Commonwealth of Massachusetts
Supreme Judicial Court

Appeals Court
No. 2023-P-0407

75 ARLINGTON ST., INC.; 202 WASHINGTON ST., INC; 111 SOUTH 17TH STREET, INC.; ONE PATRIOT PLACE LLC; 443 LEXINGTON AVENUE, INC.; 427 WALNUT ST., LLC; 201 MAIN STREET LLC; 151 GRANITE STREET LLC; AND 51 LIBERTY DRIVE, LLC,
Plaintiffs-Appellants,

v.

STRATHMORE INSURANCE CO.,
Defendant-Appellee.

ON APPEAL FROM A JUDGMENT OF THE SUPERIOR COURT FOR SUFFOLK COUNTY
NO. 22-0051-BLS2 (SALINGER, J.)

UNITED POLICYHOLDERS' MOTION FOR LEAVE TO FILE A BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS

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Pursuant to Mass. R. App. P. 17(a) and (b), United Policyholders ("UP") hereby move for leave to file an *amicus curiae* brief in support of the Plaintiffs-Appellants' Application for Direct Appellate Review in the above-captioned matter and to do so by November 10, 2023, which is more than 21 days before the scheduled oral argument on December 15, 2023. UP's *amicus* brief is conditionally filed herewith and attached as Exhibit A.

Amicus curiae have sought consent from both parties to file the attached *amicus* brief in support of the application for direct appellate review. Counsel for Plaintiffs-Appellants granted consent, whereas counsel for Defendant-Appellee denied consent. At this time, United Policyholders is unsure whether Defendant-Appellee will seek to oppose leave, but we file the attached *amicus* brief conditionally along with this motion for leave to file. We respectfully request that leave be granted.

In support of this motion, UP respectfully submits as follows:

United Policyholders, a non-profit 501(c)(3) organization, was founded in 1991. Since then, UP has served as a respected voice for the interests of consumers and policyholders across the country. UP never accepts money from insurance companies. Rather, grants, donations, and volunteers support UP's work.

Regarding the COVID-19 pandemic, UP has advocated for the rights of policyholders and consumers across the country. From 2020 onwards, UP has

assisted business owners whose operations have been impacted by COVID-19 and consequent public-safety orders.

For decades, UP has made deliberate choices about where to appear in and file *amicus* briefs in many state and federal courts around the country. The U.S. Supreme Court and state supreme courts have cited UP *amicus* briefs. *See, e.g.*, *Humana Inc. v. Forsyth*, 525 U.S. 299, 314 (1999); *Sproull v. State Farm Fire & Cas. Co.*, 184 N.E.3d 203, 220-21 (Ill. 2021); *Nat'l Indem. Co. v. State*, 499 P.3d 516, 543 (Mont. 2021); *Cont'l Ins. Co. v. Honeywell Int'l, Inc.*, 234 N.J. 23, 64 (2018); *Allstate Prop. & Cas. Ins. Co. v. Wolfe*, 105 A.3d 1181, 1185-86 (Pa. 2014); *Julian v. Hartford Underwriters Ins. Co.*, 35 Cal. 4th 747, 760-61 (2005).

This case raises important questions concerning the correct interpretation of insurance policies. Policyholders across the country – businesses and individuals alike – buy "all-risk" insurance policies for protection against unexpected disaster. Confidence that insurance will pay spurs growth in our economy and encourages people and businesses to take risks and pursue innovation. Insurance therefore is a crucial engine of the economy; and UP argues for the rights of policyholders and consumers given the protective purpose of insurance and the public's interest in the proper functioning of insurance and insurance markets. *German All. Ins. Co. v. Lewis*, 233 U.S. 389, 429-30 (1914) ("[I]nsurance is affected with a public interest . . . .").

UP seeks to fulfill the classic role of an *amicus curiae*, supplementing the efforts of the parties and their counsel, and drawing the Court's attention to points that are not addressed by the parties but are core to UP's mission. That is an appropriate role for UP, as an *amicus curiae* often can "focus the court's attention on the broad implications of various possible rulings." Robert L. Stern, Eugene Greggman & Stephen M. Shapiro, Supreme Court Practice: For Practice in the Supreme Court of the United States 570-71 (1986) (quoting Bruce J. Ennis, Effective Amicus Briefs, 33 Cath. U. L. Rev. 603, 608 (1984)). UP does that here by demonstrating to the Court how the insurance industry is attempting to leverage certain untested, and scientifically incorrect, factual conclusions in *Vervaine Corp. v. Strathmore Ins. Co.*, 184 N.E.3d 1266, 1279 (Mass. 2022) and other cases to contract the scope of standard-form insurance policy language without regulatory supervision.

Accordingly, UP moves this Court for leave to file this letter as *amicus curiae*.

WHEREFORE, United Policyholders respectfully request leave to file the *amicus* brief in support of the Plaintiffs-Appellants' Application for Direct Appellate Review, as conditionally filed herewith in Exhibit A, and to do so by November 10, 2023, which is more than 21 days before the December 15, 2023 oral argument.

Respectfully submitted,
United Policyholders,
By their attorney,

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CERTIFICATE OF SERVICE

I, Catherine R. Castaldo, hereby certify that a true copy of the above document, Motion for Leave to File a Brief of *Amicus Curiae* in Support of Plaintiffs-Appellants, was served upon the following by email/electronic service through eFileMA on November 10, 2023.

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EXHIBIT A

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AMICUS BRIEF IN SUPPORT OF APPLICATION FOR DIRECT APPELLATE REVIEW

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Judicial Court Rule 1:21, United Policyholders ("UP") is a non-profit 501(c)(3) organization. UP does not issue any stock or have any parent corporation, and no publicly-held corporation owns stock in UP.

PREPARATION OF *AMICUS* BRIEF

Pursuant to Appellate Rule 17(c)(5), UP and its counsel declare that:

(a) no party or party's counsel authored this brief in whole or in part;

(b) no party or party's counsel contributed money to fund preparing or submitting the brief;

(c) no person or entity other than the *amicus curiae* contributed money that was intended to fund preparing or submitting a brief; and

(d) counsel has not represented any party in this case or in proceedings involving similar issues, or any party in a case or legal transaction at issue in the present appeal.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amicus Curiae UP files this brief to give this Court further context in relation to three issues. First, UP demonstrates Strathmore Insurance Company ("Strathmore") specifically intended to provide coverage for business interruption losses like that claimed by the policyholder ("Davio's"), which are caused by virus. Indeed, this was coverage that Strathmore expressly told state insurance regulators that it intended to provide and that its policyholders would expect to receive.

