IN THE DISTRICT COURT OF CHEROKEE COUNTY
STATE OF OKLAHOMA

CHEROKEE NATION, CHEROKEE NATION BUSINESSES, LLC, & CHEROKEE NATION ENTERTAINMENT, LLC	)	Case No. CV-20-150
Plaintiff,	)	Hon. Douglas Kirkley
v.	)	
LEXINGTON INSURANCE COMPANY, et al.	)	
Defendants.	)	

THE NATION'S COMBINED REPLY TO DEFENDANT INSURERS' OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON BUSINESS INTERRUPTION COVERAGE AND OBJECTION TO VARIOUS SUPPLEMENTAL AUTHORITIES SUBMITTED BY DEFENDANT INSURERS

The Cherokee Nation, Cherokee Nation Businesses, LLC, & Cherokee Nation Entertainment, LLC (collectively the "Nation") submit this Combined Reply to Defendant Insurers' Opposition to Plaintiff's Motion for Partial Summary Judgment on Business Interruption Coverage and Objection to Various Supplemental Authorities Submitted by Defendant Insurers (collectively the "Reply"). In support of its Motion and this Reply, the Nation states:

SUMMARY

There is no dispute between the parties: The Tribal Property Insurance Program ("TPIP") insurance policies (Policy Nos. 017471589/06 (Dec 31) 9469, 017471589/06 (Dec 15) 9110, & 017471589/06 (Dec 37) 9109) issued to the Nation are ripe for interpretation by the Court. Through their Oppositions, Defendant Insurers have now provided the Court and the Nation with previously undelivered excess policies, claiming that various exclusions within those policies apply. As this is the Nation's first opportunity to see many of these policies, it asserts numerous defenses bar application of those exclusions to the Nation's claim. But for purposes of summary judgment, even

assuming *arguendo* the exclusions are part of the TPIP Policy, the Court must find as a matter of law such exclusions lack clear and distinct language barring pandemic coverage as required by Oklahoma law. Thus, summary judgment in the Nation's favor is proper. And, if the Court finds both parties interpretations of the Policy are reasonable, the Nation prevails.

THE NATION'S MATERIALS FACTS[1]

1. The parties do not dispute the TPIP Policy is ripe for interpretation. Within their Objections Defendant Insurers attached excess policies with exclusions they claim prevent coverage. In turn, the Nation asserts and reserves for a later time various defenses such as failure of consideration, the reasonable expectation doctrine, failure to delivery, and violation of Oklahoma insurance laws bar application of those exclusions to the TPIP.[2] Although the Nation attests to the facts supporting those defenses,[3] it will also points out that its Motion only requested a finding of coverage based on an interpretation of the TPIP Policy. The Nation is, consequently, entitled to summary judgment because, even assuming *arguendo* those exclusions apply to the TPIP Policy, the interpretation of

[1] Defendant Insurers beg the Court to deny the Motion on the basis that the Nation did not provide citation within its Statement of Undisputed Material Facts, but the Nation provided such citation contextually within its Arguments and Authorities as permitted by Oklahoma District Court Rule 13. Specifically, Summary Judgment requires "a concise written statement of the material facts as to which the movant contends no genuine issue exists and a statement of argument and authority demonstrating that summary judgment or summary disposition of any issue should be granted. Reference shall be made in the statement to the pages and paragraphs or lines of the evidentiary materials that are pertinent to the motion." Okla. Dist. R. 13.

[2] All excess policies were not delivered until after the Pandemic began, making their exclusions hidden and beyond the Nation's reasonable expectation of coverage. *Max True Plastering Co. v. U.S. Fid. & Guar. Co.*, 1996 OK 28, 912 P.2d 861, 869 (A "hidden exclusion" is "not given effect.") (adopting the reasonable expectation doctrine). Further, the excess policies reduced coverage after the policy term began without the Nation's consent or returning the Nation's premium, in-part, both of which render the exclusions invalid. *See, e.g., S. Farm Bureau Cas. Ins. Co. v United States*, 395 F.2d 176, 180 (8th Cir. 1968) (holding that "a limiting endorsement must be supported by consideration," and finding no such consideration, in part, because there was no reduction in premium); see Okla. Admin. Code 365:15-1-3 ("Coverage elimination after policy issuance. Any endorsement which eliminates or restricts coverage and which is issued during the policy term shall be identified as accepted by the insured, by the signature of the insured thereon, and a signed copy (original, computer generated or microfilm) of such endorsement shall be retained in the files of the insurer for one year after the expiration of the policy.").

[3] *Ex.* 1, Calvert Affidavit & *Ex.* 2, Copeland Affidavit (Establishing the factual basis of the Nation's defenses).

those exclusions is a question of law,[4] and the exclusions fail to clearly and expressly exclude pandemics.

2. The Nation submitted undisputed proof it suffered a loss when it closed its facilities due to the COVID-19 Pandemic ("Pandemic"). In Opposition, Defendant Insurers failed to submit an affidavit pursuant to District Court Rule 13(d) and 12 O.S. § 2056(F) stating they were unable to show specific facts in opposition to summary judgment and/or requesting a continuance so they could investigate this allegation further. *McClain v. Riverview Vill., Inc.*, 2011 OK CIV APP 57, ¶ 7; *Been v. O.K. Indus., Inc.*, 495 F.3d 1217, 1236 (10th Cir. 2007); *Dreiling v. Peugeot Motors of Am., Inc.*, 850 F.2d 1373, 1376 (10th Cir. 1988). Indeed, the Nation agreed to give Defendant Insurers nearly two (2) months to respond to the Motion,[5] during which time any of the seventeen (17) plus Defendant Insurers could have scheduled a deposition to establish a fact disputing the loss—but they did not. In fact, within their Opposition, Defendant Insurers requested the Court take judicial notice of webpages demonstrating the Nation reopened its facilities with health and safety protocols in response to the Pandemic.[6] And, given the Nation is Cherokee County's largest employer and business operator, the Court is likely already aware and can take judicial notice of, the Nation's closure is in response to the Pandemic.[7] Consequently, the Nation's loss is undisputed.

