DOC. NO.: X06-UWY-CV-20-6056095-S : SUPERIOR COURT

HARTFORD FIRE INSURANCE COMPANY : JUDICIAL DISTRICT OF WATERBURY

: COMPLEX LITIGATION DOCKET

V.

MODA, LLC, ET AL. : JUNE 15, 2021

MEMORANDUM OF DECISION RE MOTION FOR SUMMARY JUDGMENT #142

FACTS

In this matter, the plaintiff, Hartford Fire Insurance Company, has brought suit seeking a declaratory judgment that it has no legal obligation to provide insurance coverage for certain COVID-19 related losses allegedly suffered by the various defendants.[1] Broadly speaking, the plaintiff's one-count complaint alleges that following the onset of the COVID-19 pandemic, on April 2, 2020, Moda, LLC and its affiliates (collectively, the defendants), sent the plaintiff a letter indicating that it had suffered covered losses under the insurance policies between the parties. The plaintiff alleges that the defendants' claimed losses either do not fall within the ambit of the subject policies' coverage obligations or are specifically barred by exclusions found within the policies. Accordingly, the plaintiff seeks a judicial declaration that there is no coverage under its insurance policies for the defendants' claimed business losses.

[1] The named defendants in this action are: (1) Moda, LLC; (2) Marc Fisher, LLC; (3) Fisher International, LLC; (4) MB Fisher, LLC; (5) Fisher Footwear, LLC; (6) MFKK, LLC; (7) Unisa Fisher Wholesale, LLC; (8) Fisher Licensing, LLC; (9) Fisher Accessories, LLC; (10) Fisher Sigerson Morrison, LLC; (11) MBF Holdings, LLC (DE); (12) Marc Fisher Holdings, LLC; (13) Fisher Services, LLC; (14) MBF Air LLC; (15) Unisa Fisher, LLC; (16) MBF Licensing, LLC; (17) MBF Invest, LLC; (18) MBF Holdings, LLC (WY); (19) Fisher Design, LLC; (20) Marc Fisher, Jr. Brand, LLC; (21) March Fisher International, LLC; (22) MF-TLC, LLC; (23) Easy Spirit, LLC; (24) MFF-NW, LLC and (25) MFF NW Investment, LLC. All of the defendants will collectively be referred as "the defendants."

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In response to the plaintiff's complaint, on June 25, 2020, the defendants filed their answer, special defenses[2] and counterclaim. The defendants' counterclaim alleges the following relevant facts. Prior to the commencement of the COVID-19 pandemic, the defendants were a financially successful business that employed approximately 200 people nationwide selling footwear to department stores and retail establishments across the United States. Specifically, the defendants allege that they are "principally engaged in the wholesale business of designing, developing, sourcing, marketing and selling women's, men's and children's footwear under their owned or licensed brand names . . . ." During the period between October 15, 2019 and October 15, 2020, the plaintiff issued the defendants two different insurance policies. The first is special multi-flex business insurance policy number UUN AB7878 (the package policy) and the second is ocean marine business insurance policy number 31 CTP AN9840 (the marine policy). As alleged in the plaintiff's complaint, there are four covered premises identified in the policies: (1) the defendants' office/headquarters in Greenwich; (2) a condominium also located in Greenwich; (3) a showroom on 5th Avenue in New York City and (4) a warehouse situated in Cranbury, New Jersey.[3]

According to the defendants, beginning in February, 2020, they started experiencing losses covered under the subject insurance policies when state and local governments issued orders temporarily closing all non-essential businesses. As alleged by the defendants, "[i]n direct response to these orders of civil authority . . . the [defendants'] major retail customers not only shuttered their storefronts, but also cancelled their retail orders, placed months prior, from

[2] The defendants' special defenses to the plaintiff's declaratory judgment claim are: (1) failure to state a claim/absence of legitimate controversy; (2) waiver; (3) estoppel; (4) unjust enrichment and (5) misrepresentation.

