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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

London Bridge Resort, LLC, an Arizona limited liability company, Plaintiff, v. Illinois Union Insurance Company, Inc., an Illinois corporation, Defendant.	Case No. 3:20-cv-08109-GMS **PLAINTIFF'S RESPONSE TO DEFENDANT ILLINOIS UNION INSURANCE COMPANY'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT**

Plaintiff London Bridge, LLC responds as follows to Defendant's Rule 12(b)(6) Motion to Dismiss:

I. INTRODUCTION

Rather than attack the sufficiency of Plaintiff's Complaint for failure to state a claim, Defendant Illinois Union Insurance Company, Inc. requests the Court, as a matter of law, interpret the Premises Pollution Liability Insurance Policy PPL G71205162 002 (the "Policy") to deny coverage for Plaintiff's significant business interruption losses caused by the novel coronavirus ("COVID-19") currently plaguing this world. [*See* Policy, Doc. 8-1]. Not only is that an inappropriate request before any discovery can be completed, there is no merit to such an argument, as coverage should be afforded.

Defendant first argues that COVID-19 is not a "pollution condition" under the Policy because the Policy is limited to traditional environmental pollution. Defendant then asserts that even if COVID-19 is a "pollution condition," the virus was not

discovered "on, at, under or migrating from a 'covered location.'" *See* Policy at p. 1, § (I)(A). Both arguments fail because the definition of a "pollution condition" is, at best, ambiguous as **the Policy fails to define key terms such as "contaminant" or "pollutant;"** further, under the Policy, applying ordinary meaning and Arizona legal precedent, a virus could reasonably fall in the category of a contaminant or pollutant.

Arizona courts have held consistently that dismissing a complaint based on an ambiguous contract is inappropriate. Because the Policy in question is ambiguous, and Defendant does not resolve this ambiguity in its Motion, the Complaint must survive. Further, since the time the Complaint was filed, Plaintiff has discovered that five of its employees have contracted COVID-19, **with at least one employee being on the premises while infected, and another employee becoming infected while on the premises**. [*See* Affidavit of Plaintiff's V.P./General Manager Cal Sheehy, attached hereto as **Exhibit A**]. Thus, for the purposes of the Policy, COVID-19 was "on, at, under, or migrating from [the] 'covered location.'" *See* Policy at p. 1, § (I)(A)—which defeats Defendant's argument that COVID-19 was not present at Plaintiff's resort.

II. FACTUAL BACKGROUND

London Bridge is a destination resort located in Lake Havasu City, Arizona. London Bridge provides guests with 122 luxury suites, three swimming pools, a day spa, water slide with waterfall, two restaurants, two bars, and a fitness center. Plaintiff's financial health depends on reservations and consistent travel to Lake Havasu City. Since March and April 2020, each state has issued an emergency stay-at home order, which has caused, and continues to cause, Plaintiff to experience decreased occupancy by a figure of 80-90% and business interruption losses of at least $2,000,000.00. Further, Arizona Governor Ducey issued Executive Order 2020-18 which required Plaintiff to reduce the capacity of the resort to mitigate the spread of COVID-19. Overall, Plaintiff has suffered various catastrophic business interruption losses such as lost revenue and

increased costs related to COVID-19, including, but not limited to, a steep decline in guest patronage, and the total, or partial, shutdown of the resort and the above-mentioned amenities. In an effort to reduce the impact of COVID-19, Plaintiff has incurred "extra expenses" by purchasing gloves, masks, thermometers, and hand sanitizer for its employees and guests. *See* Exhibit A. Moreover, Plaintiff has purchased and installed hand sanitizer stations and plexiglass dividers throughout the resort. *Id*. Despite Plaintiff's efforts, it could not stop COVID-19 from entering the resort. Plaintiff has complied with all terms of the Policy, including, but not limited, to mitigating the losses it suffered from COVID-19 and timely filing a claim with Defendant. However, Defendant has wrongly deprived Plaintiff of its benefits under the Policy.

