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, 1730 Pennsylvania Ave. NW Washington, D.C. 20006 Plaintiff, v. THE HARTFORD FINANCIAL SERVICES GROUP, INC., a corporation, and SENTINEL INSURANCE COMPANY, LTD., a corporation, One Hartford Plaza Hartford, CT 06155 Defendants.	Case No. 1:20-cv-01094-TJK [Oral Argument Requested]

REPLY IN SUPPORT OF SENTINEL INSURANCE COMPANY, LTD'S MOTION TO DISMISS

STEPTOE & JOHNSON LLP

Sarah D. Gordon (DC Bar No. 982563)
Frank Winston, Jr. (DC Bar No. 413858)
Conor P. Brady (DC Bar No. 1012275)
1330 Connecticut Avenue, NW
Washington, DC 20036

Anthony J. Anscombe (*pro hac vice* forthcoming)
227 West Monroe Street, Suite 4700
Chicago, IL 60606

Counsel for Sentinel Insurance Company, Ltd.

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I. INTRODUCTION

This is an insurance coverage action in which a restaurant, GCDC LLC dba GCDC Grilled Cheese Bar ("GCDC"), seeks coverage for alleged business income losses because of the novel coronavirus. But the losses are not covered. The property Policy at issue excludes losses caused directly or indirectly by a virus.

GCDC does not dispute that the coronavirus is a virus, *see, e.g.*, Compl. ¶ 14, 16, or that its losses were caused by the virus or governmental orders aimed at slowing the spread of the virus. *See, e.g.* Compl. ¶¶ 67, 14-20. That places GCDC's losses squarely within the Virus Exclusion. The Court's inquiry can end there. Indeed, at least two other courts have already decided virus exclusions preclude COVID-19 business income claims like those here.

Despite the fact that Sentinel Insurance Company, Ltd. ("Sentinel") moved to dismiss on the Virus Exclusion in its Policy, and despite the fact that the exclusion is dispositive, GCDC waits until the 24th page of its brief to address it. Dkt. No. 12 at 24.[1] GCDC claims the Virus Exclusion does not apply because (1) the coronavirus was not present on its premises, (2) the cause of its losses are the governmental orders aimed at slowing the spread of the virus, and not the virus itself, (3) the limited virus coverage is illusory, and (4) it is too early in the litigation to decide the applicability of the exclusion. None of those arguments has merit.

The plain terms of the Virus Exclusion foreclose GCDC's first and second arguments. The Virus Exclusion applies so long as the "[p]resence, ***growth, proliferation, spread or any activity*** of . . . virus" is a "direct or indirect" cause of the loss, "***regardless of any other cause or event*** that contributes concurrently or in any sequence to the loss." Dkt. No. 9-2 at 134 (emphasis added). "Presence" is just one of the activities of a virus listed that are excluded.

[1] Page citations correspond to ECF page numbers at the top of the page.

Indeed, the exclusion applies to "any activity" of a virus. Moreover, the exclusion applies so long as the virus is one cause of the loss; it need not be the sole cause of the loss. No one can reasonably dispute that the virus is at least *a* cause of GCDC's losses. Thus, even if the governmental orders were a covered cause of loss under the Policy (they are not), the losses still would be excluded because the coronavirus is one cause of the loss.

GCDC's argument that the limited virus coverage is somehow illusory fares no better. Setting aside the fact that GCDC never alleges the limited coverage applies here, and in fact expressly disavows the presence of the virus on its property, GCDC does not cite a single case where a court concluded the limited virus coverage is illusory or unenforceable. That is not surprising. Several courts have applied the limited coverage and at least one court has rejected the argument that the coverage is ambiguous or unenforceable.

While GCDC may want to take discovery and get "deeper into the litigation," *see* Dkt. No. 12 at 25, 33, 35, there is no need to waste party and judicial resources. The plain terms of the Policy preclude coverage. No amount of discovery will change that. Indeed, at least *five* courts—including a District of Columbia court—have decided without any discovery that COVID-19 business interruption claims are ***not*** covered by property insurance policies.

Those five courts—plus the Southern District of New York on preliminary injunction—decided that COVID-19 business income claims do not allege direct physical loss or damage under property policies. Thus, even if the Virus Exclusion did not apply here (it does), GCDC's claims would be barred for that reason too.

The District of Columbia decision from August 6, 2020 is instructive.[2] *See Rose's 1, LLC, v. Erie Ins. Exchange*, No. 2020 CA 002424 B (D.C. Sup. Ct. Aug. 6, 2020) (Dkt. No. 12-4). The alleged facts and law in *Rose's 1* were nearly identical to those here. *Rose's 1*, like this case, involved restaurants that claimed their property insurance policies covered losses arising from orders of the District of Columbia government aimed at slowing the spread of the coronavirus. The language of the insuring agreement there was materially the same (requiring direct physical loss or damage), the governing law (DC) was the same, the relevant governmental orders were the same (DC), the application to the particular type of business (restaurant) was the same, and the procedural posture of the case (no discovery) was the same. The court held that losses from the District's orders aimed at slowing COVID-19 did not constitute direct physical loss or damage. Thus, even if the Virus Exclusion did not bar GCDC's claims (it does), dismissal would still be appropriate.

For all of these reasons, there is no coverage and the Complaint should be dismissed in its entirety.

II. ARGUMENT

GCDC's claims fail for a myriad of reasons. But the Court need only address one: the Virus Exclusion. The Virus Exclusion bars all of GCDC's coronavirus losses. Nonetheless, were the Court to look beyond that, GCDC's claims still fail because GCDC cannot demonstrate direct physical loss or damage to property – a requirement for coverage under the Policy.

[2] The *Rose's 1* decision was issued after Sentinel filed its motion to dismiss. Because GCDC addresses it and other direct physical loss cases extensively in its opposition brief, Sentinel responds to those arguments in this reply. But the Court need not address them – the Virus Exclusion bars all coverage here.

