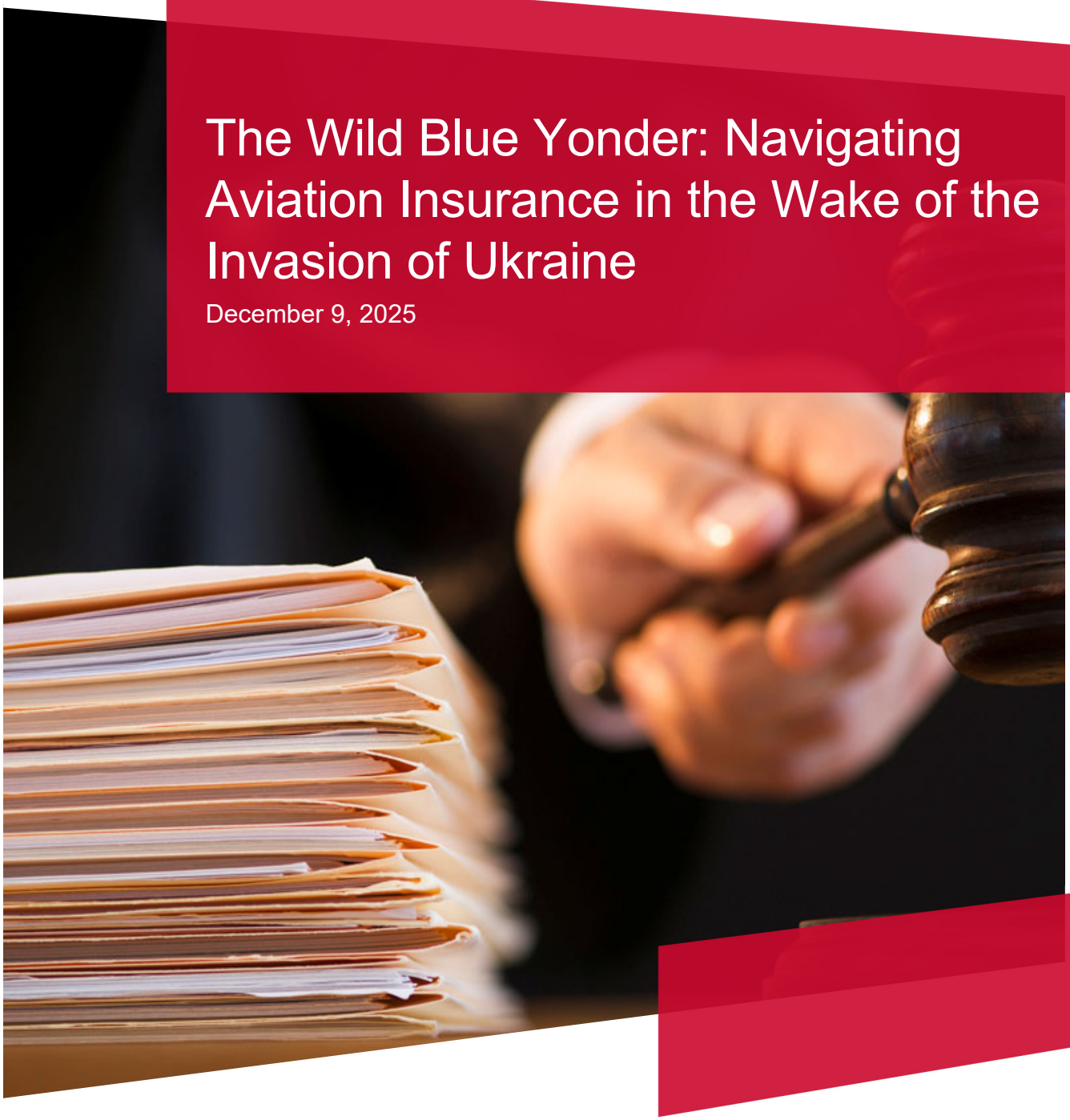
The Wild Blue Yonder: Navigating Aviation Insurance in the Wake of the Invasion of Ukraine

December 9, 2025



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The Wild Blue Yonder: Navigating Aviation Insurance in the Wake of the Invasion of Ukraine

Prepared for Association of Corporate Counsel, Western Pennsylvania Chapter

Presented by George Stewart and Max Louik
December 9, 2025

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Today's Agenda

- The Aviation Leasing Industry
- Aviation Leasing and Insurance
- The London Insurance Market
- The "Perfect Storm" – Russia's Invasion of Ukraine
- Aviation Leasing: Relevant Insurance Policies
- Russian Aviation Insurance Litigation
- Insurer Bad Faith
- Lessons Learned

Aviation Leasing Industry: Background

- Roughly a 50/50 chance your next flight isn't on an airline-owned aircraft.
- Airlines lease from lessors that buy directly from aircraft manufacturers.
- Leasing is widespread, though not widely known.
  - 150+ companies worldwide buy aircraft and lease them to airlines.
  - Over half of the global commercial fleet is leased; several lessors are publicly-traded.
- Why is leasing so prevalent?
  - Aircraft ownership ties up significant capital.
  - Leasing preserves cash and strengthens balance sheetss.

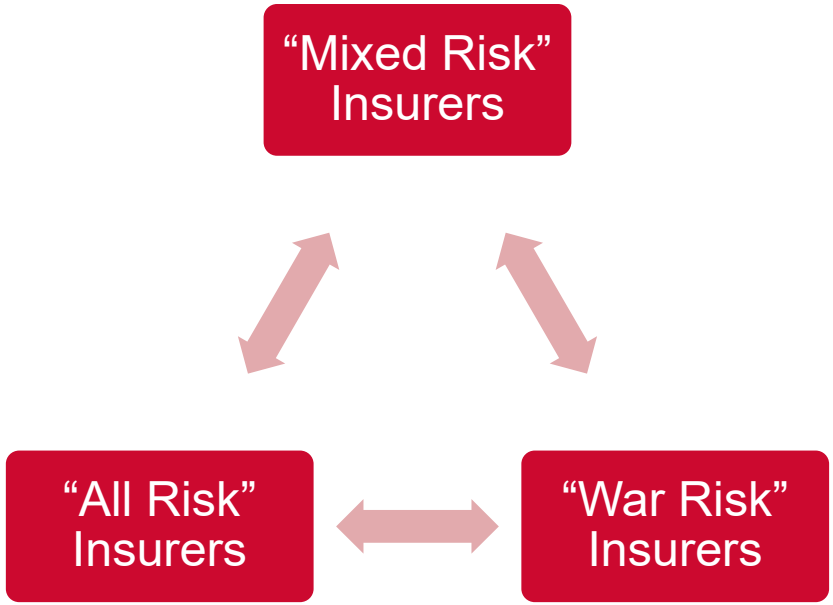
Aviation Leasing Industry: The Leasing Arrangement and Insurance

- Lessor purchases the aircraft and holds title.
- Lessor then leases the aircraft to an airline under a lease agreement, under which the lessee:
  - Pays rent in agreed amounts over a set term for use of aircraft;
  - Maintains aircraft per all applicable requirements;
  - Procures and maintains required insurance;
  - Returns aircraft at lease end (and the lessor may re-lease or sell it).
- Re: insurance, the risk follows possession:
  - Before delivery and after redelivery, the lessor has the primary insurable interest.
  - During the lease term, the lessee has the primary insurable interest.
  - Aircraft *should* be fully insured before, during, and after lease.

The London Insurance Market

- The global epicenter for aviation insurance
- Insures very sizeable risks, syndicated
- Three big players:
  - Brokers;
  - Syndicates of Lloyd's of London; and
  - Authorized London Market Companies.
- "Lead" underwriters and "lead" claims handlers

Russian Aviation Insurance Claims & The London Market



Aviation Leasing Industry: Russia

- Leasing is even more prevalent among Russian airlines.

- About 2/3 of Russia's commercial fleet is leased, mostly from Western lessors, including:
  - Air Lease Corporation;
  - Aviation Capital Group;
  - Wings Capital Partners

The “Perfect Storm” – Russia’s Invasion of Ukraine

1. Russia invades Ukraine

2. EU, US, & UK impose sanctions

3. Russia acts to keep the aircraft

Aviation Leasing Industry: Relevant Insurance Policies

Airline's Fleet Policy

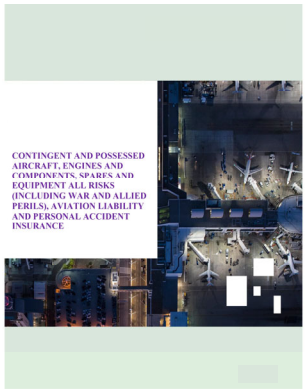
+

Leasing Company's C&P Policy

Contingent
- Fleetwide

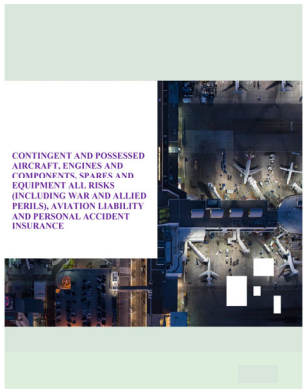
Possessed
- Scheduled Aircraft

The Policy Provides Coverage In Several Separate Sections:



Section One:	Aircraft Hull Coverage
Section Two:	Spares and Equipment Coverage
Section Three:	Aircraft Hull, Spares and Equipment War and Allied Perils Coverage
Section Four:	Aviation Liability Coverage
Section Five:	Personal Accident
Section Six:	General Exclusions
Section Seven:	General Conditions

“All Risk” – “Physical” Loss of or Damage to Aircraft



SECTION ONE - AIRCRAFT HULL COVERAGE

1. Contingent Aircraft Hull Coverage

To pay for physical loss of or damage, sustained during the Period of Insurance, to Aircraft as per the Schedule of Aircraft, the subject of a Lease/Finance Agreement, that are not in the care, custody or control of the Insured and in respect of which physical damage coverage is required to be provided under the Principal Policy, in the event that the Insured is not indemnified in whole or in part under the Principal Policy.

This coverage also applies to engines and components as per the Schedule of Engines and Components, the subject of a Lease/Finance Agreement, whilst attached to an Aircraft that is not the subject of a Lease/Finance Agreement.

In the event that the Insurers of the Principal Policy deny the Insured coverage or fail to investigate, adjust or enter into settlement negotiations in respect of any claim within 180 days after the Insured has submitted a written request thereto and have used their best efforts to obtain same, the Insurers will, subject to the terms, conditions, limitations and exclusions of this Policy, investigate any such claim.

2. Possessed Aircraft Hull Coverage

To pay for physical loss of or damage, sustained during the Period of Insurance, to Aircraft as per the Schedule of Aircraft

(1) awaiting the commencement of a Lease/Finance Agreement or closure of a sale, or

(2) having been returned on the expiry or termination of a Lease/Finance Agreement, or

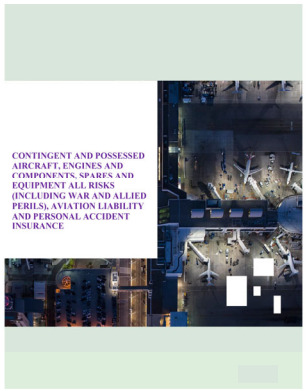
(3) (i) having been repossessed, or

(ii) which are in the course of repossession from a Lease/Finance Agreement, or

(4) in the care, custody or control of the Insured.

This coverage also applies to engines and components, as per the Schedule of Engines and Components, whilst attached to any Aircraft which is not included in the Schedule of Aircraft.

“War Risk” – Loss of or Damage to Aircraft Caused by War Perils



SECTION THREE - AIRCRAFT HULL, SPARES AND EQUIPMENT WAR AND ALLIED PERILS COVERAGE

1. Contingent Aircraft Hull, Spares and Equipment Coverage

To pay for loss of or damage to

(a) Aircraft as per the Schedule of Aircraft, and/or

* * *

2. Possessed Aircraft Hull, Spares and Equipment Coverage

To pay for loss of or damage to Aircraft as per the Schedule of Aircraft, and/or Spares and Equipment

* * *

Excluded under Sections One and Two of this Policy as caused by:

A. War, invasion, acts of foreign enemies, hostilities (whether war be declared or not), civil war, rebellion, revolution, insurrection, martial law, military or usurped power or attempts at usurpation of power.

B. Strikes, riots, civil commotions or labour disturbances.

C. Any act of one or more persons, whether or not agents of a sovereign power, for political or terrorist purposes and whether the loss or damage resulting therefrom is accidental or intentional.

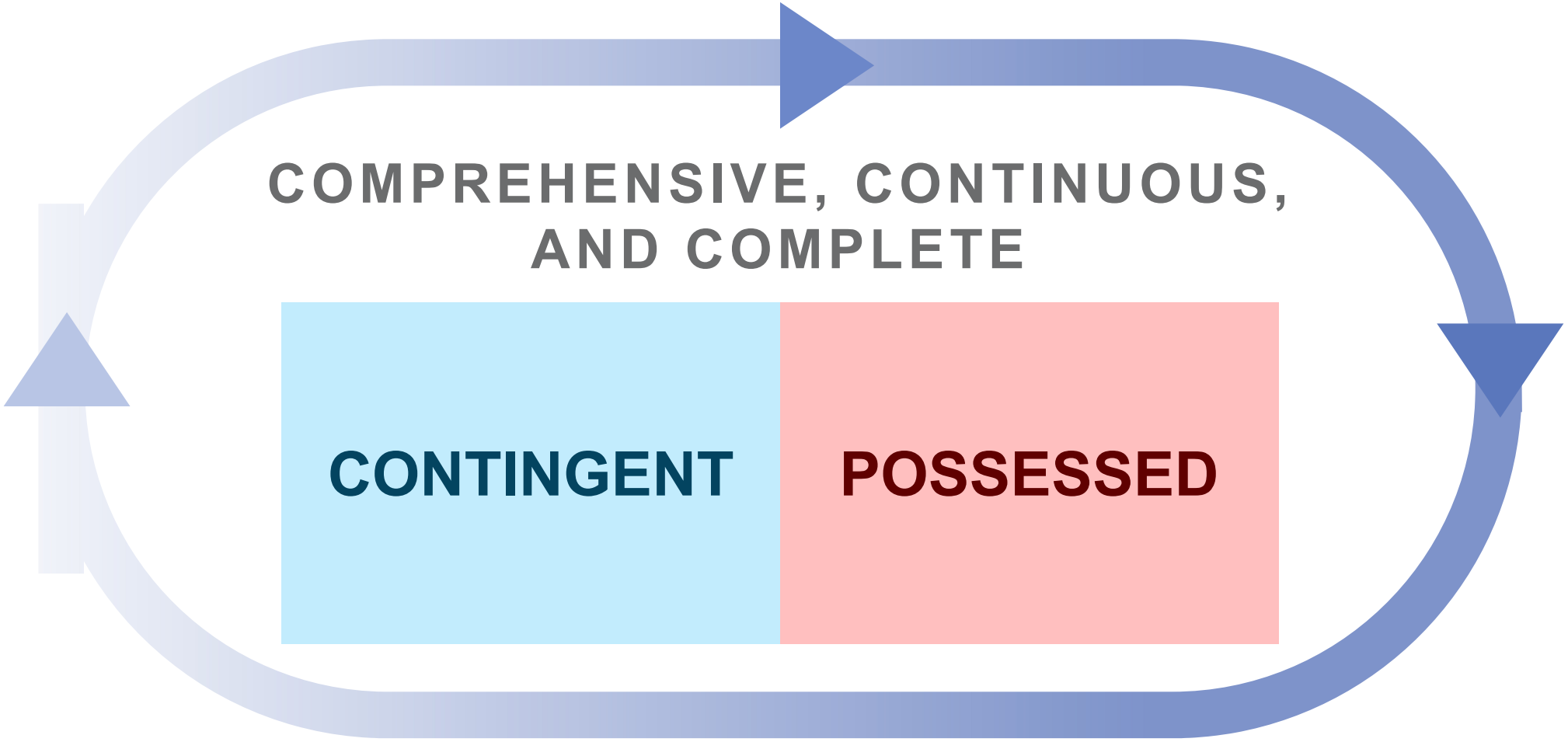
D. Any malicious act or act of sabotage.

E. Confiscation, nationalisation, seizure, restraint, detention, appropriation, requisition for title or use by or under the order of any Government (whether civil military or de facto) or public or local authority.

F. Hi-jacking or any unlawful seizure or wrongful exercise of control of the Aircraft or crew in flight (including any attempt at such seizure or control) made by any person or persons on board the Aircraft acting without the consent of the Insured/Operator. For the purposes of this paragraph F. only, an Aircraft is considered to be in flight at any time from the moment when all its external doors are closed following embarkation until the moment when any such door is opened for disembarkation or when the Aircraft is in motion. A rotor-wing Aircraft shall be deemed to be in flight when the rotors are in motion as a result of engine power, the momentum generated therefrom, or autorotation.

All Potential Claims Should Be Covered

All Potential Claims Should Be Covered



The Existential Threat of a Horizontal Claim

The Telegraph

Lloyd's of London ready for £8bn dogfight over planes 'stolen' by Putin

Insurance market seeks to 'deny' claims from owners of 500 aircraft seized by Russia

Oliver Gill
Chief Business Correspondent
02 May 2022 6:00am BST

Lloyd's of London is gearing up for a dogfight with the owners of hundreds of aircraft seized by Vladimir Putin's regime.

He conceded that Lloyd's was facing "multibillion-dollar losses", but insisted that they were "manageable". Any suggestion that Lloyd's would have to pay out $10bn in claims was "too magnificent", he said.

Litigations Across U.S.

- **California**
  - Air Lease Corporation
  - Aviation Capital Group
  - BBAM US LP
  - VX Capital Partners
  - Wings Capital Partners
- **Minnesota**
  - Castlelake, L.P.
- **Florida**
  - Aviator Capital Management, LLC
  - Avmax Aircraft Leasing Inc.
  - Carlyle Aviation Partners, LLC
  - Zephyrus Aviation Capital, LLC
- **New York**
  - Aircastle Limited
  - Avenue Capital Management II, L.P.
  - Boca Aviation Limited

Common Issues Across Litigations

- All-Risk versus War-Risk
- “Physical Loss or Damage”
- Contingent v. Possessed and the “Course of Repossession”
- Insurers’ Inconsistent Positions

Policies Intended to Provide Global Coverage

Insurers Wanted Lessors' Claims to Slip Through Cracks

All Risk v. War Risk

For educational purposes only

Most Courts Recognize a "War Risk" Loss

Case	Outcome
Carlyle	"No reasonable juror could conclude other than that Plaintiffs' loss was caused by one or more [War Risk] perils."
ALC	"The undisputed material facts show that it was indeed a war risk – specifically, the invasion of Ukraine by Russia in 2022 – that caused Plaintiffs' alleged losses in this case."
BBAM	"[B]ased on Plaintiffs' own allegations in the First Amended Complaint, the undisputed facts in the record before the Court, and Plaintiffs' own discovery responses, Plaintiffs' claim falls squarely within the perils . . . [for] war, invasion, hostilities, and military power. It also falls within the perils . . . [for confiscation], seizure, restraint, detention, appropriation, requisition for title or use by or under the order of a Government."
Castlelake	"Here, the record has conflicting evidence and presents multiple causal factors. The Court cannot summarily conclude that the war was the 'overriding' cause to trigger the [War Risk] exclusion. Summary judgment is improper."

Comparison of Loss of Use vs. Deprivation or Dispossession

Most Courts Recognize "Physical Loss of or Damage" to Aircraft

Case	Outcome
BBAM	"Physical loss" includes loss of physical possession and seizure of property . . . Here, Plaintiffs arguably were 'deprived of property without any damage to it' when the Russian government's export restrictions prevented them from retaking possession of the Aircraft after Plaintiffs terminated the underlying leases. Likewise, 'physical loss or damage' as used in the Policy reasonably may be read to refer to a governmental seizure of the Aircraft, which was the apparent effect of the Russian decrees prohibiting the export of the Aircraft from Russia and thereby preventing Plaintiffs from exercising their contractual right to retake possession of the Aircraft."
Castlelake	"[T]he Court concludes that because no insured physically possesses the Aircraft—despite demanding that the Aircraft be returned—they have experienced a physical loss . . . The relevant caselaw does not stand for the proposition that a physical loss must also include physical alteration for coverage to attach."
ALC	"Section Three, in other words, covers loss or damage that is not covered by Sections One or Two because it was caused by a war risk as defined, regardless of whether the loss or damage was *physical*. It follows that Section Three covers a broader range of loss or damage—loss or damage that might not qualify as 'physical'—so long as the loss or damage is excluded from Sections One and Two because of its cause."
Carlyle	"The Court disagrees with Defendants and agrees with Plaintiffs that even the narrow term 'physical loss' covers dispossession and physical deprivations, without a need to show actual physical *damage*."
Zephyrus	"The aircraft continues to operate in Russia. Plaintiff argues they lost use and possession of the aircraft following the outbreak of hostilities between Russian and Ukraine . . . Plaintiffs do not allege the aircraft suffered any physical damage. Instead, they argue they suffered an insurable loss because they have been permanently deprived of the aircraft . . . Plaintiffs do not allege a tangible change to their property."

Possessed Coverage

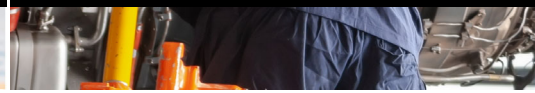
1. awaiting the commencement of a Lease/Finance Agreement or closure of a sale, or

2. having been returned on the expiry or termination of a Lease/Finance Agreement, or

3. having been repossessed or which are in the course of repossession from a Lease/Finance Agreement, or

4. in the care, custody or control of the Insured.





Possessed Coverage Extends Beyond Physical Possession

The Policy provides that possessed coverage applies to Aircraft:	Actual Possession	No Actual Possession
1) awaiting the commencement of a Lease/Finance Agreement or closure of a sale, or		✓
2) having been returned on the expiry or termination of a Lease/Finance Agreement, or		✓
3) having been repossessed or which are in the course of repossession from a Lease/Finance Agreement, or		✓
4) in the care, custody or control of the Insured.	✓	

For educational purposes only

“Course of Repossession” Envisions a Continuum

All steps should be considered as being in the “course of repossession.”

Commencing repossession

Initial steps

Continuing efforts to repossess

Intermediate steps

Finalizing repossession

Final steps

Course of Repossession

For educational purposes only

Courts Require “Physical Acts” Despite Policy Language

Case	Outcome
BBAM	“‘in the course of repossession’ must be read to refer to a situation where the lessor has taken some *physical* act to initiate repossession of the aircraft, such as where it is in the process of being transferred back to the lessor, even if the lessor does not yet have physical possession. For example, the lessor may engage a third party to seize the aircraft at a foreign airport and fly it back to its home port.”
Castlelake	“‘Repossession’ requires acts to retake physical possession. . . . Tracking the Aircraft, arranging for safe locations in the event of their future return, hiring legal counsel, and demanding return of the Aircraft do not equate to being ‘in the course of repossession’ given the plain meanings of the operative words and the context in which they are used.”

War Risk Insurers Attempt to Cancel Coverage Post-Notice

[redacted]

04 March 2022

* * *

Without prejudice to the Sanctions Notice above [redacted] hereby give 7 days' notice in accordance with the Review and Cancellation clause contained in [redacted] of the above policy to exclude Russia, Belarus and Ukraine from the geographical limits – such notice commencing from midnight (00.00 GMT) at the date of this letter.

War Risk Insurers Attempt to Rewrite the Policy

SECTION ONE - AIRCRAFT HULL COVERAGE

* * *

2. Possessed Aircraft Hull Coverage

To pay for physical loss of or damage, sustained during the Period of Insurance, to Aircraft as per the Schedule of Aircraft

(1) awaiting the commencement of a Lease/Finance Agreement or closure of a sale, or

(2) having been returned on the expiry or termination of a Lease/Finance Agreement, or

(3) (i) having been repossessed, or

(ii) which are in the course of repossession from a Lease/Finance Agreement, or

(4) in the care, custody or control of the Insured.

This coverage also applies to engines and components, as per the Schedule of Engines and Components, whilst attached to any Aircraft which is not included in the Schedule of Aircraft.

VS

SECTION THREE - AIRCRAFT HULL, SPARES AND EQUIPMENT WAR AND ALLIED PERILS COVERAGE

* * *

physical

2. Possessed Aircraft Hull, Spares and Equipment Coverage

To pay for loss of or damage to Aircraft as per the Schedule of Aircraft, and/or Spares and Equipment

(1) awaiting the commencement of a Lease/Finance Agreement or closure of a sale, or

(2) having been returned on the expiry or termination of a Lease/Finance Agreement, or

(3) having been repossessed or which are in the course of repossession from a Lease/Finance Agreement, or

(4) in the care, custody or control of the Insured.

This coverage also applies to:

(1) loss or damage arising from the action of any Government by reason of actual or alleged infringement of customs, quarantine or public health regulations (including, if required, the cost of reassembling the Aircraft). This coverage only applies in the event that

(i) the Insured has no knowledge of any action which leads to such actual or alleged infringement, and

(ii) the Insured does not consent to any action which leads to such actual or alleged infringement.

(2) engines and components, as per the Schedule of Engines and Components, whilst attached to any Aircraft which is not included in the Schedule of Aircraft.

(3) buyer furnished equipment prior to, whilst being installed in and after installation in any new or additional Aircraft prior to delivery to and acceptance by the Insured/Operator and prior to and during installation in any existing Aircraft.

Insurers Ignore the 50/50 Clause

50/50 PROVISIONAL CLAIMS SETTLEMENT CLAUSE

WHEREAS the Insured has in full force and effect

A) a "Hull All Risks" policy which inter alia contain Other Perils Exclusion Clause (AVN 48B) / the C Airline War Exclusion Clause, and

B) a "Hull War Risks" policy which inter alia covers excluded by AVN 48B / the Common North Ame Exclusion Clause in A) above

NOW IT IS HEREBY UNDERSTOOD AND AGREED THAT

in the event of loss of or damage to an aircraft schedule of aircraft forming part of this policy reached between the "Hull All Risks" Insurers ar Insurers that the Insured has a valid claim unde where nevertheless it cannot be resolved withi of occurrence as to which policy is liable, each groups of insurers agree, WITHOUT PREJUDICE to their liability, to advance to the Insured 50% of such amount as may be mutually agreed between them until such time as final settlement of the claim is agreed

PROVIDED ALWAYS THAT

(i) the "Hull All Risks" and "Hull War Risks" placing slips are identically endorsed with this provisional claims settlement clause

(ii) within 12 months of the advance being made all Insurers specified in (i) above agree to refer the matter to arbitration in London in accordance with the Statutory provision for arbitration for the time being in force

(iii) once the arbitration decision has been conveyed to the parties concerned, the "Hull All Risks" Insurers or the "Hull War Risks" Insurers as the case may be shall repay the amount advanced by the other group of Insurers together with interest for the period concerned which is to be calculated using the London Clearing Banks' Base Rate

(iv) if the "Hull All Risks" and "Hull War Risks" policies contain differing amounts payable, the advance will not exceed the lesser of the amounts involved. In the event of Co-insurance or risks involving uninsured proportion(s), the appropriate adjustment will be made.

50/50 PROVISIONAL CLAIMS SETTLEMENT CLAUSE

WHEREAS the Insured has in full force and effect

A) a "Hull All Risks" policy which inter alia contains the War Hijacking and Other Perils Exclusion Clause (AVN 48B) / the Common North American Airline War Exclusion Clause, and

B) a "Hull War Risks" policy which inter alia covers certain of the risks excluded by AVN 48B / the Common North American Airline War Exclusion Clause in A) above

The 50/50 Clause Provides a "Great Benefit to the Policyholder"

50/50 Clause

Insurers don't agree.

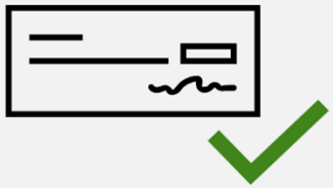
Step 1: Each side pays 50% of the agreed value.

Step 2: Insurers (without Insured) go to tribunal to determine who is responsible.

Step 3: Losing insurer repays 50% to the winning insurer.

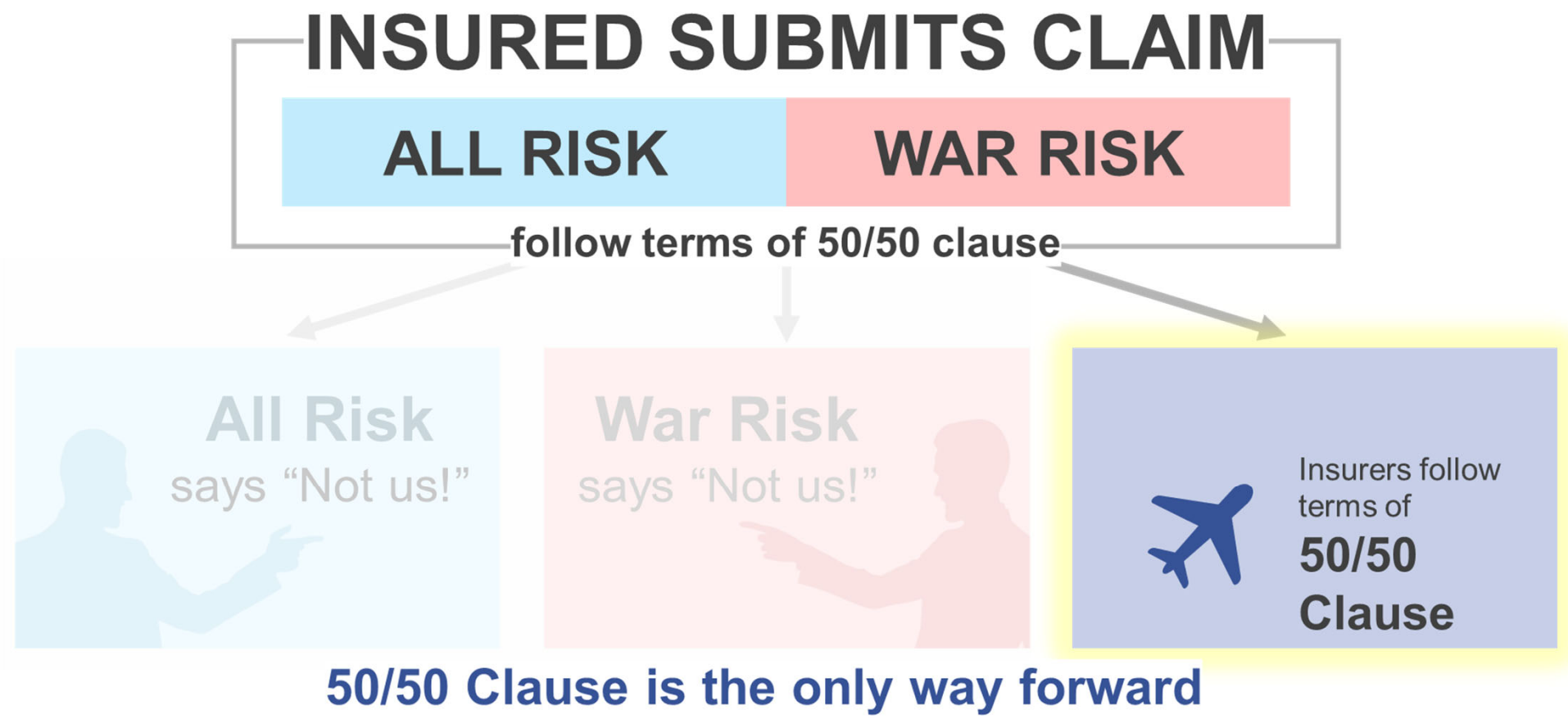
Insured

Gets paid without delay



No part of litigation

Good Faith Requires Insurers to Agree on Coverage or 50/50 Clause



Insurers' Contradictory Positions

TMK and HDI Position as WR Insurers	TMK and HDI Position as AR Insurers
"If it is the case that the Claimants' Aircraft were lost, and this is a type of loss that is insured under these Policies, the relevant peril is an AR Peril, namely the decision of the Airlines not to return the Aircraft to the Claimants."	"Plaintiffs' alleged claims against the AR Insurers fall squarely within the plain meaning of the War Perils Exclusion as caused by the excluded war perils under three separate subsections of that exclusion."
"[T]he reason the Aircraft have not been returned is the commercial decisions and actions of the Airlines, and not because of any restraint by the Government."	"Ultimately, the undisputed facts show that by directions and express decrees, President Putin, Russia's Prime Minister, FATA, and/or the Ministry of Transport prohibited the Lessees from returning the Aircraft back to Plaintiffs or flying them to Western countries and ordered the re-registration of the Aircraft on the Russian Register without title or deregistration."
All Risk's Responsibility	**War Risk's Responsibility**

Lessons Learned

- Working with the London Insurance Market is different
- Be proactive with insurance renewals
- Work with coverage counsel to identify top priorities and resolve ambiguities before claims arise


Questions

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SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN FRANCISCO

DEPARTMENT 304

BBAM US LP, BBAM AVIATION SERVICES LIMITED, ECAF I 41991 DAC, ECAF I 41992 DAC, and HORIZON II AVIATION 3 LIMITED, Plaintiffs, v. KLN 510 TOKIO MARINE KILN, et al., Defendants.	Case No. CGC-22-603451 ORDER ON (1) CERTAIN DEFENDANTS' MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, SUMMARY ADJUDICATION; (2) PLAINTIFFS' MOTIONS TO SEAL

Certain Defendants' motion for summary judgment or, in the alternative, summary adjudication and Plaintiffs' motions to seal came on for hearing on July 30, 2024. Having considered the pleadings and papers on file in the action, and the arguments of counsel presented at the hearing, the Court hereby denies Defendants' motions for summary judgment or, in the alternative, summary adjudication, and grants in part and denies in part Plaintiffs' motions to seal.

FACTUAL AND PROCEDURAL BACKGROUND

The key material facts pertinent to Defendants' motion are undisputed. Plaintiffs BBAM US LP, BBAM Aviation Services Limited, ECAF I 41991 DAC, ECAF I 41992 DAC, and Horizon II Aviation 3 Limited (together, "Plaintiffs" or "BBAM") are aircraft leasing companies. (FAC ¶¶ 5-9; Opening Brief, 8.) At issue in this litigation are three of Plaintiffs' commercial aircraft, denominated MSN 41991, MSN 41992, and MSN 40242 (the "Aircraft"). (FAC ¶ 18.)[1] The first two of these aircraft were leased by Plaintiffs to the Russian airline company Aeroflot, of which the Russian government is the majority

[1] MSN refers to manufacturer's serial number, a unique code assigned to an aircraft.

owner, and subleased to Aeroflot's wholly-owned subsidiary, Pobeda. (*Id.*) The third was leased to the Russian airline company Izhavia, the national airline of a Russian Republic controlled by Russia. (*Id.*) The Aircraft are registered under the Bermuda Civil Aviation Authority and each has registration marks under it. (*Id.* ¶ 19.) Each is a Boeing 737-800; the Aircraft apparently are configured and utilized for passenger service rather than cargo.