[3] Paragraph twenty-three of the counterclaim also alleges that the defendants have suffered losses at a warehouse located in California.

the [defendants'] spring lines. As a result, [the defendants'] warehouses are now overflowing with spring inventory, which due to the seasonal nature of the retail business, is effectively unsellable." The defendants contend they have suffered immense financial injuries resulting from these COVID-19 related business losses and "will have no choice but to liquidate" without the proceeds provided by their insurance policies with the plaintiff. According to the defendants, the plaintiff's refusal to provide insurance coverage is wrongful and in contravention of the policies. Therefore, the defendants allege the following counterclaims against the plaintiff: (1) count one: breach of contract; (2) count two: breach of the implied covenant of good faith and fair dealing and (3) count three: a claim arising under the Connecticut Unfair Trade Practices Act, General Statutes § 42-110a et seq. (CUTPA) based on alleged violations of the Connecticut Unfair Insurance Practices Act, General Statutes § 38a-815 et seq. (CUIPA). On September 25, 2020, the plaintiff filed its amended reply to the defendants' special defenses along with its amended answer to the defendants' counterclaim. In this pleading, the plaintiff also asserted seventeen special defenses to the defendants' counterclaims. These special defenses mostly recite various contractual exclusions and limitations within the insurance policies at issue that the plaintiff claims prevents it from providing coverage for the defendants' purported financial losses.

On September 24, 2020, the plaintiff filed a motion for summary judgment, both on its claim for declaratory relief and the defendants' counterclaim, along with a memorandum of law in support of its motion. The defendants filed a memorandum of law in opposition to the plaintiff's motion on January 19, 2021. On February 26, 2021, the plaintiff filed its reply memorandum. The court conducted a remote oral argument on the plaintiff's summary judgment motion on April 19, 2021.

DISCUSSION

"Practice Book § 17-49 provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party." (Internal quotation marks omitted.) *Graham* v. *Commissioner of Transportation*, 330 Conn. 400, 414–15, 195 A.3d 664 (2018). "[S]ummary judgment is appropriate only if a fair and reasonable person could conclude only one way. . . . [A] summary disposition . . . should be on evidence which a jury would not be at liberty to disbelieve and which would require a directed verdict for the moving party. . . . [A] directed verdict may be rendered only where, on the evidence *viewed in the light most favorable to the nonmovant*, the trier of fact could not reasonably reach any other conclusion than that embodied in the verdict as directed." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Dugan* v. *Mobile Medical Testing Services, Inc.*, 265 Conn. 791, 815, 830 A.2d 752 (2003). "[T]he genuine issue aspect of summary judgment requires the parties to bring forward before trial evidentiary facts, or substantial evidence outside the pleadings, from which the material facts alleged in the pleadings can warrantably be inferred. . . . A material fact has been defined adequately and simply as a fact which will make a difference in the result of the case." (Citation omitted; internal quotation marks omitted.) *Buell Industries, Inc.* v. *Greater New York Mutual Ins. Co.*, 259 Conn. 527, 556, 791 A.2d 489 (2002). "[T]he party moving for summary judgment . . . is required to support its motion with supporting documentation, including affidavits." (Internal quotation marks omitted.) *Romprey* v. *Safeco Ins. Co. of America*, 310 Conn. 304, 324 n.12, 77 A.3d 726 (2013). "The existence of the genuine issue of material fact

must be demonstrated by counteraffidavits and concrete evidence. . . . If the affidavits and the other supporting documents are inadequate, then the court is justified in granting the summary judgment, assuming that the movant has met his burden of proof." (Internal quotation marks omitted.) *Rivera* v. *CR Summer Hill, Ltd. Partnership*, 170 Conn. App. 70, 74, 154 A.3d 55 (2017).

I

THE PACKAGE POLICY

Given there are two different insurance policies at issue in this case, the court will address them separately. The first of these is the package policy. Although the plaintiff raises a number of arguments in its summary judgment motion as to why it is entitled to judgment as a matter of law under the package policy, the plaintiff's primary argument arises out of two virus exclusions found in that policy. The first of these exclusions, which is located on a page of the package policy titled "NEW YORK- EXCLUSION OF LOSS DUE TO VIRUS OR BACTERIA," states: "The exclusion set forth in Paragraph **B.** applies to all coverage under all forms and endorsements that comprise this Coverage Part, including but not limited to forms or endorsements that cover property damage to buildings or personal property and forms or endorsements that cover business income, extra expense or action of civil authority. . . . **B.** We will not pay for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease." (HFIC 87).[4]

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[4] The citations used in this memorandum of decision correspond to the Bates numbering used in the attachments to the plaintiff's summary judgment motion.

Similarly, a related virus exclusion, which applies to non-New York related losses, provides as follows: "We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss or damage . . . . Presence, growth, proliferation, spread or any activity of 'fungus,' wet rot, dry rot, bacteria or virus. But if direct physical loss or direct physical damage to Covered Property by a "Specified Cause of Loss' results, we will pay for the resulting loss or damage caused by that "Specified Cause of Loss'." (HFIC 110-111). The term "Specified Causes of Loss" is defined to include "aircraft or vehicles." (HFIC 95).

