Vermont Superior Court
Filed 05/29/26
Franklin Unit

VERMONT SUPERIOR COURT
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CIVIL DIVISION
No. 230-9-20 Frcv

Huntington Ingalls Industries et al v. Ace American Insurance Company et al.

ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT
(Motions: 94; 95; 97; 98)

This matter is before the Court on cross motions for summary judgment arising from a dispute over the interpretation of a first-party property insurance agreement and related reinsurance agreements. The central dispute is whether COVID-19 caused direct physical loss or damage to property insured under the agreement.

Plaintiffs Huntington Ingalls Industries ("HII") and Huntington Ingalls Industries Risk Management LLC ("HIIRM") move for summary judgment on two theories: (1) COVID-19 caused direct physical loss of insured property, and (2) the seepage, pollution, and contamination exclusion does not apply to COVID-19. Defendants Ace American Insurance Company and approximately 30 other reinsurers ("Reinsurers") move for summary judgment on the grounds that COVID-19 did not cause direct physical loss or damage to insured property and is excluded under the seepage, pollution, and contamination exclusion of the policy. Additionally, Defendant Lex-London moves separately for summary judgment under the microorganism exclusion in its reinsurance policy.

The Court heard arguments from the parties, through counsel, on March 10, 2026.

Upon consideration of the briefings and arguments, the Court grants Defendants' motions for summary judgment. The Court also grants summary judgment to Defendants Lex-London, Ace American Insurance Company ("ACE"), and Zurich American Insurance Company ("Zurich") on independent bases as described below. The Court denies Plaintiffs' first motion as it relates to direct physical loss of insured property. The Court grants Plaintiffs' second motion for summary judgment related to the seepage, pollution, and contamination exclusion, but this does not affect the outcome of the case.

I. LEGAL STANDARD

Summary judgment is proper "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." V.R.C.P. 56(a); *Gallipo v. City of Rutland*, 163 Vt. 83, 86 (1994).

A motion for summary judgment must be accompanied by a statement listing the undisputed material facts that support the motion. The non-moving party then may dispute those facts and additionally "file a separate and concise statement of additional material facts."

V.R.C.P. 56(c)(2). The moving party is then required to respond to the additional statement of facts to explain why they are not disputed or not material.

Parties must support all facts presented by admissible evidence, and the Court will disregard conclusory facts and conclusions of law. *H & E Equipment Services, Inc. v. Cassani Electric, Inc.*, 2017 VT 17, ¶ 20, 204 Vt. 559. In deciding a motion for summary judgment, the Court will give the non-moving party the benefit of all reasonable doubts and inferences. *Robertson v. Mylan Labs., Inc.*, 2004 VT 15, ¶ 15, 176 Vt. 356.

While some of the facts cited below are listed as disputed in the parties' filings, they are not truly disputed for purposes of this decision. In some instances, the dispute is based on relevance, and the Court denies any objection on that basis. In others, the dispute is hyper focused on a minute detail of the statement of fact and does not affect the real meaning of the statement. Last, some of the disputed facts were put forward by Plaintiffs, including in their requests to take judicial notice. Because the Court has decided these motions in favor of Defendants – except as it relates to the seepage, pollution, and contamination exclusion – the Court accepts certain facts as presented by Plaintiffs for purposes of its analysis.

II. UNDISPUTED MATERIAL FACTS

Huntington Ingalls Industries, Inc. operates major shipbuilding facilities in Newport News, Virginia, and Pascagoula, Mississippi. Huntington Ingalls Industries Risk Management LLC is its captive insurer. In March 2020, HIIRM issued the relevant property policy to HII. Plaintiffs' Statement of Undisputed Material Facts ("PSUMF"), ¶ 4. HIIRM then procured reinsurance of that obligation, and the Defendants in this case issued follow-form reinsurance contracts tied to that policy. PSUMF ¶ 5.

A. The Policy

The policy insured HII against "all risks of direct physical loss or damage to property described herein." PSUMF ¶ 9; Defendants' Statement of Undisputed Material Facts ("DSUMF"), ¶ 12. The policy insures "the interest of the insured in . . . all real and personal property while such property is located within the territorial limits of the Policy. . . which is owned, used, or acquired by the Insureds, and the property of others in the Insured's care, custody, or control . . ." PSUMF ¶ 10; DSUMF ¶ 12.

The policy contains a "PROPERTY EXCLUDED" provision that states the Policy does "not insure loss or damage to . . . Land . . . [and] Water . . . ." PSUMF ¶ 11. The policy does not have an explicit exclusion for air or airspace. PSUMF ¶ 11. However, the term "airspace" does not appear in the policy language, and the policy does not assign a separate valuation to airspace. DSUMF ¶¶ 26, 30. The policy also includes an exclusion for loss or damage caused by seepage, pollution, or contamination. The clause states the following:

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> This policy does not insure the following:
> …
> F. Loss or damage caused by Seepage and/or Pollution and/or Contamination except loss or damage to the property insured caused by
>
> 1. Seepage and/or Pollution and/or Contamination which itself results from a peril not excluded under this Policy; or
> 2. Any peril not excluded under this Policy which itself results from Seepage and/or Pollution and/or Contamination.

PSUMF ¶ 93.

HIIRM issued the policy, and Defendants agreed to reinsure the policy, after the World Health Organization declared COVID-19 a global pandemic. PSUMF ¶ 99. After the SARS outbreak in 2006, the Insurance Service Office prepared a standard exclusion for viruses. PSUMF ¶ 98. Further, on March 4, 2020, Lloyd's Market Association provided members, including reinsurers, with a general coronavirus exclusion. PSUMF ¶ 99.

The Policies also include language expanding coverage if physical loss or damage occurs to insured property. This includes loss "due to the necessary interruption of business conducted by the Insured, whether total or partial, including all interdependencies between or among companies owned or operated by the Insured caused by physical loss of damage insured herein[.]" DSUMF ¶ 13; PSUMF ¶ 12. Additionally, the Policies insure "[a]ny reasonable and necessary EXTRA EXPENSE incurred by the Insured in order to continue as nearly as practicable the normal operation of the Insured's business following physical loss or damage insured herein during the term of this Policy[.]" DSUMF ¶ 14. Extra expense is defined as "the excess (if any) of the total cost incurred during the Period of Recovery chargeable to the operation of the Insured's business, . . . over and above the cost that would normally have been incurred to conduct the business during the same period had no loss or damage occurred." PSUMF ¶ 13.

The policies also include two different preservation-of-property clauses, depending on the reinsurer. The first and more common provision is the following:

> This policy covers the costs incurred for actions to temporarily protect or preserve insured property, provided that such actions are reasonable and necessary due to actual or threatened insured physical loss or damage to such insured property. The insurer shall pay the expenses so incurred including resulting Time Element loss.

PSUMF ¶ 14; DSUMF ¶ 18. The second provision applies to a more limited number of reinsurers – it states the following:

> This policy covers the reasonable and necessary costs incurred for actions to temporarily protect or preserve insured property, provided that such actions are

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> necessary due to actual or to prevent impending insured physical loss or damage to such insured property.

PSUMF ¶ 15.

Lastly, the Policy includes an endorsement titled Reliance on Reinsurance Endorsement. The endorsement states:

> Notwithstanding Huntington Ingalls Industries Risk Management LLC's (hereinafter referred to as the "Insurer") ultimate liability as described under this Policy, shall be limited to the Insurer's liability ceded and accepted by such reinsurers per the reinsurance certificate. The claim or any portion for loss not accepted by said reinsurers in accordance with each reinsurers' agreement with this Insurer will be borne by the Insured.

DSUMF at Ex. 6, HIIRM Policy at 56.

