Bartlett v. Commerce Ins. Co., 167 N.H. 521, 530 (2015) ("In interpreting policy language, we look to the plain and ordinary meaning of the policy's words in context."). Policy exclusions must be enforced according to their plain terms if an insured's own allegations show that the insured seeks coverage for an excluded loss. See Cam-Sam Real Estate Holding, LLC v. Merchants Mut. Ins. Co., No. 18-CV-433-SM, 2019 WL 2913689, at *3 (D.N.H. July 8, 2019) (enforcing policy's animal waste exclusion where the insured's own allegations demonstrated that the cause of the loss fell within the exclusion). "The fact that the parties may disagree on the interpretation of a term or clause in an insurance policy does not create an ambiguity." Bates v. Phenix Mut. Fire Ins. Co., 156 N.H. 719, 722 (2008); Bartlett, 167 N.H. at 531 (citations and quotations omitted) ("when the policy language is clear, this court will not perform amazing feats of linguistic gymnastics to find a purported ambiguity simply to construe the policy

against the insurer and create coverage where it is clear that none was intended”).

In asking this Court to disregard the plain meaning of the AXIS exclusion, Plaintiffs rely entirely on the distinguishable Weaver decision. See Weaver v. Royal Ins. Co. of Am., 140 N.H. 780, 781-83 (1996). Plaintiffs also misguidedly cite to the Mellin decision for the proposition that “[t]he Court reaffirmed Weaver in Mellin” (Pl. Brief at 77), but Mellin only serves to further establish that Weaver’s holding was limited to the facts of that case. See Mellin v. N. Sec. Ins. Co., Inc., 167 N.H. 544, 551-56 (2015).

In Weaver, the insured was a painter named Samuel Weaver whose job involved stripping and painting a house. See Weaver, 140 N.H. at 781. The Weaver family sought coverage for injuries sustained by their son when he ingested the lead paint and dust particles that Samuel Weaver brought from his job into the family residence on his clothes and paint tarps. The insurer denied coverage based on a pollution exclusion. The Weavers argued that there was no “discharge, dispersal, release or escape” of a pollutant because there was no environmental contamination, whereas the insurer argued that the exclusion “encompass[ed] the spread of lead paint chips and dust generated by a lead paint stripping operation.” The Court found that both interpretations of the exclusion were reasonable and, therefore, that the pollution exclusion [was] ambiguous when applied to the facts of this case.” Id. at 782-83.

In Mellin, the Court did not even analyze whether there was a “discharge, dispersal, release or escape” of a pollutant. Rather, the Mellin Court’s analysis was limited to whether the odor of cat urine fell within the pollution exclusion’s definition of “irritant or contaminant.” Mellin, 167

N.H. at 551-56. The Court found that the pollution exclusion was ambiguous in the context of whether the cat urine odor can be considered an “irritant or contaminant.” The Court reasoned that a “a reasonable policyholder would not expect the[] terms [of the exclusion] to exclude injuries or damage ‘resulting from everyday activities gone slightly, but not surprisingly, awry.’” Id. at 553 (citations omitted). The Mellin Court also recounted its decision in Weaver, noting that the Weaver Court had found the exclusion “ambiguous when applied to the facts of that case.” Id. at 553. The Mellin Court emphasized that the relevant inquiry in such cases “is whether two parties can reasonably disagree about the meaning of the pollution exclusion clause, rendering it ambiguous.”⁴ Id. at 554.

