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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GCDC LLC d/b/a GCDC GRILLED CHEESE BAR, individually, and on behalf of others similarly situated, Plaintiff, v. SENTINEL INSURANCE COMPANY, LTD, Defendant.	Civil Action No. 1:20-cv-1094-TJK

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

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INTRODUCTION

Running a restaurant is an undertaking filled with risks. But that has not stopped all of the major U.S. insurance companies – including Defendant Sentinel Insurance Company Ltd. ("Sentinel"), operating under The Hartford banner – from insuring restaurant clients, including the almost 2,500 restaurants in Washington, D.C.

Plaintiff GCDC Grilled Cheese Bar ("GCDC") lined up comprehensive insurance for its business before the restaurant's doors even opened to the public in 2014. The policy Sentinel issued to GCDC – billed as a "Spectrum Business Owner's Policy" – covers losses related to GCDC's insured operation as a full-service restaurant. Among the many types of coverage provided under this policy, Sentinel promised GCDC coverage for lost business income arising from the loss of, or damage to, its restaurant property, equipment, and supplies. GCDC needs that coverage now because it has experienced a crippling decline in revenue since it was forced to suspend its regular operations in March and looks to months of uncertainty ahead.

GCDC's losses have been caused by a series of important and necessary, but highly restrictive, public health orders issued by the D.C. government in response to a global catastrophe. In an attempt to prevent the collapse of the District and broader metropolitan area's health care infrastructure and cessation of essential services like public transportation, utility maintenance, core government services, and the supply chain for groceries and household supplies, the District prohibited the operation of sit-down restaurants and restricted public gatherings in mid-March.

Sentinel has denied GCDC business income coverage, on the ground that GCDC's claim is precluded by a policy endorsement that purported to provide limited coverage for contamination of the insured premises by bacteria, fungi, and viruses. Sentinel asks the Court to interpret this endorsement as a sweeping exclusion of any claim that can be connected in any

way to a virus – even if coronavirus was not detected on the insured premises and did not cause the restaurant's closure.

Clearly, GCDC and Sentinel read the insurance contract between them differently. But at this point in the litigation, when a motion to dismiss is filed under Rule 12(b)(6), Plaintiff's allegations and Plaintiff's interpretation of any ambiguity in the Policy are accepted as true. GCDC asks this Court to allow it to pursue its claims for a declaration of its rights under the Spectrum Business Owner's Policy, for contract damages owed, and for damages arising from Sentinel's bad faith in denying GCDC's claim for benefits. GCDC is not asking Sentinel for a handout or the Court for special consideration – far from it. GCDC is asking for the opportunity to prove its right to the insurance benefits it paid for.

It is Sentinel that is asking the Court for extraordinary and undeserved relief – to summarily spare Sentinel the consequences of a risk that it knowingly took on, and to do so without any inquiry or investigation into the facts surrounding GCDC's claim. Sentinel's request is not supported by the liberal pleading standards of the federal courts, by the standards used by district courts to review motions to dismiss filed under Rule 12(b)(6), and by the black-letter law governing the interpretation of insurance contracts. As explained below, Sentinel's motion to dismiss should be denied.

FACTS

GCDC Grilled Cheese Bar opened for business in 2014 at 1730 Pennsylvania Avenue NW in Washington DC. Compl. ¶ 28 (ECF No. 1). The restaurant, close to the White House, the Old Executive Office Building, the World Bank, and George Washington University, sits in a prime downtown location and quickly became a favorite casual dining spot for government and private sector office workers, reporters, students, and tourists in the neighborhoods of Metro Center, Farragut North, and Foggy Bottom. *Id.* ¶¶ 28, 30.

Like many urban restaurants, GCDC's floorplan is compact and its success depends on maximizing seated dining and turning tables quickly through dining hours. In a space of approximately 2,146 square feet, tables can accommodate 85 diners at one time. *Id.* ¶ 29.

Before the restaurant opened, GCDC purchased comprehensive business insurance—a Spectrum Business Owner's Policy (the "Policy")—sold under "The Hartford" banner by Defendant Sentinel Insurance Group.[1] Compl. ¶ 35. The Policy was not a negotiated contract; rather, it was offered by Sentinel on a take-it-or-leave-it basis. *Id.* ¶ 37. Altogether, the Policy totals more than 219 pages, including: seven (7) pages of Declarations setting forth various limits of coverage, applicable deductibles and waiting periods, and extensions of coverage under the Policy; several major parts (*e.g.*, the Special Property Coverage Part, the Business Liability Coverage Form, Employment Practices Liability Coverage Form); four "IMPORTANT NOTICES" of various lengths; and fifty-four (54) miscellaneous coverage forms many of which are styled as endorsements. Def.'s Motion to Dismiss ("MTD"), Ex. A (ECF No. 9-2). In addition to coverage for business personal property, coverage for business income, and extended civil authority coverage, the Policy also provides third-party liability coverage, personal and advertising liability coverage, liquor liability coverage, automobile liability coverage, and cyber liability coverage. And those are just the major coverage grants; there are also extensions of coverage for many types of occurrences and events – including hazardous substances coverage, identity recovery coverage, coverage for damage to property rented to the insured, coverage for debris removal, coverage for equipment breakdown, extended business income coverage, and

[1] Based on defense counsel's representations that Defendant Hartford Financial Services Group ("HFSG") did not issue GCDC's Policy or handle GCDC's claim, the parties agreed that HFSG would be dismissed, without prejudice and with a tolling agreement in place, on July 9, 2020 and submitted a stipulated dismissal to the Court. ECF No. 8.

accounts receivable coverage – and this ***still*** is not nearly an exhaustive list of events or occurrences covered under the Policy. *See generally id.*

GCDC elected to insure itself against all risks that it might face with a comprehensive business policy. Compl. ¶ 37. Sentinel elected to insure GCDC as a business, not simply a property, understanding that the business was a full-service, sit-down restaurant. Def.'s MTD, Ex. A at 14 (Declarations, Description of Business) (ECF No. 9-2). The pertinent parts of the Policy, and basis for GCDC's claims, are the Special Property Coverage Part provisions providing coverage for loss of and damage to physical property (the premises as well as fixtures and supplies) and for loss of business income when business operations are suspended due to a loss at the insured premises or the premises of a dependent property. Compl. ¶ 38; *see also* MTD, Ex. A at 32 (Section A.1; Covered Property), 33 (Section A.3; Covered Causes of Loss), 41 (Section A.5.o; Business Income), 42 (Section A.5.p.; Extra Expense), 42 (Section A.5.r; Extended Business Income) 42 (Section A.5.s; Business Income From Dependent Properties), 125 (Business Income from Dependent Properties Endorsement). The Policy provides $1 million in coverage for each occurrence giving rise to a third-party claim with an aggregate limit of $2 million, $357,700 in coverage for business personal property losses per occurrence, and twelve months of actual losses sustained for business income losses and extra expense, also on a per occurrence basis. *Id.* ¶ 41; MTD, Ex. A at 14-17 (Declarations). GCDC has paid all premiums necessary to keep this Policy in full force throughout its years of operation. *Id.* ¶ 42.

In the United States alone, COVID-19 has infected more than 5,000,000 people and more than 160,000 have died.[2] Worldwide, scientists have advised governments to mandate or

[2] Centers for Disease Control & Prevention, *Cases in the U.S.*, https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html (last visited Aug. 13, 2020).

encourage population-wide social distancing because coronavirus spreads easily from person to person in confined environments. *Id.* ¶ 19. The goal of social distancing is to slow the virus's spread, in order to provide time for the development, production, and distribution of medical treatments or a vaccine, and to decrease the burden on health care services and critical infrastructure in the interim so that these systems are not overwhelmed.

