IN THE DISTRICT COURT OF CHEROKEE COUNTY
STATE OF OKLAHOMA

CHEROKEE NATION;
CHEROKEE NATION BUSINESSES, LLC;
CHEROKEE NATION ENTERTAINMENT, LLC;

Plaintiff,

v.

(1) LEXINGTON INSURANCE COMPANY;
(2) UNDERWRITERS AT LLOYD'S – SYNDICATES; ASC1414, XLC 2003, TAL 1183, MSP 318, ATL1861, KLN 510, AGR 3268;
(3) UNDERWRITERS AT LLOYD'S – SYNDICATE: CNP 4444;
(4) UNDERWRITERS AT LLOYD'S – ASPEN SPECIALTY INSURANCE COMPANY;
(5) UNDERWRITERS AT LLOYD'S SYNDICATES: KLN 0510, ATL 1861, ASC 1414, QBE 1886, MSP 0318, APL 1969, CHN 2015, XLC 2003;
(6) UNDERWRITERS AT LLOYD'S – SYNDICATE BRT 2987;
(7) UNDERWRITERS AT LLOYD'S – SYNDICATES: KLN 0510, TMK 1880, BRT 2987, BRT 2988, CNP 4444, ATL 1861, NEON WORLDWIDE PROPERTY CONSORTIUM, AUW 0609, TAL 1183, AUL 1274;
(8) HOMELAND INSURANCE COMPANY OF NY (ONE BEACON);
(9) HALLMARK SPECIALTY INSURANCE COMPANY;
(10) ENDURANCE WORLDWIDE INSURANCE LTD T/AS SOMPO INTERNATIONAL;
(11) ARCH SPECIALTY INSURANCE COMPANY;
(12) EVANSTON INSURANCE COMPANY;
(13) ALLIED WORLD NATIONAL ASSURANCE COMPANY;
(14) LIBERTY MUTUAL FIRE INSURANCE COMPANY;
(15) XL INSURANCE AMERICA, INC.;
(16) AXA/XL AMERICA, INC.;
(17) RSUI-LANDMARK AMERICAN INSURANCE COMPANY;
(18) CHUBB BERMUDA LTD.;
(19) UNDERWRITERS AT LLOYD'S LONDON; and
(20) ABC INSURANCE COMPANIES (to be determined),

Defendants.

Case No. CV-20-150
Judge Douglas Kirkley

DEFENDANT LANDMARK AMERICAN INSURANCE COMPANY'S SUR-REPLY TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT ON BUSINESS INTERRUPTION COVERAGE

COMES NOW Defendant Landmark American Insurance Company ("Landmark") and files this Sur-Reply in support of its Opposition to the Motion for Partial Summary Judgment brought by Plaintiffs Cherokee Nation, Cherokee Nation Businesses, LLC, and Cherokee Nation Entertainment, LLC ("Plaintiffs") and submits this brief, which solely addresses the arguments concerning the Landmark excess policy exclusions, as follows.

I. SUMMARY

Plaintiffs Cherokee Nation, Cherokee Nation Businesses, and Cherokee Nation Entertainment's Reply briefs maintain that Landmark's exclusion for Loss Due to Virus or Bacteria (the "Pathogenic Materials Exclusion") does not apply to preclude their claims under, essentially, two theories: (1) there is no evidence that the virus actually contaminated Plaintiffs' property; and (2) the exclusion does not preclude coverage for pandemics. But Plaintiffs' arguments ignore the plain terms of the Policy and rely on extrinsic evidence to attempt to create an ambiguity where none exists, in contravention of Oklahoma law.

II. ARGUMENT AND AUTHORITY

As an initial matter, Landmark maintains that this Court does not need to address the Excess Policy's Pathogenic Materials Exclusion. Plaintiffs cannot demonstrate that their claims trigger coverage under the Primary policy form because Plaintiffs have not alleged facts to support any business interruption claim caused by direct physical loss or damage as covered by the Policy to real and/or personal property insured by the Primary policy. In fact, the majority of courts who have addressed COVID-19 business interruption claims have found no

need to resort to applicable Policy exclusions because the virus does not cause direct physical loss or damage.[1]

Regardless, the plain language of the Landmark Policy demonstrates that Plaintiffs' claims are excluded.

