IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

SOMCO, LLC dba J3 CLOTHING CO., individually and on behalf of all others similarly situated Plaintiffs vs. LIGHTNING ROD MUTUAL INSURANCE COMPANY Defendant	CASE NO. CV 20 931763 JUDGE NANCY A. FUERST **PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANT LIGHTNING ROD MUTUAL INSURANCE COMPANY'S MOTION TO DISMISS, OR, ALTERNATIVELY, MOTION FOR SUMMARY JUDGMENT**

Plaintiff SOMCO, LLC dba J3 Clothing Co. ("J3") submits this Brief In Opposition to the Motion to Dismiss, or, Alternatively, for Summary Judgment (the "Motion") filed by Defendant Lightning Rod Mutual Insurance Company ("Lightning Rod"). The allegations in the Amended Class Action Complaint and Request for Declaratory Relief (the "Complaint"), all of which must be taken as true, state a claim for declaratory judgment under the insurance contract Lightning Rod issued to J3 (the "Policy"). Defendant cannot meet its burden under Civil Rule 12(B)(6). Rather, contrary to the mandates of Rule 12, Defendant's Motion refuses to concede, and at times fails to even acknowledge, the Complaint's well-pleaded allegations supporting a claim for declaratory judgment under the Policy.

Furthermore, by arguing as-of-yet unresolved factual issues and incorporating materials outside the pleadings, including documents, unproven facts, website printouts, and even proposed "expert witness" opinion affidavits, the Motion exceeds the permissible scope of Rule 12(B)(6). Recognizing this, Lightning Rod alternatively seeks conversion of its Motion to Dismiss to one for Rule 56 summary judgment. In the event the Court were inclined, at this early juncture, to convert the Motion to one for summary judgment, however, Rule 12(B)(6) mandates Plaintiff

"shall be given [a] reasonable opportunity to present all materials made pertinent to such a motion by Rule 56." As counsel made clear at the Case Management Conference, Plaintiff is agreeable to a reasonable discovery period followed by a summary judgment briefing schedule.[1]

Finally, assuming the Court were inclined to decide as a matter of law at the pleading stage the meaning of "direct physical loss of or damage to property" within the context of the Policy and the SARS-Cov-2-related claims at issue, at this juncture without any factual record, Lightning Rod's proffered definition – requiring some "structural alteration" of property – is nowhere contained in the Policy, and is contrary to law and a common sense reading of the Policy and the coverages provided therein.

I. INTRODUCTION

J3 is a small retail business that sells clothing on site at its store. To protect itself, J3 purchased and paid premiums for what is commonly called business interruption insurance. When J3 suffered losses because its business was interrupted by the coronavirus, it sought the insurance for which it had consistently paid premiums. The insurance company refused to honor the claim based on a tortured self-serving interpretation of the terms of the Policy. J3 had no choice but to file this action.

This declaratory judgment action involves a dispute between Plaintiff J3, a clothing retailer, and its insurance company, Defendant Lightning Rod. J3 submitted a timely claim for insurance coverage benefits, which Lightning Rod denied. Complaint at ¶¶ 61-62. J3 sought coverage for losses stemming from the coronavirus outbreak, including governmental shut-down orders. Specifically, the Complaint alleges J3 suffered direct physical loss of and damage to

[1] Defendant took the position at the recent Case Management Conference that Plaintiff is not entitled to undertake any discovery and promised a motion to stay or for protective order. (Under Ohio Civil Rules 33(A)(2) (interrogatories) and 34(B) (requests for production), Plaintiff was entitled to serve written discovery "after service of the summons and complaint").

property located at its premises due to the presence and spread of SARS-CoV-2 (commonly referred to "coronavirus") particles, a physical substance, as well as losses resulting from orders issued by Ohio's Governor and Department of Health prohibiting access to and suspending and/or restricting J3's retail operations in response to the presence and spread of SARS-CoV-2 and COVID-19 disease in the community. *See Id.* at ¶¶ 18, 29-38, 41-47, 49-50, 55-61.

Plaintiff seeks declaratory judgment under Civil Rule 57 and R.C. §§ 2721.01-2721.15 on behalf of itself and all other similarly situated Lightning Rod insureds in Ohio that had the same or similar claims denied by Lightning Rod under the same operative policy language. *Id.* at ¶¶ 63, 87. Lightning Rod's Motion takes no issue with any of the class allegations in the Complaint. Rather, it focuses exclusively on whether the Complaint sufficiently alleges that J3's claims are predicated on "direct physical loss of or damage to property," a condition precedent to the coverage benefits for which J3 was denied and that form the basis of this action. Motion at p. 3.

II. THE POLICY AND PLAINTIFF'S ALLEGATIONS IN THE COMPLAINT

Lightning Rod, a member of the Western Reserve Group of insurance companies, issued a "Businessowners Package Policy" to J3, "Policy Number PACKLBO3412111888," effective February 15, 2020 to February 15, 2021. *See* Policy Certification and Declarations, Exhibit A to the Motion.[2] The 112-page Policy is drafted and copyrighted by the Insurance Services Office, Inc. ("ISO"), and includes liability, property coverage, and other forms, but is a single policy. *Id.*

The "**Coverage**" section of the "BUSINESSOWNERS ADVANTAGE PROPERTY COVERAGE FORM" of the Policy states that Lightning Rod "will pay for direct physical loss of or damage to Covered Property at the premises described in the Declarations caused by or resulting from any Covered Cause of Loss." *Id.* at Form WBP 00 60 12 07, Page 2 of 33. "**Covered**

[2] Plaintiff attached a copy of the Policy to the Complaint. Defendant attached a certified copy of the Policy to its Motion.

Property" is defined to include the premises where J3's business operations are located, including the buildings, structures, and personal and business property located there. *Id*. at Pages 2-3 of 33.

The Policy defines "**Covered Cause of Loss**" to mean any and all "Risks Of Direct Physical Loss unless the loss is: **a.** Excluded in Section **B., Exclusions**; or **b.** Limited in Paragraph **A.4, Limitations**."[3] *Id*. at Page 3 of 33. Accordingly, the insuring provision at issue can be read: Lightning Rod "will pay for direct physical loss of or damage to Covered Property at the premises described in the Declarations caused by or resulting from any risks of direct physical loss."

SARS-CoV-2 is a physical substance that causes the disease COVID-19, which can be lethal. Complaint at ¶¶ 18-19. As a physical substance, SARS-CoV-2 physically interacts with and impacts other physical elements, property and substances. The Complaint asserts that the presence of physical SARS-CoV-2 particles renders items of physical property unsafe, and impairs that property's value, usefulness, and normal function. *Id*. at ¶¶ 29-30. Likewise, the Complaint alleges that the presence of SARS-CoV-2 particles, or people infected with or carrying those particles, renders premises unsafe, thereby impairing the premises' value, usefulness, and normal function, resulting in direct physical loss to the premises and the property located there. *Id*. at ¶¶ 34-36. The Complaint specifically alleges that the presence of SARS-CoV-2 particles causes direct physical harm, loss and damage to property. *Id.* at ¶¶ 31-33. In support of these allegations, the Complaint references 10 examples of state and local governmental orders that specifically recognize the virus' propensity to cause physical loss of and damage to property.[4] *Id*. at ¶ 48.