Faced with rising infection rates in the District of Columbia and the greater metropolitan area, Mayor Bowser issued a series of executive orders (the "Public Health Orders") restricting public activities and large gatherings in the District. *Id.* ¶¶ 20-27. The express purpose of the Public Health Orders was to relieve the strain on our health care delivery systems and essential services infrastructure so as to protect public health and safety.[3] As applied to GCDC, and other restaurants, these orders prohibited access to the insured premises as a sit-down restaurant and required the suspension of regular business operations. *Id.* ¶¶ 31-32. Between early March and mid-April, GCDC experienced a 95% drop in business income. *Id.* ¶ 31. On April 11, 2020, GCDC closed with an intent to re-open as soon as permitted and feasible. *Id.*

LEGAL STANDARDS

I. Motion to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted

A motion to dismiss brought pursuant to Federal Rule of Civil Procedure 12(b)(6) tests

[3] *See* Mayor's Order 2020-053 at 2 (Mar. 24, 2020), https://tinyurl.com/yy7v2zky ("'Flattening the curve' is not expected to greatly reduce the total number of people that will become infected with COVID-19, but those infections will take place over a longer period of time, which will result in a less stressed health care system, and in turn, better patient outcomes."). The relevant mandates set forth in this Public Health Order are summarized in the Complaint at Paragraph 24. A copy of the Public Health Order is attached hereto for the Court's convenience as Exhibit A. Because it was incorporated in the Complaint and is public record, the Court may take judicial notice of it. *New Vision Photography Program, Inc. v. D.C.*, 54 F. Supp. 3d 12, 23 (D.D.C. 2014).

only the legal sufficiency of the complaint.[4] When evaluating that sufficiency, "the Court must construe the complaint 'in favor of the plaintiff, who must be granted the benefit of all inferences that can be derived from the facts alleged'."[5]

If a complaint pleads factual content from which a court can "draw the reasonable inference that the defendant is liable for the misconduct alleged," then the 12(b)(6) motion must be denied.[6] When evaluating and deciding a Rule 12(b)(6) motion to dismiss, a court can consider, in addition to the facts alleged in the complaint, "any documents either attached to or incorporated in the complaint and matters of which the court may take judicial notice."[7] However, to the extent that a defendant seeks dismissal by asserting that certain facts or evidence have not been presented to the court or by disputing the facts alleged in the complaint, the motion must be denied.[8] Factual disputes are not entertained on a motion to dismiss.[9]

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[4] *Beyond Pesticides v. Monsanto Co.*, 311 F. Supp. 3d 82, 86 (D.D.C. 2018) (citations omitted).

[5] *Id.*

[6] *Id.* at 86-87 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

[7] *IMAPizza, LLC v. At Pizza Ltd.*, 334 F. Supp. 3d 95, 109 (D.D.C. 2018) (brackets removed) (quoting *Hurd v. District of Columbia*, 864 F.3d 671, 678 (D.C. Cir. 2017)).

[8] *Newport Aeronautical Sales v. Dep't of Air Force*, 660 F. Supp. 2d 60, 64 (D.D.C. 2009), *aff'd*, 684 F.3d 160 (D.C. Cir. 2012) ("To survive a motion to dismiss under Rule 12(b)(6), a plaintiff need only plead 'enough facts to state a claim to relief that is plausible on its face' and to 'nudge[ ] [his or her] claims across the line from conceivable to plausible.'") (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "[O]nce a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint," *Twombly* at 550 U.S. at 563, and a "court deciding a motion to dismiss must assume all the allegations in the complaint are true (even if doubtful in fact) [and] must give the plaintiff the benefit of all reasonable inferences derived from the facts alleged." *Aktieselskabet AF 21. November 2001 v. Fame Jeans Inc.*, 525 F.3d 8, 17 (D.C. Cir. 2008) (internal quotation marks and citations omitted).

[9] *See, e.g., Harris v. Bowser*, 369 F. Supp. 3d 93, 104 (D.D.C. 2019) ("Genuine factual disputes cannot be decided at the motion to dismiss stage. . . ."); *Richards v. Gelsomino*, 240 F.

Insurance coverage disputes, like all contract disputes regarding the proper interpretation of an ambiguous contract provision, should not be decided on a Rule 12 (b)(6) motion.[10] In fact, the proper meaning of an ambiguous contract term is a genuine dispute of material fact that cannot even be resolved on a summary judgment motion.[11]

II. Pertinent Insurance Contract Principles

"Because an insurance policy constitutes a contract," it is construed "according to contract principles."[12] In the District of Columbia, "[a]n insurance policy is a contract between the insured and the insurer, and in construing it [a court] must first look to the language of the contract."[13]

"[A]mbiguities in an insurance policy are construed against the insurer and in favor of 'the reasonable expectations of the purchaser of the policy.'"[14] This interpretive principle recognizes the often one-sided dynamic under which insurance contracts are entered.[15]

Supp. 3d 173, 179 (D.D.C. 2017) ("[A] motion to dismiss is not the proper vehicle for [resolving factual disputes].").

[10] *Lunayach Commc'ns Consultants, Inc. v. Zackiva Commc'ns Corp.*, No. 87–2296, 1988 WL 4245, at *2 (D.D.C. Jan. 4, 1988).

[11] *Parker v. U.S. Tr. Co.*, 30 A.3d 147, 150 (D.C. 2011); *accord Nat'l Trade Prods. v. Info. Dev. Corp.*, 728 A.2d 106, 109 (D.C. 1999) (citations omitted).

[12] *Sec. Title Guarantee Corp. of Balt. v. 915 Decatur St NW, LLC*, 427 F. Supp. 3d 1, 9 (D.D.C. 2019), *as amended* (Mar. 23, 2020); *Stevens v. United Gen. Title Ins. Co.*, 801 A.2d 61, 66 (D.C. 2002).

[13] *Rockhill Ins. Co. v. Hoffman-Madison Waterfront, LLC*, 417 F. Supp. 3d 50, 59 (D.D.C. 2019) (citing *Travelers Indem. Co. of Illinois v. United Food & Commercial Workers Int'l Union*, 770 A.2d 978, 986 (D.C. 2001)) (quoting *Cameron v. USAA Prop. & Cas. Ins. Co.*, 733 A.2d 965, 968 (D.C. 1999)).

[14] *Chase v. State Farm Fire & Cas. Co.*, 780 A.2d 1123, 1127 (D.C. 2001) (quoting *Smalls v. State Farm Mut. Auto. Ins. Co.*, 678 A.2d 32, 35 (D.C. 1996)).

[15] *Id.*

Ambiguity in terms exists when the contract "is susceptible of more than one reasonable interpretation."[16] Thus,

> [t]he insurer must establish not merely that the policy is capable of the construction it favors, but rather that such an interpretation is *the only one that can fairly* be placed on the language in question. It will not suffice for the insurer to demonstrate that its interpretation is more reasonable than the policyholder's. Rather, [the insurer] must show that [the insured's] construction is altogether *unreasonable*.[17]

When analyzing an ambiguity in an insurance contract, the first rule of construction is "to determine what a reasonable person in the position of the parties would have thought the disputed language meant."[18] Words that are non-technical or undefined are given their plain meaning.[19] When construing insurance policies, the main concern of District of Columbia courts is "the meaning which common speech imports," not the meaning that other insurance carriers would ascribe to an undefined term.[20]

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[16] *Id.*at 1127–28 (quoting *American Bldg. Maint. Co. v. L'Enfant Plaza Prop., Inc.*, 655 A.2d 858, 861 (D.C. 1995)) (emphasis removed).