The lease between Plaintiffs and Aeroflot is dated November 11, 2015, and provides for monthly payments of $334,488.65 to Plaintiffs for MSN 41991 and $332,101.105 for MSN 41992. (UMF 2;[2] Ex. A at MSJ-006; Ex. B at MSJ-037.) The lease between Plaintiffs and Izhavia is dated October 15, 2021, and provides for (a) payments of $950 for each flight hour and (b) otherwise, $185,000 per month. (UMF 3; Ex. C at MSJ-091, MSJ-204.) It also requires the lessee to maintain certain insurance. (Ex. C at MSJ-108-109.) The Izhavia lease authorizes Plaintiffs to declare the lease to be in default and to repossess the aircraft upon the occurrence of an Event of Default, which is defined to include, among other things, the Lessee's failure to pay rent. (*Id.* at MSJ-114, MSJ-118-119.)[3]

Plaintiffs' aircraft are insured under the policy with Defendants at issue in this litigation (the "Policy"). (FAC ¶ 23 & Ex. 1; Ex. U; UMF 1.) The Policy covers the period from May 1, 2021 to October 31, 2022. (Ex. U at MSJ-1053.)[4] It states that it "shall be governed by and construed in accordance with the law of California, USA and each party agrees to submit to the exclusive jurisdiction of the Courts of California, U.S.A. in the event of a dispute arising hereunder." (Ex. U at MSJ-1063.)

Two sections of the Policy are pertinent to this litigation: Section One ("Aircraft Hull Coverage") and Section Three ("Aircraft Hull, Spares and Equipment War and Allied Perils Coverage"). (*Id.* at MSJ-1083-1085, 1089-1094.) The former section binds the insurers to pay for "physical loss of or damage" to the Aircraft, while the latter covers "loss of or damage to" the Aircraft. (*Id.*) The Policy contains

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[2] UMF refers to the undisputed material facts in BBAM's separate statement in opposition to Defendants' motion filed May 31, 2024.

[3] Defendants have not provided the Court with the full leases for the two aircraft leased to Aeroflot, but only the novation agreements relating to those leases. (Exs. A, B.) It appears that the underlying lease provisions are substantially similar across all three leases. Although Plaintiffs have moved to seal the leases themselves, they have not objected to Defendants' disclosure of their basic terms. (See Opening Brief, 10.)

[4] Defendants also issued a second, "deductible" policy, which is not at issue here.

definitions of numerous terms, but does not separately define "physical loss," "loss," or "damage." (*Id.* at MSJ-1080-1082.)[5]

Among the exclusions listed in the Policy under Section One is one for "loss of use of any Aircraft, engine or component." (*Id.* at MSJ-1085.) Likewise, an exclusion under Section Three is for "delay, loss of use, or except as specifically provided under clause 4 – Extortion, Confiscation and Hi-Jack Expenses – above, any other consequential loss; whether following upon loss of or damage to the insured property or otherwise." (*Id.* at MSJ-1093.)[6]

On February 24, 2022, Russia invaded Ukraine.[7] At the time, the Aircraft were located in Russia. Following the invasion and the imposition of sanctions on Russia by the United States and the European Union, the Russian Government took a number of actions aimed at preventing the return of foreign-leased aircraft like BBAM's. (BBAM SSF 1-18;[8] see generally *Boca Aviation Limited v. AirBridgeCargo Airlines, LLC* (S.D.N.Y. 2023) 669 F.Supp.3d 204, 216, 218, 229.) In particular, beginning on March 9, 2022, the Russian Government issued various decrees banning the export of aircraft out of Russia and creating legal structures to facilitate the Russian airline lessees' use of foreign-owned aircraft. (BBAM SSF 4-18; see, e.g., Ex. 25 (Decree No. 311) at MSJ-Opp-241 [prohibiting export of aircraft]). Russia has twice extended its export ban decree which, as of now, remains in effect through 2025. (BBAM SSF 17.) It is undisputed that these restrictions have had the effect of preventing Plaintiffs from recovering the Aircraft, which remain in service within Russia.

BBAM terminated the leases of all three aircraft on February 27, 2022, and demanded their immediate return to the Dublin Airport in Ireland. (Ex. 1, Opp-MSJ-013-014; Ex. 2, Opp-MSJ-021-023.) Thereafter, it repeatedly requested return of the Aircraft. (Cannon Decl. ¶¶ 4-5 & Exs. 3-6.) The Lessees

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[5] "Property Damage" is defined as "physical loss of or damage to or destruction of tangible property including the resultant loss of use of such property." (*Id.* at MSJ-1082 ¶ 19.)

[6] Clause 4, "Extortion, Confiscation and Hi-Jack Expenses," indemnifies Plaintiffs for payments made in connection with, among other things, "[c]onfiscation, nationalisation, seizure, restraint, detention, appropriation, requisition for title or use by or under the order of any Government (whether civil military or de facto) or public or local authority" and excluded under Sections One and Two of the Policy. (*Id.* at MSJ-1090, 1092.)

[7] The Court takes judicial notice of the date and fact of that invasion. BBAM "does not contest that, based on the public information available to all parties, Russia's invasion of Ukraine took place on February 24, 2022." (UMF 7.)

[8] BBAM SSF refers to BBAM's separate statement of undisputed facts filed May 31, 2024. SSF 1-18, which relate to these various Russian governmental decrees, are undisputed for purposes of this motion.

did not return the Aircraft. (BBAM SSF 20.) Instead, BBAM received reports from the Lessees indicating that they were continuing to fly the Aircraft within Russia without BBAM's permission or consent. (Ex. I [monthly maintenance report for August 2022 showing 335.42 flight hours].)[9] BBAM has not received any rental payments for the Aircraft since at least February 2022. (Ex. 13 at MSJ-Opp-106-108; see also Ex. 2 at Opp-MSJ-021 [notice under Izhavia lease that Lessee did not pay the installment of Basic Rent due on 30 December 2011 and failed to maintain required insurance].) On March 11, 2022, the Bermuda Civil Authority Agency ("BCAA") suspended the certificates of airworthiness for all three Aircraft, stating that as a consequence, the Aircraft "may not be operated." (Ex. 7 at Opp-MSJ-052.)

On May 24, 2022, Plaintiffs submitted formal notices of claim regarding the Aircraft to the lead insurer under the Policy, Defendant Tokio Marine Kiln Syndicates Limited, through their insurance broker. (UMF 17; Ex. J.)[10] The claims were in the aggregate amount of $127,810,258.48, representing $46,905,129.24 for each of MSN 41991 and 41992 and $34,000,000 for MSN 40242, equivalent to the Aircrafts' alleged Agreed Value under the Policy. (*Id.*; TAC ¶ 25.)[11]

In December 2023, Plaintiffs entered into agreements to transfer title to MSNs 41991 and 41992 to Aeroflot and related entities for a settlement sum of approximately $37.267 million ($18,486,216.78 for MSN 41991 and $18,780,990.83 for MSN 41992)—less than 40 percent of the Agreed Values of the Aircraft under the Policy—and have completed the transfer of title. (UMF 18, 19; Ex. K at MSJ-687-688; Ex. R [Bills of Sale to Insurance Company NFK for MSN 41991 and 41992].) The board for Plaintiff Horizon II Aviation 3 Limited, which owns MSN 40242, the third aircraft, has internally approved Izhavia's offered settlement sum of $23,182,000. (UMF 21; Ex. K at MSJ-688; Ex. S [draft settlement agreement].) The settlement agreement with Aeroflot includes a sum of money that accounts for loss of

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[9] Defendants offer detailed logs purporting to track each individual flight within Russia taken by each of the Aircraft before and after the invasion, the reliability and admissibility of which BBAM contests. (Exs. F, H, T.) The dispute is pointless. "BBAM does not dispute that Aeroflot continued to retain control and fly [the Aircraft] following termination of the leasing and without BBAM's consent." (Resp. to UMF 8.) The details—exactly how many flights were completed, the destination and arrival airports, the scheduled and actual flight times, and the like—are not material.

[10] Plaintiffs had previously submitted notices of potential claims under the Policy. (Resp. to UMF 17; Ex. 14 at Opp-MSJ-124.)

[11] While Plaintiffs allege that these figures reflect the Aircrafts' Agreed Value (TAC ¶ 25), the Court has been unable to locate any schedule or other Policy document in the parties' exhibits which substantiates that allegation. That factual issue is not material to the Court's disposition of the instant motion.

rental income for those two aircraft. (Resp. to UMF 22.) Those settlements apparently were entered into with the approval of the U.S. Department of Commerce's Bureau of Industry and Security ("BIS") and the Office of Foreign Assets Control ("OFAC") of the U.S. Department of Treasury. (Ex. N.)

Defendants ("Moving Defendants") are nine of the twenty-two Defendants. (Opening Brief, 8; Opposition, 8; Reply, 5.) They now move for summary judgment or, in the alternative, summary adjudication on the ground that Plaintiff did not suffer "physical loss or damage" within the meaning of Section One of the Policy.[12] BBAM opposes the motion.[13]

REQUESTS FOR JUDICIAL NOTICE

Plaintiffs' unopposed request for judicial notice of certain official Russian documents and certified translations (McGraw Decl. Exs. 23-32) is granted. Plaintiffs' unopposed request for judicial notice of a Minnesota trial court decision (*id.* Ex. 33) is granted pursuant to Evidence Code section 452(d). Defendants' unopposed request for judicial notice of an unpublished decision of the Florida Circuit Court, which was later affirmed per curiam without an opinion (Ex. A), likewise is granted pursuant to Evidence Code section 452(d). Defendants' request for judicial notice of historical flight information for the three Aircraft from the FlightRadar24 site (Ex. F) is denied on the ground that it is not relevant to the Court's resolution of the motion. (See *Mangini v. R.J. Reynolds Tobacco Co.* (1994) 7 Cal.4th 1057, 1063-1065; see note 9, *supra.*)

[12] Moving Defendants refer to Section One as the "All Risk coverage" and Section Three as the "War Risk coverage." (Opening Brief, 8.) They contend that ten insurers provided coverage under Section One only. (*Id.*; Reply, 5.) While BBAM apparently disagrees with that contention, the dispute is not material to the issue presented on this motion, which asserts only that "Plaintiffs' insured property did not suffer physical loss or damage as required to trigger coverage under Section 1 of their insurance policy and California law." (Opening Brief, 2.)

[13] At the hearing, Defendants Fidelis Underwriting Limited and Fidelis Insurance Bermuda Limited (together, "Fidelis") and Chubb European Group SE ("Chubb") urged the Court to defer ruling on the motion pending further dispositive motions anticipated to be filed in the future. Neither Fidelis nor Chubb joined in or opposed the instant motion or filed any papers in connection with it. The Court declines to defer its ruling, which is based on the record presented by the parties.

LEGAL STANDARD

"A party may move for summary adjudication as to one or more causes of action within an action, . . . if the party contends that the cause of action has no merit." (Code Civ. Proc. § 437c(f)(1).) "A motion for summary adjudication shall be granted only if it completely disposes of a cause of action, an affirmative defense, a claim for damages, or an issue of duty." (*Id.*) "A motion for summary adjudication may be made . . . as an alternative to a motion for summary judgment and shall proceed in all procedural respects as a motion for summary judgment." (Code Civ. Proc. § 437c(f)(2).)

"As a question of law, the interpretation of an insurance policy is reviewed de novo under well-settled rules of contract interpretation. . . . Thus, the mutual intention of the parties at the time the contract is formed governs interpretation. If possible, we infer this intent solely from the written provisions of the insurance policy. If the policy is clear and explicit, it governs." (*Another Planet Entertainment, LLC v. Vigilant Insurance Company* (2024) 15 Cal.5th 1106, 320 Cal.Rptr.3d 843, 863-864 (cleaned up).)[14] "The insured has the initial burden of showing that a claim falls within the scope of coverage, and a court will not indulge in a forced construction of the policy's insuring clause to bring a claim within the policy's coverage. But the burden is on the insurer to show the claim falls within an exclusion to coverage, and exclusions are narrowly construed. An exclusionary clause must be conspicuous, plain and clear." (*Dua v. Stillwater Ins. Co.* (2023) 91 Cal.App.5th 127, 135.)

DISCUSSION

I. DEFENDANTS FAIL TO SHOW THAT PLAINTIFFS DID NOT SUFFER PHYSICAL LOSS OR DAMAGE WITHIN THE MEANING OF THE POLICY.

The dispositive issue presented by Defendants' motion is whether Plaintiffs have suffered "physical loss or damage" within the meaning of Section One of the Policy so as to trigger coverage. Defendants argue they have not because the Aircraft were not physically damaged or physically lost, and

[14] A policy provision will be considered ambiguous when it is capable of two or more reasonable constructions. If the terms of a policy are ambiguous, they must be interpreted in accordance with the insured's objectively reasonable expectations, and, if this does not eliminate the ambiguity, ambiguities are generally to be resolved in favor of coverage. (*St. Mary & St. John Coptic Orthodox Church v. SBC Ins. Services, Inc.* (2020) 57 Cal.App.5th 817, 825-826.) No party contends that the Policy is ambiguous.

that loss of use is not physical loss or damage. (Opening Brief, 17-23.) Plaintiffs disagree, arguing that under binding California precedent, even a temporary seizure of insured property constitutes physical loss for coverage purposes. (Opposition, 13-15.) The Court agrees with Plaintiffs. Defendants' reliance on the loss of use exclusion in the Policy and on Plaintiffs' transfers of title to the Aircraft is misplaced.

A. "Physical Loss" Includes Loss Of Physical Possession And Seizure Of Property.

In *Another Planet Entertainment*, our California Supreme Court recently addressed the meaning of "direct physical loss or damage to a property" for purposes of coverage under a commercial property insurance policy. That case addressed that issue in an entirely different factual context than presented here: claims for coverage by businesses that were forced to curtail their operations or close entirely due to the COVID-19 pandemic. Defendants rely heavily on it and on the body of authority in California and other states addressing the same issue that preceded the Supreme Court's decision. (Opening Brief, 8, 17-18, 20-23; Reply, 4-8, 10-11.) However, *Another Planet Entertainment* expressly leaves undisturbed California authority that recognizes that physical loss includes loss of physical possession and governmental seizure of property, both of which appear to be present here.

In *Another Planet Entertainment*, the Court granted review to decide a question posed to it by the Ninth Circuit: "Can the actual or potential presence of the COVID-19 virus on an insured's premises constitute 'direct physical loss or damage to a property' for purposes of coverage under a commercial property insurance property?" (320 Cal.Rptr.3d at 848.) The Court answered that question in the negative, concluding that "allegations of the actual or potential presence of COVID-19 on an insured's premises do not, without more, establish direct physical loss or damage to property within the meaning of a commercial property insurance policy." (*Id.* at 848-849.)

The Court began its analysis by summarizing the general principles of property insurance, explaining that "[t]he fundamental principle of a property insurance contract is to indemnify the owner against loss; that is to place the owner in the same position in which he or she would have been had no accident occurred." (*Id.* at 852 (cleaned up).) In contrast to specified-risk or "named perils" property insurance policies, which insure against the risk of damage or destruction resulting from specified causes of loss (such as fire, wind, or hail), "all risks" policies (such as Section One of the Policy involved here)

cover all losses not expressly excluded in the policy. (*Id.* at 852-853.) In such policies, the trigger for coverage frequently is "physical loss or damage." (*Id.* at 853.) After summarizing the extensive body of California appellate authority that construed the meaning of this phrase, both before and in the context of the COVID-19 pandemic (*id.* at 853-862), the Court turned to its plain meaning. It observed first that "direct physical loss and direct physical damage must differ in their meaning somehow, even if they overlap." (*Id.* at 864.) As to the meaning of "direct physical damage to property," the Court concluded that "the property itself must have been physically harmed or impaired," and that there must be "a distinct, demonstrable, physical change or alteration to property." (*Id.* at 865.) As to the separate meaning of "direct physical loss to property," the Court found that "[l]oss can simply be a more extreme form of damage, but its meaning is also broader." (*Id.*) As it explained,

> Loss is often used to refer to destruction and ruin, but its definition also includes the partial or complete deterioration or absence of a physical capability or function, an instance of losing someone or something, and the harm or privation resulting from losing or being separated from someone or something.

(*Id.* (cleaned up).) The Court reasoned,

> The pairing of the word "physical" with "loss" demonstrates there must be some physicality to the loss of property—e.g., a physical alteration, physical contamination, or physical destruction. It also encompasses complete physical deprivation or dispossession, such as when property is stolen.

(*Id.* at 865-866 (cleaned up).) "Finally, the requirement of a direct physical loss to property generally excludes impairments that are purely legal in nature. It does not cover situations where there is a loss of use of property but there is no direct physical loss because a government order as opposed to a physical condition caused the deprivation." (*Id.* at 868 (cleaned up); *id.* at 869 ["Where the deprivation of property is caused by a government order, rather than a physical event, no direct physical loss to property has occurred."].) Immediately following the last-quoted sentence,[15] however, the Court added the following critical caveat, which Defendants ignore:

> We need not express any view regarding the separate question of whether or under what circumstances a governmental *seizure* of real or personal property would constitute a direct physical loss to property.

[15] Defendants apparently believe this language is so helpful to their position that they quote it no fewer than four times in their reply brief—thrice with the addition of bold font and underlining. (Reply, 6, 7, 8, 13.) As discussed in text, Defendants' reliance on this language is misplaced. Repeating it over and over again does not enhance its persuasive value.

(*Id.* at fn. 4, citing *American Alternative Ins. Corp. v. Superior Court* (2006) 135 Cal.App.4th 1239.) Thus, *Another Planet Entertainment*'s holding is limited to the situation where a plaintiff claims a "temporary loss of use of property from pandemic-related government closure orders—without any physical loss of the property," but does not address the distinct issue presented here: whether a seizure of property would constitute a direct physical loss. (*Id.* at 868 (cleaned up).)

While *Another Planet Entertainment* breaks new ground with respect to the novel coverage issues presented by the COVID-19 pandemic,[16] it leaves undisturbed long-standing California law which makes clear that Plaintiffs may have suffered physical loss or damage within the meaning of the Policy,[17] for two separate but closely related reasons.

First, as the Court expressly recognized, "physical loss" "encompasses complete physical deprivation or dispossession, such as when property is stolen." (*Id.* at 866.) As the court succinctly pointed out in the case the Supreme Court cited with approval for that proposition, "An obvious instance of loss is when insured property is stolen." (*Apple Annie, LLC v. Oregon Mutual Ins. Co.* (2022) 82 Cal.App.5th 919, 928 fn. 10.) More broadly, the court explained,

> The phrase "loss of" refers to dispossession of property—for example, via theft—and therefore has a different meaning from the term "damage to." As the Sixth Circuit explained, "[t]here is no need to read 'physical loss' to include a deprivation of some particular use of a property in order to give the phrase independent meaning. That possibility could occur whenever a policy holder is deprived of property without any damage to it, say a portable grill or a delivery truck stolen without a scratch.

(*Id.* at 928 fn. 9 (cleaned up);[18] see also, e.g., *Apex Solutions, Inc. v. Falls Lake Ins. Management Co., Inc.* (2024) 100 Cal.App.5th 1249, 1258 ["It is undisputed that 'direct physical loss' encompasses physical

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[16] The Court rejects Defendants' contention that the facts of this case are "COVID all over again." The presence of an invisible virus in a concert venue or restaurant, combined with pandemic-related government public health orders imposing restrictions on individuals and businesses that prohibit or limit the use and operations of such locations, presents entirely different issues than those presented here. "It is axiomatic that cases are not authority for propositions not considered." (*People v. Ault* (2004) 33 Cal.4th 1250, 1268 fn. 10.)

[17] The Court has considered the out-of-state trial court decisions from Florida and Minnesota cited by the parties, but finds neither particularly helpful. The disposition of this motion turns on California law.

[18] Defendants attempt to avoid this holding on the ground that "the Aircraft were in the Lessees' possession before the Russian and BCAA orders and remained in their possession after the orders." (Reply, 7.) The argument is fatuous. As discussed below, the orders in question deprived Plaintiffs of their contractual right to possess the Aircraft after terminating the leases. Indeed, Section One of the Policy is expressly limited to "physical loss or damage" to the Aircraft when they "are not in the care, custody or control of the Insured." (Policy, 10.) Defendants' interpretation, which would negate any

displacement or loss of physical possession, including loss by theft."]; *EOTT Energy Corp. v. Storebrand International Ins. Co.* (1996) 45 Cal.App.4th 565, 569 [insured entitled to recover for thefts of petroleum products under policy insuring against "all risks of direct physical loss or damage"].)

Second, as the referenced caveat makes clear, *Another Planet Entertainment* does not disturb California authority holding that a governmental seizure of property may constitute a direct physical loss. In *American Alternative,* in an opinion authored by Justice Croskey, the court held that an insurer was required to reimburse expenses reasonably incurred by its insureds to recover possession of an airplane seized by a Florida sheriff. The claim was made under a policy that insured physical damage to the aircraft, defined as "direct and accidental physical loss of or damage to the scheduled aircraft." (135 Cal.App.4th at 1242-1243.) The policy also contained an exclusionary provision that precluded any claim "caused by confiscation, seizure [or] detention by or under the order of any Government (whether civil, military or defacto) or public or local authority," but the insureds had paid an extra premium for an endorsement to the policy that specifically deleted this exclusionary language. (*Id.* at 1243.) The sheriff seized the airplane and commenced a civil forfeiture proceeding, alleging that it had been used in the commission of a felony and was subject to forfeiture as contraband. After the Florida court found no probable cause to seize the airplane, the sheriff released the airplane, which had suffered minor damage. (*Id.*)[19] The trial court construed the policy term "physical damage" to include physical loss of the aircraft, and concluded that the insureds had suffered a physical loss of the airplane to the sheriff and were entitled to recover the attorney fees reasonably incurred to recover the airplane. (*Id.* at 1244.)

The Court of Appeal agreed, reasoning that the policy term "physical damage," which was specifically defined to include a "direct and accidental physical loss" of the aircraft, "could reasonably extend to a governmental seizure or confiscation." (*Id.* at 1246.) Indeed, the court noted, the insurer "presumably so construed the policy since there was an explicit exclusion included in the policy precluding such coverage," which did not apply because the insureds had purchased an endorsement expressly deleting it. (*Id.* at 1246-1247.) "In our view," the court wrote, "this supports an objectively

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coverage for losses incurred while the Aircraft were in the hands of lessees, would render this coverage illusory.

[19] The parties stipulated that the insurer had a contractual obligation to pay the reasonable repair costs for damage to the aircraft incurred while it was in the sheriff's custody. (*Id.* at 1244.)

reasonable expectation that [the policy] provided coverage for a governmental seizure." (*Id.* at 1247 (cleaned up).) The court went on to consider a policy condition stating that if the insureds failed to "protect the damaged property," the insurer "shall have no further obligation to pay for any further physical damage due to the Named Insured's failure to protect the damaged property." (*Id.*) The court rejected the insurer's strict interpretation of "damaged property" so as to limit the application of that term to property that has been damaged in the ordinary sense of the term; that is, physical injury. (*Id.* at 1248.) The court found that because the policy definition of "physical damage" encompassed not only "damage" to the aircraft in its ordinary sense, but also the physical loss of the aircraft, "the term '*physical damage*' encompasses both injury *and* physical loss." (*Id.* at 1247-1248.) It concluded, therefore, that interpreting the policy to refer both to prevention of further injury and prevention of further physical loss was consistent with the insureds' objectively reasonable expectations. (*Id.* at 1248.) Thus, "[t]he expectation that the policy provided for reimbursement of expenses reasonably incurred to prevent further 'physical loss of' the airplane caused by the seizure and detention therefore was objectively reasonable." (*Id.* at 1249.)

Defendants attempt to distinguish *American Alternative* on the ground that it involved a physical taking (the sheriff's seizure), while here "the Aircraft have remained in the possession of the Lessees both before and after the claimed loss." (Reply, 8.) Again, Defendants' argument is unpersuasive. Nothing in *American Alternative* or in the footnote in *Another Planet Entertainment* reserving the issue supports Defendants' position that a governmental seizure of property necessarily must be effected by physical means in order to constitute a physical loss. A seizure is no less a dispossession of the owner's rights if it is caused by a governmental decree prohibiting the property's return than if it is carried out by law enforcement personnel, nor would such a distinction make sense.[20]

[20] An example is illustrative. Under California's civil forfeiture laws, Health & Safety Code §§ 11469-11495, various types of property, including boats, airplanes, and vehicles, are subject to forfeiture if they are used in specified drug crimes. (E.g., Health & Safety Code § 11470(e)); see generally *O'Connell v. City of Stockton* (2007) 41 Cal.4th 1061, 1070-1071.) Under certain circumstances, a peace officer may seize an item subject to forfeiture. (Health & Safety Code §§ 11471, 11488(a).) However, the Code expressly provides that "[p]hysical seizure of assets shall not be necessary" in order for an asset to be the subject of a forfeiture petition. (*Id.* § 11488.4(b).) Yet under Defendants' approach, whether there is coverage for loss of a vehicle would turn on the fortuity of whether it was physically seized by law enforcement, or was the subject of a judicial or administrative forfeiture order unaccompanied by such a physical seizure.

Here, Plaintiffs arguably were "deprived of property without any damage to it" when the Russian government's export restrictions prevented them from retaking possession of the Aircraft after Plaintiffs terminated the underlying leases. Likewise, "physical loss or damage" as used in the Policy reasonably may be read to refer to a governmental seizure of the Aircraft, which was the apparent effect of the Russian decrees prohibiting the export of the Aircraft from Russia and thereby preventing Plaintiffs from exercising their contractual right to retake possession of the Aircraft. Indeed, exactly that conclusion was reached in a closely analogous federal case, which neither party cites.

In *Boca Aviation Limited*, the plaintiff was a global aircraft operating and leasing company that leased three aircraft to defendant, a Russian limited liability company that operates cargo airline services, pursuant to leases that were guaranteed by lessee's parent company. After the invasion of Ukraine and due to events triggered by the imposition of sanctions, including Russia's issuance of export restrictions that prevented export from Russia of aircraft and aircraft engines unless Russian government approval was obtained, plaintiff declared events of default under the leases and attempted to exercise its rights to retake the aircraft. It then filed an action alleging breaches of the leases and guaranties and a motion seeking emergency relief. The court issued an *ex parte* order for an injunction and immediate possession of one of the aircraft, but two of its four engines and the other two aircraft remained in Russia. The leases defined an "Event of Loss" to include "the condemnation, confiscation or seizure of, or requisition of title to, or requisition of use" of the leased aircraft by any government body. (669 F.Supp.3d at 222.) Construing that language together with the lease provisions regarding an event of default, the court found that "[b]oth describe circumstances under which the Lessor can effectively declare the lease at an end, recover either the Aircraft or the Stipulated Loss Value of the Aircraft, and relieve the Lessee of the obligation to pay continuing rent." (*Id.* at 223.)

The court rejected defendants' argument that the export restriction decree "only limits the transportation of the Aircrafts and BOCA Engines out of Russia and does not reflect that the Russian government actually possessed them." (*Id.* at 222.) Rather, it concluded that a seizure had occurred, construing the term to include "government actions that might involve the government taking possession of the Aircrafts (i.e., confiscation), as well as actions such as condemnation and requisition of title or of

use that would not necessarily involve the taking of possession." (*Id.* at 228.) The court explained that "the government need not take possession of property in order to seize it. A 'seizure of property' occurs when there is some meaningful interference with an individual's possessory interests in that property." (*Id.* at 228, quoting *United States v. Jacobsen* (1984) 466 U.S. 109, 113.) "For the Government to seize property, it need not take it permanently." (*Id.*) The court concluded that plaintiff had shown that the aircraft were seized within the meaning of the lease "because of the effect that Regulation 311 [the export restrictions] has on the respective rights and duties of the parties under the Lease Agreements and because of the conduct of the Russian Federation (whether or not pursuant to Regulation 311)." (*Id.* at 229.) In particular, the court found, "Regulation 311 does not just prohibit the export of the . . . Aircrafts to particular countries or under particular circumstances. Regulation 311 appears to flatly prohibit the use of the . . . Aircrafts outside the Russian Federation, save perhaps to areas in Ukraine or for the purposes of war, and does so even if the purpose of the use is to return the . . . Aircrafts to its owner and to comply with [lessee's] legal duties under the Lease." (*Id.*) Based on the export restrictions and other resolutions adopted by the Russian Federation, the court found that

> the Russian Federation (1) has taken the Aircrafts for its use, including for the delivery of food and to prevent them from being used against it in the Ukraine war and (2) that it has seized the Aircrafts by preventing the Aircrafts from being returned save upon the issuance of undertakings from the Lessor on how the Aircrafts can be used in the future. That seizure constitutes "meaningful" interference with Plaintiff's property rights due to the contractual duties and expectations that the parties negotiated in the case of an Event of Default.

(*Id.* at 230.) The court entered judgment in plaintiff's favor and awarded it the stipulated loss values of the two aircraft, together with damages for unpaid rent due and owing for all three aircraft, certain technical and repossession costs, and interest. (*Id.* at 234-238, 242.)[21]

In summary, the Court concludes that Defendants have failed to show that Plaintiffs did not suffer a physical loss within the meaning of Section One of the Policy; accordingly, their motion for summary judgment on that ground must be denied.

[21] To be sure, Defendants are correct in observing that *BOCA Aviation* construed the term "seizure" as it appeared in a lease provision defining an "Event of Loss," not in an insurance policy. Nevertheless, it suggests that Plaintiffs may be able to establish that they suffered a seizure of the Aircraft within the meaning of the Policy. (See *Another Planet Entertainment*, 320 Cal.Rptr.3d at 864 [language of insurance policy generally must be interpreted in its "ordinary and popular sense"].)

B. Defendants Do Not Meet Their Burden To Show That The Loss Of Use Exclusion Applies.

Defendants also contend that loss of use of property is not physical loss or damage, and that the Policy's loss of use exclusion bars coverage. (Opening Brief, 20-23; Reply, 11.) Plaintiffs respond that Defendants have not met their burden to show that the loss of use exclusion applies. (Opposition, 21-23.) The Court agrees with Plaintiffs.

Defendants' argument conflates "loss of use" with "loss" of property. The two are not the same. That was the square holding of *Collin v. American Empire Ins. Co.* (1994) 21 Cal.App.4th 787. In *Collin*, plaintiffs sued defendant insurer to collect a default judgment against its insured, a contractor, for conversion and damage to real property caused while remodeling plaintiffs' home. The court held that the trial court erred in finding that conversion of property was "property damage" with the meaning of the policy because the definition included "loss of use" of property: "'Loss of use' of property is different from 'loss' of property." (*Id.* at 816; see also *id.* at 818 [same].) As the court explained,

> To take a simple example, assume that an automobile is stolen from its owner. The value of the "loss of use" of the car is the rental value of a substitute vehicle; the value of the "loss" of the car is its replacement value. The nature of "loss of use" damages is described in California Jurisprudence Third as: "The measure of damages for the loss of use of personal property may be determined with reference to the *rental value* of similar property which the plaintiff can hire for use *during the period when he is deprived of the use* of his own property.

(*Id.* at 818 (cleaned up); accord, *Advanced Network, Inc. v. Peerless Ins. Co.* (2010) 190 Cal.App.4th 1054, 1063 [agreeing with the holding of *Collin* and other cases that "the terms 'loss of use' and 'loss' are not interchangeable for insurance purposes. If we were to hold otherwise, we would have to ignore the words 'of use' in the term 'loss of use.' . . . . Coverage for 'loss of use' does not apply to an underlying action in which the claimant seeks only the replacement value of converted property."].) Indeed, the Policy itself draws precisely this distinction: Section Three contains an exclusion for "loss of use . . . whether following upon loss of or damage to the insured property or otherwise."[22] Here, just as in *Collin*, Plaintiffs do "not seek damages for 'loss of use' of their property but for the value of the property itself." (21 Cal.App.4th at 818; see UMF 17; Ex. J [claims seeking Agreed Value of Aircraft]; Opposition, 22

[22] While the instant motion pertains only to Section One of the Policy, "the same word used in an instrument is generally given the same meaning unless the policy indicates otherwise." (*E.M.M.I. Inc. v. Zurich American Ins. Co.* (2004) 32 Cal.4th 465, 475.)

["BBAM has been completely dispossessed from its property and it seeks the Agreed Value for this loss from its Insurers, not the lost rental payments"].)[23]

C. Plaintiffs' Post-Loss Transfers Of Title To The Aircraft Do Not Negate Coverage.

Finally, Defendants argue there was no "loss" of the Aircraft because Plaintiffs have since transferred title to them or agreed to do so. (Opening Brief, 22-23; Reply, 9-10.) Plaintiffs disagree, arguing in essence that they had no choice but to transfer title to the Aircraft and that the amounts to which they agreed were "a token, unilaterally-determined sum." (Opposition, 19-21.)[24] The Court disagrees that Plaintiffs' agreements to transfer title to the Aircraft establishes as a matter of law that they did not suffer a loss within the meaning of the Policy.

Here, Plaintiffs arguably suffered a loss within the meaning of the Policy in or after February 2022, provided Defendant insurers with preliminary notice of claim in March 2022, and a formal notice of claim by May 2022. It was only more than one and one-half years later, in December 2023, after Defendants allegedly failed to confirm coverage or, with one exception, even issued a coverage decision, that Plaintiffs made a business decision to transfer title to the Aircraft. While those transfers of title may or may not have some bearing on other issues in this litigation, such as a possible set-off against Plaintiffs' claimed damages, Defendants do not show that they negate coverage under the Policy as a matter of law.

D. Defendants' Motion For Summary Adjudication Of The Bad Faith Cause Of Action Fails.

Defendants do not offer an independent basis for their motion for summary adjudication of the second cause of action for breach of the implied covenant of good faith and fair dealing, arguing only that it fails because "Plaintiffs' claim for coverage fails for a lack of physical loss or damage." (Opening Brief, 25-26; Reply, 12-13.) The Court having rejected that argument, Defendants' derivative motion for

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[23] Defendants' loss of use cases all involved business interruption and other coverage claims arising from the COVID-19 pandemic. (See, e.g., *Bradley Hotel Corp. v. Aspen Specialty Ins. Co.* (7th Cir. 2021) 19 F.4th 1002; *Mudpie, Inc. v. Travelers Casualty Ins. Co.* (9th Cir. 2012) 15 F.4th 885; *WP6 Restaurant Management Group LLC v. Zurich American Ins. Co.* (D. Nev. 2022) 595 F.Supp.3d 973.) As discussed in text, that context is entirely distinct from the issues presented here, which arguably involve a governmental seizure of property.

[24] Defendants contend that Plaintiffs transferred the Aircraft for more than their fair market value. Plaintiffs, for their part, disagree, and insist that they are entitled to recover the Aircraft's Agreed Value under the Policy. The Court expresses no view on those issues, which are not before it.

summary adjudication of the bad faith claim necessarily must be denied as well.

II. PLAINTIFFS' MOTIONS TO SEAL

Plaintiffs bring two motions to seal a number of exhibits, together with references to those exhibits elsewhere in the parties' papers. Among the materials sought to be sealed are Plaintiffs' agreements to transfer title to the Aircraft and related documents. The motions are supported by two declarations of Vincent Cannon, BBAM US LLP's General Counsel and Chief Operating Officer. Both motions are brought on the ground that "the documents to be sealed contain sensitive, nonpublic information subject to confidentiality obligations entered in a separate third-party agreement," together with "competitively sensitive financial and aircraft fleet information that BBAM routinely protects." (4/19/24 Mot. to Seal, 2; 5/31/24 Mot. to Seal, 2.) Defendants do not oppose either motion.