III. THE POLICY

In relevant part, Coverage A of the Policy covers "first-party claim[s]" arising out of a "pollution condition" on, at, under or migrating from London Bridge Resort. *See* Policy, p. 1 at § I(A). In relevant part, a "pollution condition" is defined as follows:

> The discharge, dispersal, release, escape, migration, or seepage of any solid, liquid, gaseous or thermal irritant, contaminant, or pollutant, including soil, silt, sedimentation, smoke, soot, vapors, fumes, acids, alkalis, chemicals, electromagnetic fields (EMFs), hazardous substances, hazardous materials, waste materials, "low-level radioactive waste", "mixed waste" and medical, red bag, infectious or pathological wastes, on, in, into, or upon land and structures thereupon, the atmosphere, surface water, or groundwater.

See Policy, p. 9 at § V(LL).

Notably, the Policy fails to define "contaminant" or "pollutant," nor are viruses expressly excluded by the Policy. Included in Coverage A are "business interruption loss[es]" which include the loss of "business income," "extra expense," and "delay expense." *See* Policy, p. 4 at § V(F). "Business interruption" is defined as "the necessary partial or complete suspension of the 'insured's' operations at a 'covered location' for a

period of time, which is directly attributable to a 'pollution condition' or 'indoor environmental condition' to which Coverage A of this Policy applies." *See* Policy, p. 4 at § V(E). Moreover, "extra expense[s]" are "costs incurred by the 'insured' due to a 'pollution condition'…that are necessary to avoid or mitigate any 'business interruption.'" *See* Policy, p. 6 at §V(S).

IV. MOTION TO DISMISS STANDARD

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 1949 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955 (2007)). A complaint meets this standard where the "nonconclusory 'factual content'" of [the complaint] and "reasonable inferences from that content," must be at least "plausibly suggestive of a claim entitling the plaintiff to relief." *Disability Rights Montana, Inc. v. Batista*, 930 F.3d 1090, 1096 (9th Cir. 2019) (quoting *Sheppard v. David Evans & Assoc.*, 694 F.3d 1045, 1048 (9th Cir. 2012) (citing *Twombly*, 550 U.S. at 555, 127 S.Ct. at 1965 and *Iqbal*, 556 U.S. at 678, 129 S.Ct. at 1949)). "[A]ll well-pleaded allegations of material fact are taken as true and construed in a light most favorable to the nonmoving party." *Wyler Summit P'ship v. Turner Broad. Sys. Inc.*, 135 F.3d 658, 661 (9th Cir. 1998).

Thus, motions to dismiss are inappropriate where "[f]actual allegations…raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555, 127 S.Ct. at 1965, *See* 5 C. Wright & A. Miller, Federal Practice and Procedure § 1216, pp. 235–236 (3d ed. 2004). "[D]ismissal for failure to state a claim is appropriate only where it appears, beyond doubt, that the plaintiff can prove no set of facts that would entitle it to relief." *Morley v. Walker*, 175 F.3d 756, 759 (9th Cir. 1999). Moreover, a "well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and 'that a recovery is very remote and unlikely'" *Twombly*, 550 U.S. at

556, 127 S.Ct. at 1965 (citing *Schueuer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 1686 (1974) (overruled on other grounds)).

V. LEGAL ARGUMENT

A. A motion to dismiss is inappropriate where a contract is ambiguous

Defendant requests the Court hold, as a matter of law, that the Policy precludes Plaintiff from recovery because COVID-19 is not a "pollution condition," "contaminant," or "pollutant." However, even if the Court finds that Defendant properly attacked the sufficiency of Plaintiff's pleading, Defendant's Motion to Dismiss must fail because the Policy—drafted by Defendant—is ambiguous.

