

DOCKET NO.: X06-UWY-CV20-6056095-S	:	
	:	SUPERIOR COURT
HARTFORD FIRE INSURANCE COMPANY	:	
	:	COMPLEX LITIGATION
	:	DOCKET
v.	:	
	:	AT WATERBURY
MODA LLC; MARC FISHER LLC; FISHER	:	
INTERNATIONAL LLC; MB FISHER LLC;	:	
FISHER FOOTWEAR LLC; MFKK, LLC; UNISA	:	
FISHER WHOLESALE LLC; FISHER	:	
LICENSING LLC; FISHER ACCESSORIES LLC;	:	
FISHER SIGERSON MORRISON LLC; MBF	:	
HOLDINGS LLC (DE); MARC FISHER	:	
HOLDINGS LLC; FISHER SERVICES LLC;	:	
MBF AIR LLC; UNISA FISHER LLC; MBF	:	
LICENSING LLC; MBF INVEST LLC; MBF	:	
HOLDINGS LLC (WY); FISHER DESIGN LLC;	:	
MARC FISHER JR BRAND LLC; MARC	:	
FISHER INTERNATIONAL LLC; MF-TFC LLC;	:	
EASY SPIRIT LLC; MFF-NW LLC; and MFF	:	
NW INVESTMENT LLC	:	

STATE OF NEW YORK)
) ss.:
 COUNTY OF NEW YORK)

AFFIDAVIT OF CHRISTINE A. MONTENEGRO

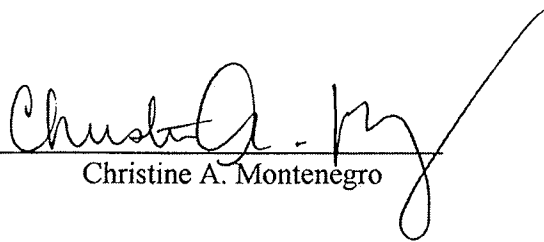
Christine A. Montenegro, being duly sworn, hereby states:

1. I am a member of Kasowitz Benson Torres LLP, counsel for Defendants Moda LLC, Marc Fisher LLC, Fisher International LLC, MB Fisher LLC, Fisher Footwear LLC, MFKK, LLC, Unisa Fisher Wholesale LLC, Fisher Licensing LLC, Fisher Accessories LLC, Fisher Sigerson Morrison LLC, MBF Holdings LLC (DE), Marc Fisher Holdings LLC, Fisher Services LLC, MBF Air LLC, Unisa Fisher LLC, MBF Licensing LLC, MBF Invest LLC, MBF Holdings LLC (WY), Fisher Design LLC, Marc Fisher Jr Brand LLC, Marc Fisher International

LLC, MF-TFC LLC, Easy Spirit LLC, MFF-NW LLC, and MFF NW Investment LLC (together "Fisher"), in the above-captioned action. I am fully familiar with these proceedings. I make this Affidavit in support of Fisher's Reply Memorandum of Law in Further Support of its Motion to Compel.

2. Attached hereto as Exhibit 1 is a true and correct copy of the transcript from the April 19, 2021 hearing on plaintiff Hartford Insurance Company's Motion for Summary Judgment in the above-captioned action.

DATED: April 26, 2021


Christine A. Montenegro

Sworn to before me this
26th day of April, 2021


NOTARY PUBLIC

MYRA PEDROZA
Notary Public, State of New York
Reg. No. 01PE6039323
Qualified in Bronx County
My Commission Expires Mar. 27, 2022

Exhibit 1

NO: X06-UWY-CV20-6055095S : SUPERIOR COURT
HARTFORD FIRE INSURANCE : JUDICIAL DISTRICT
OF WATERBURY
V. : AT WATERBURY, CONNECTICUT
MODA, LLC, ET AL : APRIL 19, 2021

BEFORE THE HONORABLE BARBARA BELLIS, JUDGE

A P P E A R A N C E S:

Representing the Plaintiff:
SHIPMAN & GOODWIN, LLP
Attorney Mark K. Ostrowski
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Hartford, CT 06103

STEPTOE & JOHNSON, LLP.
Attorney James E. Rocap, III
Attorney Johanna Dennehy
1330 Connecticut Avenue, NW
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Also Present By Phone:
Chris Girard

Representing the Defendant:
FINN DIXON & HERLING, LLP
Attorney Tony Miodonka
6 Landmark Square, Suite 600
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KASOWITZ BENSON TORRES, LLP
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Attorney Christine Montenegro
Attorney Joshua A. Siegel
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New York, NY 10019

RECORDED AND TRANSCRIBED BY:
Linda Coon
Court Monitor/Court Reporter
400 Grand Street
Waterbury, CT 06702

1 THE COURT: All righty. So, let's run it up the
2 flag pole one more time.

3 Good morning, everyone. This is Judge Bellis,
4 and we are now on the record in the Hartford Fire
5 Insurance v. Moda case. Waterbury Complex Litigation
6 Docket number 20-6056095.

7 Before I ask counsel to identify themselves for
8 the record, just a couple housekeeping matters. I
9 can see that some of you are already muted, but I can
10 see that some of you are not muted, so everyone needs
11 to mute their device. I'm going to do the same
12 thing. So, unless you are speaking, please make sure
13 that your device is muted so that our court reporter
14 doesn't have any problems with feedback.

15 Also, just as a courtesy to the court reporter,
16 each time you address the Court or re-address the
17 Court, just state your name again for the record so
18 it will be a little bit easier for the court reporter
19 to take everything down.

20 So, I'm going to do this a little backwards
21 this morning. What I'm going to do is, first, list
22 the pleadings that I believe are the appropriate
23 pleadings connected with this motion and then when I
24 ask counsel to identify themselves for the record,
25 I'll start with the plaintiff and go to the
26 defendant. If I've missed any filings, tell me then.
27 And, also, when you are identifying yourselves for

1 the record, please let me know who is going to be
2 arguing for each side. So, what I have --

3 And, I do, by the way, hope everyone is safe
4 and well. I should have led with that.

5 I have the plaintiff's Motion For Summary
6 Judgment and Memorandum of Law in Support of the
7 Motion at entry numbers 142 and 143. That was filed
8 on September 24th, 2020, and then the Affidavit at
9 144. I have the Defendant's Opposition, filed on
10 January 19, 2021, at entry number 178, I have the
11 reply filed on February 26, 2021, at entry number
12 187, and then I have the plaintiff's Notice of
13 Supplemental Authority at entry number 203 filed on
14 April 13, 2021.

15 And I do have to commend everyone for your
16 briefing schedule, for keeping on a good briefing
17 schedule, and for the superb briefing because,
18 obviously, I've read everything and I looked forward
19 to the argument, but it was quite impressive. So,
20 thank you for that in case I neglect to say it at the
21 end.

22 And I also will apologize in advance, because
23 this is a little unusual. Usually, it's a
24 defendant's Motion For Summary Judgment, so if I
25 forget and refer to the wrong party, believe me, I
26 understand who is moving.

27 So, let's start, then, with plaintiff. So, I'm

1 going to ask plaintiff's counsel of record to
2 identify themselves for the record, tell me if I
3 missed any filings, and let me know who will be
4 arguing the motion.

5 ATTY. OSTROWSKI: Good morning, Your Honor.
6 Mark Ostrowski from Shipman & Goodwin. I'm local
7 counsel for the plaintiff, and counsel from
8 (INDISCERNIBLE) Mr. Rocap will be arguing the motion.

9 ATTY. ROCAP: And, Your Honor, this is Jim
10 Rocap. Can you hear me? Your Honor?

11 THE COURT: I can hear you, Attorney Rocap. I
12 can see you as well but I'm muted, so any time
13 anybody says anything to me, it's going to take me a
14 couple minutes -- you know, a couple seconds to
15 un-mute, but if I can't hear anybody, believe me,
16 I'll let you know. I'm not shy.

17 ATTY. ROCAP: Thank you, Your Honor.

18 THE COURT: And, Attorney Rocap, did I miss any
19 filings?

20 ATTY. ROCAP: I do not believe so, Your Honor.
21 There are two counsel with me on the phone today and
22 that's Miss Gordon and Miss Dennehy both from
23 Steptoe. And I would actually defer to Miss Dennehy
24 in the event that something was missed, but I believe
25 you've got everything.

26 And then, also, Your Honor, I just wanted to
27 mention that on the phone is our client

1 representative, Chris Girard G-I-R-A-R-D and that,
2 along with Mr. Ostrowski, completes our team.

3 THE COURT: Thank you, Counsel.

4 And for the defendant?

5 ATTY. MIODONKA: Good morning, Your Honor. This
6 is Tony Miodonka from Finn Dixon and Herling, local
7 counsel for defendants. And I'll let my co-counsel
8 introduce themselves.

9 ATTY. JACKSON: Good morning, Your Honor.
10 Kirsten Jackson of Kasowitz Benson Torres on behalf
11 of the defendants. And just so you know, we'll be
12 splitting up today's argument. I will be handling
13 the Package Policy and my colleague, Christine
14 Montenegro, will be handling the Marine Policy.

15 THE COURT: All right. I don't have a
16 particular problem with that and I assume -- you
17 know, usually it's one person who does the
18 argument -- and I assume the other side doesn't have
19 an objection?

20 ATTY. ROCAP: No objection, Your Honor.

21 THE COURT: Good.

22 Did we miss anyone else or has all counsel of
23 record identified themselves?

24 ATTY. OSHINSKY: Your Honor, this is Gerald
25 Oshinsky, also counsel of record. Good morning.
26 Good to see you again.

27 THE COURT: You as well.

1 ATTY. MONTENEGRO: Good morning. Christine
2 Montenegro as well.

3 THE COURT: Good morning.

4 All right. So, if that's --

5 VOICE: Excuse me, Your Honor, I think Josh
6 Siegel was attempting to introduce himself.

7 ATTY. SIEGEL: I'm sorry. I was muted, Judge.
8 Good morning. Joshua Siegel, Kasowitz Benson Torres.
9 Good morning.

10 THE COURT: Good morning.

11 Okay. So, I know who's on whose team now, so I
12 think we are ready to get started. So, I'm going to
13 mute, just keep that in mind. So, if there is an
14 issue, just give me a couple seconds to get back on.
15 And whenever you are ready, we are ready to go,
16 Attorney Rocap.