A. The Virus Exclusion Applies to Bar Coverage

The Virus Exclusion provides that Sentinel "will not pay for loss or damage caused directly or indirectly by . . . [p]resence, growth, proliferation, spread or any activity of . . . virus." Dkt. No. 9-2 at 134. It also states that "[s]uch loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss." *Id.* GCDC's coronavirus losses fall squarely within the unambiguous language of this exclusion and, therefore, are not covered.

1. The Virus Exclusion is Not Limited to Instances Where the Virus is Present At the Insured Property

GCDC's first attempt to avoid the Virus Exclusion ignores and misconstrues the bulk of its terms. GCDC argues that, for the Virus Exclusion to apply, the virus must have actually been present at the insured property, *i.e.*, the GCDC restaurant. *See* Dkt. No. 12 at 25-31. But nothing in the Virus Exclusion limits its application only to circumstances where the virus is present on the premises; it broadly excludes losses caused directly or indirectly by the presence of a virus on or away from GCDC's premises. Further, the exclusion expressly applies not only to "[p]resence" of a virus, but also to "growth, proliferation, spread or any activity of" a virus. Dkt. No. 9-2 at 134.

The court in *Diesel Barbershop* rejected this exact argument two weeks ago. The plaintiffs there asserted "the Court should find that the Virus Exclusion does not apply because COVID-19 was not present at the Properties." *See Diesel Barbershop, LLC v. State Farm Lloyds*, No. 5:20-cv-461, 2020 WL 4724305, at *6 (W.D. Tex. Aug. 13, 2020) (no direct physical loss or damage and, in any event, virus exclusion would apply). The court disagreed. It concluded the virus exclusion applied, reasoning: "[I]t was the presence of COVID-19 in Bexar

County and in Texas that was the primary root cause of Plaintiffs' businesses temporarily closing." *Id.*

Here, the case is even stronger given the plain language of the Virus Exclusion. By its plain terms, the Virus Exclusion applies not only to "[p]resence" of a virus, but also "growth," "proliferation," "spread," or "any activity" of a virus.[3] Dkt. No. 9-2 at 134. And, it applies "whether or not the loss event results in widespread damage or affects a substantial area." *Id.* There is nothing in the exclusion's language that requires the virus to be present on the insured premises. To the contrary, the language makes clear that GCDC's virus-related losses are excluded.

That conclusion is bolstered by (1) the fact that the Virus Exclusion is added to Paragraph B.1 of the "Special Property Coverage Form" and (2) dictionary definitions GCDC chooses to ignore. On the first point, because the exclusion is added to the Special Property Coverage Form, it applies to all coverages requiring a Covered Cause of Loss, including "Civil Authority" coverage, which requires, among other things, that "property in the immediate area" experience a Covered Cause of Loss. That is, the Virus Exclusion applies to Civil Authority coverage which, by definition, involves direct physical loss or damage to property ***other than GCDC's***. Put differently, the fact that the Virus Exclusion applies to civil authority coverage demonstrates it does not require presence on GCDC's property because that coverage, by definition, involves direct physical loss to property other than GCDC's.

[3] GCDC suggests that, in its motion to dismiss, Sentinel "glosses over" and "attempt[s] to excise the words '[p]resence, growth, proliferation, spread or any activity of'" from the "explicit language defining the Virus Exclusion[.]" Dkt. No. 12 at 28. That is simply not true. In fact, Sentinel *emphasized* this exclusionary language throughout its motion to dismiss and demonstrated that GCDC's claimed losses, caused by the "spread" of the virus, are excluded. *See, e.g.*, Dkt. No. 9-1 at 3-4, 5, 9-10, 12-13.

Second, GCDC provides partial dictionary definitions of two of the policy terms – "[p]resence" and "spread." *See* Dkt. No. 12 at 26. GCDC misconstrues the meaning of "spread" and, more importantly, altogether ignores the definitions of the remaining terms, including "proliferation" and "any activity." The definition of "spread" includes "diffuse" (*i.e.*, not concentrated or localized), "to become dispersed, distributed, or scattered," and "to grow in length or breadth." *See* Spread, Merriam-Webster Dictionary Online, https://www.merriam-webster.com/dictionary/spread (last visited Aug. 19, 2020). None of these definitions are limited to "activities that occur in a given place," as GCDC suggests. *See* Dkt. No. 12 at 26.

As for the terms GCDC fails to define—including "proliferation" and "any activity"—they are similarly not constrained to activities that occur in a given place. Indeed, dictionary definitions of "proliferation" include "to grow by rapid production of new parts, cells, buds, or offspring," "to increase in number as if by proliferating," "to cause to grow by proliferating," or "to cause to increase in number or extent as if by proliferating." *See* Proliferation, Merriam-Webster Dictionary Online, https://www.merriam-webster.com/dictionary/proliferation (last visited Aug. 19, 2020). Dkt. No. 12 at 25-31. The all-encompassing "any activity" goes even further – well beyond simply denoting presence. *See* Any, Merriam-Webster Dictionary Online, https://www.merriam-webster.com/dictionary/any (last visited Aug. 19, 2020) ("unmeasured or unlimited in amount, number, or extent"); Activity, Merriam-Webster Dictionary Online, https://www.merriam-webster.com/dictionary/activity (last visited Aug. 19, 2020) ("the quality or state of being active : behavior or actions of a particular kind").

None of the descriptors in the Virus Exclusion—including "spread," "proliferation," and "any activity"—are limited to a particular location. That is consistent, of course, with the Policy language which provides that that exclusion applies even where the loss event results in "widespread damage" or "affects a substantial area." Dkt. 9-2 at 134.

All of the terms of the Virus Exclusion—including growth, proliferation, spread, and any activity—must be given meaning. Limiting the term "presence" to mean presence on GCDC's property would improperly construe the exclusion and render all terms beyond "presence" surplusage. To do so would "violat[e] fundamental principles of contract interpretation." *Keepseagle v. Vilsack*, No. 99-3119, 2012 WL 13098692, at *3 (D.D.C. Dec. 28, 2012) (citing *U.S. ex rel. K&R Ltd. Partnership v. Mass. Housing Finance Agency*, 456 F. Supp. 2d 46, 56 (D.D.C. 2006) ("The Court construes contracts in a manner that gives effect to the words used by the parties, and assumes that the parties intend every part of a contract to mean something, so that no word, clause, sentence or phrase is rendered surplusage, meaningless or nugatory.") (internal citations and quotation marks omitted)). Despite agreeing with these fundamental principles, *see, e.g.*, Dkt. No. 12 at 28,[4] GCDC nonetheless asks the Court to ignore them.