In general, the First Amendment provides a right of access to ordinary civil trials and proceedings. (*NBC Subsidiary (KNBC-TV), Inc. v. Super. Ct.* (1999) 20 Cal.4th 1178, 1212.) In particular, numerous courts have found a First Amendment right of access to civil litigation documents filed in court as a basis for adjudication. (*Id.* at 1208-1209 n.25.) Since *NBC Subsidiary*, California courts have regularly employed a constitutional analysis in resolving disputes over public access to court documents. (*Overstock.com, Inc. v. Goldman Sachs Group, Inc.* (2014) 231 Cal.App.4th 471, 485; see also *In re Marriage of Tamir* (2021) 72 Cal.App.5th 1068, 288 Cal.Rptr.3d 48, 55-56 [discussing common law right of access and constitutional right of access].) The First Amendment principles are embodied in the sealed records rules promulgated by the Judicial Council. (*Overstock.com*, 231 Cal.App.4th at 486; *In re Marriage of Tamir*, 288 Cal.Rptr.3d at 56.)

The sealed records rules apply to records sealed or proposed to be sealed by a court order and, more specifically, to discovery materials that are used at trial or submitted as a basis for adjudication of matters other than discovery motions or proceedings. (*Overstock*, 231 Cal.App.4th at 486.) The court may order a record sealed only upon making express findings that (1) There exists an overriding interest that overcomes the right of public access to the record; (2) The overriding interest supports sealing the record; (3) A substantial probability exists that the overriding interest will be prejudiced if the record is not sealed; (4) The proposed sealing is narrowly tailored; and (5) No less restrictive means exist to

achieve the overriding interest. (*Id.* at 487; Cal. Rules of Court, rule 2.550(d).) In its order, the court must specifically state the facts supporting its issuance. (Cal. Rules of Court, rule 2.550(e)(1)(A); *Overstock.com,* 231 Cal.App.4th at 487.)

As to the settlement agreements and other documents relating to the transfer of title to the Aircraft, Plaintiffs' motions to seal do not contain facts sufficient to justify the sealing of the documents in question, as required by Rules 2.550 and 2.551. (See Cal. Rules of Court, rule 2.551(b)(1) ["The motion or application must be accompanied by a memorandum and a declaration containing facts sufficient to justify the sealing."].) It is not sufficient for Plaintiffs to show that there is a confidentiality agreement with a third party (Aeroflot or its apparent nominee, NFK) that governs the agreements. "The Court must not permit a record to be filed under seal based solely on the agreement or stipulation of the parties." (Rule 2.551(a); *McNair v. National Collegiate Athletic Assn.* (2015) 234 Cal.App.4th 25, 35-36 ["the mere agreement of the parties alone is insufficient to constitute an overriding interest to justify sealing the documents"].) For this reason, the motions to seal are denied as to the settlement agreements and bills of sale regarding the Aircraft. (McGraw Decl. Exs. 16, 17, and 19.)[25]

As to the remaining documents, Mr. Cannon's declaration adequately establishes that the documents "reveal commercially sensitive and proprietary information about BBAM's aircraft fleet portfolio and related financial details," including references to the Plaintiffs' "lease agreements, rents letters of credit, payment rates, commitment amounts, performance amounts, overhaul contributions, and other investments and transactions." (Cannon Decl. ¶ 4.) The declaration further shows that those details are "key to Plaintiffs' business performance in the marketplace, which involves significant competition and individualized negotiations with lessors to determine competitive pricing and value in those transactions," and that public disclosure of those details threatens to undermine those interests. (*Id.*) It also shows, and the Court finds, that the proposed redactions are narrowly tailored to protect those interests. (*Id.* ¶ 6.) Accordingly, the Court grants the motion as to the referenced exhibits. (Exs. A, B, C, and V.)

[25] In its tentative ruling, the Court denied Plaintiffs' motion to seal as to these documents without prejudice, and offered Plaintiffs the opportunity to supplement their motion with a further factual showing. Plaintiffs declined to do so, and submitted on the tentative ruling.

CONCLUSION

For the foregoing reasons, Defendants' motion for summary judgment or, in the alternative, summary adjudication is denied. Plaintiffs' motions to seal are denied as to the settlement agreements and bills of sale regarding the transfer of title to the Aircraft, and are granted as to the remaining documents.

IT IS SO ORDERED.

Dated: August 2, 2024

Ethan P. Schulman
Judge of the Superior Court

CERTIFICATE OF ELECTRONIC SERVICE
(CCP 1010.6(6) & CRC 2.260(g))

I, DANIAL LEMIRE, a Deputy Clerk of the Superior Court of the County of San Francisco, certify that I am not a party to the within action.

On August 2, 2024, I electronically served THE ATTACHED DOCUMENT via File & ServeXpress on the recipients designated on the Transaction Receipt located on the File & ServeXpress website.

Dated: August 2, 2024

Brandon Riley, Court Clerk,

By: _____
DANIAL LEMIRE, Deputy Clerk

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

CASE NO: 2022-020857-CA-01
SECTION: CA43
JUDGE: Thomas J. Rebull

Carlyle Aviation Partners, LLC et al

Plaintiff(s)

vs.

American International Group UK Ltd. et al

Defendant(s)

_____/

ORDER ON MOTIONS FOR SUMMARY JUDGMENT

This action came before the Court on Plaintiffs' Motion for Summary Judgment (DIN 593) and Defendant Chubb European Group SE's Motion for Summary Judgment (DIN 612). The Court reviewed the Motions, the attendant Responses and Replies, as well as the record evidence, and heard argument on April 28 and April 29, 2025.

For the reasons set forth below, it is ORDERED AND ADJUDGED THAT:

1. Plaintiffs' Motion is granted as to Counts V and VI of Plaintiffs' Second Amended Complaint, with respect to liability.
2. Plaintiffs' Motion is denied as moot as to Counts I and II.
3. Plaintiffs' Motion is denied as to the amount of Plaintiffs' damages under Counts V and VI. The Court will enter final judgment on those Counts following a determination of damages.
4. Defendant Chubb's Motion is denied.

FACTUAL BACKGROUND

1. This action is a first-party insurance coverage dispute concerning twenty-three commercial aircraft that the Plaintiffs (collectively, "Carlyle") leased to airline operators in Russia.
2. Plaintiffs are an investment business based in Miami specializing in leasing and managing aircraft, and include the entities that hold title and act as lessors of the aircraft involved in this case. Declaration of Ciana Casey, MSJ Ex. E, at ¶ 1.
3. Plaintiffs are insured under an insurance Policy with the policy number 801/10805A21. The Policy had an effective period of November 1, 2021 through October 31, 2022. MSJ Ex. A

(hereinafter the "Policy"). It is explicitly governed by Florida law and contains a forum selection clause requiring litigation only in the courts of Florida. *Id.* at 33.

4. Defendants to this action are the insurers of the Policy.

5. The Policy provides "all risks" coverage in Section One (titled "Aircraft Hull Coverage") and coverage for "war," "invasion," "confiscation," "seizure," and other perils in Section Three (titled "Aircraft Hull, Spares and Equipment War and Allied Perils Coverage"). *Id. id.* at 10-12, 16-21.

6. Section One of the Policy provides coverage for "physical loss of or damage . . . to" covered aircraft. *See id.* at 10.

7. Section Three of the Policy covers "loss or damage" caused by any of the following:
    a. War, invasion, acts of foreign enemies, hostilities (whether war be declared or not), civil war, rebellion, revolution, insurrection, martial law, military or usurped power or attempts at usurpation of power.

    b. Strikes, riots, civil commotions or labour disturbances.

    c. Any act of one or more persons, whether or not agents of a sovereign power, for political or terrorist purposes and whether the loss or damage resulting therefrom is accidental or intentional.

    d. Any malicious act or act of sabotage.

    e. Confiscation, nationalisation, seizure, restraint, detention, appropriation, requisition for title or use by or under the order of any Government (whether civil military or de facto) or public or local authority.

    f. Hi-jacking or any unlawful seizure or wrongful exercise of control of the Aircraft or crew in flight (including any attempt at such seizure or control) made by any person or persons on board the Aircraft acting without the consent of the Insured/Operator. *Id.* at 16 (emphasis added).

8. The six sets of perils covered by Section Three are explicitly excluded from coverage under Section One. *Id.* at 28-29.

9. Before the hearing on Plaintiffs' Motion for Summary Judgment and the issuance of the Court's Memorandum Order granting that Motion as to liability on Counts V and VI, notices were filed with the Court indicating that several Defendants had reached settlements in principle with Plaintiffs. DIN 692, 694, 697, 836.

10. Accordingly, at the hearing on Plaintiffs' Motion, there were four remaining sets of Defendants opposing Plaintiffs' Motion: Chubb European Group SE (which subscribed to Section One and Section Three of the Policy, Inigo Managing Agent Limited (which subscribed to Section Three only), Swiss Re International SE, Niederlassung Deutschland (which subscribed to Section One only), and a group of Defendants led by Global Aerospace Underwriting Managers Limited (which subscribed to Section One Only).[1] After the hearing, Plaintiffs filed Notice of Settlement advising of a settlement with Inigo. DIN 866.

11. Plaintiffs moved for Summary Judgment as to twenty-two of the twenty-three aircraft at issue in this case. As to the twenty-third aircraft, it is undisputed that the aircraft was recovered

from Egypt several months after Russia's invasion of Ukraine. Casey Declaration at ¶ 27. Plaintiffs did not file a response to Certain Defendants' Motion for Partial Summary judgment as to that aircraft only (DIN 585), so the Court deems waived Plaintiffs' claims in this litigation as to that aircraft only, and a summary judgment of no coverage is entered in favor of Chubb as to this aircraft only.

12. On February 24, 2022, Russian troops crossed the border into Ukraine and began military hostilities. Casey Declaration at ¶ 24. *See also* Chubb Statement of Material Facts in Opposition to Plaintiffs' MSJ (DIN 704) at ¶ 43 ("The Aircraft have remained in the possession of Carlyle's Lessees at all material times both before and after Russia invaded Ukraine on February 24, 2022.").

13. At the time, Carlyle had twenty-three aircraft on lease to several Russian airlines including Rossiya, S7, UTair, IrAero, I-Fly, Yakutia, Ural, Izhavia, Nordwind, Nordstar, Smartavia and Azur. Casey Declaration at ¶ 13.

14. Each of the twenty-three aircraft was the subject of a lease agreement which required the Russian airline to procure insurance for the aircraft. *Id.* at ¶ 14.

15. In the days following the Russian invasion of Ukraine, Carlyle sent notices to its Russian lessee airlines demanding that its aircraft be returned and relocated outside of Russia. *Id.* at ¶ 22.

16. In response to Carlyle's correspondence demanding return and relocation of the aircraft, several of Carlyle's Russian lessees advised Carlyle that it would not be possible to return the aircraft. For example, Russian airline Ural wrote to Carlyle that due to decrees of the Russian Government "export of aircraft from Russia is prohibited . . . and return of aircraft is temporarily impossible." Carlyle_00007725–0007726 (Ex. N to Plaintiffs' MSJ). Similarly, Russian airline I-Fly wrote to Carlyle to advise that they were "unable to move the Aircraft to any location outside of Russia in accordance with instructions received from Russian Authorities." Carlyle_00006898–00006899 (Ex. L to Plaintiffs' MSJ). Russian airline Nordstar likewise wrote to Carlyle that they were "currently prohibited to export the Aircraft from the territory of the Russian Federation" and it would therefore "be unable to" redeliver any aircraft to Carlyle. Carlyle_00246340–00246341 (Ex. M to Plaintiffs' MSJ).

17. Some of Carlyle's lessees expressly referred to the Russian government's Resolution 311, which introduced "a ban on the export" of goods including "aircraft." Resolution 311 (Ex. P to Plaintiffs' MSJ).[2]

18. In the weeks after the invasion, the Russian government issued additional statements directing airlines to retain foreign-leased aircraft within the country. For example, "on 5 March 2022," a Russia's air transport agency ordered "that foreign-owned aircraft be confiscated, seized, restrained, detained and/or appropriated by not being allowed to leave the country." Chubb English Defense at 10 (Ex. S to Plaintiffs' MSJ).

19. Levent Ciftci, a senior executive with airline Azur at the time of the invasion, was personally involved in efforts "to return aircraft to foreign owners including Carlyle Aviation." Ciftci Decl. at ¶ 4 (Ex. O to Plaintiffs' MSJ). He testified in a sworn and notarized declaration that "it was impossible to export or return MSN 28226," one of Carlyle's leased aircraft, "due to orders and instructions of the Russian government" and that "the Russian government's actions made it impossible and illegal" to return the aircraft. *Id.* at ¶¶ 10-12.

20. Carlyle has not recovered or repossessed any of the twenty-two aircraft at issue in Plaintiffs' Motion since February 24, 2022. Casey Decl. at ¶¶ 27-33.

21. Carlyle sent numerous claims notices to the insurers of the Policy in late February and early March, 2022. Casey Decl. at ¶¶ 38-39, Plaintiffs' Statement of Facts (DIN 590) at ¶¶ 31-33 and Exhibits 17-18.

22. In addition, Carlyle brought claims under the insurance policies procured by its Russian lessees. Casey Decl. at ¶ 40, Plaintiffs' Statement of Facts at ¶ 36 and Exhibits 27-28

23. No insurer of a Russian lessee paid or compensated Carlyle—in whole or in part—under any of the Russian lessees' insurance policies. Casey Decl. at ¶¶ 43-45.

24. Plaintiffs filed this lawsuit on October 31, 2022, alleging breaches of the Policy and seeking declarations of coverage under both Section One and Section Three.

25. In their Motion for Summary Judgment, Plaintiffs sought summary judgment only on their counts for "contingent" coverage: Counts V and VI under Section Three of the Policy, and—in the alternative—Counts I and II under Section One of the Policy. "Contingent" coverage applies to aircraft that are not in in Carlyle's "care, custody or control." Policy at 15. "Possessed" coverage applies to aircraft that are in Carlyle's "care, custody or control," "in the course of repossession," and other scenarios. *Id*.

26. Plaintiffs accept, and no Defendant disputes, that summary judgment in Plaintiffs' favor with respect to "contingent" coverage would moot Plaintiffs' claims for "possessed" coverage in Counts III, IV, VII and VIII of their Second Amended Complaint.

27. Chubb filed a Motion for Summary judgment which contended that Plaintiffs have not met the conditions for contingent coverage. DIN 612 at 15.

LEGALSTANDARD

A party is entitled to summary judgment on any "claim or defense" or any "part of [a] claim or defense" if it shows "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fla. R. Civ. P. 1.510. The Florida summary judgment standard "shall be construed and applied in accordance with the federal summary judgment standard." *Id*. *See alsoIn re Amendments to Fla. R. Civ. Pro. 1.510*, 309 So. 3d 192, 192 (Fla. 2020) (adopting federal summary judgment standard set forth in *Celotex Corp. v Catrett*, 477 U.S. 317 (1986), *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), and *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986)).

"[T]he burden on the moving party may be discharged by 'showing'—that is, pointing out to the [court]—that there is an absence of evidence to support the nonmoving party's case." *Celotex*, 477 U.S. at 325. To avoid summary judgment, the non-moving party must show a genuine dispute of material fact. *See Anderson*, 477 U.S. at 249–50 ("If the evidence [provided by an

opposing party] is merely colorable, or is not significantly probative, summary judgment may be granted.") (citations omitted). The nonmovant's evidence must be of sufficient weight and quality that "reasonable jurors could find by a preponderance of the evidence that [the nonmovant] is entitled to a verdict." *Id.* at 252. *See also Nembhard v. Universal Prop. & Cas. Ins. Co.*, 326 So. 3d 760, 764 (Fla. 3d DCA 2021) (affirming summary judgment under new federal standard).

ANALYSIS

I. The Policy must be construed in accordance with its plain language.

The Carlyle Policy's construction is "a question of the law to be determined by the [C]ourt." *Allstate Ins. Co. v. Swain*, 921 So. 2d 717, 719 (Fla. 3d DCA 2006). Under Florida law, "insurance contracts are construed in accordance with the plain language of the policies as bargained for by the parties." *Auto-Owners Ins. Co. v. Anderson*, 756 So. 2d 29, 34 (Fla. 2000). *See also Taurus Holdings, Inc. v. U.S. Fid. & Guar. Co.*, 913 So. 2d 528, 532 (Fla. 2005) (describing "the guiding principle that . . . insurance contracts must be construed in accordance with the plain language of the policy"). "[P]olicy provisions should be harmonized and reconciled whenever feasible so as to give effect to all of them." *Navarro v. Citizens Prop. Ins. Corp.,* 353 So. 3d 1276, 1280 (Fla. 3d DCA 2023). And if the language of the contract is ambiguous, "the ambiguous policy must be strictly construed against the insurer." *Washington Nat. Ins. Corp. v. Ruderman*, 117 So. 3d 943, 951 (Fla. 2013). Therefore, if an insurer wishes "to limit their liability and impose conditions upon their obligations," it has "a duty to do so clearly and unambiguously." *Id.* (quotation marks omitted).

II. Carlyle has suffered a "physical loss" within the meaning of the Policy.

Plaintiffs contend that they have suffered a "loss" (under Section Three) or in the alternative a "physical loss" (under Section One) within the meaning of the Policy's language because they have been deprived of the twenty-two subject aircraft since February of 2022. The underlying facts are not in dispute: Plaintiffs have presented unrebutted evidence that they have not had physical custody, visibility or control over the aircraft since February 24, 2022. Deposition of Robert Korn at 205:14-18 ("They're lost. We haven't seen them. We haven't inspected them.") (attached as Ex. J to Plaintiffs' Motion for Summary Judgment). There is no record evidence to the contrary. Indeed, the remaining Defendants agree "that the Lessees have not returned the Aircraft to Plaintiffs." Inigo Response (DIN 709) at 11.

Although the four remaining Defendants accept that Plaintiffs have been deprived of

their aircraft, they argue that Plaintiffs have not suffered a "physical loss" within the meaning of the Policy because there is no evidence that the twenty-two aircraft are physical *damaged* or physically *altered*. And Defendants Chubb and Inigo contend that a "physical loss"—not just a "loss"—is required for coverage under Section Three.

The Court disagrees with Defendants and agrees with Plaintiffs that even the narrower term "physical loss" covers dispossessions and physical deprivations, without a need to show actual physical *damage*. The Court must give meaning to all the terms of the Policy. The terms "physical loss" and "physical . . . damage" are "not redundant. Loss can include theft or complete ruin[.]" *Commodore, Inc. v. Certain Underwriters at Lloyd's London*, 342 So. 3d 697, 703 (Fla. 3d DCA 2022). Accordingly, "physical loss" extends to scenarios where "a policyholder is deprived of property without any damage to it." *Id.* (quoting *Santo's Italian Café LLC v. Acuity Ins. Co.*, 15 F.4th 398, 404 (6th Cir. 2021)). *See also*, *e.g.*, *Goodwill Indus. of Cent. Okla. v. Phila. Indem. Ins. Co.*, 21 F.4th 704, 711 (10th Cir. 2021) (explaining that "physical loss of" "refers to dispossession of property—for example—via theft—and therefore has a different meaning to 'damage to'"). The Court need not decide whether Section Three, like Section One, requires a "physical loss," because even if it did, the Plaintiffs here have suffered a dispossession and therefore a "physical loss."

Therefore, Plaintiffs suffered a covered loss within the meaning of Section One and Section Three of the Policy.[3]

III. No reasonable juror could conclude other than that Plaintiffs' loss was caused by one or more Section Three perils.

Having concluded that the Plaintiffs suffered a covered loss, the next question is whether the loss was caused by one of the six enumerated sets of perils in Section Three, in which case the loss is covered only by Section Three, and excluded by Section One.[4]

Plaintiffs' principal contention is that their loss was caused by one or more perils covered by Section Three. Three of the four remaining Defendants agree that if Carlyle suffered a loss, it was caused by one or more of the Section Three Perils. Inigo—alone among the remaining parties to this case—disagrees. It contends that the facts of Plaintiffs' loss "support a conversion under Florida law," and that this type of "theft by the Lessee is not covered under Section Three." Inigo Resp. at 11-12. As noted above, "theft" is a type of "physical loss" covered by all-risks insurance, unless explicitly excluded. *Commodore, Inc*, 342 So. 3d at 703.

In support of its argument, Inigo urges narrow constructions of each of the Section

Three perils. For example, the plain text of Peril C covers "[a]ny act of one or more persons . . . for political or terrorist purposes and whether the loss or damage resulting therefrom is accidental or intentional." Policy at 16. But Inigo argues that this peril, notwithstanding its plain text, "requires physical damage" (not just loss) and only covers damage caused by "activist or terrorist-type acts" (not any act for political purposes). Inigo Response at 17. Inigo's proposed construction is contradicted by the Policy's plain text: the peril refers to "loss or damage" and extends to "any act" for political purposes, not just terrorist purposes. "[I]nsurance contracts are construed in accordance with the plain language of the policies as bargained for by the parties." *Anderson*, 756 So. 2d at 34. And Inigo's construction of the Section Three perils would introduce limitations that are not present in the Policy's plain language.

Applying the text of Section Three to the record evidence, no reasonable juror can find that Carlyle's loss was caused by anything other than one or more of the Section Three perils. Based on the record evidence, there are several independent bases for coverage under Section Three. As noted above, Carlyle demanded the return of the twenty-two aircraft within days of the full-scale war between Russia and Ukraine. Casey Decl. at ¶ 22. These "hostilities," whether characterized as an "invasion" or otherwise, are covered under Peril "A" of Section Three, and they are the event that put the other events of this case into motion. *See Sebo v. Am. Home Assurance Co., Inc.*, 208 So. 3d 694, 697 (Fla. 2016) (explaining that the "efficient cause—the one that set the other in motion—is the cause to which the loss is attributable") The Russian airlines themselves told Carlyle in numerous letters that they could not return their aircraft for political reasons, namely, that the Russian government made such return impossible. This also supports coverage under Peril "C" of Section Three, which covers "any act . . . for political purposes." Policy at 16. And according to Carlyle's testimony, the letters from the Russian airlines, and the testimony of Levent Ciftci (a former senior official with one of Carlyle's Russian lessees), the Russian government prevented foreign-leased aircraft from leaving the country after the war. Ciftci Decl. at ¶ 12 (testifying that "[t]he Russian government's actions made it impossible" to return Carlyle's aircraft). Mr. Ciftci's testimony, which is unrebutted by any other fact witness in the case, establishes coverage under Peril "C" as well as Peril "E," which covers the "restraint" and "detention" the aircraft "by or under the order of any Government." Policy at 16.

Notably, Chubb—which is the sole Section Three insurer which has not been dismissed and for which there has been no notice of a settlement in principle—attested in a sworn submission to an English court that there was "an order by the President and/or the

Russian government and/or other relevant public authority that foreign-leased aircraft be confiscated, seized, restrained, detained and/or appropriated by not being allowed to leave the country." Chubb Defense at 10 (Ex. S to Plaintiffs' MSJ). This sworn factual statement is binding on Chubb. *Metropolitan Dade County v. Yearby*, 580 So. 2d 186, 188 (Fla. 3d DCA 1991) ("Out-of-court admissions of a party opponent are admissible in evidence . . . in our adversary system, a party is necessarily bound by any relevant admissions which either he or his agent makes."). Thus, Chubb does not and cannot dispute that one or more Section Three perils, including peril "E," materialized in Russia and prevented the return of "foreign-leased aircraft" including Carlyle's aircraft.

Inigo argues otherwise by asserting that a reasonable juror could find that the Russian airlines made concerted or simultaneous business decisions—independent of any government action—to steal Carlyle's aircraft, and all lied to Carlyle about the reasons for their actions. The Court disagrees. There is no record evidence of such a concerted business decision, or that the airlines were acting free of government influence. Inigo's argument is therefore that a reasonable juror could *infer*, in the absence of supporting evidence, that Carlyle's eleven Russian lessees concertedly or simultaneously made a business decision to steal the aircraft and lie about it. But this supposition is an unreasonable and therefore impermissible inference, wholly untethered from the record evidence in this case. *See Vera v. McHugh,* 622 F.3d 17, 26 (1st Cir. 2010) (at summary judgment, the court is not required to draw unreasonable inferences in favor of nonmovant). *See also Anderson*, 477 U.S. at 249–50 ("If the evidence [provided by an opposing party] is merely colorable, or is not significantly probative, summary judgment may be granted.") (citations omitted).[5]

Inigo also argues that the evidence that Plaintiffs' losses were caused by a Section Three peril are inadmissible hearsay. The Court disagrees. The declaration of Mr. Ciftci, for example, is admissible: it is based on his personal knowledge of events surrounding Carlyle's aircraft, given his personal involvement in attempting to return the aircraft to Carlyle. Ciftci Decl. at ¶ 4 ("After Russia invaded Ukraine, I attempted to work with my contacts at Azur Russia's lessors to return aircraft to foreign owners including Carlyle Aviation."). The lessees' letters regarding their inability to return the aircraft are also admissible. Plaintiffs explained that the letters are not offered to prove the truth of what the Russian government may have told the airlines, but rather to prove the inability of the Russian airlines to return the aircraft, the reasons why the Russian airlines themselves acted, the Russian airlines' state of mind in the aftermath of the invasion of Ukraine, and specifically whether they acted "for political purposes." The letters are also probative of what caused Carlyle's loss because they all assert similar reasons for failing to return the aircraft within a similar time period. A

reasonable juror could infer from this pattern that the government did, in fact, prevent the return of the aircraft, even if the letters are not offered for the truth of what the Russian government may have told the airlines. The letters are also records of regularly conducted business activity within the meaning of Fla. Stat. Section 90.803(6), as it was the "regular practice" of Carlyle to issue leasing termination notices and engage in correspondence with the airlines regarding leasing matters.

Based on the record evidence, and the absence of any evidence supporting Inigo's proposed inferences, the Court finds that Carlyle's loss of aircraft in Russia is covered by perils a, c, and e, and, therefore, the Defendants subscribing to Section Three are liable to Plaintiffs.

IV. **No reasonable juror could conclude that contingent coverage has not been triggered.**

Plaintiffs' Motion seeks summary judgment only on counts for contingent coverage. Chubb's Motion for Summary judgment argues that Plaintiffs' have not met the conditions for contingent converage. DIN 612 at 15.

Contingent coverage promises to "pay for loss of or damage to" aircraft "that are not in the care, custody or control" of Carlyle. Policy at 15.[6] Under the plain language of the Policy, contingent coverage applies "in the event that the Insured is not indemnified in whole or in part under the Principal Policy." *Id.*

As a factual matter, there is no dispute that Plaintiffs have not been paid or compensated under any of the "Principal Policies," *i.e.*, the Russian airlines' own insurance policies.[7] It is undisputed that no such payment has taken place. Casey Declaration at ¶ 47. Instead, Defendants argue that the term "indemnified" does not refer to payment or compensation at all. For example, Chubb contends that Plaintiffs are "indemnified" under the Principal Policies if there is "coverage available" under those Policies, regardless of whether Carlyle has in fact received payment under those Policies. Chubb Response to Plaintiffs' Motion for Summary Judgment (DIN 703) at 2. At other times, Chubb itself uses the term "indemnification" to mean payment, but argues the contingency has not been triggered because the payment is still "possible." According to Chubb, the "mere fact that Carlyle continues to pursue coverage under the Principal Policies in legal proceedings establishes that indemnification remains possible." *Id.* at 15.

The Court disagrees with Defendants, and agrees with Plaintiffs that to be "indemnified under the Principal Policy," Carlyle must have in fact received monetary compensation under such a policy. To "indemnify" means to "reimburse (another) for a

loss." INDEMNIFY, Black's Law Dictionary (12th ed. 2024). It is not enough for such indemnification to arguably be "possible," or to be theoretically available. Because it is undisputed that Carlyle has not been paid or compensated by any Principal Policy, this coverage condition is met. This plain-English construction is further reaffirmed by a holistic reading of the Policy's text. With respect to contingent coverage, the Policy contains an exclusion for "that part of any loss or damage for which indemnity is obtained as a claim under the Principal Policy." Policy at 28. This exclusion clearly carves out partial payments under the Principal Policies, and would have no meaning if the mere theoretical existence of *coverage* under the Principal Policies abrogated contingent coverage in the first place.[8] Moreover, Chubb was unable to point to any language in Carlyle's Policy, a Florida-law contract, supporting its argument that Carlyle's contingent coverage depends on a threshold coverage determination under the Principal Policies, which are governed by foreign law.

For the same reasons, the Court disagrees with Chubb that Carlyle was "indemnified" by the Principal Policies when some of its Russian lessees contacted Carlyle to explore clearing title to Carlyle's aircraft in exchange for a monetary sum. The lessees' outreach regarding potential transactions—which were not consummated or even reduced to final agreement—do not constitute "indemnification" under any Principal Policy. The outreach was not even from an insurer, and Carlyle has offered unrebutted testimony that none of the Russian Principal Policy insurers contacted Carlyle to adjust Carlyle's claims, much less indemnify Carlyle for those claims. Decl. at ¶¶ 43-44 ("None of the Russian airlines' insurers, which are Russian insurance companies, responded to Carlyle's claims notifications).[9]

Finally, the Court disagrees with Chubb that Carlyle was "indemnified" by the Principal Policies when it entered into settlement agreements with insurers of *its* Policy—*i.e.*, former Defendants to this lawsuit—who also happen to be *re*insurers of the Principal Policies. The definition of "Principal Policy" does not refer to or encompass "reinsurance." As Defendant Inigo observed, and in which Chubb joined, "[a]ny reinsurance . . . does *not* fall within the definition of 'Principal Policy.'" DIN 350. Accordingly, if Carlyle settled the claims in this lawsuit against insurers who happen to also reinsure Principal Policies, any settlement proceeds would not constitute a payment under the "Principal Policies," and are therefore irrelevant to whether Carlyle has been "indemnified" under a Principal Policy.

The Court also heard argument about whether Carlyle had made "best efforts" to recover under the Principal Policies. The Policy provides that Carlyle's insurers "will, subject to the terms, conditions, limitations and exclusions of this Policy, investigate" Carlyle's

contingent claims "[i]n the event that the Insurers of the Principal Policy deny the Insured coverage or fail to investigate, adjust or enter into settlement negotiations in respect of any claim within 180 days after the Insured has submitted a written request thereto and have used their best efforts to obtain the same." Policy at 15.

Defendants including Chubb describe the "best efforts" language as a "condition precedent" to Carlyle's contingent claims. Plaintiffs contend that this provision is a deadline on the contingent insurers' obligations to investigate and adjust Carlyle's claims. The court need not resolve the distinction, because it makes no difference to the outcome here. "Best efforts" is an undefined term in the Policy. Defendants did not urge any specific definition of the term, nor did they specify which "efforts" they believed Carlyle should have made.

Instead, Defendants generally alleged a "fact issue" as to whether Plaintiffs' efforts here can be characterized as "best efforts." Chubb Response at 3. But Defendants presented no evidence of any specific available action that Carlyle could have undertaken to reach a different result, nor did they present any evidence that the Russian Principal Policy insurers adjusted any lessor's claims under the Principal Policies. In any event, Carlyle's efforts here exceeded any reasonable construction of "best efforts": they undisputedly include filing suit under the Principal Policies at its own expense, and maintaining that litigation for years. *See* Chubb Statement of Facts in Opposition to Plaintiffs' Motion for Summary Judgment, DIN 704 at ¶ 36 (listing cases Carlyle brought under Principal Policies beginning in 2023). At a hearing in this case on May 22, 2024, counsel arguing for one of the Defendants acknowledged "we'd all be hard pressed to say that's not best efforts." May 22, 2024 Hr'g Tr. (DIN 714, Ex. C) at 17:9-11. And at the April 28 hearing on Plaintiffs' Motion, one of the Defendant's counsel conceded that Plaintiffs "are not required to file a lawsuit" against the Principal Policy insurers in order to claim for contingent coverage. Apr. 28, 2025 Hr'g Tr. (DIN 858) at 79:9-10. The Court therefore disagrees with Chubb that Plaintiffs have not made "best efforts," and likewise disagrees that Plaintiffs have not met the conditions for for contingent coverage.

V. **Plaintiffs' Motion is denied without prejudice as to damages.**

For the foregoing reasons, Chubb's Motion is denied, and Plaintiffs' Motion is granted as to liability on Counts V and VI: no reasonable juror could conclude other than that Plaintiffs suffered a loss, that loss was caused by one or more perils covered by Section Three, and that contingent coverage has been triggered. With respect to damages, Plaintiffs' Motion is denied without prejudice. The Court reserves ruling on this issue, pending additional argument from the parties at a hearing to be set by further order.

For the reasons set forth above, it is ORDERED[10] AND ADJUDGED THAT:

1. Plaintiffs' Motion is granted as to Counts V and VI of Plaintiffs' Second Amended Complaint, with respect to liability.
2. Plaintiffs' Motion is denied as moot as to Counts I and II.
3. Plaintiffs' Motion is denied without prejudice as to the amount of Plaintiffs' damages under Counts V and VI. The Court will enter final judgment on those Counts following a determination of damages by either the finder of fact or the Court by way of summary judgment.
4. Defendant Chubb's Motion is denied.

[1] The Global Aerospace group also includes Great Lakes Insurance SE; Berkshire Hathaway International Insurance Limited; Houston Casualty Company; MAPFRE España Compañía de Seguros y Reaseguros, S.A.; Mitsui Sumitomo Insurance Company (Europe), Limited; Faraday Capital Limited, the sole Underwriting Member of Lloyd's Syndicate 435 (FDY) for the 2021 year of account; the Underwriting Members of Lloyd's Syndicate 1919 (CVS) for the 2021 year of account; the Underwriting Members of Lloyd's Syndicate 1969 (APL) for the 2021 year of account; AXIS Specialty Europe SE; and Convex Insurance UK Limited.

[2] The Court takes notice of Resolution 311, attached to Plaintiffs' Motion with a certified translation into English, pursuant to Section 90.202(4) of the Florida statutes (permitting the Court to take notice of "[l]aws of foreign nations . . . ").

[3] The Court agrees with Plaintiffs and holds that Plaintiffs suffered a "loss" under Section Three of the Policy and a "physical loss" under Section One.

[4] Section One provides "all risks" coverage. Under such coverage once a loss is established, "the insurer then has the burden to prove the damage is excluded from coverage." *Belizaire v. Citizens Prop. Ins. Corp.*, 2025 WL 466556, at *1 (Fla. 4th DCA Feb. 12, 2025) (cleaned up). Here, however, Plaintiffs' principal contention is that their loss was caused by one or more of the Section Three perils which are excluded from coverage under Section One. The Court agrees with Plaintiffs, and therefore declines to reach Plaintiffs' alternative request for relief as to their Section One claims.