17 ATTY. ROCAP: Thank you, Your Honor.

18 And, again, Jim Rocap with the law firm of
19 Steptoe & Johnson on behalf of Hartford Fire
20 Insurance Company.

21 Your Honor, this is, as you know, a dispute
22 about the terms of two commercial insurance
23 agreements. The first is the Package Policy -- what
24 we've been referring to as the Package Policy --
25 which is a First-Party Property Insurance Policy, the
26 second is a Marine Policy which provides coverage for
27 goods in transit from port to port from the high

1 seas. In this case, it also provides coverage for
2 some period of time in a temporary warehouse on
3 either side of the voyage.

4 For the reasons that I'm going to be
5 explaining, obviously, Hartford takes the position
6 that there is no coverage for Fisher's claims, Moda's
7 claims. I will use those terms interchangeably, Moda
8 and Fisher, but they mean the same thing; namely, the
9 defendants in this case. But for the reasons that I
10 will state, there is no coverage under either one of
11 those policies.

12 I'm going to address the Package Policy first,
13 Your Honor, and then I will address the Marine
14 Policy.

15 So, with respect to the Package Policy, Your
16 Honor, I started with the following: The COVID
17 litigation across the nation has been extraordinary.
18 Frankly, in my career, which has been longer than I
19 would like to think, it is the most extraordinary
20 countrywide, state-by-state, federal and state courts
21 both, all across the country, litigation that we have
22 had. The coverage litigation has been addressing
23 COVID-19 claims similar to, if not identical, to the
24 claims that are presented here, under policies with
25 similar, if not identical terms as well.

26 There have been well over 300 decisions, Your
27 Honor, in the year -- almost the year since this

1 started. The insurers have prevailed in over 270 of
2 those. These include many motions to dismiss, more
3 than I can count, eleven decisions granting summary
4 judgment to insurers, and one verdict in favor of an
5 insurer following the only COVID-19 trial that was in
6 New Orleans that has occurred to date.

7 There are only six merits decisions in which
8 coverage was found. Those are courts in Washington,
9 Oklahoma, North Carolina, Ohio, and Pennsylvania.
10 That's less than two percent of the coverage cases
11 that have been filed in which some kind of coverage
12 has been found. Now, I will say policy holders have
13 been able to avoid a full dismissal in about 44 cases
14 but that's less than 15 percent of the cases in which
15 Courts have issued rulings on coverage issues.

16 Now, Hartford, itself, my client, has prevailed
17 in full in 40 cases, that's 42 decisions before 34
18 judges across the country; on the virus exclusion,
19 which we will be focusing on in just a minute,
20 Hartford has prevailed in 26 cases before 20 judges.
21 Two of the cases that I've been talking about, Your
22 Honor, have applied Connecticut law. One, by Judge
23 Shea in the district -- court of the District of
24 Connecticut, LJ New Haven. We'll be talking about
25 that in a minute. And one by the United States
26 District Court for the Northern District of Illinois
27 entitled, Chief of Staff. And, in that case, the

1 federal judge in Chicago predicted what Connecticut
2 law would be and found that there was no coverage as
3 did Judge Shay.

4 Now, all of these Courts that I've been talking
5 about, Your Honor, have made these decisions after
6 full briefing on the issues where the same arguments
7 presented here were presented there. What does that
8 tell us? That tells us that there is widespread,
9 almost general agreement, that there is simply no
10 coverage for the types of claims that are asserted by
11 Fisher here. There is nothing different in this
12 case, Your Honor, nothing materially different from
13 the other cases, putting aside the Marine Policy
14 which we'll be addressing at the end.

15 So, under the Package Policy, Your Honor, there
16 are four provisions that are critical here: The
17 first, is the virus exclusion; the second is the
18 provision that requires direct physical loss or
19 direct physical damage to establish coverage; the
20 third provision is a provision under which they seek
21 coverage, the civil authority provision; and the
22 fourth, is the dependent properties provision.

23 I'll address each one of those in turn, but I'm
24 going to start with the virus exclusion because,
25 frankly, Your Honor, this is probably the clearest,
26 and easiest, and most direct point that we will be
27 making today in which you can make a decision on the

1 virus exclusion if you decide that it applies, then
2 you do not have to address any of the other issues
3 that have been raised in this case because the virus
4 exclusion applies to all of the coverages that the --
5 that's the direct physical loss or direct physical
6 damage, that's business interruption, that's civil
7 authorities, that's the kind of property. It applies
8 to all of those coverages.

9 So, in this particular policy, Your Honor,
10 there are two virus exclusions. One, is for all
11 states other than New York. And there is another
12 exclusion that is for New York State only that we
13 were required to add because of the New York
14 Regulator's decision that they wanted a particular
15 exclusion to be added to the policy.

16 So, I want to address first, Fisher's argument.
17 As you know, they make the argument that the
18 Countrywide Virus Exclusion Endorsement was somehow
19 eliminated by the New York Endorsement. And I'm
20 going to address that briefly. The two endorsements,
21 your Honor, are found at the Summary Judgment
22 Exhibit 1, which I'll be referring to quite a bit,
23 Your Honor. That's the Exhibit 1 to Miss Dennehy's
24 affidavit, which is the policy, the Package Policy
25 itself. And if you look at page 86 and 87 of the
26 Package Policy, you will see there are two New York
27 endorsements there. The first is entitled, NEW YORK

1 CHANGES-FUNGUS WET ROT AND DRY ROT, the second is
2 entitled, NEW YORK-EXCLUSION OF LOSS DUE TO VIRUS OR
3 BACTERIA.

4 Now, with respect to the second endorsement
5 which is the New York Virus Exclusion, the words New
6 York in the title, in big bold letters, should make
7 it very clear that this is applicable to New York
8 only and Fisher agrees with this. They assert that
9 the exclusion is applicable only to losses arising
10 from locations in New York. And they are correct
11 about that. They then do an about face, Your Honor,
12 in order to try to get rid of the other virus
13 exclusion that is in our policy. They say that the
14 first New York endorsement which is entitled, NEW
15 YORK CHANGES-FUNGUS WET ROT and DRY ROT, somehow
16 eliminates the virus exclusion that is otherwise
17 applicable in all of the other 49 states,
18 territories, et cetera.

19 Now, the fact is, that in the title of the New
20 York Changes Endorsement, the word, New York, appears
21 there just like it appears in the New York Virus
22 Exclusion, and that clearly makes it unambiguously
23 applicable only to New York. Fisher's insistence,
24 Your Honor, that the Virus Exclusion dictated by New
25 York is only applicable in New York, is completely
26 inconsistent with it's position that the Changes
27 Endorsement also dictated by New York is applicable

1 outside of New York. So, it's a completely
2 unreasonable interpretation of the unambiguous
3 wording of the policy, Your Honor. Under no
4 circumstances would anyone ever expect that a New
5 York Changes Endorsement, a change, you know, a
6 Change Endorsement for New York, would somehow
7 eliminate exclusions in all of the other 49 states.
8 No one would ever suggest that that is -- that that
9 is an appropriate wording of the policy either
10 standing alone or read as a whole.

11 So, I would like to move on from that, Your
12 Honor, to the Countrywide Endorsement. This is found
13 at page 111 of Exhibit 1 in the Package Policy. And
14 that exclusion says, we will not pay for loss or
15 damage caused directly or indirectly by any of the
16 following: Presence, growth, proliferation, spread,
17 or any activity of virus.

18 Now, there is no ambiguity in that wording,
19 Your Honor. It's as simple, and complete, and direct
20 as one could be. Now, the provision also is prefaced
21 at the beginning of the form that it is in by
22 anti-concurrent causation language. I know Your
23 Honor is familiar with that, but that is wording that
24 is intended to supervene, supercede the efficient
25 proximate causation approach that Connecticut and
26 other Courts have taken in a case where there is no
27 anti-concurrent causation language. But that

1 language says, such loss or damage is excluded
2 regardless of any other cause or event that
3 contributes concurrently or in any sequence to the
4 loss or damage. Now, Connecticut recognizes and
5 enforces this provision in it's policies. We know
6 that from Judge Shay's decision in LJ New Haven; and
7 so, that has to be included in the analysis of the
8 application of the Countrywide Endorsement.

9 Now, Connecticut law on construction is clear,
10 Your Honor. Any ambiguity -- and I'm reading here
11 from the Lexington(phonetic) case. Any ambiguity in
12 a contract must emanate from the language used in the
13 contract rather than one party's subjective
14 perception of the terms. Your Honor, you have even
15 quoted that in prior cases. I know you are very
16 familiar with it, focusing in particular on your
17 decision in Ridgaway v. Mount Vernon. It's a well
18 known principle, but the ambiguity has to be
19 determined by looking at the language in the policy.
20 In addition, the Courts in Connecticut, the Supreme
21 Court, has said that one cannot use extrinsic
22 evidence to create a latent ambiguity. That comes
23 from, among other things, the Hyman case way back in
24 the 1990s.

25 And these principles, Your Honor, were rendered
26 inadmissible and irrelevant, all of the extra
27 contractual documents that Fisher has been focused on

1 here. Now, you are going to hear a lot from them in
2 their argument regarding these extra contractual
3 documents, documents that go back 15 years or more.
4 None of them can be considered by The Court if you
5 decide that the Virus Exclusion, the Countrywide
6 Virus Exclusion is unambiguous. They are all
7 irrelevant. I will say that if we get into a
8 discussion of them and if Your Honor has any
9 questions about them, they all actually support
10 Hartford, but I'm not going to go into that
11 discussion now because those aren't really relevant.
12 The relevant point is, the language is unambiguous,
13 and it needs to be applied as written.