The reason for this is obvious: GCDC's Complaint alleges its losses are caused by efforts to slow the "spread" of the coronavirus and it wants to avoid the exclusion. *See, e.g.*, Compl. ¶ 14 ("spreading" of COVID-19); *id.* ¶ 17 (recognizing "social distancing" and other "non-pharmaceutical interventions" as tools to "slow and stop the transmission of certain diseases"); *id.* ¶ 19 (public health officials implementing "population-wide social distancing" which "was needed to stop the transmission of COVID-19"); *id.* ¶ 20 (District "issued a series of orders . . . to force social distancing"); *id.* ¶ 15 ("spread of COVID-19 outside China" prompted WHO declaration).

[4] GCDC repeatedly cites *Richardson v. Nationwide Mut. Ins. Co.*, 826 A.2d 310, 324 (D.C. 2003), for general contract interpretation principles. As GCDC notes, however, the *Richardson* decision has been vacated. *See* Dkt. No. 12 at 15 n. 17 (citing 832 A.2d 752 (D.C. 2003) and 844 A.2d 344 (D.C. 2004)). It is also inapposite.

The governmental orders upon which GCDC relies likewise make clear that they were implemented "in response" to coronavirus or aimed at slowing "the spread of coronavirus" or "because of the risk of the rapid spread of coronavirus." *See* Dkt. No. 9-1 at 10 n. 5 (citing and quoting excerpts of orders). In fact, the order GCDC attaches as Exhibit A to its Opposition (Mayor's Order 2020-053) repeatedly references the need to control the "spread" of the virus. *See* Dkt. No. 12-3 at 3 ¶¶ 3, 4, 5, 7, 9.b. Losses resulting from the spread of a virus simply are not covered under the Policy.

GCDC makes two additional efforts to avoid the Virus Exclusion. It argues (1) the limited coverage somehow demonstrates the virus must be present on the property and (2) the "history" of the exclusion demonstrates it only applies to presence on the property. *See* Dkt. 12 at 29-30. Neither has merit.

The Limited Coverage does not describe what is excluded; rather it is a limited exception to the broad Virus Exclusion with its own requirements. By definition, the Limited Coverage explains what is covered (and GCDC does not allege its losses are covered by the Limited Coverage).

The generic "ISO Circular" that GCDC attempts to rely on regarding the "history" of the Virus Exclusion is irrelevant extrinsic evidence that cannot be considered because the exclusion in unambiguous. *See, e.g.*, *Whiting v. AARP*, 701 F. Supp. 2d 21, 26 (D.D.C. 2010) (under District of Columbia law, "the text of an insurance contract controls if it is unambiguous" (citations omitted)); *Cambridge Holdings Grp., Inc.*, 357 F. Supp. 2d at 93 ("[I]f the agreement is unambiguous, the Court will apply 'the plain language used and should not consider extrinsic evidence as to how to interpret the policy.'" (quotation omitted)); *Burk & Reedy, LLP v. Am. Guarantee & Liability Ins. Co.*, 89 F. Supp. 3d 1, 9 (D.D.C. 2015) (unambiguous "exclusion

provisions must be enforced even if the insured did not foresee how the exclusion operated, otherwise courts will find themselves in the undesirable position of rewriting insurance policies and reallocating assignment of risks between insurer and insured." (internal quotation marks and citations omitted)).

In any event, the ISO Circular is irrelevant. The statements GCDC references relate to the ISO form, which is not in the GCDC Policy. The Virus Exclusion in the GCDC Policy predates the ISO Circular and does not contain the same language as the ISO Circular. *See* Dkt. No. 9-2 at 134 (Form SS 40 93 07 05, with "07 05" representing the month and year of a form's edition, here, July 2005).

Simply put, the Virus Exclusion plainly applies here, and GCDC's alleged losses are excluded.

2. The Governmental Orders Aimed At Slowing the Spread of the Coronavirus Do Not Impact the Application of the Virus Exclusion

GCDC next attempts to avoid the Virus Exclusion by arguing that the governmental orders aimed at slowing the spread of the virus caused its losses rather than the virus itself. That argument is meritless for multiple, independent reasons, as Sentinel extensively explained in its moving papers. *See* Dkt. No. 12 at 31-34.

a. The Virus Is Indisputably a Cause of the Loss and, Therefore, the Virus Exclusion Applies

The Virus Exclusion applies so long as the "[p]resence, growth, proliferation, spread or any activity of . . . virus" is a **"*direct[] or indirect[]*"** cause of the loss, **"*regardless of any other cause or event that contributes concurrently or in any sequence to the loss*."** Dkt. No. 9-2 at 134 (emphasis added). This type of clause is referred to as an anti-concurrent causation clause. Its presence in the Policy means the Virus Exclusion applies even if the coronavirus is an "indirect" cause of loss or only one of several causes of loss.

As explained in Sentinel's motion, District of Columbia courts recognize that unambiguous anti-concurrent causation clauses, like the one in the Virus Exclusion, operate to exclude coverage where the excluded peril is one cause of the loss in a chain of events. *See* Dkt. No. 9-1 at 13 (citing *Chase*, 780 A.2d at 1130 (declining to apply proximate cause rules because, in light of anti-concurrent causation clause, exclusion applied "even if earth movement was not the (efficient) proximate cause and there were more dominant causes involving covered risks"); *Cameron v. USAA Prop. & Cas. Ins. Co.*, 733 A.2d 965, 971 n.7 (D.C. Cir. 1999) (enforcing nearly identical anti-concurrent causation clause with respect to surface water damages)). The excluded peril—here, the virus—need not be the sole cause of loss. GCDC fails to address either of these cases (and cites them for inapt purposes).

