STATE OF RHODE ISLAND

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: March 29, 2022)

JOSEPHSON, LLC D/B/A THE MOINIAN GROUP,	:	
Plaintiff,	:	
v.	:	**C.A. No. PC-2021-03708**
AFFILIATED FM INSURANCE COMPANY,	:	
Defendant.	:	

DECISION

STERN, J. Before the Court is Plaintiff Josephson, LLC d/b/a The Moinian Group and Defendant Affiliated FM Insurance Company's Cross-Motions for Partial Summary Judgment pursuant to Rule 56 of the Superior Court Rules of Civil Procedure. Both parties filed timely objections. Jurisdiction is pursuant to Rule 56 of the Superior Court Rules of Civil Procedure.

I

Facts and Travel

Plaintiff Josephson, LLC d/b/a The Moinian Group (Moinian) is a limited liability company organized under the laws of New York with its principal place of business in the State of New York and is "one of the largest privately held real estate investment companies in the country," with a portfolio in excess of twenty million square feet. (Pl.'s Compl. ¶¶ 2, 24; Def.'s Mem. in Supp. of Mot. for Partial Summ. J. (Def.'s Mem.) 8.) Defendant Affiliated FM Insurance Company (AFM) is a corporation organized under the laws of the State of Rhode Island, with its principal place of business in Johnston, Rhode Island, and is authorized to issue insurance policies in Rhode Island. (Pl.'s Compl. ¶ 25; Def.'s Answer ¶ 25.)

On September 25, 2019, Moinian entered into a commercial property insurance policy with AFM (the Policy) which was effective from September 12, 2019 to September 12, 2020. (Def.'s Mem. Ex. A, at 14.)[1] The Policy "cover[ed] property, as described in this Policy, against ALL RISKS OF PHYSICAL LOSS OR DAMAGE, except as hereinafter excluded, while located as described in this Policy." *Id*. at 33. This meant that if Moinian suffered physical loss or damage to covered property or another loss covered by the Policy, and all other requirements were satisfied, the loss in question would be covered unless a specific exclusion applied to bar coverage or the exclusion is subject to an exception. *See id*.; Def.'s Mem. 4; Def.'s Mem. in Opp'n to Pl.'s Mot. for Partial Summ. J. (Def.'s Opp'n) 3.

The Policy contains two primary coverage sections: "Property Damage" and "Business Interruption." (Pl.'s Mem. in Supp. of Mot. for Partial Summ. J. (Pl.'s Mem.) 7; Pl.'s Mem. of Law in Opp'n to Def.'s Mot. for Partial Summ. J. (Pl.'s Opp'n) 5; Def.'s Mem. Ex. A, at 33, 51.) The Property Damage section insures against costs incurred by the policyholder as a result of "physical loss or damage" to insured property. (Def.'s Mem. Ex. A, at 33.) The Business Interruption section separately covers financial business interruption losses "as a direct result of physical loss or damage of the type insured[.]" *Id*. at 51. The Business Interruption section, however, is "subject to all the terms and conditions of th[e] Policy, including, but not limited to, the limits of liability, deductibles and exclusions shown in the Declarations section." *Id*. Thus, as with the Property Damage section, to trigger Business Interruption coverage, Moinian must show "physical loss or damage" to covered property in order to recover under the Policy. *Id*.; Def.'s Opp'n 4.

[1] The Policy does not contain singular, consistent pagination. Consequently, when citing to the Policy in this Decision, the pagination will follow that of the exhibit itself for ease of reference.

The Policy also contains more than twenty exclusions which, if applicable, bar coverage for loss or damage to covered property. (Pl.'s Mem. 9; Def.'s Mem. Ex. A, at 34-37, 56-57.) Among these exclusions, and of particular relevance in the instant case, is one for "Contamination." (Def.'s Mem. Ex. A, at 37.) Specifically, this exclusion provides that the Policy excludes:

> "**8. Contamination**, and any cost due to **contamination** including the inability to use or occupy property or any cost of making property safe or suitable for use or occupancy. If **contamination** due only to the actual not suspected presence of **contaminant(s)** directly results from other physical damage not excluded by this Policy, then only physical damage caused by such **contamination** may be insured." *Id*. (bold in original).

The Policy goes on to define "**contaminant(s)**" as "anything that causes **contamination**[,]" which in turn, is defined as:

> "[A]ny condition of property due to the actual or suspected presence of any foreign substance, impurity, pollutant, hazardous material, poison, toxin, pathogen or pathogenic organism, bacteria, virus, disease causing or illness causing agent, fungus, mold or mildew." *Id*. at 74 (bold in original).

In addition to the Contamination Exclusion described above is the exclusion for "loss of market or loss of use." *Id*. at 36. The terms "loss of market" or "loss of use," however, are undefined in the Policy. (Def.'s Mem. Ex. A, at 36; Pl.'s Mem. 10.) There is also a "[l]oss from enforcement of any law or ordinance" exclusion, which provides that the Policy will not cover loss from enforcement of any law or ordinance: "**a)** [r]egulating the construction, repair, replacement, use or removal, including debris removal, of any property; or **b)** [r]equiring the demolition of any property, including the cost in removing its debris[.]" (Def.'s Mem. Ex. A, at 36) (bold in original).

The Policy also includes two "Communicable Disease" coverage provisions, which do not require "physical loss or damage," and instead are triggered by "the actual not suspected presence

of **communicable disease**" at an insured property with access to such property being limited, restricted or prohibited by either "[a]n order of an authorized governmental agency regulating such presence of **communicable disease**" or "[a] decision of an Officer of the Insured as a result of such presence of **communicable disease**." *Id*. at 39, 57 (bold in original). These specific coverage extensions are each subject to an annual aggregate sublimit of $100,000, for $200,000 in total annual aggregate coverage. *Id*. at 17-18.

Lastly, the Policy's Business Interruption section also contains several "Business Interruption Coverage Extensions[,]" which cover other types of business losses resulting from physical loss or damage. (Pl.'s Opp'n 5; Def.'s Mem. Ex. A, at 56-63.) Among these Business Interruption Coverage Extensions is, for example, the "Civil or Military Authority" which provides coverage for loss incurred by Moinian "if an order of civil or military authority prohibits access to a **location** provided such order is the direct result of physical damage of the type insured at a **location** or within five (5) statute miles of it." (Def.'s Mem. Ex. A, at 56) (bold in original).

In December 2019, during the effective period of the Policy, an outbreak of the novel coronavirus disease 2019 (COVID-19)[2] was first identified in Wuhan, Hubei Province, China. (Pl.'s Compl. ¶ 29; Pl.'s Mem. 3.) Shortly thereafter, the United States identified the first confirmed case of COVID-19 in January 2020. (Pl.'s Compl. ¶ 30; Pl.'s Mem. 3.) On March 11, 2020, the World Health Organization declared the existence and spread of COVID-19 a global pandemic which caused significant economic disruption throughout the United States and the world. (Pl.'s Compl. ¶ 32; Pl.'s Mem. 3.)

[2] For purposes of this Decision, the terms "COVID-19" and "SARS-CoV-2" will be used interchangeably.

Moinian asserts that like many other businesses, Moinian has not been spared by the pandemic. (Pl.'s Mem. 6.) According to Moinian, and as mentioned above, it is one of the largest privately held real estate investment companies in the country, with a portfolio in excess of twenty million square feet spanning residential, commercial, and hospitality properties in New York, California, and Los Angeles, all of which were adversely impacted by the pandemic. (Pl.'s Compl. ¶¶ 2-6; Pl.'s Mem. 6.) Moinian specifically alleges that COVID-19 "caused physical loss or damage to Moinian's insured property as well as [to] various non-insured properties that attract business to Moinian's properties and that led to the issuance of orders of civil authority prohibiting access to Moinian's properties." (Pl.'s Compl. ¶¶ 15-16; Pl.'s Mem. 6.) COVID-19, according to Moinian, has in fact "rendered all of Moinian's insured properties partially or fully unusable for their intended purposes." (Pl.'s Mem. 6.) Consequently, Moinian claims that its "COVID-19-related loss of business income [is] in excess of $90,000,000 and . . . continuing[]" and that this alleged loss has taken "multiple forms, including lost bookings at hotel properties, non-payment of rent at residential and commercial properties, and failure to secure reasonably expected new rental income at residential and commercial properties." *Id*.; Pl.'s Compl. ¶ 17. Importantly, Moinian claims that these alleged losses "were caused by physical loss or damage from SARS-CoV-2 at its own insured locations, as well as physical loss or damage at other locations that resulted in Moinian suffering financial time element losses." (Pl.'s Mem. 6-7.)

Based on the foregoing, Moinian filed a claim with AFM under the Policy for its alleged losses on June 10, 2020. (Def.'s Mem. Ex. B.) In response, on June 22, 2020, AFM issued a letter requesting additional information related to Moinian's claim and explaining that COVID-19 meets the definition of a communicable disease under the Policy, and consequently, AFM would consider Moinian's claim pursuant to the Policy's Communicable Disease – Property Damage and

Communicable Disease – Business Interruption provisions. (Def.'s Mem. Ex. C, at 1.) On May 27, 2021, Moinian provided AFM with responses to AFM's requests for information contained in the June 22, 2020 letter and specified that "Moinian's responses to the [requests for information] should not be construed as an admission that the [Communicable Disease – Property Damage and Communicable Disease – Business Interruption coverages] are the only ones applicable to Moinian's COVID-19-related losses." (Def.'s Mem. Ex. D, at 1.)