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[4] "The interpretation of an insurance policy, with its exclusions, is a question of law." *Oklahoma Attorneys Mut. Ins. Co. v. Cox*, 2019 OK CIV APP 25, ¶ 8, 440 P.3d 75, 78; "The validity of an exclusion from compulsory liability insurance is a question of law, *Hartline*, 2001 OK 15 at ¶ 5, 39 P.3d at 767, and construction of an insurance contract is a question of law. *BP America, Inc. v. State Auto Property & Casualty Ins. Co.*, 2005 OK 65, ¶ 6, 148 P.3d 832, 835." *Mulford v. Neal*, 2011 OK 20, 264 P.3d 1173, 1185.

[5] *Ex. 3*, Eml. from Defendant Insurers (Aug. 13, 2020).

[6] *Compare* Defendant Insurers' Response to Plaintiff's Material Facts No. 2 *with* Defendant Insurers' Statement of Additional Undisputed Material Facts No. 12.

[7] "A judicially noticed adjudicative fact shall not be subject to reasonable dispute in that it is . . . [g]enerally known within the territorial jurisdiction of the trial court." 12 O.S. § 2202 (B)(1).

3. The Pandemic is a fortuitous event. Defendant Insurers inability to comprehend fortuity does not create a dispute of material fact. The Pandemic was not premeditated by the Nation but occurred by chance rendering it a fortuitous loss.

DEFENDANT INSURERS' STATEMENT OF ADDITIONAL UNDISPUTED FACTS

1-5. In response to Defendant Insurers' Additional Undisputed Facts Nos. 1-5, the Nation agrees the TPIP Policy is the contract at issue before the Court. Further, the Nation agrees, the Court must assume, for purposes of summary judgment, the excess policies' exclusions are valid additions to the TPIP Policy. However, the Nation refutes that the exclusions bar coverage as they do not use clear and distinct language applicable to the Pandemic, and it reserves its fact-based defenses as to the validity of the excess policies and their exclusions for a later date.

6-7. Defendant Insurers' Additional Fact Nos. 6 and 7 are not material facts but Defendant Insurers' opinions regarding the sufficiency of evidence. Additional Facts Nos. 6 and 7 do not dispute the substance of facts presented to the Court. *See supra* The Nation's Material Fact No. 2.

8-12. The Nation admits Defendant Insurers' Additional Fact Nos. 8-12, except for the second sentence to Additional Fact No. 11 as closure due to civil authority is not before the Court, the interpretation of the declarations and proclamations is not relevant, and the Nation denies Defendant Insurers' interpretation of the declarations and proclamations.

13. Because Defendant Insurers' Additional Fact No. 13 only relates to discovery it is not a material fact that effects the substance of the contracts subject to interpretation by the Court. Further, Defendant Insurers failed to submit an affidavit as discussed *supra* outlining what discovery is lacking for the Court to interpret the contact of the TPIP Contract.

ARGUMENTS AND AUTHORITIES

I. THE NATION IS THE ONLY PARTY TO PRESENT A COMPLETE INTERPRETATION OF THE CONTRACT.

To interpret an insurance contract, the insurance policy must be read "as a whole giving the language its ordinary and plain meaning to carry out the parties' intentions." *Oklahoma Sch. Risk Mgmt. Tr.*, 2019 OK 3, ¶ 22. The Nation is the only party to provide interpretations of the TPIP Policy that comply with that requirement as Defendant Insurers request the Court contort provisions and phrases to Frankenstein a new policy into existence. In opposition, the Nation does not ask the Court to rely on other jurisdictions alone to decide our State's insurance law; rather, it is the only party to forward opinions interpreting all-risk policies under Oklahoma law. The Court can look to *Oklahoma Schools Risk Management Trust v. McAlester Public Schools*, 2019 OK 3, *Gutkowski v. Oklahoma Farmers Union Mut. Ins. Co.*, 2008 OK CIV APP 8, and *Texas Eastern Transmission Corp. v. Marine Office-Appleton & Cox Corp.*, 579 F.2d 561 (10th Cir. 1978), which demonstrate the Nation forwards the correct interpretation.

A. *The Nation is the only party to define Direct Physical Loss.*

The Nation's interpretation of the terms at issue (*damaged property*, *repair*, and *all risks of direct physical loss*) are consistent with the interpretation that *direct physical loss* occurs when property is rendered unusable for its intended purpose.[8] Contrary to Defendant Insurers' misgivings, the phrase "unusable for its intended purpose" does not mean any "loss of use" qualifies as direct physical loss. Instead, a property is unusable when a dangerous condition makes

[8] Aside from the case law cited *ad nauseum*, the Nation's interpretation is consistent with the ordinary definition of the words "direct physical loss" as the Pandemic directly caused the Nation to be unable to physically use its covered property, which was a loss. *Direct*, MERRIAM-WEBSTER DICTIONARY (2 a "stemming immediately from a source // direct result") https://www.merriam-webster.com/dictionary/direct (last visited Oct. 19, 2020); *Physical*, MERRIAM-WEBSTER DICTIONARY ("of or relating to material things") https://www.merriam-webster.com/dictionary/physical (last visited Oct. 19, 2020); *Loss*, MERRIAM-WEBSTER DICTIONARY ("the act of losing possession : DEPRIVATION // *loss* of sight") https://www.merriam-webster.com/dictionary/loss (last visited Oct. 19, 2020).

it so that property cannot be utilized for its intended purpose.[9] To that point, Defendant Insurers concede the Pandemic is a dangerous condition that rendered the covered properties unusable.[10] Despite their attempts to distinguish *Western Fire* and *Oregon Shakespeare* from the case at hand, both courts patently rejected Defendant Insurers' argument that *direct physical loss* requires structural alteration to the property.[11] Defendant Insurers then falsely claim the Nation's interpretation ignores the words *direct* and *physical*, even though the Nation's interpretation comes from courts evaluating "direct physical loss" as a term-of-art.[12]

Aside from the myriad cases in the Nation's Motion, several other courts have rejected Defendant Insurers' attempt to define *physical loss* and *physical damage* as synonymous:[13] In a

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[9] *E.g., W. Fire Ins. Co. v. First Presbyterian Church*, 165 Colo. 34, 38–39, 437 P.2d 52, 55 (1968) ("But, in the instant case the so-called 'loss of use,' occasioned by the action of the Littleton Fire Department, cannot be viewed in splendid isolation, but must be viewed in proper context. When thus considered, this particular 'loss of use' was simply the consequential result of the fact that because of the accumulation of gasoline around and under the church building the premises became so infiltrated and saturated as to be uninhabitable, making further use of the building highly dangerous.").

