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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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FOSTER POULTRY FARMS, INC.,

Plaintiff,

v.

CERTAIN UNDERWRITERS AT
LLOYD'S, LONDON,

Defendant.

Civ. No. 1:14-953 WBS SAB

MEMORANDUM OF DECISION

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After conducting a four-day bench trial, hearing extended closing arguments, and considering the parties' post-trial briefing, the court finds in favor of plaintiff Foster Poultry Farms, Inc. ("Foster") on its breach of contract claim in the amount of \$2,706,398.00. This memorandum constitutes the court's findings of fact and conclusions of law pursuant to Federal Rule of Civil Procedure 52(a).

I. Factual and Procedural Background

Foster is a poultry producer with its largest chicken processing plant in Livingston, California. The Livingston

1 facility is comprised of two processing areas ("Plant 1" and
2 "Plant 2") that share a common packaging floor. Defendant
3 Certain Underwriters at Lloyd's, London, issued a product
4 contamination insurance policy to Foster that was effective May
5 25, 2013 to May 25, 2014 (the "Policy"). (Ex. 1 ("Policy").)
6 The Policy is governed by New York law.

7 On October 7, 2013, the United States Department of
8 Agriculture Food Safety and Inspection Service ("USDA" or "FSIS")
9 issued a Public Health Alert after 278 illnesses had been
10 reported due to a continuing salmonella outbreak. (Ex. 261.)
11 The Public Health Alert warned consumers that "consumption of
12 Foster Farms brand chicken and other brand chicken produced by
13 Foster Farms plants [were] the likely source of this outbreak of
14 Salmonella Heidelberg infections." (Id.) It is undisputed that
15 the Public Health Alert significantly affected Foster's
16 reputation and sales, but Foster does not claim coverage for any
17 losses sustained as a result of the Public Health Alert in this
18 action.

19 On January 8, 2014, the FSIS issued a Notice of
20 Suspension ("NOS") that suspended the assignment of its
21 inspectors at the Livingston facility and withheld marks of
22 inspection for chicken produced there. (Ex. 4 ("NOS").) The
23 FSIS issued the NOS because of "egregious insanitary conditions
24 observed . . . whereby products produced at [the] facility may
25 have been rendered adulterated in violation of the Poultry
26 Products Inspection Act." (Id. at 1.) As a result of the NOS,
27 the FSIS denied Foster's request to apply marks of inspection to
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1 1.3 million pounds of chicken produced at the Livingston facility
2 on January 7 and 8, 2014.

3 After the FSIS approved Foster's Verification Plan in
4 response to the NOS, the FSIS verbally placed the NOS in abeyance
5 on January 10, 2014 and sent a written "Notice of Suspension Held
6 in Abeyance" ("Abeyance Notice") on January 13. Foster resumed
7 operations in Plant 2 on January 11 and 12 and completed two full
8 production shifts. Late in the morning on January 12, Foster
9 voluntarily ceased operations at the Livingston facility and did
10 not resume operations until January 22, 2014.

11 Foster submitted a coverage claim with defendant for
12 over \$12 million in losses purportedly incurred as a result of
13 the NOS. Foster claimed coverage under the Policy's Accidental
14 Contamination and Government Recall provisions, but defendant
15 denied Foster coverage under both provisions. Foster then
16 instituted this action for declaratory relief and breach of the
17 insurance contract.

18 The parties filed cross-motions for summary judgment on
19 Foster's declaratory relief claim to resolve whether Foster was
20 entitled to coverage under the Policy. In its Amended Order
21 granting Foster's motion for summary judgment and denying
22 defendant's motion for summary judgment, which is herein
23 incorporated by reference, the court found that Foster was
24 entitled to coverage as a matter of law. (Jan. 20, 2016 Am.
25 Order (Docket No. 117).) The court first held that the January
26 8, 2014 NOS and the conditions described in it constituted an
27 Insured Event under the Accidental Contamination provision.
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1 (Id. at 9:6-16:14.) Alternatively, the court concluded that
2 Foster's destruction of the 1.3 million pounds of chicken as a
3 result of the NOS constituted an Insured Event under the
4 Government Recall provision. (Id. at 16:15-22:27.)