Thereafter, on August 26, 2021, AFM issued another letter requesting additional information related to Moinian's claim and explaining that to the extent Moinian cannot trigger the Policy's Communicable Disease coverages, the Contamination Exclusion applies and bars coverage for Moinian's claim. (Def.'s Mem. Ex. E, at 2.) AFM's letter also explained that the other provisions cited by Moinian and contained in the Policy, such as the Civil or Military Authority provision, do not apply without physical loss or damage of the type insured. *Id.* at 3. AFM made clear that "[t]he presence of COVID-19 at an insured location does not constitute 'physical damage of the type insured' as required under th[e] [Policy,]" and thus, "the Policy's Civil or Military Authority provision (and other Policy provisions requiring physical loss or damage of the type insured) do not respond based on the information presented" by Moinian. *Id.* Therefore, based on the information provided by Moinian, AFM explained that the coverage which appears "potentially available under [the] Policy for losses arising from COVID-19 is found in [the Policy's] Communicable Disease coverages, assuming the conditions of those coverages are satisfied." *Id.*

After filing suit against AFM asserting breach of contract and declaratory judgment claims, Moinian filed a Motion for Partial Summary Judgment on August 10, 2021. *See* Docket (PC-2021-03708). However, following this Court's Decision in *Pella Corp. v. Factory Mutual Insurance*

Co., PC-2021-01527 (R.I. Super. Oct. 20, 2021) (Stern, J.), Moinian voluntarily withdrew that motion. *See* Docket (PC-2021-03708); Def.'s Mem. 10. Subsequently, on November 12, 2021, Moinian filed a second Motion for Partial Summary Judgment with supporting affidavits[3] arguing that: (1) the presence of SARS-CoV-2 on, at, or in Moinian's covered property causes "physical loss or damage" within the meaning of the Policy; (2) the Contamination Exclusion applies, if at all, only to any "*costs*" incurred by Moinian to remediate damaged property and not to any business interruption "*losses*" incurred by Moinian; and (3) the Loss of Market or Loss of Use exclusion does not bar Moinian's claim to coverage. (Pl.'s Mem. 1) (emphasis in original). In addition to filing a timely objection, AFM filed a Cross-Motion for Partial Summary Judgment arguing that: (1) Moinian's affidavits which claim that employees, tenants, or guests were present at insured properties while positive for COVID-19 or had COVID-19 symptoms does not establish "physical loss or damage" as required by the Policy; and (2) even if Moinian could show "physical loss or damage," the Policy's Contamination, Loss of Use, and Ordinance and Law exclusions all apply, save the Policy's Communicable Disease coverages. (Def.'s Mem. 10-11.) The Court's decision follows.

II

Standard of Review

Summary judgment is an "extreme remedy" that should be granted "only when 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as [a] matter of law.'" *Plunkett v. State*, 869 A.2d 1185, 1187 (R.I.

[3] Specifically, Moinian submitted supporting affidavits from Moinian's Chief Executive Officer Joseph Moinian, Moinian's Executive Vice President Kimberly Cafaro, as well as from other Moinian employees. *See* Moinian Aff.; Cafaro Aff.; Virello Aff.; Gericke Aff.; Guzman Aff.

2005) (quoting *Wright v. Zielinski*, 824 A.2d 494, 497 (R.I. 2003)). The Court views the admissible evidence "in the light most favorable to the nonmoving party[.]" *National Refrigeration, Inc. v. Standen Contracting Company, Inc.*, 942 A.2d 968, 971 (R.I. 2008) (internal quotation omitted). A party opposing "'a motion for summary judgment carries the burden of proving by competent evidence the existence of a disputed material issue of fact and cannot rest on allegations or denials in the pleadings or on conclusions or legal opinions.'" *Id*. (quoting *Accent Store Design, Inc. v. Marathon House, Inc.*, 674 A.2d 1223, 1225 (R.I. 1996)). "[W]hen ruling on a motion for summary judgment, the court is not authorized to try issues. The purpose of summary judgment procedure is issue finding and not issue determination." *Westinghouse Broadcasting Company, Inc. v. Dial Media, Inc.*, 122 R.I. 571, 581, 410 A.2d 986, 992 (1980).

Importantly, when deciding a motion for summary judgment, the trial justice must keep in mind that the granting of this motion '"is a drastic remedy and should be cautiously applied."' *Steinberg v. State*, 427 A.2d 338, 339-40 (R.I. 1981) (quoting *Ardente v. Horan*, 117 R.I. 254, 256-57, 366 A.2d 162, 164 (1976)). Thus, summary judgment is appropriate '"when, viewing the facts and all reasonable inferences therefrom in the light most favorable to the nonmoving party, the Court determines that there are no issues of material fact in dispute, and the moving party is entitled to judgment as a matter of law.'" *Quest Diagnostics, LLC v. Pinnacle Consortium of Higher Education*, 93 A.3d 949, 951 (R.I. 2014) (quoting *Derderian v. Essex Insurance Co.*, 44 A.3d 122, 126-27 (R.I. 2012)) (brackets omitted). However, only when the facts reliably and indisputably point to a single permissible inference can this process be treated as a matter of law. *Steinberg*, 427 A.2d at 340. During a summary judgment proceeding, the Court does not pass upon the weight or credibility of the evidence. *See DeMaio v. Ciccone*, 59 A.3d 125, 129-30 (R.I. 2013).

III

Analysis[4]

A

Whether COVID-19 Constitutes "Physical Loss or Damage"

Before turning to the parties' arguments in support of their respective motions for partial summary judgment, it is important for the Court to distill the discrete issue that is presently before it. Moinian is not seeking summary judgment on the ultimate issues that comprise its prima facie case as asserted in its Complaint. *See* Pl.'s Mem. 14. That is, Moinian is not seeking a judicial ruling from this Court that COVID-19 was present at each of its insured locations or that Moinian has established monetary damages resulting from that circumstance or from the issuance of orders of civil authority prohibiting access to Moinian's properties. *Id*. Rather, the primary issue presently before this Court is whether the Policy's terms provide coverage for losses allegedly arising from the presence of COVID-19 on Moinian's insured properties. *Id*. To resolve this issue, however, the Court must address

[4] In AFM's Motion for Partial Summary Judgment, AFM argued that New York law governed Moinian's claims because New York has the most significant relationship to the Policy and Moinian's claims. (Def.'s Mem. 12-13.) In response, Moinian argued that because there is no "true conflict" between New York and Rhode Island law pertaining to the construction of insurance policies, there is no conflict of laws issue presently before the Court. (Pl.'s Opp'n 12.) At oral argument, counsel for AFM explained that AFM was operating under the impression that this Court's Decision in *Atwells Realty Corp. v. Scottsdale Insurance Co.*, No. PC-2020-04607, 2021 WL 2396584 (R.I. Super. June 4, 2021) was controlling precedent. *See* Hr'g Tr. 15:6-16, 16:14-22 (Jan. 21, 2022). This Court explained, however, that because the Court's Decision in *Atwells* was in the context of a motion to dismiss, the Court does not consider *Atwells* to be binding precedent. *Id*. at 24:20-23. In light of this, counsel for AFM agreed that there is no issue with the Court herein applying Rhode Island law and looking to other jurisdictions, including New York, for cases that are instructive or persuasive. *Id*. at 25:7-26:9. Thus, the Court will apply Rhode Island law in this Decision but will refer to other jurisdictions for instructive and/or persuasive authority.

an important threshold question: does the presence of COVID-19 at insured locations constitute "physical loss or damage" under the Policy and as a matter of law?

Moinian offers several rationales to support its contention that COVID-19 constitutes physical loss or damage to property under the language of the Policy. *See* Pl.'s Mem. 16-22. As a starting point, Moinian argues that the form upon which AFM issued the Policy to Moinian "expressly designates communicable disease at, and limitations to access of, property" as types of "physical loss or damage." (Pl.'s Opp'n 16.) According to Moinian, this is because the "Additional Coverages" section provided in Section D of the "Property Damage" portion of the Policy includes "Communicable Disease – Property Damage" coverage, and therefore, the Communicable Disease coverages only apply if there is insured physical loss or damage. *Id*. Put another way, in Moinian's opinion, because the Communicable Disease coverages apply only where an insured's property has the "actual not suspected presence of **communicable disease**" and access to such location is limited, restricted, or prohibited by an agency or officer decision because of that communicable disease, the Policy recognizes the presence of communicable disease at a location, and limitations or restrictions on access to a location, as types of "physical loss or damage" covered by the Policy. *Id*. (bold in original). Moinian claims that there is no dispute that COVID-19 is a "communicable disease" and that civil orders limited or restricted access to locations covered under the Policy. *Id*. Therefore, Moinian claims that the express terms of the Policy recognize that the presence of COVID-19 at a location, and limitations or restrictions to accessing property imposed by civil orders, constitute "physical loss or damage" covered under the Policy. *Id*. at 16-17.