[10] The Nation's Motion for Partial Summary Judgment on Business Interruption Coverage at 12-14 (quoting *Friends of Danny DeVito v. Wolf*, 227 A.3d 872, 881 (Pa. 2020), *cert. denied*, No. 19-1265, 2020 WL 5882242 (U.S. Oct. 5, 2020)).

[11] "Despite the fact that a 'dwelling building' might be rendered completely useless to its owners, appellant would deny that any loss or damage had occurred unless some tangible injury to the physical structure itself could be detected. Common sense requires that a policy should not be so interpreted in the absence of a provision specifically limiting coverage in this manner." *W. Fire Ins. Co. v. First Presbyterian Church*, 165 Colo. 34, 40–41, 437 P.2d 52, 56 (1968) (quotation omitted); "Defendant implies that, in order to be 'physical,' the loss or damage must be structural to the building itself. Defendant does not provide any evidence from within the policy to show that the plain meaning of the term 'physical' includes such a limitation." *Oregon Shakespeare Festival Ass'n v. Great Am. Ins. Co.*, No. 1:15-CV-01932-CL, 2016 WL 3267247, at *5 (D. Or. June 7, 2016).

[12] *Oregon Shakespeare Festival Ass'n v. Great Am. Ins. Co.*, No. 1:15-CV-01932-CL, 2016 WL 3267247, at *9 (D. Or. June 7, 2016) ("Other courts around the country have held that damage does not have to be 'structural' to be 'physical,' as long as it renders the property unusable for its intended purpose. *See, e.g., Western Fire Ins. Co. v. First Presbyterian Church*, 165 Colo. 34, 437 P.2d 52 (1968) (where gasoline vapors penetrated the foundation of the insured church and accumulated, rendering building uninhabitable, the property was held to have suffered a 'direct, physical loss'); *Matzner v. Seaco Ins. Co.*, 1998 WL 566658 (Mass. Super. 1998) (holding that carbon monoxide levels in an apartment building sufficient to render building uninhabitable were a 'direct, physical loss')").

[13] "'[L]oss' must mean something more than just 'damage.' A basic canon of construction is that courts should construe a text to give effect to every word and not make any portion of the text superfluous (*verba cum effectu sunt accipienda*), and if 'loss' simply meant 'damage,' there would be no reason for the contract to use the disjunctive 'loss or damage.' See Antonin Scalia & Bryan Garner, READING LAW, 174-79 (2012) (discussing the 'surplusage canon'). Furthermore, the courts that have considered the phrase 'direct physical loss' have not interpreted it as requiring physical damage or alteration. Rather, they have interpreted 'direct physical loss' as limiting the loss to only tangible, concrete, and measurable losses, rather than including speculative or intangible losses." *C.f. James W. Fowler Co. v. QBE Ins. Corp.*, No. 3:18-CV-1705-SI, 2020 WL 4261272, at *7 (D. Or. July 24, 2020).

recent decision from the Western District of Missouri, the court found a business interruption claim due to the Pandemic must proceed because the policy forced the court to "give meaning to both terms." *Ex. 4, Studio 417, Inc. v. Cincinnati Ins. Co.*, No. 20-CV-03127-SRB, 2020 WL 4692385, at *5 (W.D. Mo. Aug. 12, 2020) (*citing Nautilus Grp., Inc. v. Allianz Global Risks* US, No. C11-5281BHS, 2012 WL 760940, at * 7 (W.D. Wash. Mar. 8, 2012) ("if 'physical loss' was interpreted to mean 'damage,' then one or the other would be superfluous")). "Other courts have similarly recognized that even absent a physical alteration, a physical loss may occur when the property is uninhabitable or unusable for its intended purpose." *Id.* at *5.[14] Simply put, one shoe cannot fit both feet: the same meaning cannot be given to distinct terms-of-art.

Likewise, the Superior Court of New Jersey rejected the interpretation forwarded by Defendant Insurers in another Pandemic claim case. There the court found *Wakefern Food Corp. v. Liberty Mutual Fire* to be a compelling and applicable case, which stated: "Since the term 'physical' can mean more than material alteration or damage, it is incumbent on the insurer to clearly and specifically rule out coverage in the circumstances where it was not to be provided." *Ex. 5, Harrison v. Optical Services, USA et al.*, BER-L-3681-20, at 27 (Bergen Cnty., N.J. Aug. 13, 2020) (quoting 406 N.J. Super. 524 (App. Div. 2019)). The court further doubted the carrier's interpretation as *Wakerfern* held a grocery store was entitled to coverage when the "electrical grid and transmission lines were physically incapable of performing their essential function of providing electricity even though they were not necessarily damaged." *Id.* at 27-28.

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[14] *Citing "Port Auth. of New York and New Jersey v. Affiliated FM Ins. Co.*, 311 F.3d 226, 236 (3d Cir. 2002) (affirming denial of coverage but recognizing that '[w]hen the presence of large quantities of asbestos in the air of a building is such as to make the structure uninhabitable and unusable, then there has been a distinct [physical] loss to its owner'); *Prudential Prop. & Cas. Ins. Co. v. Lilliard-Roberts*, CV–01–1362–ST, 2002 WL 31495830, at * 9 (D. Or. June 18, 2002) (citing case law for the proposition that 'the inability to inhabit a building [is] a 'direct, physical loss' covered by insurance'); *General Mills, Inc. v. Gold Medal Ins. Co.*, 622 N.W.2d 147, 152 (Minn. Ct. App. 2001) ('We have previously held that direct physical loss can exist without actual destruction of property or structural damage to property; it is sufficient to show that insured property is injured in some way.')".