A. The Policy excludes loss caused by virus regardless of the presence of the virus on the property.

Plaintiffs argue that Landmark cannot meet its burden to prove the Pathogenic Materials Exclusion applies because it cannot show that there was actual virus contamination at the Plaintiffs' properties. But the Pathogenic Materials Exclusion, which is subject to an anti-concurrent causation provision ("ACC Clause"), is broadly worded to apply to the underlying virus that caused Plaintiffs' claimed losses. Therefore, its terms demonstrate that the Pathogenic Materials Exclusion is not limited to physical contamination of the Plaintiffs' premises.

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[1] There are a number of cases where the court did not address a virus exclusion at all and found no physical loss or damage. For example, business interruption lawsuits arising out of COVID-19 were wholly dismissed solely on the basis that the virus does not cause direct physical loss or damage in the following cases: *Michael Cetta, Inc. d/b/a Sparks Steak House v. Admiral Indem. Co.*, No. 20 Civ. 4612 (JPC), 2020 WL 7321405, at *13 n. 5 (S.D. N.Y. Dec. 11, 2020) ("Because the Court concludes that [the insured] fails to establish entitlement to coverage under the Policy, it need not reach the question of whether these various exclusions would apply."); *Water Sports Kauai, Inc. v. Fireman's Fund Ins. Co., et al.*, No. 20-cv-03750-WHO, 2020 WL 6562332 (N.D. Cal. Nov. 9, 2020) (finding no coverage under general policy grant of coverage with no discussion of any virus exclusion); *T & E Chicago LLC v Cincinnati Inc. Co.*, No. 20 C 4001, 2020 WL 6801845 (N.D. Ill. Nov. 19, 2020) (finding no physical loss or damage was caused by the virus with no discussion of a virus exclusion).

Similarly, the courts in the following cases only *alternatively* found that a virus exclusion applied, after first confirming there was no coverage because the virus did not cause direct physical loss or damage to insured property: *Travelers Ca. Ins. Co. of Am. v. Geragos & Geragos*, No. CV 20-3619 PSG (EX), 2020 WL 6156584, at *3 (C.D. Cal. Oct. 19, 2020) (finding no physical loss or damage was caused by the virus but also coverage was precluded by a virus exclusion)... *Raymond H Nahmad DDS PA v. Hartford Cas. Ins. Co.*, No. 1:20-CV-22833, 2020 WL 6392841, at *9 (S.D. Fla. Nov. 2, 2020) (finding no coverage under the general policy grant of coverage but further finding the virus exclusion alternatively precluded coverage); *Goodwill Indus. Of Central Okla., Inc. v. Philadelphia Indem. Ins. Co.*, No. 5:20-CV-00511, ECF No. 24 at *11 (W.D. Okla. Nov. 9, 2020) (finding no coverage under general policy grant of coverage but further finding that "the plain meaning of the Virus Endorsement expressly excludes [plaintiff's] claim for coverage."); *West Coast Hotel Mgmt., LLC, et al. v. Berkshire Hathaway Guard Ins. Co.*, No. 2:20-cv-05663-VAP-DFMx, 2020 WL 64440037, at *3-6 (C.D. Cal. Oct. 27, 2020) (finding no coverage under general policy grants of coverage but further finding the virus exclusion alternatively precluded coverage).

The Pathogenic Materials Exclusion states:

> We will not pay for loss or damage caused directly or indirectly by the discharge, dispersal, seepage, migration, release, escape or application of any pathogenic or poisonous biological or chemical materials. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss.

The language of the Pathogenic Materials Exclusion itself makes clear that the exclusion does not require the actual presence of the virus on an insured's premises. This is because the exclusion applies to preclude coverage for loss caused directly **or indirectly** by pathogenic material. And as noted in Landmark's Supplemental Opposition Brief, the dictionary defines the term "pathogenic" as "causing or *capable of causing* disease."[2] The court in the Western District of Oklahoma in *Goodwill Industries of Central Oklahoma, Inc. v. Philadelphia Indemnity Ins. Co.* addressed a similar exclusion and determined that it was broad enough to preclude coverage resulting from any virus *capable of* inducing physical illness.[3]

The insured in *Goodwill* made the same argument propounded here – that there was no evidence that the virus actually contaminated insured property. The virus exclusion in *Goodwill* provided that "there is no coverage under such insurance for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease."[4] The Oklahoma federal court found "by its terms, the exclusion applies because COVID-19 is a virus that 'is capable of inducing physical distress, illness or disease.'"[5] The court found that this language encompassed scenarios where suspected contamination qualifies.[6] The court further determined that the "mandated closures,

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2 https://www.merriam-webster.com/dictionary/pathogenic

3 *Goodwill Industries of Central Oklahoma, Inc. v. Philadelphia Indemnity Ins. Co.*, Case No. 5:20-cv-0511-R (W.D. OK. Nov, 9, 2020).