In Connecticut,[5] the "principles governing the interpretation of insurance policies [are well established]. [C]onstruction of a contract of insurance presents a question of law for the [trial] court . . . . The determinative question is the intent of the parties, that is, what coverage the [insured] expected to receive and what the [insurer] was to provide, as disclosed by the provisions of the policy. . . . In evaluating the expectations of the parties, [our Supreme Court is] mindful of the principle that provisions in insurance contracts must be construed as laymen would understand [them] and not according to the interpretation of sophisticated underwriters and that the policyholder's expectations should be protected as long as they are objectively reasonable from the layman's point of view. . . . [W]hen the words of an insurance contract are, without violence, susceptible of two [equally responsible] interpretations, that which will sustain the claim and cover the loss must, in preference, be adopted. . . . [T]his rule of construction favorable to the insured extends to exclusion clauses. . . . When construing exclusion clauses,

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[5] The parties appear to agree that the package policy is governed by Connecticut law. Additionally, the court could not locate a choice of law provision in the contract. Therefore, the court will apply Connecticut law to its interpretation of the package policy.

the language should be construed in favor of the insured unless it has a high degree of certainty that the policy language clearly and unambiguously excludes the claim. . . . While the insured bears the burden of proving coverage, the insurer bears the burden of proving that an exclusion to coverage applies." (Internal quotation marks omitted.) *R.T. Vanderbilt Co., Inc.* v. *Hartford Accident & Indemnity Co.*, 333 Conn. 343, 364-65, 216 A.3d 629 (2019).

"An insurance policy is to be interpreted by the same general rules that govern the construction of any written contract. . . . If the terms of the policy are clear and unambiguous, then the language, from which the intention of the parties is to be deduced, must be accorded its natural and ordinary meaning. . . . Under those circumstances, the policy is to be given effect according to its terms. . . . When interpreting [an insurance policy], [a court] must look at the contract as a whole, consider all relevant portions together and, if possible, give operative effect to every provision in order to reach a reasonable overall result." (Internal quotation marks omitted.) *Lexington Ins. Co.* v. *Lexington Healthcare Group, Inc.*, 311 Conn. 29, 37-38, 84 A.3d 1167 (2014). "In determining whether the terms of an insurance policy are clear and unambiguous, [a] court will not torture words to import ambiguity where the ordinary meaning leaves no room for ambiguity. . . . Similarly, any ambiguity in a contract must emanate from the language used in the contract rather than from one party's subjective perception of the terms. . . . As with contracts generally, a provision in an insurance policy is ambiguous when it is reasonably susceptible to more than one reading. . . . Under those circumstances, any ambiguity in the terms of an insurance policy must be construed in favor of the insured because the insurance company drafted the policy." (Internal quotation marks omitted.) Id., 38. For this reason, "[i]ssues of insurance coverage and contractual disputes are particularly appropriate for summary judgment because the meaning of the insurance contract presents questions of law

unsuitable for jury resolution." *Edelman* v. *Pacific Employers Ins. Co.*, Superior Court, judicial district of Hartford, Docket No. CV-93-0533463-S (December 11, 1997, *Aurigemma, J.*) (21 Conn. L. Rptr. 107, 109), aff'd, 53 Conn. App. 54, 728 A.2d 531, cert. denied, 249 Conn. 918, 733 A.2d 229 (1999).

In its supporting memorandum of law, the plaintiff straightforwardly argues that both virus exclusions are plain and unambiguous and they should be enforced by this court according to their terms. The defendants counter with a number of different arguments. With respect to the New York exclusion, the defendants first argue that "this exclusion applies only to losses in *New York*. . . . Thus by its express terms the [New York] [e]xclusion does not apply to the majority of [the defendants'] losses, which are *outside New York*." (Emphasis in original.) Second, the defendants contend that the New York exclusion does not unambiguously apply to all of their claimed losses because it only covers damages "caused by or resulting from any virus." The defendants contend that the absence of direct or indirect concurrent causation language indicates that the plaintiff cannot meet its summary judgment burden to establish that the defendants' losses were only caused by a virus as opposed to other contributing factors such as outdated products and lack of access to property due to governmental orders.