Next, Moinian relies on this Court's prior Decision in *Atwells Realty Corp. v. Scottsdale Insurance Co.*, No. PC-2020-04607, 2021 WL 2396584 (R.I. Super. June 4, 2021), where this

Court explained that the common theme among COVID-19 cases is that the resolution of the matter depends upon the policy language and the facts as alleged by the insured and as applied to the policy at issue. (Pl.'s Mem. 16) (citing *Atwells Realty Corp.*, 2021 WL 2396584, at *7). Moinian argues that in "[a]nalyzing an insuring agreement that was materially similar to Moinian's Policy," this Court held that under the insuring policy in *Atwells*

> "'[S]ubstances that cannot be seen but can survive in the air or on surface of property and that can make persons within a premises sick and the premises uninhabitable, can be considered to cause direct physical loss of or damage to property.'" *Id*. (quoting *Atwells Realty Corp.*, 2021 WL 2396584, at *8).

Moinian also points to this Court's reasoning in *Atwells* that, in light of the virus exclusion contained in the *Atwells* policy, if the presence of a virus could not be contained within the general provisions of the policy to constitute "physical loss of" or "physical damage to" property, the virus exclusion contained in the *Atwells* policy "would be superfluous and rendered meaningless." *Id*. at 17 (citing *Atwells Realty Corp.*, 2021 WL 2396584, at *6). Moinian argues that this rationale applies with equal force in this case. *Id*. More specifically, Moinian argues that the Policy insures "'against ALL RISKS OF PHYSICAL LOSS OR DAMAGE, except as *hereinafter excluded* . . . .'" and that "[s]omething cannot be 'hereinafter excluded' if it was never a 'risk[] of physical loss or damage' in the first place." *Id*. (quoting Pl.'s Compl. Ex. A, at 1) (emphasis in original). Therefore, according to Moinian, AFM cannot argue in good faith that COVID-19 is excluded by the Contamination Exclusion, while also arguing that COVID-19 could never cause "physical loss or damage" in the first place as this would render a term superfluous or meaningless and would be contrary to well-settled Rhode Island case law requiring courts to consider an insurance policy in its entirety. *Id*. (further citations omitted).

Additionally, Moinian avers that AFM's decision to include the Contamination Exclusion in the Policy demonstrates that AFM "itself knows" the substances enumerated in the Policy's definition of "contamination" are capable of causing "physical loss or damage." *Id*. According to Moinian, "[t]his interpretation neatly aligns with dictionary definitions of the word 'loss,'" which Moinian claims does not require structural alteration, permanent disposition, or visible damage to property. *Id*. at 17-18. Thus, Moinian contends that the presence of the Contamination Exclusion shows that the Policy's plain and unambiguous language contemplates "non-structural loss or damage" of the type caused by COVID-19. *Id*. at 18.

Interestingly, Moinian claims to have presented the exact fact pattern contemplated by this Court in *Atwells* because Moinian has "alleged and has shown the presence of SARS-CoV-2 at its insured property[,]" which, according to Moinian, "indisputably survives in the air and on surfaces for extended periods, makes people sick, and renders premises uninhabitable[.]" *Id*. Because of this, Moinian urges this Court to apply *Atwells*'s civil authority analysis to Moinian's business interruption claim and find that COVID-19 causes "physical loss" to property under the Policy. *Id*. at 18-19. According to Moinian, this will not only align this case with *Atwells* but also the "dozens of other pro-policyholder COVID-19 decisions." *Id*. at 19-20.

Finally, Moinian points out that, prior to the COVID-19 pandemic, AFM's affiliate Factory Mutual Insurance Company (FMIC) asserted a similar argument that a substance can cause "physical loss or damage" to property in a case involving the existence of mold in a pharmaceutical plant. *Id*. at 21 (citing *Factory Mutual Insurance Co. v. Federal Insurance Co.*, No 1:17-cv-00760 (D.N.M. 2017)); *see also* Bourne Aff. Ex. F. Moinian explains that in *Factory Mutual Insurance Co.*, FMIC argued that

> "It is undisputed that the mold infestation destroyed the aseptic environment and rendered Room 152 unfit for its intended use—

> manufacturing injectable pharmaceutical products. Numerous courts have concluded that *loss of functionality or reliability under similar circumstances constitutes physical loss or damage*." (Pl.'s Mem. 21) (emphasis in original); *see also* Bourne Aff. Ex. F, at 3.

Moinian contends that just as FMIC acknowledged that mold in a policyholder's manufacturing facility rendered its products unfit for use, "highly transmissible SARS-CoV-2 can render property unfit for its intended use." *Id*. at 21-22.

AFM, however, vehemently opposes Moinian's position. According to AFM, all of the relevant Policy provisions, save the Communicable Disease coverage provisions, "unambiguously require Moinian to demonstrate 'physical loss or damage of the type insured' to property[,]" and that "the mere presence of COVID-19—or, more specifically, the presence of individuals who have, or may have, COVID-19—at Moinian's insured properties" does not constitute "physical loss or damage" to property as a matter of law. (Def.'s Mem. 14.) More specifically, AFM contends that, as an initial matter, Moinian submitted affidavits which, even if fully credited, "merely establish the presence of employees at various facilities who either tested positive for the virus or suspected that they may have the virus . . . ." *Id*. at 14-15. However, "this does not establish 'physical loss or damage' to insured property as a matter of law[,]" according to AFM, because "no such *physical* damage occurred and there has been no *physical* dispossession, or loss, of the insured's property." *Id*. at 15 (emphasis in original).

Moreover, AFM argues that "New York courts are clear that the presence of COVID-19, even assuming it can be established, does not constitute the type of physical loss or damage required by the Policy." *Id*. AFM points to several cases including, among others, *St. George Hotel Associates, LLC v. Affiliated FM Insurance Co.*, No. 20-CV-05097 (DG) (RLM), 2021 WL 5999679, at *6-7 (E.D.N.Y. Dec. 20, 2021) and *Mohawk Gaming Enterprises, LLC v. Affiliated FM Insurance Co.*, 534 F. Supp. 3d 216, 222-23 (N.D.N.Y. 2021), where these

courts, "looking to the same AFM policy at issue here" and applying New York law, affirmed that the mere presence or spread of COVID-19 does not trigger coverage. *Id*. AFM contends that the conclusions reached by the courts in *St. George Hotel Associates* and *Mohawk Gaming Enterprises, LLC* "are consistent with the unanimous body of developing appellate authority and the overwhelming majority of trial-court decisions." *Id*. at 16. Based on this, AFM argues that "Moinian's claim is indistinguishable from those that courts have repeatedly rejected[,]" and thus, AFM is entitled to summary judgment. *Id*.

While not binding on this Court, AFM also points out that "New York law expressly requires some physical alteration or damage to the insured property to satisfy the Policy's 'physical loss or damage' requirement." *Id*. at 17 (citing *WM Bang LLC v. Travelers Casualty Insurance Co. of America*, No. 20-CV-4540 (KMK), 2021 WL 4150844, at *3 (S.D.N.Y. Sept. 13, 2021); *Park Avenue Oral and Facial Surgery, P.C. v. The Hartford Financial Services Group*, No. 20-CV-5407 (VSB), 2021 WL 5988342, at *5 (S.D.N.Y. Dec. 17, 2021)); *see also Roundabout Theatre Co. v. Continental Casualty Co.*, 302 A.D.2d 1 (N.Y. App. Div. 2002); *10012 Holdings, Inc. v. Sentinel Insurance Co., Ltd.*, 21 F.4th 216, 221 (2nd Cir. 2021); *Torches on the Hudson, LLC v. Sentinel Insurance Co., Ltd.*, No. 20-CV-07855 (PMH), 2021 WL 5403168, at *5 (S.D.N.Y. Nov. 18, 2021). This requirement to demonstrate some sort of actual, physical alteration to the insured property, AFM argues, is the precise reason why courts analyzing this "exact Policy—or a substantially similar one issued by AFM's parent company" have dismissed COVID-19-related claims for failure to identify "physical loss or damage." (Def.'s Mem. 18.) Moreover, AFM contends that because the presence of COVID-19 requires neither replacement nor repair of any part of Moinian's property, COVID-19 cannot constitute "physical loss or damage" within the meaning of the Policy's coverages. *Id*. at 23.

