UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NORTHWELL HEALTH, INC.,	:	Civil Action No. 1:21-cv-01104-JSR
Plaintiff,	:	
v.	:	
LEXINGTON INSURANCE COMPANY and INTERSTATE FIRE & CASUALTY COMPANY,	:	
Defendants.	:	

PLAINTIFF NORTHWELL HEALTH INC.'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

COHEN ZIFFER FRENCHMAN & MCKENNA LLP
Robin L. Cohen
Alexander M. Sugzda
Cynthia M. Jordano
1350 Ave. of the Americas, 25th Floor
New York, New York 10019
Tel: (212) 584-1890

Attorneys for Plaintiff Northwell Health, Inc.

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Northwell Health, Inc. ("Northwell") opposes the motion to dismiss of Lexington Insurance Company ("Lexington") and Interstate Fire & Casualty Company ("Interstate").

PRELIMINARY STATEMENT

The impact of COVID-19 on Northwell, a hospital and health care system in the midst of the COVID-19 crisis, has been devastating. Northwell closed its non-essential operations, physically transformed its properties (including its parking lots) to accommodate the influx of COVID-19 patients, and strictly prohibited access to persons and patients except for its tireless essential workers and those afflicted with COVID-19. Although Northwell purchased "All Risk" Policies from Defendants, which expressly provide coverage for Interruption by Communicable Disease, Defendants have refused to pay *any* insurance proceeds. Defendants now attempt to dismiss Northwell's Complaint in its entirety. This effort should be rejected.

Defendants have no basis to dismiss Northwell's claim for Communicable Disease coverage, which covers both Northwell's business interruption losses and costs incurred for the cleanup, removal and disposal of the substances causing the communicable disease. Contrary to Defendants' contention, Northwell specifically alleges that government orders have declared Northwell's properties uninhabitable due to communicable disease and prohibited access to those properties. Taken as true, the Complaint plausibly alleges Communicable Disease coverage. Further contrary to Defendants' position, there is no requirement in the Policies that Northwell's properties be completely shut down. Northwell negotiated for Communicable Disease coverage precisely because it operates hospitals and other medical facilities, and the notion that it should be denied that coverage now during the worst healthcare crisis the world has seen in over a century defies Northwell's reasonable expectations.

Defendants' effort to dismiss Northwell's claim for Time Element coverage should also be

rejected. Northwell alleges that COVID-19 causes "direct physical loss of or damage" to property because COVID-19 is a dangerous substance in the air and attached to surfaces in Northwell's properties, harming those properties and creating a permanent and serious dangerous condition that renders Northwell's properties unfit and unusable for their intended purposes. Defendants argue that these allegations are insufficient because the Policies and New York law require "actual, physical *alteration*" of the insured premises and because Northwell's losses are excluded. Defendants misstate the law, and their argument fails for three reasons.

First, Defendants' argument violates the plain text of the Policies, which do not require physical "alteration" of property. The Policies cover both "physical loss of" property or physical "damage to" property, a distinction Defendants ignore by writing the separate term "physical loss" out of the Policies. This runs afoul of the basic contract principle that every word in a policy must be afforded meaning. Based on the ordinary meaning of the undefined phrase "physical loss of or damage to" property, the Policies broadly afford coverage for suspension of business caused by the dangerous presence of COVID-19 at Northwell's properties.

Second, Defendants' assertion that New York law requires property be physically altered before there is coverage for "physical loss or damage" is simply wrong. The very case Defendants cite for this sweeping proposition states the opposite: "the critical policy term at issue, requiring 'physical loss or damage,' ***does not require that the physical loss or damage be tangible, structural or even visible***." *Newman Myers Kreines Gross Harris, P.C. v. v. Great N. Ins. Co.*, 17 F. Supp. 3d 323, 330 (S.D.N.Y. 2014). Indeed, this case recognizes that "[t]he invasions of noxious or toxic gases . . . ***rendering the premises unusable*** or uninhabitable, [are] held to suffice, because even invisible fumes can represent a form of physical damage." *Id.* (emphasis added). The *Roundabout Theatre Co. v. Continental Casualty Co.*, 751 N.Y.S.2d 4 (1st Dep't 2002), case

Defendants cite for the purported 20-year rule that "loss of use" alone is insufficient had no damage at the insured property and is inapposite here. Consistent with New York law, courts nationwide addressing COVID-19 have found that where a policyholder alleges that the presence of COVID-19 at the insured premises has impaired the property's function of its core business, courts have denied the motions to dismiss. The outcome should be the same here.

Third, neither of the two contamination exclusions raised by Defendants as precluding coverage for Northwell's losses apply. As described in Northwell's contemporaneously-filed motion for partial summary judgment, both of these exclusions apply only in narrow circumstances not present here, as they are limited only to Northwell's out of pocket "costs" and environmental and industrial contaminants. Indeed, the original contamination exclusion Defendants now rely on was superseded by endorsement and never raised as a defense to coverage.

FACTUAL ALLEGATIONS

Defendants' recitation of Northwell's allegations is incomplete. In particular, Defendants gloss over or altogether ignore: (i) the Policies' broad language, including express coverage for "physical loss of" property; (ii) Northwell's well-pled allegations of physical loss of or damage to its insured properties; and (iii) the numerous orders that have impacted Northwell.

A. The All Risk Policies

While Defendants repeatedly refer to the Policies as "physical damage insurance policies" (MTD at 1, 3), the Policies Northwell purchased from Defendants for over $15 million are "*All Risk*" Policies that broadly cover the "slowdown or cessation of [Northwell's] business activities" due to "direct physical loss of or damage to Covered Property." Compl. ¶¶ 10, 58-59. Among other things, the Policies provide coverage for: (i) loss resulting from the suspension of Northwell's business activities; (ii) loss caused by restriction of access to property, including

specifically if caused by an order issued by a civil authority; (iii) loss caused by communicable disease; and (iv) costs to clean Northwell's premises. *Id.* ¶ 10.

Based on these coverages, Northwell reasonably expected the Policies would cover its losses arising from a pandemic. Compl. ¶ 79. The Policies do not contain either a pandemic exclusion available in the marketplace at the time or the standard virus exclusion adopted by the insurance industry to preclude all losses resulting from viruses or diseases. *Id.* ¶ 87. As the Complaint alleges, even Northwell's Enterprise Risk Management plans reflect Northwell's understanding that it was specifically purchasing coverage for costs and losses arising out of pandemics exactly like the one it is currently facing. *Id.* ¶ 79.