[3] The Motion does not argue that any Section B Exclusions or Section A.4 Limitations apply.

[4] Lightning Rod claims, that by referencing these examples of civil orders, Plaintiff seeks to use parol evidence to change the meaning of the Policy language. *See* Motion at pp. 10-13. It is not clear how reference to these orders could ever do that. To be sure, however, Plaintiff does not reference these orders for purposes of modifying the Policy language. Rather, these orders support and confirm Plaintiff's allegations that: 1. SARS-CoV-2 can and does cause physical loss of and damage to property; and 2. Civil authority orders in response to the Pandemic have been issued and are being issued, at least in part, in response to and as a result of the physical loss and damage to property SARS-CoV-2 has caused and is causing.

The Complaint further alleges it is probable that SARS-CoV-2 particles were physically present at and inside J3's premises, both in the air and on the surfaces of other "Covered Property" during the Policy period, as were people carrying these particles. *Id*. at ¶¶ 55-59. The Complaint specifically alleges, "Plaintiff has sustained direct physical loss and damage to items of property located at its premises and direct physical loss and damage to its premises described in the Policy as a result of the presence of SARS-CoV-2." *Id*. at ¶ 60.

The property coverage form of the Policy includes "**Property Definitions**" but does not define "physical loss of or damage to property." Policy, Ex. A to Motion at Form WBP 00 60 12 07, Page 31-33 of 33.

The Policy provides certain "**Additional Coverages**" above and beyond payment for "direct physical loss of or damage to Covered Property" resulting from any "risks of direct physical loss." Relevant here are the Policy's additional coverages for: 1) lost "**Business Income**" – when an insured is required to suspend business operations (commonly referred to as business interruption insurance); 2) "**Extra Expense**" incurred by an insured to minimize interruption or to continue operations: and 3) "**Civil Authority**" coverage – when a civil order prohibiting access to the business premises results in lost Business Income and/or Extra Expense.

According to the Policy, Lightning Rod will:

> Pay for the actual loss of Business Income [J3] sustain[s] due to the necessary suspension of [its] "operations" during the "period of restoration." The suspension must be caused by direct physical loss of or damage to property at the described premises. The loss or damage must be caused by or result from a Covered Cause of Loss… *Id*. at Form WBP 00 60 12 07, Page 6 of 33.[5]

[5] "Business Income" is defined as the net profit before income taxes that would have otherwise been earned, as well as normal operating expenses and payroll. *Id*. The purpose of this insurance is to provide protection in the event a covered cause of loss interrupts business operations and normal revenue generation so that a business can pay expenses and employees and remain viable throughout the interruption. Lightning Rod does not predicate any arguments on the definitions of "period of restoration" or "operations." Accordingly, Plaintiff will not discuss those definitions herein.

Under the "**Extra Expense**" coverage, Lightning Rod will:

> pay for necessary Extra Expense [J3] incur[s] during the "period of restoration" that [J3] would not have incurred had there been no direct physical loss or damage to property at the described premises. The loss or damage must be caused by or result from a Covered Cause of Loss… *Id*. at Form WBP 00 60 12 07, Page 7 of 33.[6]

Finally, under the "**Civil Authority**" coverage, Lightning Rod will:

> pay for the actual loss of Business Income [J3] sustain[s] and necessary Extra Expense caused by action of civil authority that prohibits access to the described premises due to direct physical loss of or damage to property other than at the described premises, caused by or resulting from any Covered Cause of Loss… *Id*. at Form WBP 00 60 12 07, Page 9 of 33.

With respect to these "**Additional Coverages**," the Complaint, including all reasonable inferences drawn in Plaintiff's favor, alleges that SARS-CoV-2 particles were present at and caused direct physical loss of and damage to J3's premises and property, resulting in lost Business Income and Extra Expense. *See* Complaint at ¶¶ 13-60. The Complaint also alleges that SARS-CoV-2 particles were/are present and have caused/are causing direct physical loss of and damage to property in and throughout Ohio (at property other than J3's premises). *Id*. at ¶¶ 18-36. Finally, the Complaint alleges that, in response to the presence of SARS-CoV-2, including the loss and damage it causes to property, and the COVID-19 Pandemic, Ohio's Governor and Department of Health issued multiple orders prohibiting access to J3's premises, all of which required or otherwise caused J3 to cease, suspend and/or reduce its business operations resulting in lost Business Income and Extra Expense. *Id*. at ¶¶ 18-37.

Taken as true, the facts in the Complaint demonstrate that J3 incurred direct physical loss of and damage to covered property at its premises resulting in the suspension of business operations and covered losses, including lost Business Income and Extra Expense. These

[6] "Extra Expense[s]" include those incurred to avoid or minimize the suspension of business and to continue operations. *Id*. at Form WBP 00 60 12 07, Page 8 of 33.

allegations bring J3's claim within coverage under the "**Coverage**," "**Business Income**" and "**Extra Expense**" sections of the Policy's Property Coverage Form. Furthermore, taken as true, the Complaint demonstrates that SARS-CoV-2 caused direct physical loss of and damage to property other than at J3's premises, prompting civil authority orders prohibiting access to J3, a "non-essential" business, resulting in suspension of business operations and covered losses, including lost Business Income and Extra Expense. These allegations bring J3's claim within coverage under the "**Civil Authority**" coverage in the Policy's Property Coverage Form.

The Motion fails to acknowledge the Complaint's allegations. For example, at page 5 Defendant states, "Plaintiff's claims, in the [] Complaint… do not allege any physical damage to the insured's property." This is untrue. At paragraph 33, the Complaint alleges that SARS-CoV-2 "causes direct physical damage to property;" paragraphs 55 through 59 allege that SARS-CoV-2 particles have been physically present at and on J3's premises and property, including in the air and on physical surfaces inside its business; and paragraph 60 alleges J3 "has sustained ***direct physical***… ***damage*** to items of property located at its premises." (Emphasis added).

Furthermore, the allegations, including inferences arising from those allegations, in the Complaint allege direct physical loss, damage, loss of use, deprivation, impairment, lack of functionality, lack of use, and numerous other reasonable meanings of "direct physical loss of or damage to property" as contemplated by the Policy.

As another example of Lightning Rod's disregard of the Complaint's allegations, at page 15 of its Motion Lightning Rod claims, "there is no allegation – namely, because it is undisputed – that the SARS-COV-2 particles [present at and on J3's premises and property] … damage the business property." Again, this is not true. The Complaint makes clear that SARS-CoV-2 particles

do and did damage J3's business property. *See supra*. Furthermore, however, the Policy does not require "damage to" property. Rather, "physical loss of" property alone is covered.

