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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

Circus Circus LV, LP,

Plaintiff,

v.

AIG Specialty Insurance Company,

Defendant.

Case No. 2:20-cv-01240-JAD-NJK

PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

ORAL ARGUMENT REQUESTED

Plaintiff Circus Circus LV, LP ("Circus Circus") opposes AIG Specialty Insurance Company's Rule 12(b)(6) Motion to Dismiss. For the following reasons, AIG's Motion should be denied.

I. INTRODUCTION

AIG constructs a house of cards based on two false premises: (i) Circus Circus failed to allege "direct physical loss or damage" to its property; and (ii) exclusion "f," a traditional, environmental pollution exclusion, bars Circus Circus's claim. Among other defects, both arguments ignore the well-pled allegations of the Complaint and fundamental rules of insurance policy interpretation.

Circus Circus alleged that COVID-19 – a non-excluded and, thus, "Covered Cause of Loss" – caused "physical loss or damage" to its property in two respects. *First*, Circus Circus alleged that the

presence of COVID-19 on its property damaged the property by causing a tangible, demonstrable alteration to the condition of its insured property. Circus Circus substantiated its allegations with far greater specificity than required under Rule 12(b)(6), by supporting its well-pled allegations with reference to the mechanism by which the damage occurred and concurring medical science. Unhappy with these allegations and bona fide resources, AIG tries desperately to redirect the court to other cases from other courts where the plaintiffs failed to plead these predicate facts. Indeed, in the COVID-19 decision AIG cites where the court denied the insurer's motion to dismiss, the plaintiff, like Circus Circus, *did* plead the potential physical alteration of insured property.

Second, Circus Circus sufficiently alleged that the prevalence, virulence, and destructiveness of COVID-19 caused authorities to issue orders requiring non-essential businesses to cease operations and close their properties. Circus Circus specifically alleged that the Governor of Nevada based his closure orders on "the ability of the novel coronavirus that causes COVID-19 to survive on surfaces for indeterminate periods of time, renders some property unusable and contributes to contamination, damage, and property loss." ECF No. 2-5. Due to the presence of COVID-19 at the insured casino and in compliance with Governor Sisolak's order, Circus Circus closed its property to guests and employees. Both the presence of a dangerous substance that made Circus Circus's property unsafe and unusable and the various government orders caused "physical loss or damage" to Circus Circus's property. In short, Circus Circus more than plausibly and, thus, sufficiently, alleged facts that trigger coverage under the Policy's dual, independent triggers of coverage for "direct physical loss" or "damage" to covered property.

Furthermore, AIG's argument based on the traditional environmental pollution exclusion fails for at least two reasons. *First*, the exclusion does not apply on its face, where its plain language requires that, no matter what the deleterious substance may be, its presence be due to a "release, discharge, escape or dispersal." The Nevada Supreme Court has recognized that these environmental law terms of art apply only to industrial pollution claims. Moreover, the Nevada Supreme Court has found similarly worded exclusions to be ambiguous when applied to losses involving indoor air. Simply stated, there was no "release, discharge, escape or dispersal" here, and the industrial pollution exclusion simply cannot apply.

Second, it is incumbent upon AIG as the insurer and drafter of the policy to *prove* that the environmental pollution exclusion unambiguously applies to Circus Circus's loss. If there is *any* question as to its applicability, the exclusion must be construed in favor of Circus Circus's reasonable expectation of coverage. But, as here, where AIG has offered not even a scintilla of evidence in support of its strained application of the exclusion, AIG has failed to meet its burden.

In short, AIG's house of cards cannot bear the weight of Circus Circus's *actual* allegations. Decisions based on materially different allegations by different policyholders, in different states, against different insurers, under different policy provisions have no bearing here, where Circus Circus's allegations must control. As those allegations make clear, COVID-19 is a "Covered Cause of Loss" that caused "physical loss or damage" to Circus Circus's property. Because of the physical loss or damage to its property, Circus Circus suspended operations and closed its doors while it worked to restore the property to its pre-loss condition. The policy covers the cost of those restorations and resulting loss of business income during the suspension. Under the weight of Circus Circus's *actual* allegations, AIG's house of cards collapses.

II. STANDARD OF REVIEW

A complaint must provide a "short and plain statement of the claim showing that the pleader is entitled to relief." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). In dismissing under Rule 12(b)(6), the Court must take all allegations as true and determine whether the plaintiff has plausibly alleged the *prima facie* elements of a claim. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The complaint meets this very low threshold standard because Circus Circus has alleged:

- Circus Circus suffered "direct physical loss or damage to Insured Property." ECF No. 1 at ¶¶ 36, 37, 53-55, 101, 124;
- The "direct physical loss or damage" was caused by, among other things, "COVID-19," a "Covered Cause of Loss." *Id.* at ¶¶ 40, 41, 43, 44, 49-55, 100, 101, 111-113, 123, 124; and
- No exclusion applies because, among other reasons, the environmental pollution exclusion is (1) inapplicable on its face, *Id.* at ¶¶ 76-85, and (2) AIG has failed to meet this burden to show that it is susceptible to only one reasonable interpretation. *Id.* at ¶¶ 82-88.

III. ARGUMENT

A. Circus Circus Sufficiently Alleges "Physical Loss or Damage" to Its Property

1. Standards Governing Insurance Policy Interpretation

AIG's Policy is an "all risks" policy. Under an all-risk policy, insureds bear a minimal burden of proof. 10A *Couch on Ins*. § 148:46 (3d ed. 2019). "[A]ny fortuitous loss or damage to covered property" will suffice. *Zurich Am. Ins. Co. v. Coeur Rochester, Inc*., 720 F. Supp. 2d 1223, 1232 (D. Nev. 2010); *Prudential Prop. & Cas. Ins. Co. v. Lillard-Roberts*, 2002 WL 31495830, at *7 (D. Or. June 18, 2002) (finding mold constituted direct physical loss and explaining that under an all risk policy, "[t]he insured need only show that a physical loss occurred to covered property").

AIG contends "Circus Circus has not alleged…the actual *cause of* its alleged losses" (ECF No. 17 at p. 13), but Circus Circus does not bear that burden. Circus Circus need show only that a loss has occurred. *Churchill v. Factory Mut. Ins. Co*., 234 F. Supp. 2d 1182, 1189 (W.D. Wash. 2002) ("find[ing] as a matter of law that under an all-risks policy, the insured bears the burden of showing that it suffered a loss and that the loss is fortuitous.... However, the insured need not demonstrate the precise cause of damage for the purpose of proving fortuity.").