B. Northwell's Allegations of "Direct Physical Loss of or Damage" to Property

Defendants ignore the numerous well-pled facts of the Complaint, which must be assumed to be true. MTD at 3. For example, Northwell alleges that the coronavirus has been present in Northwell's facilities since the onset of the pandemic, and Northwell has suffered from the presence of COVID-19 at its insured premises. Compl. ¶¶ 6, 8, 11, 35. Droplets carrying the virus are physical objects, carrying a physical substance, that attach to and cause harm to property. *Id.* ¶ 36. The virus at its facilities compromises the physical integrity of the structures it permeates, poses an imminent risk of physical loss of or physical damage to structures, and likewise renders such structures unusable. *Id.* ¶ 37.

Contrary to Defendants' assertion that Northwell has not alleged a single piece of property it had to repair or replace, Northwell alleges that it was forced to physically transform its properties to combat COVID-19. Compl. ¶ 41. Defendants' own exhibit recognizes that government orders mandated the physical transformation of Northwell's properties to contain COVID-19. Defs. Ex. F. Northwell has further alleged that it suffered physical loss of its property due to government

orders in response to COVID-19 that have declared Northwell's properties uninhabitable, prohibited access to Northwell's properties, and impacted how Northwell must maintain its health care facilities. Compl. ¶¶ 8, 33, 45, 88. Orders issued in response to COVID-19 specifically stated that "the virus is physically causing property loss and damage." *Id.* ¶ 32.

C. Northwell's Claim and Defendants' Denial of Coverage

After delaying for over six months, Defendants denied Northwell's claim in its entirety. Compl. ¶ 13. Among other things, Defendants denied coverage for Communicable Disease and Decontamination Costs on the grounds that they were "modifie[d] and supersede[d]" by a pollution and contamination exclusion in Endorsement #003 and that no other coverages were available. *Id.*; Ex. 1 at 6. Northwell urged Defendants to reconsider their denial of coverage, noting that Endorsement #003 did not even mention the Policies' special coverages, much less state clearly that it "superseded" the coverage Northwell paid for. Compl. ¶ 90; Ex. 2. Defendants refused to reconsider their positions, and they reiterated their complete denial of coverage. *Id.* ¶ 91; Ex. 3.

The notion that Defendants unilaterally eliminated a health care system's bargained for coverages for Communicable Disease and Decontamination Costs via endorsement, and that they would take this position as Northwell faces the worst public health crisis in over a century, demonstrates the unreasonableness of Defendants' denials. Compl. ¶ 85. Now that Northwell has sued Defendants, they have since abandoned their position (twice confirmed) that the endorsement eliminated Northwell's Communicable Disease coverage, underscoring its frivolity.

ARGUMENT

I. THE COMPLAINT ADEQUATELY PLEADS INTERRUPTION BY COMMUNICABLE DISEASE AND NORTHWELL'S CLEANUP COSTS

A. The Complaint Alleges Business Interruption by Communicable Disease

Defendants do not cite a single case where a court dismissed a COVID-19 claim under a

policy that expressly included *Communicable Disease* coverage. Contrary to their denial letters, Defendants now concede that no exclusion applies to this coverage. Nonetheless, Defendants argue that Northwell cannot obtain Communicable Disease coverage because it has not alleged that Northwell's premises were "uninhabitable" and completely shut down. MTD at 21. Defendants are wrong. The Complaint expressly alleges "[t]he Orders have declared portions of Northwell's properties uninhabitable due to the threat of the spread of COVID-19 and prohibited access to those portions of Northwell's covered properties." Compl. ¶ 33.

To fit their argument, Defendants cherry-pick three orders to factually challenge Northwell's assertion and question the purpose behind those Orders. MTD at 22-23. However, it is not appropriate on a 12(b)(6) motion to address that issue. Defendants' concerns are properly addressed through discovery targeting the government's purpose in issuing the Orders.[1] In any event, the Complaint alleges numerous orders beyond the three identified by Defendants. Compl. ¶¶ 29-34, 38. For example, numerous orders state they are being issued because of the risks COVID-19 poses to property, health, and human welfare. Ex. 4.[2] With respect to hospitals specifically, the New York State Department of Health issued a blanket prohibition on all hospital visitors, including the loved ones of those afflicted with COVID-19, because "COVID-19 has been detected in multiple communities around New York State" and "hospitals must take [precautions and procedures] to protect and maintain the health and safety of their patients and staff during the ongoing novel coronavirus (COVID-19) outbreak." *Id.* Other orders expressly recognize access must be prohibited to hospitals "[g]iven the risk of COVID-19 in healthcare settings." *Id.* Even

[1] Defendants look beyond the Complaint to dispute Northwell's well-pled facts, which is not allowed on a motion to dismiss. *See Goel v. Bunge*, 820 F.3d 554, 559 (2d Cir. 2016) (on a 12(b)(6) motion, courts "do not look beyond facts stated on the face of the complaint").

[2] Exhibit 4 is a non-exhaustive composite exhibit of several orders Northwell was subject to, many of which have been renewed and extended multiple times. Compl. ¶¶ 31-34.

the orders Defendants attach make it clear that the New York State Department of Health suspended Northwell's non-essential surgeries and appointments "in order to reduce potential exposure for our healthcare workforce as well as aid in social distancing." Defs. Ex. F at 4.

These orders make clear that during the height of COVID-19, Northwell's properties were uninhabitable, inaccessible, and entirely unfit for normal use except in extenuating circumstances. Courts interpreting materially similar orders issued to prevent exposure to COVID-19 have found such orders deemed the property uninhabitable. For example, in *Elegant Massage, LLC v. State Farm Mutual Automobile Insurance Co.*, the court held that "it is plausible that Plaintiff's experienced a direct physical loss when the property was deemed uninhabitable, inaccessible, and dangerous to use by the Executive Orders because of its high risk for spreading COVID-19, an invisible but highly lethal virus." 2020 WL 7249624, at *10 (E.D. Va. Dec. 9, 2020).

Finally, requiring the orders to shut down all of Northwell's properties, as Defendants suggest, would result in illusory coverage for Interruption by Communicable Disease, as Northwell will always remain open, providing medical care during health care crises like the one it is facing now. *See Thomas J. Lipton, Inc. v. Liberty Mut. Ins. Co.*, 34 N.Y.2d 356, 361 (1974).[3]

B. <u>The Complaint Alleges Coverage for Northwell's Cleanup Costs</u>

Defendants' contention that Northwell does not allege its costs to clean and decontaminate its facilities were in response to government orders is equally false. MTD at 18-19. Paragraph 8 of the Complaint -- the allegation Defendants cite but cut off -- specifically alleges that Northwell incurred costs due to "the numerous and evolving mandates from local, state, and federal

[3] For the same reasons, Defendants' argument that COVID-19 is not a "fortuitous" event is baseless and writes Northwell's bargained for communicable disease coverage out of the Policies. MTD at 24.

authorities **as to how to clean its facilities**." Compl. ¶ 8 (emphasis added).