As one final example, at page 5 of the Motion, Lightning Rod claims the Complaint does not allege that the civil authority orders referenced in the Complaint were "action[s] by a civil authority preventing access to the insured's property due to property damage at any property that is not the insured's property." This is not true. The Complaint does allege that SARS-CoV-2 particles in Ohio have caused and continue to cause "physical… damage to property" other than the insured's property. Complaint at ¶¶ 49-54. Furthermore, the Complaint alleges and references the civil authority orders pursuant to which access to J3 was prohibited and its operations suspended. *See Id*. at ¶¶ 37-47.

Even when Lightning Rod does acknowledge the facts in the Complaint, it refuses to concede those facts as required by Rule 12(B)(6). Rather, Defendant's Motion attempts to counter the Complaint with its own factual allegations and arguments about the physical presence, properties and propensities of SARS-CoV-2, proffering evidence outside the pleadings, including expert witness opinions. This is plainly in violation of Civil Rule 12.

III. LAW & ANALYSIS

A. Rule 12(B)(6) Standard of Review

A Rule 12(B)(6) motion to dismiss for failure to state a claim upon which relief can be granted is a procedural mechanism that tests the sufficiency of the complaint. *Fletcher v. Univ. Hosps. Of Cleveland*, 120 Ohio St.3d 167, 170 (2008), *quoting State ex rel. Hanson v Guernsey Cty. Bd. of Commrs*., 65 Ohio St.3d 545, 548 (1992). To dismiss a complaint under 12(B)(6), "it must appear beyond doubt that the plaintiff can prove no set of facts in support of his or her claim that would entitle the plaintiff to relief." *Ghaster v. City of Rocky River*, 2013 WL 6730925, *5

(Ohio App. 8th Dist.), *citing Doe v. Archdiocese of Cincinnati*, 109 Ohio St.3d 491 (2006). "In resolving a Civ.R. 12(B)(6) motion, a court's factual review is confined to the four corners of the complaint. Within those confines a court presumes all factual allegations in the complaint are true, and all reasonable inferences from those facts are made in favor of the non-moving party." *Grady v. Lenders Interactive Servs*., 2004 WL 1799178 (Ohio App. 8th Dist.), *citing Fahnbulleh v. Strahan*, 73 Ohio St.3d 666 (1995). If there is any set of facts, consistent with the allegations of the Complaint, which would allow the plaintiff to recover, a court may not grant a 12(B)(6) motion to dismiss. *Ghaster*, 2013 WL at *6, *citing York v. Ohio State Hwy. Patrol*, 60 Ohio St.3d 143, 145 (1991).

Plaintiff generally agrees that an "insured must show facts sufficient to prove its loss was within the description of the policy." Motion at p. 14, *quoting Sterling Merchandise Co. v. Hartford Ins. Co.*, 30 Ohio App.3d 131, 137 (Ohio App. 9th Dist. 1986). The allegations in the Complaint regarding the presence of SARS-CoV-2 particles, and the physical loss of and damage to property caused thereby, must be accepted as true for purposes of the Motion. Taken as true, those facts bring J3's claims within coverage under the Policy in support of its claim for declaratory judgment. Lightning Rod's Motion to Dismiss must be denied.

1. The Factual Assertions, Website Materials and Expert Witness Opinion Affidavits are Not "Appropriate Matters" of Which the Court May Take Judicial Notice in Determining Defendant's Rule 12(B)(6) Motion to Dismiss

Plaintiff agrees that the Court may and should consider the Policy incorporated into and attached to the Complaint (and Defendant's Motion). *See* authorities cited in Motion at p. 5. Plaintiff disagrees, however, that the Court may take judicial notice of the factual arguments and allegations, website materials, and expert opinions proffered in the Motion, none of which are contained within the "four corners of the Complaint."

"Conceivably a court may take judicial notice of adjudicative facts under Evid.R. 201 in determining a Civ.R. 12[B][6] motion…" *State ex rel. Neff v. Corrigan*, 75 Ohio St.3d 12, 16 (1996), *quoting First Michigan bank & trust Co. v. P. & S. Bldg.*, 1989 WL 11915, *4 (Ohio App. 4th Dist.); *Northpoint Properties, Inc. v. Petticord*, 179 Ohio App.3d 342, 347 (Ohio App. 8th Dist. 2008). Such facts, however, must "not be subject to reasonable dispute in that [they are] either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Evid.R. 201(B). Indeed, judicial notice of facts outside the four corners of a complaint in connection with a Rule 12(B)(6) motion is extremely limited. So much so that a court may not, for example, take judicial notice of court proceedings in another case, even if the same parties and subject matter are involved. *Northpoint Properties, Inc.*, 179 Ohio App.3d at 347-48.

Nevertheless, without citing any supporting law, Lightning Rod states, "[t]his Court can take judicial notice that the "probable" SARS-CoV-2 particles allegedly present at the Plaintiff's premises can be removed, cleaned, and destroyed by routine cleaning and disinfection strategies." Motion at p. 14. Lightning Rod, by making this assertion, necessarily concedes that the physical properties of SARS-CoV-2 particles and their effect and affect on property are fact-based questions. Seeking to bypass discovery relative to these critical factual questions, Lightning Rod cites a CDC website page entitled "Cleaning and Disinfection for Households. Interim Recommendations for U.S. Households with Suspected or Confirmed Coronavirus Disease 2019 (COVID-19)" as somehow being definitive. (No households are alleged to exist at J3's business premises.) Lightning Rod quotes a portion of the webpage stating "[c]urrent evidence suggests that COVID-19 may remain viable for hours to days on surfaces made from a variety of materials" and that "[c]leaning of visibly dirty surfaces followed by disinfection is a best practice for prevention

of COVID-19 Transmission."[7] This interim best practice recommendation – to clean visibly dirty surfaces in a household in an effort to prevent COVID-19 transmission – in no way "unquestionably" demonstrates that "the SARS-CoV-2 particles present at the Plaintiff's [business] premises can be removed, cleaned, and destroyed by routine cleaning and disinfection strategies" as Lightning Rod claims. Furthermore, the same web page states that "[i]t is unknown how long the air inside a room occupied by someone with confirmed COVID-19 remains potentially infectious," and the recommendation "is aimed at limiting the survival of the virus in the environments," not "removing, cleaning, or destroying it." Finally, whether SARS-CoV-2 particles can be effectively wiped up or cleaned off any given surface, or otherwise removed from premises or property, is irrelevant to whether J3 sustained a direct physical loss of or damage to property. *See infra*.

The CDC website's interim recommendations/best practices for cleaning visibly dirty surfaces in households does not assert or stand for the factual propositions Lighting Rod and its expert witnesses argue. Furthermore, the CDC webpage does not meet Evidence Rule 201's stringent requirements. Indeed, Lightning Rod sets forth no legal support for taking judicial notice of this webpage under Rule 12(B)(6).