"In determining the meaning of an insurance policy, the language should be examined from the viewpoint of one not trained in law or in the insurance business; the terms should be understood in their plain, ordinary and popular sense." *Nat'l Union Fire Ins. Co. v. Reno's Exec. Air, Inc*., 682 P.2d 1380, 1382 (Nev. 1984) (citations omitted). Grants of coverage are to be construed broadly, while exclusions are to be interpreted narrowly. *Id.*, 682 P.2d at 1383. Where ambiguity exists, "[t]he policy should be construed to effectuate the reasonable expectations of the insured." *Id.; Ace Prop. & Cas. Ins. Co. v. Vegas VP, LP*, 2008 WL 2001760, at *4 (D. Nev. May 7, 2008), *aff'd sub nom. Ace Prop. And Cas. Ins. Co. v. Vegas VP, LP*, 349 F. App'x 232 (9th Cir. 2009).

To restrict coverage, an insurer must use language that "clearly and distinctly" communicates the terms of the exclusion. *Reno's Exec.*, 682 P.2d at 1382 (citing *Harvey's Wagon Wheel v. MacSween*, 606 P.2d 1095, 1098 (Nev. 1980); *Sparks v. Republic Nat'l Life Ins. Co*., 647 P.2d 1127, 1133 (Ariz. 1982)). "[A]lthough an individual clause standing alone might appear to contain no

ambiguity, the policy must be read as a whole in order to give a reasonable and harmonious meaning and effect to all its provisions." *Id.* at 1383 (citation omitted). Any ambiguity must be resolved against the insurer. *Id.* (citing *Harvey's Wagon Wheel*, 606 P.2d at 1098).

2. Relevant Language from the "All Risks" Policy

The "all risks" policy AIG sold to Circus Circus covers "all risks of direct physical loss or damage to Insured Property from a Covered Cause of Loss." ECF No. 2-1 at CCPolicy_0018 (the "Policy"). The Policy defines Covered Cause of Loss as a "peril" (undefined) or "other type of loss" (also undefined). *Id.* at CCPolicy_0042. The plain meaning of "peril" is "exposure to the risk of being injured, destroyed or lost," and loss is "the act of losing possession."[1] The Covered Cause of Loss must result in "direct physical loss or damage to" property. "Physical" means "perceptible especially through the senses and subject to the laws of nature."[2]

3. Circus Circus's Complaint Plainly Alleges "Damage" to Insured Property

COVID-19 is a "peril." It is a deadly communicable disease comparable to a wildfire.[3]

COVID-19 caused a "loss." Its presence on Circus Circus's property physically altered insured property and deprived Circus Circus of the safe use of that property. ECF No. 1 at ¶¶ 40, 41, 43, 44, 49-55, 100, 101, 111-113, 123, 124. The physical nature of COVID-19 is undeniable.[4] It is visible through a microscope, breathable, and touchable. *Id.* at ¶¶ 24-26. Indeed, the two primary modes of

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[1] *Peril,* Merriam Webster's Dictionary, *available at* https://www.merriam-webster.com/dictionary/peril; *Loss*, Merriam Webster's Dictionary, *available at* https://www.merriam-webster.com/dictionary/loss.

[2] *Physical*, Merriam Webster's Dictionary, *available at* https://www.merriam-webster.com/dictionary/physical.

[3] William P. Hanage, *It's a Wildfire, Not a Wave*, MEDSCAPE (July 7, 2020); WHO Director-General's Opening Remarks (March 16, 2020) ("You cannot fight a fire blindfolded. And we cannot stop this pandemic if we don't know who is infected."); Zeynep Tufecki, *et al.*, *The Real Reason to Wear a Mask*, THE ATLANTIC (Mar. 12, 2020) ("Think of the coronavirus pandemic as a fire ravaging our cities and towns that is spread by infected people breathing out invisible embers every time they speak, cough, or sneeze.").

[4] AIG argues that Circus Circus tries to avoid the Policy's environmental pollution exclusion by distinguishing between COVID-19, a communicable disease, and SARS-CoV-2, the virus that causes the disease. ECF No. 17 at p. 20-21. AIG's argument is without merit. As explained in Section III.C1., *infra,* the environmental pollution exclusion is inapplicable on its face or, at a minimum, ambiguous. Either way, AIG has not met its burden to show that the exclusion clearly bars coverage here.

COVID-19 transmission are via respiratory droplets from breathing and via surfaces infected with the virus. *Id.* at ¶¶ 24-28. COVID-19 causes "loss or damage" because it remains in the air and on surfaces for extended periods and renders property unfit and unsafe for occupancy. *Id.* at ¶¶ 26-28.

Circus Circus alleged direct physical loss or damage to its property because of the presence of COVID-19 on its property. *Id.* at ¶¶ 40, 41, 43, 44, 49-55, 100, 101, 111-113, 123, 124. COVID-19 infected surfaces and air on Circus Circus's property by making them dangerous and potentially lethal. *Id.* at ¶¶ 26-28. *Compare Great N. Ins. Co. v. Benjamin Franklin Fed. Sav. & Loan Ass'n*, 793 F. Supp. 259, 263 (D. Or. 1990) (finding no physical loss from asbestos where asbestos was encapsulated and thus not present on surfaces or in the air).

But AIG would have this Court believe that Circus Circus based its complaint only on government orders. ECF No. 17 at p. 9. This is not true. In fact, not only did Circus Circus clearly plead that COVID-19 caused or contributed to the interruption of its business (*see, e.g.,* ECF No. 1 at ¶ 40), it also plainly alleged the mechanism by which COVID-19 causes a physical alteration to insured property:

- "According to a study documented in *The New England Journal of Medicine*, COVID-19 was detectable in aerosols for up to three hours, up to four hours on copper, up to 24 hours on cardboard, and up to three days on plastics and stainless steel." ECF No. 1 at ¶ 26.
- "The physical loss and damage caused by COVID-19 and the threat of further physical loss or damage caused by COVID-19 has had a devastating effect on Circus Circus's business." ECF No. 1 at ¶ 36.
- "Persons infected with COVID-19 were present at Circus Circus prior to March 18, 2020." ECF No. 1 at ¶ 41.
- "In fact, during the period of January 1, 2020, to March 18, 2020, Circus Circus employees recorded more than 1,600 sick days. During that same period, Circus Circus had more than 337,000 registered guests from all over the world." ECF No. 1 at ¶ 42.
- "COVID-19, a highly contagious disease for which there is no known vaccine, is a peril not excluded under the Policy." ECF No. 1 at ¶ 49.
- "Circus Circus has also experienced direct 'physical damage' to its property because of COVID-19. COVID-19 causes physical damage to property because it contaminates objects and surfaces as described above." ECF No. 1 at ¶ 54.
- "Circus Circus, therefore, experienced direct 'physical damage' to its property from a Covered Cause of Loss . . . ." ECF No. 1 at ¶ 55.