14 Now, the only decision applying Connecticut law
15 to the Virus Exclusion is by Judge Shay in LJ New
16 Haven. What did he decide? First of all, he decided
17 that the Virus Exclusion was unambiguous. The Virus
18 Exclusion there was very similar to that here. It
19 included the anti-concurrent causation wording which
20 is also present here. And he found exclusion to be
21 fully applicable. And, frankly, and I'll say that --
22 address this in just a minute, but he found it
23 applicable with or without the anti-concurrent
24 causation language. He also held, because the
25 policyholder in that case presented him with a
26 document that has been presented here, the 2006 ISO
27 circular, he found that that was irrelevant because

1 there was nothing ambiguous about the virus exclusion
2 itself and therefore did not consider it.

3 I will just as an aside, Your Honor, I'll
4 mention that there is also the Vannatta case,
5 V-a-n-n-a-t-t-a which we cite in our brief which
6 found a similar exclusion although it focused on mold
7 as opposed to virus to be unambiguous.

8 So, Connecticut law is quite clear that wording
9 like this is unambiguous and, in fact, there is near
10 universal agreement among all of the cases in the
11 country across the COVID-19 litigation that there is
12 no ambiguity in the virus exclusion.

13 Now, I want to address Moda's argument about
14 the exception to the exclusion. And, once again,
15 this is found at page 111. The exclusion is, there
16 is an ensuing loss, carve-out (PHONETIC) exception,
17 whatever you want to call it. It says, if direct
18 physical loss or direct physical damage to "covered
19 property" by a specified cause of loss results, we
20 will pay for the resulting loss or damage caused by
21 that specified cause of loss.

22 Now, I will tell you, Your Honor, that in no
23 case in the COVID-19 litigation has any Court ever
24 applied the exception, the exclusion, the carve-out,
25 whatever you want to call it, has never applied that.
26 They've always applied the virus exclusion and they
27 have found no coverage.

1 But, in any event, this is a standard ensuing
2 clause that Fisher points to. Then they try to say
3 that because one of the specified causes of loss was
4 aircraft, but somehow that saves coverage and makes
5 this thing applicable. That argument makes no sense
6 under the wording, Your Honor. The virus did not
7 result in an aircraft and no aircraft, in turn,
8 caused the direct physical loss, or direct physical
9 damages, or any of Moda's losses.

10 There is a second part to that exclusion that
11 also says, the exclusion does not apply in certain
12 instances where the virus results from a specified
13 cause of loss. Moda tries to indicate here that the
14 virus somehow resulted from an aircraft. It
15 obviously did not. That's simply an unreasonable
16 reading and application of the term. No one would
17 say that Corona Virus resulted from an aircraft, it
18 resulted from the transmission of a virus originating
19 in China through a human being. The argument has
20 been rejected, Your Honor, most recently in the
21 Firenze case, F-i-r-e-n-z-e, which we cite in our
22 brief. And in that case, which I would point Your
23 Honor to, the Court said that the argument was
24 unreasonable and made the exception to the exclusion
25 absurdly over broad.

26 Now, I will like to switch from the Countrywide
27 Endorsements, Your Honor, to the New York Exclusion

1 itself. And the New York Exclusion, as we noted
2 before, is found at page 87 of Exhibit 1 to the
3 Motion For Summary Judgment, and it says in about as
4 clear a language as anyone can imagine, quote, we
5 will not pay for loss or damage caused by or
6 resulting from any virus. That's it. Again, this
7 could not be more clear indirect. Now, Fisher points
8 out that the New York Exclusion does not have the
9 anti-concurrent causation wording in it that the
10 Countrywide Endorsement has, but that makes no
11 difference here, Your Honor, at all. It does say
12 that we will not pay for loss or damage caused by or
13 resulting from any virus and that is certainly what
14 happened here. That language, without the
15 anti-concurrent causation language, has been held by
16 many courts to clearly apply to the COVID claims.
17 We've cited certain of them in our brief, refer you
18 to note six of the reply brief. There is three cases
19 cited there. I would also refer you to the Causeway
20 Automotive case out of the District of New Jersey
21 which uses, in fact, the efficient proximate cause
22 approach which Connecticut Courts would use in the
23 absence of anti-concurrent causation language. And
24 it found that the virus is the predominant cause of
25 loss and therefore the exclusion applies.

26 Let me just read to you, if I may, Your Honor,
27 just very -- a couple of very short snippets. In a

1 case that we cite in our brief in Appendix C to the
2 reply brief, the case is BA LAX v. Hartford. The
3 Court there said, there is no genuine dispute that
4 the activity of a virus, namely COVID-19, set
5 government restrictions in motion and is therefore
6 the efficient proximate cause of plaintiff's claimed
7 losses. And the same thing in Causeway, as I
8 mentioned before, Your Honor, as well as if you look
9 at the Mashallah case, I think that you'll find that
10 it reaches the same conclusion.

11 And then if we go back to LJ New Haven, Judge
12 Shay's decision, earlier this year, his case is
13 instructive with respect to Fisher's argument. And I
14 would suggest, if you haven't already, Your Honor, to
15 read it closely because he does say that with respect
16 to an argument that the -- that with an ACC wording
17 in it that somehow there would be coverage, he
18 rejected that. He said that the Virus Exclusion in
19 this case does not have or had ACC language, but he
20 went on to say that, you know, even without it, if
21 you use the efficient proximate cause approach, the
22 language is intended to supervene that as an easy
23 case. The virus, he said, meets all of the
24 following: He said it's significant, substantial,
25 it's the one that sets the other in motion. And he
26 would find I think, Your Honor, that even in the
27 absence of ACC language, that the virus is clearly

1 the efficient proximate cause here and clearly would
2 apply.

3 So, Fisher -- I'm going to take a quick sip of
4 water here -- Fisher can't contend otherwise. It
5 lists the following as the other causes that might
6 have contributed. It's products becoming outdated,
7 it's access to it's property impaired, it's access to
8 dependent properties. Now, of course, none of those
9 are direct physical loss or direct physical damage to
10 begin with, but they are all clearly caused directly
11 and predominantly by the virus. None of those things
12 would have happened without the virus. So, in sum,
13 Your Honor, in nearly 100 cases have been dismissed
14 based on the policy's virus exclusion. Most of these
15 Courts considered and rejected this exact argument
16 that the government orders are something else rather
17 than the virus for a proximately caused COVID-19
18 losses. And in sum, the virus exclusions in this
19 case are unambiguous and clearly apply across the
20 board to all of Fisher's claims and losses. You do
21 not allege losses, you do not need to reach any other
22 issue in this case in light of that fact. Having
23 said that, I will proceed to other issues that have
24 been raised by Fisher in this case.

25 First, let me talk about direct physical loss
26 or direct physical damage. First of all, if you look
27 at page 48 of Summary Judgment Exhibit 1, the policy,

1 it says that, quote, We will pay for direct physical
2 loss of or direct physical damage to the following
3 types of Covered Property caused by or resulting from
4 a Covered Loss.

5 So, point number one, it requires direct
6 physical loss or direct physical damage; second, the
7 definition of Covered Cause of Loss which must be the
8 cause of the direct physical loss and so on itself
9 says, that covered causes of loss means direct
10 physical loss or direct physical damage unless the
11 loss or damage is excluded under the policy.

12 So, it's very clear, Your Honor, that direct
13 physical loss or direct physical damage is required
14 here. Now, Connecticut law is very clear regarding
15 the wording. There must be a tangible physical
16 impact on property. In mazzarella, Your Honor, which
17 was the U.S. District Court for the District of
18 Connecticut, Judge Underhill, he was faced with a
19 homeowner's policy. He said right out, flat, direct
20 physical loss is a physical tangible alteration to
21 any property. Now, on that case, Your Honor, there
22 was no clear statement as to what the damage was but
23 it came from something that he called "oxidation".
24 Oxidation, he said, is not direct physical loss.
25 Another case, Your Honor, out of Connecticut, England
26 v. Amica Mutual, that's the U.S. District Court
27 District of Connecticut in 2017. In that case, there

1 was concrete deterioration and cracking from a
2 chemical reaction in concrete. The policyholder had
3 a problem because concrete cracking was excluded
4 under the policy, so it had to come up with an
5 argument as to what would be direct physical loss or
6 direct physical damage. He focused on the chemical
7 reaction. The Court said, a chemical reaction in
8 concrete is not direct physical loss. Quote, a
9 chemical reaction, the judge said, without any
10 physical manifestations, does not fit the bill. He
11 also said, loss must be accorded a meaning that is
12 limited to observable, tangible effects. There must
13 be a perceptible harm.

14 In *Capstone*, Your Honor, which is from the
15 Connecticut Supreme Court which we cited, because
16 there is no Connecticut Supreme Court directly
17 addressing direct physical loss or direct physical
18 damage, that case involved a CGL policy which used
19 the term, "physical injury to tangible property".
20 The Court there said that defective chimneys resulted
21 in escape of carbon monoxide was not direct physical
22 injury to tangible property. I appreciate the
23 limitations on going from the CGL policy to the first
24 party policy and back and forth. There are many
25 Courts that have said you have to be careful because
26 those are two completely different policies. I'm not
27 suggesting otherwise, Your Honor, but in light of the

1 fact that that is the only case where the Court has
2 addressed something similar to this with the escape
3 of carbon monoxide, the fact that the Connecticut
4 Supreme Court found that that was not physical injury
5 to tangible property should give you some indication
6 as to how the Court would rule in a case like this.