Lightning Rod includes two expert opinion affidavits in its Motion, each of which attaches a CV and multiple pages of information about cleaning solutions. Lightning Rod did not comply with Local Civil Rule 21.1 concerning the disclosure of expert reports. Plaintiff had no notice of these experts, or their reports, and has had no opportunity to depose or conduct any discovery on these witnesses or their affidavits. Plaintiff has been afforded no opportunity to produce its own expert reports. Rather, at the Case Management Conference recently, Lighting Rod opposed any

[7] https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/cleaning-disinfection.html

deadlines, including expert report deadlines, being set. Neither of Lightning Rod's proposed experts are epidemiologists, virologists, or infectious disease or public health experts. Rather, they claim to have experience in cleaning homes and businesses. Neither alleges he has tested for the presence of SARS-CoV-2 particles after cleaning with the products they tout. Nevertheless, each has come up with an opinion he could effectively clean and eliminate any SARS-CoV-2 particles from J3's premises, without ever having been there. (Neither address if or how SARS-CoV-2 particles could be effectively removed from the air inside J3's premises).

This Opposition is not the place or time to address the substance or admissibility of Lightning Rod's opinion witness reports, or the qualifications or competency of these witnesses, because, as Lighting Rod concedes at pages 6-7 of its Motion, the Court cannot consider these affidavits, or the materials attached to them, under Rule 12(B)(6). Rather, the Court would have to convert the Motion to one for summary judgment. This would, however, require the Court to afford Plaintiff reasonable time and opportunity to conduct discovery and present "all materials pertinent" to a summary judgment motion based on a complete record. Civ.R. 12(B)(6). This would put the parties back where they were just weeks ago at the Case Management Conference, during which Plaintiff sought a reasonable discovery period, including a summary judgment deadline and briefing schedule. Defendant resisted that and promised to oppose any discovery.

The Complaint, including all references favoring Plaintiff, is procedurally and substantively sufficient under Civil Rules 8 and 12(B)(6). The allegations set forth plausible claims for coverage under one or more provisions of the Policy and, therefore, state a claim for declaratory judgment. Accordingly, Defendant cannot meet its burden under Rule 12(B)(6). Plaintiff respectfully requests the Court deny Lightning Rod's Motion and issue a scheduling order allowing

for discovery and setting a summary judgment motion deadline, at which time Lightning Rod can renew its arguments, or assert new ones, on a developed record of admissible documents and facts.

B. Legal Principles Governing Insurance Contract Interpretation and Construction

Ohio courts examine insurance contracts as a whole, presuming the intent of the parties is reflected in the language used. *Motorists Mut. Ins. Co. v. Dandy-Jim, Inc.*, 182 Ohio App.3d 311, 316 (Ohio App. 8th Dist. 2009), *citing Kelly v. Med. Life Ins. Co.*, 31 Ohio St.3d 130 (1987). Lightning Rod elected not to define "physical loss of or damage to property" in the Policy. Accordingly, the Court must give these terms their "plain and ordinary meaning unless manifest absurdity results, or unless some other meaning is clearly intended from the face or overall contents of the [Policy]." *Dandy-Jim, Inc.*, 182 Ohio App.3d at 316, *quoting Alexander v. Buckeye Pipe Line Co.*, 53 Ohio St.2d 241 (1978); *Nationwide Mut. Fire Ins. Co. v. Guman Bros. Farm*, 73 Ohio St.3d 107, 108 (1992). If undefined terms in an insurance contract are susceptible of more than one reasonable interpretation, however, those terms will "be construed strictly against the insurer and liberally in favor of the insured." *Dandy-Jim, Inc.*, 182 Ohio App.3d at 316, *citing Sharonville v. Am. Employers Ins. Co.*, 109 Ohio St.3d 186 (2006).

The Policy at issue is an "all-risk" policy, one that pays for all "risks of direct physical loss" "unless such loss is specifically excluded." Policy, Form WBP 00 60 12 07, Page 3 of 33; *Simon v. Encompass Ins. Co.*, 2005 WL 2811890, *3 (Ohio App. 8th Dist.). And to the extent any language in an all-risk policy is exclusionary, "such language must be clear and specific and a general presumption arises to the effect that that which is not clearly excluded from the operation of such contract is included in the operation thereof." *Florists Mut. Ins. Co. v. Ludy Greenhouse Mfg. Corp.*, 521 F.Supp.2d 661, 671 (S.D. Ohio 2007), *quoting King v. Nationwide Ins. Co.*, 35 Ohio St.3d 208, 214 (1988).

1. Lightning Rod Did Not Exclude Losses Caused by or Resulting from Viruses in the Policy

Lightning Rod's Motion does not assert that any Policy exclusions apply to deny J3 coverage. It is important to note, however, that while other insurance companies include explicit virus exclusions in policies, Lightning Rod chose not to include one. *See, e.g.*, *Sentinel Ins. Co., Ltd. v. Monarch Med Spa, Inc.*, 105 F.Supp.3d 464, 466-67 (E.D. Pa. 2015) (business policy contained "**EXCLUSION – FUNGI, BACTERIA AND VIRUSES**" excluding "damage arising out of or relating to the presence of… Viruses" from coverage); *Travelers Indemn. Co. of America v. L.H.R. Farms, Inc.*, 2010 WL 11603, n. 3 (N.D. Ga.) ("Policy exlude[d] coverage for "loss or damage caused by or resulting from any virus…""); *Udinsky v. State Farm Fire and Cas. Co.*, 2019 WL 1017606, *1, 4 (N.D. Cal.) (policy with "businessowners coverage form" included exclusion "for "Fungi, Virus or Bacteria.""").

The Policy excludes coverage for "loss or damage caused by or resulting from:" earth movement, nuclear hazard, power failure, war and military action, water, flood, surface water, tides, tidal waves, overflow, mudslides, mudflows, fungi, wet rot, dry rot, bacteria, electrical apparatus, smoke, vapor, gas, steam apparatus, frozen plumbing, dishonesty, pollution, false pretense, property exposed to rain, snow, sleet, collapse, wear and tear, rust, corrosion, decay, deterioration, smog, settling, cracking, shrinking, expansion, nesting or infestation, or discharge or release of waste products or secretions by insects, birds, rodents, or other animals, mechanical breakdown, changes in or extremes of temperature, marring, scratching, as well as numerous other exclusions. Policy, Form WBP 00 60 12 07, Pages 20-25 of 33.

If Lightning Rod intended to exclude coverage for losses resulting from a virus and/or pandemic, it could, should and would have included, among its numerous other highly specific exclusions, one specifically referencing virus. The all-risk Policy does not, however, contain any

virus exclusion, even though such exclusions are common in insurance policies of the type at issue. *See supra*. Accordingly, because it is not "specifically excluded," and to the extent Lightning Rod claims the language "direct physical loss of or damage to" property, as a prerequisite to coverage, is exclusionary of J3's claims under the all-risk Policy at issue, it must be presumed that the Policy includes coverage for losses resulting from viruses and the Policy must be construed strictly against Lightning Rod and in favor of coverage. *See* 2005 WL at *3; *Florists Mut. Ins. Co.*, 521 F.Supp.2d at 671; *King*, 35 Ohio St.3d at 214; *see also Fireman's Fund Ins. Co. v. Atlantic Richfield Co.*, 94 Cal. App. 4th 842, 852 (2001) ("[w]ith respect to the words used to express the intent of the parties, several courts have observed an insurance company's failure to use available language to exclude certain types of liability gives rise to the inference that the parties intended not to so limit coverage.") (Citations omitted).