Why does AIG completely ignore these allegations in its recitation of facts? Because AIG wants to advance the false narrative that "Circus Circus has not alleged any specific non-conclusory facts to support that it suffered 'direct physical loss or damage to' property…. Rather, Circus Circus alleges that its losses were caused by general prophylactic government orders…." ECF No. 17 at p. 2. AIG wants this court to follow the line of reasoning in *Gavrilides*, *Rose's 1,* and *Diesel*: that failing to allege COVID-19 on-site, and relying exclusively on governmental orders, is fatal to a claim. Setting aside whether or not that reasoning is even correct as a matter of law, Circus Circus has clearly alleged the presence of COVID-19 on its property and is not relying exclusively on government orders to establish physical loss or damage. As such, *Gavrilides et al*. are entirely inapposite.[5]

Indeed, the allegation of the presence of COVID-19 on and in its insured property easily distinguishes Circus Circus's claim from the decisions cited by AIG. The complaints in each of those cases confirms this fundamental distinction, since those insureds did *not* allege the presence of COVID-19 on their property. *See* Exhibit A, Complaint, *Gavrilides Management Company LLC, et al*[6]*.;* Exhibit B, Complaint, *Rose's 1, LLC, et al.;* Exhibit C, Second Amended Complaint, *Diesel Barbershop, LLC, et al.*; Exhibit D, First Amended Complaint, *10E, LLC.*

In fact, as the decisions in *Gavrilides, Roses 1*, and *Diesel* state or imply, if the policyholders in those cases *had* made such an allegation, the outcome would have been different.[7] *See, e.g., Gavrilides Mgmt. Co. v. Michigan Ins. Co.,* No. 20-258-CB (Mich. Cir. Ct.) (ECF No. 18-4, July 1, 2020 transcript) ("The complaint alleges a loss of business due to the executive orders shutting down the restaurants for dining… But, the complaint also states that at no time has COVID-19 entered the [restaurants] through any employee or customer, and in fact, states that it has never been present at either [restaurant] location. So, there simply are no allegations of direct physical loss of or damage to

[5] The other two cases that AIG cites at ECF No. 17 at p. 2 are equally impertinent. The two-page decision in *The Inns by the Sea v. California Mut. Ins. Co.,* No. 20cv001274 (Cal. Sup. Ct. Aug. 6, 2020) provides no reasoning. *See* ECF No. 20-6. *Social Life Magazine, Inc. v. Sentinel Ins. Co.,* No. 1:20-cv-03311-VEC (S.D.N.Y.) was decided in the context of a preliminary injunction where the insurer was seeking an order requiring payment of its insurance claim at the very outset of the case—which is a markedly higher standard than 12(b)(6).

[6] In fact, the Complaint in *Gavrilides* affirmatively pleads the *absence* of virus on its property. Exhibit A at ¶¶ 36, 37, 48, 49, Exh. pp. 4-6.

either property."); *Rose's 1, LLC v. Erie Ins. Exchange*, No. 2020 CA 002424 B (D.C. Sup. Ct. Aug. 6, 2020) ("Plaintiffs argue that their losses were 'physical'… But Plaintiffs offer no evidence [on motions for summary judgment] that COVID-19 was actually present on their insured properties at the time they were forced to close."); *Diesel Barbershop, LLC v. State Farm Lloyds*, No. 5:20-cv-461-DAE (W.D. Tex. Aug. 13, 2020) ("Plaintiffs also assert that…COVID-19 was not present at the properties.").

In the most recent COVID-19 decision, *10E, LLC v. Travelers Indem. Co. of Conn.*, No. 2:20-cv-04418-SVW-AS (C.D. Cal. Aug. 28, 2020), decided after AIG filed its brief here, in finding that the plaintiff likewise failed to allege the presence of COVID-19, a California federal court explicitly acknowledged that COVID-19 may cause physical alteration to property. The court went on to grant the insurer's motion with leave to amend, since the plaintiff presented no allegations from which the court could infer a physical alteration to insured property:

> Plaintiff's [First Amended Complaint] appears to suggest that Plaintiff's business hardships resulted from the physical action of the novel coronavirus itself, which "infects and stays on surfaces of objects or materials…for up to twenty-eight days." However, Plaintiff does not allege that the virus "infect[ed]" or "stay[ed] on surfaces of" its insured property. Whatever physical alteration the virus may cause to property in general, nothing in the [First Amended Complaint] plausibly supports an inference that the virus physically altered Plaintiff's property.

(Exhibit E).[8]

Unlike the insureds in *Gavrilides, Roses 1, Diesel,* and *10E*, Circus Circus has explicitly alleged COVID-19 was present on its property and caused physical alteration of the property. ECF No. at ¶¶ 40, 41, 43, 44, 49-55, 100, 101, 111-113, 123, 124. *Gavrilides, Roses 1, Diesel,* and *10E,* therefore, are readily distinguishable and have no bearing on Circus Circus's claim. Moreover the reasoning employed by Judge Ezra in *Diesel,* Judge Wilson in *10E,* and the courts in *Gavrilides* and *Roses 1* actually belies AIG's argument under the facts alleged here and demonstrates why Circus Circus has pled a proper and, at a minimum, plausible claim based on direct physical loss or damage to its insured property.

[8] *10E* was decided after AIG filed its Motion, but we anticipate AIG's reliance on this case, too.

On the other hand, Judge Bough's well-reasoned decision in *Studio 417, Inc. v. The Cincinnati Ins. Co.*, the other out-of-state decision discussed by AIG, supports Circus Circus's claim even further.[9] Under facts similar to those here, the Missouri federal court denied the insurer's 12(b)(6) motion based on allegations that "COVID-19 'is a physical substance,' that it 'live[s] on' and is 'active on inert physical surfaces,' and is also 'emitted into the air.'" No. cv-03127-SRB (W.D. Mo. Aug. 12, 2020). The court found that the allegations plausibly supported the insureds' claim for "'direct physical loss' based on 'the plain and ordinary meaning of the phrase.'" *Id.* Circus Circus makes ***the same*** allegations here that COVID-19 is present and has been present on surfaces and in the air at its property. ECF No. 1 at ¶¶ 40, 41.

