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<tr><td>COLORADO SUPREME COURT<br>2 East 14th Avenue<br>Denver, CO 80203</td><td rowspan="3">DATE FILED<br>June 16, 2026 4:45 PM<br><br>▲ COURT USE ONLY ▲</td></tr>
<tr><td>Colorado Court of Appeals Case No. 24CA0034<br>Opinion by Hon. Schutz, Hon. Kuhn (concurring), Hon. Welling (concurring in part and dissenting in part)<br><br>Denver District Court Case No. 2021CV30695<br>Hon. Martin F. Egelhoff, Hon. Marie Avery Moses</td></tr>
<tr><td>Spectrum Retirement Communities, LLC, et al.,<br>Petitioner,<br><br>v.<br><br>Continental Casualty Company, an Illinois corporation, authorized to transact insurance business in Colorado,<br>Respondent.</td></tr>
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**ANSWER BRIEF**

## CERTIFICATE OF COMPLIANCE

I certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in those rules.

I certify that this brief (including the accompanying addendum) complies with the applicable word limits set forth in C.A.R. 28(g)(1). It contains 9,457 words.

I certify that this brief complies with the heading and standard of review requirements in C.A.R. 28(a) and 28(b).

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.

*/s/* David L. Coats
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## STATUTES AND RULE



## MISCELLANEOUS

## INTRODUCTION

Petitioner Spectrum Retirement Communities, LLC, and its affiliates ("Spectrum") are seeking property-insurance coverage for lost business income caused by operational disruptions at their senior-care facilities during the COVID-19 pandemic. But Spectrum's property-insurance policy issued by respondent Continental Casualty Company covered lost business income only where the loss resulted from "direct physical loss of or damage to" the insured property. Because Spectrum did not—and cannot—allege that the presence of COVID-19 or government orders issued to stop the spread of the virus caused any such physical loss or damage to property, Spectrum's claims were properly dismissed.

The overwhelming weight of authority holds that neither the presence of COVID-19 nor COVID-19-related orders constitute "direct physical loss of or damage to" property. The Tenth Circuit, applying Colorado law, has twice reached that conclusion, as have 10 other federal courts of appeals and 19 state courts of last resort. This Court has similarly held that COVID-19 is not a condition "in or related to any real property" for purposes of taxation. *MJB Motels LLC* v. *County of Jefferson Board of Equalization*, 531 P.3d 1000, 1007-1008 (2023). Spectrum's position that its losses during the COVID-19 pandemic constituted both direct physical "loss" and direct physical "damage" to property thus faces a phalanx of contrary authority.

The reasons why so many courts have rejected Spectrum's position are straightforward. As courts have explained, the plain meaning of the phrase "direct physical loss" is an immediate and perceptible destruction or deprivation of insured property. As a result, not every loss of use of property is a covered direct physical loss; a loss of use disconnected from the physical condition of the insured property is not covered. Because COVID-19 does not physically damage or destroy property, it does not trigger property-insurance coverage. On that basis, hundreds of decisions have declined to extend property-insurance coverage for business losses caused by operational disruptions during the COVID-19 pandemic.

In the decision below, the court of appeals did not reach the question of whether COVID-19 could cause a direct physical loss of property but instead held that coverage was unavailable because Spectrum did not plead any deprivation of insured property. That decision was correct. In *Western Fire Insurance Co.* v. *First Presbyterian Church*, 437 P.2d 52 (1968), this Court held that a loss of use from intangible property damage was covered as a "direct physical loss" only because the property's physical state rendered it "uninhabitable," depriving the insured of its use. But as the court of appeals explained below, Spectrum was never deprived of its insured facilities; they remained open and provided housing and services to residents during the entire pandemic. Spectrum thus cannot show that it suffered a direct physical loss.

Spectrum overreads the decision below, arguing that the court of appeals erred by construing *Western Fire* to require "complete unusability" of insured property in all circumstances (such that, according to Spectrum, the court's opinion would result in a drastic change in property-insurance coverage in Colorado). The court of appeals did no such thing. Instead, it determined only that uninhabitability was required where the insured alleges *intangible* damage to the insured property. Nor is Spectrum correct that its policy covers its losses because it is an "all risk" policy that lacks a virus exclusion. The policy plainly provides coverage only for risks of physical loss or damage, and the absence of an exclusion cannot create coverage where it otherwise does not exist.

Spectrum fares no better with respect to coverage for direct physical damage. "Direct physical damage" is physical harm or injury to insured property, not merely the risk presented by an imperceptible virus that disintegrates on its own or can be removed by standard cleaning measures. Spectrum's allegations that COVID-19 was physically "present in, attaching to, and altering" insured property in its facilities fall short because, even if physically present, COVID-19 does not harm or injure physical property. That common-sense conclusion is reinforced by the policy's provisions that limit coverage only to the time needed to "rebuild, repair or replace" damaged property; here, no property was alleged to have required any such restoration. And contrary to Spectrum's assertion, the court of appeals did not engage in impermissible factfinding in drawing that conclusion; there were simply no allegations in the complaint that COVID-19 physically harms or injures property.

The court of appeals correctly affirmed the trial court's dismissal of the complaint on Continental's motion for judgment on the pleadings. The judgment below should be affirmed.

## STATEMENT OF THE ISSUES

1. Whether the court of appeals correctly held that Spectrum failed to plead a "direct physical loss," as required for coverage under its property-insurance policy, where it did not allege that the presence of COVID-19 or government orders issued to stop the spread of the virus caused any physical injury to the insured property, and no intangible injury rendered the property completely uninhabitable.

2. Whether the court of appeals correctly held that Spectrum failed to plead "direct physical damage," where it did not allege that the presence of COVID-19 or government orders issued to stop the spread of the virus caused any physical harm or injury to the insured property.

## STATEMENT OF THE CASE

### A. Background

1. Spectrum owns, operates, and manages 43 senior-living and memory-care communities across nine states, including Colorado. CF, pp.1788-1795. The communities offer individual units for rent, as well as communal facilities and other amenities. CF, p.1795. In 2019, Spectrum purchased a property-insurance policy

from Continental for the period from August 15, 2019, to August 15, 2020, and renewed it for the period from August 15, 2020, to August 15, 2021. CF, p.1795.

Spectrum's policy covers property loss or damage. The basic grant of coverage "insures against risks of direct physical loss of or damage to property and/or interests described herein at covered Locations." CF, p.1829 (emphasis omitted). That provision is not at issue; Spectrum does not seek coverage directly for any loss of or damage to property. Instead, Spectrum seeks coverage under three policy extensions that insure against operational losses arising from property loss or damage. All three provisions condition coverage on "direct physical loss of or damage to" Spectrum's covered property.

In particular, the policy's business-interruption provision "covers against loss resulting from necessary interruption of business caused by direct physical loss of or damage to covered property." CF, p.1830. It further specifies that Spectrum is entitled to recover for such losses "for only such length of time as would be required with the exercise of due diligence and dispatch to rebuild, repair or replace such part of the property herein described as has been damaged or destroyed." CF, p.1830.

The policy's extra-expense provision covers "reasonable and necessary extra expense . . . incurred by [Spectrum] in order to continue as nearly as practicable the normal operation of [Spectrum's] business following direct physical loss of or damage to covered property by perils[] insured against." CF, p.1834 (emphasis omitted). Similar to the business-interruption provision, the extra-expense provision specifies that Spectrum may recover losses "for only such length of time as would be required with the exercise of due diligence and dispatch to rebuild, repair or replace such part of the property as has been damaged." CF, p.1835.

The policy's civil-authority provision covers lost business income and extra expenses incurred "during [a] period of time while access to [Spectrum's] Location is prohibited by order of civil authority." CF, p.1833 (emphasis omitted).[1] For such coverage to be triggered, the order denying access to the covered property must have been "given as a direct result of physical loss or damage to property of the type insured from a peril insured against occurring at or in the immediate vicinity of said Location." CF, p.1833 (emphasis omitted).

2. In August 2020, Spectrum filed an insurance claim for "business interruption and extra expense coverage and for civil authority and ingress-egress coverage to recoup substantial, ongoing financial losses directly attributed to COVID-19, and extra expenses incurred relating thereto, as well as the governmental orders." CF, p.1804. Continental denied Spectrum's claim. CF, pp.353-361.

[1] The same provision also sets forth coverage for denial of access due to interference with "ingress or egress." Spectrum does not appeal the district court's denial of coverage under that language. Br. 8 n.8.

### B. Procedural History

1. On February 25, 2021, Spectrum filed a complaint in the Second Judicial District, alleging that Continental violated the policy by denying Spectrum's claim for insurance benefits. CF, pp.1-163, 353-361. Spectrum alleged that, as a result of the COVID-19 pandemic and associated government orders, it was unable to "occupy and use [its] physical property to the full extent [it] would have otherwise been able to." CF, p.1804. Spectrum acknowledged that its residential senior-care communities remained open throughout the pandemic, but it alleges that it was forced to operate its communities with restricted or altered operations. *See*, *e.g.*, CF, pp.1799-1801. For instance, Spectrum alleged that government orders mandated that it "shutter, cease, dramatically limit, or alter physical spaces within or their use of the Covered Properties," such that existing residents could "no longer . . . enjoy the shuttered common areas, facilities and amenities." CF, p.1799. Spectrum also alleged that it incurred extra expenses for incremental cleaning costs and for "reconfiguring rooms" to address social-distancing concerns. CF, pp.1800-1801. Spectrum further alleged that it was "required to suspend all new move-ins"; "provide rent deferrals for existing residents"; "retain[] residents that considered leaving"; and leave residential units for which it had potential tenants "unoccupied and unrented." CF, p.1799.

Those restrictions, Spectrum alleged, resulted in "increased operating expenses and a significant loss of revenue." CF, p.1801. And in Spectrum's view, those financial losses resulted from the "physical presence of COVID-19," CF, p.1800, and thus were covered under the policy provisions requiring direct physical loss of or damage to property. Spectrum alleges that the direct-physical-loss-or-damage policy requirement was satisfied by "actual presence of COVID-19 in, attaching to, and altering each of [its] [c]overed [p]roperties and the government-ordered restrictions on [its] use of the [c]overed [p]roperties"; "[Spectrum's] inability to use the Covered Properties based upon the potential or risk of COVID-19 entering the Covered Properties and contaminating the surfaces"; and the "governmental orders . . . mandating that [Spectrum] shutter, cease, dramatically limit, or alter physical spaces within or [alter its] use of the [c]overed [p]roperties." CF, p.1799.

Spectrum asserted claims for breach of contract, statutory delay and denial in violation of C.R.S. §§ 10-3-1115 and 10-3-1116, and bad faith in violation of Colorado common law. CF, pp.20-22.

2. Continental moved to dismiss the complaint for failure to state a claim. CF, pp.202-223. Continental argued that the alleged facts regarding the COVID-19 virus and associated public-health orders did not demonstrate direct physical loss of or damage to Spectrum's property. CF, pp.212-221. The district court granted Continental's motion to dismiss in part and denied it in part. CF, pp.1364-1379.

Spectrum then amended its complaint to add and subtract certain parties, but did not supplement any of its substantive allegations. CF, pp.1786-1949.

Continental filed its answer and subsequently moved for judgment on the pleadings based on intervening decisions of this Court and the United States Court of Appeals for the Tenth Circuit. CF, pp.7056-7081. The district court granted Continental's motion, holding that Spectrum could not establish coverage because COVID-19 "does not cause physical harm or loss to property." CF, p.7720; *see also* CF, pp.7716-7722. In opposing Continental's motion, Spectrum did not request leave to amend its complaint for a second time.

3. The court of appeals affirmed in relevant part.

The court of appeals reasoned that this Court's decision in *Western Fire Insurance Co.* v. *First Presbyterian Church*, 437 P.2d 52 (1968), governed the analysis. *See Spectrum Retirement Communities, LLC* v. *Continental Casualty Co.*, 2025 COA 57, ¶ 36 ("Op."); Op. ¶ 66 (Welling, J., dissenting in part and concurring in part). Under *Western Fire*, the court of appeals held, intangible property damage supports coverage only when it renders the insured property uninhabitable, making further use of the property highly dangerous. Op. ¶¶ 36, 67.

Applying *Western Fire*, the court of appeals held that "Spectrum failed to plead facts that could establish it suffered a direct physical loss" or "direct physical damage" to property under the policy because Spectrum had not alleged that

COVID-19 rendered any of its covered properties "uninhabitable, either temporarily or permanently." Op. ¶¶ 36-46. As the court explained, "it is undisputed that Spectrum's facilities remained open throughout the COVID-19 pandemic" and that Spectrum "continued to provide services to its residents at its facilities," such that "the properties remained habitable." Op. ¶ 37. That distinguished this case from *Western Fire*, where, as a result of "the accumulation of gasoline around and under" the insured property, "the premises became *so* infiltrated and saturated as to be uninhabitable." Op. ¶ 39.

The court of appeals explained that Spectrum's argument for coverage would excise the policy's requirement that any loss or damage be "physical." On that score, the court of appeals cited the Tenth Circuit's decision in *Sagome, Inc.* v. *Cincinnati Insurance Co.*, 56 F.4th 931 (2023). There, the Tenth Circuit, applying Colorado law, held that COVID-19-related financial losses do not involve direct physical loss or damage because COVID-19 can be removed from a surface by standard cleaning measures. *Id*. at 935. Although the court of appeals declined to adopt a comparable rule that, as a matter of law, COVID-19 can "never be found to cause a direct physical loss," it determined that, on the facts alleged here, Spectrum had not and could not plead any such physical loss. Op. ¶ 47.

Judge Welling concurred in part and dissented in part. Op. ¶¶ 66-77. He agreed with the majority that *Western Fire* applied and required a showing of uninhabitability to have coverage for intangible property damage. Op. ¶¶ 66-68. But in his view, Spectrum's allegations that its operations were partially altered were sufficient under *Western Fire* to survive a motion for judgment on the pleadings. Judge Welling acknowledged that the question was "close" and posed "serious difficulties in drawing clear lines," but he was ultimately persuaded by the interpretive principle that insurance policies are construed in favor of the insured, noting that other, cheaper policies contain an exclusion for viruses but Spectrum's did not. Op. ¶¶ 70, 73-76.

## SUMMARY OF ARGUMENT

Coverage under the business-interruption, extra-expense, and civil-authority provisions of Spectrum's property-insurance policy is triggered only if lost business income or additional expenses are incurred as a result of "direct physical loss of or damage" to the insured property. Spectrum failed to allege facts demonstrating either a direct physical loss or direct physical damage.

I. Spectrum's allegations do not demonstrate that it suffered a direct physical loss. The plain meaning of the phrase "direct physical loss" is an immediate and perceptible destruction or deprivation of insured property. Spectrum's policy thus covers only a loss of use that arose where the insured property was physically lost or destroyed, or where the insured was deprived of the property's use because the property itself was physically harmed.

Spectrum did not allege any such loss of use. Instead, it pleaded a partial loss of use of some parts of its facilities because of COVID-19 and COVID-19-related orders. But as the Tenth Circuit (applying Colorado law) and dozens of other courts have held, the presence of COVID-19 and compliance with COVID-19-related orders do not involve any physical harm to property.

The court of appeals did not reach the question whether COVID-19 could cause physical harm to property. Instead, it applied this Court's decision in *Western Fire Insurance Co.* v. *First Presbyterian Church*, 437 P.2d 52 (1968), which held that intangible property damage that rendered an insured property completely uninhabitable constituted "direct physical loss." But as the court of appeals correctly held, Spectrum did not and could not allege that its properties were completely uninhabitable, because Spectrum's facilities remained open throughout the pandemic.

Spectrum primarily argues that the court of appeals improperly imposed a "complete unusability" rule for *any* loss of use to constitute a "direct physical loss." But the court of appeals did so only in the case of a loss of use caused by *intangible* property damage. That rule is correct, and Spectrum's remaining arguments lack merit.

II. Spectrum's complaint also failed to allege facts demonstrating direct physical damage to its property. "Direct physical damage" is physical harm or injury to property. But as numerous courts have held, risks that disintegrate on their own or can be remediated through ordinary cleaning procedures do not qualify. None of Spectrum's arguments can overcome that basic fact.