4 *Id.* at * 8.

5 *Id.*

6 *Id.* at *9.

which caused Goodwill to seek declaratory judgment, resulted from the ability, or capability, of COVID-19 to 'induce physical distress, illness or disease.'"[7] This same analysis applies here. Landmark's Pathogenic Materials Exclusion also precludes loss or damage caused by or resulting from any pathogenic material, which is something capable of causing illness or disease.

Moreover, the Landmark Pathogenic Materials Exclusion is prefaced with language that expressly states that Landmark does not insure "loss or damage caused directly or indirectly" by pathogenic material "regardless of any other cause or event that contributes concurrently or in any sequence to the loss". This is known as an ACC Clause and applies to preclude losses caused by or resulting directly or indirectly from the virus (*aka* pathogen).

In fact, the court in *Diesel Barbershop, LLC v. State Farm Lloyds*[8] specifically found that an ACC clause, in conjunction with a virus exclusion, applies to preclude business interruption claims arising out of the virus that causes COVID-19. The court noted:

> The Policies expressly state that State Farm does not "insure for such loss regardless of: (a) the cause of the excluded event; or (b) other causes of the loss; or (c) whether other causes acted concurrently or in any sequence with the excluded event to produce the loss; or (d) whether the event occurs suddenly or gradually, involves isolated or widespread damage, arises from natural or external forces, or occurs as a result of any combination of these[.]" Guided by the plain language of the Policies, the Court finds that Plaintiffs have pleaded that COVID-19 is in fact the reason for the Orders being issued and the underlying cause of Plaintiffs' alleged losses. **While the Orders technically forced the Properties to close to protect public health, the Orders only came about sequentially as a result of the COVID-19 virus spreading rapidly throughout the community. Thus, it was the presence of**

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7 *Id.* at *10.

8 *Diesel Barbershop, LLC v. State Farm Lloyds*, No. 5:20-CV-461-DAE, 2020 WL 4724305, at *6 (W.D. Tex. Aug. 13, 2020).

COVID-19 in Bexar County and in Texas that was the primary root cause of Plaintiffs' businesses temporarily closing.[9]

Similarly, Plaintiffs have pleaded and argued in their Motion for Summary Judgment that their businesses were affected as a result of COVID-19 spreading through the community. The actions Plaintiffs took within their casinos and other properties were done to protect against the spread of the virus. Accordingly, the losses claimed here are "caused directly or indirectly" by the virus. The Landmark Pathogenic Materials Exclusion applies whether or not the virus-induced pandemic results in direct damage to Plaintiffs' property or indirectly causes Plaintiffs' losses. The exclusion, by its terms, is not restricted to loss arising out of actual contamination of the property.

Plaintiffs rely on three cases to purportedly support their argument that Landmark must show actual contamination of their property. But those cases apply different language and law and therefore are not applicable.

First, Plaintiffs rely on *Duensing v. Traveler's Companies*,[10] a 1993 Montana case that addressed an exclusion that precluded coverage for "the following causes of losses **to personal property**...(d)...contamination..."[11] The court found the language of this exclusion required actual contamination that caused loss to personal property. Here, though, Landmark's exclusion is more broadly worded to apply to loss caused directly or indirectly by a virus.

Ignoring the avalanche of cases finding that virus exclusions preclude claims for COVID-19 losses, Plaintiffs also rely on two outlier cases with different exclusion language and different law. In *Urogynecology Specialist of Fla. LLC v. Sentinel Ins. Co., Ltd.*,[12] the court

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9 *Id.* at *6 (emphasis added).
10 *Duensing v. Traveler's Companies*, 257 Mont. 376, 380, 849 P.2d 203, 206 (1993).
11 *Id.* (emphasis added).
12 *Urogynecology Specialist of Fla. LLC v. Sentinel Ins. Co.*, Ltd., No. 620CV1174ORL22EJK, 2020 WL 5939172 (M.D. Fla. Sept. 24, 2020).

declined to dismiss a lawsuit based on a "Limited Fungi, Bacteria or Virus Coverage" section of the applicable policy because it did not have the entire policy form to analyze.[13] The court also determined it was not clear at the motion to dismiss stage whether the exclusion applied to the claims presented.[14]

The circumstances here are entirely different. Plaintiffs are seeking summary judgment and the Landmark Exclusion applies to preclude coverage for loss caused directly or indirectly by pathogenic materials. At a minimum, this exclusion and its plain language precludes any summary judgment in favor of Plaintiffs.