Unable to distinguish *Studio 417* on the facts, AIG contends simply that Judge Bough was wrong. ECF No. 17 at pp. 3, 18. But AIG's assertion ignores the long line of well-reasoned decisions the court considered in concluding "that even absent a physical alteration, a physical loss may occur when the property is uninhabitable or unusable for its intended purpose," *Studio 417* (collecting cases). In fact, the very existence of the federal court's decision in *Studio 417* demonstrates that AIG cannot, as it must in order to prevail, show that its interpretation of the policy language is the only reasonable one. Where there are two or more reasonable interpretations of the terms as drafted, an insurance policy is deemed ambiguous, and ambiguities must be interpreted against the drafter. *Century Sur. Co. v. Casino W., Inc.*, 329 P.3d 614, 616 (Nev. 2014); *Restatement of the Law, Liability Insurance* § 4 ("Ambiguous Terms"), cmt. a ("An ambiguous policy term is a term that has at least two

[9] AIG claims that the insureds in *Studio 417* alleged that COVID-19 "caused them to cease or suspend operations," but that Circus Circus did not make this same allegation. ECF No. 17 at p. 18. This also is not true. Circus Circus repeatedly made this allegation almost verbatim. ECF No. 1 at ¶ 36 ("The physical loss and damage caused by COVID-19 and the threat of further physical loss or damage caused by COVID-19 has had a devastating effect on Circus Circus's business."); at ¶ 40 ("As a direct result of COVID-19 and these Orders, Circus Circus closed its doors at 12:01 AM on March 18, 2020."); at ¶ 112 ("Circus Circus has sustained and will continue to sustain loss of income and extra expenses due to the necessary interruption of its business operations as a direct result of COVID-19 at its property…"). In fact, the insureds in *Studio 417* only allege the *likelihood* of COVID-19 on their property. Circus Circus alleged the *actual* presence of COVID-19 on its property. However, based on the lack of commercial surface and aerosol testing, shortages of test kits for humans, and the nature of a pandemic (*i.e.*, the World Health Organization's determination that the virus is present at dangerous levels everywhere), as a matter of public interest and public health, actual test results cannot be an insured's sole means of proving the presence of COVID-19 on insured property.

interpretations to which the language of the term is reasonably susceptible when applied to the facts of the case.").

Circus Circus alleged a plausible claim for coverage under a reasonable interpretation of the policy. To the extent an ambiguity nonetheless remains, that ambiguity must be resolved in Circus Circus's favor and against AIG. *Powell v. Liberty Mut. Fire Ins. Co*., 252 P.3d 668, 672 (Nev. 2011).

4. Analogous Cases Concerning Physical Alteration of Air and Surfaces Further Support Circus Circus's Well-Pled Complaint

a) <u>Courts in This Circuit and Elsewhere Have Found Unseen Substances Cause Physical Loss or Damage</u>

Although courts are beginning to issue COVID-19 insurance-coverage decisions, no decision to date is binding legal precedent on whether the presence of COVID-19 (or the SARS-CoV-2 virus) causes "physical loss" or "damage" to property. However, courts have found physical loss and damage in analogous situations. For example, courts in this Circuit have held that unseen forces such as bacteria and odors can cause physical loss or damage to property in the context of a property insurance policy. *See, e.g., Cooper v. Travelers Indem. Co. of Ill*., 2002 WL 32775680 (N.D. Cal. 2002) (bacteria in water well that caused closure of tavern was direct physical damage to the property at the insured's premises); *Farmers Ins. Co. v. Trutanich*, 123 Or. App. 6 (1993) ("pervasive odor" from illegal methamphetamine operation constituted a direct physical loss sufficient to trigger coverage). Just because COVID-19 is not visible to the naked eye does not mean that it is incapable of causing physical loss or damage to property.

Moreover, although Circus Circus clearly has experienced a physical loss, at least one court in this Circuit has found that "physical loss or damage" does not require *structural* damage. *See, e.g., Oregon Shakespeare Festival Ass'n v. Great Am. Ins. Co*., 2016 WL 3267247, at *9 (D. Ore. June 7, 2016) (business entitled to business-interruption coverage when it had to cancel performances at a theater due to smoke from wildfires because "[t]he smoke that infiltrated the theatre caused direct property loss or damage by causing the property to be uninhabitable and unusable for its intended purpose."). Courts in other circuits have reached similar conclusions. *See Gregory Packaging, Inc. v. Travelers Prop. Cas. Co*., 2014 WL 6675934, at *5 (D.N.J. Nov. 25, 2014) ("property can sustain physical loss or damage without experiencing structural alteration"); *W. Fire Ins. Co. v. First*

Presbyterian Church., 437 P.2d 52, 55 (Colo. 1968) (concluding plaintiff suffered direct physical loss to insured building when gasoline infiltrated soil, rendering use of building dangerous); *Pepsico, Inc. v. Winterthur Int'l Am. Ins. Co*., 806 N.Y.S.2d 709, 711 (App. Div. 2005) (rejecting argument that "demonstrable alteration" was required, holding instead that coverage is triggered when the "function and value [of the property] have been seriously impaired"); *Sentinel Mgmt. Co. v. N.H. Ins. Co*., 563 N.W.2d 296, 300 (Minn. Ct. App. 1997) (finding coverage for asbestos contamination that did not result in tangible injury to the physical structure of a building, holding that "a building's function may be seriously impaired or destroyed and the property rendered useless by the presence of contaminants."). These and other courts have reached this conclusion because, among other reasons, the terms "loss" and "damage" must have distinct meanings; otherwise, one of the words would be superfluous. *Nautilus Grp., Inc. v. Allianz Global Risks US*, No. C11-5281BHS, 2012 WL 760940, at *7 (W.D. Wash. Mar. 8, 2012) ("if 'physical loss' was interpreted to mean 'damage,' then one or the other would be superfluous.").

b) Courts and Other Authorities Agree That Physical Loss or Damage Need Not Be Permanent

Unable to show that Circus Circus has not pled a plausible claim for coverage, AIG points to case law where the alleged loss was short-lived, arguing that such deposits "are not direct physical loss or damage" because any damage is only "temporary" and can be "wiped away." ECF No. 17 at pp. 12-13. AIG's glib attempt to minimize a disease that has killed almost 200,000 Americans is appalling. And it is totally undermined by the same authoritative treatise that AIG relies on at page 11 of its Motion. In the paragraph immediately following the passage AIG quotes in its brief, the treatise explains:

> The opposite result has been reached, allowing coverage based on physical damage *despite the lack of physical alteration of the property*…

10A Couch on Ins. § 148:46 (3d ed. 2019) (emphasis added); see also *Schlamm Stone & Dolan*, 800 N.Y.S.2d 356, at *5 (2005) ("the presence of noxious particles, both in the air and on surfaces in plaintiff's premises, would constitute property damage.").

AIG cites to *Meridian Textiles, Inc. v. Indem. Ins. Co. of N. Am*. in an attempt to overcome this

fundamental tenet, but dicta there actually further makes Circus Circus's case. No. CV 06-4766 CAS, 2008 WL 3009889, *6 (C.D. Cal. Mar. 20, 2008). The court there concluded that the insured failed to show any "tangible" or "detectable" change to the insured yarn, but articulated the type of situation that would have supported the plaintiff's claim – a situation that closely mirrors the facts here. The court explained: "if an article of retail clothing has an odor strong enough that it must be washed to remove it, (and the garment therefore cannot be sold as new) it has sustained physical damage and would be covered under an 'all-risk' property insurance policy." *Id.* at *5. Like the odor in *Meridian Textiles,* COVID-19 requires remediation.[10] What is more, COVID-19 renders the entire infected property unsafe and unfit for use until it is remediated. In light of its illustrative hypothetical, the *Meridian Textiles* court would likely find the fact situation here constitutes physical loss or damage under the Policy.