III. Spectrum should not be granted leave to amend its complaint. Spectrum failed to request that relief in the district court, and any amendment would be futile.

## ARGUMENT

Under Colorado law, the insured "ha[s] the . . . burden to prove [its] entitlement to recover under the general provisions of the policy." *Rodriguez ex rel. Rodriguez* v. *Safeco Insurance Co. of America*, 821 P.2d 849, 853 (Colo. App. 1991); *accord Rocky Mountain Prestress, LLC* v. *Liberty Mutual Fire Insurance Co.*, 960 F.3d 1255, 1260 (10th Cir. 2020) (applying Colorado law). The "policy language controls," and the "words should be given their plain and ordinary meaning unless the intent of the parties, as expressed in the contract, indicates that an alternative interpretation is intended." *Chacon* v. *American Family Mutual Insurance Co.*, 788 P.2d 748, 750 (Colo. 1990); *accord* Spectrum Br. 14, 19. "[A]n insurance policy is not ambiguous merely because the parties disagree as to its interpretation." *Safeco Insurance Co. of America* v. *Robertson*, 994 P.2d 488, 490 (Colo. App. 1999). Applying those principles here, the court of appeals correctly held that Spectrum's complaint failed to show a "direct physical loss" of the insured property, or "direct physical damage" to it, under Spectrum's insurance policy.

## I. SPECTRUM'S COMPLAINT FAILED TO ALLEGE ANY DIRECT PHYSICAL LOSS OF INSURED PROPERTY

As the court of appeals correctly determined, Spectrum's claims for insurance coverage conditioned on a "direct physical loss" failed as a matter of law. The plain meaning of the policy language demonstrates that a "direct physical loss" requires the immediate and perceptible destruction or deprivation of insured property. Here, Spectrum did not allege that its property was physically destroyed or that it was physically deprived of the property. To the contrary, Spectrum acknowledges that its facilities were inhabited and continued to operate throughout the pandemic. Any limitations on Spectrum's use of its properties arose from government orders to prevent the spread of COVID-19 from person to person, not from physical harm to the insured property itself. The court of appeals thus correctly affirmed the dismissal of Spectrum's complaint on the ground that it did not allege direct physical loss.

### A. 'Direct Physical Loss' Requires The Immediate And Perceptible Destruction Or Deprivation Of Property

The policy's business-interruption, extra-expense, and civil-authority provisions each insure losses caused from a "direct physical loss of . . . property." CF, pp.1830, 1834-1835. "Direct" means "marked by absence of an intervening agency, instrumentality, or influence: immediate." *Webster's Third New International Dictionary* 640 (2002). "Physical" means "of or relating to natural or material things as opposed to things mental, moral, spiritual, or imaginary." *Id*. at 1706. "Loss" means "failure to keep possession: deprivation" or "destruction, ruin, perdition." *Id*. at 1338. Accordingly, coverage for "direct physical loss" requires an "immediate and perceptible destruction or deprivation of property." *Sagome, Inc.* v. *Cincinnati Insurance Co.*, 56 F.4th 931, 934-935 (10th Cir. 2023) (applying Colorado law); *accord Monarch Casino & Resort, Inc.* v. *Affiliated FM Insurance Co.*, 85 F.4th 1034, 1042 (10th Cir. 2023).

A "physical" loss of insured property is an indispensable requirement for coverage. That is, "the loss or damage itself must be physical, not simply stem from something physical." *Sagome*, 56 F.4th at 935; *see also Monarch Casino*, 85 F.4th at 1042; *Regents of the University of Colorado* v. *Factory Mutual Insurance Co.*, 2023 WL 6003523, at *3-*4 (Colo. Dist. Ct. May 31, 2023); *Oak Park Prosthodontics, Ltd.* v. *Twin City Fire Insurance Co.*, 2023 WL 2605407, at *9, *11-*12 (Ill. App. Ct. Mar. 22, 2023) (applying Colorado law). A "direct physical loss" thus occurs only when there is actual *physical destruction* or *physical deprivation* of the insured property.

Other language in the policy reinforces that interpretation. The policy limits business-interruption and extra-expense coverage to the time it takes to "rebuild, repair or replace such part of the property" that has been destroyed. CF, p.1830; *see also* CF, pp.1834-1835. To trigger coverage under those provisions, therefore, the policy presupposes a kind of physical loss to insured property that inherently requires repair, rebuild, or replacement. That precludes a reading of the policy that would cover risks that disintegrate on their own or can be remediated through ordinary cleaning procedures. *See Ungarean* v. *CNA & Valley Forge Insurance Co.*, 323 A.3d 593, 606 (Pa. 2024); *Sandy Point Dental, P.C.* v. *Cincinnati Insurance Co.*, 20 F.4th 327, 333 (7th Cir. 2021); *see also Goodwill Industries of Central Oklahoma, Inc.* v. *Philadelphia Indemnity Insurance Co.*, 21 F.4th 704, 711 (10th Cir. 2021); *Oral Surgeons, P.C.* v. *Cincinnati Insurance Co.*, 2 F.4th 1141, 1144 (8th Cir. 2021). A contrary interpretation would mean that property everywhere would be in a constant state of physical loss or damage from "every sneeze, cough, or even exhale." *Starr Surplus Lines Insurance Co.* v. *Eighth Judicial Dist. Ct.*, 535 P.3d 254, 264 (Nev. 2023) (citation omitted).

The overwhelming weight of authority—including 19 state courts of last resort and all of the numbered federal courts of appeals—holds that only the immediate, perceptible destruction or deprivation of property constitutes "direct physical loss" of property within the meaning of commercial property-insurance policies. *See, e.g.*, *Starr Surplus Lines Insurance*, 535 P.3d at 263; *Cherokee Nation* v. *Lexington Insurance Co.*, 521 P.3d 1261, 1270 (Okla. 2022); Add. A1-A5 (collecting cases). When interpreting insurance policies, Colorado courts often look to other jurisdictions to promote uniformity. *See Cyprus Amax Minerals Co.* v. *Lexington Insurance Co.*, 74 P.3d 294, 305 (Colo. 2003); *Mosley* v. *Industrial Claim Appeals*

*Office of State of Colorado*, 119 P.3d 576, 580 (Colo. App. 2005). It should do so again here.

### B. 'Loss Of Use' May Constitute 'Direct Physical Loss' Only When Occasioned By Physical Destruction Or Deprivation Of Insured Property

Because coverage under Spectrum's policy requires a "direct physical loss," the policy does not cover all losses of use of property. Instead, for a loss of use of property to be covered, it must have arisen because the insured property was physically lost or destroyed, or because the insured was deprived of the property's use because the property itself was physically harmed.

Colloquially speaking, government restrictions to reduce disease transmission during a pandemic may constitute a loss of use, but that type of loss is not covered under the policy, as there is no physical destruction, physical deprivation, or physical harm to the property itself. As one court has explained, "[i]t is one thing for the government to ban the use of a bike or a scooter on city sidewalks; it is quite another for someone to steal it." *Santo's Italian Café LLC* v. *Acuity Insurance Co.*, 15 F.4th 398, 402 (6th Cir. 2021). Spectrum's policy reaches "loss of use"—partial or otherwise—only where the loss itself is physical in nature, such as "a physical alteration, physical contamination, or physical destruction." *Oral Surgeons*, 2 F.4th at 1144; *see* CF, pp.1830, 1834-1835. To allow for the recovery of any loss of use that is not "physical" in nature would "improperly ignore the word 'physical'" or render it meaningless. *Sagome*, 56 F.4th at 934 (citation omitted).

Cases involving contamination of real property confirm that loss of use constitutes "direct physical loss" only where the property is destroyed or where the insured is deprived of its use because of some physical harm. As courts have explained, insured property suffers a "direct physical loss" where a contaminant renders it "unfit for normal human occupancy." *Sandy Point Dental*, 20 F.4th at 334; *see, e.g., Gregory Packaging, Inc.* v. *Travelers Property Casualty Co. of America*, 2014 WL 6675934, at *3 (D.N.J. Nov. 25, 2014). But even then, that deprivation triggers coverage only because the insured property has been physically destroyed or the insured is deprived of its use due to some physical harm to it. *See U.S. Fidelity & Guaranty Co.* v. *Wilkin Insulation Co.*, 578 N.E.2d 926, 931 (Ill. 1991); *Farmers Insurance Co.* v. *Trutanich*, 858 P.2d 1332, 1335 (Or. 1993). Without evidence of direct physical loss, operational restrictions and limitations on the insured's preferred or intended use of the property are insufficient to trigger coverage.

Courts assessing claims involving COVID-19 have repeatedly reached the same conclusion: a "loss of use" untethered from the physical condition of insured property cannot, as a matter of law, constitute "direct physical loss." *Wilson* v. *USI Insurance Service LLC*, 57 F.4th 131, 141-144 (3d Cir. 2023); *Sandy Point Dental*, 20 F.4th at 334; *Oral Surgeons*, 2 F.4th at 1144-1145; *Santo's Italian Café*, 15 F.4th at 401-402; *see* Add. A1-A5.

Those decisions are consistent with this Court's decision in *Western Fire*. In *Western Fire*, several buildings were insured through an "all risk" insurance policy that covered "direct physical loss." 437 P.2d at 53-54. A local fire department closed one building after gasoline "infiltrated and contaminated the foundation and halls and rooms . . . making the same uninhabitable and making the use of the building dangerous." *Id*. at 54. When the church sought coverage for the cost of restoring the property, the insurer refused coverage, arguing that the insured did not suffer a "direct physical loss" within the meaning of the policy because the fire department's shutdown order amounted to a mere "loss of use." *Id*. at 54-55.

This Court agreed with the insurer that the mere "loss of use" of insured property "does not in and of itself constitute a 'direct physical loss' " because a "loss of use" "could be occasioned by many different causes," including causes divorced from harm to the physical condition of the insured property. *Western Fire*, 437 P.2d at 55. Rather than rely on the fire department's shutdown order, the Court focused on the gasoline's effect on the church building. The Court held that the insured had suffered a "direct physical loss within the meaning of [the policy]" when the gasoline built up to the point where it physically "infiltrat[ed] and contaminat[ed]" the "foundation, walls and rooms" of the church building, rendering that property "uninhabitable" and "highly dangerous" for further use. *Id*. The Court "also recognize[d]" that more than ordinary cleaning procedures were needed to remedy the loss, and it allowed the insured to recover the "cost of remedying the infiltration and contamination" of the property's "very foundation, walls, and rooms." *Id*. at 54-55. *Western Fire* thus supports the rule that a loss of use may constitute "direct physical loss" only when the insured is deprived of property due to the physical state of the building itself.

### C. Spectrum Did Not Adequately Allege A Deprivation Of Property Constituting Direct Physical Loss

As the court of appeals correctly held, Spectrum's alleged partial loss of use does not arise from a physical deprivation of property and does not demonstrate direct physical loss.

1. The Tenth Circuit, applying Colorado law, has twice held that the mere presence of COVID-19 is insufficient to state an insurance claim for "direct physical loss or damage." *See Monarch Casino,* 85 F.4th at 1042; *Sagome*, 56 F.4th at 934-935. The Tenth Circuit has explained that, because "COVID-19 [does] not destroy any property, and [the policyholder] 'never lost physical control of its buildings or merchandise from its stores'" as a result of the alleged presence of COVID-19 on property, it does not cause direct physical loss. *Sagome*, 56 F.4th at 934 (citation omitted).

The Colorado Supreme Court has reached the same conclusion in the tax context, explaining that COVID-19 is not a condition "in or related to any real property." *MJB Motels LLC* v. *County of Jefferson Board of Equalization*, 531 P.3d 1000, 1007 (2023) (citation omitted). In *MJB Motels*, petitioners sought to compel the county assessor to revalue their properties in response to an exception they claimed was triggered by the COVID-19 pandemic. *See id*. at 1004. The question whether COVID-19 was "in or related to any real property" was a required element of the exception sought by the taxpayer. *Id*. at 1008. This Court reasoned that "COVID-19 may have infected people who were on the property," but "COVID-19 did not infect the property itself." *Id*.

Consistent with those principles, a "striking majority" of courts from around the country, *Starr Surplus Lines*, 535 P.3d at 267, have held that "COVID-19 does not cause physical loss or damage under similar policy language," *Sagome*, 56 F.4th at 934 n.5 (collecting cases); *see* Add. A1-A5. Unlike the gas leak in *Western Fire*, COVID-19 did not physically infiltrate insured property to render it uninhabitable; it thus could not cause direct *physical* property loss. *See MJB Motels*, 531 P.3d at 1007; *Sagome*, 56 F.4th at 934; *Monarch Casino*, 85 F.4th at 1042.

Indeed, numerous state courts and federal courts of appeals have declined even to apply *Western Fire* in the context of property-insurance claims premised on COVID-19 losses such as Spectrum's here, on the ground that COVID-19 does not physically alter or contaminate property or render property completely unusable. *See, e.g.*, *Starr Surplus Lines*, 535 P.3d at 263; *Schleicher & Stebbins Hotels, LLC* v. *Starr Surplus Lines Insurance Co.*, 302 A.3d 67, 78-79 (N.H. 2023); *Connecticut Dermatology Group, PC* v. *Twin City Fire Insurance Co.*, 288 A.3d 187, 202-203 & n.22 (Conn. 2023); *Tapestry, Inc.* v. *Factory Mutual Insurance Co.*, 286 A.3d 1044, 1066 & n.32 (Md. 2022); *Verveine Corp.* v. *Strathmore Insurance Co.*, 184 N.E.3d 1266, 1276 (Mass. 2022); *Wilson*, 57 F.4th at 145-146; *SAS International, Ltd.* v. *General Star Indemnity Co.*, 36 F.4th 23, 28 (1st Cir. 2022); *Sandy Point Dental*, 20 F.4th at 334; *Santo's Italian Café*, 15 F.4th at 404-405.

2. The court of appeals did analyze this case under *Western Fire* and correctly concluded that Spectrum could not prevail. *See* Op. ¶¶ 36-47. As the court of appeals explained, the factual circumstances alleged in Spectrum's complaint were "substantially different than those in *Western Fire*." Op. ¶ 37. Specifically, the court noted that, unlike the building in *Western Fire*, Spectrum "could not have" pleaded uninhabitability because its "facilities remained open throughout the COVID-19 pandemic," and it "continued to provide services to its residents at its facilities." *Id*. And this Court's decision in *Western Fire* likewise foreclosed the notion that the mere presence of a dangerous airborne substance suffices to allege a direct physical loss where it has not rendered a property "uninhabitable." Op. ¶ 39.

In so holding, the court of appeals rejected Spectrum's argument that every "loss of use" is by definition a "direct physical loss." Op. ¶¶ 38-45. Conflating "direct physical loss" and "loss of use," the court explained, "separates 'physical' from the policy language of 'physical losses'" in a manner that is "clearly contrary to the policy's plain language." Op. ¶ 45.

As the court of appeals stated, "limitation[s] on the day-to-day operations" do not constitute a direct physical loss based on a "partial loss of the use of its facilities." Op. ¶¶ 39-42. That is because a loss of use that is partial must still arise from a physical condition rendering it uninhabitable and dangerous in order to qualify as a direct physical loss under *Western Fire*. In other words, "*Western Fire* was focused on the point at which the building itself became unusable," with "loss of use" occurring "only when gasoline infiltration rose to such a level that the building became uninhabitable and highly dangerous." Op. ¶¶ 39-40. The court of appeals correctly concluded that financial loss resulting from mere operational alterations does not constitute a direct physical loss under those principles. Spectrum's complaint thus did not "support a conclusion that the presence of COVID-19 caused it to suffer a direct physical loss under the framework of *Western Fire*." Op. ¶ 47.