Similarly, Plaintiffs rely on *Elegant Massage, LLC v. State Farm Mut. Auto. Ins. Co.*[15] to argue that Landmark's Pathogenic Materials Exclusion should not apply. Again, the exclusion in *Elegant Massage* is different than that in the Landmark Policy.[16] More importantly, the court concluded that the language of the exclusion as written required that the virus be the immediate cause in the chain of events causing loss, and inexplicitly found the prefatory anti-concurrent causation language "has not been established as law in this jurisdiction."[17] The court therefore did not address the fact that the exclusion was written to apply to preclude loss regardless of "whether other causes acted concurrently or in any sequence with the excluded event to produce the loss; or (d) whether the event occurs suddenly

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13 *Id.* at *4 (noting "[w]ithout the corresponding forms which are modified by the exclusions, this Court will not make a decision on the merits of the plain language of the Policy to determine whether Plaintiff's losses were covered.").

14 The court recognized the virus exclusion in the *Urogynecology* matter precluded "loss or damage caused directly or indirectly by the presence, growth, proliferation, spread, or any activity of 'fungi, wet rot, dry rot, bacteria or virus.'"[14] The court determined that including virus in the same exclusion as fungi, wet rot, and dry rot created some question as to its intended application. Accordingly, the court found the plaintiff's claim could proceed to litigation.

15 *Elegant Massage, LLC v. State Farm Mut. Auto. Ins. Co.*, No. 2:20-CV-265, 2020 WL 7249624, at *1 (E.D. Va. Dec. 9, 2020).

16 *Id.* at *12.

17 *Id.*

or gradually, involves isolated or widespread damage, arises from natural or external forces, or occurs as a result of any combination of these: ... j. Fungi, Virus or Bacteria."[18]

The court's analysis in *Elegant Massage* does not apply here, though. First, the two exclusions vary significantly in language. But more importantly, Oklahoma courts enforce ACC clauses.[19] In fact, the court in *Above It All Roofing & Constr., Inc. v. Sec. Nat'l Ins. Co.*[20] recognized "the Oklahoma Court of Civil Appeals has twice held that Oklahoma law permits the parties to an insurance contract to contract around the efficient proximate cause doctrine through provisions commonly referred to as 'anti-concurrent cause provisions.'"[21] And, as noted, the court in *Goodwill*, applying Oklahoma law, found that a virus exclusion similar to that in the Landmark Policy unambiguously precluded coverage. Accordingly, summary judgment for Plaintiffs should be denied.

B. The Policy's exclusion is specific enough to preclude coverage for virus-caused pandemics.

Next, Plaintiffs argue Landmark's Pathogenic Materials Exclusion does not apply because it does not use the word "pandemic" while exclusions in other policies, not at issue in this matter, have done so. Pandemic, however, is not a separate cause of loss to be excluded.

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18 *Id.* at *5.

19 *See e.g. Duensing v. State Farm Fire & Cas. Co.*, 2006 OK CIV APP 15, ¶ 21, 131 P.3d 127, 134 (holding that "the language of the lead-in clause to the earth movement exclusion is unambiguous. The only fair construction of that paragraph is that when more than one cause is involved in a loss which includes one of the excluded events named under the lead-in clause, in this case, earth movement, there is no coverage regardless of whether the causes acted concurrently or in any sequence with the excluded event."); *Nat'l Am. Ins. Co. v. Gerlicher Co., LLC*, 2011 OK CIV APP 94, ¶ 20, 260 P.3d 1279, 1287, as corrected (Sept. 29, 2011) (finding when an exclusion has an ACC clause, "the only reasonable construction of the exclusion is that when more than one cause is involved...whether directly or indirectly, there is no coverage regardless of whether the causes acted concurrently or in any combination with [the excluded cause]. When loss is caused by both covered perils and [excluded], the [] policy contains language that expressly precludes coverage."); *Thomas v. Farmers Ins. Co., Inc.*, No. 16-CV-17-TCK-JFJ, 2018 WL 701813, at *6 (N.D. Okla. Feb. 2, 2018) (finding under Oklahoma law that when an ACC clause is part of a policy, the insured must "show that no excluded causes of loss directly *or indirectly* contributed to the damages asserted") (emphasis added);

20 *Above It All Roofing & Constr., Inc. v. Sec. Nat'l Ins. Co.*, 285 F. Supp. 3d 1224, 1235 (N.D. Okla. 2018).