The defendants' first argument is a bit of a strawman. The court assumes, and it is not disputed by the plaintiff, that the exclusion titled "NEW YORK- EXCLUSION OF LOSS DUE TO VIRUS OR BACTERIA" applies only in the state of New York. Therefore, for this portion of the decision, the court will only be analyzing the exclusionary provision with respect to New York-related losses. Regarding the defendants' second argument, the court determines that the language at issue covers the defendants' claimed losses in this matter. The exclusionary clause clearly indicates that the plaintiff "will not pay for any loss or damage caused by or resulting

from any virus . . . ." There can be no doubt that the cause of the defendants' damages is the COVID-19 virus as opposed to any of the other extraneous factors noted by the defendants. In making this conclusion, the court is guided by the analysis provided by a New York trial-level court in *Soundview Cinemas, Inc.* v. *Great American Ins. Group*, 142 N.Y.S. 3d 724, 71 Misc. 3d 493 (2021). In the *Soundview Cinemas* case, a movie theater brought suit against its insurance company when it refused to provide coverage after the movie theater was forced to close due to COVID-19 related executive orders issued by New York's governor. The virus related exclusionary provision at issue in that case had the exact same language as the package policy. The *Soundview Cinemas* court concluded, inter alia, that "the [v]irus [e]xclusion clearly and unambiguously bars coverage. The [e]xecutive [o]rders were issued to limit the spread of COVID-19. Thus, even if [the] [p]laintiff can establish that it meets the requirements of direct physical loss of or damage to property, such loss or damage would be the result of the virus and would fall within the [v]irus [e]xclusion." Id., 731. This court concludes similarly and finds the New York virus exclusion unambiguously applies to the alleged facts in this case even without the direct or indirect concurrent causation language.

Next, the defendants argue that the general virus exclusion provision does not bar non-New York related losses "because that exclusion has been deleted in its entirety" by an endorsement. The endorsement at issue, which is located on a page titled "NEW YORK CHANGES—FUNGUS, WET ROT AND DRY ROT" states as follows: "**A.** In the Property Choice—Covered Causes of Loss and Exclusion Form and Mortgageholders Errors and Omissions Coverage Form, the exclusion titled 'Fungus', Wet Rot, Dry Rot, Bacteria and Virus and the Additional Coverage—Limited Coverage for 'Fungus', Wet Rot, Dry Rot And Bacteria Found in the Property Choice—Specialized Property Insurance Coverages forms is deleted.

Under these forms, the following exclusion is added: We will not pay for loss or damage caused by or resulting from 'fungus', wet rot or dry rot. However, this exclusion does not apply when 'fungus', wet rot or dry rot results from a Covered Cause of Loss." (Emphasis in original.) (HFIC 86).

Based on its plain language, it is clear that the intent of this endorsement is to replace the general virus exclusion with respect to New York-related losses only. The endorsement is located on a page titled "NEW YORK CHANGES" and paragraph A indicates that certain language is deleted "[u]nder these forms" and then the New York specific language replaces it. It would make no sense for this endorsement to delete the virus exclusion as to the entirety of the insurance policy. Notably, the defendants do not provide the court with any case law or statutory law that would support such a strained construction of the contract. Therefore, the court rejects this argument advanced by the defendants.

The defendants' next argument to avoid application of the general virus exclusion is that "there is an express exception to the exclusion . . . ." As previously stated, the virus exclusion does not apply "if direct physical loss or direct physical damage to Covered Property by a "Specified Cause of Loss' results . . . ." (HFIC 111). "Specified Cause of Loss" is defined to include, inter alia, "aircraft or vehicles." (HFIC 95). The defendants contend that "the novel coronavirus was necessarily caused by travel via 'aircraft or vehicles' . . . [because it] was first identified in Wuhan, China and the coronavirus in [the] Western United States shares mutations in common with ones isolated in Wuhan, suggesting that a traveler had brought the coronavirus from China." (Internal quotation marks omitted.) In response, the plaintiff argues that the defendants' construction is insupportable because a virus is not caused by a mode of

transportation. Rather, a virus such as COVID-19 is spread from person-to-person by coughing, breathing or speaking.