At bottom, Spectrum's complaint fails because the government orders and other restrictions that required Spectrum to scale back its operations were intended only "to curb the spread" of COVID-19 among people. *See, e.g.*, *Sandy Point*

*Dental*, 20 F.4th at 329; CF, pp.1911-1912, 1924-1932. Those orders were entirely divorced from the physical condition of Spectrum's property. That is why Spectrum's properties were able to remain inhabited throughout the pandemic, and why Spectrum cannot allege that any of its insured facilities were rendered even temporarily uninhabitable. Having failed to establish direct physical loss, Spectrum cannot show that it is entitled to insurance coverage under its commercial-property insurance policy.

### D. Spectrum's Arguments Lack Merit

In advancing its contrary conclusion, Spectrum relies on a mistaken reading of the policy language that bypasses critical unambiguous terms, while misstating the holding below and the scope of *Western Fire*.

1. Spectrum principally argues that the court of appeals added a "complete unusability" requirement to *Western Fire* that erroneously deprived Spectrum of coverage. Br. 27-37. But the court of appeals did not announce a blanket rule that "complete unusability" is required to show a "direct physical loss" in all circumstances. Instead, the court held only that such a showing was required where the insured alleged only *intangible* property damage. *See* Op. ¶¶ 36, 49. And that makes good sense. Where the property in question was not destroyed, coverage for a "direct physical loss" could arise only from the property's *deprivation*. But as was the case with Spectrum's facilities, when the property remains either partially usable or

usable for a purpose other than its intended purpose, no deprivation has occurred; the insured "never lost physical control of its buildings." *Sagome*, 56 F.4th at 934. By contrast, Spectrum's argument that, under the decision below, "there is no longer coverage for Colorado businesses when fire destroys part, but not all, of their property," Br. 2, is plainly incorrect. A fire that partially destroyed an insured property would be covered because physical damage to property would have occurred. Because Spectrum did not allege that there was a buildup of COVID-19 to such a degree that it rendered Spectrum's properties uninhabitable, there was no deprivation for which Spectrum could recover.

Regardless, Spectrum urges, its allegations "fit squarely within a proper reading of *Western Fire*" because its premises were "extremely dangerous and no longer safe to operate Spectrum's retirement communities." Br. 36. But again, that argument cannot survive the undisputed fact that Spectrum continued to operate its senior-care communities. *See* Op. ¶ 37. Nor does that position square with *Western Fire* itself, which was concerned with "the point at which the *building* itself became unusable," not whether there was merely a dangerous substance on the premises. Op. ¶ 39 (emphasis added). Spectrum asserts that its temporary inability to re-rent some of its residential units and use parts of its "restaurants and communal spaces" as intended rendered the property "uninhabitable." Br. 32-33. But those circumstances do not fit the plain meaning of "uninhabitable," which requires a condition that is “unfit for [human] habitation.” *See Webster’s Third New International Dictionary* 2499 (2002).

Spectrum next cites (Br. 28-36) several cases that, in its view, interpret *Western Fire* as requiring only a loss of “functionality.” But because those cases involved a perceptible change to the physical condition of insured property requiring substantial remediation before the property could be inhabited again, they counsel against coverage for Spectrum. In *Mulhern* v. *Hederich*, 430 P.2d 469, 470 (Colo. 1967), “physical distortion[s]” of the property’s basement slab, floors, and walls rendered it unfit for human occupancy regardless of its “intended use.” And in *Hughes* v. *Potomac Insurance Co.*, 18 Cal. Rptr. 650, 651 (Cal. Ct. App. 1962), “direct physical loss and damage” occurred when a landslide eliminated a home’s “subjacent and lateral support” and left it dangling at the edge of a 30-foot cliff. As for *Mellin* v. *Northern Security Insurance Co.*, 115 A.3d 799, 804-805 (N.H. 2015), which involved a severe odor of cat urine, the New Hampshire Supreme Court held only that “the term ‘physical loss’ requires a distinct and demonstrable alteration of the insured property,” and “express[ed] no opinion as to the outcome of the analysis” in that case. *Id*. at 804-805.

Spectrum also cites the Vermont Supreme Court’s decision in *Huntington Ingalls Industries, Inc*. v. *Ace American Insurance Co.*, 287 A.3d 515 (2022). *See* Br. 34-36, 41, 47-48. That court interpreted the plain meaning of “direct physical loss or damage to property" the same way the court of appeals did in this case and that the Tenth Circuit did in *Sagome* and *Monarch Casino*. *See* Op. ¶ 45 (citing *Sagome*); *Huntington Ingalls*, 287 A.3d at 532-533. But it remanded for factual development under Vermont's "extremely liberal" pleading standard, *see Huntington Ingalls*, 287 A.3d at 536, which resembles the pre-*Twombly* federal pleading standard, *see id*. at 535 (citing *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544, 575 (2007) (Stevens, J., dissenting)). Colorado, however, has adopted the *Twombly* standard, under which conclusory allegations such as the ones Spectrum presented here are inadequate to state a claim. *See Warne* v. *Hall*, 373 P.3d 588, 592-595 (Colo. 2016). In any event, on remand in *Huntington Ingalls*, the trial court recently granted summary judgment, holding that plaintiffs' "claim for direct physical loss . . . fails as a matter of law" because COVID-19 did not effect a "persistent" change to the "physical condition of the insured property." Add. B1-B23 (*appeal filed*, No. 230-9-20 Frcv (Vt. 2026)). The trial court concluded that COVID-19 was distinguishable from the "contaminants" at issue in *Western Fire* and *Mellin* because the impact of COVID-19 on property does not require "rebuilding, repair, or professional remediation" of insured property. Add. B22.

2. With respect to the policy language, Spectrum interprets "direct physical loss" as encompassing a "partial loss of use" with no material or physical effect on insured property. Br. 27-42. But, as discussed above, that interpretation would

"extend coverage beyond that contracted for," *Cyprus Amax Minerals*, 74 P.3d at 299, by ignoring the word "physical" in "direct physical loss." Spectrum's reading thus lacks support in the plain language of the policy and is foreclosed by Colorado law. *See Sagome*, 56 F.4th at 934-935; *Monarch Casino*, 85 F.4th at 1042-1043.

Spectrum separately emphasizes that the policy is an "all-risk" policy that purportedly "provide[s] coverage for all losses to the property unless expressly excluded." Br. 15-16 & n.12, 23-25, 39-40. That is plainly incorrect. A policy that covers "all risks" does not necessarily cover "all losses." *Santo's Italian Café*, 15 F.4th at 403. "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." *Id*. And here—whatever the scope of covered risks—Spectrum's policy coverage extends only to losses resulting from "direct physical loss of or damage to property."

Spectrum next argues that the "absence of a widely-used [virus] exclusion" from Spectrum's policy supports a liberal construction of the policy "in favor of coverage." Br. 22-23 & n.13; *see also* Br. 16-19 & n.12.[2] But as the court of appeals

[2] Even if Spectrum could demonstrate an entitlement to coverage under the policy's affirmative coverage provisions, the policy's exclusions offer independent bases for denial of its claims. *See, e.g.*, CF, pp.1842-1843, 1855. Notably, the policy excludes coverage for the "presence, growth, proliferation, spread or any activity of . . . Microbes," including "[a]ny non-fungal microorganism or non-fungal, colony-form organism that causes infection or disease." CF, pp.1842, 1855 (emphasis omitted). A substantially similar exclusion has been applied to bar coverage for claims related to COVID-19. *See, e.g.*, *Crescent Plaza Hotel Owner, L.P.* v. *Zurich American Insurance Co.*, 20 F.4th 303, 309-310 (7th Cir. 2021).

correctly recognized, "the absence of an exclusion for a specific loss cannot create the existence of coverage for that specific loss." Op. ¶ 43. The court of appeals' determination is consistent with the fundamental principle that an exclusion cannot create coverage where none exists under the policy's affirmative grant of coverage. *See, e.g.*, *Sagome*, 56 F.4th at 935; *Schleicher & Stebbins Hotels*, 302 A.3d at 81; *Verveine*, 184 N.E.3d at 1277; *see also Greystone Construction, Inc.* v. *National Fire & Marine Insurance Co.*, 661 F.3d 1272, 1289 (10th Cir. 2011) (applying Colorado law).

Finally, Spectrum relies on several "longstanding principles of Colorado law" to argue that the policy should be construed liberally in favor of coverage. Br. 14-19, 22-23, 39-41. In particular, Spectrum invokes the principles that insurance policies are construed broadly in favor of coverage and consistently with public policy and principles of fairness. But those principles cannot override the language of the policy itself. *See Hoang* v. *Assurance Co. of America*, 149 P.3d 798, 801 (Colo. 2007). Rather, "[w]ords used in an insurance policy 'should be given their plain and ordinary meaning unless the intent of the parties, as expressed in the contract, indicates that an alternative interpretation is intended.' " *Compass Insurance Co.* v. *City of Littleton*, 984 P.2d 606, 613 (Colo. 1999) (citation omitted).

In any event, only "[a]mbiguous language must be construed in favor of the insured and against the insurer who drafted the policy." *Hecla Mining Co.* v. *New

*Hampshire Insurance Co.*, 811 P.2d 1083, 1090 (Colo. 1991). And ambiguity exists only if the relevant language is "susceptible to more than one meaning." *Northern Insurance Co.* v. *Ekstrom*, 784 P.2d 320, 323 (Colo. 1989). That is not the case here. Spectrum presents no reasonable alternative interpretation of "direct physical loss," because its proffered interpretation ignores the word "physical."

Spectrum argues that its "reasonable expectations" create ambiguity as to the policy's plain meaning. Br. 22-27, 39-42. But Spectrum's own authorities make clear that its subjective expectations are irrelevant. *See Bailey* v. *Lincoln General Insurance Co.*, 255 P.3d 1039, 1051, 1054 (Colo. 2011). The analysis is objective in nature and must be guided by "the intent of the parties, as expressed in the contract." *Compass Insurance Co.*, 984 P.2d at 613; *see also City of Aurora* v. *Northern Colorado Water Conservancy District*, 236 P.3d 1222, 1226 (Colo. 2010). The policy here is expressed in unambiguous terms. Spectrum identifies no ambiguity in the text, but instead advances an atextual alternative: Spectrum would replace "direct physical loss of or damage to" with "loss of use."

Moreover, none of Spectrum's cited cases (Br. 24-25) involves COVID-19 or other contaminants that disintegrate on their own or are easily remediated by ordinary cleaning procedures. Instead, they involved coverage for "operations suspended" as a result of "direct physical loss"—but no such suspension occurred at Spectrum's facilities, and there was no such direct physical loss. *See Oregon*

*Shakespeare Festival* v. *Great American Insurance Co.*, 2016 WL 3267247, at *4-*6 (D. Or. June 7, 2016); *Stack Metallurgical Services, Inc.* v. *Travelers Indemnity Co. of Connecticut*, 2007 WL 464715, at *7-*8 (D. Or. Feb. 7, 2007).

Spectrum's reliance (Br. 23 n.13, 27 & n.15, 33-34) on *North State Deli, LLC* v. *Cincinnati Insurance Co.*, 908 S.E.2d 802 (N.C. 2024), is similarly misplaced. The restaurant policyholders in that case "closed completely" after government orders required them to suspend services. *Id*. at 806. The North Carolina Supreme Court found ambiguity in that policy by considering extrinsic evidence about the policyholder's "reasonable expectations" and the specific nature of the restaurant business. *Id*. at 812. At the outset, *North State Deli* is inapposite because the local government authorities in that case required restaurants to close completely; here, Spectrum's operations continued, which confirms the absence of physical loss.

But even assuming the restaurant context were analogous, *North State Deli*'s approach aligns with only a small minority of courts. Courts around the country have overwhelmingly rejected the arguments of restaurants that COVID-19 caused "direct physical loss." *See, e.g.*, *Santo's Italian Café*, 15 F.4th at 401-407 (Ohio law); *Sandy Point Dental*, 20 F.4th at 336-337 (Illinois law); *Terry Black's Barbecue, L.L.C.* v. *State Automobile Mutual Insurance Co.*, 22 F.4th 450, 455-459 (5th Cir. 2022) (Texas law); *Mudpie, Inc.* v. *Travelers Casualty Insurance Co. of America*, 15 F.4th 885, 890-893 (9th Cir. 2021) (California law). *North State Deli*'s approach is also inconsistent with Colorado law, which prohibits consideration of extrinsic evidence, including as to a party's subjective expectations, to identify ambiguity. *See American Family Mutual Insurance Co.* v. *Hansen*, 375 P.3d 115, 117 (Colo. 2016).

Because the plain language of Spectrum's policy is unambiguous, this Court should enforce it in accordance with its plain and ordinary meaning. *Northern Colorado Water Conservancy District*, 236 P.3d at 1226; *see also Chacon*, 788 P.2d at 750. Spectrum's argument concerning "direct physical loss" should be rejected.

## II. SPECTRUM'S COMPLAINT FAILED TO ALLEGE ANY PHYSICAL DAMAGE TO INSURED PROPERTY

The court of appeals likewise correctly upheld the district court's determination that the complaint did not allege "direct physical damage" to covered property, which requires physical harm or injury to insured property. Spectrum's conclusory allegations that COVID-19 was present on insured property and thus purportedly "altered" that property do not suffice. As courts have consistently held and Spectrum "acknowledge[d]" in the court of appeals, direct physical damage cannot result from "every sneeze or cough that requires some cleaning of property." Op. ¶ 41.

### A. Physical Damage Requires Physical Harm Or Injury To Property

Coverage for "direct physical damage" requires physical harm to property. *Sagome*, 56 F.4th at 934-935. As with "direct physical loss," that interpretation is compelled by the plain meaning of the policy language. "Direct" means "marked by absence of an intervening agency, instrumentality, or influence: immediate." *Webster's Third New International Dictionary* 640 (2002). "Physical" means "of or relating to natural or material things as opposed to things mental, moral, spiritual, or imaginary." *Id*. at 1706. "Damage" means "injury or harm to person, property, or reputation." *Id*. *a*t 571.

Although there may be some overlap between "physical loss" and "physical damage," each term covers a distinct category of harm excluded by the other. For example, although physical loss encompasses physical destruction and deprivation of property, it does not include partial injury to property. Read together, the phrase "physical loss and damage" encompasses the full range of physical harm to property, from partial injury to wholesale destruction. Because "[e]ach *word* in an instrument is to be given meaning if at all possible," *U.S. Fidelity & Guaranty Co.* v. *Budget Rent-A-Car Systems*, *Inc*., 842 P.2d 208, 213 (Colo. 1992), the damage itself also "must be physical, not simply stem from something physical," *Sagome*, 56 F.4th at 935. The policy thus requires that the injury to property be itself a physical injury. *See* CF, pp.1830, 1834-1835.

This interpretation of damage similarly comports with the policy's period-of-restoration language. As with direct physical loss, risks that disintegrate on their own or can be remediated through ordinary cleaning procedures do not trigger coverage. *Ungarean*, 323 A.3d at 606-610; *Sandy Point Dental*, 20 F.4th at 335; *see also Goodwill Industries*, 21 F.4th at 711; *Oral Surgeons*, 2 F.4th at 1144-1145.

### B. Spectrum's Allegations Do Not Adequately Plead Direct Physical Damage

Even taking its allegations as true, Spectrum failed to allege direct physical damage from the presence of COVID-19 on its properties. Simply put, even if COVID-19 infects persons who are present on a property, it does not damage the property itself.

Spectrum attempted to allege physical damage from the purported "actual presence of COVID-19 in, attaching to, and altering each of [Spectrum's] Covered Properties and the government-ordered restrictions on [Spectrum's] use of the Covered Properties"; "[Spectrum's] inability to use the Covered Properties based upon the potential or risk of COVID-19 entering the Covered Properties and contaminating the surfaces"; and the "governmental orders . . . mandating that [Spectrum] shutter, cease, dramatically limit, or alter physical spaces within or their use of the Covered Properties." CF, p.1799.

