EFiled: Apr 28 2022 10:12AM EDT
Filing ID 67514730
Case Number 393,2021

IN THE SUPREME COURT FOR THE STATE OF DELAWARE

APX OPERATING COMPANY, LLC, APX/Appellant, vs. HDI GLOBAL INSURANCE COMPANY, Defendant/Appellee.	No. 393, 2021 On Appeal from the Superior Court of the State of Delaware C.A. No. N21C-03-058 AML CCLD

ANSWERING BRIEF OF APPELLEE HDI GLOBAL INSURANCE COMPANY

Dated: April 28, 2022

OF COUNSEL:
Kristin C. Cummings
ZELLE LLP
901 Main Street
Suite 4000
Dallas, TX 75202
214.749.4218

Kristin A. Heres
ZELLE LLP
161 Worcester Road, Suite 502
Framingham, MA 02451
781.466.0732

John D. Balaguer (#2537)
WHITE AND WILLIAMS LLP

Courthouse Square
600 N. King Street, Suite 800
Wilmington, DE 19801
302.467.4501

Counsel for HDI Global Insurance Company

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases **Page(s)**

Other Authorities **Page(s)**

NATURE OF PROCEEDINGS

This dispute arises out of Appellant APX's ("Appellant" or "APX") claim under a commercial property insurance policy issued by Appellee HDI Global Insurance Company ("Appellee" or "HDI") to recover for alleged economic losses APX attributes to the COVID-19 pandemic.

On March 5, 2021, APX filed its Complaint in the Superior Court alleging breach of contract and seeking declaratory relief. The Complaint sought coverage under the Policy for claimed COVID-19-related economic losses allegedly due to unconfirmed, but purportedly "statistically-certain and/or ubiquitous and inevitable presence of SARS-CoV-2 virions" at certain locations and due to governmental orders issued to prevent the spread of COVID-19 that caused the "loss of use" of certain property.

On May 28, 2021, HDI submitted its Opening Brief in support of its Motion to Dismiss APX's causes of action for failure to state a claim pursuant to Super. Ct. Civ. R. ("Rule") 12(b)(6). Specifically, HDI moved to dismiss APX's Complaint because APX failed to meet its burden to establish coverage under the Policy because it had not identified "direct physical loss or direct physical damage" to property. Alternatively, HDI moved to dismiss the Complaint because even if APX could establish coverage in the first instance (which is disputed), coverage for APX's claim

was excluded under the Policy's Contamination Exclusion. Oral arguments were held before the Superior Court (Legrow, J.) on September 22, 2021.

On November 18, 2021, the Superior Court granted HDI's Motion to Dismiss, holding that APX's claim was unambiguously excluded under the Policy's Contamination Exclusion and dismissed APX's Complaint with prejudice. The Superior Court declined to separately address whether SARS-CoV-2 virions in or about insured properties would constitute direct physical loss or direct physical damage.

On December 14, 2021, APX filed a Notice of Appeal in the Supreme Court contending that the Superior Court erred in interpreting the Policy's Contamination Exclusion and dismissing APX's Complaint.

On February 7, 2022, the Supreme Court issued its briefing schedule. On March 29, 2022, APX filed its Opening Brief on appeal.

HDI submits its Answering Brief on appeal and respectfully requests that the decision of the Superior Court be affirmed.

SUMMARY OF ARGUMENT

1. **Denied.** The plain, clear, and unambiguous reading of the Policy's Contamination Exclusion demonstrates that "contamination" by "virus" is expressly excluded from coverage.[1] The Superior Court correctly determined that APX's claimed losses allegedly resulting from "the statistically-certain presence of SARS-CoV-2 virions at or near the Insured Properties" was precluded under the Policy's Contamination Exclusion because the language "unambiguously excludes coverage for viruses."[2]
2. **Denied.** The Policy's Contamination Exclusion unambiguously defines contaminants to include virus. APX's attempt to limit the application of the Contamination Exclusion to traditional environmental claims would create limitations that do not exist in the plain language of the Policy, as the Superior Court correctly determined that "no such limitation appears in the Policy."[3] Moreover, APX's skewed interpretation would essentially remove the term "virus" from the definition of "pollutants and contaminants" in the Contamination Exclusion. The Superior Court properly rejected APX's unreasonable interpretation.

---

1 In consideration of Supreme Court Rule 14(e) and to avoid duplication of record submissions, Appellee will rely on and cite to the Appendix submitted by APX.
2 A485; A488.
3 A486.

3. **Denied.** APX failed to present the "superfluous" argument in the Superior Court, and thus waived the right to raise this issue on appeal under Supreme Court Rule 8. Regardless, the Superior Court's interpretation of the Contamination Exclusion does not render any portions of the Policy "superfluous." In rejecting APX's misguided and selective reading of the Contamination Exclusion, the Superior Court properly construed the Policy as a whole in finding that "the Policy's express language unambiguously excludes coverages for viruses."[4] Moreover, as the Policy's Contamination Exclusion is clear and unambiguous, and its application to APX's economic losses due to the SARS-CoV-2 virus falls clearly within its parameters, the reasonable expectation doctrine does not apply.[5]
4. **Denied.** The Superior Court correctly rejected APX's unreasonable interpretation of the Contamination Exclusion because APX "makes the mistake of reading the exclusion in 'isolation,' rather than reading 'all of the pertinent provisions of the policy as a whole.'"[6] The Policy's Contamination Exclusion unambiguously defines contaminants to include virus. APX's interpretation seeks to ignore the

---

[4] A487.

[5] *Hallowell v. State Farm Mut. Auto. Ins. Co.*, 443 A.2d 925, 928 (Del. 1982) ("[T]he doctrine of reasonable expectations is applicable in Delaware to a policy of insurance only if the terms thereof are ambiguous or conflicting[.]").

[6] A487.

plain language of the Policy, which runs afoul of long-standing principles of policy construction.[7]

5. **Denied.** The two outlier cases that APX relies upon are unpersuasive and ignore the significant body of case law, in which courts have routinely enforced contamination exclusions involving claimed losses due to SARS-CoV-2.[8] Courts have flatly declined to follow the narrow holdings in *JGB Vegas Retail Lessee, LLC v. Starr Surplus Lines Insurance Co.* and *Urogynecology Specialist of Florida LLC v. Sentinel Insurance Co. Ltd.*, as both decisions run contrary to the overwhelming majority of courts across the country.[9]

---

[7] *Monzo v. Nationwide Prop. & Cas. Ins. Co.*, 249 A.3d. 106, 118, 2021 WL 926535, at *7 (Del. 2021) (citations omitted).

[8] *See Zwillo V, Corp. v. Lexington Ins. Co.*, 504 F. Supp. 3d 1034, 1041 (W.D. Mo. 2020), *appeal dismissed*, 2021 WL 2792962 (8th Cir. Mar. 18, 2021); *Northwell Health, Inc. v. Lexington Insurance Co.*, 550 F. Supp. 3d. 3d 108, 121 (S.D. N.Y. July 26, 2021); *Circus LV, LP v. AIG Specialty Ins. Co.*, 525 F. Supp. 3d 1269 (D. Nev. 2021); *Ford of Slidell, LLC v. Starr Surplus Lines Insurance Co.*, 2021 WL 5415846, at *10 (E.D. La. Nov. 19, 2021).