[17] *Richardson v. Nationwide Mut. Ins. Co.*, 826 A.2d 310, 324 (D.C. 2003)); *accord Rockhill Ins. Co.*, 417 F. Supp. 3d at 59 (citing *Chase*, 780 A.2d at 1127). Subsequent to the *Richardson* decision, the District of Columbia Court of Appeals granted a rehearing of the case *en banc* and ordered that the opinion be vacated. 832 A.2d 752 (D.C. 2003). Before the *en banc* ruling, the parties settled, and the D.C. Court of Appeals ordered the majority and dissenting opinions vacated. 844 A.2d 344 (D.C. 2004). Nonetheless, the case remains persuasive authority, *see, e.g.*, *District of Columbia v. Tulin*, 994 A.2d 788, 797 n.10 (D.C. 2010), and is recognized as "relevant and instructive," *Essex Ins. Co. v. Café Dupont, LLC*, 674 F. Supp. 2d 166, 170 n.5 (D.D.C. 2009).

[18] *Interstate Fire & Cas. Co. v. Washington Hosp. Ctr. Corp.*, 758 F.3d 378, 383–84 (D.C. Cir. 2014) (citing *Travelers Indem. Co.* , 770 A.2d at 986) (internal quotation marks omitted).

[19] *Id.* at 383; *see also Beck v. Cont'l Cas. Co. (In re May*), 936 A.2d 747, 751 (D.C. 2007) (quoting *Tillery v. Dist. of Columbia Contract Appeals Bd.*, 912 A.2d 1169, 1176 (D.C. 2006)).

[20] *Travelers Indem.*, 770 A.2d at 986 (internal quotation omitted).

When considering the applicability of an exclusion, courts are "guided by the maxim that exclusions from coverage in an insurance policy will be construed narrowly."[21] An insurer that invokes an exclusion must establish that the exclusion is stated in clear language that applies to the particular case.[22] This burden flows from the insurer's duty as drafter of the agreement: It is "the insurer's duty to spell out in plainest terms – terms understandable to the man in the street – any exclusionary or delimiting policy provisions."[23]

ARGUMENT

I. GCDC Has Plausibly Pleaded Covered Losses Under the Spectrum Business Owner's Policy

Sentinel seeks dismissal because it contends that GCDC has failed to plead a covered loss. That argument cannot be squared with the coverage set forth in the Policy and the District's Public Health Orders that have given rise to the claimed losses. In particular, Sentinel misdirects the Court to an extension of coverage for civil authority while largely evading consideration of the Policy's grant of coverage for direct physical losses to the restaurant and its contents (including interruptions in business and the attendant loss of business income), which have been directly triggered by the District's Orders. Because GCDC has plausibly pleaded a loss that falls squarely within the insuring agreement in the Special Property Coverage Part and the Business Income from Dependent Properties Endorsement, dismissal is not warranted.

A. GCDC Has Experienced a Physical Loss that Triggers Coverage

The Policy at issue is an "all risk" commercial insurance policy that covers against all

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[21] *In re Estate of Corriea*, 719 A.2d 1234, 1243 (D.C. 1998).

[22] *Nationwide Mut. Fire Ins. Co. v. Wilbon*, 960 F. Supp. 2d 263, 267 (D.D.C. 2013); *Essex Ins. Co*, 674 F. Supp. 2d at 170 (citation omitted).

[23] *Travelers Indem.*, 770 A.2d at 986 (internal citation omitted).

risks that are not otherwise excluded or limited. Section A.1 of the Special Property Coverage Part of the Policy thus provides that Sentinel "will pay for direct physical loss of or physical damage to Covered Property . . . caused by or resulting from a Covered Cause of Loss" meaning, a loss that the Policy does not otherwise "specifically exclude[] or limit[ ]" Def.'s MTD, Ex. A at 32, 33 (Special Property Coverage Form Section A.; Coverage 1. Covered Property and 3. Covered Causes of Loss).

Owing to the disjunctive "or," which "connects [phrases that] are to 'be given separate meanings,'"[24] courts interpret the phrase "direct physical loss of **or** physical damage to" in an insuring agreement to cover instances of physical loss of property *as well as* instances of physical damage to property.[25] Further, courts recognize that the condition "physical loss of property" is met when there is a loss of access, functionality, or use of property.[26]

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[24] *Cf. Pinson v. United States Dep't of Justice*, 964 F.3d 65, 69 (D.C. Cir. 2020) (quoting *United States v. Woods*, 571 U.S. 31, 45 (2013)) (interpreting a statute).

[25] *See, e.g.*, *Nautilus Grp., Inc. v. Allianz Glob. Risks US*, No. C11-5281BHS, 2012 WL 760940, at *7 (W.D. Wash. Mar. 8, 2012) ("[I]f 'physical loss' was interpreted to mean 'damage,' then one or the other would be superfluous. The fact that they are both included in the grant of coverage evidences an understanding that physical loss means something other than damage."); *Total Intermodal Servs. Inc. v. Travelers Prop. Cas. Co. of Am.*, No. CV 17-04908AB (KSx), 2018 WL 3829767, at *3 (C.D. Cal. July 11, 2018) ("[T]o interpret 'physical loss of' as requiring 'damage to' would render meaningless the 'or damage to' portion of the same clause, thereby violating a black-letter canon of contract interpretation—that every word be given a meaning.").

[26] *See Intermetal Mexicana, S.A. v. Ins. Co. of N. Am.*, 866 F.2d 71, 76 (3d Cir. 1989) (claim fell within the plain meaning of "loss," where insured lost possession and control of equipment when it was seized by insured's investor pursuant to court order); *Total Intermodal*, 2018 WL 3829767, at *3 (property that was loaded onto a ship in California and became unrecoverable from China qualifies as physical loss); *Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am.*, No. 2:12-cv-04418 (WHW)(CLW), 2014 WL 6675934, at *5 (D.N.J. Nov. 25, 2014) ("[P]roperty can be physically damaged, without undergoing structural alteration, when it loses its essential functionality."); *Nautilus*, 2012 WL 760940, at *7 (theft of covered personal property qualifies as physical loss); *Travco Ins. Co. v. Ward*, 715 F. Supp. 2d 699, 708 (E.D. Va. 2010) (physical damage to property is not necessary to trigger coverage for direct physical loss of property); *Manpower Inc. v. Ins. Co. of Pa.*, No. 08C0085, 2009 WL 3738099, at *5-7 (E.D.

Consistent with this plain reading of the Policy, GCDC alleges that the District's Public Health Orders made its property unavailable to be occupied or operated as a dine-in restaurant, which is the property's main function. To the extent Sentinel maintains that the District's Public Health Orders did not end dine-in service or otherwise interrupt GCDC's business, *see* MTD at 12-13 (ECF No. 9-1), that argument misconstrues the District's orders, which (as alleged) plainly forced the restaurant to close to dine-in customers. (Compl. ¶¶ 31-32). This Court is bound to accept all reasonable inferences that may be drawn from such orders and their effect on GCDC.[27] The Policy, moreover, was issued to GCDC to cover its operations as a sit-down, full service restaurant – not as a storage facility or a commercial kitchen. Def.'s MTD Ex. A at 14 (Declarations, Description of Business) (ECF No. 9-2) (Spectrum Policy Declarations at 14, describing insured as "Restaurant – Full Service (Waiter/Waitress)"). Such allegations suffice to