B. Lex-London's Microorganism Exclusion

Lex-London added a "Reinsurance Endorsement" to its Reinsurance agreement, which modified the HIIRM Policy's provisions. First, the endorsement added a "Microorganism Exclusion" to the "Mold, Mildew, & Fungus Clause." The clause states the following:

> this Policy does not insure any loss . . . arising out of . . . mold, mildew, fungus, spores or other microorganism of any type, nature, or description, including but not limited to any substance whose presence poses an actual or potential threat to human health.

PSUMF in Opposition to Lex-London's Motion for Summary Judgment ("PSUMF LL"), ¶ 8. Lex-London also added another loss or damage exclusion, applying to "loss of market, loss of use, delay of use." PSUMF LL ¶ 22

C. Reinsurance Agreements

The reinsurance agreements between HIIRM and the reinsurers include the following clauses.

> **<u>3. Reinsurance Accepted</u>**
> The Reinsurer's liability shall attach simultaneously with that [HIIRM] and shall be subject in all respects to the same risks, terms, conditions, rates, interpretations, and waivers . . . .
> . . .
> **<u>6. Loss Adjustment</u>**
> The true intent of this agreement is that in every case to which this Agreement applies, the Reinsurer shall follow the settlements of [HIIRM]. All loss

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> settlements made by [HIIRM] within the terms, conditions and limits of this Agreement, shall be binding on the Reinsurer. However, the reinsurer is not obligated to indemnify the Company for ex-gratia payments.

Pl. Add. SUMF ¶ 33.

Additionally, all the Reinsurers, except ACE and Zurich, executed Claims Agreements as endorsements to their Reinsurance Agreements. Pl. Add. SUMF ¶ 34. The Claims Agreement stated the following:

> Reinsurers "assum[ed] all of the rights, obligations, and responsibilities" of HIIRM, "including without limitation, the obligation to adjust the Claim and pay all Loss covered in accordance with" the HIIRM Policy.

Pl. Add. SUMF ¶ 35.

D. COVID-19 Background

In late December 2019, a highly contagious virus, SARS-CoV-2, was discovered in Wuhan, China. PSUMF ¶ 17. It began to spread worldwide, and the World Health Organization declared the outbreak a global health emergency and later a pandemic. PSUMF ¶¶ 18, 20–21. The U.S. government provided guidance on COVID and specific industries. The US government issued a memo stating that workers in the critical infrastructure industry "have special responsibility" to maintain work schedules. PSUMF ¶ 32. The memo informed these industries to follow CDC guidelines. *Id.* In May of 2020, the CDC published guidelines for employers to prevent and reduce transmission. PSUMF ¶ 36.

E. HII Operations & Claim

HII operates its shipyard in a mix of enclosed, semi-enclosed, and open settings. DSUMF ¶ 4. Plaintiffs were designated critical infrastructure during the COVID-19 pandemic and were not subject to "stay at home" mandates. DSUMF ¶ 61. While these orders did not mandate HII to stay open, they strongly encouraged it to do so. DSUMF ¶ 62; Pl. Response to DSUMF ¶ 62. The record also reflects large numbers of employee infections at the Ingalls facility in Mississippi and the Newport News facility in Virginia. PSUMF ¶ 68.

Plaintiffs gave notice of loss on April 17, 2020, after learning of a positive employee test, and reinsurers other than ACE issued a reservation-of-rights letter on August 6, 2020, through their independent adjuster. PSUMF ¶¶ 24, 28. HII further submitted partial claim submissions to the reinsurers on December 23, 2020, February 4, 2021, and February 23, 2023, detailing expenses HII alleges it incurred due to COVID-19. PSUMF ¶ 29. The reinsurers sent a letter on July 25, 2023, denying coverage under the Policies. PSUMF ¶ 30.

The claim adjustment was conducted by the Reinsurers' independent adjuster. PSUMF ¶ 27. At this time, no settlement or any payments have been agreed to or paid by HIIRM to HII for the claimed loss in connection with the insurance claims. Def. Sec. Add. SUMF ¶ 5.

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F. COVID-19 Transmission and Mechanisms

COVID-19 is a physical entity. Pl. Add. SUMF ¶ 36. COVID-19 has three primary transmission methods: (1) inhalation of fine respiratory droplets and aerosolized viral particles, (2) deposition of droplets and viral particles onto exposed mucous membranes, and (3) touching mucous membranes with hands soiled with respiratory droplets or fomites. PSUMF ¶ 23. A fomite is a physical, inanimate object that is a source of transmission of disease – an object with a viable infectious agent on it. DSUMF ¶ 46. Once outside a human host, the virus decays over time, cannot replicate in air or on inanimate surfaces, and eventually dissipates from air and surfaces with the passage of time. DSUMF ¶ 38.

When COVID-19 particles settle onto a surface from the air, they adhere through a process called adsorption. Pl. Add. SUMF ¶¶ 39, 41. As such, when a viral particle of COVID-19 is present on the surface of a property, that surface becomes a fomite. DSUMF ¶¶ 47–49. COVID-19 has the same type of interactions with surfaces as other viruses. DSUMF ¶ 51.

COVID-19 can remain on a surface for up to 8 days, but the strength of adhesion and the duration of viral viability or infectivity depend on the surface type and temperature. Pl. Add. SUMF ¶¶ 40, 63, 67. The virus can be removed from surfaces using disinfectants, some of which can typically be found in the average commercial or residential environment. DSUMF ¶ 41; Pl. Resp. to DSUMF ¶ 41.

A person infected with COVID-19 will breathe out respiratory droplets or aerosolized particles containing the virus into the surrounding air. DSUMF ¶ 44. These droplets and particles can remain in the air for a few seconds to several hours. Pl. Add. SUMF ¶ 71.

G. COVID-19 at HII Property

Between March 22, 2020, and February 14, 2023, HII had 7,095 and 10,889 confirmed COVID-19 cases present at its two facilities, Ingalls and Newport News, respectively. PSUMF ¶ 68. Due to employees testing positive while on the HII property and the way COVID-19 is transmitted, COVID-19 was undisputedly present on and within both properties. Although Defendants initially disputed this in their filings, at oral argument they conceded that COVID-19 was necessarily present at HII's property during the policy period, based on the undisputed science of COVID-19 transmission.

When an employee tested positive at an HII facility, the employee was interviewed to identify locations where they worked and close contacts with other employees. PSUMF ¶ 54. The COVID-19 positive employee's area was temporarily shut down and HII employees cleaned it. PSUMF ¶ 56. Plaintiffs did not conduct direct testing for the presence of SARS-CoV-2 on specific surfaces or in particular airspaces, but instead inferred its presence from employee testing, tracing information, and surrounding circumstances. DSUMF ¶ 64.

HII implemented a broad set of measures at the shipyards, including enhanced cleaning and sanitation, such as fogging, ventilation and airflow measures, barriers and sanitation stations,

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staggered work schedules, and operational changes to allow time for cleaning, contact tracing, and area-specific decontamination after positive cases. PSUMF ¶¶ 41–65. No item of shipyard property was discarded, rebuilt, repaired, or replaced because of COVID-19. DSUMF ¶ 87. HII's physical property is in the same physical condition as it was before the pandemic. DSUMF ¶ 92. HII suspended production at Ingalls for five days from April 9 – 13, 2020, to sanitize the facility. PSUMF ¶ 46.

COVID-19 is still present in the community, including at HII's facilities. DSUMF ¶ 111.

III. CONCLUSIONS OF LAW

The dispute between the parties is controlled by the language of the Policy, the interpretation of that Policy, and the application of the facts of this case to that policy language. This case was previously appealed to the Vermont Supreme Court after the trial Court granted Defendants' motion to dismiss. The Vermont Supreme Court reversed that decision and provided a detailed interpretation of the policy language. *Huntington Ingalls Industries, Inc. v. Ace American Insurance Co.*, 2022 VT 45, 217 Vt. 195. Specifically, the Supreme Court laid out the meaning of the key phrase "direct physical damage or loss."