[9] *See Oz Fresh & Healthy Food LLC v. Underwriters at Lloyds's London*, 521 F.Supp.3d 1232, 1242 n.2 (S.D. Fl. Feb. 22, 2021) (finding *JGB Vegas* unpersuasive because the decision does not "construe the policies in accordance with Florida law"); *Cosmetic Laser, Inc. v. Twin City Fire Ins. Co.*, 554 F.Supp.3d 389, 401 (D. Conn. Aug. 11, 2021) (Virus Exclusion barring coverage "for loss or damage caused" by "'fungi', wet rot, dry rot, bacteria or virus" unambiguous and applied to bar coverage for COVID-19 business interruption claim, "join[ing] the vast majority of courts to consider this issue and conclude that COVID-19 is a 'virus' within the meaning of the Policy" and noting that "Urogynecology . . . has been repeatedly rejected by courts interpreting the same virus exclusion."); *Fleming.Ruvoldt PLLC v. Sentinel Ins. Co., Ltd.*, 2022 WL 401883, at *5 (N.J. Super. Ct. Law Div. Feb. 1, 2022)("Fungi", Wet Rot, Dry Rot, Bacteria and Virus exclusion barred any coverage for APX's COVID-19

6. **Denied**. The Superior Court properly held that the Policy's Contamination Exclusion unambiguously precluded APX's claim for coverage. APX cites to *Circus LV, LP v. AIG Specialty Insurance Co.*, in which the court barred the insured's claim for claimed COVID-19 related losses based on the *same exact* Contamination Exclusion at issue before this Court.[10] As the Policy unambiguously defines contaminants to include virus, the Superior Court correctly followed the majority of courts that have routinely enforced the application of HDI's specific Contamination Exclusion.[11]

7. **Denied**. APX attempts to insert limitations to the Contamination Exclusion to create coverage that does not otherwise exist. The Superior Court correctly rejected APX's argument in this regard, determining that "no such limitation appears in the Policy."[12] Moreover, the Superior Court correctly reasoned that APX "makes the mistake of reading the exclusion in 'isolation,' rather than reading 'all of the pertinent provisions of the policy as a whole.'"[13] APX's self-serving construction and interpretation of the Contamination Exclusion would essentially remove the term "virus" from the definition of "pollutants and

---

property policy claim, rejecting APX's citation of *Urogynecology* in arguing that the exclusion was ambiguous).

10 525 F. Supp. 3d 1269, 1281 n.54 (D. Nev. 2021).

11 A488-A489.

12 A486.

13 A487.

contaminants" in the Contamination Exclusion. The Policy's Contamination Exclusion unambiguously define contaminants to include virus.

STATEMENT OF FACTS

A. The Parties

Appellant APX Operating Co., LLC ("APX") is a Delaware limited liability company that, through its subsidiaries, operates amusement parks located in California, Florida, and New Jersey.[14] APX seeks coverage for claimed COVID-19-related economic losses at eight of these properties under a commercial property insurance policy issued by HDI to Apex Parks Group, LLC ("Apex Parks").[15]

HDI Global Insurance Company is licensed to do business in the State of Delaware.[16] HDI issued a commercial property insurance policy to Apex Parks.[17]

B. APX's Unsupported Claim Under the Policy

In its Complaint, APX alleges it sustained economic losses due to COVID-19 related to "suspensions of and reductions in operations at the Insured Properties."[18] APX does not allege in its Complaint the actual presence of the virus that causes COVID-19 at its locations, but rather bases its entire claim upon the unconfirmed "statistically-certain presence of SARS-CoV-2 virions in or about the Insured Properties and/or the ubiquitous and inevitable presence of SARS-CoV-2 virions throughout the locales and states where the Insured Properties are located[.]"[19]

---

[14] A11.
[15] A11; A52.
[16] A12
[17] A52.
[18] A37.
[19] A37.

APX's Complaint alleges that the hypothetical, unconfirmed presence of COVID-19 triggers coverage under the Policy.[20] APX also alleges that certain governmental orders issued to prevent the spread of COVID-19 caused "risks of direct physical loss or direct physical damage" to the insured properties, and that such orders were issued as a result of "physical damage" within five miles of insured properties and prohibited access to those properties.[21]

APX alleges that it is entitled to coverage under the Policy for claimed property damage and time element loss resulting from the "statistically-certain presence of SARS-COV-2 virions."[22] APX's central allegation is that COVID-19 rendered the insured properties "unsafe or otherwise unusable or results in a deprivation of the full use of and rights to the property" to constitute direct physical loss or damage.[23]

C. The Policy Excludes Loss or Damage Caused by Virus

HDI issued Commercial Lines Policy number CPD5484800 to Apex Parks for the period from May 8, 2018 to May 8, 2019, which was extended by endorsement to include the period from May 8, 2019 to May 8, 2020.[24] The Policy insures covered property against "direct physical loss or direct physical damage" as follows:

---

20 *See* A37–A39.
21 A37–A39.
22 A37.
23 A21; A39.
24 A52; A119.

INSURING CLAUSE

> In consideration of the terms and conditions herein or added hereto and in consideration of the premium paid, this policy insures against risks of direct physical loss or direct physical damage, **except as excluded**, to Insured covered property while on described premises, provided such direct physical loss or damage occurs during the term of this policy commencing with the effective date shown above.[25]

As referenced in the "except as excluded" clause of the Insuring Clause, the Policy contains an unambiguous Contamination Exclusion that precludes coverage for APX's claims:

EXCLUSIONS

> The following exclusions apply unless specifically stated elsewhere in this Policy:
>
> * * *
>
> D. This Policy excludes the following unless directly resulting from other physical damage not excluded by this Policy:
>
> 1) contamination including but not limited to the presence of pollution or hazardous material.[26]
>
> * * *

The Policy defines "contamination" as follows:

> **The following term(s) *whenever used* in this Policy mean:**
>
> **Pollutant(s) and/or Contaminant(s) and/or Hazardous Material(s)**

[25] A57.
[26] A82.

> The term pollutant(s), contaminant(s), hazardous material(s) shall mean any solid, liquid, gaseous or thermal irritant or contaminant, including, but not limited to, smoke, vapor, soot, fumes, acids, alkalis, chemicals, bacteria, virus, vaccines and waste. Waste includes materials to be recycled, reconditioned or reclaimed.[27]
>
> **Pollution and/or Contamination**
>
> The terms pollution and/or contamination shall mean the presence of any material which after its release or discharge can cause or threaten damage to human health and/or human welfare, or causes or threatens damage, deterioration, loss of value, marketability and/or loss of use to insured property, including, but not limited to, 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/or Toxic Substances Control Act, or as designated by the US Environmental Protection Agency or, local equivalent environmental agency.[28]

Thus, the Policy excludes, with respect to all coverages, any contamination by virus, which APX contends is the basis for its claim for coverage.