At the outset, the court notes that the defendants do not allege in their counterclaim that the COVID-19 virus was transmitted by "aircraft or vehicles" and that it suffered its alleged losses for that reason. Other courts who have examined this issue have found this omission to be dispositive. See, e.g., *Franklin EWC, Inc.* v. *Hartford Financial Services Group, Inc.*, 488 F. Supp. 3d 904, 909 (N.D. Ca. 2020) (stating that the "[p]laintiffs have not met their burden of showing that the business losses are covered under the [p]olicy's [l]imited [v]irus provision . . . [because they] have not alleged that the virus was caused by any of the specified causes of loss . . . ."); *Digital Age Market Group, Inc.* v. *Sentinel Ins. Co. Ltd.*, United States District Court, Docket No. 20-61577-CIV-DIMITROULEAS (S.D. Fla. January 8, 2021) (2021 WL 80535) (noting that "the policy does not cover direct or indirect damage caused by a virus unless the virus is the result of . . . aircraft or vehicles . . . Here, [the] [p]laintiff's claims for relief seek coverage caused directly or indirectly by a virus which the complaint does not allege was the result of a cause that would bring [the] [p]laintiff's claims within the coverage provided by the [p]olicy.").

The court is also guided by the cogent analysis of United States District Judge Gary Feinerman in *Firenze Ventures, LLC* v. *Twin City Fire Ins. Co.*, United States District Court, Docket No. 20-C-4226 (N.D. Ill. March 31, 2021) (2021 WL 1208991). When rejecting a similar argument[6] as that currently being advanced by the defendants, Judge Feinerman stated

[6] The virus exclusion at issue in *Firenze Ventures, LLC* contained similar language to the present policy. That virus exclusion stated as follows:

that the insured "contends that the pertinent 'specified cause of loss' here is 'aircraft or vehicles,' reasoning that the COVID-19 virus was introduced and spread to the Chicago area by aircraft passengers from China, and that the [infected] business premises in the Chicago metropolitan area . . . included Metra facilities and rail vehicles." (Internal quotation marks omitted.) Id. The insured's "reading of the 'specified cause of loss' requirement is unrealistically broad. At the motion hearing . . . [the insured] went so far as to suggest that viral contamination will virtually always be 'the result of' 'aircraft or vehicles' for purposes of the [l]imited [c]overage provision, excepting the hypothetical case of a [p]atient [z]ero who introduces the virus to the site of contamination by walking there. [The insured's] inability to state any principled limit to its reading of the 'specified cause of loss' requirement is, to say the least, a red flag." Id. "More to the point . . . [t]he fact that human beings use various conveyances to travel from Point A to Point B does not mean that anything caused by what they do (intentional or not) at Point B is 'the result of' the conveyance they used. If a person catches a cold in New York one night, flies to Chicago the next morning, takes an Uber downtown to her hotel, and then sneezes on her bellhop in the elevator, no speaker of ordinary English would say that the bellhop's ensuing cold was 'the result of' the aircraft or the Uber." Id. The court finds this reasoning to be highly persuasive. As a result, it cannot credit the defendants' argument. Therefore, the court concludes that the general virus exclusion applies here.

"[We] will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss:
(1) Presence, growth, proliferation, spread or any activity of 'fungi,' wet rot, dry rot, bacteria or virus.
(2) But if 'fungi,' wet rot, dry rot, bacteria or virus results in a 'specified cause of loss' to Covered Property, we will pay for the loss or damage caused by that 'specified cause of loss.'"

Having made the determination that the New York-related virus exclusion covers all losses in New York and the general virus exclusion applies to all of the defendants' other claimed losses, the court concludes that it must grant summary judgment in favor of the plaintiff with respect to the package policy.[7]

II

THE MARINE POLICY

The plaintiff also argues that it is entitled to summary judgment in its favor with respect to its potential coverage obligations under the marine policy. As a threshold matter, the court must decide which jurisdiction's law to apply in order to determine whether the plaintiff does not have to provide coverage pursuant to the marine policy's terms. The plaintiff argues for the application of New York law whereas the defendants contend the court should utilize federal maritime law. The marine policy has a choice of law provision, which dictates that "any interpretation of this policy and the rights and obligations . . . hereunder shall be US federal maritime common law or, in the absence of US federal maritime common law, the law of the state of New York, irrespective of any principles of choice of law." (HFIC 304). "[W]hen a maritime contract contains a choice-of-law clause, the law chosen by the parties governs, unless (1) that jurisdiction has no substantial relationship to the parties or the transaction or (2) that jurisdiction's law conflicts with the fundamental purposes of maritime law." (Internal quotation marks omitted.) *Swift Spendthrift, Ltd.* v. *Alvada Ins. Inc.*, 175 F. Supp. 3d 169, 175 (S.D.N.Y.