21 *Id.*

It merely addresses the geographic scope or spread of the virus. By its terms, the Landmark Policy excludes any loss or damage caused directly or indirect by the discharge, dispersal, seepage, migration, release, escape or application of any pathogenic…materials." Plaintiffs do not contend that the coronavirus pandemic was not caused by a pathogen. There is no dispute that it was. The terms of the exclusion ("any pathogenic material") captures loss or damage from a virus at a single building or nationwide.

Courts analyzing claims arising from COVID-19 have repeatedly rejected similar arguments that a pandemic is a different peril than the underlying virus that caused the pandemic. For example, in *Boxed Foods Co., LLC v. California Capital Ins. Co.*,[22] the court rejected an insured's argument that the absence of the word "pandemic" made exclusions that apply to viruses ambiguous. In reaching its decision that a virus exclusion unambiguously applied to preclude losses arising from COVID-19, the court reached three conclusions: (1) the absence from a policy of a word does not by itself create an ambiguity; (2) "the word 'pandemic' describes a disease's geographic prevalence, but it does not replace disease as the harm-causing agent…The Virus Exclusion's alleged failure to specify how widespread a disease must become to trigger the exclusion does not demonstrate that the exclusion is ambiguous"; and (3) applying the exclusion only to standalone viruses, but not viruses that escalate into a pandemic "nullifies the plain language of the Virus Exclusion. Courts interpreting a policy must give effect to every term in the policy so that no term is rendered meaningless."[23]

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[22] *Boxed Foods Co., LLC v. California Capital Ins. Co.*, No. 20-CV-04571-CRB, 2020 WL 6271021, at *5 (N.D. Cal. Oct. 26, 2020), as amended (Oct. 27, 2020).

[23] *Id. See also Raymond H Nahmad DDS PA v. Hartford Cas. Ins. Co.*, No. 1:20-CV-22833, 2020 WL 6392841, at *10 (S.D. Fla. Nov. 2, 2020) (finding "Plaintiffs offer no basis for construing 'COVID-19' or the 'pandemic' as a non-virus for purposes of this exclusion. Nor can they plausibly do so, as the global spread, proliferation, and activity of 'coronavirus' is the underlying pandemic at issue" and upholding a virus exclusion); *Vizza Wash, LP v. Nationwide Mut. Ins. Co.*, No. 5:20-CV-00680-OLG, 2020 WL 6578417, at

Further, courts recognize that "while the Virus Exclusion could have been even more specifically worded, that alone does not make the exclusion 'ambiguous.'"[24] As noted above, the plain terms of the exclusion preclude coverage for loss caused directly or indirectly by a virus and applies regardless of any other cause or event that contributes concurrently or in any sequence to the loss. That phrasing plainly and broadly applies to a pandemic.

Despite the plain language, and the wealth of cases rejecting similar "pandemic" arguments, Plaintiffs attempt to create an ambiguity where none exists by using extrinsic evidence of other exclusions that could have been used by Landmark from policies that are not at issue here. But courts must only examine the applicable policy and its language and should not consider extrinsic evidence to create an ambiguity where there is none. In 2005, the Oklahoma Supreme Court provided courts with "Well-Settled Oklahoma Standards for Insurance Contracts" and cautioned that "[w]hen policy provisions are unambiguous and clear, the employed language is accorded its ordinary, plain meaning; and the contract is enforced carrying out the parties' intentions. The policy is read as a whole, giving the words and terms their ordinary meaning, enforcing each part thereof. This Court may not rewrite an insurance contract to benefit either party. It is the insurer's responsibility to draft clear provisions of

*7 (W.D. Tex. Oct. 26, 2020) (finding the virus exclusion applied to preclude coverage for the pandemic and noting "the fact that Plaintiff could have used even more specific language does not automatically render ambiguous the language that Plaintiff actually used"); *FRANKLIN EWC, INC., v. THE HARTFORD FINANCIAL SERVICES GROUP, INC.*, No. 20-CV-04434-JSC, 2020 WL 7342687, at *3 (N.D. Cal. Dec. 14, 2020) (nothing there is "nothing in the Virus Exclusion indicates it is limited to viruses arising from the insured premises rather than a pandemic" and further finding that there is "no basis for construing 'COVID-19' or the 'pandemic' as non-virus for purposes of a virus exclusion."); *10E, LLC v. Travelers Indem. Co. of Connecticut*, No. 2:20-CV-04418-SVW-AS, 2020 WL 6749361, at *3 (C.D. Cal. Nov. 13, 2020) (holding "the virus exclusion forecloses coverage where loss or damage is 'caused by or resulting from any virus.' 'The term "resulting from" broadly links a factual situation with the event creating liability, and connotes only a minimal causal connection or incidental relationship.'").