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Wis. Nov. 3, 2009) (inaccessibility of personal property is a physical loss); *Great N. Ins. Co. v. Dayco Corp.*, 620 F. Supp. 346, 351 (S.D.N.Y. 1985) (finding a "direct physical loss ... to property" because the insured "physically lost the goods in that it no longer has control over them and has received no compensation"); *Universal Sav. Bank v. Bankers Standard Ins. Co.*, No. B159239, 2004 WL 515952, at *6 (Cal. Ct. App. Mar. 17, 2004) ("The plain meaning of 'direct physical loss' encompasses physical displacement or loss of physical possession. That the loss must be 'physical' distinguishes the loss from some other, incorporeal loss."), *vacated on other grounds*, No. B159239, 2004 WL 3016644 (Cal. Ct. App. Dec. 30, 2004); *Gen. Mills, Inc. v. Gold Medal Ins. Co.*, 622 N.W.2d 147, 152 (Minn. Ct. App. 2001) (direct physical loss occurred where business was unable to lawfully distribute product because of federal regulation); *Dundee Mut. Ins. Co. v. Marifjeren*, 587 N.W.2d 191, 194 (N.D. 1998) (coverage applied without physical alteration because the covered properties "no longer performed the function for which they were designed"); *Murray v. State Farm Fire & Cas. Co.*, 509 S.E.2d 1, 17 (W.Va. 1998) (losses that rendered insured property "unusable or uninhabitable, may exist in the absence of structural damage to the insured property."); *W. Fire Ins. Co. v. First Presbyterian Church*, 437 P.2d 52, 55 (Colo. 1968) (finding a "direct physical loss within the meaning of that phrase" when gasoline saturated under and around a church, rendering occupancy unsafe).

[27] *See Bowman v. Iddon*, 848 F.3d 1034, 1039 (D.C. Cir. 2017) ("When considering a Rule 12(b)(6) motion, we accept as true all of the factual allegations contained in the complaint and draw all inferences in favor of the nonmoving party." (quotation marks and brackets omitted) (quoting *Autor v. Pritzker*, 740 F.3d 176, 179 (D.C. Cir. 2014))).

establish, at the pleadings stage, a direct physical loss of GCDC's insured property under Policy's Special Property Coverage Part.[28] Likewise, GCDC's loss of functionality of its restaurant (per the District's Public Health Orders) triggers coverage for the "actual loss of Business Income [GCDC] sustain[ed] due to the necessary suspension of [its] 'operations'" because that loss is caused by a direct physical loss of the insured property.[29]

Sentinel did not argue in its opening brief that GCDC has not experienced a direct physical loss within the meaning of Section A.1 of the Policy. Sentinel may attempt to do so now, relying on a recent opinion issued by the Superior Court in *Rose's 1, LLC v. Erie Insurance Exchange*, Civil Case No. 2020 CA 002424 B (Aug. 6, 2020), attached hereto as Exhibit B. This opinion is not binding here and is of limited persuasive authority because it involves different facts (a policy issued by another carrier) and a different procedural posture (plaintiff's request for summary judgment). Moreover, the Superior Court's reasoning should not be applied here because doing so would impose a requirement on GCDC that plainly does not exist under the Policy.

The Superior Court acknowledged that no D.C. precedent directly addressed the issue of whether "direct physical loss" requires physical damage to the insured property. Ex. B, *Rose's 1 LLC* at 8. Where no District of Columbia authority exists, D.C. courts typically look to Maryland first[30] – where instructive authority on Maryland insurance law principles exists. In *National Ink*

[28] *See* Def.'s MTD, Ex. A at 32, 33 (Special Property Coverage Form Section A.; Coverage 1. Covered Property and 3. Covered Causes of Loss).

[29] *See id*. at 41 (Special Property Coverage Form Section A.; Coverage 5. Additional Coverages; o. Business Income and p. Extra Expense).

[30] "[I]n the absence of applicable District of Columbia common law precedent, District of Columbia courts look to Maryland common law as the most authoritative source." *Burk &*

and Stitch LLC v. State Auto Property and Casualty Insurance Company, 435 F. Supp. 3d 679 (D. Md. 2020), the federal district court for Maryland determined that a business was entitled to the replacement cost of its computer server and networked computers after a ransomware attack because protective countermeasures that were subsequently put in place "slowed the system and resulted in a loss of efficiency." *Id.* at 680. The court held, separate from the physical damage asserted (the possibility that remnants of the ransomware might be dormant in the system), that a "loss of use, loss of reliability, or impaired functionality demonstrate the required damage to a computer system, consistent with the 'physical loss or damage to' language in the [business owner's] Policy." *Id.* at 686.

The Superior Court in *Rose's 1*, however, decided that an Erie insurance contract required physical damage, relying on the conclusions of the D.C. Court of Appeals regarding "direct loss" in *Brothers, Inc. v. Liberty Mutual Fire Insurance Company*, 268 A.2d 611 (D.C. 1970). But the *Brothers* case has no application here because the insurance policy disputed in *Brothers* explicitly limited business interruption coverage to "loss resulting directly from necessary interruption of business *caused by damage to or destruction of real or personal property* by the peril(s) insured against . . . on premises occupied by the Insured. . . ." *Brothers*, 268 A.2d at 613 (quoting policy, emphasis added).[31]

Furthermore, the Superior Court in *Rose's 1* concluded that Mayor Bowser's orders had

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Reedy, LLP v. Am. Guar. & Liab. Ins. Co., 89 F. Supp. 3d 1, 10 (D.D.C. 2015) (citations omitted).

[31] *Brothers* also upheld the denial of insurance benefits under a second provision that promised compensation for losses caused directly by "riot or civil commotion" finding that the provision did not specifically provide coverage for business interruption loss and therefore should not be extended by the court to cover a "fall-off" loss in business caused by a civil curfew that followed widespread riots. 268 A.2d at 613.

not caused a direct physical loss. Here, too, the court imposed a requirement of physical damage, reasoning that "the orders did not effect any direct changes to the properties" and made no "direct physical intrusion on to the insured property." Ex. B, *Roses's 1 LLC* at 4-5. As explained above, there are numerous opinions from across the country holding that loss of use and functionality is a form of physical loss. The U.S. District Court for the Western District of Missouri recently reached the opposite conclusion, holding that "physical loss" was a covered risk distinct from "physical damage" and that closure orders suspending business operations in Missouri and Kansas could support a claim for physical loss without causing a physical alteration of the insured properties.[32] Respectfully, Plaintiff submits that such holdings also align with reasonable consumer expectations.

B. The Broad Coverage for Physical Loss of the Insured's Premises Is Not Made Smaller by An Extension of Coverage for Losses Caused by Events at Neighboring Properties

Sentinel resists a straightforward reading of the Policy and instead contends that language in a different provision of the Policy that *extends* business income and extra expense coverage should be read to *limit* the main grant of coverage for business income and extra expense that precedes the extension. Def.'s MTD at 11–14. This argument rests on language in the Policy that extends the policyholder's coverage when access to the insured property is prohibited by a civil authority order arising from loss of or damage to a neighboring property or property in close proximity to the insured property. According to Sentinel, if coverage is not available under the

[32] See *Studio 417, Inc. v. The Cincinnati Ins. Co.*, Case No. 20-cv-03127-SRB, 2020 WL 4692385, at *6–7 (W.D. Mo. Aug. 12, 2020), at 12–14 (discussing closure orders as adequate support for physical loss on insured premises triggering business income coverage as well as extended civil authority coverage and dependent property coverage). The *Studio 417* plaintiffs additionally alleged coronavirus contamination on their premises, *id.* at *2, which Cincinnati Insurance disputed, *id.* at *6 n.6. But as explained below, GCDC has not alleged any physical contamination.

civil authority *extension* for losses stemming from the Public Health Orders, then a civil authority order cannot give rise to covered losses under any other provision in the Policy.