Moreover, while Defendants frame Northwell's cleanup costs solely under the Decontamination Costs coverage, they ignore that Northwell's cleanup costs are also covered under communicable disease coverage, which states: "This Policy also covers the reasonable and necessary cost incurred for the cleanup, removal and disposal of the actual not suspected presence of substance(s) causing the spread of such communicable disease and to restore the locations in a manner so as to satisfy such authorized governmental agency." Compl. ¶ 67. Accordingly, the court should deny Defendants' motion to dismiss Northwell's claim for its cleanup costs.

II. NORTHWELL SUFFICIENTLY ALLEGES TIME ELEMENT COVERAGE

A. The Complaint Alleges "Suspension" of Northwell's Business Activities

At its core, Defendants' argument is that Northwell did not experience a "suspension" of its business activities because Northwell's "level of activity" did not fall, and "Northwell was 'inundated' with COVID-19 patients and treated more of them than any other entity." MTD at 9. This position ignores the plain language of the Policies. "Suspension" is defined as "[t]he *slowdown or cessation* of the Insured's business *activities*." Compl. ¶¶ 59, 88 (emphases added). "Suspension" expressly covers a slowdown or cessation of activities, and it is not limited to the *complete* cessation of *all* business activities as Defendants suggest.

Moreover, Defendants ignore Northwell's allegations. Northwell alleges it experienced a mandatory cessation of all Northwell's elective and non-essential services. Compl. ¶¶ 8, 9. The fact that Northwell treated thousands of COVID-19 patients during this pandemic does not eliminate coverage for the "slowdown or cessation" of Northwell's other business activities. *See Am. Med. Imaging Corp. v. St. Paul Fire & Marine Ins. Co.*, 949 F.2d 690, 692 (3d Cir. 1991) ("suspension" did not require all business levels to cease); *Derek Scott Williams v. Cincinnati Ins.*

Co., 2021 WL 767617, at *2 (N.D. Ill. Feb. 28, 2021) (dental office alleged "suspension" based on orders "prohibiting the performance of non-urgent or non-emergency elective procedures and surgeries"); *Henderson Rd. Rest. Sys., Inc. v. Zurich Am. Ins. Co.*, 2021 WL 168422, at *13 (N.D. Ohio Jan. 19, 2021) ("slowdown" of business activities occurred when "state governments ordered that the [restaurants] could no longer be used for their intended purposes – as dine-in restaurants").[4]

B. The Complaint Alleges Direct Physical Loss of or Damage to Northwell's Covered Properties

Defendants' position boils down to their argument that the undefined phrase "direct physical loss of or damage to" property written by the Defendants requires physical *alteration* of property. MTD at 9. This interpretation is contrary to the plain language of the Policies, New York precedent (which Defendants ignore), and Northwell's reasonable expectations.

1. The Policies' Plain Language Covers The "Direct Physical Loss of or Damage" to Northwell's Covered Properties

Put simply, nothing in the Policies requires "physical alteration" of property. Those words do not appear in the Policies. Defendants could have limited coverage to "physical alteration" or "structural damage." They did not, and they cannot now rewrite the Policies under the guise of policy interpretation. *See Skanska v. Atl. Yards B2 Owner*, 31 N.Y.3d 1002, 1006 (2018).

Just as Defendants cannot insert language in the Policies that does not exist, Defendants cannot ignore language that is present in the Policies. Specifically, the phrases "physical loss of" and "damage" appear side by side separated by a disjunctive "or." Even though the Policies cover

[4] Defendants' one case, *Sunrise One, LLC v. Harleysville Insurance Co.*, 293 F. Supp. 3d 317 (E.D.N.Y. 2018), is inapposite. There, the court's decision turned on whether the necessary suspension occurred during the policy's period of liability. The plaintiff "concede[d] that it did not experience a cessation or slowdown of business activities during that time period," but instead claimed it would "eventually" be forced to close its inn after the period of liability had already expired. *Id.* at 326-27. Here, there is no dispute that Northwell's suspension has occurred during the Policies' period of liability.

either physical loss of property *or* physical damage to property, Defendants contend that the Policies require "physical damage." This interpretation writes the terms "or" and "loss" out of the definition, and this violates basic rules of contract construction under New York law.

Under New York law, it is axiomatic that courts "must construe the policy in a way that affords a fair meaning to all of the language employed by the parties in the contract and leaves no provision without force and effect." *In re Viking Pump, Inc.*, 27 N.Y.3d 244, 257 (2016). In *Kingray Inc. v. Farmers Group Inc.*, the court, applying New York law, rejected defendants' imposition of a physical alteration requirement under a policy that covered "direct physical loss of or damage" to property, reasoning that "Defendant's interpretation of the contract requires 'loss' to share a meaning with 'damage,' which violates the canon that every word be given meaning." 2021 WL 837622, at *8 (C.D. Cal. Mar. 4, 2021). The court denied defendants' motion to dismiss and held "it is possible that either the coronavirus which causes Covid-19 or New York's 'stay at home' orders caused 'direct physical loss.'" *Id.* at *7; *see also Derek Scott*, 2021 WL 767617, at *4 (requiring physical alteration "writes the term 'loss' out of the definition"); *In re Society Ins. Co.*, 2021 WL 679109, at *8 (N.D. Ill. Feb. 22, 2021) (where coverage was not "limited to direct physical 'damage'" and instead "extend[ed] to direct physical 'loss of' property" the plaintiffs "need not plead or show a change to the property's physical characteristics."); *Henderson*, 2021 WL 168422, at *10 ("[P]hysical loss *of* . . . property means something different than damage to the real property . . . [o]therwise why would both phrases appear side-by-side separated by the disjunctive conjunction 'or'?"); *Ungarean, DMD v. CNA*, 2021 WL 1164836, at *6 (Pa. Com. Pl. Mar. 25, 2021) ("the concepts of 'loss' and 'damage' are separated by the disjunctive 'or,' and, therefore, the terms must mean something different from each other").

