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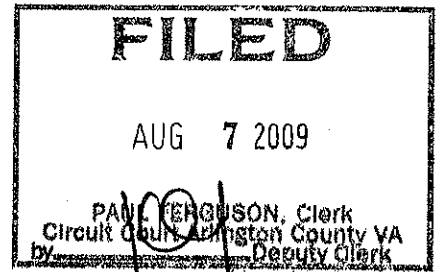

VIRGINIA
IN THE CIRCUIT COURT OF THE COUNTY OF ARLINGTON

STEADFAST INSURANCE COMPANY
Plaintiff and Counter-Defendant

v.

THE AES CORPORATION,
Defendant and Counter-Claimant

CASE NO. 2008-8:58

AES'S OPPOSITION TO STEADFAST'S MOTION FOR SUMMARY JUDGMENT

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Webster's New World College Dictionary (1997) 11
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VIRGINIA:

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STEADFAST INSURANCE COMPANY, Plaintiff and Counter-Defendant, v. THE AES CORPORATION, Defendant and Counter-Claimant.	)	CASE NO. 2008-8:58

AES'S OPPOSITION TO STEADFAST'S MOTION FOR SUMMARY JUDGMENT

SUMMARY OF OPPOSITION

The AES Corporation is an Arlington-based energy company with subsidiary operations on five continents specializing in the generation and distribution of electricity. AES paid significant premiums to Steadfast Insurance – a unit of the global insurance company Zurich – for many years to manage its financial risk with general commercial liability policies. In return, Steadfast promised (among other things) to reimburse AES's defense costs in any lawsuit for property damage allegedly resulting from AES-related negligence. The *Kivalina* Plaintiffs have brought nuisance claims against AES for property damage partly sounding in negligence, which would squarely fall within Steadfast's broad duties to indemnify AES if those plaintiffs were to obtain an adverse judgment against AES. By its motion – based on improper extrinsic evidence – Steadfast seeks to summarily avoid its very broad duty to defend AES in the underlying lawsuit, despite strong precedent favoring defense coverage and material factual disputes. In so moving, Steadfast asks this Court to be the first in the nation to exclude property damage claims from coverage based on novel theories of climate change. The fundamental premise of any general liability policy is, however, that all property damage claims based on negligence must be

defended by the insurer, unless the parties unambiguously excluded them from coverage at contract formation (which did not happen here).

Steadfast's motion must be denied under Virginia law because Steadfast failed to establish that "it clearly appears from the initial pleading" that AES could not be potentially covered in *Kivalina* by any of nine Steadfast policies spanning from 1996 to 2007.[1] As part of this analysis, this Court must decide "all doubtful questions" and interpret all three disputed terms "most strongly" in favor of coverage for AES. Even cases involving novel legal theories – such as the nuisance claims alleged in *Kivalina*, which AES has moved to dismiss – must be defended by the insurance company if there is any possibility the insured has coverage on any claim. There is more than a mere possibility of coverage here, and, at a minimum, there are many complexities, ambiguities, and questions of fact precluding summary judgment.

In an effort to create a contrary misimpression, Steadfast violates Virginia law by relying on extrinsic evidence. In duty-to-defend disputes, the eight-corners rule limits the Court's analysis of potential coverage to the language of the *Kivalina* Complaint and the nine policies at issue. Yet Steadfast relies on a single federal trial court decision as procedural authority to present out-of-context snippets as motion "exhibits," thus violating Virginia rules in an effort to deprive AES of its right to a trial on a significant dispute. None of these motion "exhibits" is attached to the *Kivalina* Complaint, some of them are not even mentioned in it, and, at most, all of them underscore certain ambiguities or factual disputes exist. Moreover, since Steadfast filed this motion, the Fourth Circuit criticized the very federal trial court decision on which Steadfast relies for considering extrinsic evidence "because Virginia courts have not signaled a readiness to look beyond the underlying complaint" in duty-to-defend disputes. By relying on extrinsic

[1] While AES refutes Steadfast's motion under Virginia law, AES does not concede that Steadfast has adequately established that Virginia law applies, and reserves the right to raise the complex choice-of-law issues that are potentially implicated by this dispute and *Kivalina*.

exhibits, Steadfast confirms that complex and novel factual issues exist precluding summary judgment.[2]

Indeed, Steadfast conceded the 104-day delay in responding to AES's request for coverage occurred because the "underlying Kivalina lawsuit sets forth ***novel*** assertions of fact and law which present coverage issues that require considerable analysis." Ex. 1.[3] As Steadfast had done for AES in a Hurricane Katrina-related lawsuit "so similar" to *Kivalina* that Steadfast currently refuses to discuss that climate change suit with AES, (Ex. 2), Steadfast eventually agreed to defend AES in *Kivalina* with a reservation of rights. One month later, however, Steadfast disavowed the highly novel and complex nature of *Kivalina* and filed this case seeking a declaration that it is unambiguously not obligated to defend AES. Steadfast relies on ***three*** policy terms.

First, Steadfast focuses exclusively on the *Kivalina* allegations of AES's intentional conduct, claiming there is no "accident" and thus no "occurrence" under the policies. Steadfast pointedly ignores the allegations of AES's negligence, which, of course, fall within the policies' broad coverage terms. Several Zurich-Steadfast witnesses admitted that which is clear under Virginia law: the definition of "accident" can include acts of alleged negligence. Nonetheless, Steadfast's claims handler asserted "just because" the *Kivalina* Plaintiffs "use the word negligence doesn't necessarily mean that it's -- the basis of the allegations are negligence." In

[2] Tellingly, despite relying on improper extrinsic evidence, Steadfast refused to produce its corporate witness to provide deposition testimony before AES was scheduled to file this opposition. AES was thus forced to seek the Court's relief on May 8 and 22. The Court rejected Steadfast's objection that the policies are supposedly unambiguous and discovery is thus impermissible, instead entering a briefing schedule to accommodate AES's discovery efforts and granting AES's motion to compel discovery into the disputed policy terms. Exs. 3, 4. Steadfast then engaged in evasive behavior during discovery, as AES has detailed in various motions to compel. Exs. 5, 6.

[3] Shortly after *Kivalina* was filed, Steadfast's counsel, Mr. Stewart, publicly characterized climate change risk as a "new problem," creating "a sense of powerlessness" and "uncertainty" in the insurance industry. Ex. 7 (March 1, 2008 Article).

an effort to support this untenable argument, Steadfast effectively advocates an unprecedented legal rule to exclude negligence claims involving allegations of intentionality and foreseeability from the definition of "occurrence," even though it is common knowledge that plaintiffs routinely include allegations of volitional conduct and foreseeable damages when pleading negligence-based torts.[4] Steadfast knows this proposed rule has no precedent, as Steadfast's claims handler cannot recall "ever denying a negligence-based claim against an insured."

Steadfast's argument that the complaint alleges no "occurrence" is really an attempt to avoid the policy's first exclusion, entitled "Expected Or Intended Injury," which excludes "'property damage' expected or intended ***from the standpoint of the insured.***" As a policy exclusion, this term imposes the heavy burden on Steadfast of establishing that AES had subjective intent or knowledge that it would harm the Kivalina island. Because it did not raise this exclusion, Steadfast cannot obtain summary judgment based on AES's alleged expectations and intent. Had Steadfast "reserved" its rights on this exclusion and raised this exclusion here, questions of fact as to AES's expectations and intent would preclude summary judgment (and AES would ultimately prevail at trial).

Second, Steadfast incorrectly claims that carbon dioxide (CO_2) is a "pollutant" excluded from coverage. The question here (which Steadfast avoids) is whether the parties understood as early as contract formation in ***1996*** that CO_2 emissions were excluded as "pollutants," construing the term "most strongly against" Steadfast. The policies nowhere mention CO_2 emissions, despite expressly excluding damage resulting from certain substances – for example, asbestos, mixed dust particles, lead, formaldehyde, fungi, MTBE, and mold – to foreclose novel legal

---

[4] Steadfast's counsel, Crowell & Moring, also represents in *Kivalina* one of AES's co-defendants (Peabody Energy Co.) and argues conflicting positions on whether *Kivalina* alleges foreseeable injuries. *Compare* Mot. at 11 *with* Ex. 8 (Peabody Mot. at 2) and Ex. 9 (Peabody Reply at 24). As detailed below, these conflicting positions help to further illustrate that the policies and pleadings do not unambiguously preclude coverage.

claims based on those substances. Steadfast can thus rely *only* on the limited, general exclusion to foreclose CO_2-based claims. Conspicuously absent from its analysis of the general exclusion is any reference to the dictionary or traditional pollution discourse. Steadfast, however, concedes the "key inquiry" focuses on "whether the substance is ***an irritant or contaminant under traditional pollution discourse.***" Mot. at 25 (internal quotations omitted). In short, the definitions include substances that "corrupt" or "defile," effectively rendering something unfit for use. And the application of the exclusion to property damage claims is also limited by "traditional pollution discourse," thus precluding a denial of coverage based on the "novel" pollution discourse implicated by *Kivalina.*

CO_2 is by no means a traditional pollutant and is not unambiguously an "irritant or contaminant," such as "smoke, vapor, soot, fumes, acids, chemicals and waste." Steadfast's corporate witness on AES policy formation (the actual underwriter) admitted that CO_2 was not considered a pollutant at the time of contract formation. Steadfast's primary claims handler made no effort to determine whether CO_2 was considered a pollutant at contract formation, despite certain policy language clearly illustrating the parties understood a "pollutant" to include only a substance "considered an irritant or contaminant ***at the time of the inception of this policy***" or one that was subsequently "deemed to be a pollutant by a government entity during the term of this policy." Moreover, when AES asked Steadfast's corporate designee on the exclusion about "traditional pollution discourse" – the area of "key inquiry" according to Steadfast – he said that he did not know anything about such discourse and Steadfast's counsel instructed him not to answer AES's potentially case-dispositive questions on that subject.