That decision is the law of this case, and this Court applies the Supreme Court's definitions and policy interpretation in this decision to determine whether the undisputed facts entitle either party to judgment as a matter of law.

The Vermont Supreme Court did not reach all of the issues raised by the parties in their cross motions. Several issues are addressed here for the first time: (1) the effect of ACE and Zurich not having executed the Claims Agreement endorsement, (2) the scope of the Lex-London microorganism exclusion, (3) the scope of the seepage, pollution, and contamination exclusion, (4) whether the protection and preservation of property clause provides independent coverage where the threatened loss or damage is not, in fact, insured, and (5) whether interior airspace qualifies as insured property under the Policy.

The Court reiterates the governing principles of insurance policy interpretation as stated by the Vermont Supreme Court in *Huntington Ingalls*, in reliance on prior Vermont cases interpreting insurance policies. A court interprets an insurance policy based on its language, which reflects the parties' intent. *Id*. at ¶ 19. Policy provisions must be read together and considered as a whole. *Id*. Courts interpret terms according to their plain and common meaning and enforce unambiguous terms as written. *Id*. Words or phrases are ambiguous if they can reasonably be interpreted in more than one way. *Id*. When ambiguity exists, the Court interprets the language broadly in favor of the insured and full coverage. *Id*. The insured bears the burden of proving coverage, and once coverage is established, the insurer must prove that any exceptions apply. *Id*.

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A. ACE & Zurich

The reinsurance agreements executed by ACE and Zurich differ from those executed by the other reinsurers in one critical way. ACE and Zurich did not execute Claims Agreements with HIIRM. The Claims Agreement language stated the following:

> Reinsurers "assum[ed] all of the rights, obligations, and responsibilities" of HIIRM, "including without limitation, the obligation to adjust the Claim and pay all Loss covered in accordance with" the HIIRM Policy.

Pl. Add. SUMF ¶ 35. The Reinsurers that executed Claims Agreements took on the obligation to adjust claims and determine whether an insured loss occurred.

ACE and Zurich did not assume that obligation. Their reinsurance agreements instead required them to "follow the settlements" of HIIRM with HII and to indemnify HIIRM accordingly. Pl. Add. SUMF ¶ 33. Under this agreement, HIIRM is required to adjust and settle HII's claim, and then ACE and Zurich have a contractual obligation to perform.

The record contains no facts establishing that (1) HIIRM adjusted the claim, (2) HIIRM agreed to a settlement with HII, or (3) HIIRM paid out any amount for the claim. Without an adjustment and settlement, Plaintiffs have no basis to sue ACE or Zurich, as neither has breached any contractual obligation. A case between ACE/Zurich and Plaintiffs would not be ripe until HIIRM adjusts the claim, settles with HII, notifies ACE and Zurich of the settlement amount, and ACE and Zurich refuse to indemnify. None of these events have occurred. As a result, these two entities are entitled to summary judgment on this independent basis.

B. Lex-London - Microorganism Exclusion

Lex-London had a separate microorganism exclusion that none of the other reinsurers included in their policies. The clause states the following:

> this Policy does not insure any loss . . . arising out of . . . mold, mildew, fungus, spores or other microorganism of any type, nature, or description, including but not limited to any substance whose presence poses an actual or potential threat to human health.

PSUMF LL ¶ 8.

When interpreting an insurance policy, language is interpreted according to its plain, ordinary meaning, and unambiguous language is enforced as written. *Huntington Ingalls,* 2022 VT 45, ¶ 19. A word or phrase is ambiguous only if it is fairly susceptible to more than one reasonable interpretation. *Id*. The fact that a dispute has arisen over interpretation does not, by itself, render the language ambiguous. *Id*. The interpretation of an insurance policy is a question of law. *Whitney v. Vt. Mut. Ins. Co.*, 2015 VT 140, ¶ 11, 201 Vt. 29.

As explained below, the microorganism exclusion unambiguously includes viruses.

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Courts frequently refer to dictionary definitions to determine the meanings of undefined terms. A microorganism is defined as "an organism (such as a bacterium or protozoan) of microscopic or ultramicroscopic size." *Microorganism*, Merriam-Webster Online Dictionary (accessed May 27, 2026). An organism is defined as "an individual constituted to carry on the activities of life by means of organs separate in function but mutually dependent**:** a living being." *Organism*, Merriam-Webster Online Dictionary (accessed May 27, 2026).

There is debate within the scientific community over whether a virus is an organism. Compare *Biological Material*, Black's Law Dictionary (12th ed. 2024) (stating "microorganisms — such as bacteria, fungi, algae, protozoa, and viruses") *with Virus*, Merriam-Webster Online Dictionary (accessed May 27, 2026) (stating viruses are "infectious agents that are usually regarded as nonliving extremely complex molecules"). However, the question before the Court is whether an average person applying for insurance would reasonably believe a virus was included in this clause, given its plain language – the answer is yes. *Shriner v. Amica Mut. Ins. Co.*, 2017 VT 23, ¶ 6, 204 Vt. 321.

The clause uses the word "any" to describe the breadth of what is covered under this clause, specifically, any type, any nature, or any description of microorganism. 'Any' in this context is used to mean all or every, and "its meaning is most comprehensive." *Fleck v. KDI Sylvan Pools, Inc.*, 981 F.2d 107, 115 (3d Cir. 1992); see *Shires Hous., Inc. v. Brown*, 2017 VT 60, ¶ 12, 205 Vt. 186. While there might be debate within the scientific community about whether a virus is an organism, the word 'any' removes any doubt that a virus is a microorganism for purposes of this exclusion.

The Court grants Lex-London summary judgment on this basis, in addition to the bases discussed in sections F and G because the microorganism exclusion would prohibit coverage for the losses alleged by Plaintiffs even if Plaintiffs could establish direct physical loss or damage.

C. Seepage Pollution Contamination

By contrast, the Seepage Pollution Contamination clause ("SPC Clause") does not exclude coverage for COVID-19. The SPC Clause states the following:

> This policy does not insure the following:
> …
> F. Loss or damage caused by Seepage and/or Pollution and/or Contamination except loss or damage to the property insured caused by
>
> 3. Seepage and/or Pollution and/or Contamination which itself results from a peril not excluded under this Policy; or
> 4. Any peril not excluded under this Policy which itself results from Seepage and/or Pollution and/or Contamination.

PSUMF ¶ 93.

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Consistent with the analysis set forth by the Supreme Court in this case, the Court first determines whether the clause is ambiguous. The clause is ambiguous if it is capable of being interpreted in two or more reasonable ways. *Huntington Ingalls*, 2022 VT 45, ¶ 19. In determining whether a clause is ambiguous, the Court does not look at it in isolation but considers the insurance contract as a whole and interprets the clause in context to give effect to every part of the contract. *Beldock v. VWSD, LLC*, 2023 VT 35, ¶ 27, 218 Vt. 144. If the terms are ambiguous, the court will generally interpret them in favor of the insured, granting coverage. *Huntington Ingalls*, 2022 VT 45, ¶ 19. Specifically, exclusions are generally interpreted narrowly if ambiguous. See *City of Burlington v. Ass'n of Gas & Elec. Ins. Servs., Ltd.*, 170 Vt. 358, 364 (1975).

The contract does not define seepage, pollution, or contamination. Because the parties left these terms undefined, they carry their ordinary meanings. *Brillman v. New Eng. Guar. Ins. Co.*, 2020 VT 16, ¶ 19, 211 Vt. 550. When determining whether undefined terms carry a plain meaning, courts frequently consult dictionary definitions. *Huntington Ingalls,* 2022 VT 45, ¶ 21.