And, a court in North Carolina granted the same summary judgment the Nation seeks through this Court. *Ex. 6, North Star Deli, LLC, et al. v. Cincinnati Ins. Co., et al.*, 20-CVS-02569 (Durham Cnty., Oct. 9, 2020). There, the court employed the same standards utilized within Oklahoma to interpret the plain and ordinary meaning of "direct physical loss" to be "the inability to utilize or possess something in the real, material, or bodily world, resulting from a given cause without the intervention of other conditions."[15] *Id.* 5-7. The *North Star* court rejected the interpretation forwarded by Defendant Insurers: "Under Cincinnati's argument, however, if 'physical loss' also requires structural alteration to property, then the term 'physical damage' would be rendered meaningless. But the Court must give meaning to both terms." *Id.* at 7.

Most recently, the Eastern District of Virginia adopted the definition proposed by the Nation. *Ex. 7, Elegant Massage, LLC v. State Farm Mut. Auto. Ins. Co.*, No. 2:20-CV-265, 2020 WL 7249624, at *8 (E.D. Va. Dec. 9, 2020). In *Elegant Massage*, the plaintiffs sought coverage under their all-risk business interruption policy for losses due to the pandemic, even though it is neither alleged "that there is a presence of a virus at the covered property nor that a virus is the direct cause of the property's physical loss." *Id.* at 13. In denying the carrier's motion to dismiss in relevant part, the court looked at the "spectrum of interpretations" for *direct physical loss* "ranging from direct tangible destruction of the covered property to impacts from intangible

[15] "As an initial matter, the Policies do not define the terms 'direct,' 'physical loss,' or 'physical damage.' The Court must therefore turn first to the ordinary meaning of those terms. Merriam-Webster defines 'direct,' when used as an adjective, as 'characterized by close logical, causal, or consequential relationship,' as 'stemming immediately from a source,' or as 'proceeding from one point to another in time or space without deviation or interruption.' Direct, Merriam-Webster (Online ed. 2020). Merriam-Webster defines 'physical' as relating to 'material things' that are "perceptible especially through the senses.' Physical, Merriam Webster (Online ed. 2020). The term is also defined in a way that is tied to the body: "of or relating to the body." Id Webster's Third New International Dictionary defines physical as 'of or relating to natural or material things as opposed to things mental, moral, spiritual, or imaginary." Physical, Webster's Third New International Dictionary (2020). The definition from Black's Law Dictionary comports: 'Of, relating to, or involving material things; pertaining to real, tangible objects.' Physical, Black's Law Dictionary (11th ed. 2019). Finally, 'loss' is defined as 'the act of losing possession,' 'the harm of privation resulting from loss or separation,' or the 'failure to gain, win, obtain, or utilize.' Loss, Merriam-Webster (Online ed. 2020). Another dictionary defines the term as "the state of being deprived of or of being without something that one has had." Loss, Random House Unabridged Dictionary (Online ed. 2020)." *Ex. 6, North Star Deli,* 20-CVS-02569 at 5-6.

noxious gasses or toxic air particles that make the property uninhabitable or dangerous to use"—the interpretations forwarded by Defendant Insurers and the Nation respectively. *Id.* There, the court adopted plaintiffs' (i.e. the Nation's) interpretation because the wide range of interpretations rendered the triggering language ambiguous:

> Therefore, given the spectrum of accepted interpretations, the Court interprets the phrase "direct physical loss" in the Policy in this case most favorably to the insured to grant more coverage. *See Virginia Farm Bureau Mut. Ins. Co. v. Williams*, 278 Va. 75, at 81 (2009) ("[I]f disputed policy language is ambiguous ... we construe the language in favor of coverage and against the insurer."). ***Based on the case law, the Court finds that it is plausible that a fortuitous "direct physical loss" could mean that the property is uninhabitable, inaccessible, or dangerous to use because of intangible, or non-structural, sources.*** *See US Airways, Inc. v. Commonwealth Ins. Co.*, 2004 WL 1094684, at *5 (Va. Cir. Ct. May 14, 2004) (holding FAA order grounding flights at Reagan National Airport could constitute direct physical loss when "nothing in the Policy ... requires that [there] be damage to [the insured's] property.").

Id. at 10 (brackets in original) (emphasis added).

Meanwhile, ***none*** of the cases cited by Defendant Insurers use *physical loss* and *physical damage* as they are used throughout the TPIP Policy in separate provisions. For example, Off Premises Services Interruption, Building Laws, Demolition Cost, Increased Cost of Construction, and Contingent Time Element coverages are all extended to *physical damage* without reference to *physical loss*. *TPIP Policy* at 10, 11, 20. Inversely, the Period of Restoration relied on by Defendant Insurers only refers to *physical loss* as a trigger, omitting any reference to *physical damage*. *Id.* at 23. There is simply no reasonable explanation as to why physical loss and physical damage are used separately throughout the TPIP Policy if they share a synonymous meaning. While Defendant Insurers may argue these are scrivener's errors, Oklahoma law states "when an insurer creates specificity in one clause of a policy and then omits it in a similar context, the omission is considered purposeful and should be given meaning." *Oklahoma Sch. Risk Mgmt. Tr.*, 2019 OK 3, ¶ 24. Since at least 1968, numerous courts have warned carriers that if they wish to define *direct*

physical loss or damage in the way the Defendant Insurers attempt to here, they should provide a definition stating as much. *E.g., Western Fire Ins. Co. v. First Presbyterian Church*, 165 Colo. 34, 437 P.2d 52 (1968). Without such a definition, the Nation's interpretation controls.