7 And then, finally, Your Honor in Chief of
8 Staff, which is the U.S. District Court for the
9 Northern District of Illinois case, applying
10 Connecticut law, he was addressing COVID-19 and he
11 said, there is no physical injury here at all, just
12 loss of use. And he said, direct physical loss
13 cannot equal loss of use otherwise there is no point
14 to the word "physical". Moda makes a big point about
15 saying, well, the word "tangible" is not in the
16 property. Your Honor, I don't know how you can say
17 "physical" does not presuppose or assume that
18 something tangible is involved. You can't have a
19 physical effect on an intangible piece of property.
20 It's not possible. So, there is clearly no physical
21 loss here. That's what the judge in Chief of Staff
22 found, and that's what's been decided in many many of
23 these other cases. There is not a single allegation
24 in the counterclaim, Your Honor, that anything at all
25 happened to the property. And to the contrary, if
26 you look at Fisher's counterclaim, it's not even
27 based on the presence of virus particles, it's

1 limited to the impact of the closure orders. And in
2 particular, I would point you to counterclaim
3 paragraphs, 21, 22, and 23. Now, it is correct, Your
4 Honor, that in opposition to the summary judgment
5 motion, Fisher has come up with a conclusory
6 statement by it's chief financial officer in an
7 effort to try to establish some contamination to try
8 to meet the direct physical loss or direct physical
9 damage requirement. And what he says in Paragraph
10 13, this is the Burriss Affidavit, he said, the
11 persons with COVID were in the premises. They know
12 that. And they also say that they know that COVID
13 particles were present at the facility. "Present".
14 The word "present" they used in both instances. Now,
15 the Yale case, which has been cited in both briefs,
16 Your Honor, the District Court of Connecticut in 2002
17 involving asbestos contamination, is conclusive on
18 this point. The mere presence of a deleterious
19 substance, in that case, asbestos, is not direct
20 physical loss or damage. I think we can all agree
21 that whether it's in the courthouse, or in my office,
22 or in Moda's facilities, that a person walking around
23 the premises with COVID cannot possibly be viewed as
24 property damage. He's not walking property damage.
25 He's not a walking direct physical loss. It is the
26 mere presence of COVID on the premises and that
27 cannot possibly reasonably be viewed as direct

1 physical loss or damage.

2 Second, the mere presence of COVID particles is
3 not direct physical loss or damage. Even if it's
4 separated somehow from the individual. There is not
5 any kind of physical loss or damage. There is no
6 property -- excuse me -- there is no property to be
7 repaired, there is no physical impact on the
8 property, there is no alteration of any sort.

9 And I would, Your Honor, just read again just a
10 couple of snippets in other cases that have addressed
11 this. In one case, which is the Michael Cetta case
12 from the Southern District of New York in December,
13 the judge said this: Imagine a fisherman, because
14 it's a public pond each day to cast his line, one
15 morning he arrived and found that the pond was closed
16 for fishing because a nearby town was hosting it's
17 annual swim meet. Did the fisherman lose the use of
18 the pond for the day? Yes. He could not enjoy the
19 premises for it's intended use, but could anyone
20 reasonably conclude that there was direct physical
21 loss or damage to the pond because he could not fish?
22 No. The condition of the pond was not altered
23 physically.

24 In the case of Henry's Louisiana Grill v.
25 Allied -- these are all mentioned, Your Honor, in our
26 briefs -- but in the case of Henry's Louisiana --
27 Henry's Louisiana Grill, the Court said this: Every

1 physical element of the dining rooms, the floors, the
2 ceilings, the plumbing, the HVAC, the tables, the
3 chairs, underwent no physical damage as a result of
4 the governor's order. The only possible change was
5 an increased public and private perception of an
6 existing threat which cannot be deemed physical
7 damage that rendered the property unsatisfactory.
8 And he finally concluded, the plaintiff's
9 construction would potentially make an insurer liable
10 for the negative affects of operational changes
11 resulting from any regulation or executive decree
12 such as a reduction in the space's maximum occupancy.
13 It's an unreasonable reading of the policy to suggest
14 that there is some physical loss or damage here, Your
15 Honor.

16 If virus particles were on the property, they
17 are easily removed as we know, like any other
18 contaminant. The governor's order, in fact, allowed
19 essential businesses to stay open and active
20 regardless of COVID particles on the premises. The
21 only difference was, the decision by the Governor
22 that certain of them needed to stay open and others
23 did not. It had nothing to do with the contamination
24 of the property.

25 Another way to look at this, Your Honor, is
26 that contagious illness is really a fact of life.
27 During the flu or cold season, there may be people

1 who walk into Moda's property, or my office, or the
2 courthouse, and they shed flu and cold virus. We
3 would never say that the mere fact that those people
4 or particles were present in the courthouse, somehow
5 demonstrates property loss or property damage.

6 And then, finally, Your Honor, as everything
7 opens back up, hopefully soon, the property is
8 exactly as Fisher left it. There are no changes due
9 to the presence of persons with COVID or the presence
10 of COVID particles. There is no need to renovate the
11 property, no need to repair the property, no need to
12 restore the property. And the overwhelming majority
13 of the cases, Your Honor, across the country, have
14 rejected this argument and this Court should as well.

15 I would like to just talk briefly about
16 Fisher's "loss of use" and "loss of value" arguments.
17 Of course "loss of use" and "loss of value", as we've
18 been talking about, that is not physical injury.
19 It's not direct physical loss. If "loss of use" were
20 all that is required, there would be no point to the
21 word "physical". If "loss of use" and "loss of
22 value" were insured, the policy would have said that.
23 In Chief of Staff, the case applying Connecticut law
24 out of the Northern District of Illinois, it reached
25 this very conclusion. It said, in order for there to
26 be physical loss, something physical must be lost.
27 But here, Fisher has not lost anything. It's

1 property is still it's property, it is still there,
2 and when all the restrictions are lifted, it will be
3 the same property as before COVID, and there has been
4 no physical injury of any kind.

5 And, again, just returning to the England v
6 Amica case, Your Honor. A chemical reaction in
7 concrete, according to the District Court of
8 Connecticut, does not affect the concrete and is not
9 direct physical loss or damage. And the same in Yale
10 where the Court said that the mere presence of a
11 contaminant, there, asbestos, is not physical loss or
12 damage. And I must say, Your Honor, there is a huge
13 difference between asbestos and Corona Virus. Virus
14 particles do nothing to the property at all. They
15 are gone in a matter of hours. They are easily
16 cleaned up with a disinfectant wipe. After they
17 disappear or are wiped away, the property is exactly
18 the same as it was before. That was not the case
19 with asbestos were -- asbestos fibers were flying
20 through the building and entraining themselves in
21 rugs, carpets, and elsewhere. Clearly, a different
22 situation. But, even there, the Courts -- both Court
23 authority as well as Yale, have concluded that the
24 mere presence of asbestos without lure was not
25 property damage.

26 So, in short, Your Honor, all of Fisher's
27 arguments on direct physical loss and direct physical

1 damage, have been rejected multiple times by the vast
2 majority of the Courts and they should be rejected by
3 this Court as well.

4 I would like to move on to Civil Authority.
5 First, Your Honor, again, as I mentioned before, the
6 virus exclusion applies very clearly to civil
7 authority coverage just as much as anything else.

8 At page 99 of Exhibit 1 of the Summary Judgment
9 Motion, you'll find the civil authority's provision.
10 It said, the insurance is extended to apply to the
11 actual loss of Business Income you sustain and the
12 actual, necessary, and reasonable extra expenses you
13 incur when access to your "scheduled premises" is
14 specifically prohibited -- it uses the word,
15 "specifically prohibited" -- by order of a civil
16 authority as the direct result of a Covered Cause of
17 loss to property in the immediate area of your
18 Scheduled Premises.

19 So, you need three things for civil authority
20 to cover: First, you need direct physical loss or
21 damage to property in the immediate area; second, you
22 need a governmental order issued because of that
23 direct physical loss or damage to property in the
24 immediate area; and third, that order has to
25 specifically -- specifically -- prohibit you from
26 accessing your premises because of that direct
27 physical loss or damage. We have none of those here,

1 Your Honor. They've identified no specific property
2 in the immediate area of their premises that has
3 suffered physical loss or damage. That alone should
4 be dispositive. But even if they had identified any
5 such property, there is no direct physical loss or
6 damage for all the reasons that we said before. No
7 physical loss or damage to those other properties,
8 just loss of use. The other thing to keep in mind,
9 Your Honor, with respect to the government order
10 here. This is not an order such as when you have a
11 fire down the street, the government shuts down the
12 streets, says, you know, the following six buildings
13 you can't go into because of the danger from
14 collapse, or smoke, or whatever it might be. The
15 government orders here, are not focused on property
16 in the immediate area of Fisher's premises. They do
17 not specifically prohibit access to Fisher's
18 premises. A statewide prophylactic order, in other
19 words, like we have here, is clearly not what was
20 intended by or within the clear scope of the
21 provision. So, for example, Your Honor, in the case
22 of Food For Thought, which is cited in Exhibit 2 to
23 the notice of supplemental authorities, this is a
24 case out of the Southern District of New York. The
25 Court said, none of these orders -- same orders that
26 we have in this case -- none of these orders
27 specifically prohibited access to plaintiff's

1 property. In fact, the Governor Cuomo's executive
2 order that the plaintiff claims to have ordered the
3 closure of all non-essential businesses. In the case
4 of Kamakura v. Greater New York Life out of the
5 District Court of the Massachusetts, it said if civil
6 authority coverage were available absent a specific
7 and identifiable damaged property, that coverage
8 would extend without geographic limitation. In this
9 case for insured premises across the entire state,
10 something that the language of the provision plainly
11 does not contemplate. So, that's another case
12 that -- all of the cases have generally rejected
13 this, Your Honor, but what we are talking about here,
14 is not the kind of order that was contemplated by the
15 civil authority section. Courts have addressed exact
16 orders like this. Chief of Staff case, in fact,
17 addressed the Connecticut order that's at issue here.
18 And the Court found that the order did not trigger
19 civil authority coverage and found the orders to be
20 similar to an order to shut down a city
21 prophylactically in advance of a Hurricane. So, to
22 the extent that access was prohibited to any specific
23 business, it was not due to direct physical loss or
24 damage to property in the immediate area. There is
25 also another case that we cite, Your Honor, Mattdogg.
26 M-a-t-t-d-o-g-g, all one word, a New Jersey State
27 Court case to the same effect.