5 The parties proceeded to a bench trial before the
6 undersigned to determine Foster's loss under the Policy. Because
7 the court already found that Foster is entitled to coverage under
8 the Policy, it is entitled to judgment in its favor on its breach
9 of contract claim if it sustained loss covered by the Policy.
10 The Policy defines "Loss" the same for the Accidental
11 Contamination and Government Recall provisions, and Foster is
12 seeking the same damages under either coverage provision.
13 Because the January 8, 2014 NOS essentially resulted in a single
14 Insured Event entitling Foster to damages under either coverage
15 provision and Foster seeks the same damages under either
16 provision, the court need not distinguish between the Accidental
17 Contamination and Government Recall provisions for purposes of
18 these findings of fact and conclusions of law.

19 II. Analysis

20 A. The "Insured Event"

21 A pivotal dispute between the parties is whether the
22 Insured Event extends for the entire duration the Livingston
23 facility was not processing chicken from January 8 to 22. Foster
24 contends there was a single shutdown from January 8 to 22 and
25 that this entire period constitutes the Insured Event.
26 Defendant, on the other hand, argues that if the Insured Event
27 was the initial shutdown mandated by the NOS as the court found
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1 at summary judgment, the second voluntary shutdown Foster elected
2 to impose is not part of that Insured Event.

3 1. The NOS and Abeyance Notice

4 The USDA issued the five-page NOS to Foster on January
5 8 and thereby withheld marks of inspection and suspended the
6 assignment of inspectors at the Livingston facility. (NOS); see
7 also 9 C.F.R. § 500.1(c) ("A 'suspension' is an interruption in
8 the assignment of program employees to all or part of an
9 establishment."). As the grounds for the NOS, the USDA stated:

10
11 This action is initiated based on egregious insanitary
12 conditions observed in your establishment whereby
13 products produced at your facility may have been
14 rendered adulterated in violation of the Poultry
15 Products Inspection Act (PPIA) This is
16 evidenced by findings of an infestation of live
17 cockroaches in and around your production areas, that
18 created insanitary conditions, and demonstrate that
19 your firm failed to maintain an effective pest control
20 program and other sanitary controls to assure that
21 wholesome, unadulterated meat and poultry products are
22 produced at your facility.

23 (NOS at 1.)

24 The USDA informed Foster in the NOS that FSIS
25 inspection personnel had found "live cockroaches at the hand wash
26 sink directly across from Inspection Station 7, line 2" while
27 slaughter operations were in progress. (Id. at 2.) The NOS
28 further memorialized four occasions on which the USDA had issued
29 notices of noncompliance based on its discovery of live
30 cockroaches in production areas. (See id. (indicating that the
31 FSIS found live cockroaches (1) on January 7, 2014 "during
32 production on a grey plastic tub that is a direct product contact

1 surface"; (2) on December 28, 2013 "during production to the left
2 of the faucet of Inspection Station 7"; (3) on November 4, 2013
3 "during production next to the sanitizer dispenser box, which is
4 located on the wall next to the ice machine"; and (4) on
5 September 14, 2013 "during production on the floor between the
6 liver tumbler/belt wall").)

7 In the NOS, the USDA informed Foster that the
8 "suspension will remain in effect until such time as you provide
9 adequate written assurances of corrective and preventative
10 measures to assure that meat and poultry products will be
11 produced under sanitary conditions in accordance with the Poultry
12 Products Inspection Act and the regulations promulgated there
13 under." (Id. at 4); see also 9 C.F.R. § 500.5 ("FSIS may hold a
14 suspension in abeyance and allow the establishment to operate
15 under the conditions agreed to by FSIS and the establishment.").

16 Foster "submitted [its] first response" to the NOS via
17 email that same day. (Ex. 9 at 1.) After a "thorough review and
18 evaluation" of Foster's "first submittal," the Alameda District
19 Office of the USDA ("ADO") determined that "additional
20 information and clarification was needed in order to determine
21 regulatory compliance." (Id.) The ADO had conference calls with
22 Foster on January 8 and 9 to "discuss the items of concern."
23 (Id.)

24 On January 10, Foster submitted its "second response
25 via email to the NOS" to address the ADO's concerns and inquires.
26 (See id. at 1-3.) The ADO had a further conference call with
27 Foster "to discuss the remaining items that required
28

1 clarification," and Foster "provided an addendum to [its] second
2 submittal" that same day. (Id. at 3.)