As a matter of fact, AES's alleged CO_2 emissions were not regulated in 1996 and are not regulated today by the EPA or under Virginia law, contrary to Steadfast's misleading citations to the U.S. Supreme Court's 2007 *Massachusetts v. EPA* opinion interpreting the Clear Air Act

(CAA) and to the Virginia Administrative Code (VAC).[5] Indeed, *Kivalina* does not allege that AES violated any environmental statute. The fact that, as late as 2007, the *Massachusetts* Court split on the question of whether the EPA had erred in 2003 by finding CO_2 not to be an "air pollutant" under the CAA's "sweeping" definition definitively supports AES's position: If four Supreme Court Justices and the EPA remained unconvinced in 2007 of CO_2's status as an "air pollutant" under the CAA's "sweeping" definition, then Steadfast cannot possibly prove that CO_2 was unambiguously understood as early as 1996 to be a "pollutant" under the policies' more restrictive definition of "pollutant," particularly given that it must be read "narrowly in favor of the insured."[6] At a minimum, questions of fact exist about the parties' understanding of whether CO_2 was an excluded "pollutant" at the time of contract formation under "traditional pollution discourse." Steadfast cannot debate this point in light of its improper and misleading reliance on extrinsic evidence to argue AES's supposed understanding of that term in 2002.

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[5] Under Virginia law, Steadfast cannot import broader definitions of "pollutant" from the CAA or VAC, because the policies do not incorporate them by reference.

[6] Under the CAA, an "air pollutant" broadly includes "*any* physical . . . substance or matter which is emitted into or otherwise enters the ambient air," which, the *Massachusetts* majority found, "embraces all airborne compounds of whatever stripe . . . ." *Mass. v. EPA*, 549 U.S. 497, 528-29 (2007) (emphasis in the original). In contrast, "pollutants" under the policies are, as Steadfast concedes, limited to traditional "irritants" and "contaminants." Under Steadfast's all-encompassing reading of the term "pollutants," even pure ***water*** vapor emitted during the production of electricity would be an excluded "pollutant" regardless of traditional discourse at contract formation. *See, e.g.*, Proposed Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 18886, 18897 (proposed April 29, 2007) (describing water vapor as the "the most abundant naturally occurring greenhouse gas"). H_2O and CO_2 were not and are not, however, unambiguously understood to be "irritants" or "contaminants" under "traditional pollution discourse." Indeed, people and animals exhale CO_2 in every breath, and plants, in turn, use it to produce energy through photosynthesis. CO_2 is "Generally Recognized as Safe" for use as a food additive and, in fact, AES-related plants capture CO_2 and sell it to bottlers, which, in turn, use it to "carbonate" soft drinks. Back in the mid-1990s, Steadfast itself characterized CO_2 as a "product" of an AES-related plant used to preserve food and not as a "pollutant" in the same risk assessment. Ex. 10 (ST00022017).

Third, Steadfast contends that the loss-in-progress endorsement excludes the damage alleged in *Kivalina* because it allegedly "incepted" before the "earliest" policy period. Steadfast moves under only its policies dated from 2003 to 2008, claiming that AES's coverage has an "earliest effective date" of "September 5, 2003." Mot. at 2, 5 n.2. Steadfast, however, knows its position is false, as it rejected AES's tender of coverage before it filed this motion pursuant to policies dated from 1996 to 2000. Steadfast fails to mention that those four policies do not contain loss-in-progress exclusions, meaning that the inception date of the alleged damage to Kivalina is immaterial to AES's coverage. As for the five policies actually containing that exclusion, Steadfast relies exclusively on improper extrinsic evidence, overstates its content, and ignores ambiguous terms. At a minimum, the *Kivalina* fact-finder could certainly conclude that the alleged property damage to Kivalina occurred during one of Steadfast's nine policy periods covering from 1996 to 2008.

ARGUMENT

In Section I, AES will set forth the rules of summary judgment and the rules of construction governing insurance policy disputes. AES will show, in Section II, that the *Kivalina* Complaint plainly alleges an "occurrence" – acts and omissions of negligence, no less. In Sections III and IV, AES establishes that Steadfast cannot meet its high burden of establishing that the pollution or loss-in-progress exclusion, respectively, unambiguously bars coverage.

I. Steadfast Misstates the Controlling Procedural and Substantive Law.

A. Summary Judgment Is Disfavored Under Virginia Law, Particularly Where, as Here, the Moving Party Improperly Relies on Extrinsic Evidence.

Summary judgment is a drastic remedy that may be granted only in rare "cases in which no trial is necessary because no evidence could affect the result." *Shevel's, Inc.-Chesterfield v. Se. Assocs., Inc.*, 228 Va. 175, 181 (1984); *see also Slone v. Gen. Motors Corp.*, 249 Va. 520, 522 (1995). The Court "must adopt those inferences from the facts that are most favorable to the

nonmoving party . . . ." *Dickerson v. Fatehi,* 253 Va. 324, 327 (1995). In contract cases, summary judgment is improper "when 'neither party has offered a construction of [contractual] provisions that could be deemed so clear that it unambiguously excludes the explanation offered by the opponent.'" *Westmoreland-LG&E Ptrs. v. Va. Elec. & Power Co.*, 254 Va. 1, 11 (1997) (alteration in original).

B. Courts Must Construe Disputed Insurance Terms Heavily in Favor of the Insured, Particularly Where, as Here, the Dispute Concerns the Insurer's Threshold Duty to Defend a Third-Party Claim.

To determine if an insurer has a duty to defend any claim, Virginia courts apply the "eight corners" rule that compares the four corners of the policy with the four corners of the complaint. *Erie Ins. Exch. v. State Farm Mut. Auto. Ins. Co.*, 60 Va. Cir. 418, 423 (2002).[7] When applying this test, courts adhere to certain principles unique to insurance disputes. As the long-held baseline for all decision-making, "this much is certain, all doubtful questions must be decided in favor of the insured." *Campbell v. Bhd. of Local Firemen*, 165 Va. 8, 16 (1935). The "insurer's obligation to defend is broader than its obligation to pay . . . ." *Lerner v. Gen. Ins. Co. of Am.*, 219 Va. 101, 104 (1978). This means an "insurer may be obligated under a valid policy to mount a defense on behalf of its insured, even if facts later brought to light indicate that there is no duty

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[7] Steadfast contends this Court may consider extrinsic, non-attached documents, contrary to Virginia's eight-corners and normal motion rules. Mot. at 7. In the lone Virginia case Steadfast cites, *Flippo v. F & L Land Co.,* 241 Va. 15, 15 (1991), the Court considered only the complaint, an attached exhibit (an undisputed contract), and letters sent by the parties that they both stipulated to using. *Id.* at 158. *Flippo* is not an insurance dispute governed by the eight-corners rule, and there is no stipulation to use exhibits here. Steadfast also relies on the federal trial court decision *CACI Int'l, Inc. v. St. Paul Fire & Marine Ins. Co.*, 567 F. Supp. 2d 824, 831-32 (E.D. Va. 2008). Since Steadfast filed this motion, the Fourth Circuit Court of Appeals criticized that federal court for considering extrinsic evidence, "because Virginia courts have not signaled a readiness to look beyond the underlying complaint" in duty-to-defend disputes. *CACI Int'l, Inc. v. St. Paul Fire & Marine Ins. Co.*, 566 F.3d 150, 156 (4th Cir. 2009). Tellingly, Steadfast's primary claims handler cannot recall a specific instance (other than this case) where she obtained and reviewed documents extrinsic to the complaint as part of her coverage analysis. Ex. 12 (Barker Dep. at 22). In this case, she obtained and reviewed only a few of the over 70 documents referenced in the complaint. *Id.* at 23.

to indemnify." *State Auto Prop. & Cas. Ins. Co. v. Gorsuch*, 323 F. Supp. 2d 746, 751 (W.D.Va. 2004). Specifically, the "obligation to defend arises whenever the complaint against the insured alleges facts and circumstances, some of which, if proved, would fall within the risk covered by the policy." *Brenner v. Lawyers Title Ins. Corp.*, 240 Va. 185, 189 (1990); *see also Reisen v. Aetna Life & Cas. Co.*, 225 Va. 327, 331 (1983) (same principle). Accordingly, an "insurer is relieved of a duty to defend only when it clearly appears from the initial pleading the insurer would not be liable under the policy contract for ***any*** judgment based upon the allegations." *Reisen*, 225 Va. at 331 (emphasis in original).

Consistent with these rules heavily favoring coverage, "[e]xclusionary language in an insurance policy will be construed ***most strongly against the insurer and the burden is upon the insurer to prove that an exclusion applies***." *Transcontinental Ins. Co. v. RBMW, Inc.*, 262 Va. 502, 512 (2001); *see also Allstate Ins. Co. v. Gauthier*, 273 Va. 416, 420 (2007) (stating exclusions must be "interpreted narrowly" against the insurer). Similarly, where "the policy language is ambiguous, it will be construed strictly against the insurer." *Lincoln Nat. Life Ins. Co. v. Commonwealth Corrugated Container Corp.*, 229 Va. 132, 137 (1985); *see also Hill v. State Farm Mut. Auto. Ins. Co.*, 237 Va. 148, 153 (1989) (same); *Andrews v. Am. Health & Life Ins. Co.*, 236 Va. 221, 224 (1988) (same).[8] An ambiguity in a policy "exists when language admits of being understood in more than one way or refers to two or more things at the same time." *Lincoln Nat. Life Ins. Co.*, 229 Va. at 136-137 (1985) (quoting *Renner Plumbing v. Renner*, 225 Va. 508, 515 (1983)); *see also Hill*, 237 Va. at 153 (same). Steadfast comes nowhere close to meeting its burden here.

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[8] Steadfast relies on *Gov't Employees Ins. Co. v. Moore*, 266 Va. 155, 828 (2003), for the proposition that Virginia courts do nothing but apply the plain meaning of a policy term in the absence of ambiguity. Mot. at 6. The *Moore* Court explains that Virginia has adopted numerous guides to interpreting insurance contracts heavily in favor of the insured: for example, "[l]anguage in a policy purporting to exclude certain events from coverage will be construed most strongly against the insurer." *Gov't Employees Ins. Co.*, 266 Va. at 828.

II. The *Kivalina* Complaint Plainly Alleges Covered Claims – Acts and Omissions of Negligence, No Less – Not Just Intentional Misconduct.

A. The Court Should Reject Steadfast's Articulation of the "Occurrence" Test, Because It Would Nullify and Otherwise Render Superfluous the Policies' "Expected Or Intended Injury" Exclusion.