AFM also points out that "courts have expressly rejected assertions that employees at various facilities tested positive for COVID-19 as evidence of 'physical loss or damage.'" *Id*. at 19 (citing *The Oregon Clinic, PC v. Fireman's Fund Insurance Co.*, No. 3:21-cv-00778-SB, 2021 WL 5921370, at *4 (D. Or. Dec. 15, 2021); *Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara, Wolf & Carone, LLP v. Valley Forge Insurance Co.*, No. 20-cv-2941 (LDH)(LB), 2021 WL 5759703, at *6 (E.D.N.Y. Dec. 3, 2021); *Zebra Technologies Corp. v. Factory Mutual Insurance Co.*, No. 20-cv-05147, 2021 WL 4459532, *1, 3 (N.D. Ill. Sept. 29, 2021)). According to AFM, "Moinian's claim fares no better; merely asserting that employees at various facilities tested positive for COVID-19, or exhibited symptoms consistent with COVID-19, does nothing to establish the kind of 'physical loss or damage' that the Policy insures, which is dispositive." *Id*. at 20 (citing *Abrams*, 2021 WL 5759703, at *6; *Zebra Technologies Corp.*, 2021 WL 4459532, at *1, 3).

Finally, AFM contends that contamination of a premises by a virus does not constitute physical loss or damage because the virus's presence can be eliminated by routine cleaning and disinfecting, and that an item or structure that merely needs to be cleaned has not suffered physical loss. *Id*. (citing *Torches on the Hudson*, 2021 WL 5403168, at *5; *Food for Thought Caterers Corp. v. Sentinel Insurance Co. Ltd.*, 524 F. Supp. 3d. 242, 249 (S.D.N.Y. 2021)) (further citations omitted). AFM notes that Moinian expressly stated that '"[w]henever [it] became aware of individuals infected with COVID-19 that were actually present at insured locations, [Moinian] took steps to disinfect all surfaces in any area where the individual had been present.'" *Id*. at 21 (quoting Moinian Aff. Ex. D, ¶ 4). Thus, because property that only needs to be cleaned is neither physically lost nor physically damaged, Moinian's claims must fail. *Id*.

The parties' arguments concerning whether COVID-19 constitutes "physical loss or damage" evidences that resolution of this issue requires the Court to address two related but slightly different questions. First, the Court must consider whether the presence or suspected presence of COVID-19 at, on, or in Moinian's insured properties constitutes "physical loss or damage" under the terms of the Policy. Second, as a matter of first impression in Rhode Island, the Court must consider whether COVID-19, and in particular whether the presence of individuals who have, or may have, COVID-19 at insured locations, causes "physical loss or damage" to property as a matter of law. Importantly, the answer to the former question is not necessarily dispositive of the latter question.

1

Whether the Presence or Suspected Presence of COVID-19 at, on, or in Moinian's Insured Properties Constitutes "Physical Loss or Damage" Under the Terms of the Policy

As mentioned above, Moinian argues that the form upon which AFM issued the Policy expressly designates communicable disease at, and limitations to access of, property as types of "physical loss or damage[]" covered under the Policy and that by the Policy's plain terms, the Communicable Disease coverages only apply if there is physical loss or damage. (Pl.'s Opp'n 16.) Moreover, the fact that the Policy contains a Contamination Exclusion, according to Moinian, is further evidence that the presence of a "virus" is a covered "physical loss or damage" under the Policy. *Id*. at 17. Indeed, Moinian claims that the Contamination Exclusion would be superfluous if the presence of a "virus" at a location did not constitute physical loss or damage to the insured location. *Id*. (citing *Atwells Realty Corp.*, 2021 WL 2396584, at *6). This is because, according to Moinian, the Policy insures '"against ALL RISKS OF PHYSICAL LOSS OR DAMAGE, *except as hereinafter* excluded . . ."' and that "[s]omething cannot be 'hereinafter

excluded' if it was never *included* as a 'risk[] of physical loss or damage' in the first place." (Pl.'s Reply 4) (quoting Pl.'s Compl. Ex. A, at 1) (emphasis in original).

AFM, however, argues that the Policy's inclusion of the Contamination Exclusion does not compel the conclusion that the presence of COVID-19 constitutes "physical loss or damage" under the Policy and that interpreting the Policy as suggested by Moinian would in fact render the Policy's Communicable Disease coverages surplusage. (Def.'s Opp'n 15, 24.) More specifically, AFM explains that if, as Moinian argues, the presence of COVID-19 constituted "physical loss or damage," the Policy's Communicable Disease provisions, and their collective $200,000 annual aggregate sublimit, "would be superseded by the Policy's Property or Business Interruption coverage, both of which have higher limits and offer broader coverage—thereby rendering the Communicable Disease provisions nugatory." *Id.* at 24.

As this Court previously acknowledged, the common theme among COVID-19 insurance disputes is that the resolution of the matter depends upon the policy's language and the facts as alleged by the insured and as applied to the applicable policy at issue. *Atwells Realty Corp.*, 2021 WL 2396584, at *7 (citing *McKinley Development Leasing Co. Ltd. v. Westfield Insurance Co.*, No. 2020 CV 00815, 2021 WL 506266, at *4-7 (Ohio Stark Cty. Ct. Com. Pl. Feb. 9, 2021)); *see also Goodwill Industries of Orange County, California v. Philadelphia Indemnity Insurance Co.*, No. 30-2020-01169032-CU-IC-CXC, 2021 WL 476268, at *2-3 (Cal. Super. Jan. 28, 2021); *Vervaine Corp. v. Strathmore Insurance Co.*, SUCV20201378BLS2, 2020 WL 8766370, at *5 (Mass. Super. Dec. 21, 2020). The law is well settled that in interpreting the contested terms of an insurance policy, the Court is '"bound by the rules established for the construction of contracts generally."' *Koziol v. Peerless Insurance Co.*, 41 A.3d 647, 650 (R.I. 2012) (quoting *Malo v. Aetna Casualty and Surety Co.*, 459 A.2d 954, 956 (R.I. 1983)); *see also*

Colagiovanni v. Metropolitan Life Insurance Co., 57 R.I. 486, 190 A. 459 (1937). In applying the principles of contract interpretation, as they are used when interpreting an insurance policy, if the terms of the policy "are clear and unambiguous, 'the task of judicial construction is at an end and the agreement must be applied as written.'" *Ashley v. Kehew*, 992 A.2d 983, 987 (R.I. 2010) (quoting *McBurney v. Teixeira*, 875 A.2d 439, 443 (R.I. 2005)); *see also Bliss Mine Road Condominium Association v. Nationwide Property and Casualty Insurance Co.*, 11 A.3d 1078, 1083 (R.I. 2010). The Court '"shall not depart from the literal language of the policy absent a finding that the policy is ambiguous."' *Koziol*, 41 A.3d at 650 (quoting *Lynch v. Spirit Rent-A-Car, Inc.*, 965 A.2d 417, 425 (R.I. 2009)); *see also Mallane v. Holyoke Mutual Insurance Co. in Salem*, 658 A.2d 18, 20 (R.I. 1995). "The terms of the policy shall be given their plain, ordinary, and usual meanings." *Koziol*, 41 A.3d at 650 (citing *Bliss Mine Road Condominium Association*, 11 A.3d at 1083); *see also Mallane*, 658 A.2d at 20.

The Court considers the policy in its entirety and will not strain to find an ambiguity by '"viewing a word in isolation or by taking a phrase out of context."' *Koziol*, 41 A.3d at 650-51 (quoting *Bliss Mine Road Condominium Association*, 11 A.3d at 1083); *see also Amica Mutual Insurance Co. v. Streicker*, 583 A.2d 550, 552 (R.I. 1990). Importantly, the Court shall '"refrain from engaging in mental gymnastics or from stretching the imagination to read ambiguity into a policy where none is present."' *Koziol*, 41 A.3d at 651 (quoting *Bliss Mine Road Condominium Association*, 11 A.3d at 1083); *see also Mallane*, 658 A.2d at 20. Nonetheless, the Court will hold a policy's terms to be ambiguous if, in light of this analysis, the policy's terms are '"reasonably susceptible of different constructions.'" *Koziol*, 41 A.3d at 651 (quoting *Bliss Mine Road Condominium Association*, 11 A.3d at 1084); *see also Westinghouse Broadcasting Co.*, 122 R.I. at 579, 410 A.2d at 991. "The subjective intent of the parties is irrelevant in reaching this

conclusion." *Koziol*, 41 A.3d at 651 (citing *Bliss Mine Road Condominium Association*, 11 A.3d at 1083-84). An ambiguity contained in an insurance policy is strictly construed against the insurer. *Id*. (citing *Bliss Mine Road Condominium Association*, 11 A.3d at 1085); *see also Aetna Casualty and Surety Co. v. Sullivan*, 633 A.2d 684, 686 (R.I. 1993).

Here, viewing the Policy in its entirety and giving the terms their plain, ordinary, and usual meanings, the Policy is, without question, clear and unambiguous and is not susceptible to more than one reasonable interpretation. Initially, this is because pursuant to the Policy's plain and unambiguous terms, physical loss or damage to insured property is a threshold requirement in order to trigger the Policy's Property Damage and Business Interruption coverages, *save the Communicable Disease coverages*. *See* Def.'s Mem. Ex. A, at 33, 39, 51, 57. Put another way, in order to trigger the Policy's Property Damage or Business Interruption coverages, the insured, here Moinian, must demonstrate "physical loss or damage" pursuant to the express terms of the Policy. *Id*. at 33, 51 (the Policy requiring "physical loss or damage" to establish a claim for Property Damage and "direct result of physical loss or damage" to establish a claim for Business Interruption).