3 On January 10, the ADO verbally notified Foster that it
4 would hold the NOS in abeyance. The following day, on January
5 11, Foster resumed operations in Plant 2 and ran two full
6 production shifts and started a third shift early Sunday morning
7 on January 12. During the time Plant 2 was in production, Foster
8 employees found two dead or dying cockroaches in a production
9 area of Plant 2. Specifically, at 11:27 p.m. on January 11,
10 Foster employees sighted a cockroach "in the pinning area behind
11 the hock nicker" and, at 12:38 a.m. on January 12, Foster
12 employees sighted a cockroach on the "evisceration wall between
13 the evisceration and chiller." (Ex. 27 at 1.) Approximately ten
14 hours later, at 10:37 a.m., Foster's plant manager at the
15 Livingston facility, Ronald O'Bara, decided to "temporarily cease
16 operations." (Id.)

17 That same day, O'Bara notified the ADO District
18 Manager, Dr. Yudhbir Sharma, in writing of the two sightings in
19 the production area of Plant 2 and of Foster's decision to
20 temporarily cease operations. (Id.) In that same letter, O'Bara
21 informed Dr. Sharma that "the corrective actions" taken in
22 response to the sightings "were sufficient to maintain sanitary
23 conditions." (Id.) He assured Dr. Sharma that the chicken
24 produced was safe for sale and consumption:

25 All sightings reported as part of the Internal Pest
26 Control Management Program did not pose a risk to
27 product for the following reasons:

- 28 • Plant 2 was monitored continuously throughout

1 the production shifts.

- 2 • Sightings were identified on non-food contact
3 sites.
4 • Corrective actions were immediately implemented
5 to ensure containment within the specific area.

6 (Id. at 2.) It is undisputed that the USDA approved the 1.25
7 million pounds of chicken produced on January 11 and 12 for sale
8 and that Foster sold it.

9 In the detailed Abeyance Notice dated January 13, the
10 USDA stated, "On January 12, 2014, your plant management notified
11 the ADO of your intent to voluntarily stop operations to
12 implement further interventions." (Ex. 9 ("Abeyance Notice") at
13 3.) As the grounds for holding the NOS in Abeyance, however, the
14 USDA informed Foster:

15 Based on your written and verbal commitments provided
16 on January 8, 2014, through January 10, 2014, in
17 response to the NOS, the ADO has determined that your
18 establishment has provided adequate corrective actions
19 to address the noncompliance identified in the NOS.
20 Therefore, we have decided to hold the Notice of
21 Suspension in Abeyance to afford your establishment
22 the opportunity to implement your proffered corrective
23 actions and preventative measures. This confirms the
24 verbal notification provided to you on January 10,
25 2014, by the FSIS Alameda District Office.

26 (Id.)

27 2. The Insured Event Does Not Include the Second
28 Voluntary Shutdown

It is undisputed that when the USDA sent the
Abeyance Notice on January 13, it knew Foster had found two dead
or dying cockroaches in a production area and had chosen to cease
its operations. Nonetheless, the USDA expressly limited its
grounds for placing the suspension in abeyance on the "written

1 and verbal commitments provided on January 8, 2014, through
2 January 10, 2014, in response to the NOS." (Id. (emphasis
3 added).) Significantly, the USDA referenced the January 10 date
4 in its Abeyance Notice directly after it recognized that Foster
5 had notified it of Foster's "intent to voluntarily stop
6 operations to implement further interventions" on January 12.
7 (Id. (emphasis added).) The USDA did not identify the voluntary
8 closure on January 12 or any further interventions as grounds for
9 holding the NOS in abeyance.

10 None of the evidence at trial establishes that the
11 USDA's decision to place the NOS in abeyance was dependent on or
12 influenced by Foster's decision to voluntarily cease operations
13 on January 12. The court therefore finds that the USDA did not
14 rely on Foster's decision to voluntarily cease operations or
15 complete any "further interventions" communicated on January 12
16 when deciding that Foster's Verification Plan was sufficient to
17 place the NOS in abeyance. Foster was thus entitled to begin
18 processing chicken upon the USDA's verbal abeyance of the NOS.