[5] For similar reasons, the Court disagrees with Inigo's argument that a Section Three peril did not materialize until May of 2022 because in the two months following its enactment, Resolution 311 contained a loophole for vehicles of "international carriage." It is undisputed that Plaintiffs were deprived of their aircraft just days after the invasion in February of 2022, and overwhelming unrebutted evidence supports that this deprivation was caused by one or more Section Three Perils. Again, no record evidence supports any alternative theory of the cause of Plaintiffs' loss. Inigo's contention that Resolution 311 contains a loophole that Carlyle's Russian lessees could theoretically have exploited to return the aircraft to Carlyle cannot negate the fact that

the lessees did not exploit any such alleged loophole. And Inigo presented no record evidence that any Russian airline ever exploited that loophole, to return Carlyle's aircraft or any other foreign-leased aircraft.

[6] Contingent coverage also requires aircraft to be "the subject of a Lease/Finance Agreement" which "require[s] coverage to be provided under the Principal Policy." *Id.* As noted above, there is no dispute of fact that these requirements have been met: each of the twenty-two subject aircraft was the subject of the lease agreement, and each of these lease agreements required the lessee to obtain coverage for the aircraft. Contrary to Chubb's contentions, there is no requirement that the Principal Policy coverages "mirror" the coverage of Carlyle's own Policy. Indeed, the plain language of Carlyle's Policy does not require that a Principal Policy be in place at all; it only requires that Carlyle's *leases* require the lessee to procure coverage. *Cf.* Chubb Motion for Summary Judgment at 5 (arguing that Principal Policies are "expected" to mirror Carlyle's Policy).

[7] The Policy at issue in this case defines "Principal Policy" to mean "the policy or policies required to be effected by the Operator pursuant to the provisions of the Lease/Finance Agreement (inclusive of policies such as hull deductible policies as may be necessary to meet the lease/finance requirements." Policy at 7.

[8] Chubb also urged a construction of contingent coverage that would limit it to covering only "mistakes" in the Principal Policy, such as if "an aircraft was mistakenly left off" coverage under the Principal Policies. Chubb Response at 2. The Court disagrees with this unduly narrow construction of the contingent coverage. Nothing in the plain language of Carlyle's Policy supports that contingent coverage exists only to cover "mistakes" in the Principal Policies, and the Court declines to introduce such a limitation into the Policy's language.

[9] The *BBAM* and *Castlelake* decisions cited by Defendants, which arose under foreign law, concerned distinct factual scenarios in which aircraft lessors released their claims against the airlines *and their claims under Principal Policies* in exchange for monetary compensation. *Castlelake L.P. v. Airline War Consortium*, 2024 WL 4800233, at *9 (Minn. Dist. Ct. Sep. 30, 2024); *BBAM US LP v. KLN 510 Tokio Marine KILN* (Cal. Sup. Ct. Dec. 5, 2024) at 4. Here, Carlyle has neither released its claims under the Principal Policies, nor crucially received any payment in exchange for any release of such claims.

[10] After the hearing the Court rendered a memorandum order [DIN 856 and 860] and requested that certain counsel prepare initial drafts of the written order. The Court then carefully reviewed and edited counsel's drafts, ensuring that this Order accurately reflects its independent and unexaggerated judgment. *Compare Univ. of Miami v. Jones*, 390 So. 3d 213, 214 (Fla. 3d DCA 2024) (cleaned up) ("Trial courts are not precluded from adopting a party's proposed order, so long as the order does not substitute for a thoughtful and independent analysis of the facts, issues, and law by the trial judge.") *with Corp. Mgmt Advisors, Inc. v. Boghos*, 756, So.2d 246, 249 (Fla. 5th DCA 2000) ("a judge's practice of delegating the task of drafting sensitive, dispositive orders to counsel, and then uncritically adopting the orders nearly verbatim would belie the appearance of justice and creates the potential for overreaching and exaggeration on the part of the attorney preparing findings of fact") *and Perlow v. Berg-Perlow*, 875 So. 2d 383, 390 (Fla. 2004) ("[w]hen the trial judge accepts verbatim a proposed final judgment submitted by one party without an opportunity for comments or objections by the other party, there is an appearance that the trial

judge did not exercise his or her independent judgment in the case. This is especially true when the judge has made no findings or conclusions on the record that would form the basis for the party's proposed final judgment. This type of proceeding is fair to neither parties involved in a particular case nor our judicial system … the better practice would be for the trial judge to make some pronouncements on the record of his or her findings and conclusion in order to give guidance for preparation of the proposed final judgment").

> Initially, we note that "Florida law does not prohibit the adoption, verbatim, of a judgment that has been proposed by a party to the litigation" Smith v. Wallace, 249 So. 3d 670, 672 (Fla. 2d DCA 2017); *In re T.D. v. Dep't of Children & Family Servs*., 924 So. 2d 827, 831 (Fla. 2d DCA 2005) (no "post-Berg-Perlow decisions of this court requires reversal solely on the ground that a trial court has adopted a judgment prepared by one of the parties"). *See also Kendall Healthcare Grp., Ltd. v. Madrigal*, 271 So. 3d 1120, 1122 (Fla. 3d DCA 2019) (rejecting appellant's argument "that the trial judge failed to exercise his independent judgment merely because he adopted verbatim [appellee's] proposed order"). Instead, **"what is critical for a reviewing court is that a final judgment reflect the trial judge's independent decision on the issues of a case, not that the judge used words drafted by one of the parties to express that decision."**
>
> *Flint v. Fortson*, 744 So. 2d 1217, 1220 (Fla. 4th DCA 1999).

Tercier v. Univ. of Miami, Inc., 383 So. 3d 847, 854 (Fla. 3d DCA 2023), *reh'g denied* (Oct. 6, 2023) (emphasis added). The Court also reviewed extensive redline and track changes comments from various Defense counsel with regard to Plaintiffs' proposed order.

DONE and **ORDERED** in Chambers at Miami-Dade County, Florida on this 4th day of June, 2025.

2022-020857-CA-01 06-04-2025 2:21 PM
Hon. Thomas J. Rebull

CIRCUIT COURT JUDGE
Electronically Signed

No Further Judicial Action Required on **THIS MOTION**

CLERK TO **RECLOSE** CASE IF POST JUDGMENT

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SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN FRANCISCO

DEPARTMENT 304

BBAM US LP, BBAM AVIATION SERVICES LIMITED, ECAF I 41991 DAC, ECAF I 41992 DAC, and HORIZON II AVIATION 3 LIMITED,

Plaintiffs,

v.

KLN 510 TOKIO MARINE KILN, et al.,

Defendants.

Case No. CGC-22-603451

ORDER ON

(1) MULTIPLE DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, SUMMARY ADJUDICATION;

(2) DEFENDANTS' MOTION TO STRIKE CO-DEFENDANTS' OPPOSITION; AND

(3) DEFENDANTS' CONTESTED MOTIONS TO SEAL.

Currently before the Court are motions for summary judgment or summary adjudication filed by Plaintiffs and multiple Defendants, together with joinders, a related motion to strike, and various motions to seal.[1] The Court rules as follows:

[1] This order utilizes the following abbreviations, which are set forth in the Foley Defendants' Appendix of Definitions in support of their omnibus reply: "Plaintiffs"; "Fidelis"; "Foley Defendants"; "Policy"; "Syndicate 1183"; "War [Risk] Defendants"; and "War Perils Exclusion." The Court also adopts Chubb's abbreviations ("All Risk Insurers," "War Risk Insurers," and "Mixed Risk Insurers"). (Chubb Motion, 10.) Finally, it utilizes certain of Plaintiffs' abbreviations to refer to the specific motions before it: "Foley Motion," "DLA Motion," "Chubb Motion," "Syndicate 1183 Motion," "Fidelis Motion," and "Locke Lord Motion." (Omnibus Opposition, 11-12 & fns. 1-4.)

1. To grant the All Risk and Mixed Risk Defendants' motion for summary adjudication on the grounds that Plaintiffs' claims against them are barred by the War Perils Exclusion in Section One of the Policy;
2. To grant the motion to strike the oppositions filed by the War Risk Defendants, Syndicate 1183, and Fidelis ("Co-Defendants") to other Defendants' motions for summary judgment for lack of standing;
3. To grant Defendants' motions for summary adjudication of Plaintiffs' claims as to the losses they allegedly incurred with respect to the two Aircraft they have transferred to Aeroflot on the ground that those claims are not eligible for either contingent or possessed coverage under the Policy;
4. To grant Defendants' motions for summary adjudication of Plaintiffs' claim as to the loss they allegedly incurred with respect to the third Aircraft, on the ground that Defendants have no obligation under the Policy to investigate, cover, or pay that claim;
5. To grant Defendants' motions for summary adjudication as to Plaintiffs' bad faith claim on the grounds that absent coverage, there is no liability for bad faith; and
6. To grant all parties' motions to seal, including Defendants' contested motions to seal.[2]

FACTUAL AND PROCEDURAL BACKGROUND

As the Court has previously found, the key material facts pertinent to the various motions before the Court are undisputed. (Aug. 2, 2024 Order, 1-5; see also Pl. Motion for Summary Adjudication, 6 [referring to "the parties' general agreement about many facts and key legal issues in this coverage litigation"].)[3] Plaintiffs BBAM US LP, BBAM Aviation Services Limited, ECAF I 41991 DAC, ECAF I 41992 DAC, and Horizon II Aviation 3 Limited (together, "Plaintiffs" or "BBAM") are aircraft leasing companies. (FAC ¶¶ 5-9.) At issue in this litigation are three of Plaintiffs' commercial aircraft,

[2] The Court need not reach the alternative grounds raised by Defendants in their motions or Plaintiffs' motion for summary adjudication of certain affirmative defenses, which are moot in light of the Court's ruling.

[3] This section provides a general summary of the factual and procedural background to the case. Citations to specific undisputed facts in the discussion are to the Unique SSF No. assigned by Plaintiffs in their separate statement accompanying their omnibus opposition to Defendants' motions.

denominated MSN 41991, MSN 41992, and MSN 40242 (the "Aircraft"). (*Id.* ¶ 18.)[4] The first two of these aircraft were leased by Plaintiffs to the Russian airline company Aeroflot, of which the Russian government is the majority owner, and subleased to Aeroflot's wholly-owned subsidiary, Pobeda. (*Id.*) The third was leased to the Russian airline company Izhavia, the national airline of a Russian Republic controlled by Russia. (*Id.*) The Aircraft are registered under the Bermuda Civil Aviation Authority and each has registration marks under it. (*Id.* ¶ 19.) Each is a Boeing 737-800; the Aircraft apparently are configured and utilized for passenger service rather than cargo.

Plaintiffs' aircraft are insured under the policy with Defendants at issue in this litigation (the "Policy"). (FAC ¶ 23 & Ex. 1.) The Policy covers the period from May 1, 2021 to October 31, 2022.[5] It states that it "shall be governed by and construed in accordance with the law of California, U.S.A. and each party agrees to submit to the exclusive jurisdiction of the Courts of California, U.S.A. in the event of a dispute arising hereunder." (Ex. 1, 55.) Two sections of the Policy are pertinent to this litigation: Section One ("Aircraft Hull Coverage") and Section Three ("Aircraft Hull, Spares and Equipment War and Allied Perils Coverage"). (*Id.* at 32-34, 38-43.) The parties refer to Section One as the "All Risks" coverage section of the Policy and Section Three as the "War Risks" section.[6] The specific provisions of the Policy, including the conditions of and exclusions from coverage, are discussed at more length below.

On February 24, 2022, Russia invaded Ukraine.[7] At the time, the Aircraft were located in Russia. Following the invasion and the imposition of sanctions on Russia by the European Union and the United States, the Russian Government took a number of actions aimed at preventing the return of foreign-leased aircraft like BBAM's. (See generally *Boca Aviation Limited v. AirBridgeCargo Airlines, LLC* (S.D.N.Y. 2023) 669 F.Supp.3d 204, 216, 218, 229.) In particular, beginning on March 9, 2022, the Russian Government issued various decrees banning the export of aircraft out of Russia and creating legal structures to facilitate the Russian airline lessees' use of foreign-owned aircraft. Russia has twice extended its export ban decree which, as of now, remains in effect through 2025. It is undisputed that

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[4] MSN refers to manufacturer's serial number, a unique code assigned to an aircraft.
[5] Defendants also issued a second, "deductible" policy, which is not at issue here.
[6] Of the twenty-two Defendant Insurers, ten provided coverage under Section One only (the "All Risk Insurers"), six under Section Three only (the "War Risk Insurers"), and six provided coverage under both (the "Mixed Risk Insurers").
[7] The Court previously took judicial notice of the date and fact of that invasion, which is uncontested.

these restrictions have had the effect of preventing Plaintiffs from recovering the Aircraft, which remain in service within Russia.

BBAM terminated the leases of all three aircraft on February 27, 2022, and demanded their immediate return to the Dublin Airport in Ireland. Thereafter, it repeatedly requested return of the Aircraft. The Lessees did not return the Aircraft. Instead, BBAM received reports from the Lessees indicating that they were continuing to fly the Aircraft within Russia without BBAM's permission or consent. BBAM has not received any rental payments for the Aircraft since at least February 2022. On March 11, 2022, the Bermuda Civil Authority Agency ("BCAA") suspended the certificates of airworthiness for all three Aircraft, stating that as a consequence, the Aircraft "may not be operated."

On May 24, 2022, Plaintiffs submitted formal notices of claim regarding the Aircraft to the lead insurer under the Policy, Defendant Tokio Marine Kiln Syndicates Limited, through their insurance broker.[8] The claims were in the aggregate amount of $127,810,258.48, representing $46,905,129.24 for each of MSN 41991 and 41992 and $34,000,000 for MSN 40242, equivalent to the Aircrafts' alleged Agreed Value under the Policy. (FAC ¶ 25.)

In December 2023, Plaintiffs entered into agreements to transfer title to MSNs 41991 and 41992 to Aeroflot and related entities for a settlement sum of approximately $37.267 million ($18,486,216.78 for MSN 41991 and $18,780,990.83 for MSN 41992) and have completed the transfer of title. The board for Plaintiff Horizon II Aviation 3 Limited, which owns MSN 40242, the third aircraft, has internally approved Izhavia's offered settlement sum of $23,182,000. Those settlements apparently were entered into with the approval of the U.S. Department of Commerce's Bureau of Industry and Security ("BIS") and the Office of Foreign Assets Control ("OFAC") of the U.S. Department of Treasury. Remarkably, Plaintiffs nevertheless continue to claim that they suffered a "total loss" entitling them to recover the full Agreed Values of the Aircraft, without any credit or offset for the $37.267 million they received in exchange for the two aircraft they sold to Aeroflot. (Omnibus Opposition, 27-28.)

A number of insurers (nine of the twenty-two Defendants) previously moved for summary judgment or, in the alternative, summary adjudication on the ground that Plaintiffs did not suffer

[8] Plaintiffs had previously submitted notices of potential claims under the Policy.

"physical loss or damage" within the meaning of the Policy. By order filed August 2, 2024, this Court denied that motion.

Defendant insurers now have filed six motions for summary judgment or summary adjudication, as well as a number of joinders, contending that Plaintiffs' claims fall outside the coverage of the Policy for a number of reasons. BBAM opposes the motions.[9]

LEGAL STANDARD

"A party may move for summary adjudication as to one or more causes of action within an action, . . . if the party contends that the cause of action has no merit." (Code Civ. Proc. § 437c(f)(1).) "A motion for summary adjudication shall be granted only if it completely disposes of a cause of action, an affirmative defense, a claim for damages, or an issue of duty." (*Id.*) "A motion for summary adjudication may be made . . . as an alternative to a motion for summary judgment and shall proceed in all procedural respects as a motion for summary judgment." (*Id.* § 437c(f)(2).)

"Insurance policies are contracts and, therefore, are governed in the first instance by the rules of construction applicable to contracts. Thus, the mutual intention of the parties at the time the contract is formed governs interpretation. If possible, we infer this intent solely from the written provisions of the insurance policy. If the policy language is clear and explicit, it governs." (*John's Grill, Inc. v. The Hartford Financial Services Group, Inc.* (2024) 16 Cal.5th 1003, 1053 (cleaned up).) "When interpreting a policy provision, we must give its terms their ordinary and popular sense, unless used by the parties in a technical sense or a special meaning is given to them by usage. We must also interpret these terms in context, and give effect to every part of the policy with each clause helping to interpret the other." (*Id.* (cleaned up).)

"A policy provision is ambiguous *only* if it is susceptible to two or more reasonable constructions despite the plain meaning of its terms within the context of the policy as a whole. The mere fact that a word or phrase in a policy may have multiple meanings does not create an ambiguity. Rather, the meaning of the word or phrase must be considered in light of its context." (*Id.* (cleaned up); accord,

[9] The parties have filed voluminous compendia of evidence and numerous evidentiary objections in connection with the various pending motions, together with various requests for judicial notice. The Court finds it unnecessary to rule on the vast majority of those objections, as they concern evidence that is not material to its disposition of the motions. (Code Civ. Proc. § 437c(q).)

Another Planet Entertainment, LLC v. Vigilant Insurance Company (2024) 15 Cal.5th 1106, 1136.) The determination of whether an ambiguity exists in a contract is "strictly a judicial function unless the interpretation turns on the credibility of extrinsic evidence." (*Delgado v. Heritage Life Ins. Co.* (1984) 157 Cal.App.3d 262, 270.) Courts "will not adopt a strained or absurd interpretation to create an ambiguity where none exists." (*Forecast Homes, Inc. v. Steadfast Ins. Co.* (2010) 181 Cal.App.4th 1466, 1475.)[10]

"It is well settled that it is the burden of the insured to show that a loss falls within the basic scope of coverage of a policy. When an occurrence is clearly not included within the coverage afforded by the insuring clause, it need not also be specifically excluded." (*Rios v. Scottsdale Ins. Co.* (2004) 119 Cal.App.4th 1020, 1025 (cleaned up).) "The insured has the initial burden of showing that a claim falls within the scope of coverage, and a court will not indulge in a forced construction of the policy's insuring clause to bring a claim within the policy's coverage. But the burden is on the insurer to show the claim falls within an exclusion to coverage, and exclusions are narrowly construed. An exclusionary clause must be conspicuous, plain and clear." (*Dua v. Stillwater Ins. Co.* (2023) 91 Cal.App.5th 127, 135 (cleaned up).)

DISCUSSION

I. PLAINTIFFS' CLAIMS UNDER SECTION ONE OF THE POLICY ARE BARRED BY THE WAR PERILS EXCLUSION.

Certain Defendants contend that Plaintiffs' claims are barred by the War Perils Exclusion of the Policy. (Foley Motion, 17-27; Chubb Motion, 21-22.) Plaintiffs do not squarely address the argument until page 30 of their omnibus opposition, which argues briefly that the application of this exclusion is "an issue of fact properly decided by the jury, as it is fundamentally a question of proximate cause." (Omnibus Opposition, 30-32.) The Court disagrees. Where, as here, a policy exclusion is unambiguous and its application turns on undisputed facts, including a party's judicial admissions, its application may be decided as a matter of law. (See, e.g., *John's Grill,* 16 Cal.5th at 1048, 1053-1054 [trial court properly

[10] No party contends that the Policy is ambiguous.

sustained demurrer without leave to amend based on "specified cause of loss" limitation, which was "clear and unambiguous"; "courts are required to interpret policy language in a reasonable manner so that it makes sense as applied" (cleaned up).)

A. The War Perils Exclusion Is Clear And Unambiguous.

The War Perils Exclusion ("War, Hi-Jacking and Other Perils Exclusion Clause (Aviation)") provides that the Policy "does not cover claims caused by," among other things,

> (a) War, invasion, acts of foreign enemies, hostilities (whether war be declared or not), civil war, rebellion, revolution, insurrection, martial law, military or usurped power or attempts at usurpation of power.
>
> . . .
>
> (d) Any act of one or more persons, whether or not agents of a sovereign Power, for political or terrorist purposes and whether the loss or damage resulting therefrom is accidental or intentional.
>
> . . .
>
> (f) Confiscation, nationalisation, seizure, restraint, detention, appropriation, requisition for title or use by or under the order of a Government (whether civil military or de facto) or public or local authority.

(FAC, Ex. 1 at 50-51.)

No party argues that the language of the War Perils Exclusion is ambiguous, nor has any party offered any extrinsic evidence regarding its meaning. It follows, therefore, that whether it applies here presents a question of law, to be determined on the factual record before the Court. That record is undisputed, including Plaintiffs' binding judicial admissions in their own First Amended Complaint.

B. Plaintiffs Are Bound By Their Own Judicial Admissions And The Undisputed Facts, And Fail To Show Any Triable Issue Of Material Fact.

Where, as here, a defendant has satisfied its burden of showing an excluded peril, the burden shifts to the insured to show the existence of a triable issue of fact on that issue. (*Alex R. Thomas & Co. v. Mutual Service Casualty Ins. Co.* (2002) 98 Cal.App.4th 66, 72.) An insurer is not required to present evidence to disprove all potential causes of the loss besides the excluded peril. (*Id.* at 73-74.) Where the insured fails to produce any evidence of any potential cause of the loss other than the excluded peril, summary judgment for the insurer is warranted. (*Id.* at 76.) That is precisely the case here: based on Plaintiffs' own allegations in the First Amended Complaint, the undisputed facts in the record before the Court, and Plaintiffs' own

discovery responses, Plaintiffs' claim falls squarely within the perils set forth in subsection (a) of the War Perils Exclusion: i.e., war, invasion, hostilities, and military power. It also falls within the perils set forth in subsections (d) and (f) of the War Perils Exclusion, i.e., acts for political purposes and "confiscation, . . . , seizure, restraint, detention, appropriation, requisition for title or use by or under the order of a Government." Under any of these subdivisions, coverage of Plaintiffs' alleged loss is excluded under Section One.

California has adopted the efficient proximate cause doctrine, an interpretive rule for first party insurance. Under that doctrine, "When a loss is caused by a combination of a covered and specifically excluded risks, the loss is covered if the covered risk was the efficient proximate cause of the loss, but the loss is not covered if the covered risk was only a remote cause of the loss, but the loss is not covered if the covered risk was only a remote cause of the loss, or the excluded risk was the efficient proximate, or predominate cause." (*Julian v. Hartford Underwriters Ins. Co.* (2005) 35 Cal.4th 747, 750 (cleaned up); Ins. Code § 532 ["If a peril is specially excepted in a contract of insurance and there is a loss which would not have occurred but for such peril, such loss is thereby excepted even though the immediate cause of the loss was a peril which was not excepted."].)[11] When "the evidence shows the loss was in fact occasioned by only a single cause, albeit one susceptible to various characterizations, the efficient proximate cause analysis has no application." (*Roberts v. Assurance Co. of America* (2008) 163 Cal.App.4th 1398, 1409 (cleaned up).)

Remarkably, Plaintiffs do not even attempt to specify what they contend is the efficient proximate cause of their alleged loss, or offer any evidence of their own regarding that purported cause.[12] Instead, they rely on *Defendant Insurers'* purported disagreement as to that issue: "the Insurers themselves cannot agree [on whether Plaintiffs' loss was caused by one of the enumerated war perils] and have identified evidence on several sides of this question. Those are disputed facts sufficient to defeat their motions."

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[11] "An insurance company can limit the coverage of a policy issued by it as long as such limitation conforms to the law and is not contrary to public policy." (*Julian*, 35 Cal.4th at 759 (cleaned up).) Plaintiffs do not contend that the War Perils Exclusion is unlawful or violates public policy.

[12] Although Plaintiffs' allegations refer vaguely to "other" actions and occurrences that may have caused their alleged loss, they do not specify, either in their First Amended Complaint or in their Omnibus Opposition, what those other potential causes may have been, much less present evidence of such causation.

(Omnibus Opposition, 30.) Plaintiffs' failure to offer any admissible evidence or argument on the subject of efficient proximate cause fails to meet their burden on summary judgment. (See, e.g., *Roberts*, 163 Cal.App.4th at 1406, 1408 ["To satisfy its burden [to prove that the claim falls within an exclusion], an insurer need not disprove every possible cause of the loss and once the insurer establishes the claim is excluded, the burden shifts to the insured to show a triable issue of material fact exists"]; see also *John's Grill*, 16 Cal.5th at 1057 [an insured cannot reasonably expect coverage where the cause of the loss is expressly excluded under the policy]; *De Bruyn v. Superior Court* (2008) 158 Cal.App.4th 1213, 1224 [trial court properly sustained insurer's demurrer without leave to amend where policy made clear that mold damage caused by a sudden and accidental release of water was an excluded peril].)

But even if it were proper for Plaintiffs to rely solely upon evidence or argument by Co-Defendants to oppose other Defendants' motions (it is not),[13] Plaintiffs cannot be heard to contradict the binding admissions in their own First Amended Complaint. "A defendant moving for summary judgment may rely on the allegations contained in the plaintiff's complaint, which constitute judicial admissions. As such they are conclusive concessions of the truth of a matter and have the effect of removing it from the issues. *The admissions may not be contradicted in opposing summary judgment.*" (*Mark Tanner Construction, Inc. v. HUB Internat. Ins.* Servs. (2014) 224 Cal.App.4th 574, 586-587 (cleaned up; emphasis added).) Here, Plaintiffs' binding allegations are dispositive of the efficient proximate cause analysis.

Plaintiffs allege that "following Russia's invasion of Ukraine and the imposition of sanctions by the European Union in relation to aircraft supplied to Russian persons or for use in Russia, Russia undertook a range of measures intended to control aircraft including the Insured Aircraft operated by Russian airlines, and to prevent and restrict their recovery by foreign owners. *These actions*, and others, *resulted in* Lessees not returning the Insured Aircraft after the leasing was terminated, and *Plaintiffs' inability to recover and loss of the Insured Aircraft.*" (FAC ¶ 29 (emphasis added).) The First Amended Complaint contains a

[13] As discussed in Section I(C), *infra*, the War Risk Defendants, Syndicate 1183, and Fidelis lack standing to oppose other Defendants' motions for summary judgment/adjudication, and as a result their opposition papers will be stricken. Regardless, the incomplete snippets of Defendants' expert reports that Plaintiffs include in their compendium of evidence are insufficient to give rise to a disputed issue of fact as to the cause of Plaintiffs' alleged loss. For that reason, Plaintiffs' contention that *Mission National Ins. Co. v. Coachella Valley Water Dist.* (1989) 210 Cal.App.3d 3d 484 involved "nearly identical circumstances to this case" (Omnibus Opposition, 31 fn. 18) is mistaken. There, unlike the instant case, parties with adverse interests offered conflicting expert testimony regarding the cause of the loss.

series of detailed allegations as to those events, including allegations regarding the various Russian government decrees banning foreign-owned and leased aircraft from export and the suspension of their certificates of airworthiness. (*Id.* ¶¶ 30-46.) In particular, Plaintiffs allege that "Aeroflot has informed Plaintiffs that Presidential Decree No. 100 prohibits it from returning the Insured Aircraft." (*Id.* ¶ 44.) "The effect of these and other actions and occurrences," Plaintiffs allege, is that "the Insured Aircraft were lost and damaged, and Lessees did not return the Insured Aircraft to Plaintiffs when they demanded their return upon the termination of the leasing." (*Id.* ¶ 47.)[14]

The detailed undisputed facts support the same conclusion. (E.g., SSF 288-338.) A few examples will suffice. In Plaintiffs' March 22, 2022 supplemental notice to its insurance broker of a potential claim under the Policy, Plaintiffs specifically invoked as a basis for that claim the very war perils provisions quoted above. (SSF 274-275.) Likewise, in a letter sent to Defendant Tokio Marine Kiln Syndicates Limited regarding their May 30, 2022 claim, Plaintiffs asserted that the Russian Government's actions preventing the return of the aircraft "arose out of Russian's [sic] invasion of Ukraine and related consequences, including, without limitation, sanctions." (SSF 280.) Indeed, in numerous communications, in their verified discovery responses, and in their own PMQ testimony, Plaintiffs have acknowledged what is glaringly obvious: that their alleged loss stemmed from the Russian Government's decrees and other actions in the wake of the invasion of Ukraine prohibiting the return of foreign-leased aircraft. (E.g., SSF 283-286, 340-353, 359-364, 368; Def. Compend., Ex. J, 27-30.) As Plaintiffs' PMQ witness testified, "The overall context here is a context of war between Russia and Ukraine. Following the outbreak of that war and the imposition of sanctions, the Russian government instructed Russian airlines not to return the aircraft that they had leased from us and other Western lessors." (SSF 366.)[15]

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[14] Plaintiffs previously took the identical position. In response to Defendants' first dispositive motion, Plaintiffs asserted that "[i]mmediately following Russia's invasion of Ukraine on February 24, 2022, BBAM was dispossessed of its aircraft" because the "Russian Government carried out a series of actions directed at preventing the return of foreign-owned aircraft like BBAM's," and that "government seizure or detention of an aircraft constitutes 'physical loss of' the aircraft, *i.e.* exactly what happened here." (Pl. Opposition to Certain Defs. MSJ (May 31, 2024), 6, 9, 13.) Although the Court need not reach the issue, Plaintiffs' half-hearted attempt to back away from their prior position comes perilously close to giving rise to judicial estoppel. (See, e.g., *Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 181 ["Judicial estoppel prevents a party from asserting a position in a legal proceeding that is contrary to a position previously taken in the same or some earlier proceeding. The doctrine serves a clear purpose: to protect the integrity of the judicial process." (cleaned up)].)

[15] Rather than forthrightly admit these facts, Plaintiffs improperly offer an evasive response,

In short, as the Foley Defendants succinctly and accurately observe, "There is only one distinct event that caused any alleged loss here: Russia's invasion of Ukraine." (Foley Motion, 20.) All of the actions that followed—the EU sanctions imposed in response to the invasion, and the resulting directives, orders, and laws issued by Russian authorities that prohibited the return of the aircraft and directed their re-registration—flowed directly from that central event, which constituted "war" and an "invasion" within the plain meaning of subsection (a) of the War Perils Exclusion.[16] (See *Universal Cable Productions, LLC v. Atlantic Specialty Ins. Co.* (9th Cir. 2019) 929 F.3d 1143, 1154 [in the insurance context, "war" requires "the existence of hostilities between de jure or de facto governments"]; *TRT/FTC Communications, Inc. v. Insurance Co. of State of Pennsylvania* (D. Del. 1993) 847 F.Supp. 28, 30, aff'd (3d Cir. 1993) 9 F.3d 1541 [losses suffered by merchant during war hostilities in Panama City were properly excluded under war-exclusion clauses in all risks insurance policy; "regardless of whether the men [who stole equipment] were part of the Panamanian forces or a band of looters, there is ample evidence to support the conclusion that their actions against [plaintiff] were enabled by the military hostilities occurring between Panama and United States"].) Further, the Russian government's decrees plainly constitute acts for political purposes. They also amount to a seizure or detention of the aircraft. (See *Boca Aviation Limited*, 669 F.Supp.3d at 229-230 [concluding that plaintiff lessor had shown that aircraft were seized by the Russian Federation, which prevented them from being returned]; Aug. 2, 2024 Order, 12-13.) At a minimum, the All Risks Defendants have established that Russia's invasion of Ukraine was "the *predominant* cause of the loss, and thus the 'efficient proximate cause.'" (*Alex R. Thomas & Co.*, 98 Cal.App.4th at 76; *TRT/FTC Communications*, 847 F.Supp. at 30 ["absent the declared war and the invasion of Panama by forces of the United States, TRT's loss . . . would not have occurred"].) Accordingly, their motion for summary adjudication must be granted.[17]

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acknowledging only that they "have asserted that one or more enumerated war peril(s) could be a potential basis [sic] their claim." (SSF 283-286, 340-353, 359-364, 368.) That Plaintiffs have asserted alternative theories is not a good faith basis for denying undisputed (and indisputable) facts.

[16] More than two and one-half years, many tens of thousands of deaths and casualties, and the displacement of millions of civilians since Russia invaded Ukraine, no one can take seriously—if they ever could have—the Putin government's doublespeak insistence that the conflict constitutes a "specialized military operation" rather than a full-scale invasion and war.

[17] The same ruling applies equally to the Mixed Risk Insurers, to the extent that they seek summary adjudication as to Plaintiffs' claim for coverage under Section One of the Policy.

C. Co-Defendants Do Not Have Standing To Oppose Other Defendants' Motions.

War Risk Defendants, Syndicate 1183 and Fidelis ("Co-Defendants"), in addition to filing their own motions for summary judgment and joinders, have also opposed in part the motions for summary judgment filed by the Foley Defendants, the DLA Piper Defendants, and Chubb. The Foley Defendants have moved to strike those oppositions on the ground that Co-Defendants lack standing to oppose their motion for summary judgment. The Court agrees. That conclusion is compelled by the plain language of Code of Civil Procedure section 437c and by fundamental principles of standing under California law, and is consistent with the weight of federal authority. Accordingly, the Court will strike Co-Defendants' opposition papers, and will not consider them for any purpose.[18]

Section 437c of the Code of Civil Procedure governs summary judgment motions. It does not authorize a co-defendant to oppose a motion for summary judgment filed by a defendant unless it has filed a cross-complaint against the moving defendant. To the contrary, the plain language of the statute provides that only a "plaintiff or cross-complainant" may oppose a motion for summary judgment or summary adjudication filed by a defendant:

> A defendant or cross-defendant has met his or her burden of showing that a cause of action has no merit if the party has shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established, or that there is a complete defense to the cause of action. Once the defendant or cross-defendant has met that burden, the burden shifts to the *plaintiff or cross-complainant* to show that a triable issue of one or more material facts exists as to the cause of action or a defense thereto. The *plaintiff or cross-complainant* shall not rely upon the allegations or denials of its pleadings to show that a triable issue of material fact exists but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to the cause of action or a defense thereto.

(Code Civ. Proc. § 437c(p)(2) (emphases added).) The Legislature could not have been clearer: only an adverse party, such as a plaintiff or cross-complainant, may oppose a defendant's motion for summary judgment. Here, Co-Defendants have not filed cross-complaints against any of the moving Defendants, do not have any immediate interest in how their motions are decided,[19] and therefore lack standing to oppose

[18] In any event, as the Foley Defendants demonstrate convincingly on reply, Co-Defendants' various arguments are meritless.

[19] Fidelis acknowledges that the War Risk Defendants' motions are directed to Section 1 of the Policy, and "do not request a further finding that enforcement of the War Perils Exclusion in Section 1 necessarily results in an affirmative finding of coverage under Section 3 of the C&P Policy." (Fidelis Resp., 2.)

those motions.

While there apparently is no reported California case that squarely addresses the issue,[20] other California authority compels the conclusion that a co-defendant lacks standing to oppose another defendant's motion for summary judgment on a plaintiff's claims against it where the co-defendant has not filed a cross-complaint against the moving defendant. At a later procedural stage, it is elementary that "[a]n appeal by a defendant against whom there is no judgment entered and who is not a party aggrieved by the judgment must be dismissed." (*Life v. County of Los Angeles* (1990) 218 Cal.App.3d 1287, 1292; accord, *M.E. Gray v. Gray* (1985) 163 Cal.App.3d 1025, 1038 ["Generally, a defendant who is individually liable is not aggrieved by the exoneration of a codefendant, even where a potential right of contribution exists."]; *Diamond Springs Lime Co. v. American River Constructors* (1971) 16 Cal.App.3d 581, 608 ["established case law has it that a defendant having independent liability has no standing to appeal from a judgment exonerating his codefendant, even where a potential right of contribution exists."].) A party is considered "aggrieved" if its rights or interests are "injuriously affected by the judgment. An appellant's interest must be immediate, pecuniary, and substantial and not nominal or a remote consequence of the judgment." (*Id.* (cleaned up).) Even if the party faces "potential pecuniary liability" as a result of summary judgment in favor of its co-defendant, that would merely be "a nominal or remote consequence" that would be insufficient to establish standing. (*Id.* at 1293.) It logically follows that if a defendant lacks standing to appeal from a summary judgment in favor of its co-defendant, it likewise must lack standing to oppose the motion in the first instance.