The clear and unambiguous terms of the Policy's Communicable Disease provisions, however, do not mention, and therefore evidently do not require, a showing of "physical loss or damage." *See id*. at 39, 57 (requiring the insured to establish the "actual not suspected presence of communicable disease and access to such described location is limited, restricted or prohibited" by either order of an authorized governmental agency or decision of an "Officer of the Insured" as a result of such presence of communicable disease); *see also Nguyen v. Travelers Casualty Insurance Co. of America*, 541 F. Supp. 3d 1200, 1227 (W.D. Wa. 2021) (noting that the policy's communicable disease provisions "by their terms, do not include a physical loss or damage

requirement"). Indeed, the Policy's Communicable Disease coverages, located in the "*Additional Coverage*" and "*Coverage Extension*" sections of the Policy, do not impose any requirement on the insured to demonstrate "physical loss or damage" in order for these coverages to be triggered and require the insured to instead demonstrate, among other things, the "actual not suspected presence of communicable disease." *Id*. at 39, 57. Thus, the Court rejects Moinian's position that the inclusion of the Communicable Disease coverages in the Policy supports a finding that the presence of a "virus" is a covered "physical loss or damage" under the Policy. This Court will not engage in "mental gymnastics" or stretch the imagination to such an extent as to read ambiguity into a policy where none is present. *Koziol*, 41 A.3d at 651 (citing *Bliss Mine Road Condominium Association*, 11 A.3d at 1083); *see also Mallane*, 658 A.2d at 20.

Moreover, the Court agrees with AFM that interpreting the Policy as suggested by Moinian would render the Policy's Communicable Disease coverages surplusage. This is because if, as Moinian avers, the presence of COVID-19 constituted "physical loss or damage" under the Policy, the Policy's Communicable Disease provisions, and their $200,000 annual aggregate sublimit, would be superseded by the Policy's Property and Business Interruption coverages, both of which have higher limits and offer broader coverage. *See* Def.'s Mem. Ex. A, at 16-17. Consequently, there would be no need for the inclusion of the Communicable Disease coverages if the presence of COVID-19 constituted "physical loss or damage" under the terms of the Policy. In other words, if, hypothetically, COVID-19 did constitute "physical loss or damage" under the Policy, Moinian would be permitted to recover under the Policy's general grants of coverage assuming an exclusion does not otherwise bar coverage; there would be no need for the additional Communicable Disease coverages. *See Nguyen*, 541 F. Supp. 3d at 1227 (explaining that "Communicable Disease provisions apply when the disease is present, making it distinct from the Insurance Provided

provision, which requires physical loss or damage"); *Cordish Companies, Inc. v. Affiliated FM Insurance Co.*, No. ELH-20-2419, 2021 WL 5448740, at *17 (D. Md. Nov. 22, 2021) (explaining that "[i]f the Policy provided that communicable diseases cause physical loss or damage, then it would not have had to include a separate provision for coverage based on communicable disease"); *see also Atwells Realty Corp.*, 2021 WL 2396584, at *7 (explaining that what constitutes "physical loss or damage" "depends upon the policy language and the facts as alleged by the insured and as applied to the applicable policy at issue").

In this regard, Moinian's reliance on this Court's Decision in *Atwells Realty* is misplaced. This is because not only was the issue of whether COVID-19 constituted "direct physical loss of or damage to property" presented to the Court in the context of a Motion to Dismiss, but the specific policy at issue in that case did not contain Communicable Disease coverages. *See Atwells Realty Corp.*, 2021 WL 2396584, at *1-3. Consequently, a significant reason behind this Court concluding that COVID-19 *could* constitute "direct physical loss of or damage to property" was that "[i]f presence of a virus could not be contained within [the policy's general provision], the Virus Exclusion would be superfluous and rendered meaningless." *Id*. at *6. In this instant case, however, the Policy at issue leads the Court to a different conclusion. *See id*. at *7 (noting that what constitutes "physical loss or damage" "depends upon the policy language and the facts as alleged by the insured and as applied to the applicable policy at issue"). There would be absolutely no need for the Policy's Communicable Disease coverages if COVID-19 constituted "physical loss or damage" under the Policy. *See Nguyen*, 541 F. Supp. 3d at 1227; *Cordish Companies, Inc.*, 2021 WL 5448740, at *17 (explaining that insured's argument that the Communicable Disease – Property Damage coverage provision indicates that a loss from virus contamination

constitutes physical loss or damage is unavailing and that the "inclusion of a separate provision on damage caused by communicable diseases actually supports the insurer's argument").

Finally, the Court finds Moinian's arguments that because the Policy contains a Contamination Exclusion, the presence of "virus" is a covered "physical loss or damage" under the Policy and that the Contamination Exclusion would be superfluous if the presence of a "virus" did not constitute physical loss or damage to the insured location, equally unavailing. *See* Pl.'s Opp'n 16-17. First and foremost, under a plain reading of the Policy and applying the ordinary and usual meanings of the terms contained therein, the Contamination Exclusion undoubtably applies to Moinian's claims. As mentioned above, the Contamination Exclusion excludes:

> "**8. Contamination**, and any cost due to **contamination** including the inability to use or occupy property or any cost of making property safe or suitable for use or occupancy. If **contamination** due only to the actual not suspected presence of **contaminant(s)** directly results from other physical damage not excluded by this Policy, then only physical damage caused by such **contamination** may be insured." (Def.'s Mem. Ex. A, at 37) (bold in original).

The Policy goes on to define "**contaminant(s)**" as "anything that causes **contamination**," which in turn, is defined in relevant part as "any condition of property due to the actual or suspected presence of [a] . . . pathogen or pathogenic organism, . . . virus, disease causing or illness causing agent[.]" *Id*. at 74 (bold in original). It is well settled that, in construing an insurance contract, if the terms of the policy "are clear and unambiguous, 'the task of judicial construction is at an end and the agreement must be applied as written.'" *Ashley,* 992 A.2d at 987 (quoting *McBurney,* 875 A.2d at 443); *see also Bliss Mine Road Condominium Association,* 11 A.3d at 1083.

In this case, Moinian attributes its claim to the actual or suspected presence of COVID-19 at, on, or in its insured properties and that the presence of infected employees at its premises and governmental orders caused Moinian's losses. *See* Pl.'s Compl. ¶¶ 3, 5. Consequently, the

Contamination Exclusion unambiguously applies to bar Moinian's claim. Indeed, this conclusion is consistent with the overwhelming majority of courts across the country who have had opportunity to apply this, or substantially similar, contractual language to bar insureds' COVID-19-related losses. *See Ralph Lauren Corp. v. Factory Mutual Insurance Co.*, No. 20-10167 (SDW) (LDW), 2021 WL 1904739, at *4 (D.N.J. May 12, 2021) ("Contamination Exclusion unambiguously excludes coverage for any condition of property due to the actual or suspected presence of any . . . virus . . . which would encompass the Virus that causes COVID-19.") (internal quotations omitted); *Zebra Technologies Corp.*, 2021 WL 4459532, at *3 ("Plaintiff's claim is barred under the Policy's Contamination Exclusion"); *Mashantucket Pequot Tribal Nation v. Factory Mutual Insurance Co.*, No. X07HHDCV216140378S, 2021 WL 4477089, at *2 (Conn. Super. Aug. 18, 2021); *Cordish Companies, Inc.*, 2021 WL 5448740, at *19-20 (finding that Contamination Exclusion can "only be read as barring plaintiff's claims"); *Nguyen*, 541 F. Supp. 3d at 1227 n.32 (same); *see also Ford of Slidell, LLC v. Starr Surplus Lines Insurance Co.*, No. 21-858, 2021 WL 5415846, at *10 (E.D. La Nov. 19, 2021) ("Contamination Clause unambiguously excludes coverage"); *Lindenwood Female College v. Zurich American Insurance Co.*, No. 4:20CV1503 HEA, 2021 WL 5050065, at *5 (E.D. Mo. Nov. 1, 2021); *OTG Management PHL LLC v. Employers Insurance Co. of Wausau*, No. 2:21-cv-01240-WJM-MF, 2021 WL 3783261, at *6 (D.N.J. Aug. 26, 2021) ("Contamination Exclusion is unambiguous and applies to insurance claims under the Policy for losses due to the COVID-19 pandemic"); *Boscov's Department Store, Inc. v. American Guarantee & Liability Insurance Co.*, 546 F. Supp. 3d 354, 369 (E.D. Pa. June 30, 2021) ("definition of 'Contamination' is unambiguous and certainly applies

to COVID-19"); *Zwillo V, Corp. v. Lexington Insurance Co.*, 504 F. Supp. 3d 1034, 1041-43 (W.D. Mo. 2020). [5]

Separately, several courts, including the Seventh, Ninth, and Tenth Circuits have held that despite the existence of an applicable exclusion, COVID-19-related claims fail to trigger coverage in the first instance. *See Bradley Hotel Corp. v. Aspen Specialty Insurance Co.*, 19 F.4th 1002, 1006 (7th Cir. 2021); *Mudpie, Inc. v. Travelers Casualty Insurance Co. of America*, 15 F.4th 885,