Accordingly, the Superior Court erred in rejecting Davio's well-pleaded allegations, entirely consistent with the admissions of Strathmore, that SARS-CoV-2 could and did cause "direct physical loss or damage" to its property which, in any event, should have been as true at the pleading stage.

Second, UP demonstrates that insurers, including Strathmore, have, for more than sixty years, sold standard-form property insurance policies containing coverage triggered by direct "physical loss" or "physical damage." Throughout this period, in high-profile cases, courts gave a broad legal construction of those terms, finding coverage triggered in contexts essentially identical to those here – including where property is infused or threatened with dangerous substances like asbestos, ammonia, smoke, bacteria, mold spores or poisonous spiders. Insurers and their drafting organization ISO[1] knew this because it was their business to know it: they monitored the legal construction courts gave the standard-form terms they chose for their policies, and if they disagreed with that construction, they negotiated changes to that language with regulators.

And, during this sixty-year period, ISO did negotiate limited changes. Notably, ISO did not seek a major change: revising the broad trigger for Business Income coverage to require "tangible alteration" to property. Instead, ISO took a

[1] The Insurance Services Office, along with other insurance industry drafting organizations of the standard-form language at issue, are referred to herin as "ISO."

targeted approach, from the other direction. When ISO became concerned about claims involving a particular substance under its broad trigger, it drafted a "laser" exclusion that insurers could add to exclude loss or damage from that substance. In this way, ISO developed exclusions for radiation, asbestos, silica, mold, bacteria and, most important for this case, virus.

As Davio's persuasively pleads and explains in its brief, SARS-CoV-2 actually does alter and damage property in a tangible way.

When evaluating those pleadings, the Court should consider that the insurance industry knew and represented that its undefined terms direct "physical loss" or "physical damage" include situations where property cannot safely be used. At a minimum, however, Strathmore knew its language was at least ambiguous as to whether it is triggered by losses caused by a virus, but chose not to employ the ISO Virus Exclusion in the Davio's Policy. Strathmore "act[ed] as [its] own peril," and its election must have a consequence: this Court should reverse the Superior Court and permit Davio's a chance to prove a covered loss.

Third, at a minimum, Davio's is entitled to further discovery to prove what Strathmore knew about coverage its standard form policies provided for loss from the presence of a deadly virus.

STATEMENT OF INTEREST OF *AMICUS CURIAE* UP

For nearly 30 years, the non-profit (501)(c)(3) United Policyholders ("UP") has been a source of insurance coverage and claim information and an advocate for the interests of individual and commercial insurance consumers throughout the entire United States. UP assists purchasers of insurance and those pursuing claims for loss indemnification. UP is routinely called upon to help policyholders secure paid-for benefits in the wake of large-scale national disasters such as floods, windstorms, and hurricanes and recently, pandemics. In the state of Massachusetts UP has assisted coastal property owners and purchasers of disability insurance and worked with the Division of Insurance on various matters.

Since March 2020 UP has been engaged in the critical effort to assist business owners around the country whose operations have been impacted by COVID-19 and public safety orders and to present considerations to courts and regulators on the special rules of contract construction that are uniquely imperative in the context of insurance.

Commerce, government and society benefit when losses are indemnified through insurance purchased by individuals and businesses. The insurance system is woven into the fabric of our economy through mandatory purchase requirements, prudent personal and business risk management and the pricing of goods and services. Each state regulates insurance contracts and transactions through its own

set of laws and regulations, yet most insurers operate in multiple states. Because insurers must meet their own revenue objectives, plus the reasonable expectations of their policyholders, *plus* the demands of their investors and shareholders, judicial oversight is essential to maintain the purpose and value of insurance purchased by individuals and businesses.

Insurance policies are adhesive in nature and their language is increasingly less standardized. That means insurers are using far more creativity in drafting policy terms and conditions and exclusions and limitations than in the past. This has made it much harder for state insurance regulators to review those terms and limitations and determine whether they will effectuate or deprive the purchaser of the protection they intend to purchase. Compounding that challenge to state insurance regulators is that data mining, artificial intelligence and computerized risk modeling have made it literally impossible to give every new policy form the scrutiny it deserves.

Effectuating indemnification in case of loss despite these factors remains a fundamental economic and social objective that courts can advance. UP respectfully seeks to assist this Court in fulfilling these important roles.

UP serves on the Federal Advisory Committee on Insurance, which briefs the Federal Insurance Office and in turn, the U.S. Treasury Department. UP's Executive Director has been an official consumer representative to the National Association of

Insurance Commissioners since 2009. In that role, UP assists regulators in monitoring policy language and claim practices through presentations and collaboration and the development of model laws and regulations.

UP gave three separate NAIC presentations in 2020 on the topic of coverage and claims for Business Interruption related to COVID-19 and public safety orders. The gist of UP's presentations was that there is evidence that insurers were not fully candid with regulators about the significance of virus and pandemic-related limitations and exclusions they added to their policies. Although insurers had paid business interruption losses from hotel reservation cancellations due to SARS, when they added limitations and exclusions after that event, some told regulators they had never paid virus-related losses and that therefore there would be no rate decrease associated with the policy language change. Because there was no rate decrease and no clear notice that virus and pandemic related losses could be excluded, commercial policyholders were not aware of insurers' efforts to drastically reduce business interruption loss protection until 2020. Because policyholders (including plaintiff in this case) had no notice of a potentially very substantial hole in their insurance, they had no opportunity to cure the gap, hence the need for special judicial handling and careful scrutiny of this case.

Since 1991 UP has filed numerous *amicus curiae* briefs in federal and state appellate courts across the country. *Amicus* briefs filed by UP have been expressly

cited in the opinions of state supreme courts as well as the U.S. Supreme Court. *See Humana Inc. v. Forsyth*, 525 U.S. 299, 314 (1999); *Sproull v. State Farm Fire & Cas. Co.*, 2021 IL 126446, at *24 (Ill. 2021); *Julian v. Hartford Underwriters Ins. Co.*, 110 P.3d 903, 911 (Cal. 2005); *Cont'l Ins. Co. v. Honeywell Int'l, Inc.*, 188 A.3d 297, 322 (N.J. 2018); *Allstate Prop. & Cas. Ins. Co. v. Wolfe*, 105 A.3d 1181, 1185-6 (Pa. 2014).