Steadfast's lead argument – that there is no "occurrence" alleged in *Kivalina* based on AES's alleged expectations and intent – is an attempt to avoid and nullify the "Expected Or Intended Injury" exclusion. Mot. at 8-11. In Section I 2 a, the policies state, as the first "exclusion" from the "insuring agreement," the coverage excludes "'property damage' expected or intended from the standpoint of the insured." *See, e.g.*, Ex. 17 (ST00017687). The parties, therefore, agreed to address the potential issue of AES's expectations and intent to cause alleged damage to Kivalina as an "exclusion" to be evaluated from AES's subjective "standpoint," not as an "occurrence" dispute to be evaluated from an objective standpoint, as Steadfast has purportedly done. Ex. 11 (Kovar Dep. at 67). Steadfast's reading of "occurrence" would impermissibly render the policy's first exclusion a nullity and may shift the burden of proof to AES on Steadfast's duty to indemnify AES in the unlikely event that AES were to lose in *Kivalina*. This Court should thus reject Steadfast's articulation of the "occurrence" test. Because it failed to raise this exclusion, Steadfast cannot possibly obtain summary judgment based on AES's alleged expectations and intent. Indeed, Steadfast's claims handler did not "analyze the expected or intended injury exclusion as part of" the coverage analysis and did not even "reserve" Steadfast's rights on that exclusion. Ex. 12 (Barker Dep. at 200, 205). Out of an abundance of caution, however, AES will refute Steadfast's "occurrence" argument nonetheless.

B. Even Under Steadfast's Definition of "Occurrence," the *Kivalina* Complaint Alleges Negligence – Clearly an "Accident" Triggering the Duty to Defend.

Even if Steadfast's claim were framed as an "occurrence" dispute and not properly as a policy exclusion, AES would still be covered by the Steadfast policies because *Kivalina* alleges AES behaved negligently. Steadfast, however, asserts the complaint does not involve allegations of property damage "caused by an occurrence," because an "accident" supposedly cannot entail the intentional conduct and foreseen harm alleged in *Kivalina.* Mot. at 10. Steadfast is wrong.

The term "occurrence" is defined as "an accident, including continuous or repeated exposure to substantially the same general harmful condition." Exs. 13-16 (policies covering 1996-2000 at §V14); Exs. 17-21 (policies covering 2003-2008 at §V13). Steadfast has conceded the "common meaning" of "accident" should govern. Mot. at 6, 12, 18. Webster's defines "accident" to include acts of alleged "negligence." Webster's New World College Dictionary at 8 (1997). Likewise, Virginia courts have found an "accident" is an "incident that was unexpected from the viewpoint of the insured." *Utica Mut. Ins. Co. v. Travelers Indem. Co.,* 223 Va. 145, 147 (1982) (citing *Norman v. Ins. Co. of N. Am.,* 218 Va. 718 (1978)). For that reason, Virginia courts focus "on the unplanned and unintentional nature of the damage." *Fid. & Guar. Ins. Underwriters, Inc. v. Allied Realty Co.,* 238 Va. 458, 462 (1989).

The *Kivalina* allegations lend no support to Steadfast's argument that the damage to Kivalina was not caused by an "accident" from the "viewpoint of the insured." First and foremost, Steadfast neglects to mention that *Kivalina* alleges negligence: "Defendants know or ***should know*** that their emissions of greenhouse gases contribute to global warming, to the general public injuries such heating will cause, and to Plaintiffs' special injuries. Intentionally or ***negligently***, defendants have created, contributed to, and/or maintained the public nuisance." *Kivalina* Compl. ¶ 252. They further allege that AES's continued "***negligent acts or omissions***" harm them today. *Id.* ¶ 265. In more detail, plaintiffs allege, among many other things, "each

defendant has failed promptly and adequately to mitigate the impact of these emissions[.]" *Id.* ¶ 5. For their part, the "power companies," including AES, allegedly failed to mitigate the impact of CO_2 emissions by generating electricity using "solar, wind, geothermal, and biomass" as "alternatives to fossil fuel combustion[.]" *Id.* ¶ 174.[9]

Steadfast's "occurrence" argument cannot survive these allegations. Several Steadfast witnesses, including its claims handler, admitted that the definition of an "accident" can include acts of alleged "negligence" causing property damage. Ex. 11 (Kovar Dep. at 72); Ex. 12 (Barker Dep. at 72-3); Ex. 22 (Stoley Dep. at 20); Ex. 23 (Commerford Dep. at 30). When confronted by these negligence allegations, Steadfast's claims handler did not recall reading them and asserted "just because" the *Kivalina* Plaintiffs "use the word negligence doesn't necessarily mean that it's -- the basis of the allegations are negligence." Ex. 12 (Barker Dep. at 76, 80). Yet she conceded negligence "means what it means" (i.e., the act "wasn't intentional") and could not recall "ever denying a negligence-based claim against an insured." *Id.* at 81-83. AES's alleged conduct is plainly covered by the policies, because they all cover negligence claims.

Moreover, *Kivalina* is a negligence-based nuisance case at heart, notwithstanding attempts to isolate and vilify U.S. energy companies with certain claims of intentional conduct. The *Kivalina* Plaintiffs allege:

- the operations of the Defendants allegedly emit carbon dioxide, *Kivalina* Compl. ¶ 3;
- those emissions "mix in the atmosphere" and "merge[] with the accumulation of emissions in California and in the world," *id.* ¶¶ 254, 10;
- these emissions accumulated in the upper atmosphere – a large fraction of which were emitted decades and even several centuries ago from other sources – and trap heat, *id.* ¶¶ 123, 125;
- over some period of time, the pool of trapped heat raised the temperature of the atmosphere, *id.* ¶¶ 123, 127;

[9] AES's subsidiaries are, in fact, significantly involved in hydro, solar, and wind projects, among other alternative electricity generation projects.

- increased atmospheric temperature has melted glaciers and ice caps, and raised ocean temperatures, both of which cause sea levels to rise, *id.* ¶¶ 130-31;
- increased temperatures have caused a loss of sea ice in the upper northwest corner of Alaska (over three thousand miles away from AES's Arlington offices), *id.* ¶ 185;
- the loss or delayed formation of sea ice left Kivalina's coast more vulnerable to intervening storm surges and erosion, *id*;
- winter storms significantly eroded part of the island, *id*; and
- the resulting damage has created an unacceptable risk of flooding, which renders the island unsafe for human habitation, *id.*

Steadfast nowhere discusses the impact of these attenuated allegations on the Court's intentionality (or foreseeability) analysis of AES's alleged intent to cause damage, but Steadfast ***twice conceded*** that the question of whether the damage to Kivalina was caused by an "accident" must be approached "from the viewpoint of the insured," that is, subjectively. Mot. at 9, 17 n.10 ("from the standpoint of the insured"). Steadfast also conceded that it "can't speak from AES' standpoint." Ex. 12 (Barker Dep. at 206). In light of these concessions and allegations, Steadfast cannot contend that AES subjectively "intended" any harm to the tiny Kivalina island, let alone intended harm to occur by "design" through each link of this highly attenuated and selective causal chain that is spread over an indefinite period of time and territory. Nor could the *Kivalina* Plaintiffs make such an allegation, given the infinite number and variety of CO_2 emitters worldwide and the complexity of climate change science. However remote or farfetched, the presence of negligence allegations unquestionably triggers Steadfast's duty to defend AES.

Indeed, the fact that the *Kivalina* Plaintiffs allege both intentional and negligent conduct does not negate Steadfast's duty to defend. *See, e.g.*, *Reisen*, 225 Va. at 331 (holding that "because the motion for judgment in the tort action alleged facts and circumstances of negligence which, if proved, would fall within a risk covered by Aetna's policy, Aetna had a duty to defend its insured, Goins, even though the pleading also contained allegations of an intentional act"); *see*

also 2 Lee R. Russ & Thomas F. Segalla, Couch on Insurance § 201:6 (June 2009) (noting the "farsighted claimant's attorney, includes not only intentional claims which are not within coverage, but also acts of negligence which are within coverage"). With such a low bar to trigger coverage, courts routinely require insurers to defend insureds in negligence-based actions. *See, e.g., Capital Envtl. Servs., Inc. v. N. River Ins. Co.*, 536 F. Supp. 2d 633, 644 (E.D. Va. 2008); *Penn-Am. Ins. Co. v. Mapp*, 461 F. Supp. 2d 442, 458 (E.D. Va. 2006); *Scottsdale Ins. Co. v. Glick*, 240 Va. 283, 290 (1990); *Reisen*, 225 Va. at 331. Steadfast failed, by contrast, to cite a ***single*** Virginia case excluding a negligence claim under its definition of "occurrence."[10]

In sum, Steadfast inaccurately suggests that AES faces only allegations of the intentional conduct in *Kivalina*. This Court's analysis of Steadfast's "occurrence" argument may end here, because the policies plainly cover allegedly negligent acts or omissions. AES will nonetheless show that Steadfast misapplies the tests for intentional and foreseeable conduct.

[10] Steadfast relies on an unreported trial court case, *Pulte Home Corp. v. Fidelity & Guar. Ins. Co.*, No. 210454, 2004 WL 516216 (Va. Cir. Ct. Feb. 6, 2004), for the proposition that the term "accident" does not include negligence. Mot. at 9. The *Pulte* court found that the event in question was not an accident because the insured had "fail[ed] to satisfy its obligations under the new home sales contracts." *Id.* at *5. In other words, the event could not be an "accident" because the parties had specifically contemplated the outcome and contracted for a resolution in that event.

C. The Alleged Damage to Kivalina Was Not "Intentional" and "Foreseeable" from AES's Standpoint, Let Alone Indisputably So Based Solely on the *Kivalina* Complaint.

Steadfast argues that it can deny AES a defense because "the *Kivalina* plaintiffs assert that damage of the nature which they have sustained was a known and foreseeable consequence of AES's operation of fossil-fuel-fired electricity plants." Mot. at 2. Steadfast cannot satisfy its own articulation of the "occurrence" test. As a matter of law, the allegations of *Kivalina* do not support such an argument. As a matter of fact, AES disputes that it intended or expected to harm Kivalina.

1. The Alleged Damage to Kivalina Was Not the Result of an "Intentional" Act, As Properly Understood.

Steadfast attempts to avoid a common-sense application of the word "accident" to the broad negligence allegations of *Kivalina* by relying on cases where Virginia courts have found that intended consequences are not "accidental" based on the specific facts of those cases. Mot. at 9. Steadfast mistakenly extends certain fact-specific holdings to manufacture an extreme rule: if an insured intends an action (that is, the initial causal conduct is volitional broadly speaking), then all results stemming from that action are also intentional (that is, no unintended consequences can exist).