C. Lightning Rod's Proposed Definition/Meaning of the Undefined Terms "Direct Physical Loss of or Damage to Property" is Not Contained in the Policy, is at Odds with Ohio and the Overwhelming Body of Law Around the Country, and is Inconsistent with the Common Ordinary Definition of Those Terms

Lightning Rod claims the phrase "direct physical loss of or damage to," as utilized in the Policy, is clear and unambiguous. Lightning Rod never proffers separate or individual meanings of "loss of" and "damage to," even though these phrases are clearly separate and distinct, stated in the disjunctive ("or"), and are separate triggers of coverage – for : 1) "loss of" property; and; 2) "damage to" property. *Security Ins. Co. of Hartford v. Kevin Tucker & Associates, Inc.*, 64 F.3d 1991, 1007 (6th Cir. 1995); *Fountain Powerboat Indus., Inc. v. Reliance Ins. Co.*, 119 F.Supp.2d 552, 557 (E.D.N.C. 2000) (Interpreting a business interruption policy in which coverage was predicated on "loss, damage, or destruction" and holding "[a] 'loss' is not predicated on physical damage but is one category of recovery along with damage and destruction as indicated by the use of the alternative coordinating conjunction 'or'").

Because Lighting Rod claims the phrase "direct physical loss of or damage to property" is clear and unambiguous, it necessarily claims the phrase is not "susceptible to more than one reasonable interpretation." In its Motion, however, Lightning Rod itself proffers multiple interpretations, including that "physical loss is tantamount to actual physical harm" (without defining "actual physical harm"), and that "direct physical loss of or damage to" property must actually mean "physical injury" as that phrase was interpreted for purposes of an exterior mold claim in a homeowner's insurance policy to "mean harm to [] property that adversely affects the structural integrity of [a] house." Motion at pp. 9-10, 14-17.

Lightning Rod relies on *Pirie v. Federal Ins.*, 696 N.E.2d 553 (Mass. Ct. App. 1998), a Massachusetts homeowner's policy case, for its claim that "direct physical loss is [unambiguously and exclusively] tantamount to physical harm." Motion at p. 14. Less than a month following the *Pirie* decision, however, another Massachusetts court, in reviewing a businessowner's property insurance policy, "rule[d] that the phrase "direct physical loss or damage" *is* ambiguous in that it is susceptible of at least two different interpretations. One includes only tangible damage to the structure of insured property. The second includes a wider array of losses." *Matzner v. Seaco Ins. Co.*, 9 Mass.L.Rptr 41, *3 (1998) (reviewing, and finding persuasive, cases "that have construed the phrase "direct physical loss or damage" broadly, to include more than tangible damage to the structure of insured property.") As discussed herein below, *Matzner*'s analysis is consistent with the substantial majority of cases interpreting the language at issue.

"When used in an insurance policy, the word "loss" is given its ordinary meaning of "injury; forfeiture; deprivation; damage; [or] deficiency." *Mastellone v. Lightning Rod Mut. Ins. Co.*, 175 Ohio App.3d 23, 38 (Ohio App. 8th Dist. 2008), *citing Polk v. Landings of Walden Condo. Assoc*, 2005 WL 1862126, *7 (Ohio App. 11th Dist.), *quoting* Gilbert's Law Dictionary (1994)

156; *see also Downwyn Farms v. Ohio Ins. Guar. Ass'n.*, 1990 WL 7991, *3 (Ohio App. 9th Dist.) (because "physical loss" "may [reasonably] be defined as "material deprivation," coverage was afforded under policy to insured who "was materially deprived" of property for a period of time).[8] Ohio courts accept that the word "loss," as used in an insurance policy, means deprivation – "the state of being kept from possessing, enjoying, or using something"[9] – and deficiency – "the quality or state of being defective or of lacking some necessary quality or element."[10] A "physical loss of" property then, within the context of a businessowners property insurance policy affording Business Income and Extra Expense coverage, includes and contemplates a situation where, as here, an insured like J3 is physically deprived of its business property because a physical substance had a physical impact on the property that rendered the property defective or lacking in some quality rendering it unfit for its intended use – a retail store where people come inside to shop – thereby resulting in lost Business Income and Extra Expense.

Lightning Rod offers no independent or different meaning of "damage to property" apart from the phrase "physical loss of or damage to property." But "physical loss of" property must mean something different than "physical damage to" property. Otherwise the terms would be repetitive, redundant, unnecessary, and superfluous, rendered meaningless – something a court will not do when interpreting an insurance contact. *See Fairview Hosp. v. Fortune*, 141 Ohio App.3d 314, 317 (8th Dist. 2001) ("Insurance policies are written contracts whose meaning must be determined according to the same rules as are applicable to other written contracts."); *Gotham*

[8] Lightning Rod offers no definition or interpretation of the word "physical" as used in its Policy. The ordinary definition includes "of or relating to natural science; having material existence; perceptible especially through the senses and subject to the laws of nature; of or relating to material things. https://www.merriam-webster.com/dictionary/physical. *See also Oregon Shakespeare Festival Assoc. v. Great American Ins. Co.*, 2016 WL 3267247, *5 (D. Or.) (citing Webster's dictionary defining "physical" as "of or belonging to all created existence; relating to or in accordance with the laws of nature; of or relating to natural or material things as opposed to things mental, moral, or spiritual.")

[9] https://www.merriam-webster.com/dictionary/deprivation

[10] https://www.merriam-webster.com/dictionary/deficiency

v. Basement Care, Inc., 2019-Ohio-3872, ¶ 10 (9th Dist.) (Contracts should not be interpreted in a way that renders words or phrases "superfluous or meaningless" because to do so would result in an "unreasonable interpretation.") (citing numerous cases).

The Policy does not define "damage to property," but it does define "property damage," in two places, as meaning, "**a.** Physical injury to tangible property, including all loss of use of that property…; or **b.** Loss of use of tangible property that is not physically injured…" and "physical injury to or destruction of any tangible property, including the loss of use thereof." *Id*. at Form BP 00 06 01 97, Page 16 of 17 and Form WIL 60 01 16, Page 12 of 12. The Policy, read as a whole, includes loss of use of property as a form of "property damage." "Property damage" is synonymous with, if not having the same meaning as, "damage to property." If loss of use is a reasonable definition/meaning of "property damage," per the terms of the Policy itsef, then "damage to property" must be reasonably interpreted to include loss of use. *In re Chinese Drywall Products Liability Litigation,* 759 F.Supp.2d 822, 832 (E.D. La 2010) (Court must read insurance contract as a whole, and because policy defined "property damage" "to include loss of use of tangible property," the court found loss of use of homes due to defective drywall to be a covered physical loss). J3 has sufficiently alleged a physical loss of, including, but limited to loss of use, of its premises and property due to the presence and physical characteristics of a physical substance (SARS-CoV-2), including the physical impact that substance had on J3's property and property other than J3's (for purposes of Civil Authority coverage).