By submitting a brief in this matter, UP seeks to fulfill the classic role of *amicus curiae* in a case of general public interest, supplementing the efforts of counsel, and drawing the Court's attention to law that escaped consideration. This is an appropriate role for *amicus curiae*. As commentators have often stressed, an *amicus* is often in a superior position to "focus the court's attention on the broad implications of various possible rulings." R. Stern, E. Greggman & S. Shapiro, Supreme Court Practice, 570-71 (1986) (quoting Ennis, *Effective Amicus Briefs*, 33 Cath. U.L. Rev. 603, 608 (1984)).

ARGUMENT

I. DAVIO'S' INTERPRETATION IS SUPPORTED BY EVIDENCE STRATHMORE INTENDED COVERAGE FOR VIRUS-CAUSED BUSINESS INTERRUPTIONS AND DELETED THE VIRUS EXCLUSION BECAUSE IT KNEW ITS POLICYHOLDERS EXPECTED THIS COVERAGE.

The Superior Court erred in disregarding Davio's' pleading and attached exhibits setting forth evidence that its interpretation of "direct physical loss or

damage" to property was not only reasonable, but correct. Davio's submitted evidence of state regulatory filings from Greater New York Mutual Insurance Company, Insurance Company of Greater New York, INSCO, and the defendant, Strathmore, in which Strathmore admitted that viruses have long been anticipated and understood in the insurance trade to cause property damage and business interruption loss.[2]

More specifically, in 2005, ISO introduced the ISO Virus Exclusion to standard-form property insurance policies, while simultaneously acknowledging that viruses have the potential to cause damage to property and related business interruption losses.[3] Subsequently, Strathmore sought approval in New York to make a variation of the ISO Virus Exclusion "optional" rather than "mandatory," so it could issue policies to certain classes of policyholders (including, specifically, restaurants) without the ISO Virus Exclusion.[4]

Strathmore's regulatory filings directly contradict its position and the Superior Court's overly-narrow interpretation, by demonstrating that insurance companies have long been aware that without a specific exclusion for "virus" or disease-causing

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2 *See* Plaintiffs-Appellants' Application for Direct Appellate Review, at 37–38 (referring to First Amended Complaint, at ¶¶ 57–69).

3 *See id.* at 38 (referring to First Amended Complaint, at ¶¶ 65–67).

4 *See id.* at 344 (referring to First Amended Complaint at Exhibit B, Explanatory Memorandum).

agents, their "all risk" property insurance policies cover losses caused by viruses and disease-causing agents that make property unusable or unsafe to people. Strathmore explained this specific issue to New York's state insurance regulator after the regulator objected that Strathmore's proposal for an "optional" virus exclusion could conceivably lead to rate discrimination. The potential for discrimination that concerned the regulator arose because ISO had not accounted for any rate reduction when introducing its new ISO Virus Exclusion and had instead falsely asserted that the exclusion would not reduce existing coverage.

In Strathmore's supplemental explanation proposing a method for rating and charging coverage for virus-related perils, Strathmore pointed out that this coverage is simply provided by omission of the ISO Virus Exclusion. Strathmore's "Explanatory Memorandum" to the New York regulator expressly acknowledged the coverage that exists for "**this type of loss ('pandemic')**" in the absence of a virus exclusion.[5] In the Explanatory Memorandum, Strathmore anticipated that viruses could result in potential covered losses "in Business Personal Property ('stock') and Business Interruption/Time Element coverage segments."[6] Strathmore also gave specific examples of communicable diseases spreading in indoor, highly trafficked spaces (like the plaintiff's restaurants) that may create covered losses, and

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5 *Id.*

6 *Id.*

recognized that "restaurants are probably the most likely to experience such events."[7]

Strathmore went so far as to acknowledge that a "pandemic" loss from "contagious disease" could involve a wide variety of vectors, including disease "transmitted to third parties via ingestion," exposure due to a "Typhoid Mary" or via "direct contact to an insured's products," or "spread through a HVAC system" in a building.[8] Although Strathmore expressed its optimism that a virus might not spread from building to building throughout a large city like New York, it recognized this was part of the "pandemic" type of loss it was insuring:

> While it is possible that some type of disease (airborne Legionnaires Disease, for example) could spread through a HVAC system in any selected Apartment or Condo Building, it is highly unlikely that it would spread throughout a vast proportion of the apartments and condominiums across NYC that we insure.[9]

Strathmore further **admitted** their restaurant-owning policyholders, like the policyholder here, reasonably expected this coverage and would never willingly part with it without a reduction in rates/premiums:

> [W]e do not anticipate that any of our insureds will voluntarily request this [virus] exclusion; some (habitational risks) because it would never enter their minds as a problem for which they would voluntarily reduce coverage; others (restaurants) because they feel that such an event is

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7 *Id.*

8 *Id.*

9 *Id.*

> well within the realm of possible fortuitous occurrences and should be covered should such an event arise.[10]

Thus, the Strathmore filings put an end to the lie that a virus cannot cause "direct physical loss of or damage" to property. Strathmore expressed its intent to sell its policyholders insurance against that risk. The Strathmore filings demonstrate that insurance companies understood the meaning of "direct physical loss of or damage" to property includes the impact of disease-causing agents on the operation and profitability of a business. The Strathmore filings show that it **specifically expected** that merely removing a virus exclusion from a property insurance policy restores the expected coverage for virus-caused losses that existed before the introduction of virus exclusions. Because Strathmore's true understanding of the coverage is also set forth in the First Amended Complaint, it must also be accepted as true as a factual matter when the Court engages in the interpretative task.