If a contract is ambiguous, the interpretation of said contract presents an issue of fact that is inappropriate for dismissal. *ASARCO, LLC v. Union Pac. R. Co.*, 765 F.3d 999, 1009 (9th Cir. 2014); *See State Farm Mut. Auto Ins. Co. v. Fernandez*, 767 F.2d 1299, 1301 (9th Cir. 1985) ("The interpretation of a contract presents a mixed question of law and fact. The existence of an ambiguity must be determined as a matter of law. **If an ambiguity exists, a question of fact is presented."** (citations omitted)(emphasis added)); *see also Scott*, 746 F.2d at 1378 (affirmative defenses may not be asserted by motion to dismiss if they raise disputed issues of fact); 11 Richard A. Lord, *Williston on Contracts* § 33:42 (4th ed. 2014) ("[T]here is unanimity" that evidence of the surrounding circumstances is necessary "when an ambiguity…exist[s].").

Further, with respect to motions to dismiss, this Court has refused to deeply examine interpretation of contract. In relevant part, the Court in *Seitz v. Rheem Mfg. Co.* examined the defendant's motion to dismiss with respect to plaintiff's claims for intentional interference with contract. 544 F. Supp. 2d. 901, 909 (D. Ariz. 2008). Breach of a contract is an essential element of the claim for intentional interference with contractual relations. *Id*. Similar to Defendant's argument regarding a "pollution condition" under the Policy, the defendant in *Seitz* asserted that a breach of contract

could not have occurred under the terms of the contract. *Id*. The Court held that a motion to dismiss based on such a contractual interpretation would be inappropriate because it would be "premature at the motion to dismiss stage" to "delve into contractual interpretation of the [agreement] checking each term of the contract against each factual allegation of the complaint." *Id*. Further, the Court held that an allegation of breach of contract was "sufficient to allow [p]laintiffs to offer evidence in support of their claim." *Id*.

Similarly, the defendant in *ABC Water LLC v. APlus Water LLC* brought forth a motion to dismiss which attacked the plausibility of the plaintiff's complaint based on an agreement between the parties. No. CV-18-04851-PHX-SPL, 2019 WL 3858193, at *1–2 (D. Ariz. Aug. 16, 2019). This Court denied the defendant's motion to dismiss because, like Defendant, the moving party requested the Court to "move beyond the sufficiency of the allegations in the [c]omplaint" and enter an order of dismissal "solely based on the Court's interpretation of the [agreement]." *ABC Water LLC*, 2019 WL 3858193, at *2. The Court reasoned, "dismissal on the basis of contract interpretation is not properly addressed through a [Rule] 12(b)(6) motion." *ABC Water LLC*, 2019 WL 3858193, at *2 (citing *Johnson v. KB Home*, 720 F.Supp. 2d 1109, 1118 (D. Ariz. 2010) ("stating that the Court would decline to interpret a contract on a motion to dismiss") and *Seitz v. Rheem Mfg. Co.*, 544 F.Supp. 2d 901, 910 (D. Ariz. 2008) ("stating 'it would be premature at the motion to dismiss stage for the Court to delve into contractual interpretation'").

Like the defendants in *Seitz* and *ABC Water LLC*, Defendant here seeks to dismiss the Complaint because the allegations contained in the Complaint allegedly contradict the terms of the Policy. Specifically, the thrust of Defendant's Motion relates to the definition of a "pollution condition," asserting that COVID-19 cannot be a contaminant or pollutant under the Policy, citing distinguishable cases from Arizona,

California, New Jersey, and New York. Yet, because Defendant fails to establish that the Policy unambiguously defines "contaminant" and "pollutant" as excluding viruses such as COVID-19, the Motion fails.

B. The Policy is ambiguous because its terms are subject to at least two reasonable interpretations

Defendant's request that the Court summarily dismiss Plaintiff's claims due to an ambiguity Defendant drafted is highly prejudicial and offends Arizona law. Defendant chose to leave the terms "contaminant" and "pollutant" undefined in the insuring clause, and to not include viruses or biological agents in any exclusion clause. Defendant cannot logically assert that the clause is unambiguous while also failing to define "contaminant" and "pollutant" or expressly exclude viruses from the Policy. Plaintiff is entitled to a broad and reasonable reading of the Policy, and should not suffer from Defendant's narrow application of its own contract.

i. The Policy is ambiguous because the terms "contaminant" and "pollutant" are not defined

The Policy contains exclusions that specifically exclude several items, yet viruses are not excluded. Because the Policy lacks any reasonable means of determining whether COVID-19 is covered, dismissing Plaintiff's claims without prejudice, especially before any discovery is conducted, is inappropriate and unduly prejudicial.