Recent jurisprudential developments have further confirmed that the Virus Exclusion applies here. Indeed, the court in *Diesel Barbershop* held just two weeks ago that "the Policies' [anti-concurrent causation] clause excluded coverage for the losses Plaintiffs incurred in complying with the [governmental] Orders" addressing the spread of COVID-19. *See Diesel Barbershop, LLC*, 2020 WL 4724305, at *7 (citation omitted). The court explained that "COVID is in fact the reason for the Orders being issued and the underlying cause of Plaintiffs' alleged losses" and "COVID-19 . . . was the primary root cause of Plaintiffs' businesses temporarily closing." *Id.* at *6. The governmental orders "only came about sequentially as a result of the COVID-19 virus spreading rapidly throughout the community." *Id.* The same is true here.

Rather than address the Virus Exclusion's anti-concurrent causation clause, or the case law in the District and elsewhere applying similar clauses, GCDC takes the implausible position that the governmental orders were not issued because of the coronavirus, but rather "to

ameliorate the stress on our social and economic infrastructure." Dkt. No. 12 at 32. That conclusory and implausible statement is divorced from reality and unsupported by facts. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (20070 ("A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'"). No one can reasonably dispute that the governmental orders were put in place to slow the spread of the coronavirus. If there were no virus, no such orders would exist. Any potential "stress on our . . . infrastructure" is due to the coronavirus.

Further, the plain terms of the governmental orders contradict GCDC's arguments. The order attached as Exhibit A to GCDC's opposition, for example, makes clear in its first paragraph that "[t]his Order is issued based on the increasing number of confirmed cases of COVID-19," and that "the most effective approach to slowing the community transmission of communicable diseases like COVID-19 is through limiting public activities and engaging in social distancing." Dkt. No. 12-3 at 2. The order repeatedly references the need to slow the "spread" of the virus. *See id.* at 2-3; *see also, e.g.*, Compl. ¶¶ 14-20.

The plain terms of the Policy once again are dispositive. The Virus Exclusion applies where the "presence, growth, proliferation, spread or any activity" of the coronavirus is one "direct[] or indirect[]" cause of GCDC's loss. It is. Therefore, the losses are excluded.

b. The Governmental Orders Are Not a Covered Cause of Loss or a Direct Physical Loss or Direct Physical Damage To Property

GCDC's argument also fails because governmental orders are not a Covered Cause of Loss under the Policy and, even if they were, they are not themselves direct physical loss or direct physical damage. The business income coverage GCDC seeks requires it to demonstrate that the suspension of its restaurant's services is "***caused by direct physical loss of or physical***

damage to property at the 'scheduled premises' . . . caused by or resulting from a ***Covered Cause of Loss***," *i.e.*, risks of direct physical loss unless excluded. Dkt. No. 9-2 at 41, 33 (emphasis added).

As explained extensively in Sentinel's moving papers, the governmental orders are not themselves a Covered Cause of Loss under the Policy – they are not a risk of direct physical loss. *See* Dkt. No. 9-1 at 13-16. The court in *Prime Alliance Grp., Ltd. v. Hartford Fire Ins. Co.* squarely addressed this issue and decided exactly that. No. 06-22535-CIV-UNGARO, 2007 WL 9703576 (S.D. Fla. Oct. 19, 2007).

GCDC attempts to get around *Prime Alliance* by arguing in a footnote that the issue for determination was the "proper deductible to apply." Dkt. No. 12 at 15 n. 34. That is true but misses the point. The question presented was whether the insured could avoid the "windstorm" deductible by arguing that the real cause of its loss was a governmental order, not the windstorm that prompted its issuance. *See Prime Alliance*, 2007 WL 9703576, at *3. That is exactly what GCDC is attempting to do here – avoid the Virus Exclusion by arguing a governmental order, not the peril that prompted the order, is the cause of its loss. This Court, like the *Prime Alliance* court, should not allow it.

GCDC also attempts to avoid *Prime Alliance* by asserting without citation that the insurer in *Prime Alliance* "accepted the insured's claim for coverage even though there was no physical damage to the insured's property." Dkt. No. 12 at 15, n. 34. That is false. The insurer in *Prime Alliance* "refused to pay any part of such claim." 2007 WL 9703576 at *1. The parties had pending cross-motions for summary judgment on the issue of whether access to the insured property was prohibited by governmental order as "a direct result of damage to property." *Id.* at

*2, *3, and n.2. The court "decline[d] to weigh in on this threshold issue," however, because it granted summary judgment to the insurer on the deductible question. *See id.* at n. 2.

Not only is GCDC wrong about *Prime Alliance*, it never addresses the fact that the *Rose's 1* court already decided that governmental orders are not direct physical loss or damage to property. The court explained: "[T]hose orders were governmental edicts that commanded individuals and businesses to take certain actions. Standing alone and absent intervening actions by individuals and business, ***the orders did not effect any direct changes to the properties.***" *Rose's 1, LLC*, No. 2020 CA 002424 B, at 4-5 (emphasis added). The *Rose's 1* court further concluded—as Sentinel advised in its moving papers here—no case "stand[s] for the proposition that a governmental edict, standing alone, constitutes a direct physical loss under an insurance policy." *Id.* at 5. Thus, GCDC cannot meet its burden to demonstrate the suspension of its restaurant's services is "***caused by*** direct physical loss of or physical damage to property." GCDC's effort to avoid the Virus Exclusion—by arguing the cause of its loss is a governmental order and not the virus itself—removes any ability of GCDC to recover for business income losses under the Policy.

The Policy only has one place where there is even a potential for coverage for losses from a governmental order: the Civil Authority Additional Coverage. *See* Dkt. No. 9-1 at 5, 13-16. That Additional Coverage requires GCDC to demonstrate access to its restaurant was "specifically prohibited by order of a civil authority as the direct result of a Covered Cause of Loss to property in the immediate area," *i.e.*, direct physical loss to property in the immediate area. *See* Dkt. No. 9-2 at 42 (Special Property Coverage Form at p. 11); *id.* at 33 (defining Covered Causes of Loss).