Here, holding Strathmore to what it said to the New York regulator is no different than holding Strathmore to what it said directly the policyholder: those statements are the complete context and reveal Strathmore previously enunciated the policyholder's interpretation as its own interpretation. When insurance companies attempt to misrepresent their policy wording to state insurance regulators or to courts, or when statements to these authorities differ (as here), it is particularly

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10 *Id.*

important to policyholders for courts to understand this process by which insurance industry drafting organizations like ISO or insurer groups like Strathmore seek approval to sell standard-form insurance policy language. The process is set forth in detail in *Morton International, Inc. v. General Accident Insurance Co.*, 629 A.2d 831 (N.J. 1993). First, the insurance industry will identify a change it wishes to make to standard forms, such as an exposure it wishes to exclude.[11] The insurance industry drafting organizations will draft the change.[12] The insurance industry drafting organizations will then seek regulatory approval, typically by submitting the same change and the same explanatory memorandum to each of the state regulators and meeting with individual regulators as necessary.[13] The insurance industry drafting organizations will then negotiate with the insurance regulators with regard to the changes they seek to make and whether those changes will require adjustment of rates.[14]

For present purposes, two points are critical. First, once approval is obtained, the standard form is sold throughout the United States, with no ability of individual policyholders to negotiate changes.[15] As *Morton* explained in relation to the

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11 *Id.* at 849-50.

12 *Id.* at 850.

13 *Id.* at 851.

14 *Id.* at 851-52.

15 *Id.* at 851.

insurance industry's efforts, through the Insurance Rating Board ("IRB"), an ISO predecessor, to add a pollution exclusion to the standard-form comprehensive general liability ("CGL") policy:

> In considering the IRB's explanatory memorandum concerning the effect of the pollution-exclusion clause which the record suggests was the only explanation offered to New Jersey insurance officials-we accord special significance to the process by which that clause gained approval in New Jersey and other states. Realistically, once the clause gained regulatory approval, it was uniformly adopted as an endorsement to the standard form CGL policies that were issued to innumerable commercial enterprises and governmental agencies for more than a decade. The abundant case law called to our attention by counsel for all parties may be regarded merely as an illustrative sample of the virtually universal inclusion of the standard clause, or one of its derivatives, in CGL policies issued throughout the United States. **Of course, after regulatory approval the specific provisions of the pollution-exclusion clause ordinarily were not negotiable by purchasers of CGL policies.** As some commentators observe, the typical commercial insured rarely sees the policy form until after the premium has been paid. Ballard and Manus, supra, 75 Cornell L.Rev. at 621; W. David Slawson, Mass Contracts: Lawful Fraud in California, 48 S.Cal.L.Rev. 1, 12 (1974). **Accordingly, to the extent that the pollution-exclusion clause ever was subjected to arms-length evaluation by interests adverse to the insurance industry, that evaluation occurred only when the clause was submitted to and reviewed by state regulatory authorities**.[16]

Second, because drafting organizations and insurer groups like Strathmore seek approval for a standard-form on behalf of all of their members for sale throughout the United States, statements by these groups to any regulator as to the content of the standard form bind all of the member companies everywhere. This is why the

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16 *Id.* at 852-53 (emphasis added).

Morton court looked to what the IRB said on behalf of its members in New Jersey, Georgia, West Virginia, Kansas, Puerto Rico, and elsewhere. [17]

Because Strathmore's interpretation was set forth in the First Amended Complaint, it should have been accepted as true by the Superior Court when resolving the Motion to Dismiss. To the extent the matter was considered as an issue of evidence, context to words in a contract, extrinsic evidence of usage of a word in trade, or a specialized meaning, or industry and trade practices, may be considered to prove the meaning of a word or phrase in an insurance policy or contract, or to establish an ambiguity.[18] This evidence should not have been disregarded because it not only establishes that the policyholder's interpretation is reasonable (and thus

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17 *See id.* at 851-54.

18 *See Commercial Union Ins. Co. v. Seven Provinces Ins. Co.*, 217 F.3d 33, 38-39 (1st Cir. 2000) (applying Massachusetts law) (holding the district court "properly considered extrinsic evidence to determine what the parties meant" where "each side proffered an expert who worked in the insurance business and could testify to what the terms in the policy must have meant in light of industry practice."); *Affiliated FM Ins. Co. v. Constitution Reins. Corp.*, 626 N.E.2d 878, 881 (Mass. 1994) ("Where, as here, the contract language is ambiguous, evidence of trade usage is admissible to determine the meaning of the agreement."); *Cohen v. Union Warren Sav. Bank*, 1991 Mass. App. Div. 95, 97, 1991 Mass. App. Div. LEXIS 49, at *7 (1991) ("Where, however, the policy terms are ambiguous and the coverage issue is reasonably disputed, a court may consider extrinsic evidence of the surrounding circumstances and of the parties' intent. For example, evidence of the construction given to the language by the parties and of the customary usage of persons in the same commercial setting is normally admissible. If the meaning of the policy terms remains unclear, the policy is generally construed in favor of the insured in order to promote the policy's objective of providing coverage.").

sufficient to prevail in any ambiguity analysis) but also **correct** and **subjectively intended** by Strathmore.

II. FOR SIXTY YEARS, THE INSURANCE INDUSTRY HAS KNOWN THAT ITS STANDARD-FORM BUSINESS INCOME TRIGGER WAS BEING READ TO APPLY TO LOSS OR DAMAGE FROM A VIRUS, AND ITS ELECTION NOT TO ADD AN EXPRESS VIRUS EXCLUSION MUST HAVE CONSEQUENCES.

Strathmore cannot reasonably contest that it was aware that policyholders, courts, insurers, and ISO had – for decades – concluded that standard-form direct "physical loss" or "physical damage" language was triggered by situations where property was rendered unfit or unsafe for its intended use, regardless of whether such property had suffered "tangible alteration." Strathmore further knew that ISO's response to this was not to narrow the broad trigger, but to draft laser exclusions like that for physical loss or damage from "virus." At a minimum, Strathmore knew that its standard-form policy language could be read to apply in situations like that at issue here, and Strathmore did not eliminate that possibility by appending ISO's Virus Exclusion or Strathmore's own virus exclusion; under Massachusetts law, its failure to act must have a legal consequence.

(A) The Insurance Industry Expanded the Business Income Trigger from "Damage" or "Destruction" in "Named Peril" Forms to "Loss" or "Damage" To Match the Breadth of "All Risk" Forms.

The first U.S. forms providing Business Income coverage were "Use and Occupancy" forms, which were triggered by "damage" to or "destruction" of

property.[19] This limited trigger was a function of the sole peril covered by these polices – fire – that inexorably causes "damage" or "destruction."[20] In the middle of the last century, "Use and Occupancy" forms were increasingly triggered by damage or destruction by additional named perils, including lightning, explosion, collapse, etc.[21] Again, given that these named perils all wreaked "damage" or "destruction," there was no need to employ a broader Business Income trigger.