"Where the language employed is unclear and can be reasonably construed in more than one sense, an ambiguity is said to exist and such ambiguity will be construed against the insurer." *Sparks v. Republic Nat. Life Ins. Co.*, 132 Ariz. 529, 534, 647 P.2d 1127, 1132 (Ariz. 1982) (citing *Ranger Ins. Co. v. Lamppa*, 115 Ariz. 124, 563 P.2d 923 (Ariz. Ct. App. 1977)). The question of whether an ambiguity exists should be determined by examining the policy from the perspective of "one not trained in law or in the insurance business." *Sparks*, 132 Ariz. at 534, 647 P.2d at 1132 (citing *State Farm Mut. Auto Ins. Co. v. O'Brien*, 24 Ariz. App. 18, 535 P.2d 46 (Ariz. Ct. App. 1975)). "If

a policy is reasonably 'susceptible to different interpretations, [Arizona courts] will attempt to discern its meaning by examining the language of the provision, the purpose of the transaction, and public policy considerations." *Odom v. Farmers Ins. Co. of Arizona*, 216 Ariz. 530, 533, ¶ 10, 169 P.3d 120, 123 (Ariz. Ct. App. 2007) (quoting *Tritschler v. Allstate Ins. Co.*, 213 Ariz. 505, ¶ 12, 144 P.3d 519, 525 (Ariz. Ct. App. 2006)). Moreover, "[i]f a clause appears ambiguous, [Arizona courts] interpret it by looking to legislative goals, social policy, and the transaction as a whole." *First American Title Ins. Co. v. Johnson Bank*, 239 Ariz. 348, 352, ¶ 19, 239 Ariz. 292, 296 (Ariz. 2016) (quoting *First American Title Ins. Co. v. Action Acquisitions, LLC*, 218 Ariz. 394, 397, ¶ 8, 187 P.3d 1107, 1110 (Ariz. 2008).

By looking to potential legislative goals, social policy, and the transaction as a whole, the Policy is, at the very least, ambiguous. The purported historical purpose of the Policy, covering traditional environmental damages, must be balanced against the public policy of Arizona of the "underlying need for clarity in insurance [policies]" as they are "contracts of adhesion in which the prospective insured [has] no bargaining power to negotiate terms." *Bjornstad v. Senior American Life Ins. Co.*, 599 F. Supp. 2d. 1165, 1171–72 (D. Ariz. 2009). At best, Defendant brings forth a reasonable interpretation of the definition of "contaminant" and "pollutant" However, there is nothing in the Policy that defines or provides any clue as to what "contaminant" and "pollutant" means and whether Defendant can justifiably deny coverage for COVID-19-related losses. The Policy makes no distinction between "traditional" environmental pollution and "nontraditional" environmental pollution that would otherwise support the distinction Defendant urges.

Moreover, even under the principles of "traditional" environmental pollution, the Environmental Protection Agency ("EPA") does not exclude viruses from the term "contaminant." In the context of drinking water, "contaminant" is defined to mean "any