Virginia law is clear, however, that only when the ***consequence*** is actually intended or known to the insured is the causal conduct no longer "accidental": "there is a fundamental distinction between the certainty of [an act] and the certainty of resulting loss." *Ins. Co. of N. Am. Inc. v. U.S. Gypsum Co., Inc.*, 870 F.2d 148, 152 (4th Cir. 1989) (applying Virginia law); *see also Fid. & Guar. Ins. Underwriters, Inc.*, 238 Va. at 462 (holding that because courts focus "on the unplanned and unintentional nature of the damage," the fact that the insured "deliberately" took action that resulted in property damage does not preclude coverage). In *U.S. Gypsum*, for example, the owner of a gypsum mine sought indemnity for a massive earth subsidence caused

by its mining operation, simply put, a huge mine cave-in. 870 F.2d at 150-51. In holding that the insured was entitled to indemnity, the court found that, although the insured had knowledge of previous, smaller subsidence, such knowledge was not enough to prevent indemnity, in part because "[a]ll of the witnesses who testified on behalf of USG stated that they did not expect the occurrence of a loss of this magnitude." *Id.* at 151. If the insurer's argument (which parallels Steadfast's) about expectations and coverage were adopted, the court concluded, "there never could be coverage for subsidence damage" because nothing would be an "accident." *Id.* at 152. Virginia courts, at bottom, draw common-sense lines between intentional and accidental conduct. *See, e.g., Norman,* 218 Va. at 723 (finding when a person willfully shoots another person, his conduct is not an "accident"); *Utica Mut. Ins. Co.,* 223 Va. at 147-48 (finding when a person intentionally runs another car off of the highway, his conduct is not an "accident").

The authority cited by Steadfast, properly read, comports with AES's common-sense reading of "accident" to include allegations of negligence even if some of the alleged conduct is, broadly speaking, volitional. Steadfast's linchpin case, *Resource Bankshares Corp. v. St. Paul Mercury Ins. Co.,* 407 F.3d 631, 637 (4th Cir. 2005), states that "Virginia courts ask whether an event was a natural and probable consequence of the insured's intended actions," thus distinguishing between the intent to act and the consequence of that action. Indeed, the court held that the insured's conduct was intentional, illegal, and thus not covered. *Id.* at 639. The insured intended to send faxes, meaning it intended people to receive the illegal "junk faxes" at issue. To be sure, AES's subsidiaries intended to generate electricity (which produces CO_2 at some facilities), but the *Kivalina* Plaintiffs do not allege that AES intended to flood Kivalina or that AES violated any statute. The alleged consequence of AES's conduct – that is, flooding in Kivalina – was not allegedly caused by AES's "design" or "intent." Even Steadfast's claims handler conceded that there are "no allegations" that AES emitted CO_2 to "cause harm to the Kivalina plaintiffs…." Ex. 12 (Barker Dep. at 93).

Steadfast also cites *Citizens Home Ins. Co., Inc. v. Nelson*, 218 Va. 216 (1977), for the proposition that intentional acts necessarily preclude insurance coverage. Mot. at 9. Steadfast fails to mention that in *Nelson* an "assassin told the insured that if he made another move he would shoot him." *Nelson*, 218 Va. at 218. The court held the insured's subsequent "gunshot wound to the head" was not accidental. *Id.* at 217. No similar allegations exist here.

Finally, Steadfast relies on two cases based on inapplicable New Hampshire law to argue that the supposed effects "concomitant of its normal business practice" cannot be accidental. *See* Mot. at 11 (citing *N. H. Ball Bearings v. Aetna Cas. & Sur. Co.*, 43 F.3d 749, 754 (1st Cir. 1995); *Great Lakes Container Corp. v. Nat'l Union Fire Ins. Co.*, 727 F.2d 30 (1st Cir. 1984)). Those cases are easily distinguishable and unsupported by Virginia law.[11] *N. H. Ball Bearings* arose out of a manufacturer's disposal of chemical solvents containing volatile organic compounds, trichloroethylene (TCE), and 1,1,1-trichloroethane. *N. H. Ball Bearings*, 43 F.3d at 751. The manufacturer disposed of waste by purposefully spilling it onto the floor and allowing it to overflow into a drain that lead directly to a local stream. As the stream was only a quarter of a mile away, the plaintiffs could directly trace their injuries to the (insured) company that released the toxins. *Id.* Unlike under Virginia law, New Hampshire law provides that an action is not accidental if either 1) the insured intended to inflict the injury or 2) its actions were "inherently injurious." *Id.* at 753. Unremarkably, the court found that dumping toxic chemicals into a local water supply was "inherently injurious" and thus was not an accident under New Hampshire law. *Id.* at 754. *Greatlakes* is factually similar and similarly reasoned: it was inherently dangerous for the insured to release waste chemicals into an "adjacent" stream. *Greatlakes Container Corp.*, 727 F.2d at 32-35.

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[11] In its interrogatory responses, Steadfast identified only Virginia law as the legal basis for denying AES coverage. Ex. 24. Steadfast also identified only the complaint and policies as the factual basis for denying AES coverage and not any of its many exhibits. *Id.*

Here, as established in Section II B, the allegations of the *Kivalina* Complaint include highly selective and attenuated causal links between AES's alleged conduct and the property damage at issue, which illustrate the alleged damage to the remote Kivalina island was not intentional (or foreseeable) under Virginia law. Operating power plants to provide energy to power homes, schools, hospitals, and the like has not been viewed as an inherently dangerous threat to remote Kivalina, Alaska. Moreover, the global CO_2 emissions of mixed eras and origins allegedly trapping the atmospheric heat at issue in *Kivalina* are not unambiguously equivalent to the "inherently injurious" chemicals discharged into a local stream and traceable to one identifiable "but for" source of damage. Thus, even by New Hampshire's inapplicable standard, AES's alleged conduct is "accidental" and thus an "occurrence," particularly given that "all doubtful questions" must be answered in AES's favor.

2. The Alleged Damage to Kivalina Was Not "Foreseeable," as Properly Understood, from AES's Standpoint.

Steadfast contends the property damage to Kivalina was alleged to be foreseen by AES. Mot. at 9-10. Because the *Kivalina* Plaintiffs allege negligence (a fact Steadfast neglected to mention) (*Kivalina* Compl. ¶¶ 252, 265), they allege a foreseeable injury occurred as well, which is a ***standard pleading requirement*** of proximate causation in any negligence-based tort case. *See, e.g., Interim Pers., Inc. v. Messer*, 263 Va. 435, 442 (2002) ("In order to warrant a finding that negligence is the proximate cause of an injury . . . the injury should have been foreseen in the light of the attending circumstances."); *Jeremy Imp. Co. v. Commonwealth*, 106 Va. 482, 491 (1907) (stating in an action to abate a nuisance, that "[i]t is well settled that the thing or act which is the ground of the prosecution must be shown to be the direct and proximate cause of the nuisance"). *Kivalina's* attenuated allegations of foreseeability do not enable Steadfast to avoid coverage.

As established in Section II B, the harm AES allegedly caused to the tiny Kivalina island was not foreseeable as a matter of law. AES's alleged conduct is far too remote and attenuated from the winter storms and soil erosion allegedly affecting Kivalina. Steadfast's counsel, Crowell & Moring, also represents Peabody Energy in *Kivalina* and, in that matter, contends: "The indisputable fact that all living organisms, human and animal activity, and advanced human efforts such as industrial and transportation methods, as well as innumerable planetary events (such as volcanic eruptions and natural degradation of plant matter), emit greenhouse gases precludes plaintiffs from showing that Peabody is the ***proximate cause*** of their alleged injuries." Ex. 8 (Peabody Mot. at 19). Peabody also (properly) chided the *Kivalina* Plaintiffs' effort to advance a claim that could possibly enable "the Court [to] rationally limit damages to those somehow deemed '***reasonably foreseeable***'" and even argued the "plaintiffs cannot show that they have been injured." Ex. 8 (Peabody Mot. at 2); Ex. 9 (Peabody Reply at 24).

In this case, by contrast, the same law firm takes the opposite position on behalf of Steadfast, asserting that AES's operations, as alleged in *Kivalina*, could be characterized as "liability-producing conduct" (i.e., emitting CO_2) leading to an "intentional" and "foreseeable (and in fact known)" injury (i.e., erosion, flooding, etc., in a remote island in northwest Alaska). Mot. at 11. Steadfast cannot credibly argue that the *Kivalina* allegations "clearly" establish that AES's alleged conduct led to a foreseeable injury not covered by its insurance policies, when its own law firm has taken the opposite – and correct – position on behalf of Peabody in *Kivalina*. Steadfast is no doubt aware of Peabody's position because its AES claims handler, Ms. Barker, has communicated with the Crowell lawyers representing Peabody about climate-change litigation also involving AES. Ex. 25 (ST00022949); Ex. 26 (ST00022943).[12]

[12] Unlike AES, Peabody is also a "conspiracy" defendant in *Kivalina*, facing the allegation that Peabody "conspired to create a false scientific debate about global warming in order to deceive the public." *See Kivalina* Compl. at 65 (Third Claim for Relief); *id.* ¶ 5. In this context,

As a practical matter, Steadfast really urges the creation of a new rule that it has a duty to defend "accident" claims only if they are not allegedly caused by negligence involving volitional acts with foreseeable consequences. But as one Virginia court already concluded, if Steadfast's "definition were applied to insurance policies it would exclude coverage for negligent conduct, which of course would be absurd since coverage for actions for negligent acts is the principal reason why liability insurance is purchased." *Morris v. Travelers Indem. Co.,* No. 1928, 1993 WL 946167, *4 (Va. Cir. Ct. 1993). Steadfast would effectively limit its defense obligations to cases involving only strict liability torts or negligent acts committed with no volitional conduct or possible foresight, perhaps harms caused while sleepwalking, during a seizure, or the like. That is not the law, nor should it be.