[27] A69.
[28] A69.

ARGUMENT

THE DECISION OF THE SUPERIOR COURT SHOULD BE AFFIRMED BECAUSE THE CLEAR AND UNAMBIGUOUS LANGUAGE OF THE POLICY EXCLUDES COVERAGE FOR APPELLANT'S CLAIM FOR ECONOMIC LOSSES DUE TO COVID-19.

A. QUESTION PRESENTED

Did the Superior Court correctly hold that the APX's claim for economic losses allegedly due to COVID-19 is unambiguously barred by the Policy's exclusion for contamination, which operates to preclude coverage for "any material which after its release or discharge can cause or threaten damage to human health and/or human welfare, or causes or threatens damage, deterioration, loss of value, marketability and/or loss of use to insured property, including, but not limited to, bacteria, virus[]"?

B. STANDARD AND SCOPE OF REVIEW

The Delaware Supreme Court reviews judgments on a motion to dismiss *de novo*.[29] In this context, the Court decides whether the trial judge erred as a matter of law in formulating or applying legal precepts.[30] Dismissal is warranted only if "it appears with reasonable certainty" that the claims asserted would not entitle APX to relief under any provable set of facts.[31]

---

[29] *Dunlap v. State Farm Fire & Cas. Co.,* 878 A.2d 434, 438-39 (Del. 2005).
[30] *Gadow v. Parker,* 865 A.2d 515, 518 (Del. 2005).
[31] *Dunlap,* 878 A.2d at 439 (*citing McMullin v. Beran,* 765 A.2d 910, 916 (Del. 2000)).

C. MERITS OF ARGUMENT

Under Delaware law, the interpretation of contractual language, including that of insurance policies, is a question of law for the courts to decide.[32] Thus, "where the language of a policy is clear and unequivocal, the parties are to be bound by its plain meaning."[33] Courts "should not 'destroy or twist policy language under the guise of construing it.' '[C]reating an ambiguity were none exists could, in effect, create a new contract . . . to which the parties [did] not assent[ ].'"[34]

The insured bears the burden of establishing that a claim is covered under the policy.[35] Once that burden is met, it then shifts to the insurer to demonstrate that an exclusion applies.[36] Courts will give plain effect to the language of the policy and will only find an ambiguity where the language is susceptible to two or more reasonable interpretations.[37] "An insurance policy is not ambiguous merely because the parties do not agree on its construction."[38]

---

[32] *O'Brien v. Progressive Northern Ins. Co*., 785 A.2d 281, 286 (Del. 2001).

[33] *Id.* at 288 (quoting *Emmons v. Hartford Underwriters Ins. Co.*, 697 A.2d 742, 745 (Del. 1997)).

[34] *Monzo v. Nationwide Prop. & Cas. Ins. Co.*, 249 A.3d. 106, 118, 2021 WL 926535, at *7 (Del. 2021) (citations omitted).

[35] *Deakyne v. Selective Ins. Co. of America*, 728 A.2d 569, 571 (Del. Super. Ct. 1997).

[36] *Id.*

[37] *Id.* at 572.

[38] *Id*.

The plain, clear, and unambiguous reading of the Policy's Contamination Exclusion demonstrates that "contamination" by "virus" is expressly excluded from coverage.[39] The Superior Court correctly determined that APX's claimed losses allegedly resulting from "the statistically-certain presence of SARS-CoV-2 virions at or near the Insured Properties"[40] was precluded under the Policy's Pollution and Contamination exclusion because the language "unambiguously excludes coverage for viruses that cause or threaten damage to human health."[41]

When a contract is only susceptible of one interpretation, and that interpretation effectively negates the claim as a matter of law, a motion to dismiss should be granted.[42] APX's attempt to rewrite the terms of the Policy to conform with its self-serving theory of coverage does not create an ambiguity. As there is only one susceptible interpretation of the Policy's Contamination Exclusion, the Superior Court's decision should be affirmed.

---

39 A69; A82.
40 A485.
41 A485.
42 *Jarden v. ACE American Ins. Co.*, 2021 WL 3280495 at *4 (Del. Super. Ct. July 30, 2021).

1. The Policy's Contamination Exclusion Unambiguously Bars Coverage.

The Superior Court correctly concluded that "[t]he Policy's express language unambiguously excludes coverage for viruses that cause or threaten damage to human health" and held that "the plain language of the Policy excludes APX's coverage claim" for its alleged economic losses arising out of the virus known as SARS-CoV-2.[43] In so doing, the Superior Court reasoned that the Policy's exclusion for contamination "is 'specific, clear, plain, conspicuous, and not contrary to public policy' even under the 'strict and narrow construction' the Court must give policy exclusions."[44] APX's efforts to identify any error in the Superior Court's ruling are unavailing. Indeed, the Superior Court has already considered and rejected the arguments presented by APX in its appeal, with the exception of arguments APX failed to raise below and are therefore waived here.

APX argues that the exclusion applies only to so-called "traditional" environmental pollution. As the Superior Court concluded, however, "[n]o such limitation appears in the Policy."[45] As a preliminary matter, the Policy unambiguously defines the terms "Pollutant(s) and/or Contaminant(s) and/or Hazardous Material(s)" to include "virus."[46] Limiting the application of the

---

[43] A485.
[44] A484.
[45] A486.
[46] A69.

Contamination Exclusion to "traditional" environmental claims, as APX argues, would require this Court to ignore and remove the term "virus" from the definition, which it cannot do.[47] APX's interpretation runs afoul of long-standing principles of policy construction while urging this Court to reverse the Superior Court's decision without citing to any applicable authority.

APX further contends that because the definition of "Pollution and/or Contamination" references "environmental laws and agencies" that the exclusion was only intended to limit traditional environmental pollution.[48] However, the Superior Court rejected this argument, noting that the Policy expressly states that "pollution and/or contamination . . . **include[s], but [is] not limited to, bacteria, virus, <u>or</u> hazardous substances** as listed in the Federal Water Pollution Control Act, Clean Air Act, Resource Conservation and Recovery Act of 1976, and/or Toxic Substances Control Act, or as designated by the US Environmental Protection Agency or, local equivalent environmental agency."[49]

APX posits that the Policy's reference to various environmental acts and agencies "demonstrate an intent to restrict the definition and the exclusion to viruses . . . that can cause environmental contamination or pollution, and not to viruses (or

---

47 *See Monzo*, 249 A.3d. at 118, 2021 WL 926535, at *7 (citations omitted).
48 APX's Opening Brief at pgs. 13, 14.
49 A486.

bacteria) that can cause pandemics or epidemics."[50] However, courts have consistently rejected this argument.[51]

Moreover, APX's reading of the language ignores **"or"** as a disjunctive. In fact, APX's strained interpretation contradicts APX's own arguments raised in its Answering Brief to HDI's Motion to Dismiss, in which APX argued that the Policy's insuring clause requiring "physical loss ***or*** damage" meant that "coverage for 'loss' is separate, distinct, and independent from coverage for 'damage.'"[52] APX now reads

---

[50] APX's Opening Brief at pg. 14.