In the 1960s and 1970s, however, insurers began to add Business Income coverage to "all risks" forms,[22] which cover loss from all fortuitous causes unless expressly excluded.[23] As a general matter, because the insurance industry expanded coverage beyond certain named perils to all risks, it also had to expand the Business Income trigger from "damage" or "destruction" of property to "loss" or "damage" to property,[24] so as to address all the ways any risk might affect property, such as

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19 *See, e.g.*, *Brecher Furniture Co. v. Firemen's Ins. Co. of Newark*, 191 N.W. 912, 912 (Minn. 1923) (noting that Use and Occupancy policy was triggered when building was "destroyed or damaged" by fire).

20 *See, e.g.*, *Fidelity-Phenix Fire Ins. Co. v. Benedict Coal Corp.*, 64 F.2d 347, 349-50 (4th Cir. 1933).

21 *See, e.g.*, *National Children's Expositions Corp. v. Anchor Ins. Co.*, 279 F.2d 428, 429 n.1 (2d Cir. 1960).

22 *See, e.g.*, *Datatab, Inc. v. St. Paul Fire & Marine Ins. Co.*, 347 F. Supp. 36, 37 (S.D.N.Y. 1972).

23 *See Parks Real Estate Purchasing Group v. St. Paul Fire & Marine Ins. Co.*, 472 F.3d 33, 41 (2d Cir. 2006).

24 *See, e.g.*, *Great N. Oil Co. v. St. Paul Fire & Marine Ins. Co.*, 227 N.W.2d 789, 792 (Minn. 1975).

by theft or burglary.[25] In short, for more than forty years, the insurance industry's standard forms have expressly covered Business Income from "loss" of property, and for this reason contained no requirement that property suffer tangible damage or alteration.

This history is especially relevant in the COVID-19 context. For instance, many cases ruling against policyholders have, urged by insurers, found that "loss" means total destruction and "damage" means something short of total ruin.[26] Insurers know this is wrong, and contravenes their intent: "loss" cannot mean "destruction" because insurers specifically replaced "destruction" with "loss."

(B) From 1957 through 2002, Courts Across the United States Concluded that Policyholders Were Correct in Asserting that Events Rendering Property Unfit or Unsafe for Intended Use Caused Direct Physical Loss or Damage.

For more than sixty years, there have been issues as to whether unusual events – *i.e.*, events other than a fire, collapse or tornado – cause direct physical "loss" or "damage" to property. The parties will no doubt discuss these cases at length, and UP will not duplicate that discussion. What is important for present purposes is that

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[25] Charles M. Miller, Richard P. Lewis and Chris Kozak, "COVID-19 and Business-Income Insurance: The History of 'Physical Loss" and What Insurers Intended It To Mean," 57 TORT, TRIAL & INS. PRAC. L.J. 675, 683 (2022) (attached hereto as Ex. **1**), at 4.

[26] *See, e.g., Uncork & Create LLC v. Cincinnati Ins. Co.*, 27 F.4th 926, 931-32 (4th Cir. 2022).

there were cases finding standard-form property insurance policies containing the language at issue here to have been triggered in such circumstances from the 1950s through 2002.[27]

(C) The Insurance Industry Made Payments for Claims of Loss from the Loss or Damage to Property Caused by SARS-CoV-1.

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[27] In chronological order: *American Alliance Ins. Co. v. Keleket X-Ray Corp.*, 248 F.2d 920, 925 (6th Cir. 1957) (radon dust and gas); *Hughes v. Potomac Ins. Co.*, 18 Cal. Rptr. 650, 655 (App. Ct. 1962) (home which became perched on the edge of a cliff); *W. Fire Ins. Co. v. First Presbyterian Church*, 437 P.2d 52, 54 (Colo. 1968) (gasoline vapors); *Cyclops Corp. v. Home Ins. Co.*, 352 F. Supp. 931, 937 (W.D. Pa. 1973) (vibration of motor, without apparent damage, caused it to be shut down); *Hampton Foods, Inc. v. Aetna Cas. & Sur. Co.*, 787 F.2d 349, 352 (8th Cir. 1986) (risk of collapse necessitated abandonment of grocery store) (emphasis added); *Pillsbury Co. v. Underwriters at Lloyd's, London*, 705 F. Supp. 1396, 1398-99 (D. Minn. 1989) (finding creamed corn which became accidentally susceptible to spoilage); *Hetrick v. Valley Mut. Ins. Co.*, 15 Pa. D. & C. 4th 271, 1992 WL 524309, at *3 (Pa. Ct. Com. Pl. May 28, 1992) (oil fumes); *Largent v. State Farm Fire & Cas. Co.*, 842 P.2d 445, 446 (Or. Ct. App. 1992) (methamphetamine fumes could cause "*accidental direct physical loss*") (emphasis added); *Farmers Ins. Co. v. Trutanich*, 858 P.2d 1332, 1335 (Or. Ct. App. 1993) (methamphetamine odor); *Arbeiter v. Cambridge Mut. Fire Ins. Co.*, No. 9400837, 1996 WL 1250616, at *2 (Mass. Super. Ct. Mar. 15, 1996) (oil fumes); *Murray v. State Farm Fire & Cas. Co.*, 509 S.E.2d 1, 17 (W. Va. 1998) (home rendered dangerously unlivable by the presence of falling rocks); *Matzner v. Seaco Ins. Co.*, 9 Mass. L. Rptr. 41, 1998 WL 566658, at *4 (Mass. Super. Ct. Aug. 12, 1998) (carbon monoxide); *Columbiaknit, Inc. v. Affiliated FM Ins. Co.*, No. 98-434-HU, 1999 WL 619100, at *7-8 (D. Or. Aug. 4, 1999) (clothes impregnated with mold or mildew); *Board of Educ. v. International Ins. Co.*, 720 N.E.2d 622, 625-26 (Ill. App. Ct. 1999) (asbestos); *Sentinel Mgmt. Co. v. Aetna Cas. & Sur. Co.*, 615 N.W.2d 819, 825-26 (Minn. 2000) (asbestos); *Prudential Prop. & Cas. Ins. Co. v. Lillard-Roberts*, No. CV-01-1362-ST, 2002 WL 31495830, at *8-9 (D. Or. June 18, 2002) (mold); *Graff v. Allstate Ins. Co.*, 54 P.3d 1266, 1269 (Wash. Ct. App. 2002) (methamphetamine vapors); *Yale Univ. v. CIGNA Ins. Co.*, 224 F. Supp. 2d 402, 413 (D. Conn. 2002) (asbestos and lead).