19 Despite the written correspondence showing that the
20 USDA issued the Abeyance Notice with knowledge of the two
21 cockroaches found in a production area on January 12, Foster
22 claims the USDA employees had orally informed Foster that it
23 would be shut down if the USDA found another cockroach. Foster's
24 head of quality control and health and safety, Dr. Robert
25 O'Connor, testified that after operations ceased on January 12,
26 he called Dr. Sharma for directions. According to Dr. O'Connor,
27 Dr. Sharma orally warned him that if the USDA found a live, dead,
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1 or dying cockroach in a production area, the USDA would suspend
2 Foster's operations. O'Bara also testified that Dr. Gregory
3 Abreu, an inspector for the ADO, told him on January 11 that the
4 USDA would shut Foster down if the USDA found a cockroach, even
5 if it was outside of a production area.

6 As a threshold matter and as the court made clear to
7 counsel at trial, the court cannot consider these hearsay
8 statements for the truth of the matters asserted. See Fed. R.
9 Evid. 801(c). Given the weight Foster sought to attribute to
10 these undocumented conversations at trial,¹ it is surprising that
11 Foster did not at least attempt to secure the testimony of Dr.
12 Sharma or Dr. Abreu for trial.

13 Nonetheless, even if the court considers these oral
14 statements when evaluating Foster's state of mind and what it
15 believed the USDA would do upon finding another cockroach, Foster
16 has not met its burden of showing that the USDA would have
17 actually shut it down or that Foster actually believed the USDA
18 would shut it down if it found one more cockroach, especially if
19 that cockroach was not in a production area.

20 As previously discussed, the USDA knew Foster had found
21 two cockroaches in a production area on January 12 and
22 nonetheless approved that chicken for sale and issued the
23 Abeyance Notice. It is not reasonable to infer that the USDA
24 would not place any significance on cockroaches reported to it
25 but would suspend the facility immediately if its inspectors, not
26 Foster, found a single cockroach.

27 ¹ In its post-trial briefing, Foster seems to distance
28 itself or cease relying on this testimony.

1 The evidence at trial also revealed that Foster and the
2 USDA understood that the "seek and destroy" method memorialized
3 in Foster's lengthy Verification Plan would cause cockroaches to
4 come out of their harborages and would not achieve immediate
5 success. The uncontroverted evidence from Dr. O'Connor and
6 O'Bara was that that Foster understood its proposed remediations
7 in the Verification Plan would take two to three weeks. This is
8 consistent with the Verification Plan, which represented that
9 Foster would apply "comprehensive treatments" for two weeks,
10 inspect "Insect Monitoring Devices" for two weeks, and
11 "continuously monitor Plant 1 and 2 for the next three weeks."
12 (Ex. 208 at FOSTER 0020105.) It strains reason to believe that
13 the USDA thoroughly reviewed and approved a Verification Plan
14 that it knew would cause cockroaches to come out of their
15 harborages and would require two to three weeks to implement, but
16 then changed course one day later and decided that a single
17 cockroach sighting required an immediate closure of the facility.
18 The court is also not persuaded that Foster was able to determine
19 that a plan it believed would take two to three weeks was
20 entirely failing on only its second day of implementation.

21 The Verification Plan also stated, "The action
22 threshold was modified so that identification of one cockroach on
23 an Insect Monitoring device in a production area will require
24 corrective actions." (Id.) The court infers that the USDA
25 considered the action threshold significant in approving the
26 Verification Plan because the Abeyance Notice memorialized that
27 the "FSIS required clarification on the threshold for escalation
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1 and treatment." (NOS at 3.) Foster therefore represented, and
2 the USDA approved, that the sighting of a single cockroach in a
3 production area would "require corrective actions." (Ex. 208 at
4 FOSTER 0020105.) Nothing in the Verification Plan or Abeyance
5 Notice even remotely suggests that the "corrective action" Foster
6 or the USDA anticipated was the complete closure of the facility.
7 To the contrary, the Verification Plan explains that if the pest
8 control operator found a cockroach on an insect monitoring
9 device, the area "will be re-inspected and treated as
10 appropriate" and the "treatments will be documented on service
11 reports and reviewed with plant management at the time of
12 service." (Ex. 208 at FOSTER 0020109 (emphasis omitted).) The
13 USDA was thus aware of the possibility that cockroaches would be
14 found in a production area and agreed to a plan that treated the
15 area with insecticide upon finding a cockroach without any
16 suggestion that a plant shutdown would be required.