1 And, finally, Your Honor, the third prong of
2 Civil Authority's coverage, there is no prohibition
3 of access. Even if one cannot operate your business,
4 that is not the same as prohibiting access to the
5 business as physical premises. Courts have
6 determined that. I would refer Your Honor to Food
7 For Thought in particular and less accessibility does
8 not mean a prohibition of accessibility. You need a
9 complete prohibitions of access under the case law
10 and under the provision in order for it to apply and
11 that is not the case here.

12 Finally, Your Honor, on the Package Policy, I
13 want to address briefly the dependent properties
14 coverage at page 100 of Exhibit 1. That coverage is
15 found. It says, we will pay for the actual loss of
16 business income you sustain, et cetera, due to the
17 necessary suspension of your operations during the
18 period of restoration. And then it says, the
19 suspension must be caused by direct physical loss of
20 or direct physical damage to a dependent property
21 caused by, resulting from a covered loss. The same
22 analysis applies here, Your Honor. There is no
23 direct physical loss or direct physical damage to
24 those dependent properties. And Fisher has, at most,
25 shown in what it's allegation is, is that there are
26 some of the brick and mortar stores that carry it's
27 shoes and accessories that either closed voluntarily

1 or closed because of a government order. In courts
2 nationwide, Your Honor, throughout this entire
3 COVID-19 coverage litigation, have overwhelmingly
4 held that government ordered closures do not
5 constitute or cause direct physical loss or damage
6 because they restrict business activity, though the
7 dependent properties coverage, Your Honor, for those
8 same reasons, does not apply here.

9 So, that's my conclusion on the Package Policy,
10 Your Honor. For all those reasons, but in particular
11 the Virus Exclusion, probably the easiest and
12 simplest decisional point, you should rule in
13 Hartford's favor here and grant summary judgment on
14 the Package Policy.

15 I'll talk for a few minutes about the Marine
16 Policy, Your Honor. The Marine Policy has a purpose
17 and it's purpose is to insure goods in transit from
18 one port to another on the high seas. And by
19 endorsement in this particular case, it insures those
20 goods while they are temporarily stored and processed
21 in a scheduled location warehouse. In this case,
22 there are some unscheduled premises as well. But, at
23 any rate, it has to be a warehouse at either the
24 beginning or the end of the voyage. And it insures
25 them from direct physical loss or damage of those
26 goods. Now, here, there is no damages to the shoes
27 or other products that Moda ordered at all. There is

1 no damage in transit. They don't even suggest it.
2 There was no damage to them in the warehouse. There
3 was not even an allegation in this case of virus
4 contamination of the shoes. The shoes were perfectly
5 fine and could be and, in fact, were sold, according
6 to Moda on-line or otherwise. Now, what is Moda's
7 argument? Their argument is that the closure of the
8 retail sales stores meant that the goods could not be
9 sold by it's customers during the spring/summer
10 market, and therefore the customers no longer wanted
11 the shoes, and therefore refused to pay for them.
12 That is not physical damage, Your Honor, by any
13 means. The cases in Connecticut that talk about this
14 kind of coverage, Blaine, involved contaminated
15 beans, Interpetrol involved contamination of oil
16 while en route to a destination, Pepsico involved
17 off-tasting soda, off-tasting because of defective
18 ingredients. The Port Authority, as we mentioned
19 before, involved asbestos contamination. That's
20 long-term, permanently unsafe condition. The Courts
21 made clear that even in that case, though, that the
22 mere presence of the asbestos was not direct physical
23 loss. So, Your Honor, there is simply no direct
24 physical loss or direct physical damage which is a
25 *sina qua non* to coverage under the Marine Policy for
26 the shoes, for the other goods that Moda was ordering
27 and which it insured, basically, from port to port.

1 Now, Moda focuses on Section 25 of the
2 policy -- of the Marine Policy which is found in
3 Exhibit 2 at page 295 and that's the freight -- what
4 I will call the Freight Forwarding Provision. It
5 says that the policy shall also cover the following
6 contributions or necessary expenses actually incurred
7 by reason of perils insured against. It has to be,
8 "by reason of perils insured against". In this case,
9 the risk -- the un-excluded risk of direct physical
10 loss or direct physical damage. And what the
11 provision says: In the event of frustration,
12 interruption, or termination of an insured voyage, or
13 similar events beyond the control of the insured, the
14 company agrees to pay all landing, warehousing,
15 transshipping, forwarding, and other expenses
16 incurred to get those goods to forward them to the
17 original location or to some substituted final
18 destination. But it has to be incurred by reason of
19 a risk insured against; namely, a risk against direct
20 physical loss or damage. So, these are just freight
21 forwarding charges, Your Honor. It has nothing to do
22 with business interruptions. The policy does not
23 cover business interruption. And, so, it's limited
24 to begin with, but there is no basis for the coverage
25 because there's been no physical loss or damage to
26 the property that resulted in any frustration,
27 interruption, or termination of an insured voyage.

1 They suggest that, well, because of COVID-19, things
2 went -- you know, were delayed. Some shipments were
3 stopped, they were frustrated. They also say that
4 because of COVID-19, the goods could not make it to
5 their, quote, final destination, namely, the retail
6 stores. Well, the retail stores -- the goods weren't
7 damaged in any way because of that. That's not what
8 frustrated the shipment, not damage to the property;
9 rather, it was simply because of the governmental
10 orders. So, there is no insured peril that resulted
11 in any of the delays of any kind even if these did
12 exist.

13 Now, I will say, Your Honor, there are a number
14 of exclusions. You don't need to reach them, but if
15 you do, they are pretty easy to apply here. The
16 first exclusion in the Marine Policy is loss of
17 market. And if there was ever a situation in which
18 there has been a loss of market, this is it. The
19 market entirely evaporated for in-store shoe sales
20 due to COVID-19 and the government's orders. This
21 had nothing to do with the quality of the shoes.
22 There was no damage to them. It was a complete
23 collapse of a retail, in-store shoe market. Now,
24 Boyd Motors, which we cite in our case, makes this
25 clear. It says, that if stock is damaged and loses
26 value. So, if the shoes were damaged and lost value,
27 even if they were able to be rehabilitated, that that

1 would be a loss of market value which might be some
2 kind of measure of damages. But that's not what
3 happened here. This isn't -- and the loss of market
4 exclusion is what applies because if the stock is
5 less valuable -- as the Boyd Motors case explains --
6 if the stock is less valuable because of a
7 market-wide event that destroys or reduces the
8 market. In the Boyd Motor cases, it was the market
9 for cars, and here, for shoes, that is loss of
10 market.

11 Second exclusion that I point to, Your Honor,
12 is the interruption of business exclusion. This is,
13 by definition, COVID-19 is an interruption of
14 business. Their losses are arising out of
15 interruption of business, the ones that they allege
16 are covered under the Marine Policy. That's exactly
17 what it claims, that's excluded, clearly.

18 And, finally, there is an exclusion for delay.
19 Modas suggests that certain of it's shipments were
20 delayed and that effected the value of it's stock.
21 Well, that is excluded under the policy. So, the
22 Marine Policy, again, is intended to protect an
23 insured in the event that stock is physically damaged
24 or destroyed during a voyage or at the very -- you
25 know, at the outside, in this particular case, that
26 the warehouses where it's off-loaded or processed.
27 There was no physical loss or damage to the stock.

1 Moda doesn't suggest it, and therefore, there is no
2 coverage under the Marine Policy.

3 Finally, Your Honor, as to the bad faith claim,
4 has to fail for a number of reasons. First of all,
5 there is no coverage here; second, it would be
6 impossible for anyone to suggest that Hartford is
7 acting in bad faith here when over 85 percent of the
8 cases in which these claims have been submitted,
9 virtually all of the ones in which Hartford has
10 sought a judgment, the Courts have agreed with
11 Hartford. You can't possibly say that they were
12 acting in bad faith by making the decisions that they
13 did.

14 So, with that, Your Honor, and absent any
15 questions, I will -- I will stop and reserve a few
16 minutes of rebuttal if necessary. Thank you.

17 THE COURT: Thank you, counsel.

18 I think what we'll do now, rather than break up
19 the defendant's argument, is take, like, a
20 five-minute for staff, especially the court reporter
21 is going to need a little break. So, it's 11:01 and
22 we'll come back -- let's see. We'll come back at
23 11:10, give her time to get to where she needs to go,
24 all right. So, we'll take a brief recess.

25 (RECESS).

26 (IN SESSION).

27 THE COURT: All right. Is our court reporter

1 back, Attorney Ferraro?

2 REPORTER: Yes, Your Honor. I'm here.

3 THE COURT: Okay. Thank you.

4 So, why don't we resume our argument if
5 everyone is ready to go. And I wasn't sure if
6 Attorney Montenegro or Attorney Jackson, who would be
7 leading the charge.

8 ATTY. JACKSON: Good morning, Your Honor.
9 Kirsten Jackson, and I'll begin by discussing the
10 Package Policy.

11 So, I'm going to (INDISCERNIBLE) our slides.
12 Let me know if you are able to see a slide which
13 discusses the virus provision.

14 THE COURT: They are visible, and I assume no
15 one else has no problems as well so that we are all
16 on the same page. If anyone has a problem, just
17 speak up.

18 Continue, Attorney Jackson, whenever you are
19 ready.

20 ATTY. JACKSON: Okay. Thank you, Your Honor.

21 Okay. So, before I delve into the slides and
22 discuss Hartford's arguments relating to the Package
23 Policy's virus provisions, I would just like to start
24 by addressing some of the points that Mr. Rocap
25 raised regarding coverage decisions from around the
26 country.

27 Now, insurance coverage is a matter of state

1 law and I would like to draw the Court's attention to
2 the fact that 58 State Court decisions have decided
3 coverage for COVID losses nationwide and, in fact,
4 the majority of them have held in favor of the
5 policyholder. Only 23 of the 58 ruled in favor of
6 the insurer full stop. In 27 of the cases, the
7 insurer's motion was denied in full. In the other
8 eight, dismissal was only partial or with leave to
9 amend. So, the state of the law clearly is in flux
10 but it's one of these things where I believe that
11 opposing counsel overstates it's hand.