Sentinel has conflated business income coverage with the civil authority coverage extension when, in fact, they are independent bases for coverage. The civil authority coverage extension in Section A.5.q does not reduce or replace the principal insuring agreement provided in the Special Property Coverage Part Section A.1 and Business Income Sections A.5.o, A.5.p. and A.5.r; rather, it *extends* coverage to situations where access to an insured location is prohibited not because of a covered cause of loss originating on its own property, but as the result of a covered cause of loss originating at a nearby property.[33] A coverage extension "gives additional coverage not available elsewhere under the Policy. . . " but it "does not limit coverage otherwise available[.]"[34] Put another way, business income insurance helps replace lost business income resulting from a covered cause of loss to the insured property, and the civil authority extension of coverage helps replace lost business income resulting from being forced to close the insured premises by a civil authority (state, federal or municipal) because of a covered cause of loss to property *near* the insured premises.

The business income coverage pays for the actual loss of business income due to the

[33] *See* Def.'s MTD, Ex. A at 42 (Special Property Coverage Form Section A.; Coverage 5. Additional Coverages; q. Civil Authority).

[34] *Sierra Pac. Power Co. v. Hartford Steam Boiler Inspection & Ins. Co.*, 665 F.3d 1166, 1173 (9th Cir. 2012) (emphasis in original). Sentinel relies upon *Prime Alliance Grp., Ltd. v. Hartford Fire Ins. Co.*, No. 06-22535-CIV-UNGARO, 2007 WL 9703576 (S.D. Fla. Oct. 19, 2007), in support of its view that a coverage extension limits liability under the Policy. But that question was not presented in *Prime Alliance*. There, the legal issue was the determination of the proper deductible to apply when an impending hurricane led to an evacuation order by civil authorities in Miami, which prohibited access to the plaintiff's club for four days. 2007 WL 9703576 at * 1.The insurer in *Prime Alliance* accepted the insured's claim for coverage, even though there was no physical damage to the insured's property.

necessary suspension of operations because of a direct physical loss of or damage to insured property caused by a covered cause of loss. GCDC has plausibly alleged that it has business income losses, caused by the Public Health Orders which applied directly to GCDC's premises and business and required suspension of operations, resulting in the direct physical loss of its covered property. It need not invoke the civil authority extension to establish coverage under the Policy, and that extension may not be read to limit the coverage available to GCDC under the Special Property and Business income provisions. Plaintiff's reading of the Policy, moreover, does not render any aspect of it wholly superfluous. Quite the opposite, Plaintiff's reading gives both the coverage extension (it applies when neighboring real property, as opposed to insured property, is lost or damaged) and the initial grant of coverage (it applies when the insured property is lost or damaged, regardless of damage to neighboring property) their due. Similar situations have resulted in courts finding coverage.[35]

If any reading creates superfluity, it is Sentinel's. Its suggestion that this extension should be understood to override the initial grant of coverage when there is loss of or damage to neighboring property *and* to the insured's property is not supported by any policy language and would render the initial grant of coverage (and its more fulsome benefits as compared to the limited benefits available under this extension) superfluous. Sentinel's reading of the Policy should thus be rejected. But even if Sentinel's reading could be credited, that would at most mean there are competing readings that each occasion their own superfluity, and in such a case,

[35] *See, e.g.*, *Assurance Co. of Am. v. BBB Serv. Co.*, 593 S.E.2d 7, 8 (Ga. Ct. App. 2003) (evacuation order issued as the result of damaging effects of a hurricane in another area satisfied the requirement for physical loss of or damage in a business interruption clause); *By Development, Inc. v. United Fire & Cas. Co.*, 2006 WL 694991, at *5 (D.S.D. March 14, 2006) (evacuation ordered due to a fast spreading wildfire satisfied the damage trigger required in the policy to activate coverage for business income losses).

the construction will favor the non-drafting party, which is GCDC.[36] Regardless, the Court cannot resolve such ambiguity on the pleadings.[37]

A plaintiff resisting a motion to dismiss need not "establish" anything, but need only to plead facts that could "plausibly" establish the elements of the claims for relief.[38] GCDC has plausibly pleaded that its loss of the use of its restaurant for dine-in services constituted a "direct physical loss of" its covered property under the Policy and District law. Therefore, its claims should be allowed to proceed.

II. The Virus Endorsement Provides No Basis for Denial of Coverage

Sentinel urges the Court to dismiss GCDC's case, in its entirety, on the basis of a contract provision that Sentinel asserts plainly wipes out almost any claim to any insurance coverage where a virus is involved. Sentinel refers to this provision as a "Virus Exclusion," but that is not actually how it is presented in the Policy.

The Policy includes an endorsement – a freestanding amendment appended onto the main policy parts – labeled "Limited Fungi, Bacteria or Virus Coverage" (hereinafter, "Virus Endorsement"). Def.'s MTD, Ex. A at 134-136 (Limited Fungi, Bacteria or Virus Coverage section, all paragraphs). This three-page endorsement purports to cover particular types of

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[36] *Fid. & Deposit Co. of Md. v. President & Directors of Georgetown Coll.*, 483 F. Supp. 1142, 1146 (D.D.C. 1980) (An ambiguous contract "should be construed less favorably to that party which selected the contractual language." (quoting *United States v. Seckinger*, 397 U.S. 203, 216 (1970))). "This canon of construction has been vigorously applied in insurance cases." *Id.* (citing *Imperial Ins., Inc. v. Emp'rs Liab. Assurance Co.*, 442 F.2d 1197, 1199 (D.C. Cir. 1970)).

[37] *See Carlyle Inv. Mgmt. LLC v. Ace Am. Ins. Co.*, 131 A.3d 886, 895 (D.C. 2016). ("If the provisions of the contract are ambiguous, the correct interpretation becomes a question for a factfinder.") (alterations and internal quotation marks omitted).

[38] *Tennant v. District of Columbia*, No. CV 19-2949 (BAH), 2020 WL 4464505, at *8 (D.D.C. Aug. 3, 2020); *Iqbal*, 556 U.S. at 678.

property loss and damage "by" fungi, wet rot, dry rot, bacteria and virus under certain circumstances *id.* at 135 (Section B.1.b; Limited Coverage For "Fungi", Wet Rot, Dry Rot, Bacteria and Virus"), while generally excluding loss or damage caused directly or indirectly by the "presence, growth, proliferation, spread or any activity of fungi, wet rot, dry rot, bacteria or virus," *id.* at 134 (Section A.2.1 ("Virus Exclusions")).

As a matter of black letter insurance contract interpretation, the exclusionary language cannot be construed as broadly as Sentinel requests. Exclusions from coverage are narrowly construed,[39] and the terms of the Virus Endorsement – both by themselves and read as a whole – demonstrate that there is no exclusion of coverage based on the facts presented here. To the extent that Sentinel disputes GCDC's interpretation of the Virus Endorsement, a genuine and material factual dispute exists. If necessary, deeper into the litigation, GCDC intends to introduce evidence showing that the exclusion in the Virus Endorsement relates solely to on-site contamination; where discovery must be conducted and evidence is needed, a determination on the pleadings would be improper.[40] Relatedly, if Sentinel's interpretation is accepted and is determined to exclude coverage in circumstances like the current ones, GCDC would argue that the exclusionary provision should not be enforced because the Virus Endorsement provides only illusory coverage while gutting significant coverages promised elsewhere in the Policy.

A. The Text of the Virus Endorsement, Read as a Whole, Makes Plain that the Limited Coverage and Exclusions Relate to Contamination on the Insured Property

Analysis of an insurance contract begins with an examination of its terms. *See Carlyle,*

[39] *In re Estate of Corriea*, 719 A.2d 1234, 1243 (D.C. 1998).

[40] *Highlands Ins. Co. v. Celotex Corp.*, 743 F. Supp. 28 (D.D.C. 1990) (denying summary judgment for insurers because of a genuine dispute of material fact as to the intent of the parties with respect to scope of the policies' asbestos exclusions).