Ordinary Meaning of Terms Read Together

Merriam-Webster defines "seep" as "to flow or pass slowly through fine pores or small openings." It defines "pollute" as "to make physically impure or unclean." And it defines "contaminate" as "to soil, stain, corrupt, or infect by contact or association." See *Seep*, Merriam-Webster Online Dictionary (accessed May 27, 2026); *Pollute*, Merriam-Webster Online Dictionary (accessed May 27, 2026); *Contaminate*, Merriam-Webster Online Dictionary (accessed May 27, 2026).

The policy does not use these terms independently. The clause groups them as a single phrase, "Seepage and/or Pollution and/or Contamination," and uses it consistently throughout the exclusion and its exceptions. The Court reads the words consistent with that grouping, as a unified concept that draws meaning from each component.

Read together, the three terms describe a coherent category of harm: the gradual introduction of a substance that degrades the physical quality of property. They are unambiguous. "Seepage" identifies the mechanism: slow permeation through a medium. "Pollution" identifies the effect on that medium, rendering it physically impure. "Contamination" identifies the resulting condition of the property – soiled, stained, or corrupted. Together, they describe environmental degradation: chemical spills seeping into groundwater, toxic waste polluting soil, and hazardous substances contaminating a building's structure. They do not describe a respiratory virus that travels through expelled human droplets, temporarily adheres to surfaces, cannot replicate outside a human host, and dissipates on its own or through cleaning.

The Court acknowledges that "contamination," viewed in isolation, could arguably include a virus, particularly through the word "infect" in its dictionary definition. *Contaminate*, Merriam-Webster Online Dictionary (accessed May 27, 2026). However, the clause never uses "contamination" in isolation. It always pairs contamination with seepage and pollution, and the surrounding terms limit its meaning. A virus does not "seep." A virus that rests on a surface for

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several days before dissipating does not "pollute" – it does not make the property itself physically impure or unclean. See infra at 16–18 (discussing COVID-19 physical effects on property). When these companion terms cannot plausibly describe a phenomenon, they constrain the reach of "contamination" so that the phrase operates as a unified whole.

Reading contamination broadly would also strip the exclusion of any limiting principle. As the Seventh Circuit observed in *Pipefitters Welfare Educational Fund v. Westchester Fire Insurance Co.*, 976 F.2d 1037, 1043 (7th Cir. 1992), terms like "contaminant," read broadly, "are virtually boundless, for there is virtually no substance or chemical in existence that would not irritate or damage some person or property." Without a limiting principle, the exclusion "would extend far beyond its intended scope, and lead to some absurd results." *Id.*; see *R.T. Vanderbilt Co., Inc. v. Hartford Accident and Indem. Co.*, 156 A.3d 539, 631–32 (Conn. App. 2017), *aff'd,* 216 A.3d 629 (Conn. 2019). The New York Appellate Division reached the same conclusion when it rejected an attempt to expand "contamination" beyond environmental contamination to include product contamination, reasoning that without a limiting principle, virtually anything could qualify as a contaminant. *PepsiCo, Inc. v. Winterthur Ins Am. Ins. Co.*, 13 A.D.3d 599, 600–01 (N.Y. App. Div. 2d Dept. 2004).

<u>Policy Structure Confirms Exclusions Limited Scope</u>

Reading the Policy as a whole supports this conclusion. A standard principle of contract interpretation requires the Court to read the policy as a whole and give each provision independent meaning. *Progressive N. Ins. Co. v. Muller*, 2020 VT 76, ¶ 11, 213 Vt. 145. The policy separately excludes loss or damage caused by radioactive contamination, asbestos, mold, mildew or fungus, and biological or chemical materials. If the SPC Clause already encompassed these hazards, as it would under an expansive reading of "contamination" or "pollution," these separate exclusions would serve no purpose. The drafters specifically identified these risks and addressed them through individual exclusions, which confirms that the SPC Clause targets a distinct and narrower category of harm. Reading the SPC Clause to reach COVID-19 would render these targeted exclusions surplusage. See *N. Sec. Ins. Co. v. Mitec Elecs., Ltd.*, 2008 VT 96, ¶ 24 (the Court strives to give effect to all material parts of a contract and avoids readings that would render portions "mere surplusage").

Additionally, a virus exclusion was available to the drafters, but was not included in this policy. While its absence does not, in itself, create coverage, see *Huntington Ingalls*, 2022 VT 45, ¶ 27 n.12, it reinforces the conclusion that the SPC Clause was not designed to address viral pathogens. The drafters knew how to exclude viruses as a special category and chose not to add that language.

<u>History and Vermont Cases</u>

Lastly, to the extent that this clause is ambiguous, the history of pollution exclusions and Vermont cases interpreting such exclusions support the Court's limited interpretation. Pollution exclusions originated in the late 1960s and 1970s when "changes in federal environmental protection laws and a series of high-profile environmental disasters imposed greater economic burdens on insurance underwriters." *Cincinnati Specialty Underwriters Ins. Co. v. Energy Wise*

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Homes, Inc., 2015 VT 52, ¶ 18, 199 Vt. 104. Insurers drafted model exclusions to address this specific category of risk. *Id.* While the clause at issue here differs from the model total pollution exclusion, it uses the same core terminology, seepage, contamination, and pollution, that grew out of the environmental-liability context.

As the Vermont Supreme Court emphasized in *Cincinnati*, each exclusion must be interpreted like any other contract provision, and no presumption runs either way. *Id.* at ¶¶ 15–16; see also *Whitney v. Vt. Mut. Ins. Co.*, 2015 VT 140, ¶ 15. However, the prior Vermont cases interpreting pollution exclusions, *Whitney* and *Cincinnati*, involved exclusions materially different from this one. Each defined "pollutants" and specified qualifying mechanisms such as "discharge, dispersal, seepage, migration, release or escape." *Cincinnati*, 2015 VT 52, ¶¶ 4–5; *Whitney*, 2015 VT 140, ¶ 17. In each case, the Vermont Supreme Court found the exclusion unambiguous as applied because the defined terms and qualifying language clearly encompassed the substances and mechanisms at issue – chlorpyrifos sprayed throughout a home (*Whitney*) and airborne chemicals from spray-foam insulation (*Cincinnati*). *Whitney*, 2015 VT 140, ¶¶ 17–19; *Cincinnati*, 2015 VT 52, ¶¶ 26–27.

This exclusion lacks that specificity. It defines none of its terms. It identifies no qualifying mechanism. It provides no list of substances. At the bare minimum, this absence of definition renders the clause ambiguous as applied to COVID-19, and the Court resolves that ambiguity in favor of coverage.

Given the analysis above, the Court holds that the SPC Clause does not exclude loss or damage caused by COVID-19.

D. Protection and Preservation of Property Clause

The "Protection and Preservation of Property" clause does not provide an independent means for triggering coverage because the threatened physical loss or damage must ultimately be an insured loss or damage for coverage to exist. The clause states the following:

> This policy covers the costs incurred for actions to temporarily protect or preserve insured property, provided that such actions are reasonable and necessary due to actual or threatened **insured** physical loss or damage to such insured property. The insurer shall pay the expenses so incurred including resulting Time Element loss.

See DSUMF ¶ 18, Ex. 6, HIIRM Policy at 25 (emphasis added).

The clause allows mitigation costs in two instances: (1) when action is taken to protect insured property from actual insured loss or damage, or (2) when action is taken to protect insured property from threatened insured loss or damage. The second instance is the one in question here: does this clause allow mitigation reimbursement even when the threatened insured physical loss or damage turns out not to be insured? The answer is no.