12 Now, turning to the virus provisions.
13 Hartford's Package Policy is an all-risks policy. It
14 covers all direct physical loss of or damage to
15 property unless expressly excluded. Now, The
16 Hartford fails to meet it's burden on summary
17 judgment to show the absence of any material fact
18 that it's virus provisions clearly and ambiguously
19 exclude coverage. As I will show, there are at least
20 five conflicting virus provisions and they are
21 located in various coverage parts that are scattered
22 throughout the policy. Two of these provisions
23 purport to take away coverage and the other three
24 purport to grant coverage for virus related losses.

25 Now, we believe that the three provisions that
26 grant coverage for virus related losses, ultimately
27 require coverage here but these conflicting virus

1 provisions are admittedly confusing even to coverage
2 counsel let alone the layperson which is the
3 standard. At a minimum, Fisher is entitled to
4 discovery regarding the interpretation of these
5 ambiguous virus provisions before this Court rules on
6 their meaning.

7 So, Hartford relies on two virus provisions in
8 order to deny coverage.

9 And I'm going to expand this a bit.

10 All right. So, the first of these is this New
11 York Exclusion of Loss Due to Virus or Bacteria which
12 appears on page HFIC 87 of the policy which is
13 attached to the Dennehy Declaration. It states in
14 relevant part that we will not pay for loss or damage
15 caused by or resulting from any virus, bacterium, or
16 other microorganism that induces or is capable of
17 inducing physical distress, illness, or disease.
18 Hartford asserts, in it's opening brief, that this
19 exclusion is limited to, in scope, to New York risks
20 and we don't necessarily disagree. But Fisher only
21 has a single showroom in New York. And Fisher
22 primarily alleges losses at various scheduled and
23 unscheduled premises in Connecticut, New Jersey, and
24 in California, as well as at thousands of dependent
25 properties across the country. Plus under Hartford's
26 very own interpretation, this exclusion doesn't apply
27 to the vast majority of Fisher's losses which are

1 outside of New York. But even in New York, this
2 exclusion is limited to loss or damages caused by or
3 resulting from any virus. This language is
4 significantly narrower than the language cited by
5 Hartford in the District of Connecticut LJ New Haven
6 case. The virus exclusion in that case barred
7 covered from losses "indirectly" caused by virus --
8 and indirectly is in quotes. The virus exclusion in
9 that case also had very broad, antique, concurrent
10 causation language.

11 Hartford's exclusion does not apply to losses
12 caused indirectly by the virus such as losses caused
13 by government shut-down orders as opposed to direct
14 contamination.

15 Now, the second virus provision Hartford relies
16 on is the Fungus Wet Rot Dry Rot Bacteria or Virus
17 exclusion shown here. This exclusion, however, is
18 located in an entirely different section of the
19 policy on page 111. This exclusion is for the
20 presence, growth, proliferation, spread, or any
21 activity of fungus, wet rot, dry rot, bacteria, or
22 virus. It does not specifically refer to pandemic
23 related losses like some of these other exclusions do
24 in other policies. And most importantly as we'll see
25 momentarily, this exclusion appears to be deleted by
26 endorsement. But even if it's not deleted, it
27 contains an expressed exception at the bottom which

1 says we will pay for the resulting loss or damage
2 caused by a specified cause of loss. And I'll get to
3 what that means in just a little bit.

4 Now, while Hartford relies on these two virus
5 provisions to deny coverage, it largely ignores
6 several other provisions that appear to grant
7 coverage for a virus. The first of these is a
8 provision on page 86 of the policy. This provision
9 states that the prior exclusion titled Fungus, Wet
10 Rot, Dry Rot, Bacteria, and Virus is deleted. And
11 I've highlighted that portion of the provision in
12 yellow.

13 Now, Hartford asserts that this exclusion is
14 deleted only as to New York risks, which is
15 plausible. But this could also be a state,
16 amendatory endorsement commonly found in these kinds
17 of insurance policies. Such amendments conform the
18 policy to minimum requirements under state law but
19 still apply everywhere.

20 Now, discovery could easily settle the meaning
21 of this provision, but so far Hartford has refused to
22 produce any documents regarding the meaning of this
23 provision.

24 Now, there are two other provisions that appear
25 to grant coverage for a virus. Both provide coverage
26 where the virus is a result of a specified cause of
27 loss, and a specified cause of loss is defined on

1 page 95 here to include aircraft or vehicles.

2 Now, the very first of these virus provisions
3 is on page 74 of the policy. It expressly states
4 that we will pay for loss or damage by Fungus, Wet
5 Rot, Dry Rot, Bacteria, and Virus. And that's that
6 Paragraph B and it's highlighted. That coverage is
7 triggered when the virus is the result of a specified
8 cause of loss, and aircraft and vehicles are a
9 specified cause of loss.

10 The second of these virus provisions is on page
11 102 of the policy, and it expressly provides coverage
12 when Fungus, Wet Rot, Dry Rot, Bacteria, Or Virus is
13 the result of a specified cause of loss. Again,
14 aircraft and vehicles are a specified cause of loss.

15 So, the question is, what does it mean for a
16 virus to be the result of a specified cause of loss?

17 THE COURT: Counsel --

18 ATTY. JACKSON: Hartford doesn't really say what
19 it means.

20 THE COURT: Counsel, I don't want to interrupt
21 you. I don't know if you intended to take this --
22 (INDISCERNIBLE).

23 ATTY. JACKSON: Yes.

24 THE COURT: Just let me know next time just so I
25 don't interrupt your flow because I wasn't sure if it
26 was a mistake or not. Okay?

27 ATTY. JACKSON: Okay. Thank you, Your Honor.

1 My apologies. I just couldn't see the group here and
2 I wanted to do that, and I'm done with my slides for
3 the time being. But, thank you.

4 All right. So --

5 So, basically the question is, what does it
6 mean for a virus to be the result of a specified
7 cause of loss? And Hartford really doesn't say what
8 it means, but we know it must mean something as the
9 contract can't be interpreted in a way that would
10 render that term superfluous. We would posit that
11 the only reasonable interpretation is that this
12 exception applies when virus travels to insured
13 property by aircraft or vehicles which is what we
14 know is the case with the Corona virus. It's not the
15 flu, as Mr. Rocap has suggested, it's a novel virus
16 that we've never seen before in the United States and
17 we know that it traveled to the West Coast and to the
18 East Coast from various portions of the world by
19 aircraft.

20 Hartford dismisses interpretation as patently
21 unreasonable but it really doesn't offer a more
22 reasonable alternative interpretation, but more
23 importantly, we haven't been allowed any discovery
24 into what this provision means. And Hartford
25 continues to withhold discovery regarding the meaning
26 of this provision, so we would request, at a minimum,
27 that there be discovery before the Court rules on the

1 meaning and interpretation of this provision.

2 Now, just to sum up this discussion with
3 respect to the virus provisions. Hartford policy is
4 really unusual compared to many of the other policies
5 that we work with in this space in that it doesn't
6 have just a single virus provision that applies to
7 the whole policy, instead, it has at least five
8 provisions that are scattered on different coverage
9 forms that were packaged together. Two of these
10 provisions purport to take away virus coverage but
11 three others clearly grant some form of virus
12 coverage. Fisher has provided a reasonable
13 interpretation of these five provisions, one, that we
14 believe gives meaning to all the terms and explains
15 why there is coverage here. But if there is any
16 doubt, that doubt must be resolved in the
17 policyholder's favor, and at a minimum, Fisher is
18 entitled to discovery regarding the meaning and
19 interpretation of these virus provisions.

20 Now, I would like to turn to the direct
21 physical loss of or damage to property language.
22 I'll cover a part of this argument, especially as it
23 relates to Connecticut law which governs the Package
24 Policy and my colleague, Miss Montenegro, will cover
25 the part of this argument that pertains to the Marine
26 Policy.

27 Now, Fisher has alleged at least three types of

1 physical loss of or damage to property as recognized
2 by Connecticut law. Now, the first of these is
3 Corona Virus contamination. And I would like to draw
4 the Court's attention to the Yale University case
5 where the District of Connecticut held that, quote, a
6 variety of contaminating conditions constitute
7 (INDISCERNIBLE) loss of or damage to property. And
8 the Yale University case specifically used odors as
9 an example. Viral contamination similarly --
10 similarly qualifies as a form of physical loss or
11 damage to property. In fact, I would like to draw
12 the Court's attention to the fact that Hartford's own
13 cases that it cited in it's reply brief and in it's
14 Exhibit A have recognized that Corona Virus
15 contamination may constitute physical loss. And
16 these decisions include the Ballas Nails decision
17 the Berkseth-Rojas decision , the Bradley Hotel
18 decision, the Clear Hearing Solutions decision, the
19 Drama Camp decision, the Fink decision, Grasp,
20 Kestler(PHONETIC), Mark's Engine Company, Sun
21 Cuisine, and Vervene Corp.(PHONETIC). And while the
22 Hartford has raised the Chief of Staff decision out
23 of Illinois, it's worth noting that that case did not
24 allege viral contamination, so it's distinguishable.
25 But at a minimum, whether or not viral contamination
26 constitutes familiar loss of or damage to property,
27 presents a fact issue that precludes summary

1 judgment.

2 Now, the second category of physical loss or
3 damage, is loss of use of property. Again, the Yale
4 University case in the District of Connecticut, held
5 that even, quote, in the absence of structural damage
6 to property, losses that, quote, render the insured
7 property unusable or uninhabitable, are losses
8 covered by the All-Risk Policy. And I would also
9 like to draw the Court's attention to the fact that
10 we provided a supplemental exhibit of recent COVID
11 cases from all around the country that have similarly
12 held that government shut-down orders cause physical
13 loss.