3. The Question of Whether AES Intended and Expected to Cause Damage to Kivalina Gives Rise to Factual Issues.

Consistent with the precedent and policy language cited above, Virginia courts routinely find that the question, as posed here, of "[w]hether a particular intentional act is excluded from coverage . . . depends upon the subjective intent of the insured, which is ordinarily a question of fact." *Erie Ins. Exch.,* 60 Va. Cir. at 424 (citation omitted); *see also supra* at Section II B. Irrespective of the mixed allegations of negligent and intentional conduct made against AES in *Kivalina*, AES would establish at trial that it did not, in fact, intend to damage or expect any

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Peabody's (proper) ridicule of the *Kivalina* Plaintiffs' foreseeability allegations is even more telling, as AES's alleged conduct is less intentional than Peabody's alleged conduct. Moreover, despite assuring AES that there was a "wall" between counsel from Crowell for Peabody and for Steadfast, Steadfast actually attempted to conceal the absence of any wall by logging those communications on its privilege log. Ex. 27. After AES moved to compel (again), Steadfast produced the night before the hearing (and two days after Ms. Barker's deposition) the Peabody-Steadfast-Crowell communications, including one where Peabody's lawyer referred to Steadfast's claims handler as one of her "Dear Clients." Ex. 25 (ST00022949); Ex. 26 (ST00022943). (AES is currently conferring with Steadfast about a motion to disqualify Crowell). Steadfast reluctantly disclosed that Peabody, like AES, tendered *Kivalina* to a Zurich-related insurer for coverage. Ex. 28 (ST00022501). Other AES co-defendants in climate change suits have also tendered coverage to Zurich-related insurers. *See, e.g.*, Ex. 12 (Barker Dep. at 48-52 (CONSOL Energy; Natural Resource Partners; NRG Energy, Inc.)).

damage to occur to Kivalina resulting from its subsidiaries' generation of electricity. Even Steadfast admitted that it is possible for a substance to be intentionally emitted, broadly speaking, "without an expectation of injury or damages." Ex. 12 (Barker Dep. at 95-96).

III. Alleged Property Damage Liability Based on CO_2 Emissions Is "Novel" and, as Steadfast Conceded, Such Emissions Were Not Understood to Be Pollutants at Contract Formation.

Steadfast asks this Court to be the first in the nation to exclude – summarily exclude, no less – admittedly "new" and "novel" theories of liability from the industry's broad general liability policies without even addressing the critical question of whether the parties understood at contract formation as early as 1996 that CO_2 emissions were excluded "pollutants" under "traditional pollution discourse." As a matter of fact, Steadfast's underwriters admitted the parties had no such understanding and its claims handler made no effort to ascertain their understanding at contract formation, despite clear policy language tying the pollution discourse "to the time of the inception of this policy." Ex. 11 (Kovar Dep. at 66-7, 73, 152-55); Ex. 23 (Commerford Dep. at 55); Ex. 12 (Barker Dep. at 66, 167-70). At a minimum, Steadfast's attempted reliance on this exclusion gives rise to complex, disputed, and "novel" questions of fact not amenable to summary resolution based solely on the *Kivalina* pleadings. Steadfast's own reliance on extrinsic evidence conclusively undercuts its motion.

A. CO_2 Is Not an Unambiguously Excluded "Pollutant."

The policies do not exclude all property damage allegedly caused by any power plant-related substances (e.g., water mist), but rather only certain "irritants" or "contaminants" understood to be "pollutants" under "traditional pollution discourse." Subject to certain exceptions, the policies exclude claims for "property damage" based on: "Any injury or damage which would not have occurred in whole or in part but for the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants at any time." *See, e.g.*,

Ex. 17 (ST00017731).[13] "Pollutants," in turn, "mean[s] any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste." *See, e.g.*, Ex. 17 (ST00017700). Subject to a narrow exception discussed below and inapplicable here, "pollutants" include only substances that, at contract formation, were characterized as an "irritant" or "contaminant" under "traditional pollution discourse." Indeed, Steadfast ***concedes*** that the "key inquiry" focuses on "whether the substance is an irritant or contaminant as understood under traditional pollution discourse." Mot. at 25 (quoting *State Auto Prop. & Cas. Ins. Co. v. Gorsuch*, 323 F. Supp. 2d 746, 754 (W.D. Va. 2004)). An "irritant" is something that causes "irritation" or "inflammation." Webster's New World College Dictionary at 715. To "contaminate," by contrast, means to "make impure, unclean, or unfit for use through contact or addition." *Id.* at 300. When used in connection with the word "pollute," contamination "implies complete befoulment, decay, or corruption." *Id.* The application of this exclusion to property damage claims is further limited by "traditional pollution discourse," thus precluding a denial of AES's coverage based on the admittedly "novel" pollution discourse implicated by *Kivalina* and climate-change science.[14]

At the threshold, the policies nowhere discuss property damage allegedly caused by CO_2 emissions, despite expressly excluding numerous substances by name. *See, e.g.*, Ex. 17 (ST00017712-ST00017720) (excluding asbestos, mixed dust particles, lead, formaldehyde,

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[13] Among the many other reasons this exclusion does not apply, CO_2 is commonly understood to be emitted into the atmosphere by power plants, not discharged, dispersed, seeped, migrated, released, or escaped into the atmosphere.

[14] Steadfast concedes, as it must, that the Court should consider these terms and their dictionary definitions in other sections of its motion where it contends that the "common meaning" of a term controls. *See, e.g.*, Mot. at 12 ("numerous dictionary definitions of 'incept' demonstrate the word commonly denotes . . ."). Steadfast decided to drop its "common meaning" approach in the "pollutants" section, however, because that approach undercuts its position.

fungi, MTBE, and mold). Thus, Steadfast must rely on only the general exclusion, which is limited to "irritants" and "contaminants" under "traditional pollution discourse."

CO_2 is not an "irritant" or "contaminant." Rather, CO_2 is an odorless and colorless gas emitted into the atmosphere in massive quantities by many natural and manmade sources. As a matter of fact, the Steadfast-Zurich underwriters of AES's policies admitted that they had no understanding of CO_2 as a pollutant at contract formation. Ex. 11 (Kovar Dep. at 152-53) (testifying that in conversations with brokers, customers, and potential customers, issues of "climate change itself or global warming or carbon dioxide" have "not really come up," in part because "you have to remember who we're dealing with here in Texas"); *id.* at 155 (testifying that Steadfast had no understanding of "CO_2 as a pollutant in 1996"); Ex. 23 (Commerford Dep. at 54, 58-59, 66) (testifying that his team analyzed AES-related risks associated with "environmental type exposures," he does not "recall any discussion of carbon dioxide emissions in any risk engineering analysis," and he does not know "whether CO_2 was considered a pollutant" in 2003); *see also* Exs. 13-21 (1996-2008 Policies). Moreover, when AES asked Steadfast's corporate designee on the pollutants exclusion about "traditional pollution discourse" – the area of "key inquiry" according to Steadfast – he said that he did not know anything about such discourse and Steadfast's counsel instructed him not to answer AES's questions on that subject. Ex. 22 (Stoley Dep. at 148-52). This uniform testimony is no surprise, as AES's alleged CO_2 emissions were not regulated in 1996 and are not regulated today by the EPA (contrary to Steadfast's misleading citations refuted below). For that reason, *Kivalina* does not and cannot allege that AES violated any environmental statute.

Moreover, people and animals exhale CO_2 in every breath, and plants, in turn, use it to produce energy through photosynthesis. *See* NASA, Earth Observatory Website, *The Carbon Cycle: Biological/Physical Carbon Cycle: Photosynthesis and Respiration*, last updated August 5, 2009 *available at* http://earthobservatory.nasa.gov/Features/CarbonCycle/carbon_cycle2.php.

The Federal Energy Regulatory Commission ("FERC") has granted "Qualifying Facility" status to numerous AES-related cogeneration facilities that capture or use heat or steam to produce CO_2 for sale to food-grade users and bottlers, which, in turn, use it to preserve food, "carbonate" soft drinks, and the like. *See, e.g.*, *AES WR Ltd. P'ship*, 69 FERC ¶ 62,082, at 64,181 and n.1 (1994); *AES WR Ltd. P'ship*, 60 FERC ¶ 62,011, at 63,012-13 (1992); *AES CB Ltd. P'ship*, 58 FERC ¶ 62,253, at 63,606-08 (1992); *AES Shady Point*, 33 FERC ¶ 62,051, at 63,082 (1985). The FDA has long considered CO_2 to be safe for use as an additive in food and drinks. 21 C.F.R. §184.1240 (2008). In its own risk assessment report of AES-related operations from the mid 1990s, Steadfast characterized CO_2 at one of the AES-related power plants as a "product" used to preserve food. Ex. 10 (ST00022011). In the next section of the risk assessment, entitled "pollution," CO_2 is nowhere mentioned as a concern. *Id.* Thus, far from causing "corruption," "decay," or "impurities" through its "contact" with or "addition" to the atmosphere or the human environment, CO_2 (like H_2O) is an omnipresent substance critical to the survival of animal and plant life. Calls for incremental reductions in CO_2 emissions to combat climate change do not change the substance's essential nature.

In this context, Steadfast cannot establish – based on "novel" litigation – that the parties unambiguously excluded CO_2 emissions from the policies at contract formation in 1996 or 2003 under "traditional pollution discourse." This conclusion is even more compelling because the exclusion must be interpreted "most strongly" in AES's favor. Indeed, even in 2009 no one can definitively declare that CO_2 unambiguously shares the characteristics of an "irritant or contaminant," such as "smoke, vapor, soot, fumes, acids, chemicals and waste." Accordingly, the interpretative doctrine of *ejusdem generis* requires the Court construe the policies not to include CO_2 as an excluded "pollutants." *See Surles v. Mayer*, 48 Va. App. 146, 164-65 (2006); *Gorsuch,* 323 F. Supp. 2d at 753.

Additional language found in the "pollutants" section also supports AES's common-sense reading of "pollutants" to not include CO_2. The defined term ("pollutants") and the item sought to be included (CO_2) must be evaluated in the context of the endorsement as a whole and the time of contract formation. To be a pollutant, substances generally require "monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing." *See, e.g.*, Ex. 17 (ST00017731). The term "Pollution incidents" expressly excludes coverage claims "based upon or attributable to the insured's willful, deliberate or intentional noncompliance with any statute, regulation," and the like. *Id.* The "pollutants" section refers to a number of regulatory acts, including the "Clean Water Act of 1977" and the "Oil Pollution Control Act of 1990." *See, e.g.*, Ex. 17 (ST00017732). The endorsement language illustrates that the term "pollutants" is intended to include only "irritants" or "contaminants" of a nature that must be "detoxified" or somehow "neutralized" and are subject to regulation. Against this backdrop, AES would establish at trial that the emission of CO_2 did not and does not possess these characteristics as informed by traditional pollution discourse.