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[7] As the court has determined that the two virus exclusions preclude all of the defendants' alleged losses under the package policy, the court need not examine the litany of other arguments raised by the parties, such as whether: (1) the defendants experienced "direct physical loss . . . or direct physical damage" as defined in the package policy or (2) the package's policy's civil authority or dependent properties provisions apply.

2016). Given that none of the parties argue that this exception applies in the present case, the choice of law provision is presumptively enforceable.

According to the Second Circuit Court of Appeals, "[a]bsent a specific federal rule, federal courts look to state law for principles governing maritime insurance policies . . . . There is no specific federal rule governing construction of maritime insurance contracts." (Citations omitted.) *Commercial Union Ins. Co.* v. *Flagship Marine Services, Inc.*, 190 F. 3d 26, 30 (2d Cir. 1999), citing *Wilburn Boat Co.* v. *Fireman's Fund Ins.*, 348 U.S. 310, 319–21, 75 S.Ct. 368, 99 L.Ed. 337 (1955). Based on this principle of law regarding the interpretation of maritime insurance contracts, multiple courts have applied state law when analyzing similar choice of law provisions to the one found in the marine policy. See, e.g., *LaptopPlaza, Inc.* v. *Starr Indemnity & Liability Co.*, United States District Court, Docket No. 14-Civ-7698 (NRB) (S.D.N.Y. August 17, 2016) (2016 WL 10703151) (applying New York state law when the contract stated "the [p]olicy and all endorsements are governed by the [f]ederal [m]aritime [l]aw of the United States and [i]n the absence thereof, the laws of the [s]tate of New York."); *American Commercial Lines, LLC* v. *Water Quality Ins. Syndicate*, United States District Court, Docket No. 09-Civ-7957 (LAK) (S.D.N.Y. March 29, 2010) (2010 WL 1379763), rev'd on other grounds, 679 Fed. Appx. 11 (2017) (applying New York state law when the contract directed that "the law applicable to the interpretation of this [p]olicy . . . shall be federal maritime law or, in the absence of federal maritime law, the law of the [s]tate of New York, without regard for New York's choice of law rules."). "New York law therefore determines the scope and validity of the marine insurance policy provisions involved and the consequences of breaching them." (Internal

quotation marks omitted.) *Hartford Fire Ins. Co.* v. *Mitlof*, 208 F. Supp. 2d 407, 411 (2002). Accordingly, this court will apply New York law to interpret the scope of the marine policy.[8]

Pursuant to New York law, "[i]n determining a dispute over insurance coverage, [a court] first look[s] to the language of the policy. . . . As with any contract, unambiguous provisions of an insurance contract must be given their plain and ordinary meaning." (Citation omitted; internal quotation marks omitted.) *Pro's Choice Beauty Care, Inc.* v. *Great Northern Ins. Co.*, 190 App. Div. 3d 868, ___, 140 N.Y.S. 3d 544, 546 (2021). "It is well settled that a contract is to be construed in accordance with the parties' intent, which is generally discerned from the four corners of the document itself. Consequently, a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms. . . . Whether a contract is ambiguous is an issue of law for the courts to decide." (Citations omitted; internal quotation marks omitted.) *Herbert* v. *Schodack Exit Ten, LLC*, 107 App. Div. 3d 1119, 1120, 966 N.Y.S. 2d 594 (2013). Accordingly, "[w]here the contract is unambiguous on its face, it should be construed as a matter of law and summary judgment is appropriate." *Niagara Frontier Transit Metro System, Inc.* v. *County of Erie*, 212 App. Div. 2d 1027, 1027, 623 N.Y.S. 2d 33 (1995). Nevertheless, "[i]f the terms of a policy are ambiguous . . . any ambiguity must be construed in favor of the insured and against the insurer. . . . Indeed, where a policy's terms are ambiguous, the insurer can prevail only if it can demonstrate not only that its interpretation is reasonable but that it is the only fair interpretation." (Citations omitted; internal quotation marks

[8] Despite the court's conclusion that it will apply New York law, it is worth noting that according to one of the cases cited in the defendants' summary judgment opposition, "[t]he question of which law should apply—federal maritime law or New York state law—is of merely theoretical importance, because the two sources of law are not materially different in this area." (Internal quotation marks omitted.) *AGCS Marine Ins. Co.* v. *World Fuel Services, Inc.*, 187 F. Supp. 3d 428, 435 (S.D.N.Y. 2016).

omitted.) *Antoine* v. *New York*, 56 App. Div. 3d 583, 584-85, 868 N.Y.S. 2d 688 (2008). "[T]he general rule is that insurance contracts are to be interpreted according to the reasonable expectations and purposes of ordinary businesspeople when making ordinary business contracts." Id., 585. "Generally, it is for the insured to establish coverage and for the insurer to prove that an exclusion in the policy applies to defeat coverage." *Consolidated Edison Co. of New York, Inc.* v. *Allstate Ins. Co.*, 98 N.Y. 2d 208, 218, 774 N.E. 2d 687, 746 N.Y.S. 2d 622 (2002).