14 And in the third category of physical loss or
15 damage, is loss of value which a Connecticut Superior
16 Court decision in U.S. Surgical held constitutes
17 direct physical loss of or damage to property. And
18 in that case, the Court specifically held that there
19 was coverage for inventory that was, quote, not
20 physically damaged but where the undamaged items
21 have, quote, lost their value.

22 So, before I hand the floor to Miss Montenegro,
23 Hartford's argument that losses caused by virus do
24 not constitute physical loss of or damage to
25 property, really makes no sense in light of the
26 policy's many virus provisions. I would ask this.
27 Why would a policy have virus exclusions in the first

1 place if virus could not cause physical loss of or
2 damage to property? And at a minimum, the phrase
3 "physical loss or damage" is ambiguous, and the
4 defendants are entitled to discovery regarding it's
5 meaning.

6 And with that, I would like to turn the floor
7 to Miss Montenegro.

8 ATTY. MONTENEGRO: Good morning, Your Honor.
9 Christine Montenegro with Kasowitz Benson. I'm going
10 to try and share the screen if that's okay?

11 THE COURT: Sure.

12 ATTY. MONTENEGRO: Oh. It's not allowing me to.

13 ATTY. JACKSON: I can open it back up. My
14 apologies. I shouldn't have closed it in the first
15 place. Give me a moment and then just tell me what
16 slide you need.

17 ATTY. MONTENEGRO: Okay. I don't need the
18 slides right now, but I will let you know when I do.

19 ATTY. JACKSON: Okay, perfect.

20 ATTY. MONTENEGRO: Thank you.

21 So, Hartford's motion for summary judgment
22 should be denied because, as we've discussed, there
23 are numerous issues of material fact regarding
24 Fisher's entitlement to coverage under the Marine
25 Policy.

26 And just for starters, I just would like to
27 mention that the Marine Policy is governed by federal

1 maritime law, absence of such law, then we would look
2 to the New York law for guidance. And also the
3 Marine Policy has no virus exclusions, so that is not
4 applicable here, anything dealing with the virus
5 exclusion. And counsel, I know, mentioned that it
6 applies to goods that are in transit. I just also
7 would like to make clear it also applies to goods
8 while they are being processed at the warehouse
9 locations and it also extends to coverage to
10 unscheduled warehouses and processing locations as
11 well. So, I just would want to make clear that the
12 coverage also applies to temporary storage, and I
13 just wanted to make those points at the outset.

14 Miss Jackson talked about some of the physical
15 losses that Fisher sustained. Again, there are
16 numerous issues of fact, the fact that Fisher
17 sustained three distinct types of losses here. And,
18 so, the first one dealing with the fact that it had
19 the inability to access it's premises as well as it's
20 footwear inventory. And I would like to highlight
21 the fact that the Marine Policy is different because
22 it specifically provides -- and this is different
23 than most of the policies that have been discussed in
24 the COVID context -- 19 context -- that the policy
25 insured against all risk of direct physical loss or
26 damage to insured property from any external cause.
27 And as we cite in our brief, the Customized

1 Distribution case, when analyzing a similar Marine
2 Policy, and looking at that use of the language,
3 "all-risk", that the Court found that that use of
4 that term "all-risk" supports the view that there
5 does not need to be actual tangible damage to
6 property. And, in fact, more recently this year in
7 the Choctaw Nation of Oklahoma case, which is at 2021
8 Westlaw 714032, that case made clear when analyzing
9 similar language, that the coverage is pretty broad
10 and actually extends from losses arising from
11 anticipated harm or danger; therefore, the coverage
12 here is broader and there does not actually have to
13 be tangible damage to property for there to be
14 coverage. Also, as we cite in our brief, the North
15 Deli case which made clear that the inability for
16 business owners to access and have rights and
17 advantages to using its property, that can constitute
18 a physical loss. And we take the position here that
19 Fisher sustained that same physical loss from being
20 unable to access it's property as well as it's
21 inventory.

22 Also, the Connecticut Superior Court and U.S.
23 Surgical Court when analyzing the same similar
24 language about all-risk of physical loss or damage
25 actually found that language is ambiguous. And in
26 those circumstances, when there is an ambiguity, the
27 language should actually be read in favor of the

1 insured. So, I would submit that the Court should
2 look at that case for guidance in finding that the
3 language is ambiguous and could provide coverage in
4 these instances. And Hartford's counsel relies on a
5 lot of different cases in arguing that coverage
6 should supposedly not apply here. And I would like
7 to note, for the record, that in some of those cases
8 while we don't agree with the interpretation, they
9 found that a tangible requirement was required but
10 coverage was only extended during the period of
11 restoration. And that restoration period was
12 triggered when property needed to be repaired,
13 rebuilt, or replaced. There is no such language in
14 the Marine Policy that coverage is at all tied to the
15 restoration period, so there is no reason to limit
16 the language in that manner.

17 And, also, we've only to date have had limited
18 discovery as Miss Jackson mentioned that we had
19 several motions to compel that we've filed about --
20 against Hartford. We are still working to get
21 discovery from nonparties. ISO has produced limited
22 discovery to date. We believe they are sitting on a
23 treasure trove of documents and some of these
24 documents raise material issues of fact. And from
25 what we've seen --

26 Miss Jackson, if you could go to slide eight of
27 the presentation?

1 So, from these slides, we see that Hartford was
2 on the Commercial Property Panel for ISO. ISO, as we
3 mentioned, was involved in drafting the standardized
4 forms. From these documents, you've seen that
5 Hartford was on the panel. The little that we've
6 seen is 2004, 2005, and this was during the time
7 period where there were discussions regarding the
8 virus exclusion. And we know that they were involved
9 in drafting -- if you look at slide nine, we know
10 that they were involved in drafting civil authority
11 provisions.

12 If you could turn to slide nine?

13 The slides will show in slide nine that they
14 were involved in the civil authority drafting that.
15 From the minutes, we see that September 28, 2005, as
16 well as we've seen that they were also involved in
17 drafting the virus exclusion.

18 And if we turn to slide 13, please?

19 ATTY. JACKSON: On my end it's showing slide 13,
20 so let me know if that's not the case on your end?

21 ATTY. MONTENEGRO: It's not showing slide 13.

22 ATTY. JACKSON: Oh, that's -- which slide is it
23 showing on your end?

24 ATTY. MONTENEGRO: Nine.

25 ATTY. JACKSON: Oh, that's -- there must be a
26 delay, then.

27 ATTY. MONTENEGRO: Okay. So, on slide 13, this

1 is documents that we received from ISO. And in those
2 documents, we see what we've highlighted in yellow
3 which, again, raises material issues of fact. It
4 states, I think an insured would have a reasonable
5 expectation of coverage if ordered to cease business
6 by government authority. And we just would like to
7 highlight that for the Court because again, that's
8 consistent with what we've alleged in this case, and
9 it also demonstrates why discovery is necessary of
10 this case at this stage and that the summary judgment
11 motion is premature.

12 Now, turning the attention to the second
13 physical loss that Fisher suffered which is the
14 contamination of it's property. Hartford admits at
15 page 29 of it's opening brief that contamination
16 could constitute direct physical loss. Now, Hartford
17 switches gears in it's brief and claims, well, if
18 it's temporary contamination, then that's not
19 sufficient. We cite the Interpetrol case in our
20 brief. And in that case, that dealt with temporary
21 contamination of oil. The oil failed to meet
22 industry standards for a period of time. So, the
23 cargo owner was unable to sell the oil at the higher
24 market rates and had to sell the oil at the lower
25 market rate after the contamination subsided. And
26 the Court there found that there were issues of
27 material facts about whether or not temporary

1 contamination could constitute physical loss and did
2 not grant summary judgment for the insurer based on
3 those facts.

4 Similarly, Hartford, here, clearly understood
5 that a virus could contaminate property.

6 If we can turn to slide 19 which is the ISO
7 circular that was submitted to various regulatory
8 authorities back in 2006 when ISO was attempting to
9 get approval for the virus exclusion? If you
10 could -- Kirsten, if you could turn to slide 19?

11 So, in this slide, if it shows up, on page 19
12 it talks about the fact that SARS is a virus
13 contaminant and also mentions the fact that disease
14 causing agents may render a product impure or enable
15 to spread a disease by their presence. So, clearly,
16 the fact that they were contemplating a virus
17 exclusion, they understood that a virus could act as
18 a contaminant. And this is the slide on page 19.
19 This is submitted as an Exhibit C to my affirmation
20 in opposition to Hartford's Motion For Summary
21 Judgment. Hartford also makes a big deal about the
22 fact that allegedly COVID can be readily cleaned.
23 Again, these are issues of fact. There are studies
24 that say otherwise. This would require expert
25 discovery. It's premature at this stage whether or
26 not the fact that COVID allegedly could be cleaned,
27 whether or not that could impact the showing of

1 physical loss or damage, particularly, when we are
2 dealing with different language under the Marine
3 Policy which is broader and extends broader coverage.
4 And, furthermore, the documents that we've received
5 from ISO, which is at page 14 of the slides, that
6 referenced the fact that from handwritten notes,
7 which again we haven't had full discovery of ISO, but
8 it mentions the fact that contamination does not need
9 to change the product's form or substance. So,
10 again, raises material issues of fact what level
11 contamination is needed for there to be coverage.
12 And the third type of loss that we -- Fisher
13 sustained here, was that it's products became
14 outdated and diminished in value. The customized
15 distribution court, which we cite in our brief, dealt
16 with a similar Marine Policy that had the same broad
17 language. There, the product, the warehouse had
18 failed to timely rotate and shift the products. It
19 was a beverage product. The beverage product did not
20 change in it's material composition however the
21 product changed how it was perceived from the
22 customers as a result of the undue passage of time.
23 And there the Court found that there was sufficient
24 issues of material fact regarding a physical loss.
25 That's similar to what happened here where Fisher
26 sells seasonal footwear goods, and because they
27 became outdated, the customers perception of the

1 product had changed because of the passage of time.
2 Hartford, as we've set forth in Mr. Burriss'
3 affidavit, understood the nature of Fisher's business
4 and that it's products had to be sold in a timely
5 manner. And these were one of the most valuable
6 assets of Fisher's product line, was it's shoes, so
7 it was imperative that they were sold on a timely
8 basis. And the customized distribution court also
9 found, given that the policy terms were ambiguous in
10 the context of the situation, that the policy should
11 be read in favor of the insured. And the same
12 rationale would apply here.