B. "All risk of direct physical loss" includes anticipated harms.

Because *all risk of* modifies direct physical loss, coverage occurs "if there is a *danger of* direct physical loss coupled with a condition that creates the threat or danger of physical loss, then there is coverage." 5 NEW APPLEMAN ON INSURANCE LAW LIBRARY EDITION § 42.02[3] (2019) (emphasis added) (citing *Hampton Foods v. Aetna Cas. and Sur. Co.*, 787 F.2d 349,351–352 (8th Cir. 1986)). That is the only interpretation consistent with Oklahoma law:

> Farmers claims under the facts of this case, the policy terms "for ***risks of direct physical loss***" limit its liability for the Insureds' loss to the composition shingles only. Farmers submits this provision excludes from coverage the damage to the wood shingles that ***will result*** from the removal of the composition shingles. First, we reiterate, under Oklahoma law, when an insurer desires to limit its liability under a policy of insurance, it must employ language that clearly and distinctly reveals its stated purpose. *Spears v. Shelter Mut. Ins. Co.*, 2003 OK 66, ¶ 7, 73 P.3d 865, 868. Such clear and distinct language of limitation was not employed in the instant policy. . . . ***We therefore reject Farmers claim that the anticipated damage . . . was not a covered loss under the policy.***

Gutkowski v. Oklahoma Farmers Union Mut. Ins. Co., 2008 OK CIV APP 8, ¶¶ 9-11 (emphasis added). Defendant Insurers failure to articulate an interpretation of "*all risk of*" *direct physical loss* that would exclude the Nation's anticipation of loss due to the Pandemic means the losses resulting from the mitigation efforts are covered.

C. Defendant Insurers repeat, without explanation, that there is no covered loss.

Despite the evidence provided, Defendant Insurers misread *Oklahoma Schools* to assert the Nation must prove some other unknown, particular and unexplained covered loss to afford coverage. That is simply not in agreement with applicable case law. The Nation's Motion

demonstrated a covered loss occurs when there is a loss and it is fortuitous.[16] In fact, the sentence Defendant Insurers rely upon in *Oklahoma Schools* cites to *Texas Eastern Transmission Corp*,[17] which states: "The general rule, in accordance with the trial court's instructions to the jury in the instant case, is that the burden is upon the insured to prove that a loss occurred and that it was due to some fortuitous event or circumstance." *Texas Eastern Transmission Corp.*, 579 F.2d at 564. The *Texas Eastern* court explicitly rejected the Defendant Insurers' argument. *Id.* at 564-565 ("Acknowledging as authority such cases as *British* and *Foreign Marine Ins. Co., Ltd.*, which hold that the insured need not prove the cause of loss, defendant here asserts that as a practical matter proof of cause of the loss is necessary in order to establish that the loss was by a fortuity. . . . The problem in the context of this case is that it is difficult to see what risks the insurance company was insuring against if the defendant's position is upheld.").

D. Defendant Insurers misinterpret the Period of Restoration.

Defendant Insurers point to the *rebuild, repair, or replace* language in the Period of Restoration provision to argue that absent such actions by the Nation there can be no coverage. That provision, when read in context, does not support Defendant Insurers 'argument:

> The period during which business interruption and or rental interruption applies will begin on the date *direct physical loss* occurs and interrupts normal business operations and ends on the date that the damaged property should have been repaired, rebuilt or replaced with due diligence and dispatch, but not limited by the expiration of this policy.

TPIP Policy at 23 (emphasis added).

First, this provision clearly relates to the length of time for coverage, **not** the trigger of coverage. If the Court were to accept Defendant Insurers' interpretation, it would create illusory

[16] *See* The Nation's Motion for Partial Summary Judgment on Business Interruption Coverage at 7-8.
[17] *Oklahoma Sch. Risk Mgmt.*, 2019 OK 3 n. 13.

coverage as the carriers expressly promised coverage for *all risk of direct physical loss* but in fact sold actual physical damage coverage only. That monstrous interpretation must be rejected.[18]

Second, there is a noteworthy difference in terminology as this section refers to *direct physical loss* and "damaged property," but not *direct physical damage*. As previously stated, the Court must place value in the specific words used within the Policy. *Oklahoma Sch. Risk Mgmt. Tr. v. McAlester Pub. Sch.*, 2019 OK 3, ¶ 24; *Kingkade v. Cont'l Cas. Co.*, 1912 OK 807, 35 Okla. 99, 128 P. 683, 685. Because the words *direct* and *physical* no longer modify the word *damage*, the Court must accept an ordinary reading of the word, where damage means a "loss or injury to person or property." *Damage*, BLACK'S LAW DICTIONARY (11th ed. 2019).[19] Meanwhile, the TPIP must have intended the Period of Restoration to apply perils more broad than *direct physical damage*, which is why the provision only references *direct physical loss*.

Finally, Defendant Insurers rest on the flawed and erroneous argument that the Nation failed to *replace, repair, or rebuild* the covered property. To be certain, the Nation made repairs to its properties before reopening. In fact, Defendant Insurers requested the Court take judicial notice of a news article and the Nation's reopening manual, both of which demonstrate the Nation implemented mitigation protocols to repair the covered properties after the Pandemic began.[20]

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[18] *Lexington Ins. Co. v. Precision Drilling Co., L.P.*, 951 F.3d 1185, 1194 (10th Cir. 2020) ("illusory coverage" occurs when a carriers attempts to construe policies "in such a limited and tortured way that it would thwart the general object of the . . . Policies.").

[19] "The term 'damage' is not statutorily defined so its meaning is to be determined by its common usage. *Cullen v. State*, 832 S.W.2d 788, 797 (Tex.App.-Austin 1992, writ ref'd). Dictionary definitions of damage include 'loss or injury to person or property,' Black's Law Dictionary 393 (7th ed.1999), and 'loss or harm resulting from injury to person, property or reputation,' Merriam–Webster's Collegiate Dictionary (11th ed.2003)." *Ortiz v. State*, 280 S.W.3d 302, 305 (Tex. App. 2008).