Meridian Textiles and each of the other cases AIG cites for this false proposition are readily distinguishable because (1) the insureds' decisions to evacuate the insured property were voluntary;[11] and (2) the alleged cause of loss was not dangerous.[12] *Compare Oregon Shakespeare Festival*, 2016 WL 3267247, at *6 (insured's time spent cleaning interior of a building, changing air filters, and

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[10] AIG suggests that COVID-19 "simply rests on surfaces . . . where it can simply be wiped away." ECF No. 17 at p. 13. However, as the court in *Meridian Textile* explained, the fact that a deleterious substance can be remediated does not diminish the fact that the substance causes physical damage sufficient to trigger coverage under an "all risk" insurance policy.

[11] *Universal Image Productions, Inc. v. Federal Ins. Co*., 475 F. App'x 569, 574-75 (6th Cir. 2012) ("Universal has not put forth any evidence indicating that such temporary conditions rendered the building 'uninhabitable' or substantially 'unusable.'"); *Mastellone v. Lightning Rod Mut. Ins. Co.*, 884 N.E.2d 1130, 1134 (January 31, 2008,8th Dist. Cuyahoga County 2008) ("Although [an expert] concluded that mold levels were not at dangerous levels, the Mastellones chose to vacate the house, citing health concerns for one of their children."); *Mama Jo's, Inc. v. Sparta Ins. Co.*, 2018 WL 3412974, at *9 (S.D. Fla. June 11, 2018) ("Here, the restaurant was not 'uninhabitable' or 'unusable.' In fact, the restaurant remained open every day, customers were always able to access the restaurant, and there is no evidence that dust had an impact on the operation other than requiring daily cleaning.").

[12] *Universal Image*, 475 Fed. App'x at 574 ("there is no evidence in the record indicating that Universal was unable to remain in the Evergreen building during remediation."); *Mastellone*, 884 N.E.2d at 1134 (The expert hired by the insurer "concluded that mold levels were not at dangerous levels." An expert hired by the insured "likewise concluded that the mold present both inside and outside the house was not at dangerous levels."); *Mama Jo's*, 2018 WL 3412974, at *8 (the restaurant was infiltrated by ordinary "dust and construction debris from the roadwork adjacent to the restaurant").

waiting for smoke to dissipate, during which time the insured was forced to suspend operations, was included in the period of restoration despite insurer's argument that this period of time cannot be considered "restoration" because no structural repairs were necessary).

Unlike the causes of loss at issue in the distinguishable cases AIG relies upon, COVID-19 is a potentially lethal disease, and regular cleaning cannot remedy the condition or restore the property to its pre-loss status as long as the disease continues to infiltrate the globe in pandemic proportions. In any event, *how* Circus Circus will restore its property to its pre-loss condition is a question of fact and not an issue that can be resolved on a motion under Rule 12(b)(6).

c) Other Authority Relied on by AIG Supports Coverage Where the Property Is Rendered Unfit for Future Use

Contrary to AIG's argument, the California appellate decision in *MRI Healthcare Center of Glendale, Inc. v. State Farm Gen. Ins. Co.,* 187 Cal. App. 4th 766 (2010) underscores Circus Circus's position that its inability to use its insured property because of the presence of COVID-19 constitutes direct physical loss or damage to property.

MRI explained that direct physical loss "contemplates an actual change in insured property then in a satisfactory state, occasioned by accident or other fortuitous event directly upon the property *causing it to become unsatisfactory for future use* ***or*** *requiring that repairs be made* to make it so." *Id.* at 779 (emphasis added) (citing *AFLAC Inc. v. Chubb & Sons, Inc*. 581 S.E.2d 317, 319 (Ga. App. 2003)). The decision stands for the proposition, therefore, that loss of future use of insured property amounts to direct physical loss *even without* physical alteration that requires repairs.[13] Thus, even if Circus Circus was not required to remediate its property, *MRI* still would support a finding that Circus Circus suffered direct physical loss. *See also Murray v. State Farm Fire & Cas. Co.*, 509 S.E.2d 1, 17 (W. Va. 1998) (finding direct physical loss could include the imminent threat of rocks falling on a house that had not yet sustained any actual damage).

In fact, the court in *Gregory Packaging*, discussed in § III.A.4.a., *supra,* applied Georgia law

[13] For this reason, *MRI* also undermines AIG's contention that the Policy's so-called "loss of use" exclusion somehow applies here. *See* § III.C.2., *infra*. *MRI*'s holding that direct physical loss may exist from either loss requiring repairs *or* loss rendering the property "unsatisfactory for future use" refutes AIG's argument.

and the *AFLAC* decision relied upon in *MRI*, specifically, to find that an ammonia discharge in a plant "produced an actual change in the content of the air in [the insured's] facility. Before the ammonia discharge, the facility was in a satisfactory state for human occupancy…, but after the ammonia discharge its state was unsatisfactory and required remediation." *Gregory Packaging, Inc. v. Travelers Prop. Cas. Co*., 2014 WL 6675934 (D.N.J. Nov. 25, 2014). Just as in *MRI* and *Gregory Packaging,* COVID-19 transformed Circus Circus's property to an unsatisfactory state that required restoration to return it to its pre-loss condition. Thus, Circus Circus alleged a covered physical loss.[14]

If nothing else, the unsettled status of Nevada law on the interpretation of "physical loss or damage to property," combined with persuasive authority on point and in analogous cases, shows that Circus Circus has, at a minimum, pled allegations that "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal,* 556 U.S. at 678.

5. The Various Federal, State and Local Orders Independently Trigger Coverage

Entirely separate from its well-pled allegations discussed above, Circus Circus also alleges a claim that is plausible on its face based on the direct physical loss to insured property as a result of the various government orders. ECF No. 1 at ¶¶ 29-44. This independent claim is made under the Policy's "physical loss trigger," which is distinct from the Policy's "damage" trigger. "Physical loss" and "damage" mean different things; otherwise, one would render the other superfluous. *Nautilus Grp.*, 2012 WL 760940, at *7. "The fact that they are both included in the grant of coverage evidences an understanding that physical loss means something other than damage." *Id.*

Thus, in addition to triggering coverage based on its well-pled allegations of damage (*i.e.*, the physical alteration of its property caused by COVID-19), Circus Circus also has pled allegations sufficient to trigger coverage based on the direct physical loss of its property.

This separate coverage basis is plausible on its face because Circus Circus has expressly pled that it suffered "direct physical loss" due to government orders requiring that it close its doors because of COVID-19. ECF No. 1 at ¶¶ 37, 28, 54. During "emergencies or disasters of unprecedented size

[14] *MRI* also failed to find covered direct physical loss for other reasons not pertinent to Circus Circus's claim. *MRI*, 187 Cal. App. 4th at 780.

and destructiveness resulting…from a fire, flood, earthquake, storm or other natural causes" and to "protect the public welfare, and to preserve the lives and property of the people of the State," the Governor is authorized to declare a state of emergency. NRS 414.020. COVID-19, an emergency or disaster from a "natural cause," caused the Governor to declare a state of emergency and to restrict Circus Circus's operations based upon "the ability of the novel coronavirus that causes COVID-19 to survive on surfaces for indeterminate periods of time renders some property unusable and contributes to contamination, damage, and property loss." ECF No. 2-5. Because of the Governor's orders, Circus Circus lost the use and functional utility of its property.