[5] Moinian argues that even if the Contamination Exclusion applies, the exclusion only applies to "costs" and not "losses" due to contamination, and thus, Moinian's alleged "losses" caused by COVID-19 is a covered loss under the Policy. *See* Pl.'s Mem. 22-28. However, as pointed out by AFM, Moinian's interpretation fails in light of the Policy's clear and unambiguous language, and in fact, would render the Contamination Exclusion's initial reference to "contamination, and" entirely superfluous. Moinian's reading of the Policy also fails to acknowledge that the Policy expressly states that the Policy's "exclusions apply unless otherwise stated," and that the Business Interruption coverage specifically states that it is "subject to all the terms and conditions of this Policy including, but not limited to . . . exclusions[.]" (Def.'s Mem. Ex. A, at 34, 51.) In essence, Moinian asks this Court to rewrite the Policy to create an exception to the Contamination Exclusion for "losses" that simply does not exist. *See Koziol v. Peerless Insurance Co.*, 41 A.3d 647, 650-51 (R.I. 2012) (quoting *Bliss Mine Road Condominium Association v. Nationwide Property and Casualty Insurance Co.*, 11 A.3d 1078, 1083 (R.I. 2010)) (explaining that the Court considers insurance policies holistically and will not strain to find an ambiguity by '"viewing a word in isolation or by taking a phrase out of context"'); *see also Amica Mutual Insurance Co. v. Streicker*, 583 A.2d 550, 552 (R.I. 1990). Consequently, this Court, like many others, rejects Moinian's "costs" and "loss" argument relating to the Contamination Exclusion. *See Ralph Lauren Corp. v. Factory Mutual Insurance Co.*, No. 20-10167 (SDW) (LDW), 2021 WL 1904739, at *4 (D.N.J. May 12, 2021) (explaining that the insured's distinction between "costs" and "losses" was a superfluous distinction); *Lindenwood Female College v. Zurich American Insurance Co.*, No. 4:20CV1503 HEA, 2021 WL 5050065, at *5 (E.D. Mo. Nov. 1, 2021) (explaining that the court disagrees with the plaintiff's argument that the Contamination Exclusion applies only to claims made for "costs" as opposed to "losses"); *OTG Management PHL LLC v. Employers Insurance Co. of Wausau*, No. 2:21-cv-01240-WJM-MF, 2021 WL 3783261, at *5 (D.N.J. Aug. 26, 2021) (noting that "regardless of whether there is a distinction between 'costs' on the one hand and 'losses' . . . on the other, it is clear that the Contamination Exclusion cannot be so limited without rendering parts of it entirely meaningless"); *Cordish Companies, Inc. v. Affiliated FM Insurance Co.*, No. ELH-20-2419, 2021 WL 5448740, at *19-20 (D. Md. Nov. 22, 2021) (rejecting insured's interpretation that the Contamination Exclusion applies only to "costs" and not "losses" because such a reading would require the court to ignore other portions of the provision, namely the first two words of the exclusion "contamination, and[,]" which must be given effect. Based on this, the court concluded that the exclusion "must be read to encompass more than just 'any cost due to contamination.'").

894 (9th Cir. 2021); *Goodwill Industries of Central Oklahoma, Inc. v. Philadelphia Indemnity Insurance Co.*, 21 F.4th 704, 710-12 (10th Cir. 2021). Similarly, while COVID-19-related claims fall within the ambit of the Contamination Exclusion, the very presence of the exclusion does not, as an initial matter, establish that the presence of a virus is a covered cause of loss. *See WM Bang LLC*, 2021 WL 4150844, at *4 (holding that there was no "direct physical loss of or damage to" property and virus exclusion nonetheless applied); *Elite Union Installations, LLC v. National Fire Insurance Co. of Hartford*, No. 20-cv-4761 (LJL), 2021 WL 4155016, at *8 (S.D.N.Y. Sept. 13, 2021) (same); *Broadway 104, LLC v. XL Insurance America, Inc.*, 545 F. Supp. 3d 93, 98-99 (S.D.N.Y. 2021) (same); *Mangia Restaurant Corp. v. Utica First Insurance Co.*, 148 N.Y.S.3d 606, 611 (N.Y. Sup. Ct. 2021) (same). Moinian cannot therefore rely on the presence of certain exclusionary provisions contained in the Policy as a means to establish coverage in the first instance. *See El Novillo Restaurant v. Certain Underwriters at Lloyd's, London*, 505 F. Supp. 3d 1343, 1348 (S.D. Fla. 2020).

This very point was highlighted by the Southern District of Florida in *El Novillo Restaurant v. Certain Underwriters at Lloyd's, London*, where the plaintiff, similar to Moinian, argued that any loss expressly excluded under the policies "must also be defined as a direct physical loss because there would be no reason to draft a specific exclusion for a category of losses not covered in the first instance." *Id*. (internal quotations omitted). In rejecting this argument, the court explained that "[p]laintiffs' reliance on the Policies' exclusionary provisions must be rejected as a means to establish coverage in the first instance." *Id*. The court noted that the Florida Supreme Court has "squarely rejected" attempts to establish coverage by relying on the policies' exclusionary provisions and has expressly stated that '"the existence or nonexistence of an exclusionary provision in an insurance contract is not at all relevant until it has been concluded

that the policy provides coverage for the insured's claimed loss."' *Id*. (quoting *Siegle v. Progressive Consumers Insurance Co.*, 819 So.2d 732, 740 (Fla. 2002)).

While not binding on this Court, the court's rationale in *El Novillo Restaurant* is particularly instructive as it relates to Moinian's attempt to argue that the very presence of the Contamination Exclusion is evidence that COVID-19 constitutes "physical loss or damage" under the Policy. The Court agrees with the *El Novillo Restaurant* court that reliance on the Policy's exclusionary provisions must be rejected as a means to establish coverage in the first instance. *Id*. Thus, Moinian's position that the Contamination Exclusion would be superfluous if the presence of a "virus" at a location did not constitute "physical loss or damage" and that the existence of the exclusion in itself is evidence that COVID-19 constitutes "physical loss or damage," is soundly rejected.

Based on the foregoing reasons, the Court finds that COVID-19 at, on, or in Moinian's insured properties does not constitute "physical loss or damage" under the terms of the Policy. The Policy contains clear and unambiguous Communicable Disease provisions which do not require a showing of "physical loss or damage" and which were, evidently, specifically designed for the very type of claim Moinian asserts in the present matter. Moreover, the Policy's Contamination Exclusion not only unambiguously bars coverage but may not be used by Moinian as a means to establish coverage in the first instance. Thus, COVID-19 does not constitute "physical loss or damage" in the context of the Policy presently before this Court. However, because the resolution of COVID-19-related cases depends upon the policy language and the facts as alleged by the insured and as applied to the policy at issue, the Court will now turn to whether COVID-19 is capable of causing "physical loss or damage," and, in particular, whether

the presence of individuals who have, or may have, COVID-19 at an insured location causes "physical loss or damage" as a matter of law.

2

Whether COVID-19 and/or the Presence of Individuals Who Have, or May Have, COVID-19 at Insured Properties Causes "Physical Loss or Damage" as a Matter of Law

Even assuming, *arguendo*, that COVID-19 at, on, or in Moinian's insured properties constitutes "physical loss or damage" under the terms of the Policy, questions such as whether COVID-19 is capable of causing "physical loss or damage" and whether the facts, as alleged by Moinian, establishes "physical loss or damage" to insured property as a matter of law remains. Put another way, assuming COVID-19 could, at least theoretically, constitute "physical loss or damage" under the Policy, questions remain concerning whether COVID-19 is even capable of causing "physical loss or damage" to property in the first instance, as well as whether the factual scenario alleged by Moinian establishes "physical loss or damage" to insured property as a matter of law. In this case, as mentioned above, Moinian alleges that the presence of COVID-19 at, on, or in its insured locations caused "physical loss or damage" to its insured locations. (Pl.'s Compl. ¶¶ 15-16.) To support this contention, Moinian has submitted several affidavits from Moinian executives and employees which seek to establish the presence of employees at various insured properties who either tested positive for COVID-19 or who were suspected to have COVID-19. *See* Moinian Aff.; Cafaro Aff.; Virello Aff.; Gericke Aff.; Guzman Aff. Based on this, Moinian asserts that it has suffered "physical loss or damage" to its insured locations, and thus, is entitled to coverage under the Policy. (Pl.'s Mem. 1, 4-6.)

This Court finds that not only does COVID-19 not constitute "physical loss or damage" under the terms of the Policy, as explained above, but, as will be explained more fully below, COVID-19 is not capable of causing "physical loss or damage" to

property, full stop. Moreover, the factual scenario presented by Moinian (i.e., the presence of employees at insured locations who either tested positive for COVID-19 or are suspected to have COVID-19), in this Court's opinion, does not establish that Moinian has suffered "physical loss or damage" to its insured locations as a matter of law.