Defendants further compound their error by fundamentally ignoring the word "of" in the

phrase "physical loss of" property. Defendants' own cases emphasize that physical loss "of" property is much broader than physical loss "to" property. For example, in *Turek Enterprises, Inc. v. State Farm Mutual Automobile Insurance Co*., the court recognized that the plaintiff's theory of "physical loss" as including loss of use would be plausible under a policy that covered "physical loss of" property. 484 F. Supp. 3d 492, 501 (E.D. Mich. 2020).[5] Indeed, numerous courts that have squarely addressed what "physical loss of" property means, including cases applying New York law, have found that the term includes loss of use and does not require physical alteration to property. *See, e.g.*, *Kingray*, 2021 WL 837622, at *7 (physical loss of property where plaintiff "was forced to shutter, rendering its property unusable" for its purpose) (New York law); *Henderson*, 2021 WL 168422, at *11 ("Plaintiffs experienced a loss *of* their real property – property which they had been using for dine-in customers."); *Society*, 2021 WL 679109, at *8 (because "coverage extends to direct physical 'loss of' property as well . . . Plaintiffs need not plead or show change to the property's physical characteristics"); *Ungarean*, 2021 WL 1164836, at *7 ("'loss' reasonably encompasses the act of losing possession [and/or] deprivation, which includes the loss of use of property absent any harm to property").

Finally, when analyzing the plain dictionary definitions of the words used in the Policies, it is inescapable that the phrase "physical loss of or damage" to property is broad enough to include physical loss of use. The dictionary definition of "direct" includes "natural, straightforward" and a "close logical, causal, or consequential relationship."[6] "Physical" is defined as "of or relating to

[5] Other courts have found that the phrase "loss to" property still encompasses loss of use and does not require physical alteration. *See Derek Scott*, 2021 WL 767617, at *5; *Elegant Massage*, 2020 WL 7249624, at *9; *Studio 417 v. Cincinnati Ins. Co.*, 478 F. Supp. 3d 794, 800 (W.D. Mo. 2020).
[6] *Direct*, *Merriam Webster*, https://www.merriam-webster.com/dictionary/direct.

material things."[7] "Loss" includes "the act of losing possession" and "failure to . . . utilize."[8] "Damage" is defined as "loss or harm resulting from injury to person, property, or reputation."[9] "Property" is defined as "something owned or possessed specifically: a piece of real estate; the exclusive right to possess, enjoy, and dispose of a thing: ownership; something to which a person or business has legal title."[10] This broad definition of "property" is consistent with the Policies' definition of "Covered Property," which includes Northwell's "interest in" its property. Lexington Policy at 17 of 98; Interstate Policy at 19 of 101. Taken together, there is nothing about these broad terms that requires physical alteration or forecloses coverage for physical loss of use. At a minimum, the phrase is ambiguous and must be read broadly in favor of coverage. *See AGCS Marine Ins. Co. v. World Fuel Servs., Inc.*, 220 F. Supp. 3d 431, 436 (S.D.N.Y. 2016).

2. The Policies' Use of the Words "Repair" and "Replace" Does Not Create a Physical Alteration Requirement

Defendants' textual argument that the two words "repair" and "replace," which are found in the Policies' Period of Liability, somehow redefine the meaning of "direct physical loss of or damage" to require physical alteration is wrong. Contrary to Defendants' argument, "repair" and "replace" do not only occur if the property is physically altered. The ordinary meaning of "repair" is broad enough to include in its definition "to restore to a sound or healthy state; RENEW; to make good: compensate for: REMEDY."[11] Further, the words "repair" and "replace," cannot rewrite the term "physical loss of or damage" to property, but must be harmonized with this provision. *Viking Pump*, 27 N.Y.3d at 257. As the *Society* court observed in harmonizing the

[7] *Physical*, *Merriam Webster*, https://www.merriam-webster.com/dictionary/physical.
[8] *Loss*, *Merriam Webster*, https://www.merriam-webster.com/dictionary/loss.
[9] *Damage*, *Merriam Webster*, https://www.merriam-webster.com/dictionary/damage.
[10] *Property*, *Merriam Webster*, https://www.merriam-webster.com/dictionary/property.
[11] *Repair*, *Merriam Webster*, https://www.merriam-webster.com/dictionary/repair.

terms "physical loss of" property and "repair" or "replace":

> There is nothing inherent in the meanings of ["repaired" or "replaced"] that would be inconsistent with characterizing the Plaintiffs' loss of their space due to the shutdown orders as a physical loss. If, for example, the coronavirus risk could be minimized by the installation of partitions and a particular ventilation system, then the restaurants would be expected to "repair" the space by installing those safety features. As another example, if a restaurant could mitigate the loss caused by a percentage-capacity limit by "replacing" some of its dining-room space by opening its adjacent banquet-hall room to increase the number of guests it could serve, then the restaurant would be expected to "replace" the loss of space by doing so.

2021 WL 679109, at *9; *see also Derek Scott*, 2021 WL 767617, at *4 ("In a situation like [this] one . . . the 'loss' would be 'repaired' if and when governmental authorities permitted full use of the property."); *Ungarean*, 2021 WL 1164836, at *8 ("in order to 'replace' or 'rebuild' unused space due to social distancing protocols, businesses might choose to buildout new spaces . . . or rearrange existing spaces in order to increase the amount of business they can safely handle during these difficult times"). This reasoning is all the more apt here because Northwell was forced to physically transform its covered properties in response to COVID-19 to ensure the safety of its workers and patients, close facilities that performed non-essential functions, and transform its space to accommodate the influx of COVID-19 patients. Compl. ¶¶ 8-9, 31, 33, 41.

Northwell's proposed reading of "repair" and "replace" to include repairs and replacements associated with the presence of the virus as well as physical loss of use, is the only reading that harmonizes the Period of Liability with the Policies' broad grant of coverage that expressly includes "physical loss of" property and New York decisions that have found coverage for the presence of hazardous substances. *See Viking Pump*, 27 N.Y.3d at 257. Defendants' proposed interpretation of the Period of Liability as mandating physical alteration would be contrary to binding precedent and write the term "loss" out of the Policies, contradicting the fundamental tenet that each word in a contract has some meaning. *Id.*

3. Under New York Law, the Presence of COVID-19 that Renders Property Unusable For its Intended Purpose is Covered

Defendants wrongly assert that "[f]or almost twenty years, New York courts have consistently held that coverage for a 'direct physical loss or damage' requires some form of actual, physical alteration to the insured premises . . ." MTD at 9. Defendants misstate New York law.

One of the cases Defendants cite for this sweeping proposition states just the opposite. In *Newman Myers*, the court recognized "the critical policy term at issue, requiring 'physical loss or damage,' ***does not require that the physical loss or damage be tangible, structural or even visible***." 17 F. Supp. 3d at 330 (emphasis added). Rather, that case recognized "[t]he invasions of noxious or toxic gases . . . ***rendering the premises unusable*** or uninhabitable, [are] held to suffice, because even invisible fumes can represent a form of physical damage." *Id.*

In the only other New York case Defendants cite for the requirement of physical alteration, *Roundabout Theatre*, it was undisputed that the policyholder did not suffer any physical loss or damage; rather, access to the insured theater was prohibited by municipal order based on a construction accident nearby. 751 N.Y.S.2d at 5. The decision does not reference that the policyholder had civil authority or ingress/egress coverage that would provide coverage in that situation. *Id.* In that circumstance, where there was no allegation of physical loss or damage at the insured premises, the court denied coverage. *Roundabout* did not in any way address the key question here: whether the presence of dangerous substances at the insured premises that render the properties unusable for their intended purposes plausibly constitutes physical loss of or damage to property. Under well-settled New York law, the answer to that question is yes.