physical, chemical, *biological*, or radiological substance or matter in water." 42 U.S.C. § 300f(6) (2020) (emphasis added). Further, the EPA noted that wells could be exposed to contaminants such as microorganisms including bacteria, viruses, and parasites. *Potential Well Water Contaminants and Their Impacts*, United States Environmental Protection Agency, https://www.epa.gov/privatewells/potential-well-water-contaminants-and-their-impacts (last visited July 30, 2020). Moreover, while COVID-19 is not regulated by the Safe Drinking Water Act, the EPA is required to maintain a "list of *contaminants* which…are subject to to any proposed or promulgated national primary drinking water regulation,…and which may require regulation…" 42 U.S.C. § 300g–1(b)(1)(B)(i) (2020) (emphasis added). **The most current list of the EPA's Contaminant Candidate List 4–CCL 4 includes viruses**. *Drinking Water Contaminant Candidate List 4—Final*, 81 Fed. Reg. 81,104 (Nov. 17, 2016). While COVID-19 is not known to infect or contaminate potable water, Defendant's assertion that viruses are not "contaminants" under principle of traditional environmental law is flawed.

With respect to the term "pollutant," the Clean Air Act does not exclude biological materials, such as viruses, from the definition of "air pollutant" as it includes "any physical, chemical, biological, or radioactive…substance or matter which is emitted into or otherwise enters the ambient air." 42 U.S.C. § 7602(g) (2020). Further, the Centers for Disease Control and Prevention considers "biological pollutants" such as viruses to be an indoor air pollutant. *See* Centers for Disease Control and Prevention and United States Department of Housing and Urban Development, Healthy Housing Reference Manual. (2006). Therefore, Plaintiff's interpretation of the terms "contaminant" and "pollutant" to include viruses is, at the very least, reasonable. Further, Defendant's cited authority does not shed any light on the meaning of the terms "contaminant" and "pollutant" because insurance policies are unique to each

policyholder. Thus, the terms "contaminant" and "pollutant" can have different meanings across different policies.

ii. Defendant's cited case law does not establish that COVID-19 is unambiguously not a "contaminant" or "pollutant"

Defendant correctly points out that Arizona courts have not addressed the scope of coverage under premises pollution liability policies, such as the Policy. However, this is why the Policy and the terms "contaminant" and "pollutant" as applied to a virus, such as COVID-19, are ambiguous. Yet, despite there being no case law directly on point, Defendant asks the Court to read into the Policy—without the benefit of any discovery—that it unambiguously excludes viruses. In fact, the authority Defendant cites supports Plaintiff's assertion that the Policy is ambiguous because each case discusses varying pollution exclusion provisions and definitions of key terms in the policies at issue—which are absent from the Policy for the key terms at issue. Moreover, Defendant's assertion that the Policy is limited to traditional environmental pollution is ineffective because several pollution exclusion provisions contained in its cited authority specifically included terms that can be interpreted as viruses.

Defendant's reliance on *Keggi v. Northbrook Prop. and Cas. Ins. Co.*, 199 Ariz. 43, 13 P.3d 785 (Ct. App. 2000) is misplaced, because, on disparate facts, the holding in *Keggi* was based on the distinction between organic and inorganic pollution (i.e., bacteria—at issue in *Keggi*—are alive, viruses are not), narrow interpretation of an exclusion clause versus broad interpretation of an insuring clause (as is at issue here), and the distinguishable definition of "pollutant."

In *Keggi*, a professional golfer became ill when she ingested water contaminated with total and fecal coliform bacteria at Desert Mountain, a mixed-use development. *Keggi*, 199 Ariz. at 44–45, ¶ 2–3, 13 P.3d 786–87. In relevant part, Desert Mountain sought coverage under its commercial general liability ("CGL") and umbrella insurance

policies—*not* pollution policies. *Id*. at 47, ¶ 5. Under both policies, pollutants were defined as:

> any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.

Id. at 47, ¶ 14.

The *Keggi* court concluded that under the policy, bacteria could not be considered a "contaminant" or "irritant," based on the premise that "water-borne bacteria … are *living, organic* irritants or contaminants which defy description under the policy as 'solid,' 'liquid,' 'gaseous,' or 'thermal' pollutants. *Id.* at 47, ¶ 16 (emphasis in original); *but see Nova Casualty Co. v. Waserstein*, 424 F. Supp. 2d. 1325 (S.D. Fla. 2006) (holding that limiting solid contaminants to inorganic material defies the plain language of the policy at issue). In other words, under the policy in *Keggi*, irritants or contaminants cannot be living. Following that logic, the converse must be true: **non-living matter, such as viruses, can be irritants or contaminants**.