GCDC cannot meet any of these requirements: (1) access to its premises was not specifically prohibited, as GCDC was still operating by providing takeout and delivery (Compl. ¶¶ 30-31) and, even when it allegedly temporarily closed, it could otherwise access its premises for Minimum Basic Operations (*see* Dkt. No. 12-3 at 4, 9), (2) GCDC does not allege any harm to any property (*see* Dkt. No. 12 at 21 n. 32), and (3) the orders of civil authority were to address the spread of coronavirus, not property damage (*see* Dkt. No. 9-1 at 9-10). Perhaps this is why GCDC rests its entire coverage theory on governmental orders but then tries to seek coverage under the Business Income coverage, rather than the Civil Authority coverage that applies to such orders.

GCDC accuses Sentinel of "conflat[ing] business income coverage with civil authority" to "resist[] a straightforward reading of the Policy." Dkt. No. 12 at 21. Not so. Sentinel utilized the civil authority provision to illuminate why a governmental order is not a Covered Cause of Loss – as the court in *Prime Alliance* concluded and the court in *Rose's 1* confirmed.

Civil Authority coverage expands coverage to losses that are not covered under the Business Income coverage. There is nothing to "conflate." The two coverages apply to entirely different things – Business Income coverage applies where there is direct physical loss to property at GCDC's own location, whereas Civil Authority coverage applies where the government issues an order because of direct physical loss to property other than GCDC's. Except in that limited circumstance where the Civil Authority coverage applies, there is no coverage under the Policy for losses resulting from governmental orders. The elements of the Civil Authority coverage are not met here (and GCDC never argues to the contrary).

In short, GCDC's creative arguments do nothing to save its claims. GCDC's losses were directly or indirectly caused by the growth, proliferation, spread or any activity of the coronavirus, and the Policy does not cover such losses.

3. Limited Coverage for Virus is Not Illusory

GCDC next argues that an exception to the Virus Exclusion somehow eliminates the application of the exclusion here. GCDC contends that the exception, which is Limited Coverage, is illusory and unenforceable because the coverage is *de minimis.* *See* Dkt. No. 12 at 35-37. GCDC relies almost exclusively on *Chase*, 780 A.2d 1123 at 1131, for this argument.[5] Dkt. No. 12 at 35. But the court in *Chase* held that certain limited additional coverage was *not* illusory or unconscionable. *See Chase*, 780 A.2d 1123 at 1131 ("While the additional coverage afforded by the [sump pump] rider may be limited, we cannot say that it is non-existent or de minimis, and thus we are not prepared to hold that the failure of the endorsement to override the earth movement exclusion is unconscionable.").[6]

The conclusion in *Chase* is consistent with other authority in the District. "A court will not strike a provision [as illusory] unless it is 'unconscionable' and renders the coverage 'non-existent or *de minimis*.'" *Essex Ins. Co. v. Café Dupont, LLC*, 674 F. Supp. 2d 166, 174 n. 10 (D.D.C. 2009) (quoting *Chase*, 780 A.2d at 1131). In *Essex*, the court held that "[e]ven if Essex's liquor liability provision excludes conduct that one might normally expect to be covered, it does not render the coverage *de minimis*, and would not be unconscionable under District law."

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[5] Aside from *Chase*, the only other case GCDC cites—*Rockhill Ins. Co. v. Hoffman-Madison Waterfront, LLC*, 417 F. Supp. 3d 50, 65-66 (D.D.C. 2019)—is inapposite. The Court there was addressing duty to defend under personal and advertising coverage. It declined to construe a policy's breach of contract exclusion to exclude all tort claims because doing so would render "coverage for personal and advertising injury to be meaningless." *Id.*

[6] As noted above, the *Chase* court also applied that policy's anti-concurrent causation clause to exclude coverage. *See id.* at 1130.

Id. (citing *Flecha de Lima v. Int'l Med. Group, Inc.*, No. 01-CA-6866, 2004 WL 2745654, at *2 (D.C. Super. Ct. Nov. 29, 2004) (although "questions might justifiably be raised regarding a 'health insurance' policy that excludes from coverage weight reduction procedures that are in fact vital to a particular insured's health," those questions did not permit the court to invalidate terms that were "clear and unambiguous")); *see also Silver v. Am. Safety Indem. Co.*, 31 F. Supp. 3d 140, 148 (D.D.C. 2014) ("While the coverage afforded under Section II is undoubtedly more limited than Section I, the Court cannot say that it is non-existent or de minimis . . . and therefore illusory or otherwise invalid as a matter of public policy." (internal quotation marks and citation omitted)).

The same is true here. The Limited Coverage is not *de minimis* or illusory. GCDC does not cite a single case where any court has reached that conclusion. Nor could it, as there are instances in which the Limited Coverage applies. This is just not one of those instances.

A federal district court in California, for example, addressed a similar limited coverage provision and dispensed with the notion that a policy provision is unenforceable because it contains both an exclusion and limited coverage. The policy at issue in that case, *WPB No. 1, LLC v. Valley Forge Ins. Co*., had a "'Fungus,' Wet Rot, Dry Rot and Bacteria Exclusion/Limited Coverage endorsement" almost identical to the provision at issue here. *See* No. 05CV2027-L(BLM), 2007 WL 9702161, at *2 (S.D. Cal. Mar. 27, 2007). The policy excluded losses arising from fungus, wet rot, dry rot, or bacteria, but provided limited coverage "when the 'fungus,' wet or dry rot or bacteria is the result of Covered Causes of Loss." *Id.* at *2-*3. The policyholder argued that the exclusion was ambiguous in the context of mold arising from a covered peril, such as a hurricane. *See id.* at *4. The court held that the

Exclusion/Limited Coverage endorsement was not ambiguous and "expressly covers the circumstance when mold is caused by a covered event, such as a hurricane." *Id.*

The policy in *Michigan Battery Equipment, Inc. v. Emcasco Ins. Co.*, 892 N.W.2d 456 (Mich. Ct. App. 2016), likewise had a limited coverage exception for wet rot that was "the result of (1) 'a specified cause of loss' other than fire or lightning or (2) flood." 892 N.W.2d at 459. The court there determined that because the wet rot was not the result of a "specified cause of loss" or flood, the limited coverage provision "simply does not apply." *Id.*[7]

In short, there are circumstances where virus, bacteria, mold or rot coverage could be provided under the Limited Coverage exception. They are just not present here. That does not make the coverage illusory or unconscionable; nor does it make the Virus Exclusion inapplicable.