As explained in § III.A.4.a., *supra*, better-reasoned decisions conclude that direct physical loss may exist even in the absence of physical damage property. *Gregory Packaging*, 2014 WL 6675934, at *5 ("property can sustain physical loss or damage without experiencing structural alteration"); *Pepsico, Inc.*, 806 N.Y.S.2d at 711 (rejecting argument that "demonstrable alteration" was required to trigger coverage). To find otherwise would render the "physical loss" language meaningless and, contrary to rules of policy interpretation, "mere surplusage."

To the extent AIG relies on *MRI* to assert otherwise, *MRI* falls short. The policy in *MRI* covered only "accidental direct physical loss." *MRI*, 187 Cal.App.4th at 777. The policy in *MRI* did not include a separate trigger of coverage for "damage" as the Policy here does. It is entirely possible that reading the Policy here and the policy in *MRI* "to give reasonable and harmonious meaning to the entire policy" means that the same words can have different meanings in each policy. *Reno's Exec.*, 682 P.2d at 1383. *MRI* equated "accidental direct physical loss" with "damage." *MRI*, 187 Cal. App.4th at 780 ("The failure of the MRI machine to satisfactorily 'ramp up' emanated from the inherent nature of the machine itself rather than actual physical 'damage.' "). But to equate "physical loss" and "damage" here would be to render the use of the word "damage" meaningless in this Policy, a result that courts strive to avoid. *Bielar v. Washoe Health Sys., Inc.*, 306 P.3d 360, 364 (Nev. 2013). In this way, "physical loss" can have two different meanings when two different policies are read as a whole. Doing so here means that "physical loss" does *not* require damage. If nothing else, Circus Circus's reading is reasonable, making the Policy ambiguous and requiring it to be interpreted in Circus Circus's favor. *Casino W., Inc.*, 329 P.3d at 616.

Furthermore, the language of the AIG Policy itself plainly supports Circus Circus's position. According to Policy's Period of Interruption provision, the measure of time during which coverage for business interruption (Gross Earnings) is available is "from the time of direct physical loss or damage" and continuing until ***either*** (1) *"Normal operations resume,"* ***or*** (2) *"Physically damaged buildings and equipment could be repaired or replaced…"* ECF No. 2-1 at CCPolicy_0025-26 (emphasis added). As this provision makes clear, the Policy expressly contemplates the payment of Gross Earnings coverage during a period measured *solely* on a disruption in the insured's operations and *without any reference whatsoever* to damage or physical alteration of property, *e.g.*, the Period of Interruption can be read as beginning "from the time of direct physical loss" and continuing until "Normal operations resume." Nowhere in that loss period need there be, or is there, any element of "damage" to property. Just the opposite, the period exists at the exclusion of any "damage," which is expressly treated in the disjunctive. This underscores and is consistent with the use of the disjunctive "or" in the phrase "direct physical loss ***or*** damage." (Emphasis added).

B. The Complaint Contains Factual Allegations Sufficient to Support a Claim Under the Policy's Additional Time-Element Coverages

Having demonstrated why AIG's arguments against direct physical loss or damage are flawed, it follows that Circus Circus has sufficiently alleged that AIG breached the Policy by failing to pay its covered additional time element losses. *See Studio 417*, No. cv-03127-SRB (W.D. Mo. Aug. 12, 2020) (finding insureds plausibly stated claims for civil authority, ingress and egress, dependent property, and sue and labor coverages).

1. Contingent Time Element Coverage

Circus Circus alleged that its operations "rel[y] on materials and customers from right next door to across the country to around the world." ECF No. 1 at ¶ 35. The orders, all of which are allegedly predicated on the pandemic presence and damage caused by COVID-19, prohibited travel to the United States, where Circus Circus is located and required residents (*i.e.*, potential customers) to stay in their homes. ECF No. 1 at ¶ 29. These allegations are sufficient to support, on a motion to dismiss, Circus Circus's claim for contingent time element coverage. *Iqbal,* 556 U.S. at 678 (the allegations, as pled, need only "contain sufficient factual matter, accepted as true, to 'state a claim to

relief that is plausible on its face.'").

2. Extra Expense Coverage

AIG argues that Circus Circus could not incur any extra expenses to "temporarily continue as nearly normal as practicable" because Circus Circus "closed its doors." ECF No. 17 at p. 16. AIG presumes, incorrectly, that the only period during which Circus Circus sustained covered loss was during the period that its doors were closed. This is wrong, as shown by AIG's Period of Interruption provision, discussed above, which measures coverage "from the time of direct physical loss or damage" and continuing until *either* (1) "Normal operations resume," or (2) "Physically damaged buildings and equipment could be repaired or replaced…" ECF No. 2-1 at CCPolicy_0025-26.

As this provision plainly provides, coverage for Circus Circus's business income loss does not end when its doors reopen. The loss period continues until Circus Circus's operations return to their normal pre-loss level.[15] Despite opening its doors around June 4, 2020, Circus Circus' operations still have not returned to their normal pre-loss level, yet all the while Circus Circus has incurred substantial extra expense to operate its business amidst the ongoing presence of COVID-19. Here, too, Circus Circus has alleged facts sufficient to state a claim that is plausible on its face. *Iqbal,* 556 U.S. at 678.

3. Ingress & Egress Coverage

AIG argues that damage to other property did not "prohibit" "physical ingress to or egress from" Circus Circus's property (ECF No. 17 at p. 16), but the Policy requires only that ingress to or egress be *partially* prohibited. ECF No. 2-1 at CCPolicy_0028. Circus Circus plainly alleges that it did suffer a partial or total prohibition of ingress or egress from covered property (*see* ECF No. 2-3), and AIG offered no evidence, to suggest otherwise. At a minimum, a fact issue remains as to whether ingress or egress to covered property was in fact totally or partially prohibited. These allegations are sufficient to survive a motion to dismiss. *Iqbal,* 556 U.S. at 678.

4. Civil Authority Coverage

AIG's Motion implies that the orders are Circus Circus's sole basis for making its claim. As illustrated in great detail above, this is not true. Circus Circus experienced physical loss and damage

[15] Furthermore, the Period of Interruption does not end upon expiration of the Policy. ECF No. 2-1 at CCPolicy_0025-26.

to its property caused by COVID-19. Separately, and in the alternative, Circus Circus made a claim under its civil authority coverage for the loss of use of its property because of the orders.