These allegations are insufficient to plead direct physical damage as a matter of law. As with direct physical loss, the Tenth Circuit applying Colorado law has held that COVID-19 does not cause direct physical damage because "COVID-19 does not physically injure or harm property" within the meaning of the policy terms. *Sagome*, 56 F.4th at 935 (collecting cases). The overwhelming majority of authority is in accord. *See, e.g.*, *Sagome*, 56 F.4th at 934 n.5 (collecting cases); *Wilson*, 57 F.4th at 141-146; *SAS International*, 36 F.4th at 26-28; *Santo's Italian Café*, 15 F.4th at 401-407; Add. A1-A5. COVID-19 does not physically injure or harm property because "COVID-19 particles can be removed from a surface by standard cleaning measures." *Sagome*, 56 F.4th at 934 (quoting *Dukes Clothing, LLC* v. *Cincinnati Insurance Co.*, 35 F.4th 1322, 1328 (11th Cir. 2022)); *see also Sandy Point Dental*, 20 F.4th at 335.

As discussed above, this Court has reached the same conclusion in the context of a tax dispute, explaining that COVID-19 is not a condition "in or related to any real property." *MJB Motels*, 531 P.3d at 1007 (citation omitted). The Court reasoned that "COVID-19 may have infected people who were on the property," but "COVID-19 did not infect the property itself." *Id*. at 1008. Both the Tenth Circuit and Colorado district courts have expressly relied on *MJB Motels* in COVID-19 insurance coverage cases like this one to conclude that the COVID-19 "virus cannot cause physical loss or damage." *Monarch Casino*, 85 F.4th at 1042; *see Regents of the University of Colorado* v. *Factory Mutual Insurance Co.*, 2023 WL 6003526, at *5 (Colo. Dist. Ct. Aug. 29, 2023); CF, pp.7719-7720. This Court should hold, consistent with the overwhelming body of precedent, that Spectrum's allegations fail to establish physical damage.

### C. Spectrum's Arguments Lack Merit

1. Spectrum again asserts that the court of appeals erred by imposing a "complete unusability" requirement that deprived Spectrum of coverage. Br. 37-42. As already explained, that misstates the court of appeals' holding and attempts to transform the policy into one insuring any "loss of use" rather than "direct physical loss of or damage to property."

Spectrum next invokes the anti-surplusage canon to argue that "damage" must mean "injury that 'impairs usefulness,'" because "the policy distinguishes between 'damage' and 'destroy,'" and "'[d]estroy' commonly means complete loss." Br. 38-39 (citation omitted). But the fact that some of the policy terms have overlapping meanings does not compel Spectrum's interpretation. "Destroy" as used in the policy is synonymous with "physical loss" and refers to the complete deprivation of property. *See Webster's Third New International Dictionary* 615 (2002). "Damage" means a lesser injury requiring more limited repair. Numerous cases considering COVID-19 insurance claims brought under identical or materially similar coverage provisions have read physical "loss" and "damage" that way. *See, e.g.*, *Sandy Point Dental*, 20 F.4th at 332; *Santo's Italian Café*, 15 F.4th at 404. Spectrum does not explain why those courts were incorrect.

2. Spectrum argues that it plausibly alleged facts supporting physical damage because "COVID-19 is physical: it is a 'physical' substance, a 'natural' or

‘material thing.’ ” Br. 46-47 (citation omitted). That argument misses the point. The question is whether Spectrum’s “property” was “injure[d] or harm[ed] . . . in some physical manner,” not whether the alleged damage was caused by something physical in nature. *See Sagome*, 56 F.4th at 934-935.

Spectrum next suggests that the court of appeals improperly disregarded so-called “expert” authorities cited in the complaint, including “scientific and governmental authorities [asserting] that COVID-19 physically alters property and causes physical damage.” Br. 48-49. But Spectrum’s complaint would be deficient even if those authorities were credited. Spectrum’s policy extends coverage for losses resulting from property damage only to the extent such damage results in a period of time where the property needs to be repaired, restored, or replaced. Here, to “restore[]” the property following exposure to COVID-19, Spectrum required only a disinfecting wipe. *Dukes Clothing*, 35 F.4th at 1328; *see, e.g.*, *Sandy Point Dental*, 20 F.4th at 335; *Ungarean*, 323 A.3d at 606-610.

3. Spectrum’s cited authorities are inapposite. The court of appeals did not “assume the role of an expert” when it rejected Spectrum’s claims. It determined that, even taking the allegations as true, Spectrum failed to plead physical damage. Op. ¶¶ 48-51.

Spectrum's reliance on *Gregory Packaging* underscores its misunderstanding of the policy.[3] There, an ammonia leak "physically incapacitated" insured property, leading to the facility being evacuated, shut down, and rendered uninhabitable until the building could be remediated. *See* 2014 WL 6675934, at *3-*4. Contrary to Spectrum's assertions (Br. 47-48), *Gregory Packaging* did not turn on the mere presence of "airborne toxins" or the property's "intended use." What mattered was the fact that the *building* itself was unfit for normal human occupation. *See id.* at *3-*7. That is not the case here.

Spectrum's analogy of COVID-19 to a property fire succeeds only in demonstrating that its position is wrong. Spectrum asserts that "there is no meaningful distinction" between its COVID-19 claims and other (extra-record) claims Spectrum has made for coverage from a "roof fire" and water seepage "into portions of the property." Br. 25-26. But even if that fact were properly before this Court, Spectrum concedes that the fire and the water used to extinguish it "caus[ed] damage" to—that is, harmed the physical condition of—insured property. Such tangible, physical damage is a textbook case of covered injury under a property-insurance policy such as Spectrum's. *See Santo's Italian Café*, 15 F.4th at 403. There is nothing unique or notable about Continental covering claims resulting from a fire and subsequent efforts to extinguish that fire that damaged insured property.

[3] For the reasons explained above, *Oregon Shakespeare* and *Huntington Ingalls* are inapposite.

As explained by the myriad cases rejecting similar coverage claims in the COVID-19 context, COVID-19 did not affect property like a fire, water, or a gas leak. *Sagome*, 56 F.4th at 937 (collecting cases). The court of appeals correctly dismissed Spectrum's claims.

Spectrum's failure to allege that COVID-19 or the relevant government orders caused any physical loss of or damage to property resolves Spectrum's claims for coverage under all three of the policy provisions at issue here. Spectrum's civil-authority claim fails for additional reasons. *First*, that provision requires a civil order to prohibit access to Spectrum's senior-care facilities. *See* CF, p.1833. The words "prohibit access" require that an order "completely 'prevent[] access,'" not merely "limit[]" it. *Brown Jug, Inc.* v. *Cincinnati Insurance Co.*, 27 F.4th 398, 405 (6th Cir. 2022) (citations omitted). The complaint concedes access was never prohibited by any government order. To the contrary: Spectrum affirmatively alleges that it continued to provide housing and services to residents throughout the pandemic. CF, pp.1799-1801. *Second*, for a government order to qualify under the civil-authority provision, it must have been issued "as a direct result of physical loss or damage to property." CF, p.1833. The phrase "direct result of" "requires a nexus between the civil authority order and property damage or losses." *Q Clothier New Orleans, L.L.C.* v. *Twin City Fire Insurance Co.*, 29 F.4th 252, 260 (5th Cir. 2022). But the orders cited by Spectrum were issued to "mitigate the spread and impact of

COVID-19 in the state," not as a direct result of previous physical loss or damage to any particular property. *Id.*; *see, e.g.*, *Torgerson Properties, Inc.* v. *Continental Casualty Co.*, 38 F.4th 4, 6 (8th Cir. 2022); *Julio & Sons Co.* v. *Continental Casualty Co.*, 2024 WL 3287598, at *9-*10 (Tex. App. July 3, 2024).

## III. SPECTRUM'S REQUEST FOR LEAVE TO AMEND SHOULD BE DENIED AS UNTIMELY AND FUTILE

In a passing footnote, Spectrum asserts that it should be granted leave to amend its complaint if the Court concludes that "it has somehow not sufficiently alleged facts of physical damage." Br. 49 n.21; *see* Br. 44. But that argument is forfeited. Spectrum was required to move to amend in the district court under Colorado Rule of Civil Procedure 15(a). Spectrum failed to do so, despite successfully amending the complaint once before, and Spectrum offers no excuse for its default.

In any event, Spectrum's request should be denied as futile. Leave to amend is futile where a complaint "fails to state a legal theory[] or would not withstand a motion to dismiss." *Benton* v. *Adams*, 56 P.3d 81, 87 (Colo. 2002). As explained above, COVID-19 cannot cause direct physical loss of or damage to property as a matter of law, and Spectrum has already conceded that no part of its property was rendered even temporarily uninhabitable during the pandemic. And Spectrum has not identified any relevant authority that would compel a different outcome. For that reason, Spectrum's argument fails to state a legal theory and cannot survive a motion to dismiss.  The court of appeals rejected Spectrum's belated, futile effort to amend its complaint.  This Court should do the same.

## CONCLUSION

The judgment of the court of appeals should be affirmed.

June 16, 2026

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## CERTIFICATE OF SERVICE

I certify that on June 16, 2026, a copy of the foregoing Answer Brief was filed with the court and served via the Court's E-Filing System on all counsel of record.

*/s/* David L. Coats
David L. Coats, #51561

## ADDENDUM A

The following cases are among the hundreds of decisions nationwide that have concluded that COVID-19 or public-health orders issued during the pandemic do not constitute "physical loss" or "physical damage."

### U.S. Courts of Appeals

- *Legal Sea Foods, LLC* v. *Strathmore Insurance Co.*, 36 F.4th 29, 34-36 (1st Cir. 2022)
- *SAS International, Ltd.* v. *General Star Indemnity Co.*, 36 F.4th 23, 26-29 (1st Cir. 2022)
- *10012 Holdings, Inc.* v. *Sentinel Insurance Co.,* 21 F.4th 216, 220-223 (2d Cir. 2021)
- *Buffalo Xerographix, Inc.* v. *Sentinel Insurance Co.*, No. 21-1502, 2022 WL 4241191, at *2 (2d Cir. Sept. 15, 2022)
- *Connecticut Children's Medical Center* v. *Continental Casualty Co.*, No. 22-322, 2023 WL 2961738, at *1-*2 (2d Cir. Apr. 17, 2023)
- *Farmington Village Dental Associates, LLC* v. *Cincinnati Insurance Co.*, No. 21-2080, 2022 WL 2062280, at *1-*2 (2d Cir. June 8, 2022)
- *Kim-Chee LLC* v. *Philadelphia Indemnity Insurance Co.*, No. 21-1082, 2022 WL 258569, at *1-*2 (2d Cir. Jan. 28, 2022)
- *Rye Ridge Corp.* v. *Cincinnati Insurance Co.*, No. 21-1323, 2022 WL 120782, at *1-*2 (2d Cir. Jan. 13, 2022)
- *SA Hospitality Group, LLC* v. *Hartford Fire Insurance Co.*, No. 21-1523, 2022 WL 815683, at *1-*2 (2d Cir. Mar. 18, 2022)
- *Ralph Lauren Corp*. v. *Factory Mutual Insurance Co.*, Nos. 21-2008, 23-2832, 22-2474, 2025 WL 1625648, at *1-*2 (3d Cir. June 9, 2025)
- *Wilson* v. *USI Insurance Service LLC*, 57 F.4th 131, 141-147 (3d Cir. 2023)

- *Uncork & Create LLC* v. *Cincinnati Insurance Co.*, 27 F.4th 926, 930-934 (4th Cir. 2022)
- *Cinemark Holdings, Inc.* v. *Factory Mutual Insurance Co.*, No. 23-40453, 2024 WL 3673544, at *1-*2 (5th Cir. Aug 6, 2024)
- *Coleman E. Adler & Sons, L.L.C.* v. *Axis Surplus Insurance Co.*, 49 F.4th 894, 897-898 (5th Cir. 2022)
- *Ferrer & Poirot, GP* v. *Cincinnati Insurance Co.*, 36 F.4th 656, 658 (5th Cir. 2022)
- *PHI Group, Inc.* v. *Zurich American Insurance Co.*, 58 F.4th 838, 841-843 (5th Cir. 2023)
- *Q Clothier New Orleans, L.L.C.* v. *Twin City Fire Insurance Co.*, 29 F.4th 252, 257-260 (5th Cir. 2022)
- *Brown Jug, Inc.* v. *Cincinnati Insurance Co.*, 27 F.4th 398, 402-405 (6th Cir. 2022)
- *Dakota Girls, LLC* v. *Philadelphia Indemnity Insurance Co.*, 17 F.4th 645, 648-649 (6th Cir. 2021)
- *Estes* v. *Cincinnati Insurance Co.*, 23 F.4th 695, 699-702 (6th Cir. 2022)
- *Santo's Italian Café, LLC* v. *Acuity Insurance Co.*, 15 F.4th 398, 401-407 (6th Cir. 2021)
- *Circle Block Partners, LLC* v. *Fireman's Fund Insurance Co.*, 44 F.4th 1014, 1019-1023 (7th Cir. 2022)
- *East Coast Entertainment of Durham, LLC* v. *Houston Casualty Co.*, 31 F.4th 547, 550-551 (7th Cir. 2022)
- *Paradigm Care & Enrichment Center, LLC* v. *West Bend Mutual Insurance Co.*, 33 F.4th 417, 421-422 (7th Cir. 2022)
- *Sandy Point Dental, P.C.* v. *Cincinnati Insurance Co.*, 20 F.4th 327, 331-337 (7th Cir. 2021)

- *Monday Restaurants LLC* v. *Intrepid Insurance Co.*, 32 F.4th 656, 658-659 (8th Cir. 2022)

- *Olmsted Medical Center* v. *Continental Casualty Co.*, 65 F.4th 1005, 1009-1012 (8th Cir. 2022)

- *Oral Surgeons, P.C.* v. *Cincinnati Insurance Co.*, 2 F.4th 1141, 1144-1145 (8th Cir. 2021)

- *Planet Sub Holdings, Inc.* v. *State Auto Property & Casualty Insurance Co.*, 36 F.4th 772, 775-777 (8th Cir. 2022)

- *Rock Dental Arkansas, PLLC* v. *Cincinnati Insurance Co.*, 40 F.4th 868, 870-872 (8th Cir. 2022)

- *Torgerson Properties Inc.* v. *Continental Casualty Co.*, 38 F.4th 4, 6 (8th Cir. 2022)

- *Crown Intermediate Holdco, Inc.* v. *Allianz Global Risks US Insurance Co.*, No. 22-55661, 2024 WL 5040044, at *1 (9th Cir. Dec. 9, 2024)

- *Mudpie, Inc.* v. *Travelers Casualty Insurance Co. of America*, 15 F.4th 885, 890-893 (9th Cir. 2021)

- *Oregon Clinic, PC* v. *Fireman's Fund Insurance Co.*, 75 F.4th 1064, 1069-1073 (9th Cir. 2023)

- *Treasure Island, LLC* v. *Affiliated FM Insurance Co.*, No. 24-7428, 2026 WL 594860, at *1 (9th Cir. Mar. 3, 2026)

- *Goodwill Industries of Central Oklahoma, Inc.* v. *Philadelphia Indemnity Insurance Co.*, 21 F.4th 704, 710-712 (10th Cir. 2021)

- *Sagome, Inc.* v. *Cincinnati Insurance Co.*, 56 F.4th 931, 934-938 (10th Cir. 2023)

- *Monarch Casino & Resort, Inc.* v. *Affiliated FM Insurance Co.*, 85 F.4th 1034, 1042-1044 (10th Cir. 2023)

- *Dukes Clothing, LLC* v. *Cincinnati Insurance Co.*, 35 F.4th 1322, 1326-1328 (11th Cir. 2022)

- *Henry's Louisiana Grill, Inc.* v. *Allied Insurance Co. of America*, 35 F.4th 1318, 1320-1321 (11th Cir. 2022)

- *SA Palm Beach, LLC* v. *Certain Underwriters at Lloyd's, London*, 32 F.4th 1347, 1357-1362 (11th Cir. 2022)

**State Courts of Last Resort**

- *Baxter Senior Living LLC* v. *Zurich American Insurance Co.*, 556 P.3d 757, 762-770 (Ak. 2024)

- *Another Planet Entertainment LLC* v. *Vigilant Insurance Co.*, 548 P.3d 303, 307 (Cal. 2024)