Here, there can be no reasonable disagreement about the meaning of the AXIS Policy’s exclusion for health-harming viruses, which makes both the Weaver and Mellin decisions distinguishable. In Weaver, the issue was whether the transportation of lead into the home via paint tarps and clothing constituted a “discharge, dispersal, release or escape of pollutants.” That is markedly different from the present case where the Coronavirus— *using Plaintiffs’ own words* — gets “expelled”; “shed”; “transmitted” through

⁴ Justice Lynn’s dissent in Mellin notably explained that the Weaver Court “did not rely upon the plain and ordinary meaning of ‘discharge,’ ‘dispersal,’ ‘release’ and ‘escape’ in its analysis, despite the fact that these terms are in everyday usage in the English language and readily susceptible of simple dictionary definitions.” Mellin, 167 N.H. at 560. Justice Lynn found “it is difficult to justify the Weaver court’s conclusion that these terms are ambiguous and could be reasonably read as so-called ‘environmental terms of art,’ when the court itself created the ambiguity by resorting to outside sources, rather than the plain language, to define the terms.” Id. at 561.

“airborne and aerosolized particles”; “suspended in the atmosphere” and “in air produced by normal breathing and talking”; and “deposited” on surfaces and “then resuspended.” Apx. I at 53 ¶1, 69 ¶¶81-83; Apx. IV at 57-60. Moreover, unlike Mellin, the language of the AXIS Policy expressly includes the cause of Plaintiffs’ loss – a virus – within the definition of excluded risks. If the policy language in Mellin specifically excluded coverage for “cat urine odor,” then the Court would have enforced the exclusion as written.⁵

⁵ It should not be lost on the Court that both Weaver and Mellin were cases where the insureds were individuals, as distinct from the present case where the Plaintiffs are sophisticated commercial insureds. Apx. IV at 82. This is notable because both Weaver and Mellin turned on an analysis of whether the insured might reasonably disagree about the meaning of the policy language such that the policy should be construed against the insurer on the basis of an ambiguity. See Weaver, 140 N.H. at 781; Mellin, 167 N.H. at 553-54. This “reasonable disagreement” analysis should take into consideration the sophistication of the insured, particularly here, where Plaintiffs are sophisticated owners/operators of a hotel enterprise who were advised by a specialized insurance broker when procuring the AXIS Policy. Not only did Plaintiffs and AXIS have equal bargaining power in negotiating the terms of the AXIS Policy, but Plaintiffs’ broker actually drafted the policy language. Apx. IV at 82. While this Court has not addressed the issue, other states have found that the terms of an insurance policy (including any ambiguous terms) should not be construed against the insurer where the insured is a sophisticated commercial entity represented by a broker, but instead that the policy terms must be construed in an even-handed fashion. See 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.”); see also Union Mut. Fire Ins. Co. v. Hatch, 835 F. Supp. 59, 67 (D.N.H. 1993) (holding that “the clear and unambiguous terms of the policy, rather than Hatch's reasonable expectations of coverage, control the outcome of this matter”).

Plaintiffs' argument on appeal is simply untenable. Plaintiffs' own allegations in their Complaint and interrogatory responses plainly contend that their loss was due to the coronavirus being released, discharged, or dispersed. Put simply, but for humans discharging and dispersing the virus, there would be no COVID-19 pandemic and, therefore, no interruption of Plaintiffs' business operations giving rise to the claims in this case. Accordingly, Plaintiffs' alleged loss falls within the unambiguous language of the AXIS Policy's virus exclusion.

C. Courts Outside New Hampshire Have Overwhelmingly Enforced The Same Virus Exclusion In The Same Context Of A Coronavirus Claim.

Both federal and state appellate courts across the country have almost unanimously ruled that virus exclusions apply to preclude coverage for COVID-19 business interruption claims. See, e.g., AFM Mattress Co., LLC v. Motorists Com. Mut. Ins. Co., 37 F.4th 440, 446 (7th Cir. 2022) (“any damage from a virus was *not* a Covered Cause of Loss because of the policy's Virus Exclusion”) (emphasis in original); Goodwill Indus. of Cent. Oklahoma, Inc. v. Philadelphia Indem. Ins. Co., 21 F.4th 704, 712 (10th Cir. 2021), cert. denied, 142 S. Ct. 2779 (2022) (“the Virus Exclusion was valid, enforceable, and barred coverage both under its plain language and under the efficient proximate cause doctrine”); Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am., 15 F.4th 885, 894 (9th Cir. 2021) (enforcing the virus exclusion); Lee v. State Farm Fire & Cas. Co., 2022 IL App (1st) 210105, ¶¶ 21-22 (March 21, 2022) (same); MAC Prop. Grp. LLC v. Selective Fire & Cas. Ins. Co., No. A-0714-20, 2022 WL 2196396, *13-16, ___ N.J. Super. ___ (App. Div. June 20, 2022) (same).