17 It is also undisputed that the cockroaches found on
18 January 12 were dead or dying. Dr. Sharma's alleged oral
19 statement that the USDA would treat dead or dying cockroaches the
20 same as live cockroaches is inconsistent with the USDA's repeated
21 reference to "live" cockroaches in the NOS. If the USDA did not
22 attribute some significance to the fact that a cockroach is
23 alive, it seems unlikely that they would repeatedly refer to the
24 finding of "live" cockroaches in the NOS. (See NOS at 1-2.)

25 Furthermore, the controlling regulations, which ensure
26 that the USDA comports with due process in suspending a facility,
27 do not empower a single USDA employee to abandon the procedures
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1 outlined in the regulations and make rogue decisions as to
2 whether a facility can remain open. For example, while the USDA
3 can suspend a facility without notice, see 9 C.F.R. § 500.3, it
4 is required to give prompt written notice to the facility that
5 includes particular information. See id. § 500.5(a) (“If FSIS
6 takes a withholding action or imposes a suspension, the
7 establishment will be notified orally and, as promptly as
8 circumstances permit, in writing. The written notification will:
9 (1) State the effective date of the action(s), (2) Describe the
10 reasons for the action(s), (3) Identify the products or processes
11 affected by the action(s), (4) Provide the establishment an
12 opportunity to present immediate and corrective action and
13 further planned preventive action; and (5) Advise the
14 establishment that it may appeal the action as provided in §§
15 306.5 and 381.35 of this chapter.”).)

16 Moreover, while the USDA may take a lesser regulatory
17 control action because of “[i]nsanitary conditions or practices,”
18 id. § 500.2, it can suspend a facility without prior notice based
19 on insanitary conditions only if the “[s]anitary conditions are
20 such that products in the establishment are or would be rendered
21 adulterated.” Id. § 500.3. The court does not believe that a
22 company as sophisticated as Foster would accept without challenge
23 the decisions of one or two USDA employees outside the scope of
24 their authority and inconsistent with controlling regulations.

25 Nor is Foster’s effort to paint its decision to cease
26 operations on January 12 as mandated by threats from the USDA
27 consistent with the numerous and repeated statements it made on
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1 January 12 and the following weeks emphasizing that its decision
2 to close the facility was "voluntary." For example, in its
3 memorandum to employees on January 12, Foster indicated it had
4 "voluntarily and temporarily put operations at [the] Livingston
5 [facility] . . . on hold" and that it was "choosing to dedicate
6 additional time" to its preventative plan. (Ex. 212.) Foster
7 placed the same emphasis on the voluntariness of its decision in
8 a press release and notices to its customers. (Ex. 209; Ex. 211
9 at 2-3; see also Ex. 212 at 4 (email from Ron Foster on January
10 16 addressing the "self-imposed shutdown").)

11 The evidence also does not persuade the court that the
12 USDA believed the two cockroaches found in the production area on
13 January 12 in Plant 2 resulted or would result in adulterated
14 chicken. Not only did Foster assure the USDA that "corrective
15 actions were sufficient to maintain sanitary conditions," (Ex. 27
16 at 1), the USDA necessarily agreed because it issued its marks of
17 inspection for all chicken produced on January 11 and 12 despite
18 the presence of cockroaches. See 21 U.S.C. § 456(b) ("The
19 Secretary shall refuse to render inspection to any establishment
20 whose premises, facilities, or equipment, or the operation
21 thereof, fail to meet the requirements of this section."). It is
22 disingenuous for Foster to argue that the sighting of the two
23 cockroaches in the production area was of such grave concern and
24 mandated an immediate closure of the facility when Foster assured
25 the USDA that the chicken was not affected by the cockroaches and
26 should be approved for sale.

27 The court therefore finds that the USDA did not require
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1 Foster to cease operations after it placed the NOS in abeyance on
2 January 10 and Foster could not have reasonably believed that it
3 was required under the NOS to cease operations in light of the
4 two cockroaches found on January 12 or the ongoing cockroach
5 infestation. The Insured Event is thus limited to the first
6 shutdown imposed by the NOS and does not include the second
7 shutdown that Foster voluntarily imposed.

8 3. The Second Voluntary Shutdown Does Not Come Within
9 the Accidental Contamination Coverage Provision

10 Foster also argues that the voluntary closure to
11 "employ more effective pest control measures" nonetheless
12 constitutes "the Insured Event of Accidental Contamination"
13 because the same unsanitary conditions that gave rise to the NOS
14 continued to persist. This argument seeks to broaden the Insured
15 Event beyond the terms of the Policy.