- *Connecticut Dermatology Group, PC* v. *Twin City Fire Insurance Co.*, 288 A.3d 187, 193-206 (Conn. 2023)

- *Hartford Fire Insurance Co.* v. *Moda, LLC*, 288 A.3d 206, 211-213 (Conn. 2023)

- *Creative Consolidation, LLC* v. *Erie Insurance Exchange*, 311 A.3d 902, 905-909 (D.C. 2024)

- *Rose's 1, LLC* v. *Erie Insurance Exchange*, 290 A.3d 52, 57-64 (D.C. 2023)

- *Jesse's Embers, LLC* v. *Western Agricultural Insurance Co.*, 973 N.W.2d 507, 510-512 (Iowa 2022)

- *Wakonda Club* v. *Selective Insurance Co. of America*, 973 N.W.2d 545, 549-556 (Iowa 2022)

- *Cajun Conti LLC* v. *Certain Underwriters at Lloyd's, London*, 359 So.3d 922, 926-929 (La. 2023)

- *Tapestry, Inc.* v. *Factory Mutual Insurance Co.*, 286 A.3d 1044, 1053-1067 (Md. 2022)

- *Verveine Corp.* v. *Strathmore Insurance Co.*, 184 N.E.3d 1266, 1274-1279 (Mass. 2022)

- *Starr Surplus Lines Insurance Co.* v. *JGB Vegas Retail Lessee, LLC*, 535 P.3d 254, 261-267 (Nev. 2023)

- *Schleicher & Stebbins Hotels, LLC* v. *Starr Surplus Lines Insurance Co.*, 302 A.3d 67, 75-81 (N.H. 2023)

- *AC Ocean Walk, LLC* v. *American Guarantee & Liability Insurance Co.*, 307 A.3d 1174, 1185-1191 (N.J. 2024)

- *Consolidated Restaurant Operations, Inc.* v. *Westport Insurance Corp.*, 41 N.Y.3d 415, 427-433 (N.Y. 2024)

- *Neuro-Communication Services, Inc.* v. *Cincinnati Insurance Co.*, 219 N.E.3d 907, 911-916 (Ohio 2022)

- *Cherokee Nation* v. *Lexington Insurance Co.*, 521 P.3d 1261, 1267-1270 (Okla. 2022)

- *Ungarean* v. *CNA & Valley Forge Insurance Co.*, 323 A.3d 593, 605-610 (Pa. 2024)

- *Sullivan Management, LLC* v. *Fireman's Fund Insurance Co.*, 879 S.E.2d 742, 744-746 (S.C. 2022)

- *Crescent Hotels & Resorts, LLC* v. *Zurich American Insurance Co.*, No. 211074, 2022 WL 1124493, at *1 (Va. Apr. 14, 2022)

- *Hill & Stout, PLLC* v. *Mutual of Enumclaw Insurance Co.*, 515 P.3d 525, 531-535 (Wash. 2022)

- *Colectivo Coffee Roasters, Inc.* v. *Society Insurance*, 974 N.W.2d 442, 447-449 (Wis. 2022)

# ADDENDUM B

VERMONT SUPERIOR COURT
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CIVIL DIVISION
No. 230-9-20 Frcv

**Huntington Ingalls Industries et al v. Ace American Insurance Company et al.**

**ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT**
**(Motions: 94; 95; 97; 98)**

This matter is before the Court on cross motions for summary judgment arising from a dispute over the interpretation of a first-party property insurance agreement and related reinsurance agreements. The central dispute is whether COVID-19 caused direct physical loss or damage to property insured under the agreement.

Plaintiffs Huntington Ingalls Industries ("HII") and Huntington Ingalls Industries Risk Management LLC ("HIIRM") move for summary judgment on two theories: (1) COVID-19 caused direct physical loss of insured property, and (2) the seepage, pollution, and contamination exclusion does not apply to COVID-19. Defendants Ace American Insurance Company and approximately 30 other reinsurers ("Reinsurers") move for summary judgment on the grounds that COVID-19 did not cause direct physical loss or damage to insured property and is excluded under the seepage, pollution, and contamination exclusion of the policy. Additionally, Defendant Lex-London moves separately for summary judgment under the microorganism exclusion in its reinsurance policy.

The Court heard arguments from the parties, through counsel, on March 10, 2026.

Upon consideration of the briefings and arguments, the Court grants Defendants' motions for summary judgment. The Court also grants summary judgment to Defendants Lex-London, Ace American Insurance Company ("ACE"), and Zurich American Insurance Company ("Zurich") on independent bases as described below. The Court denies Plaintiffs' first motion as it relates to direct physical loss of insured property. The Court grants Plaintiffs' second motion for summary judgment related to the seepage, pollution, and contamination exclusion, but this does not affect the outcome of the case.

## I. LEGAL STANDARD

Summary judgment is proper "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." V.R.C.P. 56(a); *Gallipo v. City of Rutland*, 163 Vt. 83, 86 (1994).

A motion for summary judgment must be accompanied by a statement listing the undisputed material facts that support the motion. The non-moving party then may dispute those facts and additionally "file a separate and concise statement of additional material facts."

V.R.C.P. 56(c)(2). The moving party is then required to respond to the additional statement of facts to explain why they are not disputed or not material.

Parties must support all facts presented by admissible evidence, and the Court will disregard conclusory facts and conclusions of law. *H & E Equipment Services, Inc. v. Cassani Electric, Inc.*, 2017 VT 17, ¶ 20, 204 Vt. 559. In deciding a motion for summary judgment, the Court will give the non-moving party the benefit of all reasonable doubts and inferences. *Robertson v. Mylan Labs., Inc.*, 2004 VT 15, ¶ 15, 176 Vt. 356.

While some of the facts cited below are listed as disputed in the parties' filings, they are not truly disputed for purposes of this decision. In some instances, the dispute is based on relevance, and the Court denies any objection on that basis. In others, the dispute is hyper focused on a minute detail of the statement of fact and does not affect the real meaning of the statement. Last, some of the disputed facts were put forward by Plaintiffs, including in their requests to take judicial notice. Because the Court has decided these motions in favor of Defendants – except as it relates to the seepage, pollution, and contamination exclusion – the Court accepts certain facts as presented by Plaintiffs for purposes of its analysis.

## II. UNDISPUTED MATERIAL FACTS

Huntington Ingalls Industries, Inc. operates major shipbuilding facilities in Newport News, Virginia, and Pascagoula, Mississippi. Huntington Ingalls Industries Risk Management LLC is its captive insurer. In March 2020, HIIRM issued the relevant property policy to HII. Plaintiffs' Statement of Undisputed Material Facts ("PSUMF"), ¶ 4. HIIRM then procured reinsurance of that obligation, and the Defendants in this case issued follow-form reinsurance contracts tied to that policy. PSUMF ¶ 5.

### A. The Policy

The policy insured HII against "all risks of direct physical loss or damage to property described herein." PSUMF ¶ 9; Defendants' Statement of Undisputed Material Facts ("DSUMF"), ¶ 12. The policy insures "the interest of the insured in . . . all real and personal property while such property is located within the territorial limits of the Policy. . . which is owned, used, or acquired by the Insureds, and the property of others in the Insured's care, custody, or control . . ." PSUMF ¶ 10; DSUMF ¶ 12.

The policy contains a "PROPERTY EXCLUDED" provision that states the Policy does "not insure loss or damage to . . . Land . . . [and] Water . . . ." PSUMF ¶ 11. The policy does not have an explicit exclusion for air or airspace. PSUMF ¶ 11. However, the term "airspace" does not appear in the policy language, and the policy does not assign a separate valuation to airspace. DSUMF ¶¶ 26, 30. The policy also includes an exclusion for loss or damage caused by seepage, pollution, or contamination. The clause states the following:

> This policy does not insure the following:
> …
> F. Loss or damage caused by Seepage and/or Pollution and/or Contamination except loss or damage to the property insured caused by
>
> 1. Seepage and/or Pollution and/or Contamination which itself results from a peril not excluded under this Policy; or
> 2. Any peril not excluded under this Policy which itself results from Seepage and/or Pollution and/or Contamination.

PSUMF ¶ 93.

HIIRM issued the policy, and Defendants agreed to reinsure the policy, after the World Health Organization declared COVID-19 a global pandemic. PSUMF ¶ 99. After the SARS outbreak in 2006, the Insurance Service Office prepared a standard exclusion for viruses. PSUMF ¶ 98. Further, on March 4, 2020, Lloyd's Market Association provided members, including reinsurers, with a general coronavirus exclusion. PSUMF ¶ 99.

The Policies also include language expanding coverage if physical loss or damage occurs to insured property. This includes loss "due to the necessary interruption of business conducted by the Insured, whether total or partial, including all interdependencies between or among companies owned or operated by the Insured caused by physical loss of damage insured herein[.]" DSUMF ¶ 13; PSUMF ¶ 12. Additionally, the Policies insure "[a]ny reasonable and necessary EXTRA EXPENSE incurred by the Insured in order to continue as nearly as practicable the normal operation of the Insured's business following physical loss or damage insured herein during the term of this Policy[.]" DSUMF ¶ 14. Extra expense is defined as "the excess (if any) of the total cost incurred during the Period of Recovery chargeable to the operation of the Insured's business, . . . over and above the cost that would normally have been incurred to conduct the business during the same period had no loss or damage occurred." PSUMF ¶ 13.

The policies also include two different preservation-of-property clauses, depending on the reinsurer. The first and more common provision is the following:

> This policy covers the costs incurred for actions to temporarily protect or preserve insured property, provided that such actions are reasonable and necessary due to actual or threatened insured physical loss or damage to such insured property. The insurer shall pay the expenses so incurred including resulting Time Element loss.

PSUMF ¶ 14; DSUMF ¶ 18. The second provision applies to a more limited number of reinsurers – it states the following:

> This policy covers the reasonable and necessary costs incurred for actions to temporarily protect or preserve insured property, provided that such actions are

> necessary due to actual or to prevent impending insured physical loss or damage to such insured property.

PSUMF ¶ 15.

Lastly, the Policy includes an endorsement titled Reliance on Reinsurance Endorsement. The endorsement states:

> Notwithstanding Huntington Ingalls Industries Risk Management LLC's (hereinafter referred to as the "Insurer") ultimate liability as described under this Policy, shall be limited to the Insurer's liability ceded and accepted by such reinsurers per the reinsurance certificate. The claim or any portion for loss not accepted by said reinsurers in accordance with each reinsurers' agreement with this Insurer will be borne by the Insured.

DSUMF at Ex. 6, HIIRM Policy at 56.

**B. Lex-London's Microorganism Exclusion**

Lex-London added a "Reinsurance Endorsement" to its Reinsurance agreement, which modified the HIIRM Policy's provisions. First, the endorsement added a "Microorganism Exclusion" to the "Mold, Mildew, & Fungus Clause." The clause states the following:

> this Policy does not insure any loss . . . arising out of . . . 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.

PSUMF in Opposition to Lex-London's Motion for Summary Judgment ("PSUMF LL"), ¶ 8. Lex-London also added another loss or damage exclusion, applying to "loss of market, loss of use, delay of use." PSUMF LL ¶ 22

**C. Reinsurance Agreements**

The reinsurance agreements between HIIRM and the reinsurers include the following clauses.

> **<u>3. Reinsurance Accepted</u>**
> The Reinsurer's liability shall attach simultaneously with that [HIIRM] and shall be subject in all respects to the same risks, terms, conditions, rates, interpretations, and waivers . . . .
> . . .
> **<u>6. Loss Adjustment</u>**
> The true intent of this agreement is that in every case to which this Agreement applies, the Reinsurer shall follow the settlements of [HIIRM]. All loss

> settlements made by [HIIRM] within the terms, conditions and limits of this Agreement, shall be binding on the Reinsurer. However, the reinsurer is not obligated to indemnify the Company for ex-gratia payments.

Pl. Add. SUMF ¶ 33.

Additionally, all the Reinsurers, except ACE and Zurich, executed Claims Agreements as endorsements to their Reinsurance Agreements. Pl. Add. SUMF ¶ 34. The Claims Agreement stated the following:

> Reinsurers "assum[ed] all of the rights, obligations, and responsibilities" of HIIRM, "including without limitation, the obligation to adjust the Claim and pay all Loss covered in accordance with" the HIIRM Policy.

Pl. Add. SUMF ¶ 35.

**D. COVID-19 Background**

In late December 2019, a highly contagious virus, SARS-CoV-2, was discovered in Wuhan, China. PSUMF ¶ 17. It began to spread worldwide, and the World Health Organization declared the outbreak a global health emergency and later a pandemic. PSUMF ¶¶ 18, 20–21. The U.S. government provided guidance on COVID and specific industries. The US government issued a memo stating that workers in the critical infrastructure industry "have special responsibility" to maintain work schedules. PSUMF ¶ 32. The memo informed these industries to follow CDC guidelines. *Id.* In May of 2020, the CDC published guidelines for employers to prevent and reduce transmission. PSUMF ¶ 36.

**E. HII Operations & Claim**

HII operates its shipyard in a mix of enclosed, semi-enclosed, and open settings. DSUMF ¶ 4. Plaintiffs were designated critical infrastructure during the COVID-19 pandemic and were not subject to "stay at home" mandates. DSUMF ¶ 61. While these orders did not mandate HII to stay open, they strongly encouraged it to do so. DSUMF ¶ 62; Pl. Response to DSUMF ¶ 62. The record also reflects large numbers of employee infections at the Ingalls facility in Mississippi and the Newport News facility in Virginia. PSUMF ¶ 68.

Plaintiffs gave notice of loss on April 17, 2020, after learning of a positive employee test, and reinsurers other than ACE issued a reservation-of-rights letter on August 6, 2020, through their independent adjuster. PSUMF ¶¶ 24, 28. HII further submitted partial claim submissions to the reinsurers on December 23, 2020, February 4, 2021, and February 23, 2023, detailing expenses HII alleges it incurred due to COVID-19. PSUMF ¶ 29. The reinsurers sent a letter on July 25, 2023, denying coverage under the Policies. PSUMF ¶ 30.

The claim adjustment was conducted by the Reinsurers' independent adjuster. PSUMF ¶ 27. At this time, no settlement or any payments have been agreed to or paid by HIIRM to HII for the claimed loss in connection with the insurance claims. Def. Sec. Add. SUMF ¶ 5.

**F. COVID-19 Transmission and Mechanisms**

COVID-19 is a physical entity. Pl. Add. SUMF ¶ 36. COVID-19 has three primary transmission methods: (1) inhalation of fine respiratory droplets and aerosolized viral particles, (2) deposition of droplets and viral particles onto exposed mucous membranes, and (3) touching mucous membranes with hands soiled with respiratory droplets or fomites. PSUMF ¶ 23. A fomite is a physical, inanimate object that is a source of transmission of disease – an object with a viable infectious agent on it. DSUMF ¶ 46. Once outside a human host, the virus decays over time, cannot replicate in air or on inanimate surfaces, and eventually dissipates from air and surfaces with the passage of time. DSUMF ¶ 38.

When COVID-19 particles settle onto a surface from the air, they adhere through a process called adsorption. Pl. Add. SUMF ¶¶ 39, 41. As such, when a viral particle of COVID-19 is present on the surface of a property, that surface becomes a fomite. DSUMF ¶¶ 47–49. COVID-19 has the same type of interactions with surfaces as other viruses. DSUMF ¶ 51.

COVID-19 can remain on a surface for up to 8 days, but the strength of adhesion and the duration of viral viability or infectivity depend on the surface type and temperature. Pl. Add. SUMF ¶¶ 40, 63, 67. The virus can be removed from surfaces using disinfectants, some of which can typically be found in the average commercial or residential environment. DSUMF ¶ 41; Pl. Resp. to DSUMF ¶ 41.

A person infected with COVID-19 will breathe out respiratory droplets or aerosolized particles containing the virus into the surrounding air. DSUMF ¶ 44. These droplets and particles can remain in the air for a few seconds to several hours. Pl. Add. SUMF ¶ 71.