The operative word is "insured." The clause requires it to be a "threatened insured physical loss or damage." Protection and preservation clauses share similarities with the common law duties to mitigate and to reimburse. The common law duty to mitigate requires the insured to take reasonable steps to reduce its losses and obligates the insurer to cover costs that benefit the insurer. Courts have consistently held that clauses of this nature require the underlying loss to be covered by the policy. *See, e.g., Huntington Ingalls*, 2022 VT 45, ¶ 5 (describing mitigation clause requiring insured to "make every reasonable effort to reduce" business-interruption losses); see also 12A Couch on Insurance § 178:10–11 (3d ed. 2021 Update). If a court construed this clause to require reimbursement for threatened losses the policy does not cover, the insurer would bear costs for mitigating damages that benefit only the insured – not the insurer. Such a result would unjustly enrich the insured, who would both mitigate their own damages and shift the cost to an insurer with no corresponding coverage obligation.

To find coverage under this clause, or under the common-law duty of mitigation and reimbursement, the loss or damage must qualify as an actual insured loss or damage. The cases cited by Plaintiffs do not lead to a different conclusion. As discussed below, Plaintiffs fail as a matter of law to show that COVID-19 caused direct physical damage to property. Accordingly, the protection and preservation clause does not, in itself, provide coverage.

E. Airspace as Property under Insurance Agreement

The insurance agreement states that it insures "all real and personal property . . . which is owned, used, or acquired by the insured." PSUMF ¶ 11; DSUMF ¶ 12. Excluded property includes "land" and "water"; notably, 'air' is not listed. PSUMF ¶ 11. However, in the valuation section, 'air' is not listed while "buildings and structures" is. DSUMF ¶¶ 26, 30. The definition of what is insured is missing the word tangible and the Court understands it to include all tangible and intangible real and personal property.

Personal property is defined as "any movable or intangible thing that is subject to ownership and not classified as real property." *Property*, Black's Law Dictionary (12th ed. 2024); see also *Property*, Merriam-Webster Online Dictionary (accessed May 27, 2026), Ex. 19 to Mot. for Jud. Notice. Real property is defined as "land and anything growing on, attached to, or erected on it, excluding anything that may be severed without injury to the land." *Id*. Airspace is defined as "the space that extends upward from the surface of land, esp. so far as is necessary for the owner or possessor to have reasonable use and enjoyment of the incidents of its ownership or possession." *Airspace*, Black's Law Dictionary (12th ed. 2024). Ownership is defined as "the bundle of rights allowing one to use, manage, and enjoy property, including the right to convey it to others. Ownership implies the right to possess a thing, regardless of any actual or constructive control. Ownership rights are general, permanent, and heritable." *Ownership*, Black's Law Dictionary (12th ed. 2024).

These definitions, read together, reveal that airspace is not a tangible object but a spatial dimension of real property. This intangible interest derives its legal significance from the landowner's right to use and enjoy the physical structures and land below. The definition of airspace is functional: airspace exists as a property concept because it enables the owner to use the land and structures, not because the space itself has independent value. The Policy's valuation section is consistent with this understanding – it assigns value to "buildings and structures" but contains no valuation for airspace as a separate category of insured property.

Vermont property law confirms this characterization. The principle that "the law gives the owner of the land all above it, within its boundaries" reflects a right of dominion over the space, not ownership of the air that occupies it. *Murphy v. Bolger*, 60 Vt. 723, 15 A. 365, 368 (1888). When Vermont courts enforce property rights in airspace, they do so to protect the owner's use and enjoyment of the physical property. Intrusions into a landowner's airspace may give rise to claims in trespass or implicate constitutional privacy interests. Still, in each instance, the protected interest is the owner's ability to use the property as intended, not the condition of the air itself. See *State v. Bryant*, 2008 VT 39, ¶¶ 27–28, 183 Vt. 355 (expectation of freedom from airspace intrusions); *John Larkin, Inc. v. Marceau*, 2008 VT 61, ¶ 14, 184 Vt. 207 (airborne particles entering property may create trespass liability).

Property insurance jurisprudence reflects this same understanding. Courts that have addressed intangible contaminants, odors, gases, and fumes entering or permeating the airspace of insured property have consistently recognized the owner's interest in the condition of its airspace as a cognizable property concern. The Vermont Supreme Court cited a number of these cases in *Huntington Ingalls* as persuasive authority for its analysis of direct physical loss. 2022 VT 45, ¶¶ 29, 37. Those cases confirm that conditions within a property's airspace – gasoline vapors permeating a church, *W. Fire Ins. Co. v. First Presbyterian Church*, 437 P.2d 52, 55 (Colo. 1968); toxic gas filling a residence, *TRAVCO Ins. Co. v. Ward*, 715 F. Supp. 2d 699, 707–10 (E.D. Va. 2010); ammonia rendering a facility unfit for occupancy, *Gregory Packaging, Inc. v. Travelers Prop. Cas. Co.*, No. 2:12-04418, 2014 WL 6675934, at *3–6 (D.N.J. 2014); pervasive cat urine odor saturating a property, *Mellin v. N. Sec. Ins. Co.*, 115 A.3d 799, 801, 805 (N.H. 2015); methamphetamine odor permeating a house, *Farmers Ins. Co. v. Trutanich*, 858 P.2d 1332, 1336 (Or. Ct. App. 1993) – can give rise to insurable property losses.

Critically, however, in every one of these cases, the court anchored coverage in the contaminant's effect on the physical property, the building, structure, or facility, not in damage to the air or airspace itself. The gasoline vapors in *Western Fire* made the church building unusable. 437 P.2d at 55. The toxic gas in *TRAVCO* rendered the residence uninhabitable. 715 F. Supp. 2d at 709. The ammonia in *Gregory Packaging* left the facility "physically unfit for normal human occupancy." 2014 WL 6675934, at *3. The cat urine odor in *Mellin* caused a "distinct and demonstrable alteration of the insured property" – the building. 115 A.3d at 805. In each case, the airspace served as the *medium* through which the contaminant reached and affected the tangible property; the airspace was not itself the property that suffered the loss.

The Court therefore concludes that airspace qualifies as insured property under this Policy. It is an intangible incident of real property encompassed by the Policy's broad definition of covered property. But the nature of that interest is important: an owner's right in airspace is the right to use and enjoy physical property free from interference, not a right in the air itself as a separate, independently valued asset. This distinction carries significant consequences for whether the airspace can suffer "direct *physical* damage or loss" as the Policy requires, a question the Court addresses below.

F. Direct Physical Damage

Under Vermont law, "direct physical damage" requires a "distinct, demonstrable, physical change to property." *Huntington Ingalls*, 2022 VT 45, ¶ 26. Although the change need not be visible and may occur at the microscopic level, the insured must prove "an articulable change to the property" itself. *Id.* Read in context, the requirement that the loss or damage be "direct," "physical," and "to property" excludes purely economic harm and requires that "something must occur affecting personal or real property." *Id.* at ¶ 22. The policy's period-of-recovery language further indicates that the covered physical change is likely to require physical remediation, repair, rebuilding, or replacement, although this is not a distinct requirement. *Id.* at ¶ 27. However, if something can be remedied by mere cleaning, this is insufficient to qualify as direct physical damage. *Id.* at ¶ 43.

As a basic premise, the property itself must have been harmed or impaired itself. There are instances in which physical force may alter a property, but such changes may not necessarily cause physical damage.

The insured raises two distinct theories of damage to property: (1) damage to the airspace within buildings and (2) damage to surfaces of property where COVID-19 adsorbs. Each fails based on the undisputed material facts as each is remedied by mere cleaning and does not impair the property itself "in a tangible way."

<u>Airspace</u>

To prevail against summary judgment on this theory, HII must identify facts in its favor showing that COVID-19 caused an articulable, tangible change to the airspace itself, one that harmed the airspace as property. No such facts exist.

Both parties agree that when an infected person expels respiratory droplets into the air, the air becomes a vector for viral transmission to other humans. But a transmission vector is not damaged property. The air carries the virus; the virus does not injure the air. The sole detrimental change is the risk COVID-19 poses to people who breathe the air, not any harm to the airspace itself. Risk to human health, however grave, is not synonymous with damage to property. See *Huntington Ingalls*, 2022 VT 45, ¶ 22 (requiring that "something must occur affecting personal or real property" for coverage to attach).