[51] *See Northwell Health, Inc. v. Lexington Ins. Co.*, 550 F. Supp. 3d 108, 120 (S.D.N.Y. 2021) (contamination exclusion "unambiguously excludes coverage" for COVID-related business losses when "contaminants or pollutants" is defined to include any "bacteria, virus, or other 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 designated by the U.S. Environmental Protection Agency"); *Zwillo V, Corp. v. Lexington Ins. Co.*, 504 F. Supp. 3d 1034, 1041 (W.D. Mo. 2020) (similar exclusion and nearly identical definition that also defined "contaminants or pollutants" as a substance "which after its release can cause or threaten damage to human health . . . including, but not limited to . . . virus, or hazardous substances as listed in the Federal Water, Pollution Control Act, Clean Air Act, . . . " "expressly excludes damage or loss . . . caused by a virus"), *appeal dismissed*, 2021 WL 2792962 (8th Cir. Mar. 18, 2021); *Circus LV, LP v. AIG Specialty Ins. Co.*, 525 F. Supp. 3d 1269, 1277-78 (D. Nev. 2021) (applying nearly identical contaminants exclusion and definition of "Pollutants or Contaminants" to dismiss COVID-related losses because "SARS-CoV-2 virus and resulting COVID-19 pandemic falls squarely within the policy's pollutants-or-contaminants exclusion"); *Ford of Slidell, LLC v. Starr Surplus Lines Ins. Co.*, 2021 WL 5415846, at *10 (E.D. La. Nov. 19, 2021) (interpreting a nearly identical definition of "pollutants" or "contaminants" to "unambiguously exclude[] coverage for losses resulting from COVID-19").

[52] A337.

"or" as a conjunctive rather than the intended disjunctive in an attempt to limit the application of the exclusion.

In *Jenkinson's South, Inc. v. Westchester Surplus Lines Insurance Co.*, the court rejected a policyholder's argument that a similar exclusion did not apply to preclude coverage for a claim arising out the COVID-19 pandemic because it is "not listed as a hazardous substance in the Federal Water, Pollution Control Act, Clean Air Act, Resource Conservation and Recovery Act of 1976."[53] The court reasoned that "[i]t is well settled that the virus exclusion cited in the defendants' policies is intended to include viruses and based on a plain reading of the policy the term 'virus' is not intended to be modified" by the federal statutes listed in the exclusion because "this court interprets the 'Pollutants or Contaminants' definition in a disjunctive manner, where the policy excludes both 'hazardous substances' found in the Federal Water Pollution Act, *as well as viruses*."[54] APX's interpretation is not supported by the plain reading of the language, which unambiguously bars coverage for *all bacteria and viruses, as well as those hazardous substances* listed in various environmental statutes or designated by governmental agencies.

APX also argues that the terms "release" and "discharge" contained in the Policy evidence that the exclusion for contamination is limited to "typical

---

[53] 2021 WL 2934875, at *9 (N.J. Super. Ct. Law Div. July 02, 2021).
[54] *Id.* at 9–10.

environmental pollution or contamination."[55] Again, the Superior Court rejected this argument and found that the plain meaning of "release" and "discharge" encompasses "the spread or emission of a substance in a general sense, not specifically an environmental one."[56] As the Superior Court pointed out, "APX's own Complaint alleges that individuals infected with COVID-19 'release' contagious virions."[57] Thus, by APX's own admission, it is seeking coverage under the Policy for the "release" or "dispersal" of the virus that causes COVID.

Dictionary definitions provide further support for the Superior Court's reading of these terms. "Dispersal" is "the process or result of the spreading of organisms from one place to another."[58] When used as a noun, "release" is defined as "the act or an instance of liberating or freeing."[59] Consistent with these definitions, courts that have considered similar exclusionary language held that SARS-CoV-2, a virus, fell within those exclusions because "the virus has been released, dispersed, and discharged into the atmosphere, resulting in infections and transmissions."[60] APX's

---

55 APX's Opening Brief at pg. 16.

56 A486.

57 A486.

58 MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/dispersal (last visited April 20, 2022) (emphasis added).

59 MERRIAM-WEBSTER DICTIONARY, https:// www.merriam webster.com/dictionary/release (last visited April 20, 2022).

60 *Circus LV, LP v. AIG Specialty Ins. Co.*, 525 F. Supp. 3d 1269, 1278 (D. Nev. 2021); *see Zwillo V, Corp. v. Lexington Ins. Co.*, 504 F. Supp. 3d 1034, 1041 (W.D. Mo. 2020) (same); *Sportime Clubs LLC v. Am. Home Assurance Co.*, 2021

Complaint recognizes that COVID-19 is a form of contaminant, as APX alleges that SARS-CoV-2 has the "virtual certainty of transmission" and "spread."[61] By alleging the "statistically-certain presence of SARS-CoV-2 virions in or about the Insured Properties and/or the ubiquitous and inevitable presence of SARS-CoV-2 virions," APX implicitly concedes that the virus, SARS-CoV-2, was "transmitted" or in other words, released and dispersed, in or onto APX's properties. Although APX asks this Court to ignore and essentially read out the term "virus" from the Policy's Contamination Exclusion, a court simply cannot refuse to "treat the word 'virus' in the clause as if it were not there."[62]

APX contends that the Policy's definition of "pollutants and/or contaminants" indicates that "contaminants" is limited to "products of or used in industrial production." The Superior Court rejected this argument and found that the Policy "contains no language suggesting . . . that 'virus' should be interpreted as referring

---

WL 4027887, at *3 (Sup. Ct., Suffolk Cnty. July 1, 2021) (granting motion to dismiss, reasoning that the exclusion did not cover loss or damage caused by or attributable to any "pollutants or contaminants," defined "pollutants" to include "virus," and excluded "actual, alleged or threatened release, discharge, escape or dispersal of pollutants or contaminants..."); *Till Metro Ent. v. Covington Specialty Ins. Co.*, 545 F.Supp.3d 1153, 1167 (N.D. Okla. June 28, 2021) (recognizing that COVID-19 travels by "discharge," "dispersal," or "release" and finding the plain language of the policy's exclusion).

61 A488; A28.

62 *Northwell Health, Inc. v. Lexington Insurance Co.*, 550 F. Supp. 3d. 3d 108, 121 (S.D. N.Y. July 26, 2021) ("What is a sneeze or cough if not a discharge or dispersal?").

merely to a form of medical waste."[63] Simply put, APX attempts to insert limitations on the Contamination Exclusion to create coverage that does not otherwise exist. A court should not destroy or twist policy language under the guise of construing it.[64] The Policy's Contamination Exclusion is clear and unambiguous, and its application to APX's economic losses due to the SARS-CoV-2 virus falls clearly within its parameters.