**G. COVID-19 at HII Property**

Between March 22, 2020, and February 14, 2023, HII had 7,095 and 10,889 confirmed COVID-19 cases present at its two facilities, Ingalls and Newport News, respectively. PSUMF ¶ 68. Due to employees testing positive while on the HII property and the way COVID-19 is transmitted, COVID-19 was undisputedly present on and within both properties. Although Defendants initially disputed this in their filings, at oral argument they conceded that COVID-19 was necessarily present at HII's property during the policy period, based on the undisputed science of COVID-19 transmission.

When an employee tested positive at an HII facility, the employee was interviewed to identify locations where they worked and close contacts with other employees. PSUMF ¶ 54. The COVID-19 positive employee's area was temporarily shut down and HII employees cleaned it. PSUMF ¶ 56. Plaintiffs did not conduct direct testing for the presence of SARS-CoV-2 on specific surfaces or in particular airspaces, but instead inferred its presence from employee testing, tracing information, and surrounding circumstances. DSUMF ¶ 64.

HII implemented a broad set of measures at the shipyards, including enhanced cleaning and sanitation, such as fogging, ventilation and airflow measures, barriers and sanitation stations, staggered work schedules, and operational changes to allow time for cleaning, contact tracing, and area-specific decontamination after positive cases. PSUMF ¶¶ 41–65. No item of shipyard property was discarded, rebuilt, repaired, or replaced because of COVID-19. DSUMF ¶ 87. HII's physical property is in the same physical condition as it was before the pandemic. DSUMF ¶ 92. HII suspended production at Ingalls for five days from April 9 – 13, 2020, to sanitize the facility. PSUMF ¶ 46.

COVID-19 is still present in the community, including at HII's facilities. DSUMF ¶ 111.

## III. CONCLUSIONS OF LAW

The dispute between the parties is controlled by the language of the Policy, the interpretation of that Policy, and the application of the facts of this case to that policy language. This case was previously appealed to the Vermont Supreme Court after the trial Court granted Defendants' motion to dismiss. The Vermont Supreme Court reversed that decision and provided a detailed interpretation of the policy language. *Huntington Ingalls Industries, Inc. v. Ace American Insurance Co.*, 2022 VT 45, 217 Vt. 195. Specifically, the Supreme Court laid out the meaning of the key phrase "direct physical damage or loss."

That decision is the law of this case, and this Court applies the Supreme Court's definitions and policy interpretation in this decision to determine whether the undisputed facts entitle either party to judgment as a matter of law.

The Vermont Supreme Court did not reach all of the issues raised by the parties in their cross motions. Several issues are addressed here for the first time: (1) the effect of ACE and Zurich not having executed the Claims Agreement endorsement, (2) the scope of the Lex-London microorganism exclusion, (3) the scope of the seepage, pollution, and contamination exclusion, (4) whether the protection and preservation of property clause provides independent coverage where the threatened loss or damage is not, in fact, insured, and (5) whether interior airspace qualifies as insured property under the Policy.

The Court reiterates the governing principles of insurance policy interpretation as stated by the Vermont Supreme Court in *Huntington Ingalls*, in reliance on prior Vermont cases interpreting insurance policies. A court interprets an insurance policy based on its language, which reflects the parties' intent. *Id*. at ¶ 19. Policy provisions must be read together and considered as a whole. *Id*. Courts interpret terms according to their plain and common meaning and enforce unambiguous terms as written. *Id*. Words or phrases are ambiguous if they can reasonably be interpreted in more than one way. *Id*. When ambiguity exists, the Court interprets the language broadly in favor of the insured and full coverage. *Id*. The insured bears the burden of proving coverage, and once coverage is established, the insurer must prove that any exceptions apply. *Id*.

**A. ACE & Zurich**

The reinsurance agreements executed by ACE and Zurich differ from those executed by the other reinsurers in one critical way. ACE and Zurich did not execute Claims Agreements with HIIRM. The Claims Agreement language stated the following:

> Reinsurers "assum[ed] all of the rights, obligations, and responsibilities" of HIIRM, "including without limitation, the obligation to adjust the Claim and pay all Loss covered in accordance with" the HIIRM Policy.

Pl. Add. SUMF ¶ 35. The Reinsurers that executed Claims Agreements took on the obligation to adjust claims and determine whether an insured loss occurred.

ACE and Zurich did not assume that obligation. Their reinsurance agreements instead required them to "follow the settlements" of HIIRM with HII and to indemnify HIIRM accordingly. Pl. Add. SUMF ¶ 33. Under this agreement, HIIRM is required to adjust and settle HII's claim, and then ACE and Zurich have a contractual obligation to perform.

The record contains no facts establishing that (1) HIIRM adjusted the claim, (2) HIIRM agreed to a settlement with HII, or (3) HIIRM paid out any amount for the claim. Without an adjustment and settlement, Plaintiffs have no basis to sue ACE or Zurich, as neither has breached any contractual obligation. A case between ACE/Zurich and Plaintiffs would not be ripe until HIIRM adjusts the claim, settles with HII, notifies ACE and Zurich of the settlement amount, and ACE and Zurich refuse to indemnify. None of these events have occurred. As a result, these two entities are entitled to summary judgment on this independent basis.

**B. Lex-London - Microorganism Exclusion**

Lex-London had a separate microorganism exclusion that none of the other reinsurers included in their policies. The clause states the following:

> this Policy does not insure any loss . . . arising out of . . . 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.

PSUMF LL ¶ 8.

When interpreting an insurance policy, language is interpreted according to its plain, ordinary meaning, and unambiguous language is enforced as written. *Huntington Ingalls,* 2022 VT 45, ¶ 19. A word or phrase is ambiguous only if it is fairly susceptible to more than one reasonable interpretation. *Id.* The fact that a dispute has arisen over interpretation does not, by itself, render the language ambiguous. *Id.* The interpretation of an insurance policy is a question of law. *Whitney v. Vt. Mut. Ins. Co.*, 2015 VT 140, ¶ 11, 201 Vt. 29.

As explained below, the microorganism exclusion unambiguously includes viruses.

Courts frequently refer to dictionary definitions to determine the meanings of undefined terms. A microorganism is defined as "an organism (such as a bacterium or protozoan) of microscopic or ultramicroscopic size." *Microorganism*, Merriam-Webster Online Dictionary (accessed May 27, 2026). An organism is defined as "an individual constituted to carry on the activities of life by means of organs separate in function but mutually dependent**:** a living being." *Organism*, Merriam-Webster Online Dictionary (accessed May 27, 2026).

There is debate within the scientific community over whether a virus is an organism. Compare *Biological Material*, Black's Law Dictionary (12th ed. 2024) (stating "microorganisms — such as bacteria, fungi, algae, protozoa, and viruses") *with Virus*, Merriam-Webster Online Dictionary (accessed May 27, 2026) (stating viruses are "infectious agents that are usually regarded as nonliving extremely complex molecules"). However, the question before the Court is whether an average person applying for insurance would reasonably believe a virus was included in this clause, given its plain language – the answer is yes. *Shriner v. Amica Mut. Ins. Co.*, 2017 VT 23, ¶ 6, 204 Vt. 321.

The clause uses the word "any" to describe the breadth of what is covered under this clause, specifically, any type, any nature, or any description of microorganism. 'Any' in this context is used to mean all or every, and "its meaning is most comprehensive." *Fleck v. KDI Sylvan Pools, Inc.*, 981 F.2d 107, 115 (3d Cir. 1992); see *Shires Hous., Inc. v. Brown*, 2017 VT 60, ¶ 12, 205 Vt. 186. While there might be debate within the scientific community about whether a virus is an organism, the word 'any' removes any doubt that a virus is a microorganism for purposes of this exclusion.

The Court grants Lex-London summary judgment on this basis, in addition to the bases discussed in sections F and G because the microorganism exclusion would prohibit coverage for the losses alleged by Plaintiffs even if Plaintiffs could establish direct physical loss or damage.

**C. Seepage Pollution Contamination**

By contrast, the Seepage Pollution Contamination clause ("SPC Clause") does not exclude coverage for COVID-19. The SPC Clause states the following:

> This policy does not insure the following:
> …
> F. Loss or damage caused by Seepage and/or Pollution and/or Contamination except loss or damage to the property insured caused by
>
> 3. Seepage and/or Pollution and/or Contamination which itself results from a peril not excluded under this Policy; or
> 4. Any peril not excluded under this Policy which itself results from Seepage and/or Pollution and/or Contamination.

PSUMF ¶ 93.

Consistent with the analysis set forth by the Supreme Court in this case, the Court first determines whether the clause is ambiguous. The clause is ambiguous if it is capable of being interpreted in two or more reasonable ways. *Huntington Ingalls*, 2022 VT 45, ¶ 19. In determining whether a clause is ambiguous, the Court does not look at it in isolation but considers the insurance contract as a whole and interprets the clause in context to give effect to every part of the contract. *Beldock v. VWSD, LLC*, 2023 VT 35, ¶ 27, 218 Vt. 144. If the terms are ambiguous, the court will generally interpret them in favor of the insured, granting coverage. *Huntington Ingalls*, 2022 VT 45, ¶ 19. Specifically, exclusions are generally interpreted narrowly if ambiguous. See *City of Burlington v. Ass'n of Gas & Elec. Ins. Servs., Ltd.*, 170 Vt. 358, 364 (1975).

The contract does not define seepage, pollution, or contamination. Because the parties left these terms undefined, they carry their ordinary meanings. *Brillman v. New Eng. Guar. Ins. Co.*, 2020 VT 16, ¶ 19, 211 Vt. 550. When determining whether undefined terms carry a plain meaning, courts frequently consult dictionary definitions. *Huntington Ingalls,* 2022 VT 45, ¶ 21.

<u>Ordinary Meaning of Terms Read Together</u>

Merriam-Webster defines "seep" as "to flow or pass slowly through fine pores or small openings." It defines "pollute" as "to make physically impure or unclean." And it defines "contaminate" as "to soil, stain, corrupt, or infect by contact or association." See *Seep*, Merriam-Webster Online Dictionary (accessed May 27, 2026); *Pollute*, Merriam-Webster Online Dictionary (accessed May 27, 2026); *Contaminate*, Merriam-Webster Online Dictionary (accessed May 27, 2026).

The policy does not use these terms independently. The clause groups them as a single phrase, "Seepage and/or Pollution and/or Contamination," and uses it consistently throughout the exclusion and its exceptions. The Court reads the words consistent with that grouping, as a unified concept that draws meaning from each component.

Read together, the three terms describe a coherent category of harm: the gradual introduction of a substance that degrades the physical quality of property. They are unambiguous. "Seepage" identifies the mechanism: slow permeation through a medium. "Pollution" identifies the effect on that medium, rendering it physically impure. "Contamination" identifies the resulting condition of the property – soiled, stained, or corrupted. Together, they describe environmental degradation: chemical spills seeping into groundwater, toxic waste polluting soil, and hazardous substances contaminating a building's structure. They do not describe a respiratory virus that travels through expelled human droplets, temporarily adheres to surfaces, cannot replicate outside a human host, and dissipates on its own or through cleaning.

The Court acknowledges that "contamination," viewed in isolation, could arguably include a virus, particularly through the word "infect" in its dictionary definition. *Contaminate*, Merriam-Webster Online Dictionary (accessed May 27, 2026). However, the clause never uses "contamination" in isolation. It always pairs contamination with seepage and pollution, and the surrounding terms limit its meaning. A virus does not "seep." A virus that rests on a surface for several days before dissipating does not "pollute" – it does not make the property itself physically impure or unclean. See infra at 16–18 (discussing COVID-19 physical effects on property). When these companion terms cannot plausibly describe a phenomenon, they constrain the reach of "contamination" so that the phrase operates as a unified whole.

Reading contamination broadly would also strip the exclusion of any limiting principle. As the Seventh Circuit observed in *Pipefitters Welfare Educational Fund v. Westchester Fire Insurance Co.*, 976 F.2d 1037, 1043 (7th Cir. 1992), terms like "contaminant," read broadly, "are virtually boundless, for there is virtually no substance or chemical in existence that would not irritate or damage some person or property." Without a limiting principle, the exclusion "would extend far beyond its intended scope, and lead to some absurd results." *Id.*; see *R.T. Vanderbilt Co., Inc. v. Hartford Accident and Indem. Co.*, 156 A.3d 539, 631–32 (Conn. App. 2017), *aff'd,* 216 A.3d 629 (Conn. 2019). The New York Appellate Division reached the same conclusion when it rejected an attempt to expand "contamination" beyond environmental contamination to include product contamination, reasoning that without a limiting principle, virtually anything could qualify as a contaminant. *PepsiCo, Inc. v. Winterthur Ins Am. Ins. Co.*, 13 A.D.3d 599, 600–01 (N.Y. App. Div. 2d Dept. 2004).

<u>Policy Structure Confirms Exclusions Limited Scope</u>

Reading the Policy as a whole supports this conclusion. A standard principle of contract interpretation requires the Court to read the policy as a whole and give each provision independent meaning. *Progressive N. Ins. Co. v. Muller*, 2020 VT 76, ¶ 11, 213 Vt. 145. The policy separately excludes loss or damage caused by radioactive contamination, asbestos, mold, mildew or fungus, and biological or chemical materials. If the SPC Clause already encompassed these hazards, as it would under an expansive reading of "contamination" or "pollution," these separate exclusions would serve no purpose. The drafters specifically identified these risks and addressed them through individual exclusions, which confirms that the SPC Clause targets a distinct and narrower category of harm. Reading the SPC Clause to reach COVID-19 would render these targeted exclusions surplusage. See *N. Sec. Ins. Co. v. Mitec Elecs., Ltd.*, 2008 VT 96, ¶ 24 (the Court strives to give effect to all material parts of a contract and avoids readings that would render portions "mere surplusage").

Additionally, a virus exclusion was available to the drafters, but was not included in this policy. While its absence does not, in itself, create coverage, see *Huntington Ingalls*, 2022 VT 45, ¶ 27 n.12, it reinforces the conclusion that the SPC Clause was not designed to address viral pathogens. The drafters knew how to exclude viruses as a special category and chose not to add that language.

<u>History and Vermont Cases</u>

Lastly, to the extent that this clause is ambiguous, the history of pollution exclusions and Vermont cases interpreting such exclusions support the Court's limited interpretation. Pollution exclusions originated in the late 1960s and 1970s when "changes in federal environmental protection laws and a series of high-profile environmental disasters imposed greater economic burdens on insurance underwriters." *Cincinnati Specialty Underwriters Ins. Co. v. Energy Wise*

*Homes, Inc.*, 2015 VT 52, ¶ 18, 199 Vt. 104. Insurers drafted model exclusions to address this specific category of risk. *Id.* While the clause at issue here differs from the model total pollution exclusion, it uses the same core terminology, seepage, contamination, and pollution, that grew out of the environmental-liability context.

As the Vermont Supreme Court emphasized in *Cincinnati*, each exclusion must be interpreted like any other contract provision, and no presumption runs either way. *Id.* at ¶¶ 15–16; see also *Whitney v. Vt. Mut. Ins. Co.*, 2015 VT 140, ¶ 15. However, the prior Vermont cases interpreting pollution exclusions, *Whitney* and *Cincinnati*, involved exclusions materially different from this one. Each defined "pollutants" and specified qualifying mechanisms such as "discharge, dispersal, seepage, migration, release or escape." *Cincinnati*, 2015 VT 52, ¶¶ 4–5; *Whitney*, 2015 VT 140, ¶ 17. In each case, the Vermont Supreme Court found the exclusion unambiguous as applied because the defined terms and qualifying language clearly encompassed the substances and mechanisms at issue – chlorpyrifos sprayed throughout a home (*Whitney*) and airborne chemicals from spray-foam insulation (*Cincinnati*). *Whitney*, 2015 VT 140, ¶¶ 17–19; *Cincinnati*, 2015 VT 52, ¶¶ 26–27.

This exclusion lacks that specificity. It defines none of its terms. It identifies no qualifying mechanism. It provides no list of substances. At the bare minimum, this absence of definition renders the clause ambiguous as applied to COVID-19, and the Court resolves that ambiguity in favor of coverage.