The court in *Keggi* further held that under the rule of *ejusdem generis*, "unlisted items are construed to fall within the definition must be similar in nature to the listed items." *Keggi*, 199 Ariz. at 47–48, ¶ 17. Following that rule, the court found that bacteria were not included in the definition of pollutant because "smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste" are "primarily inorganic in nature and thus dissimilar to the list." *Id*. at 48, ¶ 17. As Defendant points out, the court considered the historical purpose of pollution exclusion polices and examined the terms "discharge," "dispersal," "release," and escape" to conclude that the exclusion was intended only to exclude traditional environmental pollution. *Id.* at 48–49, ¶¶ 22–23. Further, the court noted that Arizona public policy supports a "narrow interpretation" of exclusion

provisions. *Id.* at 50, ¶ 27. Counsel undersigned is aware of no authority that would provide for a similar narrow interpretation of an insuring clause.

It should be noted, too, that in finding the pollution exclusion did not apply to bacterial infection, the court afforded coverage under the policy and construed the policy against the insurance carrier. *Id.* at 48, ¶ 19.

Further distinguishing this case from *Keggi*, the CGL policy in *Keggi* sought to exclude coverage for injuries arising from pollutants, whereas the Policy, in relevant part, seeks to cover business interruption losses caused by "pollutants" or "contaminants." Because the policies are dissimilar, the public policy guiding the decision in *Keggi* is also dissimilar. *Keggi* relied, in part, on the principle that exclusions should be narrowly construed. However, the present dispute does not involve a pollution exclusion provision that should, as a matter of public policy, be narrowly construed. Rather, the applicable public policy is that insurers must define terms to provide clarity to policies because insureds possess no bargaining power with respect to the transaction. *See Bjornstad*, 599 F. Supp. 2d. at 1171–72 (D. Ariz. 2009). Under the applicable public policy considerations, the Court should find that the terms "contaminant" and "pollutant" are, at the very least, ambiguous.

Even if the Policy and the CGL policy in *Keggi* are comparable, the pollution exclusion provision found in CGL policy is much narrower than the "pollution condition" provision at issue. Specifically, the exclusion provision in *Keggi* did not include, *inter alia*, waste materials, medical, red bag, infectious or pathological wastes, which contemplate coverage of biological matter or substances. *See* Policy at p. 10, § (V)(LL).

Of particular importance, *Keggi* does not address viruses, which are inherently different from bacteria in that **"[bacteria are] free-living cells that can live inside or outside a body, while viruses are a non-living collection of molecules that need a**

host to survive." *See What's the difference between bacteria and viruses?*, The University of Queensland, Australia: Institute for Molecular Bioscience, https://imb.uq.edu.au/article/2020/04/difference-between-bacteria-and-viruses (Apr. 20, 2020; last visited July 29, 2020) (emphasis added). Thus, the key premise in the *Keggi* holding cannot properly apply to viruses.

Similarly, *Star Surplus Lines Ins. Co. v. Star Roofing, Inc*. does not involve a virus. Nos. 1 CA-CV 18-0641; 1 CA-CV 18-0642, 2019 WL 5617575 (Ariz. Ct. App. Oct. 31, 2019). Rather, the court addressed fumes released as a by-product of roofing materials. *Id.* at *3, ¶ 15. Specifically, the court reasoned that the fumes were not a pre-existing substance, but were rather a by-product of the harmless roofing materials. *Id.* at *8, ¶ 34. Moreover, the total pollution exclusion included "pathogenic…or biological…materials or waste. *Id.* at *5, ¶ 24. Like *Star Surplus*, the pollution exclusion provision in *Nat'l Fire Ins. Co. of Hartford v. James River Ins.*, included biological infectants within the definition of waste. 162 F. Supp. 3d 898, 908 (D. Ariz. 2016). Thus, the pollution exclusion in *Nat'l Fire Ins. Co. of Hartford* contemplated that a virus may be a "pollutant."