Consistent with this forty-plus years of authority, in 2002-2004, the insurance industry paid Business Income claims for loss caused by the original novel coronavirus, SARS-CoV-1:

> The forced closure of businesses nationwide because of the novel coronavirus would seem to be the perfect scenario for filing a "business interruption" insurance claim.
>
> But most companies will probably find it difficult to get an insurance payout because of policy changes made after the 2002-2003 SARS outbreak, according to insurance experts and regulators.
>
> SARS, which infected 8,000 people mostly in Asia and is now seen as foreshadowing the current pandemic, led to millions of dollars in business-interruption insurance claims. Among the claims was a $16 million payout to one hotel chain, Mandarin Oriental International.[28]

Accordingly, by the mid-2000s, not only did insurers know that courts had found that standard-form property insurance forms covered claims for loss or damage to property affected by substances rendering it dangerous or unusable, they specifically knew that *insurers had paid Business Income claims arising from a virus, the first novel coronavirus and precursor to SARS-CoV-2*. Given this twofold historical background, insurers should have anticipated claims arising from the "current pandemic."

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[28] Todd C. Frankel, "Insurers knew the damage a viral pandemic could wreak on businesses. So, they excluded coverage," Washington Post (April 2, 2020), https://www.washingtonpost.com/business/2020/04/02/insurers-knew-damage-viral-pandemic-could-wreak-businesses-so-they-excluded-coverage (attached hereto as Ex. **2**).

(D) As a Result of Their Close Review of the Common Law, and the Claims Paid for Losses from SARS-CoV-1, ISO Drafted the Virus Exclusion.

The loss-of-function cases continued to multiply in the mid-2000s.[29] The insurance industry, through ISO, its claims handlers, its coverage counsel, and its employees reading trade journals, was well aware of the decisions; indeed, anyone reading one of the cases recounted above would quickly learn of the larger body of authority.[30]

To the extent there is any doubt of this, ISO admitted that it was part of its responsibility to its member companies (including Strathmore) to monitor the common law on standard-form property insurance policies, in order to identify, and thereafter draft changes to eliminate, troublesome language or ambiguities. Specifically, ISO admitted to regulators that it had drafted specific "laser" exclusions

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[29] In chronological order: *Motorists Mut. Ins. Co. v. Hardinger*, 131 F. App'x 823, 824, 826-27, 824-26 (3d Cir. 2005) (E. coli); *De Laurentis v. United Servs. Auto. Ass'n*, 162 S.W.3d 714, 722-23 (Tex. App. Mar. 31, 2005) (mold); *Schlamm Stone & Dolan LLP*. v. *Seneca Ins. Co.*, 800 N.Y.S.2d 356 (N.Y. Sup. Ct. 2005) (the presence of noxious particles, both in the air and on surfaces of the plaintiff's premises) (emphasis added); *Cook v. Allstate Ins. Co.*, No. 48D02-0611-PL-01156, slip op. at 6-8 (Ind. Super. Nov. 30, 2007) (infestation of house with Brown Recluse Spiders); *Stack Metallurgical Servs., Inc. v. Travelers Indem. Co.*, No. 05-1315, 2007 WL 464715, at *8 (D. Or. Feb. 7, 2007) (lead contamination).

[30] For instance, one of the first such decisions, *First Presbyterian Church* (gasoline vapors) was subsequently cited by a host of other similar decisions, including: *Lillard-Roberts*, 2002 WL 31495830, at *8-9 (mold); *Matzner*, 1998 WL 566658, at *4 (carbon monoxide); *Trutanich*, 858 P.2d at 1335 (methamphetamine fumes); and *Hetrick*, 1992 WL 524309, at *3 (oil fumes).

for mold and silica because it believed courts would not find loss or damage from mold and silica excluded by the pollution exclusion.[31] Such laser exclusions are of a piece with previous, and ubiquitous, laser exclusions for asbestos and radiation. Notably, none of these substances necessarily causes tangible damage or alteration to property. Rather, and like coronavirus, these substances harm people using such property.

Such a trend of ISO aiding the courts in expanding coverage continued as, in 2006, the industry took a similar approach with regard to loss or damage from virus. Specifically, as noted above, insurance payments in relation to the 2002-2003 SARS-CoV-1 pandemic motivated ISO to draft the Virus Exclusion.[32] As with mold and silica, ISO's concern was not whether or not virus losses triggered coverage under its standard-form "loss" or "damage" Business Income trigger – ISO accepted they could. Rather, as with mold and silica, ISO's concern was that courts would not find loss or damage, and consequent "business interruption," caused by a "universe" of viruses changing by "evolution," excluded by the pollution exclusion:

> The current pollution exclusion in property policies encompasses contamination (in fact, uses the term contaminant in addition to other

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[31] ISO Circular, July 6, 2006, Commercial Property LI-CF-2006-175 at 1 (attached hereto as Ex. **3**).

[32] *See also* Lucca de Paoli, *et al.*, "Insurance Unlikely to Cushion Coronavirus Losses – But There Are Exceptions," Insurance Journal (Mar. 4, 2020) https://www.insurancejournal.com/news/international/ 2020/03/04/560126.htm (attached hereto as Ex. **4**).