Given the analysis above, the Court holds that the SPC Clause does not exclude loss or damage caused by COVID-19.

**D. Protection and Preservation of Property Clause**

The "Protection and Preservation of Property" clause does not provide an independent means for triggering coverage because the threatened physical loss or damage must ultimately be an insured loss or damage for coverage to exist. The clause states the following:

> This policy covers the costs incurred for actions to temporarily protect or preserve insured property, provided that such actions are reasonable and necessary due to actual or threatened **insured** physical loss or damage to such insured property. The insurer shall pay the expenses so incurred including resulting Time Element loss.

See DSUMF ¶ 18, Ex. 6, HIIRM Policy at 25 (emphasis added).

The clause allows mitigation costs in two instances: (1) when action is taken to protect insured property from actual insured loss or damage, or (2) when action is taken to protect insured property from threatened insured loss or damage. The second instance is the one in question here: does this clause allow mitigation reimbursement even when the threatened insured physical loss or damage turns out not to be insured? The answer is no.

The operative word is "insured." The clause requires it to be a "threatened insured physical loss or damage." Protection and preservation clauses share similarities with the common law duties to mitigate and to reimburse. The common law duty to mitigate requires the insured to take reasonable steps to reduce its losses and obligates the insurer to cover costs that benefit the insurer. Courts have consistently held that clauses of this nature require the underlying loss to be covered by the policy. *See, e.g., Huntington Ingalls*, 2022 VT 45, ¶ 5 (describing mitigation clause requiring insured to "make every reasonable effort to reduce" business-interruption losses); see also 12A Couch on Insurance § 178:10–11 (3d ed. 2021 Update). If a court construed this clause to require reimbursement for threatened losses the policy does not cover, the insurer would bear costs for mitigating damages that benefit only the insured – not the insurer. Such a result would unjustly enrich the insured, who would both mitigate their own damages and shift the cost to an insurer with no corresponding coverage obligation.

To find coverage under this clause, or under the common-law duty of mitigation and reimbursement, the loss or damage must qualify as an actual insured loss or damage. The cases cited by Plaintiffs do not lead to a different conclusion. As discussed below, Plaintiffs fail as a matter of law to show that COVID-19 caused direct physical damage to property. Accordingly, the protection and preservation clause does not, in itself, provide coverage.

**E. Airspace as Property under Insurance Agreement**

The insurance agreement states that it insures "all real and personal property . . . which is owned, used, or acquired by the insured." PSUMF ¶ 11; DSUMF ¶ 12. Excluded property includes "land" and "water"; notably, 'air' is not listed. PSUMF ¶ 11. However, in the valuation section, 'air' is not listed while "buildings and structures" is. DSUMF ¶¶ 26, 30. The definition of what is insured is missing the word tangible and the Court understands it to include all tangible and intangible real and personal property.

Personal property is defined as "any movable or intangible thing that is subject to ownership and not classified as real property." *Property*, Black's Law Dictionary (12th ed. 2024); see also *Property*, Merriam-Webster Online Dictionary (accessed May 27, 2026), Ex. 19 to Mot. for Jud. Notice. Real property is defined as "land and anything growing on, attached to, or erected on it, excluding anything that may be severed without injury to the land." *Id.* Airspace is defined as "the space that extends upward from the surface of land, esp. so far as is necessary for the owner or possessor to have reasonable use and enjoyment of the incidents of its ownership or possession." *Airspace*, Black's Law Dictionary (12th ed. 2024). Ownership is defined as "the bundle of rights allowing one to use, manage, and enjoy property, including the right to convey it to others. Ownership implies the right to possess a thing, regardless of any actual or constructive control. Ownership rights are general, permanent, and heritable." *Ownership*, Black's Law Dictionary (12th ed. 2024).

These definitions, read together, reveal that airspace is not a tangible object but a spatial dimension of real property. This intangible interest derives its legal significance from the landowner's right to use and enjoy the physical structures and land below. The definition of airspace is functional: airspace exists as a property concept because it enables the owner to use the land and structures, not because the space itself has independent value. The Policy's valuation section is consistent with this understanding – it assigns value to "buildings and structures" but contains no valuation for airspace as a separate category of insured property.

Vermont property law confirms this characterization. The principle that "the law gives the owner of the land all above it, within its boundaries" reflects a right of dominion over the space, not ownership of the air that occupies it. *Murphy v. Bolger*, 60 Vt. 723, 15 A. 365, 368 (1888). When Vermont courts enforce property rights in airspace, they do so to protect the owner's use and enjoyment of the physical property. Intrusions into a landowner's airspace may give rise to claims in trespass or implicate constitutional privacy interests. Still, in each instance, the protected interest is the owner's ability to use the property as intended, not the condition of the air itself. See *State v. Bryant*, 2008 VT 39, ¶¶ 27–28, 183 Vt. 355 (expectation of freedom from airspace intrusions); *John Larkin, Inc. v. Marceau*, 2008 VT 61, ¶ 14, 184 Vt. 207 (airborne particles entering property may create trespass liability).

Property insurance jurisprudence reflects this same understanding. Courts that have addressed intangible contaminants, odors, gases, and fumes entering or permeating the airspace of insured property have consistently recognized the owner's interest in the condition of its airspace as a cognizable property concern. The Vermont Supreme Court cited a number of these cases in *Huntington Ingalls* as persuasive authority for its analysis of direct physical loss. 2022 VT 45, ¶¶ 29, 37. Those cases confirm that conditions within a property's airspace – gasoline vapors permeating a church, *W. Fire Ins. Co. v. First Presbyterian Church*, 437 P.2d 52, 55 (Colo. 1968); toxic gas filling a residence, *TRAVCO Ins. Co. v. Ward*, 715 F. Supp. 2d 699, 707–10 (E.D. Va. 2010); ammonia rendering a facility unfit for occupancy, *Gregory Packaging, Inc. v. Travelers Prop. Cas. Co.*, No. 2:12-04418, 2014 WL 6675934, at *3–6 (D.N.J. 2014); pervasive cat urine odor saturating a property, *Mellin v. N. Sec. Ins. Co.*, 115 A.3d 799, 801, 805 (N.H. 2015); methamphetamine odor permeating a house, *Farmers Ins. Co. v. Trutanich*, 858 P.2d 1332, 1336 (Or. Ct. App. 1993) – can give rise to insurable property losses.

Critically, however, in every one of these cases, the court anchored coverage in the contaminant's effect on the physical property, the building, structure, or facility, not in damage to the air or airspace itself. The gasoline vapors in *Western Fire* made the church building unusable. 437 P.2d at 55. The toxic gas in *TRAVCO* rendered the residence uninhabitable. 715 F. Supp. 2d at 709. The ammonia in *Gregory Packaging* left the facility "physically unfit for normal human occupancy." 2014 WL 6675934, at *3. The cat urine odor in *Mellin* caused a "distinct and demonstrable alteration of the insured property" – the building. 115 A.3d at 805. In each case, the airspace served as the *medium* through which the contaminant reached and affected the tangible property; the airspace was not itself the property that suffered the loss.

The Court therefore concludes that airspace qualifies as insured property under this Policy. It is an intangible incident of real property encompassed by the Policy's broad definition of covered property. But the nature of that interest is important: an owner's right in airspace is the right to use and enjoy physical property free from interference, not a right in the air itself as a separate, independently valued asset. This distinction carries significant consequences for whether the airspace can suffer "direct *physical* damage or loss" as the Policy requires, a question the Court addresses below.

**F. Direct Physical Damage**

Under Vermont law, "direct physical damage" requires a "distinct, demonstrable, physical change to property." *Huntington Ingalls*, 2022 VT 45, ¶ 26. Although the change need not be visible and may occur at the microscopic level, the insured must prove "an articulable change to the property" itself. *Id*. Read in context, the requirement that the loss or damage be "direct," "physical," and "to property" excludes purely economic harm and requires that "something must occur affecting personal or real property." *Id*. at ¶ 22. The policy's period-of-recovery language further indicates that the covered physical change is likely to require physical remediation, repair, rebuilding, or replacement, although this is not a distinct requirement. *Id*. at ¶ 27. However, if something can be remedied by mere cleaning, this is insufficient to qualify as direct physical damage. *Id*. at ¶ 43.

As a basic premise, the property itself must have been harmed or impaired itself. There are instances in which physical force may alter a property, but such changes may not necessarily cause physical damage.

The insured raises two distinct theories of damage to property: (1) damage to the airspace within buildings and (2) damage to surfaces of property where COVID-19 adsorbs. Each fails based on the undisputed material facts as each is remedied by mere cleaning and does not impair the property itself "in a tangible way."

<u>Airspace</u>

To prevail against summary judgment on this theory, HII must identify facts in its favor showing that COVID-19 caused an articulable, tangible change to the airspace itself, one that harmed the airspace as property. No such facts exist.

Both parties agree that when an infected person expels respiratory droplets into the air, the air becomes a vector for viral transmission to other humans. But a transmission vector is not damaged property. The air carries the virus; the virus does not injure the air. The sole detrimental change is the risk COVID-19 poses to people who breathe the air, not any harm to the airspace itself. Risk to human health, however grave, is not synonymous with damage to property. See *Huntington Ingalls*, 2022 VT 45, ¶ 22 (requiring that "something must occur affecting personal or real property" for coverage to attach).

Additionally, direct physical damage requires a tangible change to the property at issue. *Id*. at ¶ 26. As explained, airspace is by its nature intangible; it is a spatial dimension of real property, not a physical object. While the Court accepts that airspace is insured property under this Policy, its intangible character means that a "distinct, demonstrable, physical" alteration, the threshold for direct physical damage, cannot occur to it. A physical, tangible change requires something physical and tangible to change.

HII's theory rests on conflating the concepts of air and airspace. HII asserts that "airspace," as an intangible incident of real property, is insured property. But when arguing about the damage caused by COVID-19, HII shifts to "air." In contrast to airspace, "air" is a physical substance composed of gases and particulates. HII contends that COVID-19 physically altered the composition of the air and that an alteration of the physical composition of air is physical damage. The Policy does not insure the air itself; HII does not own the gases and particles that pass through its buildings. HII cannot refer to airspace as a property concept to invoke coverage and then switch to air to establish the physical damage to prove its entitlement to coverage.

In support of its theory, HII points to cases involving intangible contaminants, odors, gases, and fumes, and argues that COVID-19 in the airspace operates the same way. These cases do not support HII's theory. As the Court noted above, in every case finding coverage based on intangible contaminants, the court grounded its holding in the contaminant's effect on the *physical property*, the building, structure, or facility, not in damage to the air itself. See *W. Fire Ins. Co.*, 437 P.2d at 55; *TRAVCO Ins. Co.*, 715 F. Supp. 2d at 709; *Mellin*, 115 A.3d at 805; *Gregory Packaging*, 2014 WL 6675934, at *3–6. None of these courts held that the air or airspace was the property that suffered damage. Rather, the airspace served as the medium through which the contaminant reached and impaired the tangible structure.

The Supreme Court of Maryland examined this precise distinction in *Tapestry, Inc. v. Factory Mutual Insurance Co.*, 286 A.3d 1044, 1059–60 (Md. 2022). There, the insured argued that COVID-19 damaged the air in its stores in the same manner that ammonia damaged the air in *Gregory Packaging*. The court rejected that analogy, observing that although the *Gregory Packaging* court stated the ammonia "physically transformed the air," the actual basis for coverage was the insured's functional loss of use of the facility – not damage to the air itself. The *Tapestry* court found no reported decision treating damage to air itself, as distinct from loss or damage to property resulting from air contamination, as covered property damage. See also *Julio & Sons Co. v. Cont'l Cas. Co.*, 692 S.W.3d 877, 886–87 (Tex. App. 2024) (rejecting the argument that COVID-19 in restaurant air constituted physical loss or damage and disagreeing with cases treating air as insured property that can be physically damaged).

This Court agrees and finds the analysis consistent with the analytical framework for direct physical damage to property laid out by the Vermont Supreme Court. In *Huntington Ingalls*, the Court highlighted numerous cases involving **loss of use** of the real property. Notably, under the *Huntington Ingalls* framework, these cases would be under a theory of loss, not damage. Plaintiffs have not cited to a single case where a court has held that the air or airspace itself constitutes the damaged property under a similar property insurance policy. Where intangible contaminants triggered coverage, they did so because they rendered the **tangible, physical property** unusable – a theory that sounds in direct physical loss, not direct physical damage to airspace. The Court addresses that theory in section G below.

As to direct physical damage to the airspace, HII's claim fails as a matter of law because the undisputed facts establish no tangible, articulable change to the airspace itself, as airspace is an intangible concept.

Surfaces

Plaintiffs have failed to present evidence that establishes that COVID-19 caused direct physical damage to insured property surfaces.

To survive summary judgment, Plaintiffs must show that COVID-19 (1) physically altered the structure of the property and (2) that this alteration damaged the property itself. Since this is a property insurance policy, the injury must be to the property, not to the humans who interact with it. If Plaintiffs cannot satisfy these elements, then Defendants are entitled to judgment as a matter of law as to direct physical damage.

At the motion to dismiss stage, the Vermont Supreme Court stated that the Plaintiffs' pleading of the following facts demonstrated a plausible claim for direct physical damage.

1. The virus adheres to the property's surface.
2. Surface transforms into a fomite.
3. The adherence caused detrimental physical effects to the property.
4. The physical effects altered and impaired the property in a tangible way.
5. The alteration prevents the property from functioning.
6. Steps had to be taken to repair the property beyond mere cleaning.

See *Huntington Ingalls*, 2022 VT 45, ¶ 41.

First, there is no evidence to support point 3 above. The undisputed facts do not demonstrate that the adherence of the virus to surfaces caused detrimental physical effects to HII's property. The parties agree that the virus adheres to surfaces through adsorption, as do all viruses. But adherence alone does not satisfy the requirement of physical change. Most substances adhere to surfaces to some degree; meaningful adherence occurs only when accompanied by an additional and detrimental physical alteration. The Vermont Supreme Court allowed Plaintiffs' claim to move forward based on their allegation that a surface transformed into a fomite would represent such an additional physical change. But the undisputed facts do not support this allegation.

The parties agree that a fomite is simply an object that harbors a viable infectious agent. That definition does not describe any physical change to the object's structure, composition, or material properties – it merely classifies the object as carrying an active virus. The California Supreme Court's analysis is persuasive on this point: "Describing an object as a fomite primarily reflects a conceptual or analytical change, not a physical one." *Another Planet Ent., LLC v. Vigilant Ins. Co.*, 548 P.3d 303, 329 (Cal. 2024).

Second, even assuming a physical change occurred, that change did not tangibly impair the property as noted in point 4 above. Direct physical damage requires more than a microscopic alteration to material dimensions – the change must impair the property in a tangible way. Even if we assume that the virus's adsorption changes the material dimensions of a surface at the microscopic level, this change does not impair the property as property. The impairment Plaintiffs identify is that the surface now presents a risk to humans, but risk to humans is an intangible concept, not a tangible impairment to property. The Nevada Supreme Court reached the same conclusion: "[E]vidence that the virus remains harmful while in the air or as 'fomites' is . . . unconvincing because it does not demonstrate that the virus is harmful to the property." *Starr Surplus Lines Ins. Co. v. Eighth Jud. Dist. Ct.*, 535 P.3d 254, 264 (Nev. 2023).

Third, the property remained fully functional for its intended use, contrary to point 5 above. A person can use the property, and it performs as designed. The property does not malfunction, degrade, or fail. A person using it risks infection, but that risk affects the person, not the property.

The Vermont Supreme Court itself previewed this potential conclusion, observing that the facts may ultimately show that the losses stemmed not from damage to property but from "the risks employees posed to each other." *Huntington Ingalls*, 2022 VT 45, ¶ 48. That observation proves prescient. The undisputed facts confirm that COVID-19 on surfaces presents a risk to the people who touch them, not a tangible impairment to the surfaces themselves.