[20] *See* Defendant Insurers' Statement of Additional Undisputed Material Facts No. 13 (referenced webpages are attached here as Ex. 8, D. Sean Rowley, *Cherokee Nation Business gives reopening dates for its casinos*, CHEROKEE PHOENIX (June 5, 2020), https://www.cherokeephoenix.org/Article/index/134813 and Ex. 9, Cherokee Nation, Responsible Hospitality, https://www.cherokeecasino.com/-/media/shared-content---hr-and-cc/re-opening-campaign/responsible-hospitality-v2/responsible-hospitality-v2.pdf?la=en&hash=B060BA5042D3E74D4F0BA18B69F49B7A (last visited Dec. 12, 2020). The Nation joins Defendant Insurers request to take judicial notice of the websites as "it is not uncommon for courts to take judicial notice of factual information found on the world wide web." *Prescott v. Oklahoma Capitol Pres. Comm'n*, 2015 OK 54, n. 34 (quoting *O'Toole v. Northrop Grumman Corp.*, 499

Those documents demonstrate that the Nation installed sanitation stations and barriers between patrons and employees, staggered seating and gaming machines, implemented mask requirements, etc. Defendant Insurers' Additional Undisputed Material Fact No. 12; *see also e.g., Ex. 9,* Responsible Hospitality at 10. These modifications meet the ordinary meaning of repair, "to restore to a sound or health state: renew." *Repair*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/repair (last visited Sep. 23, 2020); *Repair*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("To renew . . . after loss, expenditure, exhaustion, etc.").[21] Ironically, despite advancing the argument, Defendant Insurers provide no definitions for the terms "replace," "repair," or "rebuild." Indeed, the Nation completed the exact type of repairs other courts have recognized:

> In this case, it is undisputed that the interior of the building had to be cleaned, the air filters had to be changed multiple times, and smoke in the air within the theater had to dissipate before business could be resumed. . . . Defendant claims that this period of time cannot be considered "restoration" because no structural repairs were necessary. Once again, the Court can find no such limitation within the terms of the policy.

See, e.g., Oregon Shakespeare Festival Ass'n v. Great Am. Ins. Co., No. 1:15-CV-01932-CL, 2016 WL 3267247, at *6 (D. Or. June 7, 2016).

F.3d 1218, 1224–25 (10th Cir.2007)); *Burns v. Cline*, 2016 OK 99, 382 P.3d 1048, 1056 ("As the United States Court of Appeals for the Tenth Circuit has pointed out, it is not uncommon for courts to take judicial notice of factual information found on the World Wide Web."); *Farley v. City of Claremore*, 2020 OK 30, ¶ 13 ("In federal court, judicial notice of fact may occur when the fact is not subject to reasonable dispute and it 'can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.' The Oklahoma statute has similar language. Some federal courts have stated a court may take judicial notice of an indisputably accurate fact on the world wide web (or internet). . . .").

[21] "[R]epair—'to restore to a sound or health state.'" *Guadiana v. State Farm Fire & Cas. Co.*, No. CIV 07-326 TUC FRZ, 2012 WL 243737, at *6 (D. Ariz. Jan. 25, 2012).

II. THE TPIP POLICY DOES NOT EXCLUDE COVERAGE.

A. The TPIP's contamination and pollution exclusions do not apply.

Defendant Insurers off-handedly mention the TPIP Policy includes exclusions for pollution and contamination without any analysis as to why those provisions are applicable. To be clear, the Nation's losses result from the Pandemic—***NOT*** the pollution/contamination of COVID-19. But even if those exclusions could apply, Defendant Insurers have not met their burden.[22] Rather than conduct an investigation to prove a virus was on the Nation's property, [23] Defendant Insurers merely assert various viral, microbial, pollutant,[24] and contamination exclusions hoping the Court will do the heavy lifting. The carriers cannot make a blanket assertion that such exclusions bar coverage when the presence of the virus has not been established.[25]

Also, the pollution and contamination exclusion in the TPIP Policy is inapplicable to all-risk policies:

> Loss, damage, costs or expenses in connection with any kind or description of seepage and/or pollution and/or contamination, direct or indirect, arising from any cause whatsoever.
>
> * * *
>
> However, if the covered property is the subject of direct physical loss or damage for which the Company has paid or agreed to pay, then this Policy (subject to its

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[22] "[T]he insurer has a burden to show the loss is excluded by the policy." *Oklahoma Sch. Risk Mgmt. Tr.*, 2019 OK 3, ¶ 16.

[23] *Buzzard v. Farmers Ins. Co.*, 1991 OK 127, 824 P.2d 1105, 1109 ("To determine the validity of the claim, the insurer must conduct an investigation reasonably appropriate under the circumstances.").

[24] And, while that exclusion does not define pollution, the TPIP Policy includes a specific Pollution Policy, which defines pollutants as "any solid, liquid, gaseous or thermal irritant, or contaminant, including smoke, soot, vapors, fumes, acids, alkalis, chemicals, hazardous substances, hazardous materials, or waste materials, including medical, infectious and pathological wastes, at levels in excess of those naturally occurring," **except "Pollutants shall not include bacteria and virus."** TPIP Pollution Liability Policy at 18 (emphasis added) (The Pollution Policy further defines Pollution as dispersal of pollutants.). Regardless of whether the Court determines the TPIP Pollution Policy provides the relevant definition to pollution, or if it demonstrates that pollution is subject to an interpretation that omits viruses from the exclusion, the exclusion is inapplicable.

[25] The Nation already summarized *Duensing v. Traveler's Companies* in its Motion, where the Supreme Court of Montana found that viral contamination exclusions require proof of actual contamination to apply, and mere suspicion of viral contamination was insufficient. Defendant Insurers failed to refute the application of that case to the exclusions provided. See *Duensing v. Traveler's Companies*, summarized in the Nation's Motion for Partial Summary Judgment on Business Interruption Coverage at 14-15.

terms, conditions and limitations) insures against direct physical loss or damage to the property covered hereunder caused by resulting seepage and/or pollution and/or contamination.

TPIP Policy at 28. Because this is an all-risk policy, the Pandemic constitutes "direct physical loss . . . for which the Company has agreed to pay," and the Pollution/Contamination exclusion does not apply. *See Id.*

B. Defendant Insurers' various excess exclusions do not apply.

Prior to COVID, carriers were aware of the pandemic perils and often used clear and express language excluded that risk from property policies. Defendant Insurers nonetheless ask the Court to utilize a jumble of broad exclusions to deny the Nation's pandemic claim. But the Oklahoma Supreme Court has recently rejected the application of broad exclusions to particular events under all-risk policies. *Compare Oklahoma Sch. Risk Mgmt. Tr. v. McAlester Pub. Sch.*, 2019 OK 3, ¶ 24 ("[A] lack of specificity in the language may make an exclusion ambiguous when applied to a particular event.") *with Max True Plastering Co. v. U.S. Fid. & Guar. Co.*, 1996 OK 28, 912 P.2d 861, 865 ("[A]mbiguities are construed most strongly against the insurer."). Moreover, numerous courts have recently refused to apply generic virus exclusions to the Pandemic. For example, the District Court for the Middle District of Florida recently held: "The virus exclusion states that Sentinel will not pay for 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." *Ex. 10, Urogynecology Specialist of Florida LLC, v. Sentinel Insurance Company, Ltd.*, 6:20-CV-01174-ACC-EJK (Sep. 24, 2020) (internal citation omitted). But the court continued to say "Denying coverage for losses stemming from COVID-19, however, does not logically align with the grouping of the virus exclusion with other pollutants such that the Policy necessarily anticipated and intended to deny coverage for these kinds of business losses. . .