For instance, Defendants do not even mention the other cases decided under New York law that expressly recognize, like *Newman Myers*, that loss of utility resulting from the presence of dangerous substances causes physical loss or damage. For example, applying New York law, the

Kingray court allowed a COVID-19 claim to survive a motion to dismiss because "dangerous conditions (a virus in the air)" that "rendered [the insured's] property ***unusable***" for its purpose sufficiently alleged a "form of loss." 2021 WL 837622, at *7-8 (emphasis added). Applying New York law, the Third Circuit held, in the context of asbestos, that physical loss or damage occurs when the "actual release of asbestos fibers" has rendered, or "an imminent threat of [such] release" would render "the property such that ***its function*** is nearly eliminated or destroyed." *Port Auth. of N.Y. & N.J. v. Affiliated FM Ins. Co.*, 311 F.3d 226, 236 (3d Cir. 2002) (emphasis added). Similarly, in *Schlamm Stone & Dolan, LLP v. Seneca Ins. Co.*, the New York Supreme Court held "the presence of noxious particles, both in the air and on surfaces in plaintiff's premises, would constitute property damage," reasoning that "[t]he carpets and other surfaces are property of plaintiff, and the presence [of] noxious particles thereon ***clearly impairs plaintiff's ability to make use of them***." 2005 WL 600021, at *4-5 (N.Y. Sup. Ct. Mar. 4, 2005) (emphasis added).[12]

Consistent with this New York law, the case law developing around COVID-19 related

[12] New York law is in accord with numerous jurisdictions that find the actual presence of dangerous particles of all types constitute physical loss or damage. *Accord. Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am.*, 2014 WL 6675934, at *2, 6 (D.N.J. Nov. 25, 2014) (ammonia); *Am. Alliance Ins. Co. v. Keleket X-Ray Corp.*, 248 F.2d 920, 925 (6th Cir. 1957) (radioactive dust and radon gas); *W. Fire Ins. Co. v. First Presbyterian Church*, 437 P.2d 52, 54 (Colo. 1968) (en banc) (gasoline vapors); *Pillsbury Co. v. Underwriters at Lloyd's, London*, 705 F. Supp. 1396, 1399 (D. Minn. 1989) (health-threatening organisms); *Hetrick v. Valley Mut. Ins. Co.*, 1992 WL 524309, at *2 (Pa. Ct. Com. Pl. May 28, 1992) (oil); *Farmers Ins. Co. v. Trutanich*, 858 P.2d 1332, 1336 (Or. Ct. App. 1993) (methamphetamine fumes); *Azalea, Ltd. v. Am. States Ins. Co.*, 656 So. 2d 600, 601 (Fla. Dist. Ct. App. 1995) (unknown pollutant); *Arbeiter v. Cambridge Mut. Fire Ins. Co.*, 1996 WL 1250616, at *1-2 (Mass. Super. Ct. Mar. 15, 1996) (oil fumes); *Sentinel Mgmt. Co. v. N.H. Ins. Co.*, 563 N.W.2d 296, 300 (Minn. Ct. App. 1997) (asbestos); *Matzner v. Seaco Ins. Co.*, 1998 WL 566658, at *4 (Mass. Super. Ct. Aug. 12, 1998) (carbon monoxide); *Bd. of Educ. v. Int'l Ins. Co.*, 720 N.E.2d 622, 626 (Ill. App. Ct. 1999) (asbestos); *Yale Univ. v. Cigna Ins. Co.*, 224 F. Supp. 2d 402, 413-14 (D. Conn. 2002) (asbestos and lead); *Graff v. Allstate Ins. Co.*, 54 P.3d 1266, 1269 (Wash. Ct. App. 2002) (methamphetamine vapors); *Cooper v. Travelers Indem. Co. of Ill.*, 2002 WL 32775680, at *1 (N.D. Cal. Nov. 4, 2002) (coliform bacteria and E.coli); *Motorists Mut. Ins. Co. v. Hardinger*, 131 F. App'x 823, 824-27 (3d Cir. 2005) (E.coli).

losses reveal an emerging consensus: claims for COVID-19 proceed where the insured alleges the actual or threatened physical presence of the virus at its insured premises. *See, e.g.*, *Kingray*, 2021 WL 837622, at *8 (allegations of a "virus in the air" alleged "loss" because of dangerous conditions); *Studio 417*, 478 F. Supp. 3d at 798 ("direct physical loss" alleged by "the presence of [the virus] 'render[ed] physical property in [the virus's] vicinity unsafe and unusable,'" forcing it "to suspend or reduce business at their covered premises"); *Cajun Conti, LLC v. Certain Underwriters at Lloyd's London*, 2020 WL 8484870 (La. Dist. Ct. Nov. 4, 2020) ("[i]f COVID constitutes a physical loss or damage, it is clear that the question of how COVID impacts the environment is a genuine issue of material fact"); *Goodwill Indus. v. Phila. Indem. Co.*, No. 30-2020-01169032-CU-IC-CXC (Cal. Super. Ct. Jan. 28, 2021) (complaint "expressly alleged . . . that coronavirus and COVID-19 were present at its properties at the time of the . . . closure orders") (Ex. 5); *Dino Palmieri Salons, Inc. v. State Auto. Mut. Ins. Co.*, No. CV-20-932117 (Ohio Ct. Com. Pl. Nov. 17, 2020) ("Plaintiffs' premises sustained physical loss or damage directly from the presence of physical Covid-19 particles") (Ex. 6); *Society*, 2021 WL 679109, at *8 n.5 (fact issue as to whether "the coronavirus particles themselves have in fact rendered, or could render, physical harm to their property given that the virus lingers on surfaces and remains in the air"); *Blue Springs Dental Care, LLC v. Owners Ins. Co.*, 488 F. Supp. 3d 867, 877 (W.D. Mo. 2020); *K.C. Hopps, Ltd. v. Cincinnati Ins. Co.*, 2020 WL 6483108, at *1 (W.D. Mo. Aug. 12, 2020).