Other jurisdictions addressing substantially identical facts have reached the same conclusion, albeit at the motion to dismiss stage, where courts accept allegations as true rather than requiring evidentiary support. At the summary judgment stage, Plaintiffs face a higher burden: they must show their allegations are rooted in undisputed facts, not merely accepted as plausible. See *Tapestry, Inc. v. Factory Mut. Ins. Co.*, 286 A.3d 1044, 1059–60 (Md. 2022) (holding COVID-19 did not cause physical loss or damage to retail properties); *Julio & Sons Co. v. Cont'l Cas. Co.*, 692 S.W.3d 877, 886 (Tex. App. 2024) (holding COVID-19 did not cause direct physical loss or damage to restaurant properties); *Lloyd's Syndicate 1967 v. Baylor Coll. of Med.*, 721 S.W.3d 574, 581–83 (Tex. App. 2025) (reversing jury verdict and holding COVID-19 did not cause direct physical loss or damage to university property).

Fourth, there is no evidence that any property had to be repaired beyond routine cleaning – the sixth fact on the list above. The key distinction between COVID-19 and other viruses lies not in its effects on surfaces but in its risk to humans. The undisputed facts establish that COVID-19 interacts with surfaces in the same manner as other viruses. DSUMF ¶ 51. Plaintiffs have not presented any evidence that HII repaired or replaced property because of COVID-19. Although HII implemented extensive cleaning and social-distancing measures, they do not, on their own, establish direct physical damage. Such measures support a finding of damage only when the predicate requirements of physical alteration and tangible impairment are met, which they are not here.

The Vermont Supreme Court observed that if mere cleaning suffices to restore property, this indicates no direct physical damage occurred. *Huntington Ingalls*, 2022 VT 45, ¶ 43. Here, it is undisputed that disinfectant agents, including bleach or the simple passage of time, remove the virus from surfaces. While HII presented evidence that it also "fogged" the areas where a COVID-19-positive employee had been working, the Court does not find that fogging goes beyond mere cleaning. The question is not what measures HII chose to deploy, but what measures the virus actually required. The undisputed facts demonstrate that the virus required only disinfection or time, both of which are hallmarks of cleaning rather than repair.

The Court concludes based on the undisputed facts that there is no direct physical damage to the property owned by HII. This also makes sense as a matter of logic – viruses rest on surfaces in both workplaces and homes across the world every day. The surfaces they rest on remain unharmed, and the viruses either dissipate or are cleaned from the surface. The Court grants summary judgment to Defendants on the theory of direct physical damage.

**G. Direct Physical Loss**

Plaintiffs and Defendants seek summary judgment based on the theory of direct physical loss. The Vermont Supreme Court held that "direct physical loss" and "direct physical damage" are two distinct concepts, either of which triggers coverage. *Huntington Ingalls*, 2022 VT 45, ¶ 38. While "direct physical damage" requires a distinct, demonstrable, physical change to property, "direct physical loss" means "persistent destruction or deprivation, in whole or in part, with a causal nexus to a physical event or condition." *Id.* The Supreme Court identified four central components of this standard: (1) destruction or deprivation, (2) whole or in part, (3) linked to a physical event, (4) that is persistent. The Court discusses each component below.

<u>Destruction or Deprivation</u>

Direct physical loss requires deprivation or destruction of property. Destruction addresses situations in which property is harmed to the point that it no longer exists or is no longer usable. That clearly does not apply here.

Deprivation encompasses circumstances in which property is intact but cannot be used for some reason. Deprivation may occur when property is unusable due to a health hazard. *Id.* at ¶ 29; see *W. Fire Ins. Co. v. First Presbyterian Church*, 437 P.2d 52, 55 (1968) (gasoline fumes); *Sentinel Mgmt. Co. v. N.H. Ins. Co.*, 563 N.W.2d 296, 302 (Minn. Ct. App. 1997) (asbestos); *Motorists Mut. Ins. Co. v. Hardinger*, 131 F. App'x 823, 826–27 (3d Cir. 2005) (*E. coli*); *TRAVCO Ins. Co. v. Ward*, 715 F. Supp. 2d 699, 707–10 (E.D. Va. 2010) (toxic gas). Deprivation can be identified "based on how the property was intended to be used and why it cannot be used in that manner anymore." *Huntington Ingalls*, 2022 VT 45, ¶ 29. However, the deprivation cannot be prospective, and the insured must prove it was actually deprived of use. *Id.* at ¶ 30. A purely economic loss does not constitute deprivation. *Id.*

The facts raised by the parties raise a genuine dispute as to whether HII was deprived of use of portions of its insured property. HII suspended all production at its Ingalls facility for five days in April 2020 to sanitize the facility. PSUMF ¶ 46. Beyond the full shutdown, HII temporarily closed individual work areas each time an employee tested positive for COVID-19, to allow contact tracing and decontamination. PSUMF ¶ 56. HII also reconfigured workspaces for social distancing, reducing the number of workers who could occupy a given area at any one time. PSUMF ¶¶ 48, 65. HII closed areas of its facilities to allow time for enhanced cleaning protocols. PSUMF ¶ 45.

These facts are consistent with the type of deprivation recognized in the intangible-contaminant cases the Vermont Supreme Court found persuasive. In *Western Fire*, gasoline vapors forced the closure of a church. 437 P.2d at 55. In *TRAVCO*, toxic gas rendered a residence uninhabitable. 715 F. Supp. 2d at 709. In *Gregory Packaging*, ammonia forced a week-long shutdown of a packaging facility. 2014 WL 6675934, at *2. In each case, a physical condition, not a government order, prevented the insured from using the property for its intended purpose. See *Huntington Ingalls*, 2022 VT 45, ¶ 29 (deprivation identified "based on how the property was intended to be used and why it cannot be used in that manner anymore").

HII's deprivation was similarly grounded in the physical presence of COVID-19 at its facilities, not solely in government mandates. HII was designated critical infrastructure and was not subject to stay-at-home orders. DSUMF ¶ 61. The shutdowns and area closures at HII occurred because COVID-19 was physically present at the property. Taking the facts in the light most favorable to Plaintiffs, the first factor is satisfied.

<u>Whole or In Part</u>

Second, the deprivation or destruction may be total or partial. The policy language anticipates loss impacting only part of the covered property – for example, the business-interruption clause covers losses "whether total or partial." *Id.* at ¶ 31. However, partial deprivation must still be discrete and identifiable. *Id.* at ¶ 32; see *City of Burlington v. Indem. Ins. Co. of N. Am.*, 332 F.3d 38, 41 (2d Cir. 2003) (applying Vermont law to identify discrete defective welds); *Aztar Corp. v. U.S. Fire Ins. Co.*, 224 P.3d 960, 966 (Ariz. Ct. App. 2010) (identifying that partial interruption may "mean the complete stoppage of a portion of an insured's business as contrasted with stoppage of the entirety of an insured's business"). Whether the deprivation is in whole or in part is a matter of extent and provides important context. *Huntington Ingalls*, 2022 VT 45, ¶ 32.

HII's deprivation occurred both in whole and in part. The five-day facility-wide shutdown at Ingalls is a complete deprivation of that facility. PSUMF ¶ 46. The individual area closures after positive tests and the workspace reconfigurations for social distancing were partial deprivations — discrete, identifiable portions of the property were rendered unavailable for their intended use. See *Huntington Ingalls*, 2022 VT 45, ¶ 32 (partial deprivation must be "discrete and identifiable"); see also *Aztar Corp.*, 224 P.3d at 966 (partial interruption may constitute "the complete stoppage of a portion of an insured's business"). The second factor is satisfied based on the undisputed evidence.

<u>Casual Nexus to Physical Event</u>

Third, the deprivation must link directly to a physical event or condition affecting the insured property. *Huntington Ingalls*, 2022 VT 45, ¶ 33. There must be an "explicit nexus between the purported loss and the physical condition of the insured property," that is not a government order alone. *Id.* at ¶¶ 33-34. This requirement also reinforces that purely economic losses cannot constitute direct physical loss, because any qualifying loss must trace back to the condition of the property. *Id.* "This logic applies to other physical conditions that render property unusable for its intended purpose and therefore lost even though the property itself is not damaged." *Id.* at ¶ 33 (citing to cases involving asbestos, E.coli, mold, and toxic gas).

The deprivation HII experienced traces to a physical event or condition affecting the insured property. It is undisputed that COVID-19 is a physical entity. Pl. Add. SUMF ¶ 36. The parties agree that employees tested positive while on HII property. The virus was undisputedly present at the facilities – HII had 7,095 and 10,889 confirmed cases at Ingalls and Newport News, respectively, between March 2020 and February 2023. PSUMF ¶ 68. Although Plaintiffs did not conduct direct testing for the presence of SARS-CoV-2 on specific surfaces or in particular airspaces, DSUMF ¶ 64, the Court makes the only rational inference based on the undisputed evidence of employee testing and illness at both facilities: that COVID-19 was present throughout 2020.

The deprivation of HII's property stems from the physical presence of COVID-19 at the facilities — not solely from a government order or purely economic forces. See *Huntington Ingalls*, 2022 VT 45, ¶¶ 33–34. Plaintiffs have satisfied the third factor.

Persistence

Fourth, the deprivation must be persistent. Courts must examine "how long the deprivation has persisted or will persist without any intervening action in order to remedy it." *Huntington Ingalls*, 2022 VT 45, ¶ 35. The requirement applies because the policy anticipates that a direct physical loss may require the property to be "rebuilt, repaired, or replaced," language that "demonstrates that the policy anticipates a need for some kind of intervention to rectify the loss." *Id*. The Supreme Court drew a clear line: "in order for something intangible to cause a direct physical loss, the cause of the loss must be so persistent as to require intervention, rather than the mere passage of time, to satisfactorily address it." *Id*. at ¶ 37.

Courts have generally found coverage when a persistent issue caused a loss, but have declined to find coverage when the contamination was ephemeral or transient. *Id*. at ¶ 36; see *Kim-Chee LLC v. Phila. Indem. Ins. Co.*, 535 F. Supp. 3d 152, 160–61 (W.D.N.Y. 2021) (collecting cases). The Supreme Court found Judge Crawford's analysis in *Kim-Chee LLC v. Philadelphia Indemnity Insurance Co.* to be persuasive. The *Kim-Chee* court identified two complementary principles: first, persistent contamination by a chemical or biological agent may cause a direct physical loss if it renders the insured property unusable; second, temporary contamination that is short-lived or imposes only remediation costs without preventing use of the building is unlikely to qualify. *Id*. at 161. The court described a spectrum: at one end, easily remedied intrusions, like road dust, that require only cleaning; at the other, persistent hazards, like gasoline seepage, that render the property fundamentally unusable. *Id*.

The intangible-contaminant cases in which courts found coverage illustrate the persistent end of this spectrum. In *Western Fire*, gasoline accumulated around and under a church over time, requiring removal of the contamination source. 437 P.2d at 55. In *TRAVCO*, drywall continuously released toxic gas, requiring replacement of the drywall to make the residence habitable. 715 F. Supp. 2d at 707–10. In *Mellin*, cat urine saturated the property to such a degree that remediation efforts failed entirely, and the odor persisted despite intervention. 115 A.3d at 801. In *Gregory Packaging*, the insured hired a professional remediation company to clear ammonia from the building. 2014 WL 6675934, at *2. In each case, the contaminant persisted in or on the property and required affirmative intervention, not merely the passage of time, to address. See *Huntington Ingalls*, 2022 VT 45, ¶ 37.

COVID-19 falls on the opposite end of the spectrum. The parties dispute the precise duration that COVID-19 remains viable on surfaces. Plaintiffs assert the virus can persist on surfaces for up to eight days, while other evidence in the record indicates shorter periods. For purposes of determining whether Defendants are entitled to summary judgment, the Court accepts that COVID-19 can be present for eight days.

But the key fact is undisputed: COVID-19 dissipates from both air and surfaces with the mere passage of time. Pl. Add. SUMF ¶ 40; DSUMF ¶ 38. The virus cannot replicate outside a human host and eventually becomes nonviable without any intervention. *Id.* Where intervention occurs, typical disinfectants accomplish the task. DSUMF ¶ 41. No evidence establishes that the virus saturated, infiltrated, or permeated the property in the manner of the contaminants in *Western Fire*, *TRAVCO*, *Mellin*, or *Gregory Packaging*. No property required replacement. DSUMF ¶ 87. The virus required standard cleaning or time, not rebuilding, repair, or professional remediation.

The Eleventh Circuit confronted an analogous persistence question in *Mama Jo's, Inc. v. Sparta Insurance Co.*, 823 F. App'x 868 (11th Cir. 2020). There, dust from road construction entered a restaurant daily, requiring repeated cleaning. The court affirmed summary judgment for the insurer, holding that property requiring only cleaning has not suffered a loss that is both "direct" and "physical." *Id.* at 879. The *Kim-Chee* court placed *Mama Jo's* at the nonpersistent end of its spectrum, observing that the intrusion of road dust, despite being recurring, did not qualify because the property merely needed cleaning. 535 F. Supp. 3d at 161. COVID-19 on surfaces is analytically equivalent if not less pervasive: the virus adheres, requires no more than cleaning to remove, and dissipates on its own if left alone, unlike dust.

Plaintiffs advance a theory of persistence through continual reintroduction. Plaintiffs contend that because infected employees continuously reintroduced the virus, the contamination was effectively persistent. The Court does not credit this theory, and as noted above, neither did the Eleventh Circuit when analyzing dust intrusions.

The California Supreme Court squarely rejected this argument in *Another Planet Entertainment, LLC v. Vigilant Insurance Co.*, 548 P.3d 303, 329–30 (2024). The *Another Planet* court held that persistence requires the property itself to become the source of harm. When the continuing risk stems not from the property but from the presence of humans who carry the virus, the risk is "untethered to any property" and "may be reduced or rendered less harmful through practices unrelated to the property, such as social distancing, vaccination, and the use of masks." *Id.* at 330. The court contrasted this with the contaminants in the coverage-granting cases and concluded that "the presence of SARS-CoV-2 is unlike the presence of other substances, such as unpleasant odors, dangerous chemical contamination, or asbestos that permeate the property and require substantial effort to remove." *Id.*

This Court agrees. The reintroduction theory conflates the persistence of a pandemic with the persistence of a contaminant on property. The Vermont Supreme Court's persistence requirement focuses on whether the cause of the loss is "so persistent as to require intervention, rather than the mere passage of time, to satisfactorily address it." *Huntington Ingalls*, 2022 VT 45, ¶ 37.

Each instance of COVID-19 at HII's facilities was transient. The virus dissipated on its own or through cleaning. That infected employees continuously reintroduced the virus reflects the nature of the pandemic, not a persistent condition of the property. The property did not become the source of harm, such as when drywall continuously emitted toxic fumes or the smell of cat urine persisted even after the owner attempted professional remediation. The humans using HII's property became the source of harm. As the Vermont Supreme Court observed, the losses may ultimately stem from "the risks employees posed to each other," a risk to people, not a persistent physical condition of the insured property. *Id.* at ¶ 48

The undisputed facts establish that COVID-19 dissipates with the mere passage of time and requires, at most, standard cleaning to remove. As such, the virus does not, as a matter of law, satisfy the persistence requirement. Plaintiffs' claim for direct physical loss therefore fails as a matter of law. The Court grants summary judgment to Defendants on this theory.

## IV. ORDER

Based on the analysis above, the Court denies Plaintiffs' request for summary judgment on the theory of direct physical loss.

The Court grants Lex-London's Motion for Summary Judgment against Plaintiffs under the microorganism exclusion.

The Court grants Plaintiffs' request for summary judgment as it relates to the seepage, pollution, and contamination exclusion. That exclusion does not bar coverage here.

The Court grants Defendants Ace America and Zurich's motion for summary judgment because the claims against them are not ripe.

The Court grants all Defendants' motion for summary judgment on Plaintiffs' theories of direct physical damage and direct physical loss.

The Court will enter judgment in favor of Defendants.

Electronically signed on May 29, 2026, pursuant to V.R.E.F. 9(d).

Navah C. Spero
Superior Court Judge