Challenging Circus Circus's allegations, AIG questions the *purpose* behind the orders. However, a motion under Rule 12(b)(6) is not the appropriate place or time to address those issues. AIG's concerns are better addressed through discovery into the government's "purpose."

The need for discovery notwithstanding, AIG ignores cases where, like here, civil authority orders specifically barred guests from entering an insured premises for its intended purpose. *Kean, Miller, Hawthorne, D'Armond McCowan & Jarman, LLP v. Nat'l Fire Ins. Co. of Hartford*, 2007 WL 2489711, at *6 (M.D. La. Aug. 29, 2007) ("[C]ourts have held that access to an insured premises is 'prohibited' where the order or action of civil authority actually requires the insured's business premises to close, thereby invoking coverage for business losses.").

Under these facts, courts treat it as a foregone conclusion that a civil authority order prohibited access to the premises. *See Assurance Co. of Am. v. BBB Serv. Co.,* 265 Ga. App. 35 (2004) (finding civil authority coverage available when restaurants closed in response to county evacuation order as Hurricane Floyd approached); *Southlanes Bowl, Inc. v. Lumbermen's Mut. Ins. Co.*, 46 Mich. App. 758 (1973) (finding civil authority coverage available when governor's order in response to riots forced insured to close its bowling alleys, restaurants, and motels); *Narricott Indus., Inc. v. Fireman's Fund Ins. Co.*, 2002 WL 31247972 (E.D. Pa. Sept. 30, 2002) (holding that order of town authorities prohibited access to industrial plant that was directed to suspend operations due to Hurricane Floyd).

The Court should find that "[a]t the motion to dismiss stage, these allegations plausibly allege that access was prohibited to such a degree as to trigger the civil authority coverage… This is particularly true insofar as the [Policy] require[s] that the 'civil authority prohibits access,' but does not specify 'all access' or 'any access.'" *Studio 417*, No. cv-03127-SRB (W.D. Mo. Aug. 12, 2020); *Iqbal,* 556 U.S. at 678.

C. No Exclusion Applies

1. The Environmental Pollution Exclusion Does Not Apply on its Face, and AIG Fails to Demonstrate Otherwise

a) <u>The Environmental Pollution Exclusion Does Not Apply on Its Face</u>

Contrary to AIG's claims, the Policy contains no "virus exclusion." even though standard virus exclusions are available in the insurance industry and have been in use since at least 2006.[16] In fact, many of the COVID-19 insurance cases decided thus far feature those exclusions. *See, e.g., Gavrilides*, *Diesel*, and *10E.* In *Diesel*, for example, the policy contained an exclusion that purported to exclude all loss caused by or resulting from virus:

> We do not insure under any coverage for any loss which would not have occurred in the absence of one or more of the following excluded events...:
>
> . . .
>
> **j. Fungi, Virus Or Bacteria**
>
> . . .
>
> (2) Virus, bacteria or other microorganism that induces or is capable of inducing physical distress, illness or disease.

Diesel Barbershop, LLC, No. 5:20-cv-461-DAE (W.D. Tex. Aug. 13, 2020).[17]

The exclusion that AIG relies upon here is completely different. It is a traditional environmental pollution exclusion that is uniquely premised, first and foremost, on the "[t]he actual, alleged or threatened release, discharge, escape or dispersal' of **Pollutants or Contaminants**.'" ECF No. 17 at p. 19; *see Casino W.*, 329 P.3d at 617 (finding that the "absolute pollution exclusion" which purported to limit coverage for "the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of 'pollutants'" applies to traditional environmental pollution only;

[16] The Insurance Services Office, an insurance industry organization, which drafts standard-form policy wording and endorsements, issued an endorsement titled "Exclusion Of Loss Due To Virus Or Bacteria" in 2006. *See* Exhibit A at Exh. p. 26.

[17] The policy in *10E* also contained an exclusion entitled "Exclusion of Loss Due to Virus or Bacteria." Exhibit E. Likewise, the policy in *Gavrilides* contained an exclusion addressed to "loss or damages caused by or resulting from any virus, bacteria or other microorganism that induces or is, is capable of inducing physical distress, illness or disease." ECF No. 18-4 at p. 10.

because the exclusion was ambiguous, the court construed it against the insurer and in accordance with the insured's reasonable expectations).

Unlike the "virus" exclusion in *Diesel*, the exclusion here provides, in pertinent part:

> Except as otherwise provided under the Additional Coverages and Additional Time Element Coverages (and in such event, only to the extent provided therein), the Company does not insure for loss or damage caused directly or indirectly by any of the following perils.
>
> : . . .
>
> f. The actual, alleged or threatened ***release, discharge, escape or dispersal*** of **Pollutants or Contaminants**, all whether direct or indirect, proximate or remote or in whole or in part caused by, contributed to or aggravated by any **Covered Cause of Loss** under this **Policy**.

ECF No. 2-1 at CCPolicy_0018-19 and CCPolicy_0048 (emphasis added).

The definition of **Pollutants or Contaminants**, which is incorporated into the pollution exclusion, also expressly limits substances qualifying as **Pollutants or Contaminants** to substances that are "release[d]." The definition provides, in relevant part:

> any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste, ***which after its release*** can cause or threaten damage to human health or human welfare or causes or threatens damage, deterioration, loss of value, marketability or loss of use to property insured hereunder, including, but not limited to, bacteria, virus, or hazardous substances listed in applicable environmental state, federal or foreign law or regulation, or as designated by the U.S. Environmental Protection Agency or similar applicable state or foreign governmental authority…

ECF No. 2-1 at CCPolicy_0018-19 and CCPolicy_0048 (emphasis added).

Circus Circus alleges that COVID-19 is pandemic and, thus, ubiquitous and globally present. ECF No. 1 at ¶¶ 22, 81. Furthermore, Circus Circus specifically alleges that COVID-19 was *not* released, discharged, escaped or dispersed onto its property. ECF No. 1 at ¶ 80. The Court on this motion must take these allegations as true. *Iqbal*, 556 U.S. at 678. The exclusion and its incorporated definition of **Pollutant or Contaminant**, therefore do not apply on their face.