1. Defendant Misreads and Misplaces its Reliance on *Mastellone v. Lightning Rod Mut. Ins. Co*. as the Basis for Injecting a Silent "Structural Alteration" Requirement into Policy's "Physical Loss of or Damage to" Property Language. *Mastellone* Itself Refutes Defendant's Argument.

Lightning Rod predicates nearly its entire argument on *Mastellone,* an 8th District Court of Appeals case involving exterior and interior mold claims under a homeowner's policy. It should

be noted that *Mastellone* was decided after a fully developed factual record, not on a Rule 12(B)(6) motion. It is also important to note that *Mastellone* interpreted a different kind of insurance policy – a homeowner's policy offering coverage for dwellings and structures – as opposed to a businessowner's property coverage policy including coverages for lost Business Income, Extra Expense, and other coverages geared toward insuring against business interruptions and losses. Furthermore, we do not know what the terms of the *Mastellone* policy are; we do not have the entire policy and do not know what the language of that policy states. For example, the *Mastellone* court references a "definition of "property damage"" within the homeowner's policy at issue in that case but does not set forth that definition in the opinion. Accordingly, we have no way of knowing how the *Mastellone* policy defined "property damage" for purposes of interpreting "damage to property" under the Policy at issue here. This is critical because the *Mastellone* court ultimately "construed the term "physical injury,"" – a phrase not included within the language relied upon by Lightning Rod in its Motion – within the "context [of] the other terms used in the definition of "property damage"" in the *Mastellone* policy. 175 Ohio App.3d at 40. But we do not even know what those other terms are that gave context to the court's interpretation.

Furthermore, the *Mastellone* policy had a specific exclusion for mold. *Id*. The Policy here, by contrast, has no virus exclusion. All of this is to say that the *Mastellone* court's interpretation of the term "physical injury," within the context of an unknown definition of "property damage," in a homeowner's policy, for purposes of evaluating a mold claim, cannot be transposed onto different language, under a different Policy, within the context of very different claims.

The Motion twice repeats the following excerpt from *Mastellone*:

> The term "physical injury" is undefined by the policy, so we give that term its usual meaning. *Nationwide Mut. Fire Ins. Co. v. Guman Bros. Farm*, 73 Ohio St. 107, 108, 1995-Ohio-214, 652 N.E.2d 684. Read in context with the other terms used in

> the definition of "property damage," we construe the term "physical injury" to mean a harm to the property that adversely affects the structural integrity of the house.

Mastellone, 175 Ohio App.3d at 40. From this passage Lightning Rod divines its argument that direct "physical loss of or damage to" property is unambiguous and only susceptible of one interpretation which necessarily requires a structural alteration to the insured property. It is not clear how Lightning Rod gets from "physical injury," construed within the context of other unknown terms included within the definition of "property damage," to structural alteration as a clear and indispensable, albeit silent, component of direct "physical loss of or damage to" property.

Furthermore, importantly, Lightning Rod fails to explain that there were two different mold claims at issue in *Mastellone* – 1) claim for mold on the exterior of the house; and 2) a claim for "interior loss to the house occasioned by mold around a skylight" inside the house. *Id*. at 27, 36. The quote repeatedly relied upon by Lightning Rod, however, addressed only the mold claim for "property damage" to the exterior of the house. Unlike the exterior mold claim for "physical damage" (definition unknown), the *Mastellone* insureds' claim for loss as to the interior mold was predicated on them "vacat[ing] the house" over "health concerns for one of their children." *Id*. at 29. Lightning Rod fails to acknowledge that as to the "claim for interior loss to the house occasioned by mold," the trial court "***concluded that the insurance policy predicate of "physical loss"*** [as opposed to "property damage"] ***required mold levels within the house to rise to dangerous levels***." *Id*. at 36 (emphasis added). That is, the trial court interpreted the *Mastellone* policy to provide coverage for direct physical loss to/of the insured property – the house – if the mold inside the house would have risen to "dangerous levels." *Id.* The evidence in *Mastellone*, however, did not demonstrate dangerous levels of interior mold, and the court also concluded that the insureds failed to bring the interior mold claim timely. *Id*. at 36. Significant to the claims at issue here, the 8th District Court of Appeals left undisturbed the trial court's ruling, and recognition

under the terms of the *Mastellone* policy, that coverage would have been triggered if the interior mold, which caused no structural alteration of property, had risen to dangerous levels requiring the insureds to leave the home, thereby suffering a covered "physical loss" (or "deprivation" or "forfeiture") of covered property, the house.

Consistent with the overwhelming majority of cases (*see infra*), *Mastellone*, applying Ohio law, recognizes that a physical substance can cause a covered physical loss of/to property without causing structural alteration of the insured property. In distinguishing the nature of the exterior mold claim under the circumstances, however, including the absence of any allegation that it required the insureds to move out, or stop using, or otherwise deprived them of the use or function of their house, and that, after hearing all of the evidence, it was agreed the exterior mold could be washed off without any damage or harm or injury to the wood, the *Mastellone* court properly focused on the phrase "physical injury" within the "property damage" definition, as the basis for denying the exterior mold claim. *See* 175 Ohio App.3d 23.

Mastellone involved different coverage and different claims and did not set forth the complete policy language governing its holding. To the extent *Mastellone* recognizes that the "predicate of "physical loss" within an insurance policy is met when an insured is deprived of, or required to forfeit, or loses the use of or utility or function of its insured property on account of the infiltration or presence of dangerous levels of a physical substance, it is consistent with the overwhelming body of law around the country and with the plain and clear meaning of the Policy language at issue, and serves as applicable governing precedent this court must follow.

Trying to squeeze this Policy and these very different facts and claims into *Mastellone's* exterior mold claim analysis under a homeowner's policy, Lightning Rod commissioned cleaning "experts" who follow the CDC's current interim "best practice measure [for residences] for

prevention of COVID-19 transmission" of cleaning and disinfecting "visibly dirty surfaces" by using "bleach and other disinfecting chemicals." These "expert witnesses" opine as to their belief that the products they use have "been fully effective to remove any and all microbial hazards or other foreign agents from any surfaces at [their] customers' places of business," and therefore, they believe they "could disinfect and kill the coronavirus known as COVID-19" at J3's premises." *See* Affidavits of Richard Kuhlman and Andrew Meyer, Exhibit B to the Motion. Coronavirus is not COVID-19. COVID-19 is a disease process inside the human body caused by SARS-CoV-2 particles, a physical substance that exists outside the human body. Furthermore, neither expert offers any opinion as to how or if the air inside the premises can be rendered SARS-CoV-2 free, or how often one would have to wipe down surfaces. Neither of them claims to have ever tested for the presence of SARS-CoV-2 anywhere, either before or after cleaning.