4. Discovery is Not Needed and Sentinel's Motion is Ripe for Decision

Contrary to GCDC's request, no amount of discovery will change the inevitable result that the Policy does not cover GCDC's losses. *See* Dkt. No. 12 at 25, 34, 37.

At least five courts—including the District of Columbia Superior Court in *Rose's 1*—have already dismissed coronavirus business interruption claims without any discovery. *See Rose's 1, LLC*, No. 2020 CA 002424 B (Dkt. No. 12-4) (no direct physical loss or damage to restaurants from District's orders); *Diesel Barbershop, LLC*, 2020 WL 4724305 (W.D. Tex. Aug.

[7] With respect to viruses in particular, at least one court has previously addressed losses associated with a windstorm (a specified cause of loss) and a "pseudorabies virus." *See Curtis O. Griees & Sons, Inc. v. Farm Bureau Ins. Co. of Nebraska*, 528 N.W.2d 329, 331 (Neb. 1995). There, however, the policy did not have a virus exclusion and the proximate cause of the loss was the windstorm that carried the virus because "absent the windstorm, there would have been no infection of plaintiff's swine." *Id.* at 532. Here, the Policy excludes GCDC's coronavirus losses. And, for the reasons explained above, the virus is the cause of GCDC's alleged losses because, "absent the" virus, GCDC's restaurant would not have closed.

13, 2020) (no direct physical loss or damage and, in any event, virus exclusion would apply); *The Inns by the Sea v. Cal. Mut. Ins. Co.*, No. 20CV001274 (Cal. Super. Ct. Aug. 4, 2020) (Ex. A at 5 (transcript) (no direct physical loss or damage); Ex. B (order sustaining demurrer without leave to amend)); *Gavrilides Mgmt. Co. v. Michigan Ins. Co.*, Case No. 20 258-CB-C30 (Mich. Circuit Ct. July 1, 2020) (Ex. C at 23 (transcript) (no direct physical loss or damage and, in any event, virus exclusion would apply); Ex. D (order incorporating grounds stated in transcript)); *Malaube, LLC v. Greenwich Ins. Co.*, No. 20-22615, 2020 WL 5051581 (S. D. Fla. Aug. 26, 2020) (report and recommendation finding no direct physical loss or damage); *cf. Social Life Magazine, Inc. v. Sentinel Ins. Co*., No. 1:20-cv-03311-VEC (S.D.N.Y. May 14, 2020) (Ex. E at 15 (transcript) (denying preliminary injunction because "this kind of business interruption [claim] needs some damage to the property" before there is coverage)).

Here, like in all of those other COVID-19 business interruption cases, there are no fact issues. Interpretation of the GCDC Policy presents a question of law, which the Court can decide on the record before it. Where a policy contract is unambiguous, "the Court will apply 'the plain language used and should not consider extrinsic evidence as to how to interpret the policy.'" *Cambridge Holdings Grp., Inc.*, 357 F. Supp. 2d at 93 (quotation omitted). Unambiguous exclusions, like the Virus Exclusion, "must be enforced even if the insured did not foresee how the exclusion operated, otherwise courts will find themselves in the undesirable position of rewriting insurance policies and reallocating assignment of risks between insurer and insured." *Burk & Reedy, LLP*, 89 F. Supp. 3d at 9 (internal quotation marks and citations omitted).

Sentinel's motion requires the Court to do nothing more than that – accept as true GCDC's alleged facts in the Complaint and apply them to the terms of the Policy. Doing so

results in one conclusion: the Virus Exclusion precludes coverage for GCDC's coronavirus losses. Accordingly, the Complaint should be dismissed in its entirety. To conclude otherwise would allow "sympathy for a party to produce a result contrary to the clear language of the contractual provisions," which the District does not allow. *See GEICO v. Fetisoff*, 958 F.2d 1137, 1141 (D.C. Cir. 1992) (quotations omitted).

B. GCDC's Claims Also Fail Because It Experienced No Direct Physical Loss of or Physical Damage to Its Property

GCDC devotes much of its opposition to arguing that it experienced direct physical loss, even though it admits that nothing physical happened to its property and the virus was not present. *See* Dkt. No. 12 at 16-24. This is surprising for two reasons. First, Sentinel did not move to dismiss on this ground (though it could have).[8] Second, in *Rose's 1*, a District of Columbia court, applying District law, already decided that business interruption claims under property insurance policies like GCDC's are not covered. Thus, even if the Virus Exclusion did not bar GCDC's claims (it does), dismissal would still be appropriate.

GCDC admits that it has experienced no direct physical loss because the coronavirus was not actually present at its restaurant. *See, e.g.*, Dkt. No. 12 at 21 n. 32 ("GCDC has not alleged

[8] *See Burk & Reedy, LLP*, 89 F. Supp. 3d at 9 (insured bears the burden of meeting the insuring agreement requirements). Given that GCDC raised and extensively briefed the issue of direct physical loss in its opposition brief, Sentinel may of course respond to those arguments in this reply brief. *See Banner Health v. Sebelius*, 905 F. Supp. 2d 174, 188 (D.D.C. 2012) ("As Courts consistently observe, when arguments raised for the first time in reply fall 'within the scope of the matters [the opposing party] raised in opposition,' and the reply 'does not expand the scope of the issues presented, leave to file a surreply will rarely be appropriate.'" (quotation omitted)*; Alavi v. Weinstein*, No. 15-2146, 2018 WL 4828401, at *4 (D.D.C. Oct. 4, 2018) (denying plaintiff's request for leave to file sur-reply because defendant's reply did not raise new issues for the first time, but rather responded to issues raised in plaintiff's opposition); *Robinson v. Detroit News, Inc.*, 211 F. Supp. 2d 101, 113 (D.D.C. 2002) (striking plaintiff's proposed sur-reply that "merely reiterates arguments already made" in plaintiff's "original response to the defendant's motion for summary judgment.").

any physical contamination."). GCDC thus only alleges purely economic losses. Such economic losses are insufficient to demonstrate direct physical loss or damage under the Policy.