Turning first to the question of whether COVID-19 is capable of causing "physical loss or damage" to property in the absence of any actual or alleged physical alteration to the property, this precise question presents a matter of first impression in Rhode Island. Despite being a matter of first impression in this state, however, an overwhelming majority of jurisdictions have held that COVID-19 does not cause the type of physical loss or damage generally required by property damage insurance policies. *See, e.g., Sandy Point Dental, P.C. v. Cincinnati Insurance Co.*, 20 F.4th 327, 335 (7th Cir. 2021) (explaining that even if the virus was present and physically attached itself to Sandy Point's premises, "Sandy Point does not allege that the virus *altered* the physical structures to which it attached, and there is no reason to think that it could have done so." The court further noted that COVID-19's "impact on physical property is inconsequential: deadly or not, it may be wiped off surfaces using ordinary cleaning materials, and it disintegrates on its own in a matter of days.") (emphasis in original); *Gilreath Family & Cosmetic Dentistry, Inc. v. Cincinnati Insurance Co.*, No. 21-11046, 2021 WL 3870697, at *2 (11th Cir. Aug. 31, 2021) (explaining that the court did not "see how the presence of [COVID-19] would cause physical damage or loss to the property"); *Dakota Girls, LLC v. Philadelphia Indemnity Insurance Co.*, 17 F.4th 645, 649 (6th Cir. 2021) (rejecting argument that COVID-19 "merely through its supposed presence, was somehow 'damaging surfaces' within its properties"); *Santo's Italian Café LLC v. Acuity Insurance Co.*, 15 F.4th 398, 401 (6th Cir. 2021); *Mudpie, Inc.*, 15 F.4th at 892 (pointing out that insured's complaint fails to identify a "distinct, demonstrable, physical alteration of the

property") (internal quotations omitted); *Oral Surgeons, P.C. v. Cincinnati Insurance Co.*, 2 F.4th 1141, 1145 (8th Cir. 2021) (explaining that because the insured did not allege any physical alteration of property, the insured's insurance claim failed); *Benny's Famous Pizza Plus Inc. v. Security National Insurance Co.*, 149 N.Y.S.3d 883, at *4 (N.Y. Sup. Ct. 2021) (explaining that all New York courts applying New York law have reached the conclusion that COVID-19 does not cause physical loss or damage to property and have rejected arguments that business closures due to the presence of COVID-19 constitute physical loss or damage to property); *10012 Holdings, Inc.*, 21 F.4th at 221 (explaining that all New York courts have uniformly followed the rule that coverage must be denied where the insured property itself was not alleged or shown to have suffered direct physical loss or physical damage); *St. George Hotel*, 2021 WL 5999679, at *6-7; *Mohawk Gaming Enterprises, LLC*, 534 F. Supp. 3d at 222 (explaining that COVID-19 was "insufficient to trigger coverage when the policy's language requires physical loss or physical damage").

This Court agrees with the overwhelming majority of jurisdictions. Specifically, this Court agrees with the rationale that COVID-19 cannot cause "physical loss or damage" to property where no physical *alteration* or *damage* has occurred to the property. *See, e.g., Mudpie, Inc.*, 15 F.4th at 892; *Oral Surgeons, P.C.*, 2 F.4th at 1145; *see also Ralph Lauren Corp.*, 2021 WL 1904739, at *3 n.6 (rejecting argument that the presence of COVID-19 caused "physical loss or damage" and reasoning that "the Virus can harm humans, it does not physically alter structures and therefore does not result in coverable property loss or damage"); *WM Bang LLC*, 2021 WL 4150844, at *3 (explaining that New York courts have "repeatedly found" that direct physical loss of or damage to property requires some form of actual, physical damage to the insured property); *Cordish Companies, Inc.*, 2021

WL 5448740, at *16 ("virus does not cause physical alteration of property because it can be cleaned and eliminated from surfaces"). To reach a contrary conclusion would run directly against the plain and ordinary phrase, "*physical* loss or damage," as well as common sense.

However, in arguing that COVID-19 can cause "physical loss or damage" to property, Moinian contends that "a growing number of courts are granting summary judgment on the 'physical loss or damage' issue." (Pl.'s Mem. 19.) Moinian relies primarily on a recent New Hampshire Superior Court decision in *Schleicher & Stebbins Hotels, LLC v. Starr Surplus Lines Insurance Companies*, No. 217-2020-CV-00309, 2021 WL 4029204 (N.H. Super. Ct. June 15, 2021) to support this contention. *See id*. In *Schleicher & Stebbins Hotels, LLC*, the New Hampshire Superior Court was similarly faced with a motion for partial summary judgment that the terms "loss or damage" and "direct physical loss of or damage to property" encompass the impact of COVID-19 on the plaintiff's properties. *Schleicher & Stebbins Hotels, LLC*, 2021 WL 4029204, at *1. In concluding that the policies at issue in that case encompassed the kind of damage caused by the spread of COVID-19 to the plaintiff's properties, the court reasoned that "property contaminated with SARS-CoV-2 is 'distinct' from uncontaminated property[,]" and that "[c]oming into contact with property exposed to the virus results in a risk of contracting a potentially deadly disease." *Id*. at *10. The court further explained that "in the event an infected guest at one of the Hotels were to infect a doorknob, that the doorknob turns[,] in no way lessens the now very different risk that it poses to human health." *Id*. at *11. Based on this, the court concluded that the policies' references to "direct physical loss of or damage to property" does not prevent classification of loss resulting from COVID-19 contamination as a "peril insured against." *Id*. (internal quotations omitted).

This Court finds the New Hampshire Superior Court's reasoning not only unpersuasive but flawed. This is because, in this Court's opinion, the New Hampshire court conflated a risk to *humans* and a risk to *property*. That is, the policies at issue in the *Schleicher & Stebbins Hotels, LLC* case as well as the Policy currently in question are *property* insurance policies. Whether a doorknob, for example, poses a risk to human health is absolutely irrelevant to whether that doorknob is physically lost or damaged for purposes of insurance coverage. As far as this Court is concerned, the hypothetical doorknob still turns. Because of this, the mere presence of a virus on the doorknob (assuming the virus's presence can actually be determined) does nothing to affect the functionality of the doorknob itself. This is consistent with the Court's finding made above that COVID-19 cannot cause "physical loss or damage" to property where no physical *alteration* or *damage* has occurred to the property. Thus, this Court rejects the rationale put forth by the New Hampshire Superior Court and, consequently, rejects Moinian's argument in this regard.

As a final effort to circumvent the physical alteration rationale as a basis to reject its claims, Moinian argues that, prior to the pandemic, AFM asserted an argument similar to the one that Moinian presently asserts: that a substance can cause physical loss or damage to property regardless of whether there is a structural alteration to the property. (Pl.'s Mem. 21) (citing Bourne Aff. Ex. F, at 3). Moinian avers that this not only shows that a substance can cause physical loss or damage to property regardless of whether there is any structural alteration to the property, but that AFM in fact endorsed this position when the argument best "suited" AFM. *Id*.

Moinian's argument, however, can easily be defeated. This is because the case in which AFM made such an argument was in the context of a pharmaceutical plant who had determined that outside air had created mold inside of a sterile room, rending the pharmaceuticals unfit for use. *See* Bourne Aff. Ex. E, ¶¶ 9-12. The case of mold in a

sterile pharmaceutical room, however, presents a drastically different situation from that where COVID-19 is, or is perhaps suspected of being, present at an insured location. As AFM pointed out during argument, a mold situation "has a *physical* element to it. It requires some *physical* remediation or repair on the property pursuant to various protocols . . . There is a *physical* response, a *physical* remedy. Something has to be repaired, replaced, or rebuilt. That's not the case with COVID[.]" (Pella Corporation Hr'g Tr. 40:11-20, Jan. 19, 2022)[6] (emphasis added); *see also Park Place Hospitality, LLC v. Continental Insurance Co.*, No. 20 C 6403, 2021 WL 3549770, at *5 (N.D. Ill. Aug. 10, 2021) (explaining that "[u]nlike COVID-19 . . . the cases finding coverage based on the presence of asbestos, mold, or other hazards 'generally involve persistent physical contamination that requires repair or replacement, rather than cleaning and disinfecting, to remediate'") (internal quotations omitted)). AFM also explained that in the case of mold, "there is an element of permanen[ce]. It's a permanent condition that unless remedied persists. You have to get rid of the mold. Mold doesn't go away on its own. You have to address it . . . And that is simply not the case with . . . COVID." (Pella Corporation Hr'g Tr. 41:4-10); *see also Park Place Hospitality, LLC*, 2021 WL 3549770, at *5.

This Court agrees. COVID-19 does not permanently exist on surfaces for an indefinite period of time, unlike mold, and does not require any physical repair, replacement, or rebuild to remedy its presence on property. *See Park Place Hospitality, LLC*, 2021 WL 3549770, at *5 ("The

[6] This citation is to the hearing transcript from the related matter, *Pella Corporation. v. Factory Mutual Insurance Co.*, PC-2021-01527 (R.I. Super. Oct. 20, 2021) (Stern, J.). This matter was heard on January 19, 2022, two days prior to the hearing on the instant Cross-Motions for Partial Summary Judgment. Because of the substantial similarities between these two matters, the Court suggested, and the parties agreed, that the parties would "pare down" argument in the instant matter in the interest of efficiency as many of the arguments asserted in the *Pella Corporation.* matter were the same as those asserted in the *Moinian* matter. *See* Pella Corporation Hr'g Tr. 60:16-23; Hr'g Tr. 1:19-25, 2:1-9. Consequently, citations to the Pella Corporation hearing transcript will be referred to as "Pella Corporation Hr'g Tr."