Nevertheless, even assuming everything these experts say is true and could ever be verified, these opinions do not change the fundamental fact, for purposes of interpreting the Policy, that J3, by virtue of the presence of SARS-CoV-2, a dangerous physical substance, on its premises and covered property, has suffered "physical loss of and damage to property" resulting in covered losses, including lost Business Income and Extra Expense.

2. Direct "Physical Loss of or Damage to" Property, as Used Within Insurance Contracts, does not Require Structural Alteration of Property

The overwhelming majority of cases from around the country specifically reject the argument Lightning Rod asserts here – that the plain and ordinary meaning of "direct physical loss of or damage to property," as used within an insurance policy, is susceptible of only one reasonable interpretation that necessarily includes structural alteration of the insured property (or for purposes of Civil Authority coverage of property other than the insured's property). Furthermore, the reason virus exclusions exist and have been adopted by other insurers is because a virus can cause direct

physical loss of or damage to property within the context of any given insurance policy. *See supra*.

The following non-exhaustive listing exemplifies the settled status of the law on this issue.

***Oregon Shakespeare Festival Assoc. v. Great American Ins. Co.*, 2016 WL 3267247 (D. Or.)** – Plaintiff, a partially open-air theatre, sustained "direct physical loss or damage to property" within meaning of insurance policy when wildfire smoke infiltrated the theater and rendered it unusable for its intended purposes thereby entitling insured to lost Business Income. Defendant insurer implied that, "in order to be "physical," the loss or damage must be *structural* to the building itself." No evidence from within the policy, however, showed that the plain meaning of the term "physical" "includes such a limitation." Defendant insurer gave no "sufficient explanation for why air is not physical. Certainly, air is not mental or emotional, nor is it theoretical. For example, if the dispute were over the theater's reputation or its fair market value, the Court might be inclined to agree with the Defendant. By contrast, while air may often be invisible to the naked eye, surely the fact that air has physical properties cannot reasonably be disputed." "The Court finds that defendant's interpretation, which would add the word "structural," and exclude the air within the building, is not a plausible plain meaning of the term "direct physical loss of or damage to property." (Citing numerous cases supporting its interpretation of "direct physical loss or damage" as not requiring structural alteration).

- The Policy defines "**Property Not Covered**" but does not list the air inside the insured buildings and structures as not covered under the Policy. Policy, Form WBP 00 60 12 07, Page2-3 of 33.

***Columbiaknit, Inc. v. Affiliated FM Ins. Co.*, 1991 WL 619100 (D. Or.)** – Physical damage or alteration of property may occur at the microscopic level. "In making the determination [whether physical loss of or damage has occurred], courts consider the nature and intended use of the property itself and the purpose of the insurance contract."

***Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am.*, 2014 WL 6675934 (D.N.J.)** – Accidental release of ammonia gas into packaging facility caused it to be closed for one week while ammonia dissipated. Insurer denied coverage arguing lack of structural alteration to property. Court disagreed, noting that "while structural alteration provides the most obvious sign of physical damage," various courts have found "that property can sustain physical loss or damage without experiencing structural alteration." ***See also Port Authority of N.Y. and N.J. v. Affiliated FM Ins. Co.*, 311 F.3d 226 (3d Cir. 2002)** (asbestos in building of such quantity and condition as to make the structure unusable constitutes "physical loss or damage" within meaning of insurance policy.

***Wakefern Food Corp. v. Liberty Mut. Fire Ins. Co.*, 406 N.J. Super. 524 (App. Div. 2009)** – Holding that property can be physically damaged without undergoing structural alteration for purposes of triggering coverage under insurance contract for "physical loss or damage to" property, when property loses its essential function.

***Western Fire Ins. Co. v. First Presbyterian Church*, 165 Colo. 34 (1968)** – Where gasoline vapors penetrated the foundation of the insured church and accumulated, rendering building uninhabitable, the property was held to have suffered a "direct physical loss."

***One Place Condominium, LLC v. Travelers Property Cas. Co. of Am.*, 2015 WL 2226202, *9 (N.D. Ill.)** – "Where a general all-risk commercial or homeowner's policy insures against both "loss" and "damage" to an existing structure, "physical" damage may take the form of loss of use of otherwise undamaged property, which in turn suffices as a covered loss."

***Matzner v. Seaco Ins. Co.*, 1998 WL 566658 (Mass. Super. 1998)** – Carbon monoxide levels in apartment building sufficient to render building uninhabitable were a "direct physical loss."

***Motorists Mut. Ins. Co. v. Hardinger*, 131 Fed. Appx. 823 (3d Cir. 2005)** – Bacteria contamination of home's water supply constituted "direct physical loss." Whether functionality of insured's property was nearly eliminated or destroyed, or whether property was made useless or uninhabitable for purposes of rising to the level of physical loss in insurance policy may be question of fact.

***Essex v. Bloom South Flooring Corp.*, 562 F.3d 399 (1st Cir. 2009)** – Unpleasant odor rendering property unusable for intended purposes constituted physical injury to property.

***Mellin v. Northern Security Ins. Co., Inc.*, 167 N.H. 544 (2015)** – Cat urine odor emanating into condo unit caused direct physical loss under insurance policy. "Physical loss" as used in insurance policy "need not be read to include only tangible changes to property that can be seen or touched but can also encompass changes that are perceived by the sense of smell and in the absence of structural damage." Insured not required to demonstrate tangible physical alteration to the condo unit. "Rather, to demonstrate a physical loss" under the policy, the insured "must establish a distinct and demonstrable alteration to the unit."

***AFLAC, Inc. v. Chubb & Sons, Inc.*, 260 Ga.App. 306 (2003)** – Physical loss contemplates a change that causes the insured property, which was "in a satisfactory state… to become unsatisfactory for future use or requiring repairs be made to make it so" but does not require structural alteration.

***Stack Metallurgical Servs., Inc. v. Travelers Indem. Co. of Connecticut*, 2007 WL 464715, *8 (D. Or.)** – Insured suffered "direct physical loss of or damage to" covered property when the property could not be used for its "ordinary expected purpose" even though the property could still be used for other income-generating purposes."

***Sentinel v. New Hampshire Ins.*, 563 N.W.2d 296 (Minn. Ct. App. 1997)** – Physical loss "may exit in the absence of structural damage to the insured property." Presence of asbestos fibers in building at levels that present a health hazard to building's tenants seriously impairs the building's function and therefore constitutes a direct physical loss entitling insured to coverage under insurance policy.

***TRAVCO Ins. Co. v. Ward*, 715 F.Supp.2d 699 (E.D. Va. 2010)** – Toxic gasses released by Chinese drywall rendered home uninhabitable resulting in direct physical loss or damage under insurance policy even in the absence of structural alteration.

***Murray v. State Farm Fire & Cas. Co.*, 203 W.Va. 477 (1998)** – Home rendered unusable by increased risk of rock slide suffered direct physical loss for purposes of triggering coverage under policy even in the absence of any structural damage.