These decisions interpreting virus exclusions are directly on point here. There is no merit to Plaintiffs' argument that the AXIS exclusion is not a virus exclusion simply because the word "virus" does not appear in the title of the exclusion. The AXIS exclusion specifically defines excluded contaminants to include any "virus." Apx. I at 352. It is the *terms* of the exclusion which are controlling, not the *title* of the exclusion. See A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 222 (2012) ("[A] title or heading should never be allowed to override the plain words of a text."). Indeed, Section 68 of the AXIS Policy form – which was drafted by Plaintiffs' broker (Apx. IV at 82) – expressly states that the title of an exclusion "shall not be deemed in any way to limit or affect" the terms of the exclusion. Apx. I at 345. Specifically, Section 68 of the AXIS Policy states:

68. TITLES OF PARAGRAPHS - The titles of the paragraphs of this form and of endorsements and supplemental contracts, if any, now or hereafter attached hereto are inserted solely for convenience of reference and shall not be deemed in any way to limit or affect the provisions to which they relate.

Apx. I at 345. Thus, there is no basis to distinguish the legion of decisions that have enforced virus exclusions to preclude coverage for COVID-19 claims.⁶ See Zwillo V, Corp. v. Lexington Ins. Co., 504 F. Supp. 3d 1034,

⁶ Plaintiffs' attempt to rely on a 2020-2021 policy is a red herring that is simply irrelevant to this appeal. Pl. Brief at 75. Only the 2019-2020 AXIS Policy is at issue in this motion, not the 2020-2021 policy. There was an additional virus exclusion endorsement added to the 2020-2021 policy as part of a quote in October 2020, but that endorsement was added only because Plaintiffs filed this lawsuit in June 2020 challenging the applicability of the virus exclusion at issue here in the 2019-2020 AXIS Policy. Apx. VI at 61, 69. In other words, the only reason that the additional virus exclusion endorsement was added to the 2020-2021 policy was because Plaintiffs were

1042 (W.D. Mo. 2020), appeal dismissed, No. 21-1015, 2021 WL 2792962 (8th Cir. Mar. 18, 2021) (enforcing a similarly-worded “Pollution and Contamination Exclusion” and rejecting the argument that the exclusion should not apply on the basis that the insurance “industry has developed a [different] ‘virus-specific exclusion’ that would preclude coverage”).

In any event, virus exclusions with the same wording as the AXIS exclusion (*i.e.* virus exclusions that appear in a pollutants or contaminants exclusion) have been enforced by both state and federal courts across the country. See, e.g., Dana Inc. v. Zurich Am. Ins. Co., No. 21-4150, 2022 WL 2452381, at *4 (6th Cir. July 6, 2022) (enforcing exclusion that defined “contamination” to include “virus” and rejecting the insured’s argument that the exclusion should be limited to traditional environmental contamination); AC Ocean Walk, LLC v. Am. Guarantee and Liab. Ins. Co., No. A-1824-21, 2022 WL 2254864 (N.J. App. Div. June 23, 2022) (holding same); Crescent Hotels & Resorts, LLC v. Zurich Am. Ins. Co., No. CL-2021-02974, (Virginia Circuit Court of Fairfax County 2021), appeal dismissed, No. 211074 (Supreme Court of Virginia, April 14, 2022), annexed at AXIS Supp.

actively disputing the applicability of the virus exclusion in the 2019-2020 policy. Moreover, even if we assume for the sake of argument that the two virus exclusions must be treated differently, the additional virus exclusion cannot be used to create a negative implication that coverage is owed. See Verveine Corp. v. Strathmore Ins. Co., 489 Mass. 534, 545–46, 184 N.E.3d 1266, 1277 (2022) (“[W]e will briefly address the virus exclusion to Little Donkey’s policy, not for whether it would exclude coverage, but whether, as the plaintiffs claim, it creates a clear negative implication that policies that do not contain the exclusion should cover claims arising from the COVID-19 virus. We conclude that no such negative implication can or should be drawn. Indeed, we have emphasized the importance of not drawing negative implications.”)