The District of Columbia Superior Court reached this exact conclusion on August 6. In *Rose's 1*, the court decided that governmental orders aimed at slowing COVID-19—the same orders at issue here—did not constitute "direct physical loss." *See Rose's 1, LLC*, 2020 CA 002424 B. The court explained that "the orders did not [a]ffect any direct changes to the property," that the "orders did not have any effect on the material or tangible structure of the insured" (including because "Plaintiffs offer no evidence that COVID-19 was actually present on their insured properties at the time they were forced to close properties"), and that the orders were not a "direct physical intrusion" to the insured property. *Id.* at 5. The facts and law in *Rose's 1* are on all fours with this case – a District of Columbia restaurant, impacted by District of Columbia stay-at-home orders, seeking coverage under a property insurance policy.

GCDC's efforts to avoid *Rose's 1* are unpersuasive. GCDC suggests the case "involves different facts (a policy issued by another carrier) and a different procedural posture (plaintiff's request for summary judgment)." *See* Dkt. No. 12 at 19. Both statements are misleading. The insurance policy at issue in *Rose's 1*—just the like Policy here—was a property insurance policy covering certain restaurants in the District. *See Rose's 1, LLC*, 2020 CA 002424 B, at 1. The insuring agreement in the *Rose's 1* policy was materially the same as that in GCDC's. The policy there—just like the Policy here—required a showing of "direct physical 'loss' of or damage to" covered property. *Id.; see also* Plaintiffs' Memorandum of Points and Authorities in Support of Their Motion for Expedited Summary Judgment ("Memo"), dated May 5, 2020, at 8. The business income provision in that policy—again, like the GCDC Policy—required the business interruption to "result[] directly from 'loss' or damage to property on the premises from

a peril insurance against." Ex. H to Memo. at policy p. 90. Simply put, the pertinent policy terms are materially the same. That, of course, was clear from the fact that GCDC did not identify a single material difference in the policy terms in its opposition brief. As to the procedural posture, the posture was different in name but not in substance. In *Rose's 1*, no discovery had taken place; the motion for summary judgment was based upon the pleadings, the policy, and the governmental orders.

Unable to distinguish *Rose's 1*, GCDC instead asks the Court to "look to Maryland" for "instructive authority." *See* Dkt. No. 12 at 19. GCDC provides no reason why this Court—sitting in the District of Columbia, applying District of Columbia law—should ignore directly on point authority from the District of Columbia courts in favor of a single federal district court case in Maryland, applying Maryland law, and having nothing to do with coronavirus business interruption losses.[9] The District of Columbia courts will only look to Maryland "in the absence of applicable District of Columbia" precedent. *See Burk & Reedy, LLP*, 89 F. Supp. 3d at 10 (citations omitted). Here, the *Rose's 1* decision is directly on point and should control.

As the court in *Rose's 1* explained, its decision is in accord with numerous other courts that have "rejected coverage when a business's closure was not due to direct physical harm to the insured premises." *See Rose's 1, LLC*, 2020 CA 002424 B, at 7. In *Roundabout Theatre Co. v Contin. Cas. Co*., 302 A.D.2d 1 (N.Y. App. Div. 2002), for example (cited in *Rose's 1*), the scaffolding of a midtown building collapsed, causing New York City to close certain

[9] The policyholder in *National Ink and Stitch LLC v. State Auto Property and Casualty Insurance Co.*, 435 F. Supp. 3d 670 (D. Md. 2020) (cited at Dkt. No. 12 at 19-20) involved a ransomware attack that physically impaired computer systems – including a physical slowing of the system. Here, of course, *nothing* physical has happened to GCDC's property. Any alleged loss of use of GCDC's property is *not* because of something physical; rather, it is because of governmental orders aimed at slowing person-to-person transmission of the virus.

surrounding blocks, and resulting in a Broadway theater having to "cancel 35 performances of *Cabaret*." *Id*. at 5. The First Department found there was no coverage under substantially the same policy language because, even though the theater was inaccessible, there was no property loss or damage at the theater itself. *See id*. at 7. Importantly, the First Department *rejected* the theory that "loss of use of" property was sufficient, *id*. at 6 – the exact theory GCDC tries to advance here. *See* Dkt. No. 12 at 20-21.

The court in *Rose's 1* also found Judge Engelmayer's decision in *Newman Myers Kreines Gross Harris, P.C. v. Great Northern Ins. Co*. instructive, 17 F. Supp. 3d 323, 332 (S.D.N.Y. 2014). There, the court concluded that a law firm could not recover when power outages rendered the firm's offices inaccessible. *See Rose's 1, LLC*, 2020 CA 002424 B, at 7 (citing *Newman Myers Kreines Gross Harris, P.C. v*, 17 F. Supp. 3d at 332). The court in *Newman Myers* explained that the policy language "requires some form of actual, physical damage to the insured premises to trigger" coverage, as opposed to "forced closure of the premises for reasons exogenous to the premises themselves." *Newman Myers Kreines Gross Harris, P.C.*, 17 F. Supp. 3d at 331. Here, too, the Complaint alleges only a forced closure based on an "exogenous" reason – the virus outbreak and associated governmental orders.