The weight of federal authority has reached the same conclusion. "Although caselaw on the issue of whether a co-defendant may oppose a summary judgment in lieu of a plaintiff is limited, the courts that have considered the issue have found co-defendants do not have standing to oppose summary judgment without asserting cross-claims." (*Crincoli v. Geico Insurance Company* (D.N.J. July 10, 2024) 2024 WL 3355289, *5; see Foley Mot. to Strike, 8 & fn. 2 [collecting authority]; compare *Blackwood v. Cumberland County, Tennessee* (M.D. Tenn. Jan. 18, 2019) 2019 WL 266673, *2 [noting some contrary authority and

[20] The Foley Defendants improperly rely on unpublished Court of Appeal decisions (Foley Mot. to Strike, 7-9, 13; Reply, 3-4.). (See Cal. Rules of Court, rule 8.1115(a) [an unpublished Court of Appeal opinion "must not be cited or relied on by a court or a party in any other action"].)

declining to decide issue].)

II. PLAINTIFFS' ALLEGED LOSS IS NOT ELIGIBLE FOR EITHER CONTINGENT OR POSSESSED COVERAGE UNDER THE POLICY.

Although Section One of the Policy excludes losses caused by war perils, Section Three of the Policy explicitly covers such losses; in insurance parlance, it "writes back" such coverage. (See FAC, Ex. 1, 39 [binding insurers to pay any total loss excluded under Section One as caused by war perils].) However, a number of Insurers seek summary judgment on another, broader ground: that Plaintiffs have not shown that either the Contingent Coverage or Possessed Coverage provisions of the Policy are triggered. (DLA Opening Brief, 16-22.)

The Policy is a "Contingent and Possessed" insurance contract. (FAC, Ex. 1.) Sections One and Three contain substantially identical insuring clauses binding Defendants to cover "contingent" and "possessed" losses, and distinguishing between the two:

> 1. **Contingent Aircraft Hull Coverage**
>
> To pay for physical loss of or damage, sustained during the Period of Insurance to Aircraft as per the Schedule of Aircraft, the subject of a Lease/Finance Agreement, that are not in the care, custody or control of the Insured and in respect of which physical damage coverage is required to be provided under the Principal Policy, in the event that the Insured is not indemnified in whole or in part under the Principal Policy.
>
> 2. **Possessed Aircraft Hull Coverage**
>
> To pay for physical loss of or damage, sustained during the Period of Insurance, to Aircraft as per the Schedule of Aircraft
>
> (1) awaiting the commencement of a Lease/Finance Agreement or closure of a sale, or
>
> (2) having been returned on the expiry or termination of a Lease/Finance Agreement, or
>
> (3) (i) having been repossessed, or
>
> (ii) which are in the course of repossession from a Lease/Finance Agreement, or
>
> (4) in the care, custody or control of the Insured.

(Ex. 1, 32; *id.* at 38 [substantially same provisions under Section Three of Policy].)[21]

[21] The Principal Policy referred to in the contingent coverage provision is defined elsewhere as "the policy or policies required to be effected by the Operator pursuant to the provisions of the Lease/Finance

Thus, the two types of coverage differ in two key respects. First, contingent coverage applies where the Aircraft "are not in the care, custody or control of the Insured," while possessed coverage applies where the Aircraft *are* in the Insured's care, custody or control, or under circumstances the Policy treats as equivalent to such care, custody or control. Second, contingent coverage applies only "in the event that the Insured is not indemnified in whole or in part under the Principal Policy," while possessed coverage contains no such limitation. In other words, contingent coverage applies when the Aircraft are out on lease and in the care, custody or control of the lessees/operators, and depends upon (is "contingent" on) the insured's inability to recover in whole or in part under the Principal Policy. As Plaintiffs expressly conceded at the hearing, the two categories of coverage are mutually exclusive: that is, if coverage of their claim is available under one, then a claim is not covered under the second. Plaintiffs nevertheless insist that coverage is proper under both.

A. Plaintiffs Are Not Entitled To Contingent Coverage As To The Two Transferred Aircraft Because They Have Been Indemnified Under The Principal Policies For Those Aircraft.

Here, it is undisputed that the first condition or criterion of the Contingent Coverage provision is satisfied: the Aircraft are "not in the care, custody or control" of Plaintiffs, nor have they been during the entire time since Plaintiffs allege their insurance claim arose. (SSF 5.) However, undisputed evidence shows that the second condition is not met as to the two Aircraft Plaintiffs sold to Aeroflot because Plaintiffs have been indemnified in whole or in part for those Aircraft under the Principal Policies.[22] For that reason, it follows that Plaintiffs' claim for Contingent Coverage fails as to those Aircraft.

It is undisputed that in December 2023, BBAM executed an agreement to transfer title of two of the Aircraft to Aeroflot, and has completed that transfer of title. (SSF 19, 23.)[23] The settlement agreements

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Agreement (inclusive of policies such as hull deductible policies as may be necessary to meet the lease/finance requirements)." (FAC, Ex. 1, 31.) The Operator is defined as "the agreement party named in the Lease/Finance Agreement and/or any lessee and/or any sub-lessee and/or the operator of the Aircraft as approved by the agreement party." (*Id.*)

[22] Plaintiffs insist that the Aeroflot Agreement "was not to 'sell' the Aircraft but rather to receive (very little) compensation for BBAM's damages in exchange for title." (Omnibus Opposition, 28.) That is a distinction without a difference: a transfer of title to property in exchange for payment plainly constitutes a sale. (See Comm. Code §§ 2106(1) ["A 'sale' consists in the passing of title from the seller to the buyer for a price."], 2401.) Regardless, the semantic quibble over how to characterize the transaction adds nothing.

[23] Plaintiffs' insistence that the transfer of title and related negotiations or agreements are "immaterial" (SSF 16-25) verges on the frivolous. The materiality of the undisputed fact that Plaintiffs sold two of the

governing the transfer of those Aircraft contain provisions by which Plaintiffs release all their claims against Lessees and the Principal Policy insurers and reinsurers related to the Aircraft. (SSF 22; see also SSF 26 [quoting provision of settlement agreements entitling the Principal Policy insurers to their benefit].) Further, as noted above, it is undisputed that Plaintiffs received some $37.267 million for the two transferred Aircraft. As to those two Aircraft, therefore, Plaintiffs have been indemnified in whole or in part, and the second condition is not met.

Plaintiffs make two arguments in response, neither of which has merit. First, Plaintiffs argue that their agreement with Aeroflot did not constitute indemnification under the Principal Policy because it had no choice but to accept Aeroflot's take-it-or-leave-it proposal, and because the transaction was channeled through a newly-created Russian Government insurance entity, "Insurance Company 'NSK.'" (Omnibus Opposition, 19-21.) As a result, Plaintiffs argue, "the Aeroflot Agreement did not indemnify BBAM *under the Principal Policy*." (*Id.* at 21.) The Court is unpersuaded. Plaintiffs admit that they sought authorization from the U.S. Department of Commerce Bureau of Industry & Security to negotiate with the lessees and with "various Russian insurers regarding insurance settlement" for the Aircraft. (SSF 16.) They also admit that they represented to that agency that authorization to settle with the lessees and their insurers was necessary "to mitigate losses as may be appropriate *under the insurance issued by BBAM and the Lessors' insurers*" because, "[a]bsent settlement payment by *or on behalf of the Russian lessees and/or their Russian insurers*, the enormous financial cost arising from the loss of these aircraft will be borne either by the non-Russian lessors or non-Russian insurers." (SSF 17 (emphases added).) The Aeroflot Agreement expressly referenced the Principal Policies, and was made "in full and final settlement" of Plaintiffs' claims relating to the transferred Aircraft, including any claims it might have against "any insurer Party . . . and the Policies and/or the Reinsurance Policies" issued by the Principal Insurers. (DLA Compend., Ex. K, 8.) Finally, as Plaintiffs acknowledge, "NSK was 'transferred' to the Principal Policies by order of the Aeroflot Agreement." (Omnibus Opposition, 21; see DLA Compend., Ex. K ["On or prior to the date of this Agreement, the respective rights and obligations of the Previous Insurers under the Policies [AlphaStrakhovanie plc and Insurance Company of Gaz Industry Sogaz] have been transferred as part of

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three Aircraft for which it now seeks coverage in the full amount of their insured value is self-evident.

insurance portfolio transfer by the Previous Insurers to the Insurer [NSK], and each Lessor confirms its consent to such transfer in respect of its Aircraft Asset with effect from the Payment Date thereof."].) In other words, NSK was the successor-in-interest to the Principal Insurers, as to which Plaintiffs expressly released all claims under the Aeroflot Agreement. Plaintiffs' contention that the payments they received did not indemnify them under the Principal Policy is meritless.

Second, Plaintiffs contend that while the Contingent Coverage provisions of the Policy apply only "in the event that the Insured is not indemnified in whole *or in part* under the Principal Policy," another Policy term provides that contingent coverage excludes "that part of any loss or damage for which indemnity is obtained as a claim under the Principal Policy." (Omnibus Opposition, 21; see FAC, Ex. 1, 50.) Plaintiffs contend that the two provisions are inconsistent, potentially giving rise to an ambiguity that must be construed in their favor. (*Id.*)[24] At a minimum, Plaintiffs argue, BBAM would be entitled to "the difference between the agreed value promised in the Policy and the amount it obtained from the Aeroflot Agreement." (*Id.* at 22.)[25] Plaintiffs are mistaken. The referenced provision is an *exclusion* that precludes Plaintiffs from obtaining double recovery for categories of loss for which the insured has already obtained indemnity under the Principal Policy. It does not give rise to coverage in the first instance, nor can it satisfy Plaintiffs' burden in the first instance to show that their alleged loss falls within the insuring clause. Under the unambiguous language of that clause, Plaintiffs *were* indemnified "in whole or in part" under the Principal Policy for the two transferred Aircraft. There is therefore no Contingent Coverage for any additional amounts that Plaintiffs claim for the loss of those Aircraft, and Defendants' motions for summary adjudication must be granted as to that portion of Plaintiffs' alleged loss.

B. Plaintiffs' Claim For Contingent Coverage Of The Alleged Loss Of The Third Aircraft Is Not Ripe For Adjudication.

The third Aircraft, MSN 40242, is in a different position. On May 5, 2022, Izhavia, the lessee of

[24] Plaintiffs stop short of contending that the Policy is, in fact, ambiguous. (See Omnibus Opposition, 21 ["To the extent that this provision is ambiguous, the Court must resolve that ambiguity in BBAM's favor"].)

[25] Plaintiffs complain that their settlement agreement with Aeroflot "does not cover their losses for unpaid rent, let alone their total loss of Aircraft," and that the agreement "was the only option to recoup a portion of [their] losses given international sanctions." (SSF 22.) Regardless of Plaintiffs' economic or political motivations for entering into the agreement, however, there is no disputing that it represented at least partial indemnification for the two transferred Aircraft.

the third Aircraft, contacted BBAM "to discuss the airplane purchase and change of the ownership." (Chubb Compend., Ex. 25.) That communication occurred even before BBAM's formal notices of claim to the Principal Insurers, which were tendered on May 24, 2022. (Def. Compend., Ex. J, 23, 26; Exs. V, W.) As BBAM admitted in verified discovery responses, "[d]iscussions with Izhavia for the potential transfer of title of [the third Aircraft] began in July 2022," less than 60 days later. (Def. Compend., Ex. J, 18.) The Board of the owner of the third Aircraft ultimately agreed to a settlement sum of $23,182,000 for transfer of title. (SSF 21.) To date, however, Plaintiffs have not entered into any final agreement to transfer title to that Aircraft. (SSF 21-22 ["Plaintiffs have not reached a settlement to compensate, in whole or in part, for their loss of MSN 40242. BBAM has not received a substantive response since BBAM sent a draft agreement on January 16, 2024." (cleaned up)]; Omnibus Opposition, 22 ["despite BBAM working for over a year with Izhavia to reach some kind of deal, no progress has been made."]; Cannon Decl. ¶ 10 & Ex. 12.)[26] As a consequence, Plaintiffs have not (yet) been indemnified, in whole or in part, for their claimed loss as to that Aircraft.

Defendants nevertheless contend that Plaintiffs cannot obtain contingent coverage for the third Aircraft because they have entered into settlement negotiations for the transfer of that Aircraft. (E.g., DLA Motion, 17-19.) Defendants rely on the second paragraph of the Contingent Coverage clause, which provides,

> In the event that the Insurers of the Principal Policy deny the Insured coverage or fail to investigate, adjust or enter into settlement negotiations in respect of any claim within 180 days after the Insured has submitted a written request thereto and have used their best efforts to obtain same, the Insurers will, subject to the terms, conditions, limitations and exclusions of this Policy, investigate any such claim.

(FAC, Ex. A, 32, 38.) By its plain language, however, that provision does not limit Defendants' Contingent Coverage liability; rather, it merely governs the timing within which Insurers must commence their investigation of a claim. If the Principal Insurers have already acted on a claim by denying coverage, or have failed to investigate or enter into settlement negotiations with the insured within 180 days, then

[26] The parties' papers provide little or no insight into why Izhavia, having apparently extended a settlement offer for the third Aircraft, has been unwilling or unable to finalize its settlement agreement with Plaintiffs. The most recent communication from Izhavia to BBAM contained in Plaintiffs' papers, dated August 20, 2024, states only that Izhavia has "completed all the necessary paperwork and submitted it to the relevant services and authorities." (Pl. Compend., 63.)

Defendant Insurers must "investigate any such claim"; otherwise, they need not do so, but may instead defer investigation (and, it logically follows, any coverage determination and payment) until any settlement negotiations with the Principal Insurers are concluded.

While to date Plaintiffs have not been indemnified, in whole or in part, for the third Aircraft, Defendants are entitled to summary adjudication for a closely related reason:[27] the 180-day provision makes clear that Defendants have no current obligation to investigate (much less to pay) Plaintiffs' claim as to the third Aircraft. In this sense, Defendants are in a position closely analogous to that of excess insurers where the primary policy has not yet been exhausted.[28]

Fox Paine & Co., LLC v. v. Twin City Ins. Co. (2024) 104 Cal.App.5th 1034 is instructive. There, plaintiff insureds filed suit against several excess liability insurers for breach of contract, breach of the covenant of good faith and fair dealing, declaratory relief, and aiding and abetting breaches of fiduciary duty. The excess insurers demurred on the ground that plaintiffs had not alleged, and could not allege, exhaustion of the underlying primary policies, and the trial court sustained the second- and third-level excess insurers' demurrers without leave to amend on that ground. The Court of Appeal affirmed, holding that plaintiffs could not state a cause of action for breach of contract because, under the applicable policy language and governing California law, the excess insurers' obligation to pay covered claims did not attach until the underlying policies were exhausted. (*Id.* at 1046-1048.) Likewise, plaintiffs did not state a cause of action for declaratory relief that their alleged losses constituted covered loss within the meaning of the excess insurance policies because, absent exhaustion, there was no actual controversy warranting such relief. (*Id.* at 1048-1052.) Further, declaratory relief was not "proper" because the outcome of the pending litigation against Twin City, the first-level excess insurer, was unknown: "That litigation includes a claim for breach of contract, as to which Twin City has asserted several defenses. And if one or more of the

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[27] A court has inherent power to grant summary judgment on grounds not explicitly raised by the moving party "when the material fact is undisputed and entitles the moving party to judgment as a matter of law." (*Juge v. County of Sacramento* (1993) 12 Cal.App.4th 59, 69; see also *Marlton Recovery Partners, LLC v. County of Los Angeles* (2015) 242 Cal.App.4th 510, 517-518.) The trial court is not required "to close its eyes to an unmeritorious claim" simply because the operative ground was overlooked by the moving party. (*Juge*, 12 Cal.App.4th at 605.)

[28] While the Policy may not technically constitute an excess policy, it nevertheless functions in much the same way; as one Defendant explains, it "acts as a backstop to the operators' Principal Policy." (Syndicate 1183 Motion, 12.)

defenses succeed, it will mean that Twin City would not have to pay its full $10 million policy limits. So, keeping the excess insurers in the case would raise the prospect of what we described as a 'purely advisory opinion based on hypothetical facts or speculative future events.'" (*Id.* at 1053 (cleaned up).) "Moreover, there is the expense involved to the excess insurers—not to mention the superior court. If plaintiffs had their way, the excess insurers will have to engage in a trial alongside Twin City, this against parties who apparently have unlimited resources and the willingness to spend them, witness the $25 million plaintiffs claim was spent in the Fox Paine litigation. And if it turns out that Twin City defeats or diminishes plaintiffs' claims, the excess insurers will have wasted significant time and resources. And, of course, so would the superior court in having to manage that case." (*Id.*) Finally, the court concluded that "there are sound policy reasons why the excess insurers should stay on the sidelines without incurring these unnecessary costs. A strict exhaustion requirement brings stability and predictability to the excess insurance system, both for insurers and insureds." (*Id.*)

Closely similar considerations apply here. While Plaintiffs' settlement negotiations with Izhavia commenced within the 180-day period required by the Policy,[29] they remain unresolved. If those negotiations ultimately result in an agreement by the Principal Insurer to indemnify BBAM, Insurers will have no obligation to investigate Plaintiffs' claim as to the alleged loss of the third Aircraft, and will not have any potential contingent liability. Unless Izhavia ultimately denies coverage, Insurers have no obligation under the Policy to investigate Plaintiffs' claim as to the third Aircraft, much less to grant or pay it. It follows that Plaintiffs currently have no ripe claim that Defendants have breached the Policy.[30] Accordingly, Defendants' motion for summary adjudication as to the claim for breach of contract as to the

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[29] At the hearing, Plaintiffs insisted that Izhavia's Principal Insurer did not enter into settlement negotiations within 180 days of their claim against the Principal Policy. Wrong: as noted in text, Izhavia expressed interest in purchasing the Aircraft before BBAM even filed its formal notices of claim against the Principal Policy, and BBAM expressly admitted that discussions with Izhavia for the sale of that Aircraft began in July 2022, within 60 days of those claims. As for Plaintiffs' hypertechnical argument that the negotiations were with Izhavia itself, rather than with its Insurer, it strains credulity that Izhavia would have initiated those discussions without its insurers' consent, particularly after BBAM filed notices of claim. To the contrary, the parties' settlement communications reflect their understanding that NSK would be a party to the agreement as assignee of Izhavia's insurers, and the draft agreement that BBAM sent to Izhavia, like the agreements with Aeroflot, lists NSK as assignee of its previous insurer. (Pl. Compend., Ex. 12; Def. Compend., Exs. M, Z.)

[30] Although Plaintiffs argue in their motion for summary adjudication that this is a ripe and justiciable controversy under California law, nowhere in that discussion do they address the effect of the 180-day provision. (Pl. Mot. for Summary Adjudication, 12-14.)

alleged loss of that Aircraft must be granted.

C. Plaintiffs Are Not Entitled To Possessed Coverage Because The Aircraft Are Not In Their Care, Custody Or Control Or In The Course Of Repossession.

The Possessed Coverage issue is readily resolved. As noted above, Plaintiffs concede that the contingent and possessed coverage provisions of the Policy are mutually exclusive: that is, if one applies, the second does not. As Defendants pointed out at the hearing, by their conduct in making claims against the Principal Policies and entering into settlement discussions aimed at reaching agreements to transfer the Aircraft to the Russian lessees, Plaintiffs expressly invoked the contingent coverage section of the Policy, a position they continue to urge here. Without regard for logic or consistency, Plaintiffs nevertheless doggedly insist that the possessed coverage provisions also apply. Plaintiffs' attempt to have it both ways is unconvincing. (See, e.g., *Titan Corp. v. Aetna Casualty & Surety Co.* (1994) 22 Cal.App.4th 457, 473 [rejecting insured's efforts to avoid policy exclusions which rested on an internally inconsistent "Catch-22" argument; "[The insured] cannot have it both ways."].)[31] In any event, Plaintiffs' arguments lack merit.

As noted above, it is undisputed that the Aircraft are not in Plaintiffs' "care, custody or control." The only possible basis for Possessed Coverage would be if they were "in the course of repossession." Based on the undisputed facts, as well as the plain language of the Policy, they are not.

The plain language of the phrase "in the course of repossession," together with a reasonable reading of the Policy language as a whole, makes clear the intended meaning of that phrase. (See *John's Grill, Inc.*, 16 Cal.5th at 1053 [in interpreting a policy provision, court must give its terms their ordinary and popular sense and must interpret terms in context].) "The phrase 'in the course of' is often just a wordy way of saying '*during* or *while*.'" (*People v. Sinohui* (2002) 28 Cal.4th 205, 215, quoting Garner, Dict. Of Modern American Usage (1998) p. 382.) It also has "also been defined as 'in the process of' or 'during the progress of.'" (*Id.* at 215-216, citing 3 Oxford English Dict. (2d ed. 1989) p. 1055.) Thus, "in the course of repossession" logically means *during* the repossession of the aircraft, i.e., while the repossession of the aircraft is actually in process.

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[31] Plaintiffs' "throw everything against the wall and see what sticks" approach to litigation has greatly multiplied the expense and burden of the litigation. For example, Plaintiffs inexplicably continue to insist on proceeding against the All Risks Insurers under Section One of the Policy, despite the obvious bar of the War Perils Exclusion.

This reading is supported by the Policy language as a whole. As distinct from Contingent Coverage, which applies when the Aircraft are *not* in the insured's care, custody or control, Possessed Coverage applies when the Aircraft *are* in the insured's possession, i.e., its care, custody or control. In addition, the Policy lists three specific situations in which Possessed Coverage will apply: (1) when the aircraft is in the hands of a prospective lessee or buyer and awaiting the commencement of a lease or closure of a sale; (2) when the aircraft has been returned on the expiration or termination of a lease; and (3) when it has been repossessed or is in the course of repossession. Each of these categories provides an example of a specific situation in which the aircraft is in the insured's actual or constructive possession. Thus, if an insured has delivered an aircraft to a lessee but the lease has not yet commenced, the lessee has not yet assumed legal possession of the aircraft, which remains in the lessor's constructive (but not actual) possession. Similarly, once an aircraft has been returned to the lessor or has been repossessed, it is in the lessor's actual possession.

For these reasons, "in the course of repossession" must be read to refer to a situation where the lessor has taken some *physical* act to initiate repossession of the aircraft, such as where it is in the process of being transferred back to the lessor, even if the lessor does not yet have physical possession. For example, the lessor may engage a third party to seize the aircraft at a foreign airport and fly it back to its home port. (See DLA Motion, 21 ["Aircraft lessors like Plaintiffs must generally retain consultants, pilots, and other skilled professionals to effect such seizures."]; see, e.g., *Boca Aviation Limited*, 669 F.Supp.3d at 217 [after lessor terminated lease and court granted order granting lessor immediate possession of aircraft located in Hong Kong, lessor was able to have a crew from Elite Aero Ireland Limited fly the aircraft to Arizona]; see also *Henderson v. Security Nat. Bank* (1977) 72 Cal.App.3d 764, 768, 770 [defendant bank, which had financed plaintiff's automobile contract, employed an independent contractor, a licensed "repossessor," to repossess the car].) If physical loss or damage occurs "in the course of" (i.e., during) that process, it logically triggers Possessed Coverage, even if the asset may not be physically in the insured's actual possession at the time. (See *Henderson*, 72 Cal.App.3d at 770 [plaintiff alleged that in the repossession of his automobile the lock on his garage door had been broken]; see also, e.g., *Rudd Const. Equip. Co., Inc. v. Home Ins. Co.* (6th Cir. 1983) 711 F.2d 54, 55 [plaintiff sought to recover insurance proceeds for equipment which was damaged in the course of repossession from a third party].)

Here, it is undisputed that Plaintiffs never took possession of any of the Aircraft, nor did any third party do so on their behalf, in order to transfer them to Ireland (or any other location outside Russia). As Plaintiffs have previously conceded without qualification, "BBAM never repossessed the Aircraft." (Pl. Opposition to Certain Defs. MSJ (May 31, 2024), 11.) Further, Plaintiffs admit that the Aircraft "have not been recovered and are not subject to recovery." (Def. Compend., Ex. J, 39.) Thus, Plaintiffs' claimed loss did not occur "in the course of repossession" of the Aircraft. Plaintiffs' contrary arguments are not persuasive.

First, Plaintiffs contend that "BBAM's termination of the leasing and demands for return of the Aircraft necessarily placed the Aircraft 'in the course of repossession from a Lease/Finance Agreement' even in the absence of any further action at all." (*Id.*) Defendants, for their part, disagree, contending that "'course of repossession' must involve at least some overt act to physically regain the Aircraft from Lessees." (DLA Motion, 20.) For the reasons discussed above, the Court agrees. A lessor that has merely sent written notice terminating a lease and demanding that the lessee return its property is not engaged in "repossession," which necessarily entails some physical acts to regain possession of the property. (See also Bus. & Prof. Code § 7500.1(w) [provision of California Collateral Recovery Act defining "repossession" to mean, among other things, when the repossessor gains entry to the collateral, connects it to a tow truck, moves the collateral, gains control of it, or disconnects any part of it from any surface where it is mounted or attached].) It is not sufficient that the insured merely *intends* or *hopes* to repossess the property, or *plans* to do so in the future if it is able to do so, yet that is all that Plaintiffs point to as the basis for their contention that the loss occurred "in the course of repossession" of the Aircraft.[32]

Second, Plaintiffs contend that, at a minimum, there are triable disputes as to whether their alleged loss occurred in the course of repossession of the Aircraft. (Omnibus Opposition, 22.) Plaintiffs assert they

[32] Plaintiffs' position is also inconsistent with the factual record. Their notices terminating the leases and demanding that the Aircraft be returned were sent on February 27, 2022, just three days after the invasion. (FAC ¶ 32.) In fact, "BBAM demanded the return of the Aircraft numerous times" during June and July 2022. (Omnibus Opposition, 10; Cannon Decl. ¶ 5 & Exs. 2-4.) At any point, Aeroflot/Pobeda and Izhavia could have acceded to those demands and voluntarily agreed to return the Aircraft. Had they done so, the Aircraft obviously would not have been repossessed, nor would it have been "in the course of repossession" while the Russian lessees were considering their response. Thus, Plaintiffs' contention that their February 27, 2022 notice and demand initiated the repossession of the Aircraft, and that the alleged loss occurred immediately on February 27, 2022, is ill-founded.

did undertake overt acts to repossess the Aircraft, including tracking the location of the Aircraft to determine whether it might land in a location where BBAM might attempt to repossess the Aircraft directly and "reaching out to other relevant parties" to look into other possible ways to secure the Aircraft's return. (Omnibus Opposition, 16.) Plaintiffs contend that "BBAM did all it could reasonably have done" to try to regain the Aircraft. That may well be so. But its acts, like those of sending a notice of termination and demanding the Aircraft's return, do not constitute physical acts of regaining possession, but at most planning for the possible future repossession of the Aircraft, and do not establish that its alleged loss occurred "in the course of repossession" of the Aircraft.

Third, Plaintiffs assert that BBAM directed its insurance brokers to "put the Aircraft on possessed cover," and notified Defendants of that direction. (Omnibus Opposition, 18-19; Cannon Decl. ¶ 3.) Again, however, that Plaintiffs may have taken such a position vis-à-vis their insurers in anticipation of the claims giving rise to this litigation cannot establish that the alleged loss took place in the course of repossession of the Aircraft.[33]

III. DEFENDANTS ARE ENTITLED TO SUMMARY ADJUDICATION OF PLAINTIFFS' BAD FAITH CLAIM.

Thus, the Court has determined (1) that Plaintiffs' claims under Section One of the Policy are barred by the War Perils Exclusion, (2) that Plaintiffs' claims are not eligible for either contingent or possessed coverage under either Section One or Section Three of the Policy. It follows inescapably that all Defendants are entitled to summary adjudication of Plaintiffs' bad faith cause of action. Where, as here, there is "no coverage" under an insurance policy, that is "a failure fatal to [the insureds'] claim for bad faith." (*Fox Paine & Company, LLC*, 104 Cal.App.5th at 1056; accord, *Kransco v. American Empire Lines Ins. Co.* (2000) 23 Cal.4th 390, 408 ["without coverage there can be no liability for bad faith on the part of the insurer"]; *Brown v. Mid-Century Ins. Co.* (2013) 215 Cal.App.4th 851, 858 [affirming summary judgment for insurer: "Because the policy did not cover the Browns' claims, however, the Browns do not have a claim for breach of the implied covenant of good faith and fair dealing"]; *Benavides v. State Farm General Ins.*

[33] Contrary to their argument at the hearing, Plaintiffs did not offer any competent evidence of an industry custom or usage of giving a specialized meaning to the term "in the course of repossession" that could overcome its plain, ordinary meaning in the context of the Policy as a whole. (Cf. Civ. Code § 1644.)

Co. (2006) 136 Cal.App.4th 1241, 1250-1251 [insurer could not be held liable for negligent investigation, absent covered loss under policy].)

IV. MOTIONS TO SEAL

The parties have filed numerous motions to seal various materials submitted in connection with their motions, most of which are uncontested. However, Plaintiffs oppose in part the motions to seal filed by Chubb and the Mixed Risk Insurers represented by DLA Piper. Chubb's motions, including requests to seal portions of Plaintiffs' and other parties' filings, are brought on the grounds that the exhibits it seeks to seal reveal details regarding Chubb's claims handling techniques and process, all of which have economic value to its competitors, and the public disclosure of which would harm its competitive standing in the marketplace. (Patel Decl. (Aug. 14, 2024) ¶¶ 3, 8; Patel Decl. (Oct. 9, 2024) ¶¶ 3, 6.) DLA's second motion is brought on similar grounds, as well as on its obligation to its policyholders and brokers to safeguard the confidentiality of their financial and policy information under UK and European privacy laws. (Bowman Decl. ¶¶ 3-4.)[34] Plaintiffs do not oppose "the portions of those motions that are based on legitimate claims of confidentiality: disclosure of expert witnesses who face retribution by Russia." (Opposition to Insurers' Motion to Seal, 2.) However, they oppose the remainder, which they contends "seeks to obscure from public view details of Insurers' conduct in handling BBAM's claim or their claims regarding aircraft in Russia more broadly." (*Id.*) Plaintiffs—who have filed their own motion to seal on similar grounds—assert without any supporting evidence that such information, which includes correspondence with BBAM about its claim, a coverage letter, details about Insurers' investigation of BBAM's claim, and Insurers' analysis of their own financial exposure, is "regularly disclosed to Insurers' competitors, was disclosed to other policyholders in similar litigation, [and] has already substantially been discussed publicly in this litigation." (*Id.* at 2-3.) They argue that Insurers are seeking to seal these documents only so that other policyholders will not use it against them in other pending litigation. (*Id.* at 3.) The Court is unpersuaded, and finds that the moving Defendants have met their burden to show that the standards for sealing set forth in Rule 2.550(d) have been met.

[34] In its reply, DLA has agreed to withdraw its motion to seal as to two exhibits and proposes to file redacted versions of certain exhibits in lieu of complete seal. (DLA Reply, 3 fn.2.)

CONCLUSION

For the foregoing reasons, the Court rules as follows:

1. Defendants' motions for summary judgment are granted.
2. The Foley Defendants' motion to strike the oppositions filed by the War Risk Defendants, Syndicate 1183, and Fidelis to other Defendants' motions for summary judgment for lack of standing is granted.
3. All parties' motions to seal are granted.
4. The March 3, 2025 trial date and all previously set pretrial deadlines, including the February 3, 2025 hearing on a motion to bifurcate and the February 14, 2025 pretrial conference, are vacated.

Defendants shall submit a single proposed judgment.

IT IS SO ORDERED.

Dated: December 5, 2024

Ethan P. Schulman
Judge of the Superior Court

CERTIFICATE OF ELECTRONIC SERVICE
(CCP 1010.6(6) & CRC 2.260(g))

I, Edward Santos, a Deputy Clerk of the Superior Court of the County of San Francisco, certify that I am not a party to the within action.

On December 5, 2024 , I electronically served:

ORDER ON: (1) MULTIPLE DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, SUMMARY ADJUDICATION; (2) DEFENDANTS' MOTION TO STRIKE CO-DEFENDANTS' OPPOSITION; AND (3) DEFENDANTS' CONTESTED MOTIONS TO SEAL

via File & ServeXpress on the recipients designated on the Transaction Receipt located on the File & ServeXpress website.

Dated:
DEC 05 2024

Brandon E. Riley, Court Executive Officer

By: Edward J. Santos
Edward Santos, Deputy Clerk

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

AIR LEASE CORPORATION, et al., Plaintiffs, v. CERTAIN UNDERWRITERS OF LLOYD'S SYNDICATE 1969, et al., Defendants.	Case No.: 22STCV39411 [TENTATIVE] ORDER DENYING MOTION FOR SUMMARY JUDGMENT BY "CERTAIN DEFENDANTS": TOKIO MARINE KILN SYNDICATES LTD., HDI GLOBAL SPECIALTY SE, AND QBE INSURANCE CORPORATION Hearing Date: May 1, 2025 Hearing Time: 9:00 a.m. Dept.: 7

A group of three defendants — Tokio Marine Kiln Syndicates Limited, on its own behalf and on behalf of underwriting members of Lloyd's Syndicates 510 and 1880; HDI Global Specialty SE; and QBE Insurance Corporation (collectively, "Defendants") — move the Court for summary judgment on three

causes of action asserted by plaintiff Air Lease Corporation ("ALC") and its affiliated entities (collectively, "Plaintiffs"). Plaintiffs oppose the motion.

Plaintiffs obtained an insurance policy that in broad terms provides coverage for losses caused by all types of risks, with some exceptions, one of which is losses caused by the risk of war. Yet the policy also provides coverage, under a different coverage provision, for losses caused by war.

Defendants subscribed to both of these coverage provisions, all-risks and war-risk coverages. As so-called "mixed-risk" insurers, they base their motion for summary judgment on the argument that both provisions only cover loss and damage that qualifies as "physical" loss or damage. While the Court agrees with Defendants that all-risks coverage is only for "physical" loss or damage, as a matter of contract interpretation, the Court is not persuaded that war-risk coverage is also so limited. The Court therefore denies Defendants' motion for summary judgment.

I. Introduction

ALC owns airplanes that it leases to airlines around the world, including airlines based in Russia. (First Amended Complaint (June 20, 2023) ¶ 2.) In early 2022 the Russian government, facing international sanctions for its invasion of Ukraine, prevented Russian airlines from returning leased airplanes to their owners, affecting 32 aircraft and 4 engines owned by Plaintiffs. (*Id.* at ¶¶ 41-54.) Plaintiffs subsequently terminated the affected leases but were unable to recover their aircraft or engines from the lessors. (*Id.* at ¶¶ 55-56.)