The fact that a certain substance (like CO_2 or H_2O) can be produced and emitted by a power plant but not be considered a "pollutant" is admitted by Steadfast and clear from the context of the policy language. Steadfast's claims handler conceded that substances can be emitted into the atmosphere and cause property damage but necessarily not fall within the definition of contaminants simply because they allegedly caused damage. Ex. 12 (Barker Dep. at 194). The policies provide that "pollutant" will include a substance that "***was not considered an irritant or contaminant at the time of the inception of this policy,***" but only if it "subsequently is deemed to be a pollutant by a government entity ***during the term of this policy***." *See, e.g.*, Ex. 17 (ST00017732). This provision is found in the endorsement entitled "Time Element Limited Pollution Liability Endorsement For Energy And/Or Energy Related Operations." In this industry-specific endorsement (which is ambiguous in other respects), Steadfast acknowledged

that not all emissions were pollutants at contract formation. Yet Steadfast's claims handler said that the application of this term is somehow "questionable" and failed to "make any effort to determine whether carbon dioxide emissions were considered a traditional pollutant at the time that any of the policies were entered in this case." Ex. 12 (Barker Dep. at 65-66, 211).

CO_2 is an example of a substance that was not considered an "irritant" or "contaminant" at contract formation and was not "deemed to be a pollutant by a government entity during the term of the policy." *See, e.g.*, Control of Emissions From New Highway Vehicles and Engines, 68 Fed. Reg. 52922, 52928 (Notice of denial of petition for rulemaking Sept. 8, 2003) (concluding that greenhouse gases "are not air pollutants under the CAA's regulatory provisions..."). As applied to the 1996 and 2003 policies, this endorsement language not only establishes that CO_2 is not a pollutant, but also prevents Steadfast from (inaccurately) citing recent precedent like the *Massachusetts* opinion as a basis to expand the scope of "pollutants." *See* Ex. 11 (Kovar Dep. at 167-70) (admitting that the government's characterization of a substance as a "pollutant" must occur "during the term" of the policy for it to be excluded from coverage).

At bottom, Steadfast did not categorically exclude all power plant-related substances allegedly causing or contributing to property damage, much less specifically exclude the substance CO_2 or global-warming-related damages allegedly caused by it. Certain Steadfast policies do, however, ***expressly exclude*** by endorsement numerous environmental hazards adopted in response to novel legal theories seeking recovery for them and adverse judgments against the insurance industry in related coverage disputes. Ex. 11 (Kovar Dep. at 160-61) (admitting the environmental endorsements are "usually based on some sort of litigation and our response to that"). For example, certain policies exclude damages caused by mixed dust particles, PCBs, lead, formaldehyde, silica, fungi, mold, MTBE, nuclear emissions, and asbestos. *See, e.g.*, Ex. 17 (ST00017712-ST00017720). Steadfast has even used exclusionary language to

address the particular property damage caused by "acid rain," which, of course, is a form of pollution caused by certain emissions. Ex. 11 (Kovar Dep at 140-42).

If the definition of "pollutants" were nearly as broad and clear as Steadfast claims here, then such express exclusions would have been unnecessary. But through its actions, Steadfast admitted that such exclusions were necessary to broaden the "pollutants" exclusion after the insurance industry's litigation failures. Ex. 11 (Kovar Dep. at 160-61). Likewise, if it wants to categorically exclude CO_2 emissions or climate change claims from its coverage, then Steadfast must amend its policies. Until it does, the policy language will not unambiguously exclude CO_2, particularly when "construed most strongly" in AES's favor.

The cases cited by Steadfast support AES's position. Steadfast devoted little time to discussing what it characterized as the "leading Virginia case" on the pollution exclusion – *City of Chesapeake v. States Self-Insurers Risk Retention Group, Inc.* – because that case is easily distinguishable and, to the extent relevant, actually favors AES's position. 271 Va. 574, 577 (2006). The City sought reimbursement for fees resulting from a toxic tort litigation brought pursuant to a "Public Entity Excess Liability Insurance Policy." *Id.* Over two hundred plaintiffs alleged "that their miscarriages were caused by exposure to trihalomethanes ('THMs') in the City of Chesapeake's water system on various dates from ***1984 through 2000***." *Id.* at 576. The Court found that, "the THMs involved in" the underlying toxic tort suit "are 'contaminants,'" because "THMs have been regulated as contaminants under the Federal Safe Drinking Water Act [(SDWA)] and its implementing regulations ***since 1979***." *Id.* at 578.[15] The Court continued, the plaintiffs alleged "THMs are a poisonous byproduct of disinfection that are disposed of and

[15] The issue of whether the Court could rely on definitions from the SDWA was not litigated. The Virginia Supreme Court has held that courts cannot adopt statutory definitions in coverage disputes unless they are incorporated by reference into the policy. In any event, unlike CO_2, THMs are clearly cancer-causing contaminants under traditional pollution discourse, because their presence renders water unfit to drink.

released into the domestic water . . . ." *Id.* at 578. The Court upheld the application of a pollutant exclusion because it found that the substance alleged to be a "pollutant" had been regulated under the SDWA for several years before the first injuries. Unlike the personal injury plaintiffs in *City of Chesapeake*, the *Kivalina* Plaintiffs do not allege that AES violated any environmental statute by emitting CO_2, let alone any statute regulating such emissions as "contaminants" before contract formation in 1996 or 2003. And, of course, unlike the THMs in *City of Chesapeake*, the CO_2 in *Kivalina* is not a poison that causes miscarriages or the like.

Steadfast also relies on *State Auto Property & Casualty Insurance Co. v. Gorsuch*, which, like *City of Chesapeake*, supports AES's position. Mot. at 25 (citing *Gorsuch*, 323 F. Supp. 2d at 753). In that case, the court actually found the insurer had a duty to defend because the H_2O that allegedly caused certain flooding during a heavy rain was not an irritant or contaminant under traditional pollution discourse. *Gorsuch,* 323 F. Supp. 2d at 753-755. The court found in "their plain, ordinary, and popular sense, the terms 'irritant' and 'contaminant' do not include excess, though not impure or unclean, waters." *Id.* at 753. The Court looked to "The American Heritage Dictionary of the English Language," which defines "irritant" as "a source of irritation" and cites "tobacco smoke" as an example. *Id.* Similarly, a "contaminant" is defined as "something that contaminates," such as the "bacteria contaminated the wound," "iron contaminated with phosphorous," and "water contaminated by industrial wastes." *Id.* "In addition, the remaining language comprising the pollution exclusion clause informs the meaning of 'contaminant' and 'irritant.'" *Id.* Specifically, the exclusion "refers to 'smoke, vapor, soot, fumes, acids, alkalis, chemicals, and waste[,]' all of which are traditional industrial pollutants that defile the environment." *Id.* The court also relied on the absence of regulation in Virginia treating flood waters as contaminants. *See id.* at 755.

The similarity between the purported pollutants in *Gorsuch* and *Kivalina* – H_2O and CO_2 – is evidently lost on Steadfast. These natural substances allegedly caused property damage

through flood events. In both cases, neither one is a regulated "contaminant." Like the "excess" H_2O in *Gorsuch*, the "excess" CO_2 in *Kivalina* is not a "pollutant" because, as explained above, it does not allegedly "irritate" or "contaminate" the environment as informed by "traditional pollution discourse."[16]

B. The *Kivalina* Plaintiffs' Facile Characterization of Certain CO_2 as "Pollution" Is Not Dispositive of This Insurance Dispute.

Steadfast contends that "the Kivalina plaintiffs' characterizations [of CO_2 as 'pollution'] are dispositive and the Steadfast Policies' pollution exclusion applies to bar AES's coverage claims." Mot. at 23. As established above, the meaning of the defined term "pollutants" as "irritants" and "contaminants" under traditional pollution discourse at contract formation controls. *Kivalina* does not address the term "pollutants" defined in the policies. Nonetheless, AES will tackle Steadfast's baseless argument head on.

First, the Virginia Supreme Court expressly rejected Steadfast's argument that the plaintiff's characterization of an insured's conduct or activity in an underlying suit is "dispositive" – here, *Kivalina's* unproven allegations loosely characterizing CO_2 as "pollution." In *Virgina Electric*, the Court not only refused to apply the worker's compensation definition of employee to the policy, but also disregarded Virginia Electric's own characterizations of her as an employee in the underlying suit and the trial court's final determination that she was one. *Va. Elec. & Power Co. v. Northbrook Prop. & Cas. Ins. Co.*, 252 Va. 265, 271-72 (1996). Thus, the fact that *Kivalina* uses the word "pollution" is far from "dispositive."

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[16] Under Steadfast's unprecedented reading of "pollutants," even pure water, H_2O, could be a "pollutant" if someone claimed that its release from an AES-related plant caused property damage based on some remote theory of "nuisance" liability. This example is not far-fetched, as power plants transform solid water, H_2O, into steam and water vapor during the production of electricity and even water vapors contribute to the greenhouse effect according to the EPA. *See* 74 Fed. Reg. at 18897 (describing water vapor as the "the most abundant naturally occurring greenhouse gas").

Second, *Kivalina* does not make the allegations necessary for Steadfast to unambiguously invoke the "pollutants" exclusion. CO_2 is not an alleged "irritant" in *Kivalina*. And while *Kivalina* alleges "the natural carbon cycle is out of balance" owing to manmade CO_2 emissions (*Kivalina* Compl. ¶ 126), the notion that CO_2 – whether manmade or natural – is a "contaminant" is not alleged in *Kivalina* and is disputed by the defendants.[17] The *Kivalina* Plaintiffs do not allege that their island has been somehow contaminated or its villagers irritated by CO_2 emissions (if that is even possible) as understood in traditional pollution discourse. Rather, they loosely characterize defendant-related CO_2 as "pollution" when combined with the emissions of innumerable other natural and manmade sources spread over time. *See* Compl. ¶¶ 141, 254-55. The highly attenuated causal chain (*supra* at Section II B) illustrates CO_2 emissions have none of the traits of traditional pollutants reasonably attributable to AES-related operations. These "novel" allegations are far from "dispositive" as to the application of the exclusion, particularly since the exclusion must be "most strongly construed" in favor of AES.