Nevertheless, AIG argues that because COVID-19 spread from one host to another, that there must have been some release, discharge, escape or dispersal. ECF No. 17 at p. 21. AIG's argument fails where, as here, all allegations must be taken as true and all reasonable inferences must be drawn

in favor of the plaintiff. *Iqbal*, 556 U.S. at 678. In contrast, as an exclusionary provision, the environmental pollution exclusion must be construed narrowly, with AIG bearing the burden of *proving* the exclusion's application. *Casino W.*, 329 P.3d at 617. AIG has offered absolutely no evidence of a "release, discharge, escape or dispersal" of COVID-19. And, given the pandemic presence of the disease and the virus that causes it, there is no way AIG could ever meet that burden. Because AIG has failed to prove there was any "release, discharge, escape or dispersal" of COVID-19, the exclusion is inapplicable on its face for this reason as well.

b) Even if the Exclusion Is Not Inapplicable on Its Face, AIG Fails to Prove Only One Reasonable Interpretation

AIG has not only failed to offer any evidence to show that there was a "release, discharge, escape or dispersal" of COVID-19, it has failed to demonstrate that its pollution exclusion is susceptible to only one reasonable interpretation. For this reason as well, the exclusion cannot operate as a bar to Circus Circus's claim.[18] *Casino W.*, 329 P.3d at 616; *Restatement of the Law, Liability Insurance* § 4 ("Ambiguous Terms"), cmt. A, *supra.*

Even if the Court were to consider AIG's unsupported argument that its exclusion should apply to the pandemic presence of a virus, AIG cannot overcome the Nevada Supreme Court's decision in *Casino W.*, which found a pollution exclusion requiring a "discharge, dispersal, seepage, migration, release or escape" of pollutants –strikingly similar to the language here – ambiguous. *Id.* at 618.

Casino W involved a claim for coverage under a general liability insurance policy for injury caused by carbon monoxide from a faulty pool heater. The policy contained an "absolute pollution exclusion" that purported to bar coverage for " '[b]odily injury' or 'property damage' arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of 'pollutants.'" The insured argued that because it contained environmental terms of art, it applied only

[18] AIG is all too familiar with the rule on multiple reasonable interpretations. Indeed, the insurer uses that rule as a matter of course when defending its policy interpretation in claims alleging that the insurer denied coverage in bad faith. *See, e.g., Paulino v. Chartis Claims, Inc.*, 774 F.3d 1161 (8th Cir. 2014) (affirming summary judgment for AIG based on insurer's argument that it need not be correct as long as it was reasonable for purposes of defeating bad faith claim under "fairly debatable" standard.)

to traditional environmental pollution, and that other courts had reached that same conclusion based on the exclusion's drafting history. Casino West also argued that the fact that it and the insurer disagreed on the exclusion's applicability amounted to an ambiguity. The insurer contended, on the other hand, that the exclusion applied because carbon monoxide is a "pollutant" under the policy's terms. *Id.* at 617. The Nevada Supreme Court found both interpretations to be reasonable and, thus, held the exclusion to be ambiguous, construing it against the insurer. *Id.* at 618.[19]

c) AIG's Attempt to Exclude Virus is an Admission that Virus Causes Physical Loss or Damage

Finally, AIG's emphatic effort to apply its environmental pollution exclusion to loss caused by virus or disease, belies its argument that virus or disease do not cause the "direct physical loss or damage" necessary to trigger coverage in the first instance. Indeed, in Nevada as elsewhere, every provision in a contract is presumed to have meaning, and no provision is to be treated as superfluous. *Bielar v. Washoe Health Sys., Inc*., 306 P.3d 360, 364 (Nev. 2013). AIG ignores this tenet by arguing on the one hand, that COVID-19 cannot cause "direct physical loss or damage" (ECF No. 17 at p. 11), and then arguing on the other that "direct physical loss or damage" caused by COVID-19 is excluded. *Id.* at p. 19. AIG cannot have it both ways. Its argument that the environmental pollution exclusion could even plausibly apply to Circus Circus's claim should be taken as an admission that COVID-19 is capable of causing "direct physical loss or damage." *See Stanford Ranch, Inc. v. Md. Cas. Co*., 89 F.3d 618, 627 (9th Cir.1996) (proper coverage analysis begins by considering whether the policy's insuring agreements create coverage for the disputed claim. If coverage exists, then the court considers whether any exclusions apply.).

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[19] The exclusion also does not apply for two additional reasons. First, a **Pollutant or Contaminant** is defined here *exactly* as in *Casino W.* as "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, alkalis, chemicals and waste." *See* ECF No. 2-1 at CCPolicy_0048; *Casino W.* at 616. These environmental terms of art do not include anything like COVID-19. Second, the only reference to "virus" in AIG's pollution exclusion is one that may *result from* the "release" of industrial pollution. The definition makes this clear, stating that **Pollutant or Contaminant** "means any solid [etc.] . . ., *which after its release can cause* . . . [a] virus . . . ." (emphasis added). ECF No. 2-1 at CCPolicy_0048. This fact pattern simply does not exist here. Thus, not only does the pollution exclusion not apply to pandemic COVID-19, but the exclusion does not apply to SARS-CoV-2 because the novel coronavirus was not *caused by* the release of an industrial pollutant.

2. The "Loss of Use" Exclusion Does Not Bar Coverage

In a last-ditch effort to avoid coverage, AIG contends that the "loss of use" exclusion somehow bars coverage. As with the pollution exclusion, it does not. The entire exclusion reads "The Company does not insure for loss or damage caused by any of the following: Delay, loss of market or loss of use." ECF No. 2-1 at CCPolicy_0020.[20] The exclusion limits coverage to losses flowing from a covered cause of loss and not losses caused by other factors. As another federal court explained, "to the extent any loss claimed to be a loss of business income by [the insured] was not lost as a direct result of [the covered cause of loss] but rather as a consequence of any other reason, then such loss is excluded from coverage and there can be no recovery … for such loss." *Dictiomatic, Inc. v. U.S. Fid. & Guar. Co*., 958 F. Supp. 594, 604 (S.D. Fla. 1997). In other words, the loss of use exclusion does not apply to business-interruption damages that are tied to a covered event.

AIG's attempt to apply the loss of use exclusion here turns the exclusion on its head and would render Circus Circus's business-income coverage illusory. The entire point of business income coverage is to cover business losses while the insured cannot use its property for its intended purpose. Circus Circus's business income loss was caused by the physical loss or damage to its property, not loss of use based on some other, uncovered cause.

IV. CONCLUSION

The allegations that Circus Circus *actually* pled plausibly support its claim for coverage. AIG has not and cannot show otherwise, particularly when that attempt is based on an incomplete summary of the allegations and reliance on dissimilar cases. AIG's motion should be denied.

[20] We can also infer meaning from the other phrases in the exclusion – *i.e.*, "delay" and "loss of market" – which courts generally apply to indirect or consequential losses. *Boyd Motors, Inc. v. Employers Ins. of Wausau*, 880 F.2d 270, 274 (10th Cir. 1989) ("the loss of market exclusion is read, as it must be, in light of both the immediately surrounding text and the policy as a whole").

Date: September 1, 2020.

Respectfully submitted,

CIRCUS CIRCUS LV, LP

By and through its attorneys,

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CERTIFICATE OF SERVICE

By the undersigned signature, I hereby certify on behalf of the above-captioned plaintiff that on September 2, 2020, a true and correct copy **PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS** was electronically filed with the Clerk of Court via the Court's CM/ECF System, will be sent electronically to all registered participants as identified on the Notice of Electronic Filing.

/s/ Renee M. Finch
Renee M. Finch