Defendant's reliance on *Essex Walnut Owner L.P. v. Aspen Specialty Ins. Co.* is also misplaced because, like Defendant's other cited authority, *Essex Walnut Owner L.P.* did not address whether viruses are considered to be pollutants or contaminants. Rather, the case related to "debris consist[ing] of wood, concrete, glass, metal, tires, and large, buried tree trunks." 335 F. Supp. 3d. 1146, 1149 (N.D. Cal. 2018). Moreover, the provision in question differs significantly from the Policy provision at issue here. Like *Star Surplus Lines* and *Nat'l Fire Ins. Co. of Hartford*, the policy in *Essex Walnut Owner L.P.* defined "pollutant" to include "microbial matter, legionella pneumophila,…[and] biological agent[s]," which could reasonably include viruses. 335 F. Supp. 3d. at 1148–49. *See* 42 CFR § 73.1. Of particular importance, the court did not

definitively define "pollutant" or "pollution condition," because the "cost of redesigning the temporary shoring system is not a 'clean-up cost' under the policy." *Essex Walnut Owner L.P.*, 335 F. Supp. 3d. at 1154 & 1156. Similarly, *MacKinnon v. Truck Ins. Exch.* does not address whether a virus is a pollutant or a contaminant. 3 Cal. Rptr. 3d. 228 (Cal. 2003). Rather, the court only addressed whether a pollution exclusion provision precluded coverage of death from pesticide exposure. *MacKinnon*, Cal. Rptr. 3d. 228, 232 (Cal. 2003).

In each case Defendant cites, the question of covered losses inevitably turns on the definition of a "pollutant" or "pollution." Defendant's authority successfully illustrates that insurance policies vary wildly in their scope of coverage, the terms employed by said policies, and the definitions of the terms contained therein. Thus, Defendant's argument that premises pollution liability policies were "intended to fill coverage gaps created by the absolute pollution exclusion…" found in commercial general liability policies fails, because, as shown by Defendant, the "gap" to be filled is different with every policy. Because the terms "contaminant" and "pollutant" are not defined by the Policy and Defendant has failed to establish that the terms "contaminant" and "pollutant" do not include viruses, its Motion to Dismiss should be denied.

C. Even if the Policy is not ambiguous, COVID-19 is covered as a "contaminant" or "pollutant"

Should the Court find that the Policy is unambiguous, Defendant's Motion should still be denied because COVID-19 is a "contaminant" or "pollutant" under the Policy. "Absent a specific definition, terms in an insurance policy are construed 'according to their plain and ordinary meaning," and the policy's language should be examined from the viewpoint of one not trained in law or insurance business." *Equity Income Partners, LP v. Chicago Title Ins. Co.*, 241 Ariz. 334, 338, ¶ 13 387 P.3d 1263, 1267 (Ariz. 2017) (quoting *Sparks v. Republic Nat. Life Ins. Co.*, 132 Ariz. 529, 534, 647 P.2d 1127, 1132

(Ariz. 1982)). Because "contaminant" and "pollutant" are not defined by the Policy, those terms should be read according to their plain and ordinary meanings.

Specifically, "contaminate" is defined as: "to soil, stain, corrupt, or **infect** by contact or association." Merriam-Webster Dictionary, Contaminate, https://www.merriam-webster.com/dictionary/contaminate (emphasis added) (last visited July 29, 2020). And, as previously demonstrated, the term "pollutant," as interpreted by governmental entities, includes biological substances such as viruses. In *Nova Casualty Co. v. Waserstein*, 424 F. Supp. 2d 1325 (S.D. Fla. 2006), the U.S. District Court for the Southern District of Florida examined a pollution exclusive clause nearly identical to the one in *Keggi, supra.* In *Waserstein*, the court was asked to determine whether "microbial contaminants" or "living organisms" were contaminants under the pollution exclusion provision. 424 F. Supp. 2d at 1329 (S.D. Fla. 2006). The court rejected *Keggi's* definition of "contaminant" because the plain meaning of the solid contaminants did not limit, or distinguish, organic and nonorganic matter. *Waserstein*, 424 F. Supp. 2d at 1335 (S.D. Fla. 2006).