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[17] Steadfast cites in a footnote the *Kivalina* Plaintiffs' Consolidated Opposition to Defendants' Motions to Dismiss for the proposition that the *Kivalina* Complaint alleges that CO_2 is somehow "noxious" and, thus, it is an excluded pollutant based on a case addressing fumes emanating from "epoxy sealants." Mot. at 24 n. 13 (citing extrinsic Ex. O). This argument is flawed. First, under the eight-corners rule, this Court cannot consider Steadfast's Exhibit O, but rather is limited to the *Kivalina* Complaint. *See supra* at Section I B. The *Kivalina* Complaint does not allege that CO_2 is "noxious." Even Steadfast's claims handler testified that she did not review the Opposition brief and has "never done that" as part of her coverage analysis. Ex. 12 (Barker Dep. at 125-26). Second, Steadfast's citation is misleading. In their Opposition brief, the *Kivalina* Plaintiffs simply addressed whether CO_2 could be considered "noxious" under federal nuisance law and, to that end, they argued that "noxious" is synonymous with "harmful." *See* Mot. Ex. O at 32. They even analogize CO_2 to water, arguing "[w]ater is not inherently harmful, yet ***too much water*** causes flooding and gives rise to a federal nuisance claim." *Id.* In a case quoted by Steadfast, however, a court already held that water is not an excluded pollutant under Virginia insurance law. Mot. at 25 (citing *Gorsuch*, 323 F. Supp. 2d at 754). The *Kivalina* Plaintiffs' attempt to draw analogies between federal nuisance claims based on flood waters and their nuisance claims based on CO_2 emissions simply underscores that *Kivalina* is not a traditional pollution case, but rather a nuisance case not tied to the violation of any pollution statute.

C. Because the Policies Do Not Incorporate Pollution Terms from the Clean Air Act or Virginia Administrative Code, Those Statutes Are Irrelevant to Whether CO_2 Is a "Pollutant" Under the Policies, and, in Any Event, They Provide No Basis to Deny AES Coverage.

The defined terms set forth in the Clean Air Act (CAA) and Virginia Administrative Code (VAC) are irrelevant to interpreting the "pollutants" exclusion "unless the policy provides by reference to the specific statute that the statutory definition is intended to be applied." *Va. Elec. & Power Co.*, 252 Va. at 271-72 (citing other Virginia Supreme Court authority); *see also Firemen's Ins. Co. v. Kline & Son Cement Repair, Inc.*, 474 F. Supp. 2d 779, 789 (E.D. Va. 2007) (finding the "allegations charge no violation of the Clean Air Act, or any other federal statute for that matter, and any reference to a particular federal environmental statute is therefore rendered unnecessary and inappropriate"). Even though Steadfast itself relied on this Virginia authority and knows *Kivalina* does not rely on any environmental statutes, Steadfast cites selected portions of the CAA and VAC in a baseless effort to show that CO_2 was "commonly" understood to be a "pollutant" under the policies. *See* Mot. at 19-21. Steadfast's citation to these statutes is improper. Out of an abundance of caution, however, AES will show that Steadfast's use of these statutes lacks merit. Indeed, because Virginia courts have found the absence of regulation relevant in insurance disputes about pollutant exclusions, both the VAC and CAA actually support AES's claim for coverage. Neither Virginia nor the EPA currently regulates stationary CO_2 emissions.

1. Virginia Did Not at Contract Formation and Does Not Currently Regulate CO_2 Emitted by Power Plants as a "Pollutant."

Steadfast attempts to create the misimpression that CO_2 is a regulated "pollutant" under Virginia's "environmental regulatory framework," and, thus, AES must have had the supposedly "common understanding" that CO_2 is an excluded "pollutant" under the policies at contract formation. Mot. at 20-22. The reality is that CO_2 falls outside the definitions of "regulated

pollutant" used in Virginia's stationary source program for power plant emissions.[18] Under Virginia's Administrative Code, "Regulated Air Pollutants" include only: (1) nitrogen oxides and volatile organic compounds ("VOCs"); (2) pollutants subject to a federal national ambient air quality standard ("NAAQS"); (3) pollutants subject to a federal new source performance standard ("NSPS"); (4) substances regulated under the federal stratospheric ozone protection program; (5) pollutants subject to a national emission standard for hazardous air pollutants ("NESHAP") or otherwise regulated as a federal hazardous air pollutants; (6) pollutants subject to a regulation adopted by the Virginia Air Pollution Control Board; and (7) pollutants subject to regulation under the Virginia Air Pollution Control Law. 9 Va. Admin. Code § 5-80-810 (defining "regulated pollutant" under the state stationary source operating permit program). None of the seven prongs of the definition extends to CO_2. Indeed, in the only instance where the definition of "Regulated Air Pollutants" might have been broad enough to encompass CO_2, Virginia law ***expressly*** excludes CO_2 by name. *See* 9 Va. Admin. Code § 5-10-20.

Steadfast seeks to avoid these facts by referencing several generic definitions of pollution throughout the Code, implying that these open-ended definitions include CO_2 emitted by power plants. *See* Mot. at 19-21. Even assuming that the Commonwealth intended to regulate CO_2 emissions from power plants, there are no substantive CO_2 regulations to create a "common understanding" that CO_2 is a "pollutant" under insurance policies. Indeed, after AES renewed its last policy with Steadfast, Governor Kaine acknowledged the absence of CO_2 regulation in a 2007 Executive Order. Ex. 29. Steadfast's citations to the VAC are legally irrelevant to the meaning of "pollutants" under the policies and factually misleading as applied to CO_2.

[18] Moreover, because AES has no current or historical interest in any power plants subject to regulation under the VAC, Steadfast's reliance on that code is even further misplaced.

2. The U.S. Supreme Court's Split Opinion in *Massachusetts v. EPA* (2007) Supports AES's Coverage Claim, Not Steadfast's Denial.

Steadfast "requests that this Court adopt the Supreme Court's holding in *Massachusetts v. EPA*, that greenhouse gases are pollutants as that term is commonly understood" so as to bar coverage for CO_2 emissions under AES's insurance policies. Mot. at 18-19. For the reasons stated above, this Court cannot "adopt" as a policy term the U.S. Supreme Court's reading of "air pollutant" under the CAA. Steadfast's request is wrong on many other levels too.

The U.S. Supreme Court did not "hold" that CO_2 is "commonly understood" to be a "pollutant" under the disputed policy language and insurance law. Rather, the majority found that CO_2 is an "air pollutant" under the CAA's "sweeping" definition. In October 1999, a group of private citizens filed a rule-making petition requesting the EPA to regulate CO_2 and other emissions from automobiles (not power plants). *Mass. v. EPA,* 549 U.S. 497, 510 (2007). In September 2003, the EPA denied the petition. *Id.* at 511. Among other parties, twelve States (but not the Commonwealth) sought judicial review of the EPA's decision. As part of its holding, the U.S. Supreme Court interpreted the CAA's "sweeping" definition of "air pollutant." *Id.* at 528-29. "The Clear Air Act's sweeping definition of 'air pollutant' includes '***any*** air pollution agent or combination of such agents, including ***any*** physical, chemical . . . substance or matter which is emitted or otherwise enters the ambient air . . . .'" *Id.* (emphasis in original). Based on this broad language, the U.S. Supreme Court concluded, "On its face, the definition ***embraces all airborne compounds of whatever stripe***...." *Id.* at 529. Thus, the majority found CO_2 is "without a doubt" a "physical" and "chemical" substance emitted into the ambient air. *Id.*

While the U.S. Supreme Court interpreted the CAA broadly to effectuate the purpose of the legislation, this Court must construe the policy exclusion narrowly in favor of coverage. Steadfast is dead wrong that the CAA's definition of "air pollutants" is "equally sweeping" as the policy exclusion. Mot. at 19. The CAA's definition of "air pollutant" is broader on its face than

the definition of "pollutants" in the exclusions, because the CAA's definition includes "all airborne compounds of whatever stripe." *Mass.*, 549 U.S. at 529. Here, by contrast, this Court must determine not simply whether CO_2 is an "airborne compound of whatever stripe," but rather, as Steadfast concedes, whether CO_2 is an "irritant" or "contaminant" akin to "smoke," "soot," or the like under "traditional pollution discourse." *See supra* at Section III A. In doing so, this Court must interpret the policy exclusion "most strongly" in AES's favor. CO_2 is no such compound, as established above.

The issue here is not how broadly the CAA should be construed in 2007, but rather what the parties understood the scope of the pollution exclusion to be in 1996 as informed by traditional pollution discourse. At that time, the EPA – the expert agency charged with administering the CAA – did not regulate CO_2 emissions as "air pollutants" under the CAA's "sweeping" statute. Thus, the "common understanding" at contract formation in 1996 was that CO_2 was not pollution. Even Steadfast ***concedes***, as it must, that in "August 2003, the EPA concluded that it lacked authority to regulate greenhouse gases because they were not 'air pollutants'...." Mot. at 18. The *Massachusetts* opinion provides no basis for holding that the parties intended that CO_2 be treated as a "pollutant" in 1996 or even today. Indeed, the fact that, as late as 2007, the U.S. Supreme Court split on whether to overturn the EPA's position that CO_2 was not a regulated "air pollutant" under the broad CAA definition fully supports AES's position that CO_2 was not unambiguously understood to be a pollutant under "traditional pollution discourse" when Steadfast first issued the narrower "pollutants" exclusion. At bottom, Steadfast's reliance on the CAA definition at issue in 2007 *Massachusetts* opinion is legally

improper and factually misplaced as applied to historical policies dating back as far as the mid 1990s.[19]

D. Steadfast's Improper and Misleading Reliance on Extrinsic Evidence Does Not Support Its "Pollutants" Argument.

In support of its "pollutants" argument, Steadfast relies on "Exhibit M," which contains portions of an AES 10-K filed on March 25, 2002. This Court cannot consider this exhibit under Virginia law. *See supra* at Section I B.

Moreover, Exhibit M does not include a concession by AES, as Steadfast asserts, that "greenhouse gases (including CO_2) are pollutants." Mot. at 18. A 10-K filing is intended to advise the public of potential investment risks. As such, AES summarizes "[n]ew legislation" that had been introduced by "Congress which, ***if passed into law***, would require reduction in power plant emissions beyond those described above." Mot. at 18. The bill, however, never became law. This summary of proposed legislation is plainly irrelevant to the understanding of the meaning of the defined term "pollutants" in 1996. Indeed, Steadfast's claims handler admitted that Steadfast issued a policy to AES as early as 1996 and that there are no allegations in the complaint "about AES' understanding of the alleged harmful impacts of CO_2 emissions on the Earth's atmosphere as of the year 1996." Ex. 12 (Barker Dep. at 87-88).