Apx. at 3-124 (holding same; Circus Circus LV, LP v. AIG Specialty Ins. Co., 525 F. Supp. 3d 1269, 1277–78 (D. Nev. 2021), aff'd, No. 21-15367, 2022 WL 1125663 (9th Cir. Apr. 15, 2022) (holding same where the exclusion that defined “contaminants or pollutants” to include “virus”); Zwillo, 504 F. Supp. 3d at 1041–42 (W.D. Mo. 2020), appeal dismissed, No. 21-1015, 2021 WL 2792962 (8th Cir. Mar. 18, 2021) (holding same); Cordish Companies, Inc. v. Affiliated FM Ins. Co., No. CV ELH-20-2419, 2021 WL 5448740, at *19–20 (D. Md. Nov. 22, 2021), aff'd, No. 21-2055, 2022 WL 1114373 (4th Cir. Apr. 14, 2022) (holding same); Boscov's Dep't Store, Inc. v. Am. Guarantee & Liab. Ins. Co., 546 F. Supp. 3d 354, 368–70 (E.D. Pa. 2021) (holding same); Ford of Slidell, LLC v. Starr Surplus Lines Ins. Co., No. CV 21-858, 2021 WL 5415846, at *10–11 (E.D. La. Nov. 19, 2021) (holding same); Monarch Casino & Resort, Inc. v. Affiliated FM Ins. Co., No. 20-CV-1470, 2021 WL 4260785, at *3 (D. Colo. Sept. 17, 2021) (holding same).

These decisions have rejected Plaintiffs’ argument that the AXIS exclusion should be limited to traditional industrial pollution. By way of example, in Circus Circus, the court rejected the insured’s argument that the exclusion must be narrowly interpreted to apply only to “traditional environmental pollution.” Circus Circus, 525 F. Supp. 3d at 1277–78. The court acknowledged that prior case law had found an ambiguity in pollution exclusions for this reason, but ruled that there was no ambiguity in the subject exclusion when applied to a claim seeking coverage for losses from the Coronavirus. Id. at 1278. The court went on to state the following:

I must determine whether the virus that causes COVID-19 falls within the definition of a “virus” that has been “releas[ed]”

dispers[ed],” or “discharg[ed],” or has “escape[d],” causing damage to health and human welfare.

I find that the SARS-CoV-2 virus and resulting COVID-19 pandemic falls squarely within the policy's pollutants-or-contaminants exclusion. Circus Circus cannot reasonably claim that SARS-CoV-2 is not a virus. Its own pleadings support a finding that the virus has been released, dispersed, and discharged into the atmosphere, resulting in infections and transmissions. And Circus Circus also contorts the clear language of the policy when it argues that the exclusion requires the virus to have been released from solid waste, improperly deleting an intermediary clause in order to support its reading. Such efforts are unpersuasive and have been rejected by courts before me. So I also find that Circus Circus could not expect coverage under this policy for damages caused by the COVID-19 pandemic.

Id.

The rationale of Circus Circus and the other above-cited decisions are directly on point here. When an insured's own allegations make clear that they seek coverage for a virus released, dispersed, and discharged into the atmosphere, the virus exclusion applies to preclude coverage.