Additionally, direct physical damage requires a tangible change to the property at issue. *Id.* at ¶ 26. As explained, airspace is by its nature intangible; it is a spatial dimension of real property, not a physical object. While the Court accepts that airspace is insured property under this Policy, its intangible character means that a "distinct, demonstrable, physical" alteration, the threshold for direct physical damage, cannot occur to it. A physical, tangible change requires something physical and tangible to change.

HII's theory rests on conflating the concepts of air and airspace. HII asserts that "airspace," as an intangible incident of real property, is insured property. But when arguing

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about the damage caused by COVID-19, HII shifts to "air." In contrast to airspace, "air" is a physical substance composed of gases and particulates. HII contends that COVID-19 physically altered the composition of the air and that an alteration of the physical composition of air is physical damage. The Policy does not insure the air itself; HII does not own the gases and particles that pass through its buildings. HII cannot refer to airspace as a property concept to invoke coverage and then switch to air to establish the physical damage to prove its entitlement to coverage.

In support of its theory, HII points to cases involving intangible contaminants, odors, gases, and fumes, and argues that COVID-19 in the airspace operates the same way. These cases do not support HII's theory. As the Court noted above, in every case finding coverage based on intangible contaminants, the court grounded its holding in the contaminant's effect on the *physical property*, the building, structure, or facility, not in damage to the air itself. See *W. Fire Ins. Co.*, 437 P.2d at 55; *TRAVCO Ins. Co.*, 715 F. Supp. 2d at 709; *Mellin*, 115 A.3d at 805; *Gregory Packaging*, 2014 WL 6675934, at *3–6. None of these courts held that the air or airspace was the property that suffered damage. Rather, the airspace served as the medium through which the contaminant reached and impaired the tangible structure.

The Supreme Court of Maryland examined this precise distinction in *Tapestry, Inc. v. Factory Mutual Insurance Co.*, 286 A.3d 1044, 1059–60 (Md. 2022). There, the insured argued that COVID-19 damaged the air in its stores in the same manner that ammonia damaged the air in *Gregory Packaging*. The court rejected that analogy, observing that although the *Gregory Packaging* court stated the ammonia "physically transformed the air," the actual basis for coverage was the insured's functional loss of use of the facility – not damage to the air itself. The *Tapestry* court found no reported decision treating damage to air itself, as distinct from loss or damage to property resulting from air contamination, as covered property damage. See also *Julio & Sons Co. v. Cont'l Cas. Co.*, 692 S.W.3d 877, 886–87 (Tex. App. 2024) (rejecting the argument that COVID-19 in restaurant air constituted physical loss or damage and disagreeing with cases treating air as insured property that can be physically damaged).

This Court agrees and finds the analysis consistent with the analytical framework for direct physical damage to property laid out by the Vermont Supreme Court. In *Huntington Ingalls*, the Court highlighted numerous cases involving **loss of use** of the real property. Notably, under the *Huntington Ingalls* framework, these cases would be under a theory of loss, not damage. Plaintiffs have not cited to a single case where a court has held that the air or airspace itself constitutes the damaged property under a similar property insurance policy. Where intangible contaminants triggered coverage, they did so because they rendered the **tangible, physical property** unusable – a theory that sounds in direct physical loss, not direct physical damage to airspace. The Court addresses that theory in section G below.

As to direct physical damage to the airspace, HII's claim fails as a matter of law because the undisputed facts establish no tangible, articulable change to the airspace itself, as airspace is an intangible concept.

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Surfaces

Plaintiffs have failed to present evidence that establishes that COVID-19 caused direct physical damage to insured property surfaces.

To survive summary judgment, Plaintiffs must show that COVID-19 (1) physically altered the structure of the property and (2) that this alteration damaged the property itself. Since this is a property insurance policy, the injury must be to the property, not to the humans who interact with it. If Plaintiffs cannot satisfy these elements, then Defendants are entitled to judgment as a matter of law as to direct physical damage.

At the motion to dismiss stage, the Vermont Supreme Court stated that the Plaintiffs' pleading of the following facts demonstrated a plausible claim for direct physical damage.

1. The virus adheres to the property's surface.
2. Surface transforms into a fomite.
3. The adherence caused detrimental physical effects to the property.
4. The physical effects altered and impaired the property in a tangible way.
5. The alteration prevents the property from functioning.
6. Steps had to be taken to repair the property beyond mere cleaning.

See *Huntington Ingalls*, 2022 VT 45, ¶ 41.

First, there is no evidence to support point 3 above. The undisputed facts do not demonstrate that the adherence of the virus to surfaces caused detrimental physical effects to HII's property. The parties agree that the virus adheres to surfaces through adsorption, as do all viruses. But adherence alone does not satisfy the requirement of physical change. Most substances adhere to surfaces to some degree; meaningful adherence occurs only when accompanied by an additional and detrimental physical alteration. The Vermont Supreme Court allowed Plaintiffs' claim to move forward based on their allegation that a surface transformed into a fomite would represent such an additional physical change. But the undisputed facts do not support this allegation.

The parties agree that a fomite is simply an object that harbors a viable infectious agent. That definition does not describe any physical change to the object's structure, composition, or material properties – it merely classifies the object as carrying an active virus. The California Supreme Court's analysis is persuasive on this point: "Describing an object as a fomite primarily reflects a conceptual or analytical change, not a physical one." *Another Planet Ent., LLC v. Vigilant Ins. Co.*, 548 P.3d 303, 329 (Cal. 2024).

Second, even assuming a physical change occurred, that change did not tangibly impair the property as noted in point 4 above. Direct physical damage requires more than a microscopic alteration to material dimensions – the change must impair the property in a tangible way. Even if we assume that the virus's adsorption changes the material dimensions of a surface at the microscopic level, this change does not impair the property as property. The impairment Plaintiffs identify is that the surface now presents a risk to humans, but risk to humans is an

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intangible concept, not a tangible impairment to property. The Nevada Supreme Court reached the same conclusion: "[E]vidence that the virus remains harmful while in the air or as 'fomites' is . . . unconvincing because it does not demonstrate that the virus is harmful to the property." *Starr Surplus Lines Ins. Co. v. Eighth Jud. Dist. Ct.*, 535 P.3d 254, 264 (Nev. 2023).

Third, the property remained fully functional for its intended use, contrary to point 5 above. A person can use the property, and it performs as designed. The property does not malfunction, degrade, or fail. A person using it risks infection, but that risk affects the person, not the property.

The Vermont Supreme Court itself previewed this potential conclusion, observing that the facts may ultimately show that the losses stemmed not from damage to property but from "the risks employees posed to each other." *Huntington Ingalls*, 2022 VT 45, ¶ 48. That observation proves prescient. The undisputed facts confirm that COVID-19 on surfaces presents a risk to the people who touch them, not a tangible impairment to the surfaces themselves.

Other jurisdictions addressing substantially identical facts have reached the same conclusion, albeit at the motion to dismiss stage, where courts accept allegations as true rather than requiring evidentiary support. At the summary judgment stage, Plaintiffs face a higher burden: they must show their allegations are rooted in undisputed facts, not merely accepted as plausible. See *Tapestry, Inc. v. Factory Mut. Ins. Co.*, 286 A.3d 1044, 1059–60 (Md. 2022) (holding COVID-19 did not cause physical loss or damage to retail properties); *Julio & Sons Co. v. Cont'l Cas. Co.*, 692 S.W.3d 877, 886 (Tex. App. 2024) (holding COVID-19 did not cause direct physical loss or damage to restaurant properties); *Lloyd's Syndicate 1967 v. Baylor Coll. of Med.*, 721 S.W.3d 574, 581–83 (Tex. App. 2025) (reversing jury verdict and holding COVID-19 did not cause direct physical loss or damage to university property).