Nevertheless, Steadfast falsely claims that AES's 2002 10-K was published "two years before the first Steadfast Policy was issued," (Mot. at 18), thus supposedly reflecting AES's understanding of CO_2 as a "pollutant" at contract formation. Steadfast has, therefore, conceded that the parties' understanding of CO_2 under traditional pollution discourse at the time of contract

[19] Steadfast's counsel, Mr. Stewart of Cozen O'Connor, has confirmed that treating CO_2 as pollution is a very recent phenomenon. In March 2008, he referred to climate change risk as a "new problem," and said "given all the uncertainty, there's just a sense of powerlessness" in the insurance industry. Ex. 7. He then predicted *Mass. v. EPA* could be a "watershed" opinion, noting that "litigants in all sorts of cases, including insurance cases, will be able to point to that decision in April of 2007 and say 'Look, ***at this point in time*** there was a recognition by the United States Supreme Court that climate change was a very serious issue.'" *Id.*

formation governs this dispute and not arguments based on "novel" positions. The Steadfast-Zurich underwriters who evaluated AES's risk profile and priced and executed the AES-Steadfast policies had no understanding of CO_2 as pollution at the time of contract formation. Ex. (Kovar Dep. at 152-3, 155); Ex. 23 (Commerford Dep. at 54, 55-59). Steadfast's "primary claims handler," in turn, failed to "undertake any effort to determine whether in the 1996 to 2003 timeframe people generally understood carbon dioxide to be a pollutant." Ex. 12 (Barker Dep. at 113, 172-3, 199-200). In this factual and legal context, Steadfast cannot ask this Court to be the first in the nation to exclude – summarily, no less – property damage claims based on "novel" theories of CO_2 liability, particularly since "all doubtful questions" must be answered in AES's favor.

IV. The Loss-in-Progress Exclusion Is Contained in Only Some of the Steadfast Policies and Does Not Relieve Steadfast of Its Duty to Defend AES in *Kivalina*.

A. Steadfast Ignores Prior Policies that Contain *No* Loss-in-Progress Exclusions.

Steadfast's motion is falsely premised on the assertion that each of the relevant Steadfast policies contained a contractual "Known Loss or Loss in Progress" provisions to exclude from coverage damage that "incepted prior to" the effective date of 2003. Mot. at 11-12. Specifically, Steadfast moves under only its five policies dated from 2003 to 2008, even though Steadfast rejected AES's tender of coverage pursuant to policies dated from 1996 to 2000 before Steadfast filed its summary judgment motion. The four older policies do not contain a loss-in-progress exclusion, were referenced generally by AES in its Counterclaim, and are now attached as Exhibits to AES's Amended Counterclaim. Exs. 13-21 (1996-2008 Policies). Having issued these older policies itself and having produced them from its files in this litigation, Steadfast is no doubt aware of their existence. Nevertheless, Steadfast asserts that AES's coverage has an "earliest effective date" of "September 5, 2003." Mot. at 2, 5 n.2. AES, however, needs only one of nine policies to cover the *Kivalina* claims to have the right to a defense. Thus, Steadfast's

motion must be denied because it owes a duty to defend AES under the 1996 to 2000 policies without regard to when the damage allegedly incepted.

B. Steadfast's Argument Ignores Key Policy Terms and the *Kivalina* Complaint.

Steadfast acknowledges that the eight-corners rule applies (Mot. at 7), but it completely ignores the allegations of the complaint, instead relying improperly on ***two*** of the over 75 extrinsic documents merely referenced in the complaint. Mot. at 13-14. Steadfast then concludes that the 2003-08 policies bar coverage by focusing on only a single word – "incepted" – while ignoring other terms. Mot. at 12. Steadfast is wrong.

1. Steadfast Ignores the Knowledge and Notice Terms of the Policies.

Virginia law requires policy provisions be read as a whole, "seemingly conflicting provisions harmonized" where possible, and "where there is doubt as to their meaning," provisions be read "in favor of that interpretation which grants coverage . . . ." *See Seals v. Erie Ins. Exch.*, 277 Va. 558, 562 (2009). Reading the language of the policies as a whole, Steadfast's argument falls apart.

As cited by Steadfast, the policy exclusion found only in the 2003-08 policies provides:

> This insurance does not apply to:
>
> (1) any injury or damage which incepts prior to the effective date of this policy; . . .

This exclusion seems simple enough on its face, but it is ambiguous when the policy is read as a whole. In Section I 1 b(3), the policies provide that insurance applies to property damage only if, "[p]rior to the policy period," no specified AES agents "knew" that the damage had "occurred, in whole or part." Exs. 17-21 (2003-2008 Policies). If specified AES agents "knew, prior to the policy period, that" the damage had occurred, "then any continuation, change, or resumption of such" damage "during or after the policy period will be deemed to have been known prior to the policy period." *See, e.g.*, Ex. 17 (ST00017684). Under this provision,

property damage that incepted before the policy period is excluded only if it is known to AES and not disclosed to Steadfast. Unlike some policy exclusions written with the requisite precision to amend conflicting terms, the "Loss-In-Progress" exclusion does not expressly modify this provision, but rather it vaguely references "(occurrence)," which is defined in Section V. *See, e.g.*, Ex. 17 (ST00017726). Tellingly, the Steadfast-Zurich underwriter could not confirm that the loss-in-progress endorsement amended this notice provision, which prompted Steadfast's counsel to attempt to redirect the underwriter toward the end of his deposition. Ex. 23 (Commerford Dep. at 40-41) (testifying that he "can't really tell" whether "the loss-in-progress endorsement was intended to modify, amend, or in any way affect Section 1b3 of this agreement"); *id.* at 93-103 (counsel's redirect and re-cross on this ambiguous term).

Thus, the 2003-08 policies provide in Section I 1b(3) that only damage known to AES and not disclosed to Steadfast by AES prior to 2003 is excluded. Insofar as these policies state that damage that incepted before 2003 is excluded, this creates an ambiguity at best, which must be interpreted in favor of the insured AES. To avoid this ambiguity, Steadfast argues no knowledge is required, (Mot. at 14), but that reading renders the policy's knowledge and reporting terms a nullity. Moreover, Steadfast recently demanded discovery from AES to determine "when AES first became aware of damage allegedly being caused by climate change or global warming (which may relate to the analysis of the application of the 'loss in progress' endorsement in Steadfast's policies)." Ex. 30. Steadfast has, thus, acknowledged that there is an ambiguity and a factual issue.

2. Steadfast Relies Solely on Improper Extrinsic Evidence and Ignores the Complaint.

Steadfast ignores the eight-corners rule and contractually defined term "damages." The policies define "property damage" as "[p]hysical injury to tangible property." *See, e.g.*, Ex. 17 (ST00017701). Instead of addressing the alleged damages, Steadfast initially focuses on the

alleged cause of those damages – namely, the allegations of global warming that Steadfast contends "has been occurring over centuries." Mot. at 13. Global warming, however, is not the physical injury to tangible property at issue in *Kivalina*.

Steadfast does not cite ***a single*** allegation from the complaint concerning when global warming caused damage to Kivalina's property. Instead, Steadfast relies on a now-repudiated portion of a federal trial court decision in *CACI Int'l* as a procedural basis to present and overstate two individual statements from lengthy government reports discussing Kivalina, neither of which is attached as an exhibit to the *Kivalina* Complaint.[20] Steadfast claims that both reports indicate that the damage to Kivalina incepted "decades earlier." Mot. at 13. The Court, however, cannot consider this extrinsic evidence under Virginia law. The actual allegations of the complaint do not unambiguously establish damage to Kivalina incepted before 2003.[21]

Because Steadfast's policies cover from 1996 to 2000 (containing no loss-in-progress exclusion) and from 2003 to 2008 (containing an ambiguous loss-in-progress exclusion), the fact-finder in *Kivalina* could conceivably conclude that property damage incepted or occurred

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[20] As part of a *Kivalina* joint-defense group, AES moved to dismiss the February 2008 *Kivalina* Complaint under California's three-year statute of limitations, relying in part on those government reports. The Ninth Circuit rules for Rule 12(b) motions differ from Virginia's eight-corners rule in terms of what material can be considered with the pleadings.

[21] None of three cases cited by Steadfast supports another finding. The only case cited on the issue of "inception," *Ramsey v. Home Ins. Co.*, 203 Va. 502 (1962), concerns a statute of limitations and a one-day event – a fire – where there was no potential for a factual dispute about when the loss incepted. *Id.* at 502-05. Steadfast's other two cases – *Pilot Life Ins. Co. v. Crosswhite*, 206 Va. 558 (1965) and *Nat'l Hous. Bldg. Corp. v. Acordia of Va. Ins. Agency, Inc.*, 267 Va. 247 (2004) – are also distinguishable. *Pilot Life* arose from a bench trial decided on stipulated facts. *Pilot Life*, 206 Va. at 558. The court simply enforced a policy exclusion from coverage for bodily infections except those "*occurring through an open visible wound*," (emphasis in the original), because the insured stipulated "the plaintiff's fall on the school gymnasium floor did not cause an abrasion or open visible wound." *Id.* at 559-60. Similarly, *Nat'l Housing* arose from a jury trial. 267 Va. at 251. The trial court enforced a "clear exclusion" covering "deficiency in designs" because the undisputed evidence supported the finding that the construction subject to the policy was "defectively designed." *Id.* at 252-53. There is no stipulation or undisputed evidence here establishing the date on which the alleged damage to Kivalina "incepted."

during one of AES's nine coverage periods spanning from 1996 to 2008 – as the *Kivalina* Plaintiffs allege. *See, e.g., Kivalina* Compl. ¶¶ 181-85. Thus, Steadfast owes a duty to defend AES in *Kivalina* without regard to when the alleged damage to Kivalina incepted.

CONCLUSION

For the foregoing reasons, AES respectfully requests that the Court deny Steadfast's motion for summary judgment.

Dated: August 7, 2009

Respectfully submitted,

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I certify that on August 7, 2009 copies of the foregoing Opposition was served via email and U.S. Mail, postage pre-paid on the following counsel of record:

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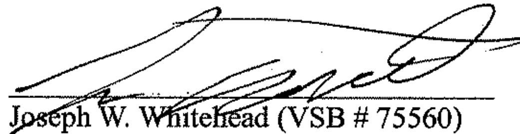

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