13 As I mentioned earlier, there is no virus
14 exclusion in the Marine Policy so Hartford relies on
15 inapplicable exclusions to claim that coverage is
16 barred. To begin with, Hartford bears the burden to
17 show that there are no material issues of fact that
18 Fisher's losses were proximately caused by an
19 excluded peril and Hartford has not met that showing.
20 In fact, there are material issues of fact showing
21 that Fisher's losses were proximately caused by three
22 different types of insured perils. Hartford also
23 claims that Fisher can't -- coverage is barred
24 because the losses constitute consequential losses.
25 That's not so. We cite cases in our brief that makes
26 clear that any economic damages that proximately are
27 caused by an insured peril, will not be deemed

1 consequential damages, so as any economic damages
2 that flowed to Fisher from it's physical losses that
3 it sustained are recoverable.

4 Also, Mr. Rocap mentioned that there was a loss
5 of market exclusion that applies here. And he claims
6 that the market evaporated. Again, these are issues
7 of fact. We've put forth evidence from Mr. Burris
8 who is the CFO of Fisher and he actually attested to
9 the opposite. The evidence actually shows the
10 opposite, that the market didn't evaporate, because
11 as soon as a civil orders authorities lifted, Fisher
12 was able to sell those outdated goods, a portion of
13 them, at a discount, and also the goods that were
14 new, they were able to sell it at prevailing market
15 rates. So, the market didn't evaporate. When you
16 are talking about loss of market, you are talking
17 about a shift in demand or you are talking about
18 competition, and that's not what happened here.

19 Also, Mr. Rocap mentioned that the loss of use
20 exclusion applies. And that just doesn't make sense.
21 A loss of exclusion is ambiguous. If you look at
22 that provision in the context of other provisions in
23 the policy if, for instance under Section 22 of the
24 Marine Policy it provides for coverage if government
25 authorities take action for the public welfare.
26 Clearly, there could be instances where when the
27 government takes such actions that you would have

1 loss of use of your property. Also, Hartford admits
2 that contamination could be a physical loss. So, in
3 those circumstances, clearly you wouldn't have access
4 to your property if there is contamination. So,
5 given the ambiguity of this exclusion, it should be
6 construed in Fisher's favor.

7 Also, if you take Hartford's reading as they
8 suggest, it would just render their promises elusory
9 under the contracts.

10 And then in terms of the bad faith -- switching
11 to the bad faith argument, there is still -- it's
12 premature at this stage. We have not obtained any
13 discovery relating to Fisher's state of mind. We've
14 attempted to obtain those documents. To date, we
15 have not obtained them. In terms of the decisions
16 that have come out, at the time that Hartford made a
17 blanket denial on it's website back in April of last
18 year, no such decisions had even issued, so there is
19 no way that it could predict what would happen.

20 Also, there were letters going to our client
21 pretending to investigate the claim when we found out
22 a few days later that they were actually filing a
23 lawsuit in Connecticut court against our client. So,
24 again, this is too premature at this stage for any
25 decision to be rendered on the bad faith claims.

26 Also, Hartford had also mentioned in terms of
27 coverage under Section 25. We submit that if you

1 look at both Section 19 and 25 together, that you
2 don't necessarily need to show a physical loss to get
3 coverage under 25 but even assuming arguendo that you
4 need to show physical loss, we have sufficiently
5 showed physical loss here. And if you look at
6 Mr. Burris' affidavit, Paragraphs 20 to 28, he sets
7 forth all the different shipments that were
8 frustrated and weren't able to meet their
9 destination.

10 And I think that covers my argument for the
11 Marine Policy.

12 THE COURT: Thank you, counsel.

13 Are we going to take the screen down?

14 Thank you.

15 Attorney Rocap? I don't see you here, but you
16 must be here somewhere. There we are.

17 ATTY. ROCAP: I'm back, yeah.

18 THE COURT: I see you now.

19 ATTY. ROCAP: Do you hear me okay? I'm off
20 mute?

21 THE COURT: I sure can.

22 ATTY. ROCAP: Thank you, Your Honor.

23 So, most of what counsel for Fisher have said
24 has been addressed in the briefs and in my opening
25 argument there, so I'm not going to go over
26 everything, but there are two or three things that I
27 would like to mention.

1 First of all, with respect to the exception to
2 the -- to the virus exclusion, Your Honor, they have
3 come up with a completely unreasonable reading of the
4 exclusion. They say that we are supposed to come up
5 with a reasonable reading. We don't have to come up
6 with some reason about why a virus might be caused by
7 an aircraft. It's a ridiculous presumption of
8 principle to begin with. So, the fact is, they have
9 not provided any kind of a reasonable reading of that
10 exception for it to apply. And, as I said, Your
11 Honor, the only time that a Court has actually
12 addressed that in Firenze, the Court rejected it out
13 of hand as being absurdly over broad.

14 I would like to address the U.S. Surgical case,
15 Your Honor. This is the case in which there were
16 medical staplers, not the kind you get at Costco, but
17 these are medical -- you know, important things --
18 medical staplers, and some of them were contaminated
19 by, I think it was water intrusion, others they
20 weren't sure or they didn't know and it didn't look
21 like they were, but because of for medical
22 requirements, they needed to actually go in and check
23 the medical staplers when they -- what the Court made
24 clear, was when they did that, they were
25 automatically contaminating them. They were no
26 longer permitted to be used under the FDA. So, the
27 Court, I think quite reasonably in that particular

1 instance said, well, they are all bad because there
2 is no way that they could be used under the
3 circumstances. So, that does not support their loss
4 of value argument, Your Honor, it's simply another
5 issue -- it's simply another case in which the
6 staplers, all of them were, in fact, subject to
7 direct physical loss.

8 They made a few points about Custom
9 Distributors, Your Honor. I would say, first of all,
10 please note that that is not New York law which
11 applies to the Marine Policy, it's not Connecticut
12 law either. And it's -- it's position that a
13 perception of damage is sufficient to establish
14 direct physical loss has not been accepted by any
15 Court in the COVID cases by any Court to my knowledge
16 anywhere else, and in fact, has been criticized by
17 other courts. Perception of direct physical loss is
18 simply not direct physical loss. A risk -- a risk of
19 direct physical loss is something that could cause a
20 direct physical loss. Perception does not, you know,
21 create or cause direct physical loss under any
22 circumstances.

23 The points that they made with respect to
24 discovery of ISO documents, the documents that they
25 mentioned, particularly, Your Honor, if you look at
26 those documents, and this is not a debate that you
27 need to get into because the policy language is

1 unambiguous and so you shouldn't even be looking at
2 it, but if you look at it, for example, at -- yes,
3 the ISO circular, to Exhibit C for Miss Montenegro's
4 affidavit, it explains that it doesn't believe that
5 this kind of claim is covered, but because people can
6 make allegations that it is, similar to the
7 allegations that have been made here, we are going to
8 institute and use a virus exclusion that is specific
9 to viruses and it simply says, if it has anything to
10 do with a virus, it's excluded. We don't want to
11 have debates over direct physical loss or direct
12 physical damage. We are simply going to exclude all
13 virus related losses.

14 And then they mentioned, I think, with respect
15 to the loss of market. This will be my last point,
16 Your Honor. Miss Montenegro mentioned that while
17 they were able to sell their product later and
18 therefore there was not a loss of market. Well, what
19 she -- her statement, you know, suggests, says that
20 there was a loss of market and then the market came
21 back. And they are not claiming, you know, damages
22 after the market came back. What they are claiming,
23 are damages during the time that the market was not
24 there and that it's customers did not want it's
25 product because they felt they could not sell them in
26 retail stores. That is the period of time for which
27 they are seeking damages. Those damages are not

1 covered because of loss of market. But she also --
2 I also mentioned, as well, the delay exclusion and
3 the interruption of business exclusion which clearly
4 excludes these losses in the Marine Policy.

5 So, that's all I have, Your Honor. And I
6 appreciate you listening very patiently to us.

7 THE COURT: All right. Thank you very much,
8 counsel. I will get to work and take it under
9 advisement. I hope everyone stays safe and well.

10 And we are adjourned.

11 ATTY. ROCAP: Thank you, Your Honor.

12 ATTY. JACKSON: Thank you, Your Honor.

13 (ADJOURNED)
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NO: X06-UWY-CV20-6055095S : SUPERIOR COURT
HARTFORD FIRE INSURANCE : JUDICIAL DISTRICT
OF WATERBURY
V. : AT WATERBURY, CONNECTICUT
MODA, LLC, ET AL : APRIL 19, 2021

C E R T I F I C A T E

I, Linda A. Coon, hereby certify that this is a true and accurate transcription of the above-referenced case, heard in Superior Court, Judicial District of Waterbury, Connecticut, before the Honorable Barbara Bellis, on this 19th day of April, 2021.

Dated this 23rd day of April, 2021, in Waterbury, Connecticut.

Linda A. Coon
Court Monitor/ Court Reporter

NO: X06-UWY-CV20-6055095S : SUPERIOR COURT
HARTFORD FIRE INSURANCE : JUDICIAL DISTRICT
OF WATERBURY
V. : AT WATERBURY, CONNECTICUT
MODA, LLC, ET AL : APRIL 19, 2021

E L E C T R O N I C C E R T I F I C A T E

I, Linda A. Coon, hereby certify that this is a true and accurate electronic version of the above-referenced case, heard in Superior Court, Judicial District of Waterbury, Connecticut, before the Honorable Barbara Bellis, on this 19th day of April, 2021.

Dated this 23rd day of April, 2021, in Waterbury, Connecticut.

Linda A. Coon
Court Monitor/ Court Reporter

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent by electronic mail on this the 27th day of April 2021 to the following:

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