> terminology). Although the pollution exclusion addresses contamination broadly, viral and bacterial contamination are specific types that appear to warrant particular attention at this point in time.
>
> An example of bacterial contamination of a product is the growth of listeria bacteria in milk. In this example, bacteria develop and multiply due in part to inherent qualities in the property itself. Some other examples of viral and bacterial contaminants are rotavirus, SARS, influenza (such as avian flu), legionella and anthrax. The universe of disease-causing organisms is always in evolution.
>
> Disease-causing agents may render a product impure (change its quality or substance), or enable the spread of disease by their presence on interior building surfaces or the surfaces of personal property. When disease-causing viral or bacterial contamination occurs, potential claims involve the cost of replacement of property (for example, the milk), cost of decontamination (for example, interior building surfaces), and business interruption (time element) losses.[33]

As shown above, Strathmore is a member of ISO and, as such, it adopts ISO's representations as to the meaning and effect of that language. This means ISO's statements to regulators are legally and factually the equivalent of statements by Strathmore directly to Davio's and should be considered admissions by Strathmore.[34] That is precisely why insurance trade organizations like ISO exist: to prepare, draft, and negotiate policy changes, *on behalf of their members*, with the state regulators, *who represent consumers*.[35] In addition, ISO's policies are meant

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33 ISO Circular (Ex. **3**).

34 *See Morton Int'l, Inc. v. General Acc. Ins. Co.*, 629 A.2d 831, 849-53 (N.J. 1993).

35 *Id.*

to reflect changes in a developing society, including providing protections from modern viruses that have detrimental impacts on business. As such, ISO's statements that, without the Virus Exclusion, the standard-form language could cover Business Income loss from the presence of a virus, *including one evolving from SARS-CoV-1*, are admissions of Strathmore. Strathmore, although it employed other laser exclusions like that for radiation, chose not to use the virus exclusion, and this choice has consequences under Massachusetts law.

(E) From 2007 through 2018, Courts Continued To Conclude and Insurers Agreed that Events Rendering Property Unfit or Unsafe for Intended Use Caused Physical Loss or Damage.

After ISO drafted the Virus Exclusion, courts continued to rule for policyholders in cases like this one under language like that at issue here.[36]

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[36] In chronological order: *Wakefern Food Corp. v. Liberty Mut. Fire Ins. Co.*, 968 A.2d 724, 734 (N.J. Super. App. Div. 2009) (electrical grid down); *Manpower Inc. v. Insurance Co. of the State of Pa.*, No. 08C0085, 2009 WL 3738099, at *1 (E.D. Wis. Nov. 3, 2009) (risk of collapse); *Travco Ins. Co. v. Ward*, No. 2:10cv14, 2010 WL 2222255, at *8-9 (E.D. Va. June 3, 2010) (Chinese drywall which emitted toxic gases); *In re Chinese Mfd. Drywall*, 759 F. Supp. 2d at 831 (Chinese-manufactured drywall); *Association of Apartment Owners of Imperial Plaza v. Fireman's Fund Ins. Co.*, 939 F. Supp. 2d 1059, 1068 (D. Haw. 2013) (applying Hawai'i law) (intrusion of arsenic into roof); *Gregory Packaging, Inc. v. Travelers Prop. Cas. Co.*, No. 2:12-cv-04418, 2014 WL 6675934, at *5-6 (D.N.J. Nov. 25, 2014) (ammonia discharge); *Mellin v. N. Sec. Ins. Co.*, 115 A.3d 799, 805-06 (N.H. 2015) (pervasive odor of cat urine); *Oregon Shakespeare Festival Ass'n v. Great Am. Ins. Co.*, No. 1:15-cv-01932-CL, 2016 WL 3267247, at *5-6 (D. Or. June 7, 2016), *vacated by joint stipulation*, 2017 WL 1034203 (Mar. 6, 2017) (smoke from wildfires).

Prior to the current run of pandemic-related claims, insurers had confirmed the status of the law discussed above. For instance, three months before the pandemic, Factory Mutual Insurance Company admitted that "physical loss or damage" to property exists when the presence of a physical substance renders property unfit for its intended use, despite it causing **no** structural alteration to property.[37]

At issue in *Factory Mutual Insurance Co. v. Federal Insurance Co.* was a mold infestation in a "clean room" at a drug manufacturing plant.[38] Mold (and its spores), like SARS-CoV-2 virions, can exist on the surface of property and in the air. Factory Mutual argued the mold infestation constituted "physical loss or damage" under a property insurance policy sold by Federal Insurance Company because the mold "destroyed the aseptic environment and rendered [the clean room] unfit for its intended use."[39] Additionally, Factory Mutual asserted case law "broadly interprets the term 'physical loss or damage' in property insurance policies."[40] Referencing several of the cases cited above, Factory Mutual asserted

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37 FM's Mot. *in Limine* No. 5 re Physical Loss or Damage, filed Nov. 19, 2019 as ECF#127 in *Factory Mut. Ins. Co. v. Fed. Ins. Co.*, No. 1:17-cv-00760-GJF-LF (D.N.M.) (attached hereto as Ex. **5**).

38 *Id.* at 3.

39 *Id.*

40 *Id.*

"[n]umerous courts have concluded that loss of functionality or reliability under similar circumstances constitutes physical loss or damage."[41] Factory Mutual reiterated that the key was whether property could be used as it was used prior to the impacting event, and, essentially, that the Period of Restoration lasted until customers viewed the policyholder's location as safe.[42]

Like mold infestation, coronavirus renders the premises unfit for its intended use, despite no permanent damage or destruction. Therefore, businesses whose "functionality or reliability" were lost due to COVID-19 would constitute having suffered a physical loss or damage. Moreover, Factory Mutual conceded that, *at the very least*, it had put forward a reasonable interpretation of the undefined phrase "physical loss or damage" and even if Federal Insurance Company could propose a reasonable reading, this merely rendered the policy language ambiguous.[43]

(F) The Vast Majority of Property Insurance Policies in Effect in March 2020 Contained Express Virus Exclusions.

On the eve of the COVID-19 pandemic, insurers acted in conformity with their knowledge that viruses could cause loss or damage to property triggering Business Income coverage. Specifically, given the evolving universe of threats from SARS-CoV-1, MERS, Zika, *etc.*, and ISO's decision not to change the core trigger

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41 *Id.* at 3-4 (emphasis added).

42 *Id.* at 4-5 (emphasis added).

43 *See id.* at 3 n.1.

to require tangible damage or alteration of property, most insurers added express virus exclusions. Specifically, in the wake of the COVID-19 pandemic, the National Association of Insurance Commissioners called on insurers nationwide to report the percentage of commercial property policies they sold containing an exclusion "for Viral Contamination, Virus, Disease, Pandemic, or Similar Exclusion." This call revealed that 82.83% of such policies sold in in 2020 had such an exclusion.[44]

(G) Conclusion: Where an Insurer Has Knowledge of an Ambiguity in Standard-Form Policy Language and Has the Ability To Resolve It but Fails To Do So, that Language Will Be Construed in Favor of Coverage.