[24] *Diesel Barbershop, LLC v. State Farm Lloyds*, No. 5:20-CV-461-DAE, 2020 WL 4724305, at *6 (W.D. Tex. Aug. 13, 2020) *citing In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 210 (5th Cir. 2007) ("The fact that an exclusion could have been worded more explicitly does not necessarily make it ambiguous.").

exclusion. **We will not impose coverage where the policy language clearly does not intend that a particular individual or risk should be covered.**"[25]

Courts therefore recognized that under Oklahoma law, "[i]f a contract is complete in itself, and when viewed as a totality, is unambiguous, its language is the only legitimate evidence of what the parties intended. That intention cannot be divined from extrinsic evidence but must be gathered from a four-corners' examination of the instrument."[26] Accordingly, it is improper for Plaintiffs to attempt to introduce extrinsic evidence from another policy form to try to create an ambiguity.[27]

Plaintiffs do not dispute that the virus ultimately caused its loss. Even if an overall pandemic affected the Plaintiffs' business, that pandemic was caused by a virus. And the Policy unambiguously excludes loss or damage caused directly or indirectly by pathogenic materials, regardless of any other cause or event that contributes concurrently or in any sequence to the loss. Therefore, there is no need for a more narrow exclusion for a pandemic when the Pathogenic Materials Exclusion is broad enough to encompass the claimed loss. The fact that the term "pandemic" is not in the Landmark Policy does not diminish the applicability of the Pathogenic Materials Exclusion.

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25 *BP Am., Inc. v. State Auto Prop. & Cas. Ins. Co.*, 2005 OK 65, ¶ 6, 148 P.3d 832, 835–36, *as corrected* (Oct. 30, 2006) (emphasis added); *see also* OKLA. STAT. tit. 15, §§ 151–169 (setting standards of contract interpretation by statute).

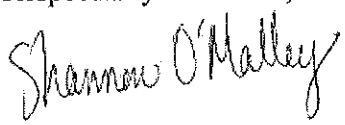
26 *Marquis v. N. Star Mut. Ins. Co.*, No. CIV-14-1157-R, 2015 WL 13573967, at *3 (W.D. Okla. Mar. 30, 2015)

27 *See also Hensley v. State Farm Fire & Cas. Co.*, 2017 OK 57, ¶ 38, 398 P.3d 11, 23 (reiterating that "an insured may not invoke the principle of latent ambiguity as a means to alter a term in a policy when that term may be applied in the circumstances without creating an ambiguous meaning"); *Pitco Prod. Co. v. Chaparral Energy, Inc.*, 2003 OK 5, ¶ 14, 63 P.3d 541, 546 ("If a contract is complete in itself, and when viewed as a totality, is unambiguous, its language is the only legitimate evidence of what the parties intended. **That intention cannot be divined from extrinsic evidence but must be gathered from a four-corners' examination of the instrument.**) (emphasis added); *Eureka Water Co. v. Nestle Waters N. Am., Inc.*, 690 F.3d 1139, 1149 (10th Cir. 2012) ("Under current Oklahoma common law, extrinsic evidence is not admissible to create an ambiguity in a contract that is unambiguous on its face."); *Milburn v. Life Inv'rs Ins. Co. of Am.*, No. CIV-04-0459-C, 2004 WL 7340077, at *3 (W.D. Okla. Dec. 17, 2004), rev'd and remanded, 511 F.3d 1285 (10th Cir. 2008) (holding a party "may neither use extrinsic evidence to define the disputed language, absent an ambiguity, nor use extrinsic evidence to create the ambiguity").

III. CONCLUSION

For all the foregoing reasons, and those incorporated by reference from Defendants' Opposition Brief, Landmark respectfully requests that the Court deny Plaintiff's Motion for Partial Summary Judgment on Business Interruption Coverage.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of January, 2021, a true and correct copy of the foregoing document was served via U.S. Mail and/or email to:

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