Plaintiffs had purchased an insurance policy on the aircraft, underwritten by two principal groups of insurers. (First Amended Complaint, ¶ 3.) The first group, called the All-Risks Insurers, allegedly promised to provide coverage for "all risks" under Sections One and Two of the Policy. (*Id.* at ¶ 20.) The second group, called the War-Risk Insurers, allegedly promised to provide coverage for "war perils" under Section Three of the Policy. (*Id.* at ¶ 19.)

On July 13, 2022, Plaintiffs allegedly sent a letter to all of the insurers, claiming coverage for their alleged losses of the airplanes. (First Amended Complaint, ¶ 57.) "To the extent [they] have not outright denied [Plaintiffs'] claims, [the insurers] constructively or impliedly denied them by sitting on their hands, refusing to complete their purported investigation, refusing to take a coverage position, and refusing to pay." (*Id.* at ¶ 75.)

Plaintiffs sue the insurers for damages, including punitive damages, on theories of breach of contract (count 1) and breach of the implied covenant of good faith and fair dealing (count 2), in addition to a claim for a declaration of the parties' rights (count 3). (First Amended Complaint, ¶¶ 80-116.)

Of the three Defendants moving for summary judgment, two of them — Tokio Marine Kiln Syndicates Limited and HDI Global Specialty SE — allegedly promised to provide both all-risk coverage (Section One and Section Two) and war-risk coverage (Section Three). (First Amended Complaint, ¶¶ 19-20, Exhs. K-L.) The third moving party, QBE Insurance Corporation, allegedly promised to provide only all-risk coverage under Sections One and Two.[1] Defendants move for summary judgment of all three causes of action.

II. Legal Standard: Motion for Summary Judgment or Adjudication

The purpose of summary judgment or adjudication is to "cut through the parties' pleadings" to determine whether, "despite their allegations, trial is in fact necessary to resolve their dispute." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 854 (*Aguilar*).)

"A party may move for summary judgment in an action or proceeding if it is contended that the action has no merit" or may, alternatively, move for summary adjudication as to one or more causes of action within an action, one or more affirmative defenses, one or more claims for damages, or one or more

[1] QBE has also joined a motion for summary judgment by the All-Risks Insurers, a motion the Court has tentatively granted. Here the Court shall discuss only the arguments by mixed-risk insurers, that is, insurers subscribing to both Sections One and Two (all risks) and Section Three (war risk) of the Policy.

issues of duty, if the party contends that the cause of action has no merit, that there is no affirmative defense to the cause of action, that there is no merit to an affirmative defense as to any cause of action, that there is no merit to a claim for damages, as specified in Section 3294 of the Civil Code, or that one or more defendants either owed or did not owe a duty to the plaintiff or plaintiffs. (Code Civ. Proc., § 437c, subds. (a)(1), (f)(1).)

Whether a motion for summary judgment or adjudication, the procedure is the same. (Code Civ. Proc., § 437c, subd. (f)(1)(2).) "A defendant or cross-defendant has met that party's burden of showing that a cause of action has no merit if the party has shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established, or that there is a complete defense to the cause of action." (§ 437c, subd. (p)(2).) If a defendant carries its initial burden, the burden shifts to the plaintiff to show that "a triable issue of one or more material facts exists as to the cause of action or a defense thereto." (*Ibid.*) Though the burdens of production can shift, the moving party always bears the burden of persuading the court there are no triable issues of material fact and that she is entitled to judgment as a matter of law. (*Aguilar, supra,* 25 Cal.4th at p. 850.) A motion for summary adjudication is granted only if it "completely disposes of a cause of action, an affirmative defense, a claim for damages, or an issue of duty." (Code Civ. Proc., § 437c, subd. (f)(1).)

III. Analysis

The material facts are undisputed.[2]

A. The Policy: Coverage Provisions and the War-Perils Exclusion

Plaintiffs' assets are insured under six policies, all titled "Contingent and Possessed Aircraft, Engines and Components, Spares and Equipment All Risks (including War and Allied Perils), Aviation Liability and Personal Accident Insurance." (Undisputed Material Fact ("UMF") No. 1.) The six policies, which

[2] Neither side raises evidentiary objections material to the disposition of the Insurers' motion. (Code Civ. Proc., § 437c, subd. (q).)

neither side contends differ in form or substance, shall be referred to collectively as the "Policy."

Within the Policy, relevant here are three coverage provisions — Sections One, Two, and Three — and one exclusion from coverage, the "War-Perils Exclusion," found with other exclusions at Section Six.

Section One and Section Two are similar in kind. Section One covers "physical loss of or damage to" the aircraft hull, and Section Two covers physical loss of or damage to aircraft spares and equipment. Both sections cover physical loss or damage caused by all kinds of risks, unless a kind of risk is expressly excluded.

Exclusions from Sections One and Two are listed at Section Six of the Policy. The exclusion relevant here is titled the "War, Hi-Jacking and Other Perils Exclusion Clause (Aviation)," or the "War-Perils Exclusion" for short. It excludes from the coverage provided by Sections One and Two claims that are caused by, among other things, "[w]ar, invasion, acts of foreign enemies, hostilities (whether war be declared or not), civil war, rebellion, revolution, insurrection, martial law, military or usurped power or attempts at usurpation of power" (Section Six, subsection (4)(a)) or "[c]onfiscation, nationalization, seizure, restraint, detention, appropriation, requisition for title or use by or under the order of any Government (whether civil military or de facto) or public or local authority" (Section Six, subsection (4)(f)).

The final relevant coverage provision is Section Three, which is different in kind than Sections One and Two. It provides coverage for both the aircraft hull and for aircraft spares and equipment (among other things) caused by a more limited kind of risk, what the Policy calls "War and Allied Perils." These are the risks that are excluded from coverage under Section One and Two by the War-Perils Exclusion: risks and perils of "[]war, invasion, acts of foreign enemies, hostilities (whether war be declared or not), civil war, rebellion, revolution, insurrection, martial law, military or usurped power or attempts at

usurpation of power" (Section Three, subdivision (A)) and "[c]onfiscation, nationalisation, seizure, restraint, detention, appropriation, requisition for title or use by or under the order of any Government (whether civil military or de facto) or public or local authority" (Section Three, subdivision (E)).

In short, what is excluded from Section One and Two by the War-Perils Exclusion is re-covered (in the insurers' words, "written back" into coverage) by Section Three.

B. Plaintiffs' Coverage Claim

On July 13, 2022, Plaintiffs sent a claim letter to their insurance broker, describing the Russian invasion and detention of aircraft and that, given these circumstances, "it is the Insureds' case that one or more War Risks Perils, namely (i) an act of one or more persons for political purposes (bearing in mind that such an act can occasion loss or damage intentionally as well as accidentally), and/or (ii) a confiscation, nationalisation, seizure, restraint, detention, appropriation or requisition for title or use, has occurred, and that peril has (or those perils have) occasioned the actual total or constructive total loss of the Aviation Assets under the War Risks Cover. The Insureds reserve the right to rely on other War Risks Perils." (UMF Nos. 5-7.) "We consider that there is a compelling case of immediate political interference by the Russian state giving rise to the actual total loss or constructive total loss of the Aviation Assets that is covered under the War Risks Cover. Should that compelling case for some reason not give rise to a claim under the War Risks Cover, the Insureds will therefore have cover under the All Risks Cover, and claim accordingly." (*Ibid.*)

The reason Plaintiffs have been unable to repossess their assets, in sum, is the actions taken by the Russian government to prevent Russian airlines from returning leased aircraft to non-Russian lessors. (First Amended Complaint, ¶¶ 13, 55.)

C. Coverage Under Section Three (War Risks)

Defendants allegedly subscribed to Sections One and Two, thereby promising to indemnify Plaintiffs for loss or damage caused by all risks (unless excluded, as with war risks), and subscribed to Section Three, thereby promising to indemnify Plaintiffs for loss or damage caused by a war risk. To prevail on their motion for summary judgment, Defendants therefore must show they are entitled to judgment as a matter of law on Plaintiffs claims for coverage under Sections One, Two, and Three.

The purpose of interpreting a contract is to determine "what the parties meant by the words they used." (*Pacific Gas & Electric Co. v. G.W. Thomas Drayage & Rigging Co.* (1968) 69 Cal.2d 33, 38.) If a policy term is "clear and explicit" its meaning governs, but if it is "capable of two or more constructions, both of which are reasonable," the term is ambiguous. (*Foster-Gardner, Inc. v. National Union Fire Ins. Co.* (1998) 18 Cal.4th 857, 868.) The "threshold" question of ambiguity is a question of law for the court to decide. (*Oakland-Alameda County Coliseum Authority v. Golden State Warriors, LLC* (2020) 53 Cal.App.5th 807, 816.) However, if "two equally plausible interpretations of the language of a contract may be made" — meaning the contract is ambiguous — then "parol evidence is admissible to aid in interpreting the agreement, thereby presenting a question of fact which precludes summary judgment if the evidence is contradictory." (*Wolf v. Superior Court (Walt Disney Pictures and Television)* (2004) 114 Cal.App.4th 1343, 1351.)

Sections One, Two, and Three of the Policy, as provisions that grant rather than exclude insurance coverage, are "interpreted broadly so as to afford the greatest possible protection to the insured…." (*MacKinnon v. Truck Ins. Exchange* (2003) 31 Cal.4th 635, 648.)

Defendants argue they are entitled to summary judgment because they promised to indemnify Plaintiffs for "physical" loss or damage, and Plaintiffs do not allege, and have no evidence of, "physical" loss or damage to the assets that they have been unable to repossess. "Simply put, being deprived of

property alone is not enough to be a physical loss," Defendants argue; "what is critical to a physical loss analysis is the manner in which the deprivation occurred, specifically, whether there is a 'causal link' between the deprivation and a 'physical event' affecting the property's 'physical condition.'" (Memorandum (Nov. 5, 2024) 17:15-19.) The actions of the Russian government were not "a 'physical event' that has affected the 'physical condition[']' of the insured property…. Thus, there is no physical loss." (*Id.* at 19:3-4.)

Defendants' first point is that although they subscribed to Sections One, Two, and Three of the Policy, they promised to indemnify Plaintiffs for only *physical* loss or damage, which they contend does not describe what happened to Plaintiffs' assets in Russia (their second point). As a question of contract interpretation, they are correct about Sections One and Two. By subscribing to these two sections, they clearly and unambiguously promised to pay for "physical loss of or damage" to Plaintiffs' assets.

But Section Three, as Plaintiffs argue, is significantly different in this regard. It omits the word "physical" — Defendants, by subscribing to Section Three, promised "[t]o pay for loss of or damage to" Plaintiffs' assets; there is no express qualification that the loss or damage be "physical" in nature. Defendants are thus mistaken that Policy Section Three — at least facially — covers only *physical* loss or damage.

Neither side contends the omission of the word "physical" from the coverage provision of Section Three was a mistake. The sophisticated parties on both sides of this case must have intentionally included the word "physical" in Sections One and Two and intentionally omitted it from Section Three. Moreover, as Plaintiffs point out, Section Three includes a provision titled, "Subject Same Terms," that reads, in relevant part: "This Section [i.e., Section Three] is subject to the same warranties, definitions, terms and conditions (EXCEPT AS OTHERWISE PROVIDED HEREIN) as are contained in or may

be added to Sections One and Two of this Policy." (Policy, p. 64.) The Court agrees with Plaintiffs that this "Subject Same Terms" provision is evidence the parties intended for Section Three to have different terms than Sections One and Two.

Defendants argue Section Three is nevertheless impliedly limited to physical loss or damage based on the structure of the Policy. They base their argument on a phrase that appears in Section Three following five subsections, (1) through (5), that establish the kinds of assets that are insured. Each of these subsections is headed by a title printed in bold font, as follows:

(1) Contingent Aircraft Hull, Spares, and Equipment Coverage…

(2) Possessed Aircraft Hull, Spares and Equipment Coverage…

(3) Technical Records Coverage…

(4) Repossession Expenses Coverage…

(5) Hull Total Loss Only Coverage…

Following these subsections, with no title or break between it and the final sentence of subdivision (5), appears the key phrase — "Excluded under Sections One and Two of this Policy as caused by: ..." What follows is a list of the same risks and perils described in the War-Perils Exclusion: war, invasion, hostilities confiscation, seizure, restraint, and so forth.

The parties do not dispute that the "Excluded by" language modifies the five preceding coverage provisions, subsections (1) through (5) of Section Three. Section Three thus memorializes Defendants' promise to pay for loss or damage to assets "[e]xcluded under Section One and Two" of the Policy "as caused by" the war risks listed in the War-Perils Exclusion.

It is the "Excluded under" language, Defendants argue, that necessarily limits Section Three coverage to *physical* loss or damage. Because Sections One and Two, the all-risk provisions, qualify loss or damage with the term "physical," and all Section Three does, in Defendants' view, is write-back coverage that is excluded from all-risk coverage by the War-Perils Exclusion,

Section Three, the argument goes, is, too, limited to physical loss or damage. "Section Three's War Risk coverage," Defendants argue, "is available *only* for a claim that would be covered under Section One or Two but is excluded by the [War-Perils Exclusion]." (Reply Brief (Feb. 6, 2025) 5:26-28.)

Defendants' argument, as formulated in the final sentence of the preceding paragraph, is persuasive to a point. Section Three undisputedly covers claims that are otherwise excluded from the all-risk coverage of Sections One and Two. But the question remains: why is it that some claims are excluded from all-risk coverage?

The answer requires a close reading of Section Three, which covers loss or damage that is "Excluded under Section One and Two of this Policy *as caused by*" a war risk, such as invasion or restraint. (Emphasis added.) Section Three therefore covers loss or damage that is not covered by Section One or Section Two for a specific reason: the loss or damage is not covered by the other sections because of its *cause*, not necessarily its *physicality*. As Plaintiffs point out, Section Three does not state that it provides coverage for a claim that would *otherwise* be covered under Sections One or Two, meaning the claim *otherwise* meets all the qualifications for all-risks coverage. Rather, Section Three gives only one reason, the *cause* of the loss or damage, as the reason all-risk coverage need be unavailable. Section Three, in other words, covers loss or damage that is not covered by Sections One or Two because it was *caused* by a war risk as defined, regardless of whether the loss or damage was *physical*. It follows that Section Three covers a broader range of loss or damage — loss or damage that might not qualify as "physical" — so long as the loss or damage is excluded from Sections One and Two because of its cause. This interpretation is logical given the coverage provisions, Sections One, Two, and Three, are distinguished not by the kind of loss or damage, but rather by the causes of risks, all risks (with exceptions) versus war risks.

Defendants argue the term "physical" was omitted from Section Three because it would have been "redundant" and "superfluous" given that the term appears in Sections One and Two. (Reply Brief, 12:10-22.) But as Defendants acknowledge, the rule is that an interpretation of a term "give[] force and effect to every clause" of the contract. (*Union Oil Co. v. International Ins. Co.* (1995) 37 Cal.App.4th 930, 937.) Plaintiffs' interpretation arguably gives a stronger force and effect to the inclusion of the word "physical" in two sections and its omission from a third section, stronger than Defendants' interpretation of the omission as stylistic drafting. Furthermore, there is the "fundamental principle" that "in interpreting contracts, including insurance contracts, courts are not to insert what has been omitted." (*Safeco Ins. Co. of America v. Robert S.* (2001) 26 Cal.4th 758, 764.) Defendants advocate for the insertion into Section Three of not one, but at least two omitted terms: first, the insertion of the term "physical" to qualify "loss of or damage to," and second, in the "Excluded by" phrase, the insertion of language providing that Section Three coverage is available, for example, only if coverage would *otherwise* be available under Sections One and Two *but for* the cause of the *physical* loss or damage.

Plaintiffs argue their interpretation is further supported by the type of risks covered by Section Three — risks that, in their view, do not necessarily involve physical loss or damage. "For example," Plaintiffs argue, Section Three "expressly covers loss caused by 'confiscation,' 'detention,' 'seizure,' and 'restraint' of aircraft, among other perils. Nothing about the plain meaning of those terms requires – or even contemplates – a '"physical event" affecting the property's "physical condition"' as [Defendants] suggest." (Opposition Brief, 23:16-19.) However, because Section Three is clear and explicit — it omits the word "physical" in describing the covered loss or damage — the Court need not address here whether the perils that Plaintiffs cite qualify as *physical* loss or damage.

Coverage under Section Three for loss or damage caused by war risks is not limited to loss or damage that qualifies as "physical." Defendants, as subscribers to Sections One, Two, and Three, do not persuade the Court there is no reasonable possibility that Plaintiffs are entitled to coverage under Section Three. Defendants are thus not entitled to summary judgment as a matter of law.

IV. Conclusion

The Court DENIES Defendants' motion for summary judgment.

Dated: _____

_____

SAMANTHA P. JESSNER
JUDGE OF THE SUPERIOR COURT

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

AIR LEASE CORPORATION, et al., Plaintiffs, v. CERTAIN UNDERWRITERS OF LLOYD'S SYNDICATE 1969, et al., Defendants.	Case No.: 22STCV39411 [TENTATIVE] ORDER GRANTING THE ALL-RISKS INSURERS' MOTION FOR SUMMARY JUDGMENT Hearing Date: May 1, 2025 Hearing Time: 9:00 a.m. Dept.: 7

A group of defendants known as the "All-Risks Insurers" (also referred to herein as "Defendants") move the Court for summary judgment or, alternatively, summary adjudication of several issues raised by the claims of plaintiff Air Lease Corporation ("ALC") and 40 of its affiliated entities (collectively, "Plaintiffs"). Plaintiffs oppose the motion.

As explained below, the All-Risks Insurers promised to insure Plaintiffs against loss or damage caused by all types of risks, with a handful of particular exceptions. One of the excluded risks was the risk of loss caused by war, as the term is defined by the policy. The undisputed material facts show that it was indeed a war risk — specifically, the invasion of Ukraine by Russia in 2022 — that caused Plaintiffs' alleged losses in this case. They are therefore not entitled to coverage under the all-risks provisions of policy. For this reason, the grants the motion for summary judgment by the All-Risks Insurers, the insurers who subscribed solely to the all-risks provisions of the policy.

I. Introduction

ALC owns airplanes that it leases to airlines around the world, including airlines based in Russia. (First Amended Complaint (June 20, 2023) ¶ 2.) In early 2022 the Russian government, facing international sanctions for its invasion of Ukraine, prevented Russian airlines from returning leased airplanes to their owners, affecting 32 aircraft and 4 engines owned by Plaintiffs. (*Id.* at ¶¶ 41-54.) Plaintiffs subsequently terminated the affected leases but were unable to recover their aircraft or engines from the lessors. (*Id.* at ¶¶ 55-56.)

Plaintiffs had purchased an insurance policy on the aircraft, underwritten by two principal groups of insurers. (First Amended Complaint, ¶ 3.) The first group, called the All-Risks Insurers, allegedly promised to provide coverage for "all risks" under Sections One and Two of the Policy. (*Id.* at ¶ 20.) The second group, called the War-Risk Insurers, allegedly promised to provide coverage for "war risks" (also called "war perils") under Section Three of the Policy. (*Id.* at ¶ 19.)

On July 13, 2022, Plaintiffs allegedly sent a letter to all of the insurers, claiming coverage for the loss of their aircraft. (First Amended Complaint, ¶ 57.) "To the extent [they] have not outright denied [Plaintiffs'] claims, [the insurers] constructively or impliedly denied them by sitting on their hands, refusing to

complete their purported investigation, refusing to take a coverage position, and refusing to pay." (*Id.* at ¶ 75.)

Plaintiffs sue the insurers for damages, including punitive damages, on theories of breach of contract (count 1) and breach of the implied covenant of good faith and fair dealing (count 2), in addition to a claim for a declaration of the parties' rights (count 3). (First Amended Complaint, ¶¶ 80-116.) The All-Risks Insurers move for summary judgment or, alternatively, summary adjudication of seven issues.[1]

II. Legal Standard: Motion for Summary Judgment or Adjudication

The purpose of summary judgment or adjudication is to "cut through the parties' pleadings" to determine whether, "despite their allegations, trial is in fact necessary to resolve their dispute." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 854 (*Aguilar*).)

"A party may move for summary judgment in an action or proceeding if it is contended that the action has no merit" or may, alternatively, move for summary adjudication as to one or more causes of action within an action, one or more affirmative defenses, one or more claims for damages, or one or more issues of duty, if the party contends that the cause of action has no merit, that

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[1] The All-Risks Insurers are Chubb European Group SE; Axis Specialty Europe SE; Lloyd's Syndicate 1969 Subscribing to Policy No. B080124270A21; Faraday Capital Limited, the sole corporate member of and capital provider to Lloyd's Syndicate 435 for the 2021 Year of Account; Starr Managing Agents Limited for the Underwriting Members of Lloyd's Syndicate 1919; Convex Insurance UK Limited; Great Lakes Insurance SE; Berkshire Hathaway International Insurance Ltd.; Mitsui Sumitomo Insurance Company (Europe) Ltd.; Mapfre Espana Compania de Seguros y Reaseguros S.A.; and Houston Casualty Company; United States Aircraft Insurance Group for itself and on behalf of its Member Companies Defendants ACE American Insurance Company and National Liability & Fire Insurance Company.

The motion is joined by four additional defendants represented by the firm of DLA Piper LLP: Tokio Marine Kiln Syndicates Limited ("TMK"), HDI Global Speciality SE ("HDI"), Swiss RE International SE ("SRI"), and QBE Insurance Corporation ("QBE"). (Notice of Joinder (Nov. 25, 2024) 2.) However, only the latter two — SRI and QBE — are all-risks insurers; TMK and HDI are "mixed risk" insurers who subscribed to both the all-risks and the war-risk provisions of the policy. The terms "All-Risks Insurers" and "Defendants," as used herein, include defendants SRI and QBE.

there is no affirmative defense to the cause of action, that there is no merit to an affirmative defense as to any cause of action, that there is no merit to a claim for damages, as specified in Section 3294 of the Civil Code, or that one or more defendants either owed or did not owe a duty to the plaintiff or plaintiffs. (Code Civ. Proc., § 437c, subds. (a)(1), (f)(1).)

Whether a motion for summary judgment or adjudication, the procedure is the same. (Code Civ. Proc., § 437c, subd. (f)(1)(2).) "A defendant or cross-defendant has met that party's burden of showing that a cause of action has no merit if the party has shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established, or that there is a complete defense to the cause of action." (§ 437c, subd. (p)(2).) If a defendant carries its initial burden, the burden shifts to the plaintiff to show that "a triable issue of one or more material facts exists as to the cause of action or a defense thereto." (*Ibid.*) Though the burdens of production can shift, the moving party always bears the burden of persuading the court there are no triable issues of material fact and that she is entitled to judgment as a matter of law. (*Aguilar, supra,* 25 Cal.4th at p. 850.) A motion for summary adjudication is granted only if it "completely disposes of a cause of action, an affirmative defense, a claim for damages, or an issue of duty." (Code Civ. Proc., § 437c, subd. (f)(1).)

III. Analysis

A. Plaintiffs' Alleged "Losses"

Before February 2022, Russian aviation substantially depended on leased, foreign aircraft. Of the country's 1,287 cargo, private, and state-owned aircraft, some 513 were leased from foreign lessors. (Separate Statement of Undisputed Material Facts (Nov. 22, 2024) Undisputed Material Fact ("UMF") Nos. 22-23.)[2] An en masse termination of these leases and return of aircraft to

[2] Neither side raises evidentiary objections material to the disposition of the Insurers' motion. (Code Civ. Proc., § 437c, subd. (q).)

their foreign owners would have caused an "immediate and serious disruption to the Russian economy and aviation industry." (UMF No. 24)

On February 24, 2022, Russia invaded Ukraine. (UMF No. 21.) Two days after the invasion, the Russian government began planning ways to prevent leased aircraft from leaving Russian control. On February 26 and 28, government ministers and officials told representatives of Russia-based airlines to not return leased aircraft to foreign lessors. (UMF Nos. 29-30.) On March 2, the Russian Federal Agency for Air Transport (FATA) requested information from the airlines about foreign lessors, including information on whether the lessors had submitted lease terminations. (UMF No. 31.) On March 3, FATA "made clear" to certain airlines that the Russian government would not help foreign lessors repossess their aircraft, despite the country's obligations to the contrary under an international agreement. (UMF Nos. 32-33.) The next day, FATA advised Russian airlines that if they received lease terminations, they should try to negotiate with the lessors and, if negotiations failed, register the leased aircraft in Russia. (UMF No. 34.)

More concrete restrictions began on March 5, when FATA issued a report that restricted flights to and from foreign countries and restricted Russian airlines from "operating foreign-registered aircraft under a leasing agreement with a foreign entity." (UMF No. 35.) On March 8, President Vladimir Putin issued Presidential Decree No. 100 banning, until December 31, the export of certain products from Russia without approval by the Ministry of Transport. (UMF No. 38.) Among the products covered by the decree were foreign-leased aircraft. (UMF Nos. 39-41.) Subsequent decrees extended the export ban to December 31, 2023, and then again, to December 31, 2025. (UMF Nos. 49-50.) In addition to the export ban, the Russian government proposed and ultimately implemented a plan to permit airlines to register foreign-leased aircraft in Russia without proof of title or de-registration from other countries. (UMF Nos. 37, 42-44.) Before the invasion, the aircraft that Plaintiffs leased to the Russian airlines

had been registered with the civil aviation authorities of Bermuda and Ireland. (UMF No. 3.) The Russian government has since directed the airlines to register the aircraft in Russia. (UMF No. 108.)

At the time of the invasion, Plaintiffs leased 32 aircraft and four engines — what the parties call the "Aviation Assets" — to six Russian airlines. (UMF Nos. 1-2.) Soon after the invasion began, Plaintiffs began trying to repossess their assets. (UMF No. 51) On February 28, 2022, they sent notice to the lessee to ground the assets and move them to airports located outside of Russia. (UMF No. 52.) But by mid-March, Plaintiffs realized the airlines would not be able to secure approval from the Russian government to return the assets. (UMF No. 63) They therefore began terminating the leases by sending notice to the airlines. (UMF No. 63) By March 23, less than a month after the invasion began, they had "purported" to terminate the leases on some-31 aircraft. (UMF Nos. 64-68, 70-71.)

Despite the lease terminations, Plaintiffs have had limited success at either repossessing their assets or receiving compensation from the airlines. Of the six lessees, the airline Nord Wind has returned the most aircraft to Plaintiffs, a total of four. (UMF No. 55.) The airlines Globus and S7 have returned one. (UMF No. 57.) In March 2022, shortly after the invasion began, Plaintiffs were able to repossess an additional five aircraft at locations outside of Russia, namely Dubai and Istanbul. (UMF Nos. 157-158.) The remaining three airlines — I FLY, Ural, and Azur Air — have returned zero of the aircraft they leased from Plaintiffs. In December 2023, S7 and a Russian insurer compensated Plaintiffs for an additional eight aircraft per a settlement agreement. (UMF Nos. 57, 141-142.)

To the extent Plaintiffs have remained in communication with the lessees, all six have cited the same reason for not returning the assets: they cannot return the aircraft either without facing fines or criminal punishment or without the Russian government's approval, which they have not been able to

secure. (UMF Nos. 53-54, 56, 59-61, 69, 89, 92, 102, 116.) Some of Plaintiffs' witnesses testified they had heard that anyone who tried to "help" recover the aircraft would also be criminally liable. Plaintiffs in fact hired a law firm that had an office in Russia, but the government closed the office and advised the firm that helping to recover Plaintiffs' aircraft would be considered treasonous. (UMF Nos. 105-107.)

On July 13, 2022, Plaintiffs sent a claim letter to their insurance broker, describing the Russian invasion and detention of aircraft and that, given these circumstances, "it is the Insureds' case that one or more War Risks Perils, namely (i) an act of one or more persons for political purposes (bearing in mind that such an act can occasion loss or damage intentionally as well as accidentally), and/or (ii) a confiscation, nationalisation, seizure, restraint, detention, appropriation or requisition for title or use, has occurred, and that peril has (or those perils have) occasioned the actual total or constructive total loss of the Aviation Assets under the War Risks Cover. The Insureds reserve the right to rely on other War Risks Perils." (UMF Nos. 80, 83-84.) "We consider that there is a compelling case of immediate political interference by the Russian state giving rise to the actual total loss or constructive total loss of the Aviation Assets that is covered under the War Risks Cover. Should that compelling case for some reason not give rise to a claim under the War Risks Cover, the Insureds will therefore have cover under the All Risks Cover, and claim accordingly." (UMF No. 86.)

Plaintiffs admit the Russian government prevented the return of their assets. (UMF Nos. 90-91, 94-97, 99-101, 103-104, 109.)

B. The Policy and the War-Perils Exclusion

Plaintiffs insured the leased assets under a Contingent and Possessed Aircraft, Engines and Components, Spares and Equipment All Risks (including War and Allied Perils), Aviation Liability and Personal Accident Insurance policy, no. B080124270A21, for the period of June 3, 2021, to June 2, 2022 (the

"Policy"). (UMF Nos. 4, 6.) Within the Policy, relevant here are Section One and Section Two. Section One covers physical loss of or damage to the aircraft hull, and Section Two covers physical loss of or damage to aircraft spares and equipment. Both sections cover physical loss or damage caused by all kinds of risks, unless a kind of risk is expressly excluded.

Exclusions from coverage under Sections One and Two are listed at Section Six. The exclusion relevant here is titled the "War, Hi-Jacking and Other Perils Exclusion Clause (Aviation)," or the "War-Perils Exclusion" for short. It excludes from coverage under Sections One and Two claims that are caused by war perils, defined as, among other things, "[w]ar, invasion, acts of foreign enemies, hostilities (whether war be declared or not), civil war, rebellion, revolution, insurrection, martial law, military or usurped power or attempts at usurpation of power" (Section Six, subsection (4)(a)) or "[c]onfiscation, nationalization, seizure, restraint, detention, appropriation, requisition for title or use by or under the order of any Government (whether civil military or de facto) or public or local authority" (Section Six, subsection (4)(f)).

Defendants move for summary judgment on the ground the War-Perils Exclusion applies. More specifically, they contend Plaintiffs' claims were caused by Russia's acts of war or invasion or confiscation or seizure or restraint — in short, a war peril. "[S]etting aside threshold coverage issues," Defendants argue, "Plaintiffs do not dispute that the War Perils Exclusion excludes losses caused by certain war perils. They acknowledged as much in their Amended Claim Letter, UMF 81, and again in their FAC. Plaintiffs' alleged claims against the AR Insurers fall squarely within the plain meaning of the War Perils Exclusion as caused by the excluded war perils under three separate subsections of that exclusion. Because the AR Insurers provide only All Risk coverage, if the Court finds that Plaintiffs' claims are excluded under the War Perils Exclusion, then all of the causes of action against the AR Insurers are

disposed of in their entirety and summary judgment is proper." (Memorandum (Nov. 22, 2024) 29:3-10.)

The purpose of interpreting a contract is to determine "what the parties meant by the words they used." (*Pacific Gas & Electric Co. v. G.W. Thomas Drayage & Rigging Co.* (1968) 69 Cal.2d 33, 38.) If a policy term is "clear and explicit" its meaning governs, but if it is "capable of two or more constructions, both of which are reasonable," the term is ambiguous. (*Foster-Gardner, Inc. v. National Union Fire Ins. Co.* (1998) 18 Cal.4th 857, 868.) The "threshold" question of ambiguity is a question of law for the court to decide. (*Oakland-Alameda County Coliseum Authority v. Golden State Warriors, LLC* (2020) 53 Cal.App.5th 807, 816.)

The exclusion clauses of an insurance policy "remove coverage for risks that would otherwise fall within the insuring clause." (*Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 16.) An insurer may move for summary judgment on the ground the plaintiff's claim is excluded from coverage. (*Mosley v. Pacific Specialty Insurance Company* (2020) 49 Cal.App.5th 417, 423.) To show that a claim is excluded, the insurer does not need to disprove every possible cause of the alleged loss. (*Ibid.*) If the insurer carries its burden, it shifts to plaintiff, the insured, the burden to show "a triable issue of material fact as to coverage." (*Ibid.*)

The Court agrees with Defendants: Plaintiffs' alleged losses fall within the War-Perils Exclusion. Although Plaintiffs had conveyed to the airlines the right to possess the assets in exchange for lease payments, Plaintiffs apparently had the right to terminate the leases and re-assert their right to possession. Assuming the loss of possession is the claimed loss in this case, several of the terms that define a "war peril" clearly and unambiguously describe the cause of Plaintiffs' alleged loss, that is, the Russian invasion of Ukraine and subsequent actions that prohibited export of the assets, among them the terms "war," "invasion," "hostilities," "confiscation," "nationalization," "seizure,"

"restraint," "detention," and "requisition for use" by or under the order of the Russian government. War-Perils Exclusion, even if construed as a narrow exclusion from broad coverage for all risks, plainly excludes coverage for Plaintiffs' alleged loss in this case.

In fact, Plaintiffs do not dispute their claim falls within the War-Perils Exclusion. They admit their theory, that Defendants agreed to indemnify the alleged loss, is an alternative or backup to their principal theory that another group of insurers, the so-called "War Risk Insurers" who subscribed to Section Three of the Policy, are the insurers who promised to indemnify the alleged loss. "Let there be no mistake: ALC continues to contend — as it has all along that its claim should be paid by the WR Insurers, rather than the AR Insurers." (Opposition Brief (Dec. 30, 2024) 39:20-21.)

The Court concludes that the cause of Plaintiffs' alleged losses qualifies as a war peril. Under the War-Perils Exclusion, the losses are excluded from all-risk coverage under Sections One and Two of the Policy.

C. The 50/50 Clause

Nevertheless, Plaintiffs argue Defendants are not entitled to summary judgment because they breached a term called the "50/50 Clause." The clause is not part of the Policy, but rather part of the Policy slip, an underwriting agreement among the insurers who subscribed to the Policy. The clause reads, in relevant part,

> … in the event of loss of or damage to an aircraft identified on the schedule of aircraft … and where agreement is reached between the "Hull All Risks" Insurers and the "Hull War Risks" Insurers that the Insured has a valid claim under one or other policy where nevertheless it cannot be resolved within 21 days from the date of occurrence as to which policy is liable, each of the aforementioned groups of insurers agree, WITHOUT PREJUDICE to their liability, to advance to the Insured 50% of such amount as may be mutually

agreed between them until such time as final settlement of the claim is agreed…

(UMF No. 239.)

Plaintiffs interpret the 50/50 Clause as protecting them from a coverage "purgatory" — "a policyholder being indefinitely deprived of substantial insurance proceeds that — pursuant to the 50/50 clause — should have been paid within 21 days of loss." (Opposition Brief, 39:28, 40:1-2.) "This case," Plaintiffs argue, "makes painfully apparent precisely why the 50/50 clause exists and why it must be enforced as was intended: to benefit the insured." (*Id.* at 40:24-25.) "That conduct by all Insurers (including the AR Insurers [i.e., Defendants]) was a separate and self-standing breach of contract as set forth in [Plaintiffs'] complaint. [Citation.] According, regardless of whether this Court concludes as a matter of undisputed fact and law that [Plaintiffs'] loss was caused by a War Risks peril, [Defendants] are not entitled to summary judgment because a ruling on applications of the War Risks exclusion would not: (1) completely dispose of [Plaintiffs'] complaint, as is required for summary judgment; or (2) completely dispose of [Plaintiffs'] breach of contract claim, as is required for summary adjudication." (*Id.* at 40:2-8.)