Court does not find persuasive [the insured's] analogy to cases finding that the presence of asbestos fibers, mold, or other persistent hazards cause a physical loss."). At most, the physical response required when faced with the presence of COVID-19 at an insured location is to undertake routine cleaning and disinfecting. *See Dino Drop, Inc v. Cincinnati Insurance Co.*, 544 F. Supp. 3d 789, 798 (E.D. Mich. 2021) ("the virus may be eliminated simply by cleaning and disinfecting surfaces"); *Ascent Hospitality Management Co., LLC v. Employers Insurance Co. of Wausau*, 537 F. Supp. 3d 1282, 1288 (N.D. Ala. 2021) ("[a]t most, the presence of COVID-19 would require Ascent to clean and disinfect its locations"); *Out West Restaurant Group Inc. v. Affiliated FM Insurance Co.*, 527 F. Supp. 3d 1142, 1150 (N.D. Cal. 2021) (noting that COVID-19 can be disinfected and cleaned from surfaces). Indeed, the very fact that COVID-19 can be eliminated by routine cleaning and disinfecting is further evidence that the property upon which COVID-19 exist (or allegedly exist) is in no way physically damaged or lost. *See, e.g.*, *Food for Thought*, 524 F. Supp. 3d at 249 ("contamination of the premises by a virus does not constitute a 'direct physical loss' because the virus's presence can be eliminated by routine cleaning and disinfecting, and an item or structure that merely needs to be cleaned has not suffered a direct physical loss") (internal quotations omitted); *Torches on the Hudson*, 2021 WL 5403168, at *5 (same); *Sharde Harvey, DDS, PLLC v. Sentinel Insurance Co., Ltd*, No. 20-CV-3350 (PGG) (RWL), 2021 WL 1034259, at *10 (same); *Tappo of Buffalo, LLC v. Erie Insurance Co.*, No. 20-CV-754V(Sr), 2020 WL 7867553, at *4 (W.D.N.Y. Dec. 29, 2020) (same); *see also Mama Jo's Inc. v. Sparta Insurance Co.*, 823 F. App'x 868, 879 (11th Cir. 2020) (concluding that an item or structure that merely needs to be cleaned has not suffered a "loss" which is both "direct" and "physical"); *Skillets, LLC v. Colony Insurance Co.*, 524 F. Supp. 3d 484, 494 (E.D. Va. 2021) ("alterations remedied by normal cleaning procedures cannot constitute structural alteration sufficient to trigger coverage for

a direct physical loss"); *Windy City Limousine Co., LLC v. Cincinnati Financial Corp.*, No. 20-cv-04901, 2021 WL 4806384, at *7 (N.D. Ill. Oct. 14, 2021) (explaining that because COVID-19 can be easily removed through routine cleaning, the virus cannot be said to damage or otherwise physically alter property).

To this point, Moinian admitted that "[w]henever [it] became aware of individuals infected with COVID-19 that were actually present at insured locations, Moinian took steps to disinfect all surfaces in any area where the individual had been present." (Moinian Aff. Ex. D, ¶ 4.) Thus, Moinian's own actions demonstrate that the presence of a virus on property cannot be said to constitute "physical loss or damage." Consequently, this Court finds, like many other jurisdictions, that an item or structure that can be simply cleaned and/or disinfected has not suffered "physical loss or damage."

Finally, courts have rejected the very factual scenario asserted by Moinian in the instant matter: that the presence of individuals who have or who are suspected of having COVID-19 at, on, or in the insured's locations causes "physical loss or damage" to the insured properties. *See Abrams*, 2021 WL 5759703, at *6 (court held that insured did not state a valid claim to coverage where insured claimed that a number of employees tested positive for COVID-19 because "the mere presence of the virus [did] not amount to physical damage"); *Zebra Technologies Corp.*, 2021 WL 4459532, at *1, 3 (holding that there was no physical loss or damage to property where employees at certain insured facilities tested positive for COVID-19); *The Oregon Clinic, PC*, 2021 WL 5921370, at *4, 8 (same). This Court agrees with the rationale and conclusions reached by the *Abrams, Zebra Technologies Corp.*, and *The Oregon Clinic, PC* courts and similarly finds merely asserting that employees at various facilities who have or are suspected of having COVID-19 does not cause the type of "physical loss or damage" that is required by

the Policy. Holding otherwise would be for this Court to make the same analytical mistake made by the New Hampshire Superior Court in *Schleicher & Stebbins Hotels, LLC* by conflating a risk to *humans* and a risk to *property*.

In conclusion, Moinian, like many of the plaintiffs in the cases cited herein, has not alleged any facts demonstrating that its insured locations have been *physically* or *structurally altered*. All of Moinian's insured structures remain intact and have even been routinely cleaned, as stated by Moinian's Chief Executive Officer. *See* Moinian Aff. Ex. D, ¶ 4. Consequently, even if COVID-19 at, on, or in Moinian's insured locations could constitute "physical loss or damage" under the Policy, Moinian has presented claims that numerous courts have rejected, as demonstrated above. This Court joins the overwhelming majority of jurisdictions who have concluded that COVID-19 does not cause physical loss or damage to property. [7]

[7] Because the Court finds that COVID-19 does not constitute "physical loss or damage" both under the Policy and as a matter of law, the Court need not address the parties' arguments with respect to whether and to what extent the Policy's other exclusions apply to bar Moinian's claim. Moreover, Moinian's Civil Authority coverage claim similarly fails because, as explained above, COVID-19 does not constitute "physical loss or damage" both under the Policy and as a matter of law, and thus, any civil or military orders applicable to Moinian were not issued as a "direct result of physical damage of the type insured[,]" as required by the Civil Authority provision. *See* Def.'s Mem. Ex. A, at 56. Based upon a plain reading of the Civil Authority provision, this particular provision is predicated on the existence of some "physical damage of the type insured[.]" *Id*. at 56. However, because COVID-19 cannot constitute "physical loss or damage" both under the Policy and as a matter of law, as explained above, the issuance of any civil or military orders was simply not the "direct result of physical damage of the type insured[.]" *See, e.g., Mohawk Gaming Enterprises, LLC v. Affiliated FM Insurance Co.*, 534 F. Supp. 3d 216, 222-23 (N.D.N.Y. 2021) (explaining that insured's Civil Authority claim failed because "the presence of the novel coronavirus at the Casino would still not qualify as 'physical damage'" and that "the inclusion of the modifier 'physical' in a phrase such as 'direct result of physical damage' clearly imposes a requirement that the damage actually be tangible in nature; *i.e.*, this language unambiguously requires some form of physical harm to the location (or to a location within five miles)."); *Chefs' Warehouse, Inc. v. Employers Insurance Company of Wausau*, No. 20 Civ. 4825 (KPF), 2021 WL 4198147, at *11 (S.D.N.Y. Sept. 15, 2021); *Cordish Companies, Inc.*, 2021 WL 5448740, at *18 (noting that Civil Authority coverage "depend[s] on physical loss or damage to *some* property, and COVID-19 did not cause such loss or damage") (emphasis in original); *Nguyen v. Travelers Casualty Insurance Co. of America*, 541 F. Supp. 3d 1200, 1231 (W.D. Wa. 2021);

IV

Conclusion

Based on the foregoing, Moinian's Motion for Partial Summary Judgment is denied, and AFM's Motion for Partial Summary Judgment is granted. Counsel shall prepare and submit the appropriate order for entry consistent with this Decision.

Ralph Lauren, 2021 WL 1904739, at *3. Even assuming, *arguendo*, that COVID-19 could constitute "physical loss or damage" under the Policy and as a matter of law, the Policy's Contamination Exclusion unambiguously bars coverage because contamination is expressly excluded under the terms of the Policy, and consequently, even if COVID-19 caused physical loss or damage, it is not "physical damage *of the type insured*[.]" *See* Def.'s Mem. Ex. A, at 37, 51 (emphasis added); *see also Monarch Casino & Resort, Inc. v. Affiliated FM Insurance Co.*, No. 20-cv-1470, 2021 WL 4260785, at *6 (D. Colo. Sept. 17, 2021) (explaining that the plaintiff's Civil or Military Authority claim, among others, failed because "contamination is explicitly excluded from coverage under the clear terms of the Policy"). Thus, Moinian's Civil Authority claim fails.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	**Josephson, LLC d/b/a The Moinian Group v. Affiliated FM Insurance Co.**
CASE NO:	**PC-2021-03708**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**March 29, 2022**
JUSTICE/MAGISTRATE:	**Stern, J.**
ATTORNEYS:	
For Plaintiff:	**Stephen M. Prignano, Esq.**
For Defendant:	**Dana M. Horton, Esq.**