APX argues that the placement of the definitions of "pollutants and/or contaminants" after the provision discussing "Debris Removal" further illustrates that the exclusion was intended to be applied only in the environmental context.[65] APX's contentions are without merit. Unlike some policies, the Policy does not contain a "Definitions" section that collects all of the defined terms contained in the Policy in one section. Instead, the Policy defines terms in the section in which they are first used. Consistent with this policy structure, the terms "Pollutant(s) and/or Contaminant(s) and/or Hazardous Material(s)" and "Pollution and/or Contamination" are defined where they first appear in the Policy- in the Policy's "Debris Removal" section.[66] It is therefore unreasonable to conclude that where these terms appear in the Policy has any bearing on their meaning or interpretation.

---

63 A486–A487.
64 *State Farm Fire & Cas. Co. v. Hackendorn,* 605 A.2d 3,7 (Del. Super. 1991).
65 APX's Opening Brief at pg. 18.
66 A69.

The terms have the same meaning regardless of where they appear, as explicitly stated in the Policy:

> **The following term(s) *whenever used* in this Policy mean:**
>
> **Pollutant(s) and/or Contaminant(s) and/or Hazardous Material(s)**
>
> The term pollutant(s), contaminant(s), hazardous material(s) shall mean any solid, liquid, gaseous or thermal irritant or contaminant, including, but not limited to, smoke, vapor, soot, fumes, acids, alkalis, chemicals, bacteria, virus, vaccines and waste. Waste includes materials to be recycled, reconditioned or reclaimed.[67]
>
> **Pollution and/or Contamination**
>
> The terms pollution and/or contamination shall mean the presence of any material which after its release or discharge can cause or threaten damage to human health and/or human welfare, or causes or threatens damage, deterioration, loss of value, marketability and/or loss of use to insured property, including, but not limited to, 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/or Toxic Substances Control Act, or as designated by the US Environmental Protection Agency or, local equivalent environmental agency.[68]

* * *

The placement of these definitions has no impact on their clear and unambiguous meaning. Insurance policies "are construed as a whole, to give effect to the parties' intentions."[69] In other words, the Court is to interpret the insurance policy through a

---

[67] A69.

[68] A69.

[69] *Arch Ins. Co. v. Murdock*, 2016 WL 7414218, at *4–5 (Del. Super. Dec. 21, 2016).

reading of all of the relevant provisions of the contract as a whole, "and not . . . any single passage in isolation."[70] The Court is also to interpret an insurance policy in a manner that does not render any provisions "illusory or meaningless."[71] APX's flawed interpretation of the Policy would render both the prefatory language ("wherever used") *and* the Contamination Exclusion meaningless.

APX also suggests that had HDI intended to exclude all viruses, including SARS-CoV-2, HDI could have used what APX refers to as the "standard-form virus exclusion," otherwise known as the Insurance Services Office ("ISO") virus exclusion.[72] Courts have rejected this very argument and it should be similarly rejected here.[73] An unambiguous exclusion, like the Contaminant Exclusion, is not nullified simply because other policies contain different language.

---

[70] *Id.* at *4.

[71] *Id.*

[72] APX's Opening Brief at pg. 19.

[73] *See Kim-Chee LLC v. Phila. Indem. Ins. Co.*, 2021 WL 1600831, at *8 (W.D.N.Y. Apr. 23, 2021) ("absence of the ISO virus exclusion is not relevant to the processing of APXs' claim"); *Zwillo V, Corp. v. Lexington Ins. Co.*, 504 F. Supp. 3d 1034, 1041 (W.D. Mo. 2020) (denying coverage under same P&C endorsement even though policy lacked the "virus-specific exclusion" that "industry has developed"); *Promotional Headwear Int'l v. Cincinnati Ins. Co*., 504 F.Supp.3d 1191, 1206 n.61 ("The fact that Defendant chose not to include [ISO's] virus exclusion in the Policy does not render it ambiguous."); *St. Julian Wine Co. v. Cincinnati Ins. Co*., 2021 WL 1049875, at *4 (W.D. Mich. Mar. 19, 2021) ("St. Julian asserts that the lack of such [virus] exclusion is relevant for interpreting the Policy as a whole, but the Court looks at the Policy to interpret the Policy. A non-existent provision does not alter the unambiguous language of the Policy.").

The supposed "standard virus exclusion" referenced in *AFM Mattress Co., LLC v. Motorists Commercial Mutual Insurance Co.* included exclusionary language that barred coverage for loss or damage caused by or resulting from "any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease."[74] Similarly, the Policy's Contamination Exclusion excludes "the presence of any material" that "can cause or threaten damage to human health and/or human welfare, or causes or threatens damage, deterioration, loss of value, marketability and/or loss of use to insured property, including, but not limited to, bacteria, virus[.]"[75] Courts have enforced the application of the Policy's specific Contamination Exclusion even absent a "standard virus exclusion."[76] There are no

---

[74] 2021 WL 1725790 (E.D. Ill. Apr. 15, 2021).

[75] A69.

[76] *Levy v. Hartford*, 520 F.Supp.3d 1158, 1167 (E.D. Mo. Feb. 16, 2021) (rejecting APXs' argument that the carrier's "decision to draft its own virus exclusion rather than the 'virus exclusion language drafted by the [ISO]" resulted in an exclusion which was unclear); *Zwillo V, Corp. v. Lexington Ins. Co.*, 504 F. Supp. 3d 1034, 1041 (W.D. Mo. 2020) (dismissing the insured's complaint seeking coverage for losses allegedly sustained as a result of the COVID-19 virus because the policy had a pollutants exclusion and defined "pollutants" to include viruses); *see also Circus LV LP v. AIG Specialty Ins. Co.*, 525 F. Supp. 3d 1269, 1278 (D. Nev. 2021) (D. Nev. Feb. 26, 2021) (concluding that COVID-19 is SARS-CoV-2, a virus, that fell within the policy's "pollutants" definition and thus the exclusion because "the virus has been released, dispersed, and discharged into the atmosphere, resulting in infections and transmissions"); *Manhattan Partners v. American Guar. & Liab. Ins. Co.*, 2021 WL 1016113 at n.3 (D.N.J. Mar. 17, 2021) (holding that a similar exclusion "clearly and explicitly excludes coverage for damage, loss or expense arising from a virus"). *see also Dakota Girls, LLC v. Phila. Indem. Ins. Co.*, 17 F.4th 645, 653 (6th Cir. 2021) (inclusion of virus exclusion in some policies at issue but not others was irrelevant "[b]ecause [APX]

"magic" words or forms needed to trigger the applicability of an exclusion for a virus; both the "standard form virus exclusion" and Contamination Exclusion bar coverage for viruses, including SARS-CoV-2. Contrary to APX's assertions, the Policy did not specifically need to include the "standard form virus exclusion" because the Policy already unambiguously excluded coverage for viruses.

never established its initial entitlement to coverage"); *E.g.*, *Rye Ridge Corp. v. Cincinnati Ins. Co.*, 535 F.Supp.3d 250, 256 (S.D.N.Y. Apr. 23, 2021) ("APXs' argument that there is no virus exclusion in the Policies is irrelevant because the Complaint does not meet its initial burden of pleading that the Policies apply.").