The court in *Rose's 1* found "no published cases in this jurisdiction [DC] analyzing the exact term 'direct physical loss'" but noted cases "addressing similar issues" did not help the policyholders. *See Rose's 1, LLC*, 2020 CA 002424 B, at 8. The court found that *Brothers, Inc. v. Liberty Mut. Fire Ins. Co.*, 268 A.2d 611 (D.C. Ct. App. 1970) "support[ed] the proposition that, in the context of property insurance, the term 'direct loss' implies some form of direct physical change to the insured property." *Id.* at 9. As the court in *Rose's 1* explained:

> The Court of Appeals [in *Brothers, Inc.*] interpreted the term "direct loss" in the contract to mean "a loss proximately resulting from

> physical damage to the property or contents caused by a riot or civil commotion." *Id.* Under that definition, the Court found that the restaurant was unable to recover, since, "at the most," the restaurant's lost business due to the curfew "was an indirect, if not remote, loss resulting from riots" and there was no "physical damage to the property." *Id.*

Rose's 1, LLC, Civil Case No. 2020 CA 002424 B, at 9.[10]

The conclusion of the *Rose's 1* court is in accord with the weight of the authority thus far on coronavirus business interruption losses. At least five other courts have already concluded business interruption losses arising from COVID-19 do not constitute direct physical loss under property insurance policies:

- A court in Michigan concluded that "the loss of access or use of the premises due to executive orders and the Covid-19 virus crisis" did "not constitute the direct physical damage or injury that's required under the policy." *See Gavrilides Mgmt. Co.*, Case No. 20-258-CB-C30 (Ex. C at 23 (transcript); Ex. D (order incorporating grounds stated in transcript).) The plaintiff, the operator of a restaurant, argued that the "physical requirement is met because people were physically restricted from dine-in services," but the court found that argument to be "simply nonsense," coming "nowhere close to meeting the requirement" that there be "some physical alteration to or physical damage" to property at the premises. (Ex. C at 20.)

- A court in Texas ruled that the COVID-19 pandemic and associated governmental orders did not amount to "direct physical loss" to a group of barbershops because there was no "tangible injury to property." *Diesel Barbershop, LLC*, 2020 WL 4724305, at *5.

- A court in California, which issued a summary order dismissing a hotel's case with prejudice (Ex. B), explained on the record that the alleged physical presence of COVID-19 was not the *cause* of the hotel's alleged losses: "[W]hen the

[10] GCDC also suggests that because the Policy has certain specific exclusions, but does not have a specific exclusion for pandemic-related losses, the Court should infer that the Policy covers GCDC's coronavirus losses. *See* Dkt. No. 12 at 29. GCDC is wrong. The Policy has a Virus Exclusion, GCDC has the burden of proving coverage, and the court in *Rose's 1* already rejected a similar 'absence of exclusion' argument. *See Rose's 1, LLC*, Civil Case No. 2020 CA 002424 B, at 9-10 ("Plaintiffs argue that . . . their policies do not include a specific exclusion for pandemic-related losses. . . . But again, even in the absence of such an exclusion, Plaintiffs would still be required to show a 'direct physical loss.' Because they cannot do so, the Court grants summary judgment to Defendant.").

> Governor ordered us all to shelter in place and businesses to close, it wasn't necessarily because there was COVID at your hotels. It was because there was a fear that COVID might arrive at your hotels, and there was a fear by having people move around the state, that that would cause us all to infect each other." *The Inns by the Sea*, No. 20CV001274 (Ex. A, at 5).

- In a report and recommendation dated August 26, 2020, a federal magistrate judge in Florida recommended dismissing an insurer's motion to dismiss, finding in part: "Plaintiff merely claims that two Florida Emergency Orders closed his indoor dining. But . . . this cannot state a claim because the loss must arise to actual damage. And it is not plausible how two government orders meet that threshold when the restaurant merely suffered economic losses – not anything tangible, actual, or physical." *Malaube, LLC*, 2020 WL 5051581, at *8.

- Judge Caproni in the U.S. District Court for the Southern District of New York reached the same conclusion in ruling on a motion for preliminary injunction: "there is no damage to . . . property"; the coronavirus "damages lungs. It doesn't damage printing presses." *See* Ex. E, Transcript of Hearing on Mot. for Preliminary Inj., *Social Life Magazine, Inc.*, No. 20-cv-3311, at 4-5.[11]

This Court should reach the same conclusion. GCDC experienced no direct physical loss or damage to its property. Thus, if the Court does not dismiss this lawsuit because of the Virus Exclusion, it should dismiss it because GCDC cannot demonstrate direct physical loss or damage.

[11] One court applying Missouri law has come out the other way, but its central conclusion—that "restricted access to Plaintiffs' premises" amounted to "direct physical loss," is flatly inconsistent with *Rose's 1* and the New York cases upon which it relies. *See Studio 417, Inc. v. Cincinnati Ins. Co*., No. 20-cv-03127, 2020 WL 4692385, at *6 n.6 (W.D. Mo. Aug. 12, 2020); *see also K.C. Hopps, Ltd. v. The Cincinnati Ins. Co.*, 20-cv-00437 (W.D. Mo. Aug. 12, 2020) (ECF 29) (companion case from same judge denying motion to dismiss for "substantially the same reasons as those in the *Studio 417* Order") (Ex. F). *Studio 417* is distinguishable and inapplicable here because (i) it does not apply District of Columbia law, (ii) the *Studio 417* court emphasized that the plaintiffs "expressly allege physical contamination," whereas here GCDC does exactly the opposite, and (iii) the insurance policy in *Studio 417* did not have a virus exclusion.

III. CONCLUSION

In sum, the Policy does not cover GCDC's coronavirus-related losses. Accordingly, for all of the foregoing reasons and others appearing in the record, Sentinel respectfully requests that the Court dismiss GCDC's Complaint in full and with prejudice.

Dated: August 28, 2020

Respectfully submitted,

/s/ Frank Winston, Jr.
Sarah D. Gordon (DC Bar No. 982563)
Frank Winston, Jr. (DC Bar No. 413858)
Conor P. Brady (DC Bar No. 1012275)
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, NW
Washington, DC 20036
Tel.: 202.429.3000
Fax.: 202.429.3902
sgordon@steptoe.com
fwinston@steptoe.com
cbrady@steptoe.com

Anthony J. Anscombe (*pro hac vice* forthcoming)
STEPTOE & JOHNSON LLP
227 West Monroe Street, Suite 4700
Chicago, IL 60606
Tel.: 312.577.1265
Fax.: 312.577.1370
aanscombe@steptoe.com

Counsel for Sentinel Insurance Company, Ltd.

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of August, 2020, I caused a true and correct copy of the foregoing to be filed and served electronically on all registered counsel of record via the Court's CM/ECF system.

/s/ Frank Winston, Jr.
Frank Winston, Jr.