Plaintiffs are simply wrong in their assertion that “state courts evaluating COVID-19 business interruption claims have held that pollution exclusions do not apply, even where ‘pollutant’ is defined to include virus.” Pl. at 79. Plaintiffs support this assertion with a citation to a single trial court decision from a Nevada federal court that is distinguishable. See JGB Vegas Retail Lessee, LLC v. Starr Surplus Lines Ins. Co., No. A-20-816628-B, 2020 WL 7190023, at *3 (Nev. Dist. Ct. Nov. 30, 2020). The JGB case involved a different pollution exclusion that did not preclude coverage for “materials that can cause or threaten damage to human health or human

welfare.”⁷ Id. at *2-3. The JGB case also is distinguishable because it was decided on a pre-answer motion to dismiss which required the court to impose a higher burden on the insurer seeking to enforce the exclusion. Id. Indeed, the JGB court prefaced its analysis by noting that it must draw all favorable inferences in the insured’s favor. Id. at 2.

Here, by contrast, the Court has a complete record, which demonstrates that Plaintiffs’ own allegations of the loss brings this claim within the unambiguous exclusion for loss resulting from the “actual, alleged or threatened release, discharge, escape or dispersal of” “materials that can cause or threaten damage to human health or human welfare,” including a “virus.”

CONCLUSION

For the above reasons, the portion of the Superior Court’s June 15, 2021 Order granting AXIS’ motion for summary judgment should be affirmed.

⁷ Even assuming for the sake of argument that the Nevada JGB case was not factually distinguishable, it is an outlier when compared to other decisions applying Nevada law to find that the same virus exclusion precludes coverage for COVID-19 business interruption claims. See Project Lion LLC v. Badger Mut. Ins. Co., No. 220CV00768JADVCF, 2021 WL 2389885, at *4–5 (D. Nev. May 19, 2021); Circus Circus, 525 F. Supp. 3d at 1277–78; Monarch Casino, 2021 WL 4260785, at *3 (applying Nevada law).

REQUEST FOR ORAL ARGUMENT

AXIS respectfully requests oral argument before the full Court with 15 minutes per side. Kristin V. Gallagher or Eduardo DeMarco will argue for AXIS.

Respectfully submitted,

AXIS SURPLUS INSURANCE COMPANY

By its Attorneys,

By: */s/ Kristin V. Gallagher*

/s/ Eduardo DeMarco

KENNEDYS CMK LLP

Kristin V. Gallagher (admitted *pro hac vice*)

Eduardo DeMarco (admitted *pro hac vice*)

P.O. Box 650

Basking Ridge, New Jersey 07920

(908) 848-6300

Kristin.Gallagher@kennedyslaw.com

Eduardo.DeMarco@kennedyslaw.com

/s/ Kevin G. Collimore

CULLENCOLLIMORE, PLLC

Kevin G. Collimore, NH BAR #11259

10 East Pearl Street

Nashua, NH 03060

(603) 881-5500

kcollimore@cullencollimore.com

Dated: July 25, 2022

CERTIFICATION OF WORD COUNT

Pursuant to Supreme Court Rule 26(7) and this Court’s Order dated April 25, 2022, this brief for Defendant-Respondent AXIS Surplus Insurance Company contains 6,513 words, exclusive of the coverage page, signatures, and pages containing the table of contents and table of citations. This word count was made using the word count feature of Microsoft Word.

/s/ Eduardo DeMarco
KENNEDYS CMK LLP
Eduardo DeMarco (admitted *pro hac vice*)
P.O. Box 650
Basking Ridge, New Jersey 07920
(908) 848-6300
Eduardo.DeMarco@kennedyslaw.com

CERTIFICATE OF SERVICE

I, Eduardo DeMarco, attorney for Defendants AXIS Surplus Insurance Company, certify that on July 25, 2022, I caused the foregoing *Brief for Defendant-Respondent AXIS Surplus Insurance Company* and *Supplemental Appendix of Defendant-Respondent AXIS Surplus Insurance Company* to be served on the counsel of record for all parties that have appeared in this action through the Court’s electronic filing system.

/s/ Eduardo DeMarco
KENNEDYS CMK LLP