Defendants' cases recognize this national trend. For example, in *Mudpie Inc. v. Travelers Casualty Insurance Co. of America*, the court expressly held that if the policyholder had "alleged the presence of the Covid in its store," the Court's conclusion about the intervening physical force would be different. 487 F. Supp. 3d 834, 841 n.7 (N.D. Cal. 2020). In another case cited by Defendants, *Pappy's Barbers Shops, Inc. v. Farmers Group, Inc.*, the court distinguished *Studio*

417, observing that in *Studio 417* the plaintiff alleged COVID-19 is a "physical substance" that attacked and deprived the plaintiffs of their property making it "unusable," whereas in *Pappy's Barbers Shops* the plaintiff expressly alleged that COVID-19 did not cause "physical loss of or damage to the property." 487 F. Supp. 3d 937, 943 n.2 (S.D. Cal. 2020).

Notably, Defendants' Exhibit C listing an "overwhelming majority of courts" that have granted dismissals contains no description of these cases or their lack of relevance. MTD at 11. As shown in Northwell's Exhibit 7, Defendants neglect to mention that 174 of the 191 dismissed cases did *not* allege the physical presence of COVID-19 at the insured property and 117 of the 191 dismissed cases contained the insurance industry's standard virus exclusion excluding losses from viruses (not present here). Ex. 7.[13] Defendants also ignore that in 245 cases nationwide, the insurers did not even move to dismiss, implicitly recognized physical loss is a fact issue, and the cases advanced to discovery to resolve the factual issues of the insured's claim. Ex. 8.

The New York COVID-19 cases Defendants cite are entirely consistent with and reinforce this national trend. In eight of the ten New York COVID-19 cases where the courts dismissed the case, the courts acknowledged ***there were no allegations that COVID-19 was present and causing physical loss or damage at the insured premises***.[14] Here, Northwell has alleged and there is no

[13] Defendants' Exhibit C lacks case citations, in many cases includes incorrect docket numbers, and does not include any analysis of the cases cited. Northwell has located and reviewed every case cited in Exhibit C and flagged the material differences in Exhibit 7 submitted with this motion.

[14] *See, e.g.*, *Visconti Bus Serv., LLC v. Utica Nat'l Ins Grp.*, 2021 WL 609851, at *8-9 (N.Y. Sup. Ct. Feb. 12, 2021) (factually distinguishing *Studio 417* because "[the insured] has explicitly affirmed that its premises is not infected with the Covid virus"); *DeMoura v. Cont'l Cas. Co.*, 2021 WL 848840, at *6 (E.D.N.Y. Mar. 5, 2021) (plaintiff "does not allege that the virus was, in fact, present in his business"); *Michael Cetta, Inc. v. Admiral Ins. Co.*, 2020 WL 7321405, at *10 (S.D.N.Y. Dec. 11, 2020) (plaintiff failed to allege that COVID-19 "attached to and deprived [p]laintiffs of their property, making it unsafe and usable, resulting in direct physical loss to the premises and property"); *Food For Thought Caterers Corp. v. Sentinel Ins. Co.*, 2021 WL 860345, at *5 (S.D.N.Y. Mar. 6, 2021) (referencing the potential impact of the presence of COVID-19 only in *dicta*); *Social Life Mag., Inc. v. Sentinel Ins. Co.*, 2020 WL 2904834 (S.D.N.Y. May 14, 2020)

dispute that COVID-19 was present at Northwell's properties.

There are only two New York COVID-19 cases that recommended dismissal even where the plaintiff alleged the presence of COVID-19 at the insured premises, *Tappo of Buffalo, LLC v. Erie Insurance Co*., 2020 WL 7867553 (S.D.N.Y. Dec. 29, 2020), and *Sharde Harvey, DDS v. Sentinel Insurance Co., Ltd.*, 2021 WL 1034259 (S.D.N.Y. Mar. 18, 2021). These are reports and recommendations, and Northwell respectfully submits that this Court should reject application of these cases to Northwell's claim. In *Tappo*, the court did not cite any New York law when it stated that COVID-19 does not cause direct physical loss because it can be cleaned from surfaces. 2020 WL 7867553, at *5 (collecting out of state cases). Rather, *Tappo* relied primarily on *Mama Jo's Inc. v. Sparta Insurance Co.*, 823 F. App'x 868 (11th Cir. 2020). *Tappo* mischaracterizes *Mama Jo's* as a COVID-19 case, but *Mama Jo's* addressed only whether the presence of dust at a restaurant from a nearby construction site caused physical damage under Florida law. *Id.* at 872. COVID-19 is not dust. It is an extremely dangerous substance that, when known to be present, necessitates serious precautions to avoid spread and exposure, such as Northwell's hospital workers wearing personal protective equipment. That is exactly the kind of dangerous condition that New York law expressly finds constitutes physical loss or damage if it impairs the insured's ability to use its property. *See supra* at 14-15.

In *Sharde*, the court recommended dismissal based on the premise that *Roundabout* precludes coverage for loss of use under New York law. 2021 WL 1034259, at *9. For the reasons

(asking plaintiff at preliminary injunction hearing "[w]hat evidence do you have that your premises are infected with the COVID bug"); *10012 Holdings, Inc. v. Sentinel Ins. Co.*, 2020 WL 7360252, at *4 (S.D.N.Y. Dec. 15, 2020) (no allegation that COVID-19 was at the insured premises or caused physical loss or damage); *Soundview Cinemas Inc. v. Great Am. Ins. Grp.*, 2021 WL 561854, at *6 (N.Y. Sup. Ct. Feb. 8, 2021) (same); *Dressel v. Hartford*, 2021 WL 1091711, at *4 (S.D.N.Y. Mar. 22, 2021) ("the presence of the virus . . . was never alleged").

discussed above, *Roundabout* did not deal with the presence of dangerous substances at the insured premises, and it does not address the relevant question of whether loss of utility resulting from dangerous conditions constitutes physical loss or damage. Further, the suggestion that "loss of" means "theft or misplacement" cannot be true of Northwell's Policies. These Policies expressly exclude theft and disappearance of property. Lexington Policy at 19 of 98; Interstate Policy at 21 of 101. *Sharde* in fact recognized that, under New York law, non-structural damage is covered when dangerous substances, such as ammonia, e-coli, or asbestos, render the insured premises unusable or unfit for occupancy. 2021 WL 1034259, at *9. Nonetheless, relying on *Tappo*, the court recommended dismissal because unlike ammonia, e-coli, or asbestos, COVID-19 purportedly does not require "non-routine, extensive remediation," but instead "can be eliminated by 'routine cleaning and disinfecting.'" *Id.* This reasoning is flawed for three distinct reasons.