As indicated in paragraph nineteen, the marine policy is an "[a]ll [r]isk" policy that "insures against all risks of direct physical loss or direct physical damage to [i]nsured [p]roperty from any external cause . . . ." subject to some exclusions that are not relevant here. (HFIC 293). The plaintiff contends that the defendants cannot meet their burden to establish "direct physical loss or direct physical damage" as interpreted under New York law because there is no allegation or evidence that could demonstrate tangible change to the defendants' goods. In response, the defendants argue that they have experienced a direct physical loss as a result of: (1) contamination of their property; (2) loss of access to their property and (3) their inventory becoming outdated and diminished in value.

In the seminal case of *Roundabout Theatre Co.* v. *Continental Casualty Co.*, 302 App. Div. 2d 1, N.Y.S. 2d 4 (2002), the New York Appellate Division, First Department, interpreted similar language to that found in the marine policy. *Roundabout Theatre Co.* arose out of an insurance claim made by a theatre that suffered losses after New York City closed the street in front of the theatre due to a construction accident. As a result of the street closure, the theatre's patrons were unable to enter the premises even though there was no physical damage to the theatre itself. The insurance policy at issue provided coverage for "all risks of direct physical

loss or damage to the property . . . ." (Emphasis omitted.) Id., 3. The trial court granted summary judgment in favor of the theatre, reasoning that because the policy was an "'all risk" policy, the loss was presumptively covered and the burden shifted to the insurer to demonstrate that the loss was expressly excluded by the terms of the policy." Id., 5. When reversing the trial court, the Appellate Division observed that "[t]he [p]erils [i]nsured clause covers 'all risks of direct physical loss or damage to the [insured's] property,' not otherwise excluded. . . . . [Therefore,] the only conclusion that can be drawn is that the business interruption coverage is limited to losses involving physical damage to the insured's property." Id., 7. "The plain meaning of the words "direct" and "physical" narrows the scope of coverage and mandates the conclusion that losses resulting from off-site property damage do not constitute covered perils under the policy." Id.

The *Roundabout Theatre Co.* case has been cited by New York courts in cases involving insurance coverage disputes regarding COVID-19 related losses. For example, in *Visconti Bus Service, LLC* v. *Utica National Ins. Group*, 71 Misc. 3d 516, 142 N.Y.S. 3d 903 (2021), the plaintiff insured, a bus company, brought suit under an "all risk" policy for "its significant business interruption losses and extra expenses suffered as a direct result of the nationwide and statewide government shutdown orders designed to mitigate the COVID-19 pandemic by, in part, restricting all or part of the insured's business at the insured premises . . . ." Id., 517-18. The insurance policy in that case covered "direct physical loss" of the plaintiff's property. When rejecting the argument that the insurance policy applied to the insured plaintiff's purported losses, the court noted that "[t]he words 'direct' and 'physical' narrow the scope of coverage to physical damage to the property itself and foreclose [the plaintiff's] argument that the phrase

'loss of' includes mere 'loss of use of' the property." Id., 523. The *Visconti Bus Service, LLC* decision cites to numerous other New York courts that have decided similarly.

Pursuant to New York law, "despite the 'all risk' coverage, [a]n insured seeking to recover for a loss under an insurance policy has the burden of proving that a loss occurred and also that the loss was a covered event within the terms of the policy. . . . Labeling the policy as 'all-risk' does not relieve the insured of its initial burden of demonstrating a covered loss under the terms of the policy." (Citations omitted; internal quotation marks omitted.) *U.S. Dredging Corp.* v. *Lexington Ins. Co.*, 99 App. Div. 3d 695, 696, 952 N.Y.S. 2d 60 (2012). After reviewing cases such as *Roundabout Theatre Co.* and *Visconti Bus Service, LLC*, it becomes clear that under New York law, the words "direct" and "physical" in an insurance policy limit an insurance company's coverage obligations to physical damage to the property itself. Accordingly, the defendants cannot succeed on their arguments that they are entitled to coverage based on loss of access to the property and the fact that their inventory became outdated or diminished in value. While the defendants also argue that their property has been "contaminated," there are no allegations in the counterclaim or evidence in the record indicating that their shoes have somehow been infected with the COVID-19 virus. Therefore, the court is constrained to conclude that the marine policy does not cover the losses alleged in the defendants' counterclaim.