Similarly, in *Landshire Fast Foods of Milwaukee, Inc. v. Employers Mutual Casualty Co.*, the Court of Appeals of Wisconsin explored the issue of whether Listeria monocytogenes, a type of bacteria, was excluded from a food preparer's commercial property insurance policy. 269 Wis. 2d 775 (Wis. Ct. App. 2004). Like *Waserstein*, the Wisconsin Court of Appeals examined a pollution exclusion provision that was nearly identical to the one found in *Keggi. Landshire*, 269 Wis. 2d at 782, ¶ 13. The Wisconsin Court of Appeals held that bacteria were a "contaminant" under the policy because Listeria monocytogenes came into contact with food items and rendered them unfit for consumption, which fit under the plain meaning of the term "contaminant." *Landshire*, 269 Wis. 2d at 784, ¶ 16.

Because the Policy does not define the terms "contaminant" or "pollutant," Plaintiff urges the Court to adopt their plain and ordinary meanings, and find those terms include viruses. Like other contaminants, or pollutants, COVID-19 infects its host by contact or association via contaminated surfaces or airborne droplets (source: https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7293495/). And, the Policy does not expressly distinguish between organic and inorganic pollution, nor does it expressly distinguish between "traditional" environmental pollution and "nontraditional" environmental pollution. For these reasons, viruses, such as COVID-19, should be construed as being covered under the Policy.

D. COVID-19 was found on the Premises; therefore, related business losses are covered under the Policy

The only instance where Defendant's Motion directly addresses the sufficiency of Plaintiff's Complaint is the prior lack of known COVID-19 cases at the "covered location." However, in the previous weeks, Plaintiff has learned of at least five cases of COVID-19 on property. *See* Exhibit A. "Dismissal without leave to amend is proper only if it is clear, upon de novo review, that the complaint could not be saved by an amendment." *MHC Financing Ltd. Partnership v. City of San Rafael*, 714 F.3d 1118, 1132–33 (9th Cir. 2013) (quoting *McKesson HBOC, Inc. v. N.Y. State Common Ret. Fund, Inc.*, 339 F.3d 1087, 1090 (9th Cir. 2003)).

The presence of COVID-19 on the premises was unknown until after Plaintiff filed its Complaint. Each case involved an employee that contracted COVID-19. At least one employee contracted COVID-19 while on-duty, and another employee was later discovered to be on property while infected. Thus, COVID-19 has been discovered at the "covered location," expressly triggering coverage under the Policy. Here, the Complaint can be bolstered by amendment because Plaintiff can now affirm that known cases of COVID-19 have been present on the premises. Therefore, Plaintiff asks that it be permitted leave to amend its pleading to allow its claim to move forward.

VI. CONCLUSION

Defendant has denied coverage and seeks dismissal despite the Policy's ambiguity as to the terms "contaminant" and "pollutant." Moreover, because viruses are not excluded from the Policy, Defendant cannot reasonably ask the Court to write in the exclusion. Thus, at the very least, the Policy is ambiguous, and the Complaint should move forward. Should the Court decide that the Policy is unambiguous, the plain and ordinary meaning of the terms "contaminant" and "pollutant" support the assertion that COVID-19 is covered under the Policy.

If the Court deems it necessary, Plaintiff should be given leave to amend its pleading due to recently discovered COVID-19 cases at the resort. To dismiss this action would deprive Plaintiff from recovering under a Policy that should be construed in its favor.

DATED this 31st day of July, 2020.

MATT ANDERSON LAW, PLLC

/s/ *Matt Anderson*
Matt Anderson
Attorneys for Plaintiff

Certificate of Service

I certify that on July 31, 2020, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and for transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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