First, the notion that an item that can be cleaned has not suffered physical loss or damage is *not* an articulation of New York law. This argument was first enunciated in *Tappo*, which relied entirely on non-New York cases for this proposition, including the *Mama Jo's* case that dealt with the presence of dust. Under New York law, there is no requirement of "non-routine" cleaning or "extensive remediation" for non-structural damage. *See Schlamm*, 2005 WL 600021, at *5 (no requirement of extensive remediation); *Port Auth.*, 311 F.3d at 236 (same); *Newman*, 17 F. Supp. 3d at 330 (same). *Second*, the *Sharde* court's conclusion that COVID-19 is somehow factually different from ammonia, e-coli, or asbestos and requires only "routine cleaning," is a factual conclusion, not a legal one, that was not properly decided at the pleading stage. *See Society*, 2021 WL 679109, at *8 n.5 (extent of harm caused by COVID-19 particles was a factual issue).

Further, Defendants' position that Northwell can remediate COVID-19 at its hospitals and health care facilities with only routine cleaning (MTD at 12 n.5) contradicts scientific studies that

have determined COVID-19 is "much more resilient to cleaning than other respiratory viruses so tested," and cannot be remedied through conventional disinfection.[15] It also contradicts Northwell's allegations. Northwell alleges that it has been forced to undertake significant and costly measures to prevent the spread of the virus to its essential workers and COVID-19 patients, including adopting heightened cleaning methods to comply with government orders, physically transforming its insured properties, and prohibiting access to non-COVID patients, non-essential staff, and even the loved ones of patients afflicted and hospitalized with the disease. Compl. ¶¶ 33, 38, 41, 88. Indeed, health authorities, including the WHO, have stated that stricter COVID-19 containment methods are necessary in health care settings, and Defendants' own exhibit recognizes that government orders placed physical demands on Northwell beyond just cleaning. *Id.*; *see also* Defs. Ex. F. *Third*, in *Port Authority*, the court recognized that the "imminent threat" of dangerous substances sufficiently shows physical loss or damage. 311 F.3d at 236. Here, there is no question Northwell's premises faced an ongoing imminent threat of COVID-19 at its premises, as the disease came back with every new COVID-19 patient admitted. Compl. ¶¶ 3, 6, 42, 48.

4. Northwell Sufficiently Pleads Physical Loss of or Damage to Property

Defendants' argument that Northwell's allegations of physical loss of or damage to property are "bare legal conclusions" is similarly misplaced. MTD at 13. Northwell's allegations include, *inter alia*: (1) the virus has been present at Northwell's covered properties since the onset of the pandemic; (2) droplets carrying the virus are physical objects, carrying a physical substance, that attach to and cause harm to property; (3) the presence of the virus renders the structures it attaches to unusable; (4) the Orders issued in response to COVID-19 explicitly state "the virus is physically causing property loss and damage"; (5) Northwell's properties face an ongoing

[15] https://doi.org/10.1002/jmv.26170.

imminent threat of COVID-19; (6) Northwell has suffered loss of its property due to "the government orders [that] have prohibited access to Northwell's properties and forced the closure of Northwell's non-essential business"; and (7) Northwell was forced to physically transform its properties in response to COVID-19. Compl. ¶¶ 3, 6, 8, 11, 33-45. Materially similar allegations have been deemed sufficient to survive motions to dismiss. *See supra* at 14-16.

C. The Complaint Alleges COVID-19 Caused Northwell's Losses

Equally unavailing is the suggestion that the government orders alone, not the virus, caused Northwell's alleged business interruption. MTD at 14. To the contrary, the Orders expressly state they were issued in response to COVID-19 and on their face state "*the virus physically is causing property loss and damage*[,]" and are therefore causally linked. Compl. ¶ 32 (quoting Mayor de Blasio's orders). Indeed, Defendants admitted causation in their denial letters, and they should not be permitted to tactically change position now. Ex. 3 ("It is undeniable that all such orders resulted from the SARS-CoV-2 virus."). Thus, Northwell has sufficiently alleged that the physical loss of or damage to property caused by COVID-19 at the insured premises and the imminent threat of COVID-19 are the "the proximate, efficient and dominant cause" of its business interruption losses. *Potoff v. Chubb Indem. Ins. Co.*, 875 N.Y.S.2d 124, 125 (1st Dep't 2009). "[T]he issue of proximate cause is fact laden and inappropriate for a motion to dismiss at the pleadings stage." *In re Sept. 11 Prop. Damage & Bus. Loss Litig.*, 468 F. Supp. 2d 508, 531 (S.D.N.Y. 2006).

D. The Contamination Exclusions Raised by Defendants Do Not Bar Coverage

Defendants' final argument that Northwell has failed to allege a "Covered Cause of Loss" is simply wrong. MTD at 15.[16] "Covered Cause of Loss" is broad and defined by the Policies as

[16] Northwell incorporates by reference the arguments made in its contemporaneously-filed motion for partial summary judgment on the application of the two contamination exclusions.

"*all risks* of direct physical loss of or damage *from any cause* unless excluded." Compl. ¶ 60 (emphases added). Defendants, not Northwell, bear the "heavy burden" of proving that claims fall entirely and unambiguously within an exclusion. *Belt Painting Corp. v. TIG Ins. Co.*, 100 N.Y.2d 377, 384 (2003). Defendants raise two contamination exclusions to bar coverage, one found in Endorsement #003 and another found in section 3.03 of the Policies' main form, which by Defendants' own admission has been "superseded." Exs. 1, 3. Defendants cannot meet their burden of proving conclusively that either contamination exclusion plainly precludes coverage.

1. The Modified Contamination Exclusion in Endorsement #003 Does Not Apply

Endorsement #003 precludes "loss or damage caused by . . . actual, alleged or threatened release, discharge, escape or dispersal" of "contaminants or pollutants." Lexington Policy at 79 of 98; Interstate Policy at 81 of 101. The definition of "contaminants" includes "bacteria, virus, or hazardous substances as listed in the Federal Water, Pollution Control Act, Clean Air Act, Resource Conservation and Recovery Act of 1976, and Toxic Substances Control Act or as regulated by the U.S. Environmental Protection Agency." *Id.*

Under binding New York law, including *Belt Painting*, which Defendants relegate to a footnote, a straightforward reading of Endorsement #003's pollution and contamination exclusion limits the exclusion to traditional environmental contaminants and pollutants, which has no application to COVID-19. *See, e.g.*, *Belt Painting*, 100 N.Y.2d at 382 ("the terms used in the exclusion to describe the method of pollution—such as 'discharge' and 'dispersal'—are terms of art in environmental law used with reference to damage or injury caused by disposal or containment of hazardous waste"). Courts have applied the reasoning in *Belt Painting* to limit the reach of virtually identical pollution and contamination exclusions to COVID-19 claims. *See JGB Vegas Retail Lessee, LLC v. Starr Surplus Lines Ins. Co.*, 2020 WL 7190023, at *3 (Nev. Dist. Ct.