131 A.3d at 894–95. Matched against the precise wording of the relevant provision, Sentinel's argument fails. Sentinel argues, "the Virus Exclusion applies so long as 'virus' is a direct or indirect cause of the loss." MTD at 13. But that is not what the contract says. The contract says:

> We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss:
>
> (1) Presence, growth, proliferation, spread or any activity of "fungi", wet rot, dry rot, bacteria or virus.

Def.'s MTD, Ex. A at 134 (Virus Endorsement, Section A.2.1 ("Exclusions").The exclusionary language, on its face, is limited to losses or damage caused directly or indirectly by "[p]resence, growth, proliferation, spread or any activity of . . . virus." Each of these terms refers to activities that occur in a given place. For example, "[p]resence" is "[t]he quality, state, or condition of being *in a particular time and place*, particularly with reference to *some act that was done then and there*." Presence, Black's Law Dictionary (11th ed. 2019). Similarly, "growth," "proliferation," and "spread" are all spatial terms, describing activities that occur in a given place. *See, e.g.*, Spread, Merriam-Webster Dictionary Online, https://www.merriam-webster.com/dictionary/spread (last visited Aug. 13, 2020) ("to extend the *range* or incidence of" (emphasis added)).[41] Thus, the Virus Exclusions apply when a virus *has contaminated the covered property*—i.*e*., it is present, growing, proliferating, spreading, or active there.

The grant of limited coverage under the Virus Endorsement further demonstrates that the

[41] These terms should be read together rather than in isolation. *See Richardson*, 826 A.2d at 325 n.23 ("Our dissenting colleague correctly notes that carbon monoxide may fairly be considered a 'fume.' But where 'fumes' is one of eight terms, all of which bring to mind waste dumps and industrial pollution, the notion that the exclusion was intended to include carbon monoxide emanating from a furnace in an apartment building becomes, at least, a good deal less than certain.").

covered property, GCDC's restaurant, has to actually be contaminated with the virus for the Virus Endorsement to be triggered. Section B of the Endorsement states:

> We will pay for loss or damage by "fungi", wet rot, dry rot, bacteria and virus. As used in this Limited Coverage, the term loss or damage means:
>
> (1) *Direct physical loss or direct physical damage* to Covered Property caused by "fungi", wet rot, dry rot, bacteria or virus, *including the cost of removal* of the "fungi", wet rot, dry rot, bacteria or virus;
>
> (2) *The cost to tear out and replace* any part of the building or other property as needed to gain access to the "fungi", wet rot, dry rot, bacteria or virus; and
>
> (3) *The cost of testing* performed after removal, repair, replacement or restoration of the damaged property is completed, provided there is a reason to believe that "fungi", wet rot, dry rot, bacteria or virus *are present*.

Def.'s MTD, Ex. A at 135 (Virus Endorsement, Section B.1.b(1)-(3) ("Limited Coverage") (emphasis added). The types of "loss or damage" contemplated in this section all result from the presence, growth, proliferation, spread, or activity of a virus *physically located at the covered property*. The covered losses set forth here are losses to tear out and replace any part of the insured property necessary to gain access to the virus, the costs of removing the virus, and the costs of testing after the removal of the virus. Additionally, sub-paragraph 3's use of the term "present" clearly refers to presence at the covered property.[42] This reading is also consistent with the cases cited by Sentinel, where exclusions were triggered by the physical contamination of covered property or infection of a person.[43]

[42] "Generally, a word used by the parties in one sense will be given the same meaning throughout the contract in the absence of countervailing reasons." 11 Williston on Contracts § 32:6 (4th ed., May 2020 update).

[43] See MTD at 9–10, relying on the following cases: *Sentinel Ins. Co., Ltd. v. Monarch Med. Spa, Inc.*, 105 F. Supp. 3d 464, 467–70, 472 (E.D. Pa. 2015) (exclusion for "[i]njury or

Sentinel glosses over the explicit language defining the Virus Exclusions – "presence, growth, proliferation, spread or any activity" – suggesting that this qualifying language is equivalent to "losses caused by a virus." MTD at 5. But those phrases are not equivalent. To read "caused . . . by [p]resence, growth, proliferation, spread or any activity of . . . virus" as equivalent to "caused by a virus" is to transgress well-established principles of contract interpretation. "[E]very provision of an insurance contract is to be given effect, if possible, and no word or clause eliminated as meaningless, or disregarded as inoperative, if any reasonable meaning consistent with other parts of policy can be given to it."[44] As a corollary, contracts must be read, if possible, to avoid surplusage.[45] Additionally, exclusions must be "strictly construed," *Carlyle*, 131 A.3d at 896 (citation omitted), and evaluated "in light of the whole policy to determine whether, in that context, the exclusion applies," *Richardson*, 826 A.2d at 314 (citation omitted). Sentinel's attempt to excise the words "[p]resence, growth, proliferation, spread or any activity of" does not comport with these canons.

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damage arising out of or related to the presence of, suspected presence of, or exposure to . . . . [b]acteria" applied when client-patients were infected by bacteria); *Alea London Ltd. v. Rudley*, 2004 WL 1563002, at *1–3 (E.D. Pa. July 13, 2004) (exclusion for "Bodily Injury, Property Damage, Personal Injury, Advertising Injury or Medical Payments directly or indirectly relating to the actual, potential, alleged or threatened presence of mold" applied when apartments became contaminated by mold); *Lambi v. Am. Mut. Ins. Co.*, 2012 WL 2049915, at *1–2, 4–5 (W.D. Mo. June 6, 2012) (exclusion for "bodily injury arising out of the actual or alleged transmission of a communicable disease" applied when person transmitted HIV); *Michigan Battery Equip., Inc. v. Emcasco Ins. Co.*, 892 N.W.2d 456, 458–59 (Mich. Ct. App. 2016) (exclusion for "loss or damage caused directly or indirectly by . . . [p]resence, growth, proliferation, spread or any activity of 'fungus', wet or dry rot or bacteria" applied when wet rot damaged roof).

[44] 2 Steven Plitt et al., Couch on Insurance § 21:17 (3d ed. June 2020 update); *accord District of Columbia v. Young*, 39 A.3d 36, 40 (D.C. 2012) (citing *Caglioti v. Dist. Hosp. Partners, LP*, 933 A.2d 800, 811 (D.C. 2007)); *Malik Corp. v. Tenacity Grp., LLC*, 961 A.2d 1057, 1060–61 (D.C. 2008).

[45] *Katopothis v. Windsor-Mount Joy Mut. Ins. Co.*, 211 F. Supp. 3d 1, 15 (D.D.C. 2016), *aff'd*, 905 F.3d 661 (D.C. Cir. 2018).

Had Sentinel intended to exclude risks associated with a global pandemic, or the types of public health countermeasures that might be necessary to protect critical infrastructure under pandemic conditions – as opposed to contamination of property – Sentinel could have referred explicitly to these risks as it did for other risks. The Policy refers to numerous other natural and man-made catastrophes by name. Def.'s MTD, Ex. A at 47 (excluding, *inter alia*, "Earthquake," at B.1.a.(1), "Landslide," at B.1.a.(2), "Mine subsidence," at B.1.a.(3), "Volcanic Eruption," at B.1.a.(5), "Nuclear reaction or radiation," at B.1.c, "Insurrection, rebellion, revolution, [or] usurped power," at B.1.e.(3), and "Flood," at B.1.f.(1)). Making provision for a pandemic was within Sentinel's capability and would have been consistent with its legal obligations as the drafter possessing superior knowledge of potential underwriting risks. Additionally, Plaintiff intends to prove during the merits portion of this litigation that carriers like Sentinel not only knew that this type of pandemic with widespread closures was a likely possibility, but that business income coverage as written would likely result in the avalanche of claims that the carriers now face. Nevertheless, Sentinel chose not to exclude such risks by name. That it did not do so is telling.