2. APX's Flawed Interpretation of the Policy Violates the Principles and Canons of Contract Construction.

Next, APX attempts to create an ambiguity by suggesting the Superior Court's interpretation of the Policy's Contamination Exclusion to encompass viruses such as SARS-CoV-2 would "swallow up coverage otherwise reasonably expected by a policyholder."[77] APX contends that virtually anything could "threaten damage to human health," including flood water, hail, falling meteor debris/falling objects from an aircraft, bullets "discharged" from a gun, or even the "release" of a toy drone that "errantly crashes through a window" causing property damage.[78]

Like every argument raised by APX, this one again ignores pertinent Policy language in a desperate attempt to convince this Court that the Superior Court's interpretation would somehow render the entire Policy illusory. An insurance policy provision is only illusory where it results in a complete lack of any coverage.[79] As an initial matter, physical property damage due to flood water, hail, or otherwise covered perils are separately defined and covered under the Policy subject to the applicable limitations and conditions.[80]

---

77 APX's Opening Brief at pg. 20.

78 APX's Opening Brief at pgs. 21–22.

79 *See e.g., PNC Fin. Servs. Grp., Inc. v. Houston Cas. Co.*, 647 F.App'x 112, 119 (3d Cir. 2016) (finding coverage under a policy "not to be illusory because the policy would still provide coverage for [claims] that do not fall within any of the exceptions").

80 *See* A73; A57; A58.

The Contamination Exclusion applies to **"irritants"** and **"contaminants"** that can cause or threaten damage to human health or human welfare, which expressly encompasses **"virus."**[81] Thus, in reading the Policy as a whole, the Superior Court found that the Policy intentionally included "virus" as an excluded contaminant, as it is undisputed that a virus like SARS-CoV-2 can cause or threaten damage to human health or human welfare. While the Contamination Exclusion's application is not limited only to traditional environmental pollution, that does not mean the exclusion is limitless in its application. APX's isolated and piecemeal reading of the Policy's Contamination Exclusion violates well-established principles of contractual interpretation.[82]

APX mistakenly relies on *Alstrin v. St. Paul Mercury Insurance Co.*, where the Court held the deliberate fraud exclusion in a directors and officers insurance policy would eviscerate the policy's coverage grant for securities claims.[83] In *Alstrin*, the Court held that the exclusion would not be given effect because it would effectively eliminate the coverage that had been granted for securities fraud claims:

> If the deliberate fraud exclusion applied to securities claims, there would be little or nothing left to that coverage. Particularly, in a D & O insurance policy, where securities fraud claims are among the most common claims filed against directors and officers, the effect of such

---

81 A69; A82.

82 *Arch Ins. Co. v. Murdock*, 2016 WL 7414218, at *4–5 (Del. Super. Dec. 21, 2016).

83 179 F. Supp. 2d 376, 398 (D. Del. 2002).

an exclusion would be particularly devastating.[84]

The rationale applied to the distinct directors and officers insurance policy in *Alstrin* simply has no bearing on the first party property Policy at issue here.

Moreover, APX's argument that the Contamination Exclusion goes against its "reasonable expectations" concerning coverage is similarly unpersuasive.[85] In Delaware, the doctrine of reasonable expectations is applicable to a "policy of insurance only if the terms thereof are ambiguous or conflicting[.]"[86] APX's expectations cannot replace the clear, unambiguous terms of the policy.[87]

Here, the Policy's Contamination Exclusion is clear and unambiguous, and its application to APX's economic losses due to the SARS-CoV-2 virus falls clearly within its parameters. Unless there is an ambiguity, a court will not destroy or twist policy language under the guise of construing it.[88] As no ambiguity exists, the reasonable expectation doctrine does not apply.[89]

---

84 *Id.* at 398.

85 *See Body Physics v. Nationwide Ins.*, 524 F.Supp.3d 372, 381 (D.N.J. Mar. 10, 2021).

86 *Hallowell v. State Farm Mut. Auto. Ins. Co.*, 443 A.2d 925, 928 (Del. 1982).

87 *See, e.g., Downs Ford, Inc. v. Zurich Am. Ins. Co.*, 2021 WL 1138141, at *8 (D.N.J. Mar. 25, 2021) ("[T]he language of the Virus Exclusion is clear, and should not be overridden by [APX's] claimed reasonable expectation or public policy").

88 *Monzo*, 249 A.3d. at 118, 2021 WL 926535, at *7 (citations omitted).

89 *Hallowell*, 443 A.2d at 928.

Moreover, APX contends that the Superior Court's interpretation of the Contamination Exclusion would render certain portions of the Policy "superfluous," including the Policy's exclusion for radioactive contamination and exclusion for smog, smoke, vapor, liquid or dust. As an initial matter, Plaintiff failed to present this specific argument to the Superior Court, and thus waived the right to raise this argument on appeal.[90] Under Supreme Court Rule 8, a party may not raise new arguments on appeal.[91] The Supreme Court of Delaware "adhere[s] to the well settled rule which precludes a party from attacking a judgment on a theory'" [it] failed to advance before the trial judge."[92]

Even if this Court were to consider Plaintiff's new argument, Plaintiff's position is a misguided attempt to stretch the Superior Court's proper interpretation. The Superior Court clearly held that "the Policy's express language unambiguously excludes coverages for **viruses** that cause or threaten damage to human health."[93] Thus, APX's assertion that the Superior Court's interpretation would simply make *any* "material" a "contaminant" is misleading and, again, ignores the plain language of the Policy.

---

[90] SUPR. CT. R. 8; *see Scion Breckinridge Managing Member, LLC v. ASB Allegiance Real Estate Fund*, 68 A.3d 665, 678 (Del. 2013).
[91] *Id.*
[92] *Scion Breckinridge*, 68 A.3d at 678.
[93] A485.

Even if there were some overlap in coverage or exclusions under the Policy, a construction that produces "some redundancy is acceptable" if the construction gives effect to the contract language.[94] In *Farm Family Casualty Company v. Cumberland Insurance Company, Inc.*, this Court held that "redundant" exclusions "can be read in harmony," as there "are certainly situations where both of the exclusions will apply, but there are also scenarios . . . where one exclusion will apply but not the other."[95] Here, just because radioactive contamination, smoke, vapor, liquid, or dust could possibly be excluded under two separate exclusions under the Policy, that does not render the exclusions "superfluous." The fact that certain "materials" are excluded under separate Policy provisions only evidences that "the parties accepted some redundancy to guarantee their contractual expectations would be fulfilled."[96]

---

[94] *In re IAC/InterActive Corp.*, 948 A.2d 471, 498 (Del. Ch. 2008) (internal quotation marks omitted).

[95] 2013 WL 5496780 (Del.Super. Oct. 2, 2013).