Nov. 30, 2020) (insurer "has not shown it is unreasonable to interpret the Pollution and Contamination Exclusion to apply only to traditional environmental and industrial pollution and contamination that is not at issue here, where [the policyholder's] losses are alleged to be the result of a naturally-occurring, communicable disease").[17]

Furthermore, Defendants make no effort to demonstrate that COVID-19 implicates the environmental statutes specifically named by the exclusion, and they cannot meet their burden of demonstrating that COVID-19 falls clearly and unmistakably within the scope of the exclusion.

2. The Original Contamination Exclusion in Section 3.03 Does Not Apply

Defendants never cited the original contamination exclusion in section 3.03 in any of their denial letters as a basis to deny coverage. Exs. 1, 3. To the contrary, Defendants relied on Endorsement #003's pollution and contamination exclusion and argued that the endorsement "modifies and *supersedes*" the Policies' main form. *Id.* Having previously argued that the pollution and contamination exclusion in Endorsement #003 "supersedes" the Policies' main form, Defendants have waived the right to assert the same endorsement acts to "extend" the original contamination exclusion.[18] *Compare* MTD at 16 *with* Exs. 1, 3.

Even so, the language of the original contamination exclusion in section 3.03 *only* excludes Northwell's out-of-pocket "costs," *i.e.*, costs that Northwell has to pay due to contamination—not to business interruption "loss" that Northwell suffers. As Exhibit 9 demonstrates, this is in contrast

[17] The cases cited by Defendants are readily distinguishable, as they contained the broad ISO virus exclusion for loss or damage caused by viruses, did not contain the "discharge" language used in the Policies here, or did not follow *Belt Painting*. MTD at 17.

[18] *La Reunion Francaise, S.A. v. Halbart*, 1998 WL 1750128, at *7-8 (S.D.N.Y. Sept. 28, 1998) (carrier waived exclusion when it "had actual or constructive knowledge of the circumstances of" the exclusion, but failed to raise the exclusion in its reservation of rights letter); *Farr Man Coffee In. v. Chester*, 1993 WL 248799, at *33 (S.D.N.Y. June 28, 1993) (carrier waived defense when it had knowledge of the facts but failed to raise the exclusion in its disclaimer letter).

to the other exclusions in the Property Damage section, which specifically exclude "loss or damage." It also is contrary to the exclusions in the Time Element coverage section, which all expressly apply to "loss." Ex. 9. If Defendants intended the original contamination exclusion to apply to "loss," they could have said so *expressly* in the exclusion, just as the insurance industry did when it drafted the new ISO endorsement for "Loss due to Virus or Bacteria." Compl. ¶ 87. Applying the original contamination exclusion as Defendants suggest, to exclude all of Northwell's significant business interruption losses from COVID-19, would violate New York contract interpretation rules requiring that exclusions be read narrowly.

At the very least, the exclusion is ambiguous and does not compel dismissal of Northwell's case at the pleading stage. As the court recently held in *Thor Equities, LLC v. Factory Mutual Insurance Co.*, the insured's similar interpretation of the same exclusion was reasonable and the exclusion did not "unambiguously foreclose[] recovery on [the insured's] losses due to contamination." 2021 WL 1226983, at *4 (S.D.N.Y. Mar. 31, 2021).

III. THE COMPLAINT ADEQUATELY PLEADS INGRESS/EGRESS AND CIVIL OR MILITARY AUTHORITY COVERAGE

Defendants argue that Northwell has not alleged coverage for Ingress/Egress or Civil Authority because it has not alleged "direct physical loss of or damage" to property of others within five miles form an insured location" or "physical obstruction" to Northwell's premises. MTD at 19-20. For the reasons discussed above, COVID-19 causes "physical loss of or damage to" property. *See supra* at 9-21. Furthermore, Northwell expressly alleges that the "Orders have also resulted from the physical loss of or damage to property not owned, occupied, leased or rented by Northwell within 5 miles of Northwell's covered properties, which have the presence of COVID-19 and SARS-CoV-2." Compl. ¶ 34. Northwell further alleges that the Orders prohibited and obstructed access to its facilities. *Id.* ¶¶ 33, 88 ("the government orders have prohibited access to

Northwell's properties"). Defendants' factual challenges to these allegations are inappropriate.

IV. NORTHWELL SUFFICIENTLY STATES A CLAIM FOR BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

Under New York law, "implicit in contracts of insurance is a covenant of good and fair dealing." *Bi-Economy Mkt., Inc. v. Harleysville Ins. Co.*, 10 N.Y.3d 187, 194 (2008). Thus, a bad faith claim will survive dismissal when the "causes of action are predicated on different wrongful conduct and seek different relief." *Utica Mut. Ins. Co. v. Fireman's Fund Ins. Co.*, 238 F. Supp. 3d 314, 325 (N.D.N.Y. 2017). Here, Northwell alleges that Defendants delayed assessment of Northwell's claim and put forth baseless reasons why Northwell's claim is not covered, including their contention that a "pollution and contamination" exclusion added through Endorsement #003 eliminated Northwell's bargained for coverages for Communicable Disease and Decontamination Costs. Compl. ¶¶ 84-85, 113. Despite reiterating this argument in two denial letters, Defendants now abandon this argument entirely in litigation, effectively conceding its frivolity. Furthermore, Defendants contradict the positions taken in their denial letters, including their newfound arguments that the government orders are a superseding cause of loss and their position that Endorsement #003 "extends" the Policies' exclusions. Northwell further alleges consequential damages flowing from Defendants' bad faith, including attorneys' fees. *Id.* ¶¶ 116-17. These allegations and Defendants' tactical change in position sufficiently plead a viable bad faith claim.

CONCLUSION

For the foregoing reasons, Northwell respectfully requests that the Court deny Defendants' motion to dismiss in its entirety.[19]

[19] If the Court is inclined to grant Defendants' motion, Northwell respectfully requests leave to amend its Complaint, as it is capable of alleging additional facts to cure any deficiencies identified in its Complaint. Leave to amend should be "freely granted when justice so requires." *Chenensky v. N.Y. Life Ins. Co.*, 2012 WL 234374, at *1 (S.D.N.Y. Jan. 10, 2012).

Dated: New York, New York
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/s/ Robin L. Cohen

Robin L. Cohen
Alexander M. Sugzda
Cynthia M. Jordano
COHEN ZIFFER FRENCHMAN & MCKENNA LLP
1350 Avenue of the Americas, 25th Floor
New York, New York 10019
Tel: (212) 584-1890
rcohen@cohenziffer.com
asugzda@cohenziffer.com
cjordano@cohenziffer.com

Attorneys for Plaintiff Northwell Health, Inc.