Fourth, there is no evidence that any property had to be repaired beyond routine cleaning – the sixth fact on the list above. The key distinction between COVID-19 and other viruses lies not in its effects on surfaces but in its risk to humans. The undisputed facts establish that COVID-19 interacts with surfaces in the same manner as other viruses. DSUMF ¶ 51. Plaintiffs have not presented any evidence that HII repaired or replaced property because of COVID-19. Although HII implemented extensive cleaning and social-distancing measures, they do not, on their own, establish direct physical damage. Such measures support a finding of damage only when the predicate requirements of physical alteration and tangible impairment are met, which they are not here.

The Vermont Supreme Court observed that if mere cleaning suffices to restore property, this indicates no direct physical damage occurred. *Huntington Ingalls*, 2022 VT 45, ¶ 43. Here, it is undisputed that disinfectant agents, including bleach or the simple passage of time, remove the virus from surfaces. While HII presented evidence that it also "fogged" the areas where a COVID-19-positive employee had been working, the Court does not find that fogging goes beyond mere cleaning. The question is not what measures HII chose to deploy, but what measures the virus actually required. The undisputed facts demonstrate that the virus required only disinfection or time, both of which are hallmarks of cleaning rather than repair.

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The Court concludes based on the undisputed facts that there is no direct physical damage to the property owned by HII. This also makes sense as a matter of logic – viruses rest on surfaces in both workplaces and homes across the world every day. The surfaces they rest on remain unharmed, and the viruses either dissipate or are cleaned from the surface. The Court grants summary judgment to Defendants on the theory of direct physical damage.

G. Direct Physical Loss

Plaintiffs and Defendants seek summary judgment based on the theory of direct physical loss. The Vermont Supreme Court held that "direct physical loss" and "direct physical damage" are two distinct concepts, either of which triggers coverage. *Huntington Ingalls*, 2022 VT 45, ¶ 38. While "direct physical damage" requires a distinct, demonstrable, physical change to property, "direct physical loss" means "persistent destruction or deprivation, in whole or in part, with a causal nexus to a physical event or condition." *Id.* The Supreme Court identified four central components of this standard: (1) destruction or deprivation, (2) whole or in part, (3) linked to a physical event, (4) that is persistent. The Court discusses each component below.

<u>Destruction or Deprivation</u>

Direct physical loss requires deprivation or destruction of property. Destruction addresses situations in which property is harmed to the point that it no longer exists or is no longer usable. That clearly does not apply here.

Deprivation encompasses circumstances in which property is intact but cannot be used for some reason. Deprivation may occur when property is unusable due to a health hazard. *Id.* at ¶ 29; see *W. Fire Ins. Co. v. First Presbyterian Church*, 437 P.2d 52, 55 (1968) (gasoline fumes); *Sentinel Mgmt. Co. v. N.H. Ins. Co.*, 563 N.W.2d 296, 302 (Minn. Ct. App. 1997) (asbestos); *Motorists Mut. Ins. Co. v. Hardinger*, 131 F. App'x 823, 826–27 (3d Cir. 2005) (*E. coli*); *TRAVCO Ins. Co. v. Ward*, 715 F. Supp. 2d 699, 707–10 (E.D. Va. 2010) (toxic gas). Deprivation can be identified "based on how the property was intended to be used and why it cannot be used in that manner anymore." *Huntington Ingalls*, 2022 VT 45, ¶ 29. However, the deprivation cannot be prospective, and the insured must prove it was actually deprived of use. *Id.* at ¶ 30. A purely economic loss does not constitute deprivation. *Id.*

The facts raised by the parties raise a genuine dispute as to whether HII was deprived of use of portions of its insured property. HII suspended all production at its Ingalls facility for five days in April 2020 to sanitize the facility. PSUMF ¶ 46. Beyond the full shutdown, HII temporarily closed individual work areas each time an employee tested positive for COVID-19, to allow contact tracing and decontamination. PSUMF ¶ 56. HII also reconfigured workspaces for social distancing, reducing the number of workers who could occupy a given area at any one time. PSUMF ¶¶ 48, 65. HII closed areas of its facilities to allow time for enhanced cleaning protocols. PSUMF ¶ 45.

These facts are consistent with the type of deprivation recognized in the intangible-contaminant cases the Vermont Supreme Court found persuasive. In *Western Fire*, gasoline vapors forced the closure of a church. 437 P.2d at 55. In *TRAVCO*, toxic gas rendered a

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residence uninhabitable. 715 F. Supp. 2d at 709. In *Gregory Packaging*, ammonia forced a week-long shutdown of a packaging facility. 2014 WL 6675934, at *2. In each case, a physical condition, not a government order, prevented the insured from using the property for its intended purpose. See *Huntington Ingalls*, 2022 VT 45, ¶ 29 (deprivation identified "based on how the property was intended to be used and why it cannot be used in that manner anymore").

HII's deprivation was similarly grounded in the physical presence of COVID-19 at its facilities, not solely in government mandates. HII was designated critical infrastructure and was not subject to stay-at-home orders. DSUMF ¶ 61. The shutdowns and area closures at HII occurred because COVID-19 was physically present at the property. Taking the facts in the light most favorable to Plaintiffs, the first factor is satisfied.

<u>Whole or In Part</u>

Second, the deprivation or destruction may be total or partial. The policy language anticipates loss impacting only part of the covered property – for example, the business-interruption clause covers losses "whether total or partial." *Id.* at ¶ 31. However, partial deprivation must still be discrete and identifiable. *Id.* at ¶ 32; see *City of Burlington v. Indem. Ins. Co. of N. Am.*, 332 F.3d 38, 41 (2d Cir. 2003) (applying Vermont law to identify discrete defective welds); *Aztar Corp. v. U.S. Fire Ins. Co.*, 224 P.3d 960, 966 (Ariz. Ct. App. 2010) (identifying that partial interruption may "mean the complete stoppage of a portion of an insured's business as contrasted with stoppage of the entirety of an insured's business"). Whether the deprivation is in whole or in part is a matter of extent and provides important context. *Huntington Ingalls*, 2022 VT 45, ¶ 32.

HII's deprivation occurred both in whole and in part. The five-day facility-wide shutdown at Ingalls is a complete deprivation of that facility. PSUMF ¶ 46. The individual area closures after positive tests and the workspace reconfigurations for social distancing were partial deprivations — discrete, identifiable portions of the property were rendered unavailable for their intended use. See *Huntington Ingalls*, 2022 VT 45, ¶ 32 (partial deprivation must be "discrete and identifiable"); see also *Aztar Corp.*, 224 P.3d at 966 (partial interruption may constitute "the complete stoppage of a portion of an insured's business"). The second factor is satisfied based on the undisputed evidence.

<u>Casual Nexus to Physical Event</u>

Third, the deprivation must link directly to a physical event or condition affecting the insured property. *Huntington Ingalls*, 2022 VT 45, ¶ 33. There must be an "explicit nexus between the purported loss and the physical condition of the insured property," that is not a government order alone. *Id.* at ¶¶ 33-34. This requirement also reinforces that purely economic losses cannot constitute direct physical loss, because any qualifying loss must trace back to the condition of the property. *Id.* "This logic applies to other physical conditions that render property unusable for its intended purpose and therefore lost even though the property itself is not damaged." *Id.* at ¶ 33 (citing to cases involving asbestos, E.coli, mold, and toxic gas).