Should Sentinel contend, later in the litigation, that its interpretation of the Virus Endorsement controls, Plaintiff will have the opportunity to produce this and other evidence to the contrary. For example, the denial letter sent by Sentinel to GCDC on March 25, 2020 shows a clear understanding by Sentinel that the exclusionary language is tied to the presence, growth, proliferation, spread, or activity of a virus.

The history of the Virus Endorsement further demonstrates that it was intended to apply

only to a virus that has contaminated a covered property.[46] A generic endorsement excluding coverage for fungi, bacteria, and viruses was first submitted to state regulators for approval by the Insurance Services Office, Inc. ("ISO") in 2006, in the wake of the global SARS outbreak.[47] The accompanying ISO Circular explaining the proposed policy language as it was presented to regulators is instructive; it describes the proposed virus endorsement as a measure to address risks of contamination:

> The current pollution exclusion in property policies encompasses contamination (in fact, uses the term *contaminant* in addition to other terminology). Although the pollution exclusion addresses contamination broadly, viral and bacterial contamination are specific types that appear to warrant particular attention at this point in time.
>
> . . . .
>
> [W]e are presenting an exclusion relating to contamination by disease-causing viruses or bacteria or other disease-causing microorganisms.

Id. at 9–10 (emphasis in original). The ISO Circular also provided examples of claims that the Virus Endorsement was designed to address. These claims all involve bacterial or viral contamination of real and personal property at the insured premises, including "the growth of listeria bacteria in milk" and "viral and bacterial contaminants [like] rotavirus, SARS, influenza (such as avian flu), legionella and anthrax." *Id.* at 5. In describing the kinds of losses that might result from such harms, the ISO Circular explains,

> Disease-causing agents may render a product impure (change its

[46] D.C. courts look to the history of an insurance policy provision if doing so will aid in interpretation. *See Richardson*, 826 A.2d at 314–16, 321–24, 331–33.

[47] *See* ISO Circular LI-CF-2006-175, *New Endorsements Filed to Address Exclusion of Loss Due to Virus or Bacteria* (July 6, 2006), https://www.propertyinsurancecoveragelaw.com/files/2020/03/ISO-Circular-LI-CF-2006-175-Virus.pdf.

> quality or substance), or enable the spread of disease by their presence on interior building surfaces or the surfaces of personal property. When disease-causing viral or bacterial contamination occurs, potential claims involve the cost of replacement of property (for example, the milk), cost of decontamination (for example, interior building surfaces), and business interruption (time element) losses.

Id.

But on the present preliminary motion, Plaintiff is not required to adduce evidence, nor can evidence be weighed. Because Plaintiff proposes a reasonable reading of the Virus Endorsement, that reading controls.[48] Any doubt, at this point in the litigation, as to whether and how the Virus Endorsement applies in these circumstances must be resolved in Plaintiff's favor.[49]

B. Even Under Sentinel's Expansive Construction of the Virus Exclusions, Plaintiff's Loss Was Not Caused by a Virus

Even if the Court were to accept Sentinel's interpretation of the Virus Endorsement, the exclusionary language therein still does not serve to exclude GCDC's claims. Plaintiff's business income losses are the direct result of the Public Health Orders detailed in the Complaint, not by COVID-19. The Complaint summarizes the various ways in which GCDC's access to and use of its physical premises were restricted by the Orders. Compl.. ¶¶ 21–27.[50]

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[48] *Richardson*, 826 A.2d at 324.

[49] *Chase*, 780 A.2d at 1127.

[50] The Superior Court deciding *Rose's 1 LLC* concluded that the District's Orders did not cause a *direct* loss to Rose's Luxury. Instead, the court attributes plaintiff's losses to unexplained and unidentified (by the court) "intervening actions by individuals and businesses." Ex. B, *Rose's 1 LLC* at 4-5. The only reasonable inference from the court's conclusion is that the court viewed the restaurant's *compliance* with the Orders as the intervening action. Respectfully, Plaintiff submits that this conclusion is founded on erroneous logic that would encourage disobedience to Public Health Orders like the ones currently in force.

These Orders, moreover, were not "caused by" coronavirus; they are public health countermeasures – interventions – intended to ameliorate the stress on our social and economic infrastructure. Standard definitions of the verb "cause" are "[t]o bring about or effect." Cause, Black's Law Dictionary (11th ed. 2019). The Complaint states,

> Throughout March and April, the District of Columbia, through the Office of the Mayor Muriel Bowser, issued a series of orders ("Public Health Orders") placing increasingly stringent limitations on public activities and private gatherings to force social distancing. *In order to comply with these orders, many D.C. businesses, including the businesses in the immediate area of GCDC, were forced to abandon their property and suspend ordinary business activities*.

Compl. ¶ 20 (emphasis added). These Public Health Orders were not implemented to prevent the contamination of GCDC's premises with coronavirus. They were implemented to slow infection rates among the populace and slow the pandemic to lessen the burden on health care services and critical infrastructure in the District of Columbia and the greater metropolitan area so that these systems would not be overwhelmed. By mid-March, experts and commentators had concluded, "our hope of stopping the disease in its tracks has ended. Our main goal now is to prevent a huge spike in cases, or 'flatten the curve.'"[51] "Flattening the curve" was a strategy implemented not in response to the virus itself, but rather in response to the limits of the health care system. As explained at the time Public Health Orders were first issued, Mayor Bowser explained:

> In epidemiology, the concept of slowing a virus's spread so that fewer people need to seek treatment at any given time is known as "flattening the curve." The faster and the more sharply the infection curve rises, the more quickly Washington, DC's health care system will be stressed, to the point that it may become overloaded beyond its capacity to treat severely sick patients. *"Flattening the curve" is not expected to greatly reduce the total*

[51] Sean Illing, *How Bad Could the Coronavirus Get in the US? I Asked an Expert*, Vox (Mar. 12, 2020), https://www.vox.com/2020/3/12/21171505/coronavirus-covid-19-outbreak-containment.

> *number of people that will become infected with COVID-19, but those infections will take place over a longer period of time, which will result in a less stressed health care system, and in turn, better patient outcomes.*[52]

Sentinel has not disputed that the Public Health Orders caused Plaintiff's loss. MTD at 7–8. Instead, it argues that COVID-19 caused the Public Health Orders to be issued, and for that reason, COVID-19 caused the Plaintiff's loss. Sentinel's speculations are not well-received for two reasons.

First, Sentinel's conclusions about the District's motives in issuing the Public Health Orders are contradicted by the explicit language in the Orders. Nor do Sentinel's conclusions align with a long history of viral and bacterial outbreaks in the DC-Metro region, including norovirus, influenza, and bacterial meningitis. These germs can be highly contagious and cause disability and death, but none of these communicable disease outbreaks caused the District to issue an order effectively shutting down all businesses and prohibiting large gatherings. If Sentinel pursues its theory of causation deeper into the litigation, GCDC intends to prove that its loss of business income is the direct result of the Public Health Orders, which are a covered cause of loss under the Policy. The Public Health Orders, the evidence will show, were entered as a pandemic response measure designed to preserve the ability of the healthcare system to care for the sick without becoming overwhelmed. The evidence will show that the Public Health Orders were definitely not entered as the result of the presence of COVID-19 at the insured premises.