." *Id.* And that is the same conclusion reached by the *Elegant Massage* court from the Eastern District of Virginia:

> Accordingly, the Court finds that the Virus Exclusion particularly deals with the "[g]rowth, proliferation, spread or presence" of "virus, bacteria or other microorganism" just as it applies to " 'fungi' or wet or dry rot." . . . . This supports the interpretation that the Virus Exclusion applies where a virus has spread throughout the property. Other state and federal courts have interpreted similar virus, bacteria, and fungi exclusions in the same the way. *See, e.g., Mount Vernon Fire Ins. Co. v. Adamson*, 2010 WL 3937336, at *4 (E.D. Va. Sept. 15, 2010) (exclusions barring coverage for mold exposure barred claims for mold exposure); *Poore v. Main Street Am. Assurance Co.*, 355 F. Supp. 3d 506, 512 (W.D. Va. 2018) (finding mold exclusion barred coverage from losses stemming from mold in the insured's property); *Alexis v. Southwood Ltd. P'ship*, 792 So. 2d 100, 104 (La. Ct. App. 2001) (communicable disease exclusion barred coverage from illness after exposure to raw sewage); *Evanston Ins. Co. v. Harbor Walk Development, LLC*, 814 F. Supp. 2d 635, 652 (E.D. Va. 2011) (finding pollution exclusion which barred claims stemming from bodily injury or property damaged caused by pollutants barred claims stemming from bodily injury or property damage caused by pollutants). Therefore, in applying the Virus Exclusion there must be a direct connection between the exclusion and the claimed loss and not, as the Defendants argue, a tenuous connection anywhere in the chain of causation. That is, although the Virus Exclusion does require that the virus be the cause of the policyholder's loss, the connection must be the immediate cause in the chain. Here, Plaintiff is neither alleging that there is a presence of a virus at the covered property nor that a virus is the direct cause of the property's physical loss. Also, Plaintiff does not allege that the Executive Orders the Commonwealth of Virginia issued were as a result of "growth, proliferation, spread or presence" of virus contamination at the Plaintiff's property. . . . Therefore, Defendants have failed to meet its burden to show that the Virus Exclusion applies to Plaintiff's claim.

Ex. 7, Elegant Massage, LLC v. State Farm Mut. Auto. Ins. Co., No. 2:20-CV-265, 2020 WL 7249624, at *12–13 (E.D. Va. Dec. 9, 2020).

Although *Oklahoma Schools* provides the law the Court will rely upon, the application is not dissimilar to *Pan American World Airways, Inc. v. Aetna Casualty & Surety Co. Ex. 11,* 505 F.2d 989, 1000 (2d Cir. 1974). More specifically, when all-risk carriers fail to adopt a specific exclusion that is known and exists within the market ***"they acted at their own peril."*** *Id.* at 1001

(emphasis added).[26] Echoing *Pan Am*, Defendant Insurers here are aware of the pandemic peril and previously utilized pandemic exclusions. For example, the Nation's Motion referenced a pre-2016 Liberty Mutual exclusion that specifically excluded *suspected* and *threatened* viruses including *pandemics*, but such language is not utilized here. Likewise, Defendant Arch modified its viral exclusion with *suspected* or *threatened* language but limited its application to *physical damage* and failed to exclude reference pandemics. Immediately following the Pandemic, Defendant Hallmark released a new "Epidemic and Pandemic Exclusion" showing it could clearly and distinctly exclude such coverage. Meanwhile, the new TPIP Policy exclusion for Communicable Diseases was added one day after the Nation filed its claim. Taken together, Defendant Insurers were well aware of the pandemic peril,[27] knew how to craft clear and express language to exclude this Pandemic and have since published such exclusions. Unfortunately for Defendant Insurers, they failed to include an applicable exclusion within the TPIP Policy.

III. DAMAGES ARE NOT AT ISSUE AT THIS TIME.

Some excess Defendant Insurers believe the Nation is not entitled summary judgment because underlying carriers have not paid. This is wholly irrelevant as the Nation seeks a determination of coverage in its Motion, not damages,[28] and this is the same argument the Court rejected from Defendants Hallmark and Aspen's Motions to Dismiss.

Further, the Priority of Payments provision many of the "excess carriers" rely upon, states:

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[26] "From this discussion it should be evident that if the district court erred in its application of *contra proferentem*, it erred in the direction of giving it too little weight. It found that this 'ancient canon' is not a 'decisive concern.' But the maxim defines the scope of coverage as much as if it were a clause in the all risk policies. It is part of the understanding of the parties. The experienced all risk insurers should have expected the exclusions drafted by them to be construed narrowly against them, and should have calculated their premiums accordingly." *Pan Am.*, at 1003-04 (internal citations omitted).

[27] For example, Lloyd's published *Pandemic: Potential Insurance Impacts* in 2008, which stated: "A pandemic is inevitable. There have been a series of pandemics in history, since the 1600s these have had an average recurrence rate of 30-50 years." *Ex. 10* at 6. With regard to business interruption coverage specifically, the report warns that "***[c]ontract certainty may be a useful defence here.***" *Id.* at 21.

[28] "An interlocutory summary judgment may be rendered on liability alone, even if there is a genuine issue on the amount of damages." 12 O.S. § 2056 (D).