[96] *Sycamore Partners Mgmt., L.P. v. Endurance Am. Ins. Co.*, 2021 WL 4130631, at*10 (Del.Super. Sept. 10, 2021) (citing *iBio, Inc. v. Fraunhofer USA, Inc.*, 2016 WL 4059257, at *11 (Del. Ch. July 29, 2016) (finding a "somewhat redundant" provision not meaningless "to the extent" it gave the parties "additional comfort")).

3. The Superior Court Properly Held That APX's Interpretation of the Policy's Contamination Exclusion Is Unreasonable.

While APX acknowledges that SARS-CoV-2 is a virus, APX disputes the Superior Court's holding that the Policy's Contamination Exclusion is not confined to traditional environmental pollution. As explained in ***Supra 1.C.1***, APX ignores the language of the exclusion itself, which expressly excludes "contamination" by a "virus." The Superior Court correctly held that the Policy's Contamination Exclusion was not confined to traditional environmental pollution because "no such limitation appears in the Policy."[97] To limit the application of the Contamination Exclusion to traditional environmental claims, as APX argues, this Court would have to ignore "virus" as a defined "contaminant" and essentially create limitations that simply do not exist in the plain language of the Policy.

To support its unreasonable position, APX cites to *JGB Vegas Retail Lessee, LLC v. Starr Surplus Lines Insurance Co*.[98] *JGB Vegas* was decided under Nevada Rule of Civil Procedure 12(b)(5), which articulates a lenient pleading standard that is not followed by the majority of courts, and it has been distinguished on this basis.[99]

---

97 A486.

98 2020 WL 7190023 (Nev. Dist. Ct. Nov. 30, 2020).

99 *See Oz Fresh & Healthy Food LLC v. Underwriters at Lloyds's London*, 521 F.Supp.3d 1232, 1242 n.2 (S.D. Fl. Feb. 22, 2021) (finding *JGB Vegas* unpersuasive because the decision does not "construe the policies in accordance with Florida law").

Other courts have criticized the substance of the decision and declined to follow it.[100] APX also cites *Urogynecology Specialist of Florida LLC v. Sentinel Insurance Co. Ltd.*, a case which construed a virus exclusion that bears no resemblance to the contamination exclusion here.[101] In that case, the court declined to rule on the exclusion because the form was not even provided to the court, and other courts have consistently declined to follow the decision.[102] Several courts have also declined to follow the *Urogynecology Specialist* reasoning, in finding that virus exclusions, including those that list virus alongside bacteria, fungus and rot, apply to bar

---

[100] *See Circus LV, LP v. AIG Specialty Ins. Co.*, 525 F. Supp. 3d 1269, 1277-78 (D. Nev. 2021) (concluding that COVID-19 is SARS-CoV-2, a virus, that fell within the policy's "pollutants" definition and thus the exclusion because "the virus has been released, dispersed, and discharged into the atmosphere, resulting in infections and transmissions").

[101] 489 F. Supp. 3d 1297, 1302 (M.D. Fla. 2020).

[102] *Kahn v. Pa. Nat'l Mut. Cas. Ins. Co.*, 517 F. Supp. 3d 315, 328 (M.D. Pa. Feb. 8, 2021) (court found *Urogynecology Specialist* unpersuasive); *Raymond H. Nahmad D.D.S. P.A. v. Hartford Cas. Ins. Co.*, 499 F. Supp. 3d 1178, 1190 n.4 (S.D. Fla. 2020) (in *Urogynecology Specialist* the court refused "to make a decision on the merits of the plain language of the Policy to determine if APX's losses were covered" because, in part, the parties failed to provide the court with the relevant coverage forms that corresponded to the exclusions); *Edison Kennedy, LLC v. Scottsdale Ins. Co.*, 510 F.Supp.3d 1116, 1126 n.12 (M.D. Fla. Jan. 4, 2021) (in *Urogynecology Specialist* the court was not presented with all of the relevant documents necessary to interpret the language of the complete policy); *Mena Catering, Inc. v. Scottsdale Ins. Co.*, 512 F.Supp.3d 1309, 1323 n.4 (S.D. Fla. Jan. 11, 2021) (the court in *Urogynecology Specialist* denied a motion to dismiss and rejected defendant's argument that a differently worded virus exclusion barred coverage because, in part, the parties failed to provide the court with relevant coverage forms that corresponded to the exclusions).

coverage for COVID-19 claims under first party property insurance policies.[103] This Court should, like the vast majority of other courts, decline to follow *JGB Vegas* and *Urogynecology*, both outlier cases that faultily read the exclusion narrowly by ignoring the plain meaning of the term "virus."

Courts that have considered the type of Contamination Exclusion at issue have declined to find coverage for economic losses resulting from COVID-19. In *Zwillo V, Corp. v. Lexington Insurance Co.*, for example, the court held that very similar exclusionary language which defined "Contaminants or Pollutants" as "any solid, liquid, gaseous or thermal, irritant or contaminant…which after release can cause damage to human health, human welfare, or cause or threaten damage, loss of value,

---

[103] *See Robert E. Levy, D.M.D., LLC v. Hartford Fin. Servs. Grp. Inc., Levy v. Hartford*, 520 F.Supp.3d 1158, 1167 (E.D. Mo. Feb. 16, 2021) (rejecting argument that grouping of "virus" with non-disease-causing agents such as "dry rot" and "wet rot" in similar exclusion established that the excluded virus had to be at the insured premises to apply, and noting that "courts . . . have found the policy language unambiguous and reject *Urogynecology's* conclusion"); *Cosmetic Laser, Inc. v. Twin City Fire Ins. Co.*, 554 F.Supp.3d 389, 401 (D. Conn. Aug. 11, 2021) (Virus Exclusion barring coverage "for loss or damage caused" by "'fungi', wet rot, dry rot, bacteria or virus" unambiguous and applied to bar coverage for COVID-19 business interruption claim, "join[ing] the vast majority of courts to consider this issue and conclude that COVID-19 is a 'virus' within the meaning of the Policy" and noting that "Urogynecology . . . has been repeatedly rejected by courts interpreting the same virus exclusion."); *Fleming.Ruvoldt PLLC v. Sentinel Ins. Co., Ltd.*, 2022 WL 401883, at *5 (N.J. Super. Ct. Law Div. Feb. 1. 2022)("Fungi", Wet Rot, Dry Rot, Bacteria and Virus exclusion barred any coverage for APX's COVID-19 property policy claim, rejecting APX's citation of *Urogynecology* in arguing that the exclusion was ambiguous).

or loss of use to property," including "virus" "expressly excludes damage or loss of value and even loss of use of property caused by a virus."[104]

Moreover, in *Northwell Health, Inc. v. Lexington Insurance Co.*, the court held that the contamination exclusion that defined "contaminants or pollutants" to include "any 'bacteria, virus, or hazardous substances" "unambiguously excludes coverage" for COVID-related business losses.[105] In *Circus LV, LP v. AIG Specialty Ins. Co.*, the court considered an identical contamination exclusion and dismissed the insured's claim for COVID-related losses because "SARS-CoV-2 virus and resulting COVID-19 pandemic falls squarely within the policy's pollutants-or-contaminants exclusion."[106] Contrary to APX's assertion that the *Circus* policy "does not tie 'virus' to environmental laws or agencies," the policy did in fact define "pollutants" and "contaminants" to include bacteria, virus, or hazardous substances listed in applicable environmental state, federal or foreign law or regulation, or as designated by the U.S. Environmental Protection Agency or similar applicable state or foreign governmental authority[.]"[107]