Plaintiffs partly base all three of their causes of action on the 50/50 Clause. To support their claim of breach of contract (count 1), they allege, "In the alternative, and at a minimum, to the extent Defendants contend there is a question as to which coverage applies as between the All Risks coverage and the War Risks coverage, Defendants have violated the 50/50 clause. As discussed herein, there is no question a valid claim exists under one of these coverages, and in that situation, Defendants must pay at least the amount they mutually agree between them and in good faith should be paid towards the Insureds' covered losses." (First Amended Complaint, ¶ 95.) Similar allegations partly support Plaintiffs' claim of breach of the implied covenant of good faith

and fair dealing (count 2) and claim for declaratory relief (count 3). (*Id.* at ¶¶ 102(i), 114.)

Defendants reply with two principal reasons why the 50/50 Clause raises no triable issues of material fact. First is that Plaintiffs do not have standing to enforce it, given that the clause, as mentioned, appears not in the Policy but in a separate agreement between the insurers. "Plaintiffs therefore cannot enforce the clause against [Defendants] without both pleading and proving that they are all third-party beneficiaries to [the] separate agreement. [Citation.] Plaintiffs did neither." (Reply Brief (Feb. 6, 2025) 10:12-16.)

Defendants further argue the 50/50 Clause, by its terms, does not apply because of two express prerequisites that are not met here. First, the clause applies "in the event of loss of or damage to an aircraft identified on the schedule of aircraft," and second, "where agreement is reached between the 'Hull All Risks' Insurers and the 'Hull War Risks' Insurers that the Insured has a valid claim under one or other policy where nevertheless it cannot be resolved within 21 days from the date of occurrence as to which policy is liable…." Defendants suggest the clause might apply, for example, if "an aircraft crashe[d] mid-flight due to unknown causes: the loss is immediately obvious and agreed among insurers, but the cause [of the crash] is not." (Reply Brief, 11:6-8.) But here, Defendants point out, neither prerequisite is met; there has not been loss of or damage to an aircraft, and they have not agreed with the War-Risk Insurers that Plaintiffs have a valid claim under the Policy.

The Court finds persuasive Defendants' argument that the 50/50 Clause does not apply. Plaintiffs' position implies that Defendants (subscribers to Sections One and Two) and the War-Risk Insurers (subscribers to Section Three) should have agreed among themselves that the Policy — at least some part of it — covers the loss alleged. The Court does not interpret the 50/50 Clause as having forced on the insurers an "agreement to agree" that the Policy affords coverage. Defendants have maintained that the War-Perils Exclusion

applies, and Plaintiffs do not allege this position was unreasonable, given they do not dispute it. Defendants therefore did not breach the 50/50 Clause, or act in bad faith under its terms, by not agreeing with the War-Risk Insurers that Plaintiffs had "a valid claim under one or other policy."

* * * *

The undisputed material facts show that Plaintiffs' alleged losses were caused by a war peril within the meaning of the War-Perils Exclusion. Their claims for coverage are therefore excluded from all-risks coverage under Sections One and Two of the Policy.

IV. Conclusion

The Court GRANTS the All-Risks Insurers' motion for summary judgment.

Dated: _____

_____

SAMANTHA P. JESSNER
JUDGE OF THE SUPERIOR COURT

IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA

CASE NO. **CACE23002230** DIVISION: **07** JUDGE: **Tuter, Jack (07)**

ZEPHYRUS AVIATION CAPITAL, LLC, et al

Plaintiff(s) / Petitioner(s)

v.

BERKSHIRE HATHAWAY INTERNATIONAL INSURANCE LIMITED, et al

Defendant(s) / Respondent(s)

_____/

ORDER ON HULL DEFENDANTS MOTION TO DISMISS

This is an insurance coverage dispute relating to two aviation insurance policies. Plaintiff is an aviation leasing, servicing, and management company that leases aircrafts throughout the world. Plaintiff claims ownership to the aircraft in question and alleges the aircraft was insured by a Hull Policy and a War Risk Policy. On April 27, 2023, Defendants filed the *instant* Motion to Dismiss Counts III and IV of the Complaint, which seek coverage under the Hull Policy. The case centers on a commercial aircraft owned by Plaintiffs and leased to a Russian airline. **The aircraft continues to operate in Russia.** Plaintiff argues they lost use and possession of the aircraft following the outbreak of hostilities between Russia and Ukraine.

Defendants argue that changes to Russian law governing the use of the aircraft notwithstanding, Plaintiffs do not allege the aircraft experienced any physical damage. Defendants aver counts III and IV seek coverage under an insurance policy that only insures against "**physical loss or damage**" to the aircraft or its engines. Defendants argue that at most, Plaintiffs have alleged a change in the legal and geopolitical constructs, which define the aircraft's legal use but not its physical properties.

Defendants argue Florida courts have considered whether changes in law, which restrict the use of property, amount to "physical loss or damage" and have uniformly held they do not. Defendants argue this is so even when a change in the law is alleged to have

caused an insured to lose access or use to their property. Thus, Defendants contend Plaintiffs' claims seeking coverage under the Hull Policy fail as a matter of law because they do not allege the insured property experienced "physical loss or damage," and therefore counts III and IV should be dismissed.

In opposition, Plaintiffs allege that the subject aircraft, leased to a Russian commercial airliner, was lost in the aftermath of Russia's February 2022 invasion of Ukraine. Plaintiffs argue they have engaged in diligent efforts to repossess the aircraft from its lessee. Plaintiffs maintain the defendants have failed to pay the value of the lost aircraft. Plaintiffs argue the Defendants try to recast Plaintiffs' claim arising from the lost aircraft into a claim for "loss of use" of the property akin to a restaurant whose business was restricted or closed by governmental order during the early days of the COVID-19 pandemic. They further argue the COVID-19 business interruption insurance cases do not involve "lost" property. Plaintiffs contend they have suffered "actual harm." Essentially, Plaintiffs argue they have been deprived and dispossessed of their aircraft and assert the dispossession constitutes a "physical loss" under the policy, and the motion should be denied.

Plaintiffs do not allege the aircraft suffered any physical damage. Instead, they argue they suffered an insurable loss because they have been permanently deprived of the aircraft. Plaintiffs maintain in early March 2022, they emailed the Lessee to request it move the aircraft to Turkey. Thereafter, Plaintiff issued a Notice of Default, Notice of Lease Cancellation and Demand for Return of the Aircraft. In March 2022, the Russian Government prohibited aircraft from being moved out of Russia. Further, Plaintiffs allege Lessee has refused to return the aircraft and further allege since March 2022, the Lessee has remained in control of the aircraft without permission of Plaintiffs.

The relevant potion of the policy is located on page 51 of the Complaint (attached as Exhibit A). The All-Risk Policy covers "against all risks of physical loss or damage." The phrase "physical loss or damage" is not defined in the policy. Defendants argue that because there has been no physical damage to the aircraft itself, Plaintiffs claims fail as a matter of law. The Court agrees the language in question did not contemplate the complete "physical loss" of an aircraft due to a wartime conflict. Here, essentially

Plaintiffs claim the lessee stole the aircraft when they refused to return it. Although the parties each provided legal authority for their positions, the bulk of authority supports the Defendants position. Florida law holds "physical loss" requires some physical change to the insured property. Suhaag Garden, Inc., 344 So. 3d at 586, (quoting Commodore, Inc. v. Certain Underwriters at Lloyd's London, 342 So. 3d 697,702) (Fla.3d DCA 2022) "direct physical loss" requires some actual alteration to the insured property."). Marna Jo's, Inc. v. Sparta Ins. Co., 17-CV-23362-KMM, 2018 WL 3412974, at *9 (S.D. Fla. June 11, 2018), affd, 823 Fed. Appx. 868 (llth Cir.2020) ("A direct physical loss 'contemplates an actual change in the insured property.'") Plaintiffs do not allege a tangible change to their property, and the Complaint fails because it does not.

The aircraft in question continues to operate and did not suffer physical loss or damage. The Hull Defendants Motion to Dismiss Counts III and IV is **GRANTED**, with prejudice.

DONE AND ORDERED in Chambers at Broward County, Florida on 30th day of June, 2023.

CACE23002230 06-30-2023 3:23 PM

CACE23002230 06-30-2023 3:23 PM
Hon. Jack Tuter
CIRCUIT COURT JUDGE
Electronically Signed by Jack Tuter

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Castlelake, L.P. v. Lancashire Airline War Consortium/Airline Hull

Minnesota District Court, County of Hennepin, Fourth Judicial District

April 8, 2024, Decided; April 8, 2024, Filed

Court File No. 27-CV-22-17450

Reporter
2024 Minn. Dist. LEXIS 572 *

Castlelake, L.P., Plaintiff, v. Lancashire Airline War Consortium/Airline Hull and Allied Perils Consortium as per LPSO Registered Consortium No. 9381 YOA 2020, et al., Defendants.

Judges: [*1] Susan M. Robiner, Judge of District Court.

Opinion by: Susan M. Robiner

Opinion

ORDER DENYING DEFENDANTS' MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS

This matter came before the Honorable Susan M. Robiner on February 15, 2024 upon certain Defendants'[1] Motion for Partial Judgment on the Pleadings. Attorneys Scott M. Flaherty, Esq., John H. Mathias, Jr., Esq., and David M. Greenwald, Esq. appeared on behalf of Plaintiff Castlelake, L. P. ("Castlelake"). Attorneys Jeanette M. Bazis, Esq., and Aidan M. McCormack, Esq., appeared on behalf of the moving Defendants.

Based upon all the files, records, and proceedings herein, the Court makes the following:

ORDER

1. Moving Defendants' Motion for Partial Judgment on the Pleadings is DENIED.

2. The accompanying memorandum is incorporated herein.

Dated: April 8, 2024

BY THE COURT:

/s/ Susan M. Robiner

Susan M. Robiner

Judge of District Court

MEMORANDUM

I. Summary of Relevant Pleadings

Castlelake served and filed a 35-page, 151-paragraph Amended Complaint. Nevertheless, the relevant allegations for this motion can be readily summarized as follows.

a. Allegations Regarding Alleged Covered Event

i. Castlelake leased 18 commercial aircraft ("Aircraft") to various Russian airlines ("Lessees"). **[*2]** Am. Compl. ¶ 1.

ii. On February 24, 2022, Russia invaded Ukraine. Am. Compl. ¶ 38.

iii. Castlelake immediately took steps to recover the Aircraft. Am. Compl. ¶¶ 40-46.

iv. On March 1, 2022, Castlelake sent termination notices to the Lessees directing them to cease operations, ground the leased Aircraft, and cooperate with Castlelake to return the Aircraft to Castlelake. Am. Compl. ¶¶ 46, 56.

v. These efforts were unsuccessful. Am. Compl. *See., e.g.*, ¶ 47.

[1] The moving Defendants are identified in footnote 1 of Defendants' Memorandum in Support of Their Motion for Partial Judgment on the Pleadings. They are referred to herein as "Moving Defendants."

vi. Several Lessees informed Castlelake that the Russian government had directed the Lessees to not return the Aircraft. Am. Compl. ¶ 47.

vii. The Lessees have "steadfast[ly] refus[ed] to return the Aircraft while maintaining exclusive use and control of the Aircraft." Am. Compl. ¶ 4.

viii. As a result, Castlelake has been deprived of use and possession of the Aircraft "by reason of theft and/or confiscation in complicity with the Russian government." Am. Compl. ¶ 57.

b. Relevant Policy Language

This motion relates to Plaintiff's claims under the All Risk Policy which are the subject of Counts V - VIII of Plaintiff's Amended Complaint.

i. The All Risk Policy "provides coverage for *all risks of physical loss or damage*." Am. Compl. ¶¶ 123, 130, **[*3]** 138 (emphasis added).
ii. The operative language is set forth below:

1.1 Contingent Hull

To cover Aircraft and/or Engines not in the care, custody or control of the Insured or their agents in which the Insured has a Financial Interest (as set forth in the Policy Schedule) against all risks *of physical loss or damage howsoever occasioned, sustained during the Policy Period* except as hereinafter excluded.

...

1.3 Possessed Hull

To cover Aircraft and/or Engines in which the Insured has a Financial Interest (as set forth in the Policy Schedule), being Aircraft that are.

a) awaiting commencement of a Lease Agreement

b) returned on expiry/termination of a Lease Agreement

c) repossessed (or in the course of repossession) from a Lease Agreement against *all risks of physical loss or damage* except as hereinafter excluded (emphasis added).

II. Conclusions of Law

a. Motion for Judgment on the Pleadings Standard

Moving Defendants move for partial judgment on the pleadings. Under *Minn. R. Civ. P. 12.03*, "[a]fter the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." The moving party faces a demanding standard in bringing such a motion. All pleadings are to be accepted **[*4]** as true for purposes of evaluating the motion, and they are to be construed in favor of the non-moving party. *Bodah v. Lakeville Motor Express, Inc., 663 N.W.2d 550, 553 (Minn. 2003)* (facts alleged in the Complaint must be accepted as true); *Homan v. Barber, 149 Minn. 421, 184 N.W. 19, 20 (Minn. 1921)* (pleadings must be construed favorably to the party against whom the judgment is asked). The motion must be denied if a colorable claim is stated. *Zutz v. Nelson, 788 N.W.2d 58, 61 (Minn. 2010)*; *Gostomezik v. Gostomezik, 191 Minn. 119, 253 N.W. 376, 377 (Minn. 1934)* (motion for judgment on the pleadings not favored and not sustained if "by a liberal construction the pleading can be held sufficient").

b. Coverage Dispute

Succinctly, Moving Defendants assert that the phrase "physical loss or damage" requires "physical alteration of the property" as a matter of settled law, (Defs.' Initial Memo. at 2), and since Plaintiff does not allege that the Aircraft have been physically altered, there is no coverage. In support of this interpretation, Moving Defendants rely on several Minnesota state and federal cases, as well as cases from outside Minnesota. The principal Minnesota cases upon which Defendants rely are *Pentair,*[2] *Oral Surgeons,*[3] *Bachmans, Olmsted, and Torgerson*,[4] all of which are discussed below. All but one, *Pentair*, relate to claims brought by insureds for claimed physical loss or damage due to the COVID-19 pandemic.

Plaintiff asserts that the All Risk policy, by its express terms, covers "all risks of physical loss or damage" and that the plain meaning of physical loss includes theft, as the policy recognizes in referencing theft as a type of claim for which there is no deductible. Pl.'s Memo. at 10. It argues that Defendants' insistence that there be physical alteration renders meaningless the policy's use of the two words "loss" and "damages." Pl.'s Memo. at

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[2] *See infra* at 7 for full citation.

[3] *See* ***[*5]*** *infra* at 8 for full citation.

[4] *See infra* at 10 note 7 for full citations.

13. It distinguishes the cases relied upon by Defendants and relies on the plain meaning of the policy language as well as Minnesota and non-Minnesota cases for its interpretation of "physical loss or damage" (*Thane Hawkins, Nautilus Gr., Manpower, Inc.*[5]). These cases, unlike those cited by Moving Defendants, involve theft of insured property.

c. Court's Analysis

Before analyzing the specific language at issue, the Court notes that there are settled principles that provide general guidance.

First, insurance contracts are to be given their plain and ordinary meaning. *Gen. Mills, Inc. v. Gold Medal Ins. Co., 622 N.W.2d 147, 151 (Minn. Ct. App. 2001)*.

Second, any ambiguity in an insurance contract is construed against the drafting insurer, regardless of the sophistication or balance of bargaining power **[*6]** between the contracting parties. *Id. at 151*, citing *St. Paul Fire & Marine Ins. Co. v. MetPath, Inc., 38 F. Supp. 2d 1087, 1092 (D. Minn. 1998)*.

Third, an all-risk policy is recognized as a broad form of coverage; it is intended to cover fortuitous losses not resulting from misconduct or fraud. *Gen. Mills, Inc., 622 N.W.2d at 151*, citing 13A George J. Couch, *Couch on Insurance* § 48:141 (2d ed. 1982); *see also 30 A.L.R. 5th 170* ("all-risks insurance [extends] to risks not usually contemplated, and generally allows recovery for all fortuitous losses"); 7 *Couch on Ins.* § 101:7 (3d ed. Nov. 2023 update) ("'All-Risk' policies provide coverage for all risks unless the specific risk is excluded [but] . . . only insure against a loss that arises from a fortuitous event that is unexpected and not probable").

Fourth, a contract is to be construed to give meaning to all its terms. A construction that renders certain terms superfluous is disfavored over a construction that gives meaning to all terms. *Brookfield Trade Center, Inc. v. Cnty. of Ramsey, 548 N.W.2d 390, 394 (Minn. 1998)*.

i. Physical Loss or Damage: Principles of Contract Construction Favor Plaintiff

No one who has lost her cellphone exclaims that she has damaged her cellphone, and vice versa. Here, Plaintiff is not claiming that its Aircraft were damaged. It is claiming that its Aircraft are gone.

Moving Defendants, however, assert that loss without "physical alteration" **[*7]** is not covered. Under their interpretation, no form of loss, including theft, is covered unless it also involves "physical alteration of the property." Defs.' Initial Memo. at 8.

The Court addresses *infra* the cases upon which Moving Defendants rely for this argument. For now, the Court focuses on the strength of the argument in light of common sense, the English language, and canons of construction.

Plain, Ordinary Meaning of Contract Terms. A court is to interpret an insurance contract applying the plain and ordinary meanings of the words used. *Gen. Mills, Inc., 622 N.W.2d at 151*. Here, the plain and ordinary meaning of the phrase "physical loss or damage" describes two separate potential events: (1) physical loss; or (2) physical damage. These are two distinct phenomena. Moving Defendants, by insisting that "loss" does not mean loss unless it also means physical alteration (a "Loss Plus Alteration" argument), Moving Defendants are ignoring the plain meaning of the word "loss" which does not incorporate the concept of alteration. *See Loss, Cambridge Dictionary*, https://dictionary.cambridge.org/us/dictionary/english/loss (April 4, 2024) (defining "loss" as "no longer hav[ing] something or hav[ing] less of something"); **[*8]** *see also State v. Currin, 974 N.W.2d 567, 573 (Minn. 2022)* ("loss" defined as "the condition of being deprived or bereaved of something").

Canon Against Superfluity. Moving Defendants' interpretation renders the use of the word "damage" superfluous. The *Nautilus* Court recognized this reality when an insurer presented the identical argument. *Nautilus Group, Inc., v. Allianz Global Risks US, 2012 WL 760940 (W.D. Wash. Mar. 8, 2012)*. In *Nautilus*, the insured operated a business in China through a Chinese subsidiary. When it attempted to terminate the lead employee of the Chinese office, that employee refused to leave and ultimately took over the office using his own security force. Nautilus responded by firing all the employees and then made an insurance claim for property left at the seized premises, including the business license and "chop" - a unique, carved ink stamp necessary to conduct business in China.

Allianz, the insurer, insisted that the insured "must show 'direct physical loss or damage to' covered property to

[5] *See infra* at 6, 7, 9 for full citations.

state a valid claim and that 'this required proof that the property at issue has been physically altered.'" Id. at *6. The Court rejected Allianz's interpretation of the policy language and caselaw and concluded that:

> if "physical loss" was interpreted to mean "damage", then one or the other would be superfluous. The fact that they **[*9]** are both included in the grant of coverage evidences an understanding that physical loss means something other than damage.

Id. at *7; *see also* Manpower, Inc. v. Ins. Co. of State of Pa., 2009 WL 3738099 (E.D. Wi. November 3, 2009).

Finally, Moving Defendants' interpretation would lead to the absurd result of defeating any theft claim under an All Risk policy where the thief has not kept the victim apprised of the physical condition of the stolen property. Since the initial burden is on an insured to establish coverage, no insured could make a successful theft claim under an All Risk policy unless it: 1) knew the physical condition of the property *that it no longer possessed*; and 2) the physical condition had been altered. This outcome would defeat the expectations of a reasonable person purchasing All Risk coverage for physical loss or damage who would reasonably expect such coverage to cover theft. Atwater Creamery Co. v. W. Nat. Mut. Ins. Co., 366 N.W.2d 271, 277 (Minn. 1985)("[t]he objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations"), citing R.E. Keeton, *Insurance Law Rights at Variance with Policy Provisions*, 83 Harv. L. Rev. 961, 967 (1970).

As discussed below, this outcome is not supported by the caselaw.

[*10] ii. The Caselaw Does Not Support Moving Defendants' "Loss Plus Alteration" Interpretation

The relevant caselaw does not stand for the proposition that a physical loss must also include physical alteration for coverage to attach. First, Pentair, Inc v. Am. Guar. & Liab. Ins. Co. (400 F.3d 613 (8th Cir. 2005)) involved a claim for business interruption losses by Pentair under an all-risk policy when an earthquake in Japan disabled a substation that served one of Pentair's suppliers, rendering the supplier unable to function and supply Pentair. Pentair boldly argued that "the supplier's inability to function after the loss of power constituted direct physical loss or damage." Id. at 616.

The 8th Circuit affirmed the district court, holding that where the factory was not itself damaged there was no direct loss or damage and the factory's inability to function did not constitute a physical loss or damage. Id. at 616.

This outcome is unremarkable. In *Pentair*, there was no dispute that the factory was not physically damaged, nor was it gone—i.e., the factory was not physically lost. Critically, the *Pentair* Court never held that all physical loss claims require loss plus physical alteration. Rather, it was addressing the specific position advanced by Pentair—that loss of use is equivalent to **[*11]** physical loss. *Id.* The case at bar is very different. Plaintiff is alleging that its Aircraft have been involuntarily taken by not being returned upon demand, and that, consequently, they have suffered the physical loss of these insured Aircraft.

Next, Oral Surgeons, another case relied upon by Moving Defendants, is the quintessential COVID-19 case seeking coverage for physical loss or damage. Oral Surgeons, P.C. v. Cincinnati Ins. Comp., 2 F.4th 1141 (8th Cir. 2021). There, a dental office stopped performing non-emergency services due to a state mandate related to COVID-19. It submitted a loss of income claim to its insurer under the policy language "accidental physical loss or accidental physical damage." The Court held that the policy requires direct physical loss or physical damage to trigger coverage. Id. at 1144. It also stated that "there must be some physicality" to the loss or damage, citing, *inter alia*, Couch on Insurance for the principle that a loss must be "material or perceptible" at some level. *Id.*, citing 10A Steven Pitt *et al.*, Couch on Insurance, §148:46 (3d ed. 2021).

Not surprisingly, the Oral Surgeons Court, like many courts interpreting similar language following COVID-19 closures or disruptions, held that these losses were not covered because the insured did not actually **[*12]** experience physical damage to an insured property or a physical loss of an insured property. But, like *Pentair*, the Oral Surgeons case does not guide the outcome of this case. Here, unlike in Oral Surgeons, there is a physical loss alleged. To use the language that the Oral Surgeons Court quoted favorably from the Couch treatise, there has been a "loss of something material or perceptible." *Id.*

Moving Defendants use Oral Surgeons to assert that

physical loss "requires 'a physical alteration, physical contamination, or physical destruction'" to the insured property. Defs.' Initial Memo. at 8, quoting *Oral Surgeons*. Yet, this quotation is misleading. The actual language in *Oral Surgeons* states that "there must be some physicality to the loss or damage of property" and then identifies "physical alteration, physical contamination, or physical destruction" as *examples* of such loss—not as the only forms of such loss.[6]

Nothing in either the *Oral Surgeons* opinion or the Couch treatise requires this Court to conclude that the physical dispossession of the Aircraft does not constitute a physical loss. *See., e.g., State v. Currin, 974 N.W.2d at 573* ("loss" defined as "the condition of being deprived or bereaved of something" citing *The American Heritage Dictionary* at 540, or the "diminution of one's possessions or advantages; **[*13]** detriment or disadvantage involved in being deprived of something," citing *Oxford English Dictionary* at 1009); *see also Thane Hawkins Polar Chevrolet, Inc. v. Truck Ins. Exchange, 1995 WL 70152 (Minn. Ct. App. Feb. 21, 1995), *2* ("'physical loss or damage' is susceptible only to a limited meaning: the direct and accidental injury to, destruction of, or theft of tangible property").

Almost all the other Minnesota cases Moving Defendants cite on this issue are COVID-19 cases.[7] These COVID-19 cases are inapt for the reasons set forth *supra* in discussing *Oral Surgeons*. Other than *Pentair*, Defendants cite only two non-COVID-19 cases in their initial brief when interpreting "physical loss or damage": 1) *NMA Invs. L.L.C. v. Fid. & Guar. Ins. Co., 627 F. Supp. 3d 993 (D. Minn. 2022)*; and 2) *Cup Foods, Inc. v. Travelers Cas. Co. of Am.*, 2023 WL 259602 (D. Minn. Jan. 23. 2023). In their reply brief, they also cite *Source Foods Technology, Inc. v. U.S. Fidel. & Guar. Co., 465 F.3d 834 (8th Cir. 2006)*.

NMA Investments and *Cup Foods* are readily distinguishable. Both involve businesses being barricaded in the aftermath of the George Floyd murder. There, as with the COVID-19 cases, there was no colorable claim that the barricaded properties were physically damaged or that the insureds were dispossessed of their property.

Source Food Technology is more factually relevant. There, a beef wholesaler ordered beef product from a Canadian supplier. The product was prevented from crossing the international border on orders from the United States government after mad cow disease **[*14]** was discovered in a Canadian cow. There was no evidence that the insured's beef product was contaminated. Instead, the insured could not gain possession of the product due to the government closing the border to Canadian beef products.

The *Source Food* Court held that there was no physical damage since the product was not itself contaminated, distinguishing *Gen. Mills, Inc. Id. at 836-37*. It also held that there was no physical loss concluding that characterizing the "inability to transport its truckload of beef product across the border and sell the beef product in the United States as direct physical loss to property would render the word 'physical' meaningless." *Id. at 838*.

The inability to access beef product is analogous to Plaintiff's inability to access their Aircraft. Nevertheless, this Court will not adapt the *Source Food* court's reasoning. Even if it were precedent, which it is not, the language scrutinized in *Source Food* is meaningfully different from the case at bar. In *Source Food*, the policy language referred to physical loss "to" property. The *Source Food* Court considered the use of the preposition "to" to be "significant" and expressly opined that the result might be different if the policy language stated loss "of" property. *Id.* Here, we do not **[*15]** have prepositions to wrestle with. Here, the operative phrase is "all risks of physical loss or damage." Given that insurance contracts are to be construed against their drafters, it is reasonable, on a motion for judgment on the pleadings, for this Court to give the insured the benefit of construing the language to provide for physical loss *of* the insured property - rather than physical loss *to* the insured's property. Here, there has been a physical loss of the property. Plaintiff has been dispossessed of the Aircraft, despite terminating the leasehold interests of the Lessees and demanding the return of the Aircraft. *See* Am. Compl., ¶ 46 (termination notices issued).

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[6] The *Oral Surgeons* Court also quoted Couch as stating that physical loss requires "a distinct, demonstrable physical alteration of the property." *Id. at 1144*. It is certainly understandable that it would quote this language given the claim being made by the dental office—i.e., that it suffered damage or loss even though its office was completely intact.

[7] *Bachman's, Inc. v. Florists' Mut. Ins. Co., 525 F. Supp. 3d 984 (D. Minn. 2021)*; *Olmsted Medical Center v. Cont'l Cas. Co., 65 F.4th 1005 (8th Cir. 2023)*; *Torgerson Props., Inc. v. Cont.'l Cas. Co., 38 F. 4th 4 (8th Cir. 2022)*; *Armory Hosp., LLC v. Philadelphia Indem. Cas. Co., 2022 WL 16706684 (D. Minn. Nov. 2, 2022)*; *HealthPartners, Inc., v. Am. Guarantee & Liab. Ins. Co., 587 F. Supp. 3d 874 (D. Minn. 2022)*

S.M.R.

iii. The New Arguments in the Reply Brief Do Not Change the Outcome

In their reply, Moving Defendants make two new arguments.

First, they engage, for the first time, with Plaintiff's theft argument. Defendants state, without authority, that certain kinds of theft "may involve physical alteration to property—cases where the property is *carried off* or experiences structural damages." Defs.' Reply at 3 (emphasis added). They fail completely to explain how property being "carried off" constitutes physical alteration. They fail **[*16]** to define "carried off" at all. Importantly, the new statement appears at odds with Moving Defendants' initial brief which insists that loss must include some physical change to the property itself. *See. e.g.*, Defs.' Initial Mem. at 8.

It is also at odds with Moving Defendants' position at oral argument. There, the Court posed a hypothetical of a plane being taken from a hangar in the middle of the night, and asked whether that would be covered. Moving Defendants' counsel responded that without knowing if the plane experienced some physical alteration, he could not opine as to whether the plane was covered. The Court's hypothetical was that of a plane being "carried off" without any information about whether the plane was also physically altered. Under the "Loss Plus Alteration" position taken by Moving Defendants in their initial memorandum and at oral argument, the stolen plane would not be covered. In sum, the Court is at a loss to understand what Moving Defendants mean in their reply brief when they acknowledge there could be coverage if the Aircraft were "carried off".

Second, they argue that Plaintiff has not adequately pled theft because it has not pled all the elements of criminal **[*17]** theft under Minnesota criminal law, including *mens rea*. Defs.' Reply at 4. This argument is puzzling since Moving Defendants also insist that the case does not turn on establishing the legal elements of theft. *Id.*

The Court agrees that it does not need to decide whether theft has been adequately pled. It need only decide whether physical loss has been adequately pled. For the reasons set forth above, the Court holds that physical loss has been adequately pled.

Defendants' motion for judgment on the pleadings is DENIED.

Castlelake, L.P. v. Lancashire Airline War Consortium/Airline Hull

Minnesota District Court, County of Hennepin, Fourth Judicial District

September 30, 2024, Decided; September 30, 2024, Filed

Court File No. 27-CV-22-17450

Reporter
2024 Minn. Dist. LEXIS 573 *; 2024 LX 13700

Castlelake, L.P., Plaintiff, v. Lancashire Airline War Consortium/Airline Hull and Allied Perils Consortium as per LPSO Registered Consortium No. 9381 YOA 2020, et al., Defendants.

Prior History: *Castlelake, L.P. v. Lancashire Airline War Consortium/Airline Hull, 2024 Minn. Dist. LEXIS 572 (Apr. 8, 2024)*

Judges: [*1] Susan M. Robiner, Judge of District Court.

Opinion by: Susan M. Robiner

Opinion

ORDER PARTIALLY GRANTING AND PARTIALLY DENYING PARTIES' MOTIONS FOR SUMMARY JUDGMENT

This matter came before the Honorable Susan M. Robiner on July 25 and July 26, 2024, upon multiple parties' cross motions for summary judgment. Appearances were noted on the records. Based upon all the files, records, and proceedings herein, the Court makes the following:

ORDER

1. The Court GRANTS the motion for partial summary judgment of the War Risk Defendants, Fidelis, and Chubb and declares that claims related to the Aeroflot 3 are dismissed in their entirety.

2. Except as otherwise noted above, all remaining motions for summary judgment are DENIED.

3. The accompanying memorandum is incorporated herein.

Dated: September 30, 2024

BY THE COURT:

/s/ Susan M. Robiner

Susan M. Robiner

Judge of District Court

MEMORANDUM

I. SUMMARY OF MATERIAL AND UNDISPUTED FACTS

Certain introductory facts are well-established, uncontroversial, and provide guidance for the legal analysis. They are set forth herein.

a. Introductory Facts

1. Castlelake, L.P., ("Castlelake") is a private investment firm that contracts with securitization trusts and other financing structures to **[*2]** service aircraft ("Aircraft") leased to airlines. The services it provides include negotiating and obtaining insurance for the leased Aircraft and pursuing insurance claims related to the Aircraft. The serviced Aircraft are owned by various non-parties ("Owner/Lessors").

2. Defendants are all insurance companies that have subscribed to the policies at issue in this lawsuit. They are grouped as follows:

"All Risk Defendants" are those 7 Defendants represented by Greene Espel, PLLP and DLA Piper LLP and are referred to in abbreviated form as Tokio, Global, Great Lakes, Convex, Faraday, Axis, HDI, Starr, and QBE. They moved to dismiss Plaintiff's Counts V, VI, VII, and VIII.

"War Risk Defendants" are those 6 Defendants represented by Meagher &

Geer, P.L.L.P. and Locke Lord, LLP and are referred to in abbreviated form as Lancashire, Liberty, Liberty Mutual, MS Amlin, Chaucer, and SGL. They moved to dismiss all claims as they relate to the 3 aircraft that Aeroflot[1] leased ("Aeroflot 3").
Chubb European Group SE ("Chubb") is represented by Cozen O'Connor and O'Melveny & Myers, LLP. It moved to dismiss all counts.

XL Specialty Insurance Company ("XL") is represented by O'Meara Wagner and Crowell **[*3]** & Moring, LLP. It moved to dismiss all counts.
Fidelis Underwriting Limited ("Fidelis") is represented by Stinson, LLP, and Fields Howell LLP. It joined in the motion brought by the War Risk Defendants.

3. Castlelake entered into an All Risk insurance policy ("ARP") and a War Risk insurance policy ("WRP") for the 18 Aircraft that it services for the policy period of December 19, 2020, to December 19, 2021, and extended to March 31, 2021.[2]
4. In summary, the ARP covers all risks of physical loss or damage if the coverage conditions are met and except as excluded. WRP covers all risks of physical loss or damage if its coverage conditions are met and except as excluded. War perils are excluded from the ARP coverage and included in the WRP coverage—as more fully described in the policies which are incorporated herein by reference.

5. Castlelake is a named insured on these policies. The parties agree that the Owner/Lessors also meet the definition of additional insureds.

b. Other facts relevant to the disputed issues are contained in the Analysis below. The facts referred to in the Analysis are contained in the record, admissible, and not genuinely disputed.[3]

II. Summary Judgment Standard

Pursuant **[*4]** to Rule 56 of the Minnesota Rules of Civil Procedure and settled case law, summary judgment shall be awarded where there are no genuine issues of material fact and a party is entitled to judgment as a matter of law. *Minn. R. Civ. P. 56.03*. A trial court shall not decide any issues of disputed fact in deciding summary judgment, but any party challenging summary judgment may not rely upon speculation but must present specific facts that would foreclose summary judgment. *Anderson v. Liberty Lobby Inc., 477 U.S. 242, 256, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*.

Summary judgment is not designed to deny a party of its right to a full hearing on the merits of any fact issue. Rather, summary judgment is an extraordinary remedy—a "blunt instrument" to be employed "only where it is perfectly clear that no issue of fact is involved." *Poplinski v. Gislason, 397 N.W.2d 412, 414 (Minn. Ct. App. 1986)*, *rev. denied* (Minn. Feb. 18, 1987) (*quoting* *Donnay v. Boulware, 275 Minn. 37, 144 N.W.2d 711, 716 (Minn. 1966)*). Based on the governing standard and established case law, the Court proceeds with caution in deciding summary judgment motions.