The defendants also point to a few other provisions in the marine policy in an attempt to establish coverage obligations on the part of the plaintiff. The first of these is paragraph thirty-five, which is labeled "VALUATION" and sets forth various methodologies to calculate the value of "[p]roperty insured." (HFIC 299). According to the defendants, "[t]he valuation provisions . . . demonstrate that [the plaintiff] agreed to cover a loss in the value of [the

defendants'] goods." Contrary to that assertion, the plain language of the marine policy dictates that the property at issue must first be "insured" under the policy before the valuation section, and, therefore, the plaintiff's obligation to pay, is triggered. See, e.g. *Indianapolis Airport Authority* v. *Travelers Property Casualty Co. of America*, 849 F. 3d 355, 362 (7th Cir. 2017) (stating that "the [v]aluation [c]ondition . . . provide[s] a framework for computing insurance liability . . . where the insured has sustained damage to the buildings and structures that constitute the insured [b]uilders' [r]isk."). Similarly, the defendants also cannot rely on paragraph forty-nine, the Brands and Trademarks clause, because that section is not operative unless there is "damage to insured property." (HFIC 301). Therefore, actual damage to property that is insured under the policy is a necessary predicate to the applicability of that clause.

Finally, the defendants point to the marine policy's ocean cargo form. That section provides: "This policy shall also cover the following contributions and/or necessary expenses actually incurred by reason of perils insured against . . . **25. LANDING, WAREHOUSE & FORWARDING CHARGES**. . . In the event of frustration, interruption, or termination of the insured voyage, or similar events beyond the control of [the defendants] and in addition to the limit(s) of liability set forth elsewhere in this policy, the [plaintiff] agrees to pay all landing, warehousing, transshipping, forwarding and other expenses insured by [the defendants] . . . ." (Emphasis in original.) (HFIC 295). The defendants contend that this portion of the marine policy is applicable without the separate requirement in the contract to demonstrate direct physical loss or damage to property. On the other hand, the plaintiff argues that this provision only applies when expenses are incurred "by reason of perils insured against" and it does not create a stand-alone coverage obligation.

In resolving this dispute, the Second Circuit Court of Appeals' decision in *New York Marine & General Ins. Co.* v. *Tradeline, LLC*, 266 F.3d 112 (2d Cir. 2001) is instructive. That matter involved the interpretation of a marine insurance policy under New York law. The policy at issue in that case provided that: "Where, *as a result of the operation of a risk covered by this insurance*, the insured transit is terminated at a port or place other than that to which the subject-matter is covered under this insurance, the [u]nderwriters will reimburse the [a]ssured for any extra charges properly and reasonably incurred in unloading [,] storing and forwarding the subject-matter to the destination to which it is insured hereunder." (Emphasis in original.) Id., 128. When analyzing the meaning of this portion of the insurance policy, the court noted that "[t]o determine the import of this [c]lause, we must first ascertain whether the [alleged loss occurred] . . . 'as a result of the operation of a risk covered by this insurance.' . . . We do not agree that [the clause at issue] . . . provides coverage to [the insured] for those 'extra charges properly and reasonably incurred in unloading [,] storing and forwarding' . . . [because] the expenses incurred . . . were not incurred as a result of loss or damage to the [the insured from a risk covered under the policy] . . . . Therefore, we cannot conclude that the expenses incurred . . . occurred as a 'result of the operation of a risk covered.'" (Emphasis omitted.) Id., 128-29. Similarly, in the present case, the marine policy requires an expense "actually incurred by reason of perils insured against" before paragraph twenty-five regarding landing, warehouse and forwarding charges applies. Accordingly, this section of the marine policy cannot operate to provide a coverage obligation on the part of the plaintiff.[9]

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[9] Having made this determination, the court need not examine the plaintiff's additional argument that the defendants' claimed losses are precluded by the marine policy's exclusion for "[l]oss of use or market, interruption of business, or consequential loss of any nature." (HFIC 293). Although this argument does have some resonance, the court chooses not to base its decision on this exclusion because "[t]he [New York] law governing the interpretation of exclusionary