Second, if GCDC had closed because of the presence of virus, or because an employee fell ill with COVID-19, it would have closed for a day or two at most. The CDC provides

[52] Mayor's Order 2020-053 at 2 (Mar. 24, 2020) (emphasis added), https://tinyurl.com/yy7v2zky.

instructions for cleaning and disinfecting a business facility if someone becomes ill with COVID-19, and one of the first things they advise is that "companies do not necessarily need to close operations, if they can close off affected areas."[53] At most, the guidance suggests waiting 24 hours before disinfecting; it provides a list of approved cleaners and provides that after an "area has been appropriately disinfected, it can be opened for use." *Id.* But GCDC's losses are different in character and duration. In complying with the Public Health Orders, GCDC experienced months of losses.

Because Public Health Orders, not COVID-19 or coronavirus contamination, caused Plaintiff's loss, that loss is not excluded – even under Sentinel's flawed interpretation of the exclusionary provision.[54] Because Plaintiff has presented a logical, factually-supported explanation that can be inferred from the Public Health Orders cited in the Complaint, Defendant's contentions will have to wait for another day. The question of causation is one for the fact-finder.[55] Therefore, on a 12(b)(6) motion, the Court must accept as true Plaintiff's plausible allegations regarding causation.[56]

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[53] Centers for Disease Control and Prevention, *Disinfecting Your Facility*, https://www.cdc.gov/coronavirus/2019-ncov/community/disinfecting-building-facility.html (last visited Aug. 13, 2020).

[54] Sentinel cited the recent oral opinion in *Gavrilides Mgmt. Co. vs. Michigan Ins. Co.*, Case No. 20-258-CB-C30 (Mich. Cir. Ct., Ingham Cty.), available at https://www.youtube.com/watch?v=Dsy4pA5NoPw (last visited Aug. 14, 2020). That opinion is based on Michigan law. Moreover, while *Gavrilides* found that a virus exclusion applied, it did not address the questions at issue in this case.

[55] 7 Couch on Insurance § 101:59; *cf. Folks v. District of Columbia*, 93 A.3d 681, 684 (D.C. 2014) (causation in negligence action).

[56] *Iqbal*, 556 U.S. at 679.

C. The Question of Whether the Virus Endorsement is Unenforceable Because It Provides Illusory Coverage Cannot Be Decided on a Preliminary Motion Under Rule 12

Sentinel's motion is premised on the assumption that the Virus Endorsement is enforceable. Plaintiff does not agree – particularly if Sentinel's sweeping interpretation of the Endorsement is ultimately accepted by the fact-finder. If necessary deeper in the litigation, GCDC intends to show that any coverage for viruses under the Virus Endorsement is illusory and therefore unenforceable.

An insurer cannot purport to offer coverage and then virtually eliminate that coverage. "Illusory" coverage occurs where an insurance policy purports to provide coverage, but an exclusion or other provision of the policy renders that coverage "non-existent or de minimis."[57] As a matter of public policy, "the Court will decline to apply an exclusion that would make coverage illusory."[58] Insureds were provided with an endorsement purporting to *extend* coverage, and Sentinel now claims the same provision wipes out all possible coverage for GCDC. By contrast, the Policy explicitly labels other exclusions with titles like "Exclusion – Playground Facility" and "Exclusion – Nuclear Energy Liability." Def.'s MTD Ex. A at 152–54.

The coverage actually extended under the Virus Endorsement is so thin as to be *de minimis*. Coverage applies only when two separate conditions are met. First, fungus, wet or dry rot, bacteria, or virus must *result from* "[a] 'specified cause of loss' other than fire or lightning," or an "[a]ccident occur[ring] to Equipment Breakdown Property." *Id.* at 135 (Limited Coverage

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[57] *Chase*, 780 A.2d at 1131.

[58] *Rockhill Ins. Co. v. Hoffman-Madison Waterfront, LLC*, 417 F. Supp. 3d 50, 65–66 (D.D.C. 2019); *see also Chase*, 780 A.2d at 1131.

For "Fungi", Wet Rot, Dry Rot, Bacteria and Virus Section 1.a.(1)-(2)). A "specified cause of loss" means:

> Fire; lightning; explosion, windstorm or hail; smoke; aircraft or vehicles; riot or civil commotion; vandalism; leakage from fire extinguishing equipment; sinkhole collapse; volcanic action; falling objects; weight of snow, ice or sleet; water damage.

Id. at 56 (Special Property Coverage Form ¶19). Once the excluded specified causes of loss are stricken from the list, it is impossible to see how a virus might result from any of them other than water damage, which is itself a very restricted cause of loss.[59]

Second, coverage applies only if one of the following particular types of loss occurs:

> (1) Direct physical loss or direct physical damage to Covered Property caused by "fungi", wet rot, dry rot, bacteria or virus, including the cost of removal of the "fungi", wet rot, dry rot, bacteria or virus;
>
> (2) The cost to tear out and replace any part of the building or other property as needed to gain access to the "fungi", wet rot, dry rot, bacteria or virus; and
>
> (3) The cost of testing performed after removal, repair, replacement or restoration of the damaged property is completed, provided there is a reason to believe that "fungi", wet rot, dry rot, bacteria or virus are present.

Id. at 135 (Limited Coverage For "Fungi", Wet Rot, Dry Rot, Bacteria and Virus Section 1.b.(1)-(3). So the Virus Endorsement will extend coverage, but only if events like vandalism or volcanic action *cause* a virus to appear, and even then only for certain types of loss, all of which suggest that the virus must cause contamination that requires remediation of some sort.

[59] The Policy imposes many limitations on water damage. It does not cover flood waters from waves, tides, tidal waves, overflow of streams or any other bodies of water; mudslides and mudflows; sewer and drain back-ups; seepage coming through foundations, floors, walls, windows, and doors; or water damage caused by earthquakes and volcanic eruptions. Def.'s MTD, Ex. A at 47–48 (B. Exclusions 1.f Water (1) – (5)).

The mysteries of this limited coverage grant are compounded by an additional basis for coverage set forth in the exclusionary provision. Section A.2 of the Virus Endorsement carves out an exception to the exclusions: "But if fungi, dry rot, wet rot, bacteria or virus results in a 'specified cause of loss' to Covered Property, we will pay for the loss or damage caused by that 'specified cause of loss'." See Def.'s MTD, Ex. A at 134 (Limited Fungi, Bacteria or Virus Coverage Endorsement; A. Fungi, Bacteria or virus Exclusion, 2.i(2)) And so it appears that if a virus *causes* a volcanic eruption (or one of the other specified causes of loss) and that eruption (or specified cause of loss) in turn causes a loss or damage to the property, GCDC would be totally covered – within policy limits.[60] This complex set of conditions – in which a virus is the *result of* a specified cause of loss *and results in* a specified cause of loss – is impossible to understand. Indeed, the best explanation may be that Sentinel, under the guise of granting coverage, has successfully undone broad categories of coverage from the other 217 pages of the Policy.

Because the purported grant of coverage is so limited and the Endorsement so convoluted, the Court should not permit the Virus Endorsement to exclude coverage in this case without further examination of this Endorsement – beginning with discovery into Sentinel's practices of paying and denying claims made under this provision. Plaintiff could not find any case law reporting any instance in which a specified cause of loss, including water damage, caused a virus to contaminate an insured property.

CONCLUSION

For the foregoing reasons, Sentinel's Motion to Dismiss should be denied in its entirety.

[60] It is worth noting, however, that there are limits on coverage for volcanic eruptions, too. *See* Def.'s MTD, Ex. A at 47 (SPCP Section B.1.a.5 (Exclusions, Earth Movement, Volcanic Eruption)).

If, however, the Court grants the Motion (in whole or in part), Plaintiff respectfully requests leave to amend the Complaint.

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Respectfully submitted,

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