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The deprivation HII experienced traces to a physical event or condition affecting the insured property. It is undisputed that COVID-19 is a physical entity. Pl. Add. SUMF ¶ 36. The parties agree that employees tested positive while on HII property. The virus was undisputedly present at the facilities – HII had 7,095 and 10,889 confirmed cases at Ingalls and Newport News, respectively, between March 2020 and February 2023. PSUMF ¶ 68. Although Plaintiffs did not conduct direct testing for the presence of SARS-CoV-2 on specific surfaces or in particular airspaces, DSUMF ¶ 64, the Court makes the only rational inference based on the undisputed evidence of employee testing and illness at both facilities: that COVID-19 was present throughout 2020.

The deprivation of HII's property stems from the physical presence of COVID-19 at the facilities — not solely from a government order or purely economic forces. See *Huntington Ingalls*, 2022 VT 45, ¶¶ 33–34. Plaintiffs have satisfied the third factor.

<u>Persistence</u>

Fourth, the deprivation must be persistent. Courts must examine "how long the deprivation has persisted or will persist without any intervening action in order to remedy it." *Huntington Ingalls*, 2022 VT 45, ¶ 35. The requirement applies because the policy anticipates that a direct physical loss may require the property to be "rebuilt, repaired, or replaced," language that "demonstrates that the policy anticipates a need for some kind of intervention to rectify the loss." *Id.* The Supreme Court drew a clear line: "in order for something intangible to cause a direct physical loss, the cause of the loss must be so persistent as to require intervention, rather than the mere passage of time, to satisfactorily address it." *Id.* at ¶ 37.

Courts have generally found coverage when a persistent issue caused a loss, but have declined to find coverage when the contamination was ephemeral or transient. *Id.* at ¶ 36; see *Kim-Chee LLC v. Phila. Indem. Ins. Co.*, 535 F. Supp. 3d 152, 160–61 (W.D.N.Y. 2021) (collecting cases). The Supreme Court found Judge Crawford's analysis in *Kim-Chee LLC v. Philadelphia Indemnity Insurance Co.* to be persuasive. The *Kim-Chee* court identified two complementary principles: first, persistent contamination by a chemical or biological agent may cause a direct physical loss if it renders the insured property unusable; second, temporary contamination that is short-lived or imposes only remediation costs without preventing use of the building is unlikely to qualify. *Id.* at 161. The court described a spectrum: at one end, easily remedied intrusions, like road dust, that require only cleaning; at the other, persistent hazards, like gasoline seepage, that render the property fundamentally unusable. *Id.*

The intangible-contaminant cases in which courts found coverage illustrate the persistent end of this spectrum. In *Western Fire*, gasoline accumulated around and under a church over time, requiring removal of the contamination source. 437 P.2d at 55. In *TRAVCO*, drywall continuously released toxic gas, requiring replacement of the drywall to make the residence habitable. 715 F. Supp. 2d at 707–10. In *Mellin*, cat urine saturated the property to such a degree that remediation efforts failed entirely, and the odor persisted despite intervention. 115 A.3d at 801. In *Gregory Packaging*, the insured hired a professional remediation company to clear ammonia from the building. 2014 WL 6675934, at *2. In each case, the contaminant

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persisted in or on the property and required affirmative intervention, not merely the passage of time, to address. See *Huntington Ingalls*, 2022 VT 45, ¶ 37.

COVID-19 falls on the opposite end of the spectrum. The parties dispute the precise duration that COVID-19 remains viable on surfaces. Plaintiffs assert the virus can persist on surfaces for up to eight days, while other evidence in the record indicates shorter periods. For purposes of determining whether Defendants are entitled to summary judgment, the Court accepts that COVID-19 can be present for eight days.

But the key fact is undisputed: COVID-19 dissipates from both air and surfaces with the mere passage of time. Pl. Add. SUMF ¶ 40; DSUMF ¶ 38. The virus cannot replicate outside a human host and eventually becomes nonviable without any intervention. *Id*. Where intervention occurs, typical disinfectants accomplish the task. DSUMF ¶ 41. No evidence establishes that the virus saturated, infiltrated, or permeated the property in the manner of the contaminants in *Western Fire*, *TRAVCO*, *Mellin*, or *Gregory Packaging*. No property required replacement. DSUMF ¶ 87. The virus required standard cleaning or time, not rebuilding, repair, or professional remediation.

The Eleventh Circuit confronted an analogous persistence question in *Mama Jo's, Inc. v. Sparta Insurance Co.*, 823 F. App'x 868 (11th Cir. 2020). There, dust from road construction entered a restaurant daily, requiring repeated cleaning. The court affirmed summary judgment for the insurer, holding that property requiring only cleaning has not suffered a loss that is both "direct" and "physical." *Id*. at 879. The *Kim-Chee* court placed *Mama Jo's* at the nonpersistent end of its spectrum, observing that the intrusion of road dust, despite being recurring, did not qualify because the property merely needed cleaning. 535 F. Supp. 3d at 161. COVID-19 on surfaces is analytically equivalent if not less pervasive: the virus adheres, requires no more than cleaning to remove, and dissipates on its own if left alone, unlike dust.

Plaintiffs advance a theory of persistence through continual reintroduction. Plaintiffs contend that because infected employees continuously reintroduced the virus, the contamination was effectively persistent. The Court does not credit this theory, and as noted above, neither did the Eleventh Circuit when analyzing dust intrusions.

The California Supreme Court squarely rejected this argument in *Another Planet Entertainment, LLC v. Vigilant Insurance Co.*, 548 P.3d 303, 329–30 (2024). The *Another Planet* court held that persistence requires the property itself to become the source of harm. When the continuing risk stems not from the property but from the presence of humans who carry the virus, the risk is "untethered to any property" and "may be reduced or rendered less harmful through practices unrelated to the property, such as social distancing, vaccination, and the use of masks." *Id*. at 330. The court contrasted this with the contaminants in the coverage-granting cases and concluded that "the presence of SARS-CoV-2 is unlike the presence of other substances, such as unpleasant odors, dangerous chemical contamination, or asbestos that permeate the property and require substantial effort to remove." *Id*.

This Court agrees. The reintroduction theory conflates the persistence of a pandemic with the persistence of a contaminant on property. The Vermont Supreme Court's persistence requirement focuses on whether the cause of the loss is "so persistent as to require intervention, rather than the mere passage of time, to satisfactorily address it." *Huntington Ingalls*, 2022 VT 45, ¶ 37.

Each instance of COVID-19 at HII's facilities was transient. The virus dissipated on its own or through cleaning. That infected employees continuously reintroduced the virus reflects the nature of the pandemic, not a persistent condition of the property. The property did not become the source of harm, such as when drywall continuously emitted toxic fumes or the smell of cat urine persisted even after the owner attempted professional remediation. The humans using HII's property became the source of harm. As the Vermont Supreme Court observed, the losses may ultimately stem from "the risks employees posed to each other," a risk to people, not a persistent physical condition of the insured property. *Id.* at ¶ 48

The undisputed facts establish that COVID-19 dissipates with the mere passage of time and requires, at most, standard cleaning to remove. As such, the virus does not, as a matter of law, satisfy the persistence requirement. Plaintiffs' claim for direct physical loss therefore fails as a matter of law. The Court grants summary judgment to Defendants on this theory.

IV. ORDER

Based on the analysis above, the Court denies Plaintiffs' request for summary judgment on the theory of direct physical loss.

The Court grants Lex-London's Motion for Summary Judgment against Plaintiffs under the microorganism exclusion.

The Court grants Plaintiffs' request for summary judgment as it relates to the seepage, pollution, and contamination exclusion. That exclusion does not bar coverage here.

The Court grants Defendants Ace America and Zurich's motion for summary judgment because the claims against them are not ripe.

The Court grants all Defendants' motion for summary judgment on Plaintiffs' theories of direct physical damage and direct physical loss.

The Court will enter judgment in favor of Defendants.

Electronically signed on May 29, 2026, pursuant to V.R.E.F. 9(d).

Navah C. Spero
Superior Court Judge