***In re Chinese Manufactured Drywall Products Liab. Lit.*, 759 F.Supp.2d 822 (E.D. La. 2010)** – While the mere presence of a potentially injurious material in a home may not qualify as a covered physical loss, "when these types of materials are activated, for example by releasing gases or fibers, courts [and posing danger to inhabitants and rendering property unfit or unusable for its intended purposes], courts have held there exists a physical loss."

***Board of Educ. V. Int'l Ins. Co.*, 308 Ill. App.3d 597 (1999)** – Release of harmful asbestos fibers in a building constitutes physical loss within meaning of insurance contract.

***Gen. Mills, Inc. v. Gold Medal Ins. Co*, 622 N.W. 2d 147 (Minn. Ct. App. 2001)** – Food manufacturer suffered "direct physical loss or damage to" cereal when oats used in product were treated with a non-hazardous pesticide that was not FDA-approved rendering it unsaleable. Even though oats were safe for human consumption and had not been destroyed, insured suffered covered "physical loss of or damage to" covered property.

***Farmers Ins. Co. v. Trutanich*, 123 Or. App. 6 (1993)** – Saturation of insured dwelling by methamphetamine fumes constituted a loss for purposes of insurance policy in the absence of any structural alteration of insured property.

***American Guarantee & Liability Ins. Co. v. Ingram Micro*, 2000 WL 726789 (D. Ariz.)** – Where insured's loss of custom computer programming configurations prevented insured from conducting business ""physical damage" is not restricted to the physical destruction or harm of computer circuitry, but includes loss of access, loss of use and loss of functionality."

***Three Palms Pointe, Inc. v. State Farm Fire and Cas. Co.*, 250 F.Supp.2d 1357 (M.D. Fla 2003)** – "[D]irect physical loss" includes more than losses that harm the structure of the covered property."

***Cook v. Allstate Ins. Co.*, 48D02-0611-PL-01156 (Ind. Super. 2007)** – House infested with spiders that rendered house unsuitable for occupancy constitutes a direct physical loss even when house's structural integrity remains intact.

This Brief has already addressed *Mastellone*. The other cases cited in support of Lightning Rod's argument to interpose a silent "structural alteration" of insured property requirement into the Policy, listed at pages 17-18 are inapposite and otherwise do not support Lightning Rod's

interpretation under the circumstances of the current claims and Policy language. Before briefly addressing these cases, it is relevant to note that none of them were decided on a motion to dismiss.

Penton Media, Inc. v. Affiliated FM Ins. Co., 245 Fed. Appx. 495 (6th Cir. 2007) involved a claim for coverage by a trade show company when it was unable to host a trade show at a venue in New York City following the 9/11 World Trade Center terrorist attacks. The insured sought coverage under the policy's civil authority coverage which required physical loss or damage at the insured's "Supplier and Customer locations." *Id*. at 498. The insured could not and did not argue any such physical loss or damage at those locations. Rather the entire litigation stemmed around whether that policy requirement was limited to those properties. The case has no application here.

In *Universal Image Productions, Inc. v. Federal Ins. Co.*, 475 Fed. Appx. 569 (6th Cir. 2012) the court determined that the insured's claims for mold and bacteria contamination did not constitute "direct physical loss or damage" to the insured's property. Unlike the present case, the court determined the premises at issue were not rendered substantially unusable because "no health threat existed." *Id*. at 570-71. Furthermore, unlike the Policy at issue, the *Universal Image Productions* policy excluded the "air inside or outside the structure" from the definition of "insured building." *Id*. at 572. The Sixth Circuit applied Michigan law in this case, but nevertheless recognized that "[s]everal courts have held that "physical loss" occurs when real property becomes "uninhabitable" or substantially "unusable." *Id*. at 574. Ultimately, while the mold and bacteria issues that affected the HVAC system, requiring the landlord, not the insured, to fix the system, resulting in unpleasantly hot conditions for a period of time, there was no health hazard or risk that rendered the insured's rented property uninhabitable or substantially unusable for its intended purposes. The facts and policy language in this case are not applicable here.

United Airlines, Inc. v. Ins. Co. of State of Pa., 439 F.3d 128 (2d Cir. 2006) and *Source Food Tech, Inc. v. U.S. Fidelity & Guar. Co.*, 465 F.3d 834 (8th Cir. 2006) involved the government's closure of an airport and US-Canadian border, respectively. These closures, however, were not as the result of any physical loss of or damage to property, so lost business income was denied under the policies' civil authority coverage. These cases likewise have no meaningful application to the case at bar.

In *Mama Jo's, Inc. v. Sparta Ins. Co.*, 2018 WL 342974 (S.D. Fla.), an insured restaurant business sought coverage for the costs of cleaning dust and debris at the business that accumulated from nearby construction (the court excluded the insured's experts' opinions that the dust and debris caused physical damage to awnings, the retractable roof, the HVAC system, railings and audio and lighting systems such that they required replacement or repair). 2018 WL at *9. Furthermore, the court concluded that the restaurant was not "uninhabitable or unusable," and "[i]n fact, the restaurant remained open every day… and there is no evidence that dust had an impact on the operation other than requiring daily cleaning." *Id*. The court concluded that the cost of daily cleaning did not constitute physical loss of or damage to property. *Mama Jo's Inc.* is not helpful or instructive in the instant case involving the presence of a deadly virus on and at the insured's property and premises, and throughout the community, forcing a retail clothing insured to cease its operations for a lengthy period of time followed by continued significant impact on operations.

Finally, *Great Northern Ins. Co. v. Benjamin Franklin Fed. Sav. And Loan Ass'n*, 793 F.Supp. 259 (D. Or. 1990) is an asbestos case where the insured sought coverage for the costs of abatement and removal of asbestos, as well as the alleged loss in market value on account of the presence of asbestos, after a tenant rescinded a lease upon discovering asbestos was present. There is no evidence, however, that asbestos fibers were released into the air, or otherwise became active

and dangerous such that they ever rendered the building uninhabitable or unfit for its intended purposes. *Id*. As set forth above, there is a demarcation in asbestos coverage cases where the asbestos was actively threatening the health and safety of those in the building (like SARS-CoV-2 does) and where the asbestos was dormant and did not affect the utility of the building. Furthermore, the court found that a pollution exclusion in the policy applied. *Id*. at 263. Finally, Plaintiff has set forth numerous Oregon cases that make clear that the plain and ordinary meaning of "direct physical loss of or damage to property" does not require structural alteration of property. *See supra*. *Great Northern* does not add anything to or otherwise change the accepted holdings consistently repeated by courts around the country as to the plain and ordinary meaning of "direct physical loss of or damage to property."

IV. CONCLUSION

For all the foregoing reasons set forth herein, Plaintiff respectfully requests the Court deny the Motion in its entirety and set a discovery and summary judgment briefing schedule.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26th day of June 2020, I electronically filed the foregoing with the Clerk of Court by using the Court's electronic filing system. Copies will be served upon counsel of record via electronic mail, and may be obtained through, the Court's electronic filing system.

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