III. Analysis

The moving parties have raised multiple legal issues and many motions overlap. Consequently, the Court will address the motions issue by issue identifying which party(ies) have moved on each issue.

a. Castlelake's Standing to Pursue the Litigated Claims (Chubb, All Risk Defendants, and XL)

Chubb and others[4] have moved to dismiss Castlelake's **[*5]** claims entirely asserting that Castlelake has not experienced a physical loss in its own right, and that if the Owner/Lessors have experienced a physical loss, Castlelake may not properly bring those claims as a matter of law. Put otherwise, Chubb argues that Castlelake does not have an insurable interest and therefore no standing to bring

[1] Aeroflot is a Russian airline.

[2] Or April 1, 2021, in the case of one policy issued by Starr.

[3] An issue is only genuinely disputed if there is substantial evidence to create an issue of fact. *DLH, Inc. v. Russ, 566 N.W.2d 60, 70 (Minn. 1997)*.

[4] All Risk Defs.' Br. at 14-15; XL Br. at 6-7. Chubb took the lead on briefing this issue and consequently, this memorandum will refer to Chubb when referring to the arguments presented on this issue even though Chubb is joined by the All Risk Defendants and Defendant XL.

suit.

The definition of "Insured" in all policies includes not only Castlelake, but also other entities with different levels of interest in the Aircraft. For example, the Owner/Lessors, who all parties agree are additional insureds under the Policies, have title to the Aircraft and the right to lease them to third party lessees.

No one disputes that Castlelake is a named insured on the policies. However, according to the policies, coverage exists for aircraft "in which the Insured has a financial interest." ARP, §§ 1.1, 1.3; WRP, §§ 1.1, 4.1. Chubb argues that Castlelake has no financial interest in the Aircraft, but rather only an interest in a servicing fee—which it has not pled as a loss.

Castlelake makes two counterarguments. First, it asserts that its servicing fee interest is itself a sufficient financial interest to create an insurable interest **[*6]** under the Policies. Second, it argues that it is presenting the claims of the Owner/Lessors pursuant to *Minn. R. Civ. P. 17.01* which states that "a party with whom or in whose name a contract has been made for the benefit of another, . . . may sue in that person's own name without joining the party for whose benefit the action is brought." Additionally, Castlelake presents evidence that the Owner/Lessors have ratified its actions as further legal support under *Minn. R. Civ. P. 17.01* which provides that "[n]o action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification . . . and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest."

i. Castlelake Has an Insurable Interest Sufficient to Withstand Summary Judgment.

First, the Court agrees with Castlelake that its servicing interest is sufficient to create an insurable interest.[5] In *Anderson v. State Farm Fire & Cas. Co., 397 N.W.2d 416 (Minn. Ct. App. 1986)*, the court faced the issue of what constituted an insurable interest. There, two parties insured a garage: William Anderson and his former wife, Nancy Anderson. Nancy Anderson was awarded **[*7]** the garage in the divorce but allowed William Anderson to use the garage. He purchased insurance on the garage during the relevant period. When the garage burned down, William Andersons's insurer, State Farm, refused to pay him for the value of the garage, claiming he had no insurable interest.

The court first noted that the issue of insurable interest *vel non* is a fact issue. *Id. at 417*. The court then held that William Anderson had no insurable interest—only a limited right to occupancy. However, it confirmed that "'insurable interests' are not necessarily synonymous with absolute property rights." *Id. at 418*. Rather, an insured had an insurable interest "if, by the destruction of the property, he will suffer a loss, whether he has or has not any title to, lien upon, or possession of the property itself." *Id.* quoting *Banner Laundry Co. v. Great E. Cas. Co., 148 Minn. 29, 180 N.W. 997, 999 (Minn. 1921)*.

Chubb relies upon *Hane v. Hallock Farmers Mut. Ins Co., 258 N.W.2d 779 (Minn. 1977)*, and *Crowell v. Delafield Farmers Mut Fire Ins. Co., 453 N.W.2d 724 (Minn. Ct. App.)*, *aff'd*, *463 N.W.2d 737 (Minn. 1990)*, to assert that Castlelake has no insurable interest as a matter of law and undisputed fact. Yet, these cases do not support this conclusion. In *Hane*, the appellate court found no insurable interest where a farmer had assigned his vendee's interest in a contract for deed to a third party and thereafter had only an informal, unwritten opportunity to repurchase **[*8]** the farm at some unspecified time in the future. The court had little trouble concluding that this vague opportunity did not constitute an insurable interest. *Hane, 258 N.W.2d at 781-82*. Here, Castlelake's interest is neither informal nor vague and has a clear financial value.

In *Crowell*, the Minnesota Court of Appeals held that a landowner whose farm was in foreclosure nevertheless had an insurable interest when the farmhouse burned down after foreclosure and after the homeowner's redemption period, but before the expiration of his statutory right of first refusal. There, although the bank had absolute title to the land, the farmer had a statutory right of first refusal that created "a reasonable expectation to derive a benefit from the continued existence of the farmhouse." *Crowell, 453 N.W.2d at 727*. Notably, that reasonable expectation did not only allow the claim to survive summary judgment; it resulted in summary judgment in the farmer's favor.[6]

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[5] Whether it can claim a total loss of that insurable interest is another issue addressed *infra* III(f).

[6] It is also noteworthy that the *Crowell* Court took into consideration that the insurance company did not cancel the farmer's insurance after the foreclosure. *Id. at 726*. Here,

As stated above, an insurable interest does not need to be an absolute right of property if the insured would suffer a loss regardless of whether the insured holds title to the property. Castlelake's interest is sufficient to survive summary judgment on this issue. However, since Castlelake is seeking **[*9]** to recover for interests *other than its servicing interest*, the question becomes whether it has standing to advance the insurable interests of the Owner/Lessors.

ii. There Are Issues of Fact Regarding Castlelake's Standing to Advance Claims of the Owner/Lessors

While Defendants mightily dispute that the Owner/Lessors have suffered a physical loss, *see infra* at III(b), they argue that if the Owner/Lessors can establish a physical loss, Castlelake may not recover for that loss in this lawsuit because the loss is experienced by a different insured (the Owner/Lessors) that Castlelake does not represent. Castlelake relies on its servicing agreement to support its proceeding on behalf of the Owner/Lessors. But Chubb asserts that the servicing agreements between Plaintiff and the Owner/Lessors do not assign a right to recover. Castlelake also presents facts to establish that the Owner/Lessors have ratified the lawsuit. Chubb, however, claims that there is insufficient evidence that the Owner/Lessors have ratified this legal action.

Minn. R. Civ. P. 17.01 provides the legal standard by which to decide whether Plaintiff can proceed on behalf of the real parties in interest. It states:

> Every action shall be prosecuted **[*10]** in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, *a party with whom or in whose name a contract has been made for the benefit of another*, or a party authorized by statute may sue in that person's own name without joining the party for whose benefit the action is brought. *No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest*; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.
>
> Minn. R. Civ. P. 17.01 (emphasis added).

First, the Court observes that the rule does not require an assignment of the right to recover. Instead, it allows "a party with whom or in whose name a contract has been made for the benefit of another" to sue in that person's own name without joining the party for whose benefit the action is brought. *See also* Feldman v. Arnold, 158 Minn. 243, 197 N.W. 219, 221 (Minn. 1924) ("any person in whose name a contract is made for the benefit of another may bring suit"). In other **[*11]** words, an assignment may be one avenue to bring an action originally held by another, but Rule 17.01 allows a contracting party to bring an action on behalf of a third-party beneficiary. The relevant inquiry relates to third-party beneficiary status, not assignee status. Consequently, the Court considers whether there are sufficient facts to establish that the insurance contracts at issue were entered into by Castlelake for the benefit of third parties—i.e., Owner/Lessors.

In Minnesota, a party has third-party beneficiary rights under a contract where it is "an intended beneficiary of the contract." Hickman v. SAFECO Ins. Co. of Am., 695 N.W.2d 365, 369 (Minn. 2005). On this point, there is strong evidence that the insurance contracts were entered into for the benefit of the Owner/Lessors. The servicing agreements with the Owner/Lessors specifically provide that Castlelake is obligated to obtain insurance for the Aircraft that benefits the Owner/Lessors. Chandler Decl. Ex. 34 (servicer shall "source and arrange" insurance for the Aircraft).

And Defendants *agree*. In Chubb's brief, it quotes a Castlelake representative who stated under oath that Castlelake "contracted [with] the owners and lessors to procure insurance in respect of these named aircraft, take out **[*12]** this policy on their behalf, in accordance with the servicing agreements, and we do so therefore by taking it out in our own name as the insured party." Chubb Br. at 23, n.7. It provides this quote to support one of its arguments and even adopts the phrase itself elsewhere in its brief. *See* Chubb Br. at 21 ("Castlelake is just a servicer that contracted to provide insurance for third-party Lessors that own the aircraft"). The Court concludes that, at a minimum, there are issues of fact as to whether Castlelake may sue on behalf of the Owner/Lessors, the real parties in interest, to recover

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similarly, the insurance policies were never cancelled due to any claimed lack of an insurable interest.

the "total loss" of the Aircraft. *See infra* at III(f).[7]

b. Physical Loss Dispute (Castlelake, Chubb, XL)

Plaintiff is an Insured under the ARP which, by its express terms, covers "all risks of physical loss or damage." Plaintiff is also an Insured under the WRP which similarly provides coverage for "all risks of physical loss or damage" presuming that Plaintiff establishes a peril covered by the WRP.

Castlelake moves for a summary declaration that it "suffered a total 'physical loss' of its 18 aircraft under the All-Risk and the War Risk policies." Castlelake Notice of Mot. and Mot. at 2. Defendants **[*13]** Chubb and XL have cross-moved for a declaration that Castlelake has suffered no physical loss.[8]

This issue was the subject of an earlier order denying judgment on the pleadings. There, the Court held that Plaintiff could proceed on its claim of physical loss without pleading physical alteration.

The facts regarding the status of the Aircraft on the date of the claimed loss (March 1, 2022) are not materially disputed for purposes of this issue. On March 1, 2022, Castlelake sent notices of termination of lease and grounding to the lessees. The lessees refused and continue to refuse to return the Aircraft to Castlelake or the Owner/Lessors. The Aircraft were not destroyed or damaged. They were not, and are not, in an unknown location. The Aircraft did not disappear. Instead, on the date of claimed loss, they were possessed by their lessees. To date, most of them remain in the custody of the lessees and are being flown commercially by these lessees. The Owner/Lessors have retained title to the Aircraft and have been negotiating for their disposition. *See infra* at III(d).

First, all parties resubmitted arguments initially submitted during the motion for judgment on the pleadings. Briefly, Defendants **[*14]** argue that the Aircraft are not physically gone and, therefore, there is no physical loss. Plaintiff argues that since it has been unable to retrieve the Aircraft despite demands, they are physically lost.

Consistent with its prior order, the Court concludes that because no insured physically possesses the Aircraft—despite demanding that the Aircraft be returned—they have experienced a physical loss. *See* Order of April 8, 2024, denying judgment on the pleadings, (incorporated by reference).

Second, certain Defendants argue that the mirrored nature of the contingent coverage makes the coverage co-extensive with the principal policy coverage, and since the lessees are in physical possession and could not claim physical loss, then neither can the Owner/Lessors or Castlelake. The Court addresses the mirrored nature of contingent coverage in detail *infra* at III(c). Briefly, the concept of the two policies mirroring each other is helpful but flawed. Defendants point to no policy language and no caselaw for this claim of complete mirroring. The policy language that they rely on does not support the claim of complete mirroring. In fact, the policy language contemplates that the contingent coverage **[*15]** will be available where the principal policy is *not* available. This discussion, i.e., of the relationship between the principal and contingent policies, is discussed in more detail *infra* at III(c).

Third, Defendants argue, principally Defendant XL, that Castlelake itself has experienced no physical loss because it never had a physical interest *ab initio*. Its only loss is servicing revenue. XL Br. at 8. But this argument conflates separate concepts by suggesting that an insured's interest must be physical for it to recover for the risk of physical loss. If there is a physical loss, then there is coverage presuming that all other conditions are met, and no exclusion applies. Then, and only then, does one inquire whether the loss is total and the nature and extent of the insured's financial interest.[9]

Here, no insured physically possesses the Aircraft, despite having demanded the return of the Aircraft as permitted by the operative leases. The Court holds that

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[7] Castlelake also claims, as a separate basis to proceed on behalf of the real parties in interest, that the Owner/Lessors have ratified this action. Chubb argues that there is insufficient evidence of ratification to survive summary judgment. The Court does not address this issue, having held that there is sufficient evidence that Castlelake is proceeding on behalf of a third-party beneficiary as permitted under *Minn. R. Civ. P. 17.01*.

[8] XL Notice of Mot. and Mot. (moving to establish that "Castlelake itself has suffered no recoverable loss or damage within the coverage of the All Risks Policy"); Chubb Br. at 29 (seeking dismissal on grounds that "neither Castlelake nor the Lessors have any out-of-pocket losses for these Aircraft").

[9] *See., e.g.*, ARP at § 1 (policy covers risk of physical loss for insureds with a financial interest); WRP, at § 1 (policy covers risk of physical loss for insureds including those without an ownership interest).

this is a physical loss. Castlelake's more limited financial interest, *vis a vis* the Aircraft, is relevant to whether it has experienced a total loss. It is not relevant to whether there has been a physical loss of the Aircraft. **[*16]**

c. Principal Policy Defense

Castlelake seeks to have the Court summarily declare that Defendants have failed to present threshold evidence that the principal policy exclusion applies. Defendants appear to claim that Plaintiff must establish that the principal policies have not responded as part of its initial burden. In short, the parties dispute the burden of proof.

These underlying facts are established: (1) the lessees obtained principal policies as required by their leases; (2) as required by Defendants' policies, Castlelake and the Owner/Lessors are additional insureds on the principal policies; and (3) Castlelake has made claims under the principal policies. Castlelake also claims, but Defendants dispute, that the principal policies did not "respond substantively." Castlelake Br. at 28.

Simply put, Plaintiff insists that the facts establish that the principal policies have not responded and it may proceed on the ARP and WRP policies. In response, Defendants argue that Plaintiff's claims are recoverable under the principal policies and, therefore, it may not proceed against the ARP or WRP.

The Court will begin by interpreting the language of the policies and then consider the pertinent **[*17]** evidence in the record.

The ARP. The ARP does not refer to the principal policies in its Conditions section. Instead, the principal policies are discussed in the "General Exclusions" section. Section 4.6 states that the policy "does not cover loss or damage which is recoverable as a claim or any liability for which indemnity is obtained from the principal policy." ARP, §4.6.

Under the terms of the ARP, the issue is whether the claims are "recoverable." Castlelake makes the technical argument that the "claim" is not recoverable because it had to proceed to litigation to recover on the principal policies. This is an overly narrow reading of the policy language. The objective of any coverage lawsuit is to obtain a ruling that the claim is recoverable. "Recoverable" means capable of being recovered. The facts that Plaintiff depends on, even if accepted as true, do not establish conclusively that the claim is not recoverable under the principal policies. In fact, no one knows whether the claim is recoverable under the principal policies. Defendants observe, accurately, that Castlelake has sued under the principal policies alleging that its claims are recoverable under the principal policies. **[*18]**

The WRP. The WRP contains different language. In the Conditions section it states that "[t]his Policy does not cover loss or damage which is recoverable as a claim from the Principal Policy." Additionally, the WRP expressly grants coverage when the Principal Policy "fails to respond." Later, under the heading "Principal Policy Fails to Respond," the WRP identifies specific circumstances under which "[t]he Principal Policy shall be deemed to have failed to respond to a claim." Plaintiff relies upon the following definition of "fails to respond":

> If:
> i) The insured has made a claim in writing to the Principal Policy . . . ; and
> ii) No fewer than 180 days have elapsed since making the claim . . . ; and
> iii) Despite the Insured having used best efforts and having taken reasonable steps to do so, the Insured has been unable to secure recovery of sums due, or unconditional agreement to pay for the claim under the Principal Policy
> ....

WRP, at §6, Conditions.

The Court, in the context of the ARP, has already concluded that recoverability is a fact issue not suited for summary judgment given this record. The Court now concludes, similarly, the "failure to respond" definition in the WRP creates fact **[*19]** issues not suited for summary judgment. This language describes a factual inquiry, i.e., have reasonable best efforts been made? Castlelake insists so, relying on having submitted claims without success. Yet, the record contains evidence that efforts have paid off at least with some of the Aircraft: the Owner/Lessors have recovered on claims related to the Aeroflot 3 after negotiating with Insurance Company NSK, LLC ("NSK"), an assignee of the principal policy insurers.[10] *See infra* at III(d). The Court concludes that,

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[10] Castlelake claims that the NSK negotiations and the resulting settlement related to the Aeroflot 3 do not constitute a response by the principal policies. And, indeed, NSK is not a traditional insurer. But there is uncontroverted evidence that the principal policy insurers assigned their rights and obligations to NSK. Lance Dec., Ex. 12 ("Settlement Agreement" at WHEREAS Clause (c).) NSK then negotiated to resolve the coverage dispute at least regarding the Aeroflot 3.

regardless of who carries the burden of proof, there are disputed issues of fact as to whether Castlelake's claims are recoverable under the principal policies or, put differently, whether the principal policies have failed to respond.

i. Possessed Hull Coverage

Castlelake attempts to avoid this fact issue by arguing that it is seeking possessed hull coverage and the principal policy defense/exclusion does not apply to possessed hull coverage since, by its terms, possessed hull coverage is available only when the Aircraft are in the custody, care, or control of the *insured*.

Both the ARP and the WRP provide both contingent and possessed coverage. Possessed coverage applies **[*20]** when the Aircraft is in the care, custody, and control of the insured and not covered by the lessee's policy. The WRP states that possessed coverage attaches where the Aircraft are awaiting commencement of a lease, returned at the end of a lease, in the custody of the insured, or "repossessed (or in the course of repossession)." WRP, §1.5. The ARP has substantially identical language. *See* ARP, §1.3.

Perhaps signaling its lack of evidence supporting possessed hull coverage, Castlelake's claim for possessed hull coverage is pled in the alternative. It is seeking contingent coverage at the same time *despite arguing that the two coverages are mutually exclusive*. Additionally, Castlelake is not seeking a summary determination that possessed hull coverage applies. Rather, to avoid the principal policy defense/exclusion, it insists that the Aircraft were in the "course of repossession" at the time of the loss, triggering possessed hull coverage. Defendants reject this claim.

Castlelake has not provided any language from the policies or leases defining repossession or the "course of repossession." Hence the Court relies on a plain meaning construction. "In the course of" means "during." Cambridge **[*21]** Dictionary, dictionary.cambridge.org ("during an event or period of time"). "Repossession" requires acts to retake physical possession. *Repossession, Black's Law Dictionary* (12th ed. 2024) (The act or an instance of retaking property; esp., a seller's retaking of goods sold on credit when the buyer has failed to pay for them.—Often shortened to *repo*. Cf. foreclosure; rescue (3).—repossess, *vb*.). Tracking the Aircraft, arranging for safe locations in the event of their future return, hiring legal counsel, and demanding return of the Aircraft do not equate to being "in the course of repossession" given the plain meanings of the operative words and the context in which they are used.

Additionally, Castlelake has not established how its leases allow for repossession. The only remedy for default that Castlelake placed in the record was a remedy to draw on a letter of credit.[11] The relevant undisputed facts are:

- The Aircraft were in the care, custody, and control of the lessees on February 26, 2022, when Russia invaded Ukraine.

- On February 28, 2021, Castlelake emailed its insurance broker stating that it was "taking steps to repossess" the Aircraft and asking that coverage be switched to **[*22]** possessed hull coverage. Consequently, there were endorsements created for the ARP and an increase in premium to reflect possessed hull coverage.[12]

- The Aircraft were in the care, custody, and control of the lessees on March 1, 2022, the date Castlelake identifies as the date of loss.

- Castlelake has identified no actual steps taken to repossess the Aircraft applying the plain, ordinary meaning of repossession.

Castlelake cannot avoid this outcome by relying on its request to have the Aircraft moved from contingent to possessed hull coverage and upon subsequent endorsements reflecting this change. *See* Pl.'s Br., SOF ¶¶ 30-38. Asking to have the Aircraft moved from one coverage to another does not establish that acts of repossession occurred.

Possessed hull coverage does not apply as a matter of law and undisputed fact.

d. Are Claims Regarding Aeroflot 3 Defeated Due to Principal Policy Exclusion or Lack of Damages (War Risk Defendants, Fidelis, and Chubb).

See Settlement Agreement.

[11] Minnesota provides certain statutory and common law rights to repossession of secured assets. But the Court does not know what law applies to the leases and therefore does not know whether Plaintiff has either a contractual, common law, or statutory right to repossession of the leased Aircraft.

[12] There is no evidence in the record related to informing the WRP insurers.

The War Risk Defendants and others move the Court to conclude that the principal policies have responded fully to the subject claim regarding the Aeroflot 3 and therefore, no coverage is available under the ARP and WRP. Alternatively, **[*23]** Defendants seek to have claims related to the Aeroflot 3 dismissed due to lack of damages. Castlelake asserts that the principal policies have not responded and that their claims in this matter survive any settlement or settlement payments related to the Aeroflot 3.

The Aeroflot 3 are owned by AS Air Lease 110 (Ireland). They were leased to Aeroflot during the relevant period. Aeroflot obtained principal policy insurance through two Russian insurers, Alfa Strakhovanie plc and Insurance Company of Gaz Industry Sogaz (collectively "Russian Insurers"). These Russian Insurers, in turn, named Castlelake and the Owner/Lessors as additional insureds, and obtained reinsurance. Castlelake, on its behalf and on behalf of the Owner/Lessors, submitted a claim under the principal policy to the Russian insurers' reinsurers on April 13, 2022, for the loss that is claimed in this case—i.e., the grounding of the Aircraft on or about March 1, 2022.

Prior to December 12, 2022, and with the consent of the Owner/Lessors, the Russian Insurers transferred all their rights and obligations under the principal policies to NSK. Thereafter, NSK negotiated with Aeroflot and the Owner/Lessors and ultimately settled **[*24]** the insurance claims originally advanced against the principal policies.

The Settlement Agreement is part of the record and incorporated by reference. Key terms are summarized below.

The Settlement Agreement settles and resolves all insurance claims not otherwise reserved. Claims advanced in this lawsuit are reserved claims. The Settlement Agreement also provides that the insured assets, i.e., the Aeroflot 3, will be transferred to NSK. The settlement amounts for the Aeroflot 3 equal: $18,046,000.00 (Airbus 4058), $17,556,000.00 (Airbus 4074), and $19,307,000.00 (Airbus 4116) for a total of $54,909,000.00. The agreed values of the Aeroflot 3 under the ARP and WRP are: $25,500,978.71 (Airbus 4058), $24,067,027.86 (Airbus 4074), and $24,920,264.77 (Airbus 4116) for a total of $74,488,271.20. Each of the settlement amounts is less than the agreed values of the respective Aircraft.

i. Defendants' Damages Argument Is Unpersuasive.

The Court first addresses Defendants' argument that Castlelake has no damages because the amount recovered in the settlement exceeds the agreed values in the ARP and WRP, which are the extent of recovery allowed under the policies. This argument requires that the **[*25]** Court consider not just the settlement payments, but approximately $20 million in drawdowns from lines of credit and other reserves from which Plaintiff and Owner/Lessors have drawn, bringing the total recouped or retained by Plaintiff and Owner/Lessors up to $75,159,000.00.

This argument fails. The agreed value in the ARP and WRP represents the amount that the policies will pay in the event of a total covered loss. It is meant to cover the loss of the insured's physical assets. Yet, the line of credit, from which it appears that $6,750,000.00 was drawn for each of the 3 planes, does not compensate for the loss of the physical asset; it functions to replace lost rental income. This is clear from the Aeroflot lease language which states that in the event of default, the lessor may draw from the line of credit to replace lost rental income. *See* Chandler Decl., Ex. 69 (citing §14.2 of Aeroflot lease agreements). Additionally, Exhibit 27 to the Marvin Declaration confirms this. The amount of unpaid rent and late charges accrued from March 2022 until the settlement closely aligns with the line of credit draw downs.

There is no reason that Defendants should be able to use money that was intended **[*26]** to replace rental income and require that it perform double duty—i.e., cover lost income and inflate the settlement amount for each plane so that it equals or exceeds the agreed value in the ARP and WRP. They are two different losses. Consequently, the Court will not summarily dismiss Castlelake's claim on Defendants' theory that Castlelake and the Owner/Lessors have been made whole by the settlement funds and, therefore, have no damages claim.[13]

ii. The Principal Policy Exclusion Applies to the Aeroflot 3.

As a separate and distinct argument, Defendants assert that the settlement establishes dispositively that the principal policy has responded and therefore, the Aeroflot 3 contingent claims may not proceed. This

[13] The agreed values are greater than the settlement amounts set forth in the Settlement Agreement. The Court does not address the issue of set-off at this time.

argument is more persuasive. Castlelake cannot successfully argue that NSK does not stand in the shoes of the principal policy insurers. It insists that NSK is not a true insurer, and the settlement was not an arms-length negotiation. But it has no sound evidentiary basis to challenge the evidence of the transfer contained in the Settlement Agreement. Moreover, the reservation of rights in the Settlement Agreement does not change the outcome. Defendants are not claiming that **[*27]** the Settlement Agreement expressly settled and released Castlelake's claims in this case. They argue that the fact of the settlement provides a legal basis for dismissing this lawsuit, namely that the principal policy has responded and Owner/Lessors have recovered from the principal policy.

The ARP "does not cover loss or damages which is recoverable as a claim or any liability for which indemnity is obtained from the principal policy." The WRP "does not cover loss or damage which is recoverable as a claim from the Principal Policy" and separately states that it provides coverage only where the principal policy "fails to respond."

It defies logic that a full settlement and release of claims under the principal policy between the Owner/Lessors and the lessee and its insurer does not constitute both a recovery under the principal policy and a response. Castlelake relies upon the standard denial of liability language in the settlement agreement whereby the insurer denies liability and does not admit to coverage. Yet, this argument proves too much. A denial of liability clause is standard in virtually all settlement agreements. If such a denial could be used to argue that there was no actual **[*28]** recovery and the claim remains recoverable, no settlement with such a clause could ever be binding.

The record is clear. The principal policy responded and paid out significant settlement proceeds in exchange for a release of claims. This response and recovery bars Castlelake from proceeding against Defendants regarding the Aeroflot 3.

e. Have the All Risk Insurers Established that the War Risk Exclusion Applies

The ARP includes an exclusion for war risks that reads in relevant part:

> This Policy does not cover claims caused by:
>
> (a) War, invasion, acts of foreign enemies, hostilities (whether war be declared or not), civil war, rebellion, revolution, insurrection, martial law, military or usurped power or attempts at usurpation of power.
>
> ...
>
> (d) Any act of one or more persons, whether or not agents of a sovereign power, for political or terroristic purposes and whether the loss or damage resulting therefrom is accidental or intentional.
>
> ...
>
> (f) Confiscation, nationalisation, seizure, restraint, detention, appropriation, requisition for title or use by or under the order of any Government (whether civil, military or de facto) or public or local authority.

ARP, §4.1

Those perils excluded by the **[*29]** war risk exclusion in the ARP are covered by the WRP unless otherwise excluded by the terms of the WRP.

The All Risk Defendants moved for a declaration that the war risk exclusion bars recovery under the ARP as a matter of law and undisputed fact. Both the War Risk Defendants and Castlelake assert that material disputed facts exist that prevent summary judgment on this issue.

The only fact that all parties appear to consider undisputed is that Russia invaded Ukraine on February 26, 2022. From that point forward, the parties disagree regarding all other material facts, including whether they have been established by admissible evidence and, if so, what they signify. They also disagree on what is the legal standard for causation.

To begin, the moving parties argue that the invasion constitutes war and an act for political purposes thereby triggering clauses (a) and (d) of the exclusion. They then argue that the lessees refusal to return the Aircraft despite demands from Plaintiff constitutes government-ordered confiscation triggering the clause (f) exclusion. The clauses are addressed in turn.

Clause (a). Castlelake and the War Risk Defendants do not argue forcefully against the invasion **[*30]** constituting war, and the Court will assume that war commenced on February 26, 2022, since this fact does not affect the Court's conclusion.

The primary dispute relates to whether the war caused the lessees to refuse to return the Aircraft. The moving parties rely on statements contained in Castlelake's

notice of claim and subsequent updates.[14] The War Risk defendants and Castlelake argue that these statements are inadmissible hearsay and cannot support a summary dismissal of the All Risk Defendants.

The Court agrees that the statements in the claim notices constitute inadmissible hearsay. The statements are decidedly being used for the truth of the matters asserted—i.e., the war has caused the claimed loss. The protection provided by the hearsay rule makes sense. It cannot be that either a war risk exclusion or war risk coverage can be triggered by accepting as true a mere statement on a claims notice.

The All Risk Defendants also assert that an excluded war risk caused the loss because "the loss never would have happened in the absence of the war." All Risk Defs.' Br. at 20. The War Risk Defendants and Castlelake assert that this "but for" causation is inadequate to establish that the **[*31]** loss was "caused by" the excluded peril.

The All Risk Defendants claim that the policy language ("caused by") requires that the exclusion be established by *direct* evidence because elsewhere, in other exclusions, the causation language is broader. For example, the nuclear risk, pollution risk, and asbestos risk exclusions all use broader language such as "directly or indirectly caused by", "contributed to", "indirectly relating to or occasioned by", etc. The Court will not join the War Risk Defendants in speculating that this difference authoritatively establishes proximate cause as the causation standard. There may be many reasons that the language differed among the various risks—all of which are materially different from one another.

The legal standard for causation forecloses summary judgment. In *Anderson v. Connecticut Fire Ins. Co., 231 Minn. 469, 43 N.W.2d 807 (Minn. 1950)*, the Minnesota Supreme Court provided guidance where the record contained evidence that both supported coverage and supported an exclusion. There, a business owner's policy covered windstorm damage but excluded snowstorm damage. A freak storm occurred causing damages, and the homeowner made an insurance claim. The insurers invoked the snowstorm exclusion. The court held that there is coverage **[*32]** where a loss has been proximately caused by a covered event, regardless of whether an excluded event contributed to the loss. *Id. at 812*. In *Henning Nelson Constr. Co. v. Fireman's Fund Am. Life Ins. Co., 383 N.W.2d 645 (Minn. 1986)*, the court further elaborated that an exclusion could not bar coverage, even if the excluded cause contributed to the loss, unless the excluded cause was an "overriding" cause. *Id. at 653*.

Here, the record has conflicting evidence and presents multiple causal factors. The Court cannot summarily conclude that the war was the "overriding" cause to trigger the exclusion. Summary judgment is improper.

Clause (d). The All Risk Defendants assert that the clause (d) exclusion applies because someone, either Russia, the lessees, or Western Nations, was acting from a "political imperative." All Risk Defs.' Br. at 23. They then catalog communications contained in the record, revealing the so-called political interests of the involved parties.

The Court spends no time on this argument. "Political" is an undefined term in the ARP, and the evidence presented to support this exclusion constitutes hearsay or supposition likely influenced by the fog of war. It provides no basis to declare that clause (d) applies as a matter of law and undisputed fact.

Clause (f). The All Risk Defendants **[*33]** assert that this exclusion applies because Castlelake witnesses testified that the lessees retained possession of the Aircraft at the behest of the Russian government. Again, the All Risk Defendants rely upon pleadings, hearsay, and double hearsay contained in claims notices and emails. They further rely on Castlelake's characterizations. *See* All Risk Defs.' Br. at 28. Yet, for this exclusion to apply, the All Risk Defendants must present admissible evidence sufficient to bear their burden of proof that the assets were seized or confiscated by order of the Russian government, and, at the summary judgment stage, that evidence must be undisputed. It does not matter how Castlelake characterized the losses in various communications. Summary judgment is inappropriate.

f. Has Castlelake Established a Total Loss Entitling It to Agreed Value

Castlelake moves to have this Court find, on summary judgment, that it has suffered a total loss of the 18 Aircraft. It argues that where there has been a physical loss, and no exclusion applies, it is entitled to the

[14] The briefs also refer to allegations in Castlelake's Complaint. However, summary judgment cannot be awarded based on unverified pleadings.

policy's "agreed value"—i.e., the negotiated amount for each Aircraft and the only valuation available for a "total loss." Defendants disagree. **[*34]** They argue that neither Castlelake nor the Owner/Lessors have experienced a total loss since Castlelake's specific loss is only servicing revenue, and the Owner/Lessors' loss is not total in that they remain in title with power to negotiate the disposition of the Aircraft.[15]

Under the heading "Total Loss", the relevant policy language states:

> In the event of a claim adjustable on the basis of a total loss of the Aircraft/Engine(s) the Insurers will pay the Insured Proportion of the Agreed Value of the Aircraft (at the date of loss) as set forth in the Policy Schedule....

ARP, §1.9.1 (i).

Castlelake argues in favor of finding total loss because the Aircraft are physically and involuntarily out of their reach, essentially presenting the same argument it presented to establish physical loss. Yet, physical loss and total loss are two separate concepts. Physical loss describes the kind of loss for which the policies provide coverage. Total loss describes the extent of a covered loss. There must be a physical loss to trigger coverage, but the physical loss need not be total as the policy language makes clear by providing for partial loss recovery.

Total loss is a standard insurance term **[*35]** despite it not being defined in the policy. Black's Law Dictionary defines total loss as "[t]he complete destruction of property so that nothing of value remains and the subject matter no longer exists in its original form . . . [or a] loss so great that the property damaged or destroyed cannot be repaired or rebuilt to its condition before the loss, or else that doing so would be financially imprudent." *Total Loss, Black's Law Dictionary* (12th ed. 2024). Minnesota case law supports this broad definition. *Nw. Mut. Life Ins. Co. v. Rochester German Ins. Co., 85 Minn. 48, 88 N.W. 265, 271 (Minn. 1901)* (total loss requires total destruction, leaving nothing useful).

This issue of total loss *vel non* presents an unusual set of facts. The Aircraft are not possessed by Owner/Lessors, and they are unable to retrieve them. But they continue to have some control over them, including actively negotiating their sale. Construing the facts in favor of Defendants' on this issue, as the Court must, there is evidence that the Owner/Lessors continue to exercise significant ownership rights. These rights, specifically the right to dispose of the Aircraft, are being honored and exercised if one accepts as true the evidence of the settlement negotiations. Moreover, if this Court were to find total **[*36]** loss, Defendants would be obligated to pay the agreed value while being unable to exercise their complementary right under the policies "to elect to take the Aircraft as salvage." Given the broad language of total loss and the continuing ability of the Owner/Lessors to exercise certain rights with respect to the Aircraft, this Court cannot hold that either Castlelake[16] or the Owner/Lessors have experienced a total loss.[17]

S.M.R.

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[15] Defendants also argue that there has been no loss *vis a vis* the Aeroflot 3 since there has been a settlement recovery, which they argue covers all Plaintiff's losses. The Court did not conclude that the settlement recovery fully covered the agreed values of the Aeroflot 3 but dismissed Aeroflot 3-related claims on other grounds.

[16] Castlelake did not separately argue that its loss of servicing revenue represented a total loss and therefore the Court does not address this loss.

[17] Given that the Court has not found total loss, it will not address what offsets, if any, could be made in the event of a total loss.