UP submits it is perfectly plain that the direct physical loss or damage Business Income trigger in the Strathmore policy covers lost income as a result of loss or damage caused by a virus, and that to avoid this result, it was incumbent upon Strathmore to add an express virus exclusion. Strathmore did not do this because restaurant policyholders like Davio's expected coverage for loss from virus.

At a minimum, however, Strathmore was well aware that the "physical loss" or "physical damage" language in its Policy was at least ambiguous as to whether it was triggered by agents – such as virus, bacteria, ammonia, smoke, *etc.* – making ordinary use of the property dangerous. Where an insurer has knowledge that its standard-form policy language is ambiguous, and has the ability to resolve that

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[44] *See* COVID-19 Property & Casualty Insurance Business Interruption Data Call (June 2020) (attached hereto as Ex. **6**).

ambiguity with an express exclusion, its failure to do so will be construed against it and in favor of coverage. As stated in one of the most influential insurance coverage cases, decided nearly fifty years ago and widely known in the insurance industry, when insurers fail to use clear and distinct language to exclude a cause of loss known in the market, especially in an all risk policies, they "act at their own peril."[45]

UP make two other limited points as to the historic legal interpretation of the Business Income trigger. First, Strathmore uses a clever bit of casuistry to the effect that SARS-CoV-2 harms people, not property.[46] Of course, biting spiders (*Cook*) harm people not property, as does radiation (*Keleket*), gasoline vapors (*Presbyterian Church*), oil fumes (*Arbeiter*), asbestos (*Sentinel*), carbon monoxide (*Matzner*), e-coli bacteria (*Cooper*), toxic gases (*TRAVCO*), fumes (*In re Chinese Manufactured Drywall*), *etc.* What is important is that these conditions in or on covered property render it unsafe for normal use, and thus cause the physical loss or damage.

Second, Strathmore suggests a parade of horribles, essentially arguing that if SARS-CoV-2 can be found to cause physical loss or damage, what about the common cold virus?[47] The obvious answer is that, as Strathmore knows, the issue is one of degree. The risk that a piece or two of falling gravel may hit a house does

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45 *Pan Am. World Airways, Inc. v. Aetna Cas. & Sur. Co.*, 505 F.2d 989, 1001 (2d Cir. 1974).

46 Brief of Respondent, at 19.

47 *Id.*

not amount to physical loss or damage, but the risk posed by falling boulders does (*Murray*). Similarly, ambient air throughout the United States contains asbestos fibers, but only extremely large concentrations of such fibers will constitute physical loss or damage (*Sentinel, Board of Education, Yale*). The same is true for radiation, which exists everywhere in the universe, but causes physical loss or damage only when readings are very high (*Keleket*).

Applied here, the common cold virus might be said to cause physical loss or damage, but not until it mutates to cause its first fatality, and then mutates further to cause millions. By contrast, COVID-19, killing more than one million Americans, was the leading cause of death in the United States from 2020-2022. Furthermore, and in sharp contrast to the far more disruptive COVID-19 virus, the common cold, alone, does not render entire premises unfit for their intended use.

III. THE SUPERIOR COURT'S DISMISSAL WAS PREMATURE PRIOR TO COMPLETION OF DISCOVERY

It was premature for the Superior Court to dismiss the case, based on not only the aforementioned historical background and Strathmore's ambiguous policy language, but also the need for full discovery.

It is clear that the insurance industry has refused to make full production of relevant documents relative to the meaning of loss or damage in the context of a virus. For instance, on September 26, 2023, the United States District Court for the District of Nevada issued an order barring an insurer from arguing that

communicable disease cannot cause "direct physical loss or damage" because that insurer failed to disclose in discovery that its claims manual contained a loss code for "physical loss or damage" caused by a communicable disease.[48] The relevant loss code is defined as: "Physical loss or damage which results from the actual presence of a communicable disease and the associated business interruption as defined in the policy."[49]

This opinion demonstrates the types of potential evidence that might be adduced in discovery should this matter be remanded. Similarly, allowing for discovery of evidence of this sort impacts insurers' future arguments, thereby affecting the outcome of future proceedings significantly. Moreover, *Treasure Island* crucially proves that, consistent with Section II above, one of the largest commercial property insurers understood pre-pandemic that communicable diseases were capable of causing "direct physical loss or damage." Certainly, as shown in Section I, Strathmore did.

IV. CONCLUSION

Insurers like Strathmore have known for decades that standard-form physical loss or physical damage language was triggered by events like a lethal virus, rendering property unfit or unsafe for its intended use. Strathmore knew that its

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48 *See Treasure Island, LLC v. Affiliated FM Ins. Co.*, No. 2:20-cv-00963-JCM-EJY, *slip op.* (D. Nev. Sept. 26, 2023) (attached hereto as Exhibit **7.**).

49 *Id.* at 1 n.1.

standard-form language was capable of that reading, and that its policyholders expected this coverage. At a minimum, however, Strathmore knew its language was ambiguous, and Strathmore sought neither to resolve that ambiguity by defining those terms to require alteration to property, nor to include ISO's Virus Exclusion. The still-remaining ambiguity must be construed against Strathmore and in favor of UP.

Accordingly, the judgment below should be reversed.

Respectfully submitted,

Dated: November 10, 2023

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CERTIFICATE OF COMPLIANCE

I, Catherine R. Castaldo, do hereby certify that this brief complies with the rules of Court that pertain to the filing of *amicus* briefs, including, but not limited to Rule 16,17, and 20. This brief complies with the length limit of Rule 20(a)(3)(E) because it is set in 14-point Times New Roman font, and contains 7,315 non-excluded words using Microsoft Word for Microsoft 365 MSO (Version 2208 Build 15601.20796).

/s/Catherine R. Castaldo
Catherine R. Castaldo

CERTIFICATE OF SERVICE

I, Catherine R. Castaldo, hereby certify that, in compliance with Mass. R. App. P 13(e), on this 10th of November, I served this *amicus* brief in support of the application for direct appellate review on the Commonwealth and the parties in this action by directing an electronic copy of the foregoing brief to the following counsel.

/s/Catherine R. Castaldo
Catherine R. Castaldo