> In the event of loss ***caused by or resulting from more than one peril or coverage***, the limit of liability of the primary / underlying coverage shall apply first to the peril(s) or coverage(s) not insured by the excess layers and the remainder, if any, to the peril(s) or coverage(s) insured hereunder. Upon exhaustion of the limit of liability of the primary / underlying coverage, ***this Policy shall then be liable for loss uncollected from the peril(s) or coverage(s) insured hereunder***, subject to the limit of liability and the other terms and conditions as specified.

TPIP Policy at 8 (emphasis added). Here, however, the Nation alleges only ***one*** peril (the Pandemic) and only ***one*** coverage (business interruption coverage under the TPIP Policy), therefore the Priority of Payment provision offers no relief to carriers by its plain terms.[29]

IV. THE NATION OBJECTS TO DEFENDANT INSURERS' NOTICES OF SUPPLEMENTAL AUTHORITY.

Defendant Insurers' assertion that the November 9, 2020 Order of the U.S. District Court for the Western District of Oklahoma in *Goodwill Industries of Central Oklahoma, Inc. v. Philadelphia Indemnity Insurance Co* addresses "allegations and arguments" that are "virtually identical" to those by the Nation is false. No. CV-20-511-R, 2020 WL 6561315 (W.D. Okla. Nov. 9, 2020). In fact, the policy at issue in *Goodwill* and the vast majority of supplemental authority submitted by Defendant Insurers utilize Insurance Services Office, Inc. ("ISO") language substantially different than that of the TPIP Policy. *Colony Ins. Co. v. Jackson*, No. 09-CV-780-TCK-TLW, 2011 WL 2118728, at *3 (N.D. Okla. May 27, 2011) ("ISO is a national insurance policy drafting organization that develops standard policy forms and files them with each state's insurance regulators. See *French v. Assurance Co. of Am.*, 448 F.3d 693, 697 & n. 1 (4th Cir.2006)."). Unlike ISO policies, the TPIP Policy was created, designed, and marketed specifically for tribes:

> Tribal First truly does "insure Native America." We are the largest provider of tribal insurance solutions to Indian Country overall and are the leader in our specialty areas of Indian gaming facilities, Tribal workers' compensation, high-value

[29] And, as an aside, the Priority of Payments provision is ambiguous on its face as the second emphasized section above reads as though the TPIP Policy is itself the excess policy.

> property (casino), and tribal self-insurance. Our programs are backed by "A" rated insurers and are designed to protect both the legal sovereignty of Native American tribes and their physical and financial assets.

Tribal First, ALLIANT, https://www.alliant.com/Industry-Solutions/Tribal-Nations/Pages/default.aspx (last visited on December 3, 2020) (emphasis added).

When the TPIP Policy is "read as a whole" as required by the Court, it is clear that neither *Goodwill* nor the other ISO policy cases listed in Defendant Insurers' Notices of Supplemental Authority are applicable. *Oklahoma Sch. Risk Mgmt. Tr.*, 2019 OK 3, ¶ 22. The Nation has dedicated substantial argument to demonstrate that "all risk of" within the triggering language broadens the scope of coverage contemplated by the TPIP Policy; conversely, the *Goodwill* court did not provide analysis of that language. *See generally Goodwill Indus. of Cent. Oklahoma*, No. CV-20-511-R, 2020 WL 6561315. Moreover, the ISO Policy at issue in *Goodwill* defined "Cause of Loss" and required a "suspension" of "operation" due to "direct physical loss of or damage to property." But such words, definitions, and provisions are absent here, casting doubt on Defendant Insurers' reliance on Goodwill. Furthermore, the triggering language within the ISO Policies and the TPIP Policy are simply not the same. Even courts cited by Defendant Insurers have assigned special meaning to "direct physical loss of property" in the ISO Policies, unlike all risk of direct physical loss generally, which neither has property as the object of the clause nor include the of modifying the scope of loss. To interpret these policies the same would render those different words, definitions, and provisions meaningless against Oklahoma law.

For example, many of the cases relied on by Defendant Insurers noted that "direct physical loss *of*" has a unique meaning within policy interpretation to include permanent dispossession without physical damage. *E.g., Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.*, No. 20-CV-03213-JST, 2020 WL 5525171, at *3 (N.D. Cal. Sept. 14, 2020) ("The court reasoned that 'the '*loss of*'

property contemplates that the property is misplaced and unrecoverable, without regard to whether it was damaged." (emphasis in original)). And still other courts have distinguished ISO policies from others based on the other provisions therein: The court in, stated:

> Plaintiff heavily relies on Studio 417, Inc. v. The Cincinnati Insurance Co., 20 C 3127-SRB (S.D. Mo Aug. 12, 2020), a Missouri case that found that the coronavirus cause a physical loss to property warranting insurance coverage. That court rested its decision on that policy's expansive language, language very different from the policy in the instant case. The unambiguous language in the instant policy warrants a different conclusion.

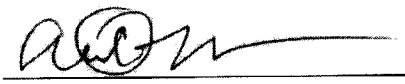
Sandy Point Dental, PC v. Cincinnati Insurance Company, 2020 WL 5830465 fn. 3 (N.D. Ill Sep. 21, 2020). The Nation can assure the Court that the language in the TPIP Policy is even more expansive and inclusive than the language in the *Studio 417* case, as recognized in *Sandy Point*.

While Defendant Insurers contend a "strong majority" of courts support its argument for dismissal, that does not appear true. According to the University of Pennsylvania Law School's "COVID Coverage Litigation Tracker"—which keeps a nationwide tally on COVID-related business interruption litigation—courts are split on the issue, granting and denying insurers' motions to dismiss in equal measure. See Outcomes on Merits-Based Motions to Dismiss, COVID Coverage Litigation Tracker, available at https://cclt.law.upenn.edu/judicial-rulings/ (noting eleven grants of dismissal and eleven denials when policy did not contain virus exclusion). This split in authority, combined with the lack of Oklahoma-specific case law on the issue, granting the Nation's Motion for Partial Summary Judgment.

CONCLUSION

The Nation respectfully requests the Court find the TPIP Policy issued by Defendant Insurers requires the Nation be indemnified for fortuitous losses related to the COVID-19 Pandemic Disaster under its business interruption coverage. The Nation further requests this Court strike the supplemental authorities filed by Defendant Insurers from the record.

Respectfully submitted,



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