In *Ford of Slidell, LLC v. Starr Surplus Lines Insurance Co.*, the court also considered the same contamination exclusion at issue and held that "COVID-19 falls

---

[104] *Zwillo V, Corp. v. Lexington Ins. Co.*, 504 F. Supp. 3d 1034, 1041 (W.D. Mo. 2020), *appeal dismissed*, 2021 WL 2792962 (8th Cir. Mar. 18, 2021)
[105] 550 F. Supp. 3d. 3d 108, 121.
[106] 525 F. Supp. 3d 1269 (D. Nev. 2021).
[107] *Id.* at 1281 n.54.

directly into the definition of contaminant and is therefore excluded from coverage. Contaminant is defined under the Policy to include a "virus."[108] Importantly, appellate courts have uniformly rejected the position that economic losses due to SARS-CoV-2 are a covered loss under first-party property policies.[109]

---

[108] 2021 WL 5415846, at *10 (E.D. La. Nov. 19, 2021).

[109] *See 10012 Holdings Inc. v. Sentinel Ins. Co. Ltd.*, 21 F.4th 216 (2d Cir. Dec. 27, 2021); *Kim-Chee LLC v. Philadelphia Indemnity Ins. Co*., 2022 WL 258569 (2d Cir. Jan. 28, 2022); *SA Hospitality Group, LLC v. Hartford Fire Insurance Co*., 2022 WL 815683 (2d Cir. Mar. 18, 2022); *Uncork and Create v. Cincinnati Insurance Co*., 27 F.4th 926 (4th Cir. 2022); *Q Clothier New Orleans LLC et. al v. Twin City Fire Insurance Co*., 29 F.4th 252 (5th Cir. 2022); *Terry Black's Barbecue, LLC v. State Auto Mut. Ins. Co*., 22 F.4th 450 (5th Cir. 2022); *Aggie Investments, LLC v. Continental Cas. Co.*, 2022 WL 257439 (5th Cir. Jan. 6, 2022); *System Optics, Inc. v. Twin City Fire Insurance Co*., 2022 WL 616968 (6th Cir. Mar. 2, 2022); *Bridal Expressions LLC v. Owners Ins. Co.*, 2021 WL 5575753 (6th Cir. Nov. 30, 2021); *The Brown Jug, Inc. v. Cincinnati Insurance Co.*, 27 F.4th 398 (6th Cir. 2022); *Estes v. Cincinnati Ins. Co*., 23 F.4th 695 (6th Cir. 2022); *Dakota Girls, LLC v. Philadelphia Indemnity Ins. Co.*, 17 F.4th 645 (6th Cir. 2021); *Santo's Italian Cafe LLC v. Acuity Ins. Co*., 15 F.4th 398 (6th Cir. 2021); *Sandy Point Dental, P.C. v. Cin. Insurance Co.*, 20 F.4th 327 (7th Cir. 2021); *Bradley Hotel Corp. v. Aspen Specialty Ins. Co*., 20 F.4th 327 (7th Cir. 2021); *Oral Surgeons, P.C. v. Cincinnati Ins. Co.*, 2 F.4th 1141 (8th Cir. 2021); *Baker v. Oregon Mutual Insurance Co.*, 2022 WL 807592 (9th Cir. Mar 16, 2022); *Levy Ad Grp., Inc. v. Fed. Ins. Co*., 2022 WL 816927 (9th Cir. Mar. 17, 2022); *Selane Prods. v. Cont'l Cas. Co.*, 2021 WL 4496471 (9th Cir. Oct. 1, 2021); *Gilreath Family & Cosmetic Dentistry, Inc. v. Cincinnati Insurance Co*., 2021 WL 3870697 (11th Cir. Aug. 31, 2021); *Ascent Hospitality Management Co. LLC v. Employers Ins. Co. of Wausau*, 2022 WL 130722 (11th Cir. Jan. 14, 2022); *Mudpie, Inc. v. Travelers Cas. Ins. Co*., 487 F.Supp.3d 834 (9th Cir. 2021); *Mashallah, Inc. v. W. Bend Mut. Ins. Co*., 20 F.4th 311 (7th Cir. 2021); *Crescent Plaza Hotel Owner, L.P. v. Zurich Am. Ins. Co.*, 20 F.4th 303(7th Cir. 2021); *Goodwill Indus. of Cent. Okla., Inc. v. Phila. Indem. Ins. Co.*, 21 F.4th 704 (10th Cir. 2021); *Inns-by-the-Sea v. Cal. Mut. Ins. Co.*, 286 Cal. Rptr. 3d 576 (Ct. App. 2021); *Sanzo Enters., LLC v. Erie Ins. Exch.*, 182 N.E.3d 393 (Ohio Ct. App.

APX would have this Court shut its eyes to the very substantial body of case law that has developed in the context of the COVID-19 pandemic—and which overwhelmingly supports Appellee's arguments in this case. "Virus" is expressly excluded under the Contamination Exclusion, and thus not "loss or damage of the type insured." APX's entire claim is premised on the alleged presence of SARS-CoV-2, a virus—which is expressly excluded. Because the Policy unambiguously excludes from coverage any losses caused by a "virus", there is no coverage for APX's economic loss as a result of SARS-CoV-2.

2021); *Nail Nook, Inc. v. Hiscox Ins. Co.*, 2021-Ohio-4211 (Ct. App.); *Ind. Repertory Theatre v. Cincinnati Cas. Co.*, 180 N.E.3d 403, 404 (Ind. Ct. App. 2022); *Gavrilides Mgmt. Co., LLC v. Mich. Ins. Co.*, 2022 WL 301555 (Ct. App. Feb. 1, 2022); *Sweet Berry Café, Inc. v. Soc'y Ins., Inc.*, 2022 WL 780847 (Ill. App. Ct. 2022); *Lee v. State Farm Fire & Cas. Co.*, 2022 WL 829651 (Ill. App. Ct., 1st Dist. Mar. 21, 2022).

CONCLUSION

For the foregoing reasons, Appellee HDI Global Insurance Company requests that this Court affirm the decision of the Superior Court.

WHITE AND WILLIAMS LLP

By: */s/ John D. Balaguer*

John D. Balaguer (ID No. 2537)
Courthouse Square
600 N. King Street, Suite 800
Wilmington, DE 19801
Phone: 302.467.4501

and

Kristin C. Cummings (*pro hac vice)*
ZELLE LLP
901 Main Street
Suite 4000
Dallas, TX 75202
Phone: 214.749.4218

and

Kristin A. Heres (*pro hac vice)*
ZELLE LLP
161 Worcester Road, Suite 502
Framingham, MA 02451
Phone: 781.466.0732

Counsel for Appellee HDI Global Insurance Company