16 The Policy defines Accidental Contamination as an
17 "error" in the production, processing, or preparation of any
18 Insured Products "provided that" their use or consumption "has
19 led to or would lead to bodily injury, sickness, disease or
20 death." (Policy § 4.A.) At summary judgment, the parties
21 strongly disagreed about what the Policy required Foster to show
22 to establish that the consumption of chicken "would lead to"
23 bodily injury or sickness. As a matter of contract
24 interpretation, the court concluded that "[t]he Policy must [] be
25 interpreted to require a showing of something less than an
26 absolute certainty of bodily injury or sickness from eating the
27 erroneously produced chicken." (Jan. 20, 2016 Am. Order at 12:4-

1 7.) After discussing possible reasonable interpretations, the
2 court held that "erroneously produced chicken 'would lead to'
3 bodily injury or sickness if the government determines the
4 chicken cannot be sold because it may cause bodily injury or
5 sickness or the plaintiff shows that bodily injury or sickness is
6 likely or reasonably probable as a result of consumption." (Id.
7 at 13:18-23.)

8 The FSIS's finding "that the 'egregious insanitary
9 conditions' resulted in the production of chicken that was
10 'prepared, packaged, or held under insanitary conditions whereby
11 it may have become contaminated with filth, or whereby it may
12 have been rendered injurious to health'" was therefore crucial to
13 the court's determination that the NOS constituted an Insured
14 Event. (Id. at 12:15-19 (quoting NOS at 1, 3).)² Absent that
15 finding, Foster could not have shown that the chicken subject to the
16 NOS "would lead to" bodily injury or sickness.

17 Foster cannot, however, extract the explicit finding
18 made in the NOS and subsequently apply it simply because the
19 cockroach infestation continued to exist. The undisputed
20 evidence at trial was that the USDA determined that the
21 Verification Plan provided adequate assurances to the USDA that

22 ² Although in the NOS the FSIS repeatedly stated that the
23 chicken "may have become" contaminated, the controlling
24 regulations actually mirrored the Policy's requirement of a
25 finding that products "are or would be rendered adulterated."
26 See 9 C.F.R. § 500.3 ("Sanitary conditions are such that products
27 in the establishment are or would be rendered adulterated.").
28 This only strengthens the court's conclusion at summary judgment
that the finding in the NOS satisfied the Policy's Accidental
Contamination requirement that "the use of consumption of such
Insured Products has led to or would to" bodily injury or
sickness. (Policy § 4.A.)

1 the chicken produced would not lead to bodily injury or sickness.
2 Foster did not put forth a single piece of evidence from which
3 the court could find that the chicken produced after the NOS was
4 placed in abeyance "would lead to" bodily injury or sickness.
5 Although it argues it had "the understanding that FSIS had
6 determined that any chicken processed under such unsanitary
7 conditions would be deemed 'adulterated' and unfit for human
8 consumption," the USDA's approval of the chicken produced on
9 January 12 despite its knowledge of the cockroaches in the
10 production area defeats this argument. Any suggestion that
11 Foster actually believed the chicken produced after the NOS was
12 held in abeyance was adulterated is belied by Foster's assurances
13 to the USDA that the chicken produced on January 12 was safe for
14 consumption.

15 Foster's invocation of public policy is also misplaced.
16 Foster argues that it should not have been forced to process
17 chicken unless and until the FSIS reinstated the NOS in order for
18 coverage to be triggered. Foster neglects to reconcile this
19 concern with the fact that it assured the USDA that the chicken
20 produced on January 12 under the very "unsanitary conditions" it
21 claims required immediate closure was safe to sell. (Ex. 27;
22 accord Ex. 30 (January 12 memorandum notifying its employees of
23 the voluntary shutdown and assuring them that "[n]o product,
24 packaging or line was in any way affected"). If Foster truly
25 believed that the chicken it produced on January 12 was
26 "adulterated" because of the cockroach infestation, it would have
27 violated federal law when it assured the USDA the chicken was
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1 safe and then sold it to the public. See 21 U.S.C. §
2 458(a)(2)(A) (“No person shall . . . sell . . . any poultry
3 products which are capable of use as human food and are
4 adulterated or misbranded at the time of such sale”); see
5 also 21 U.S.C § 453(g)(4) (defining “adulterated” to include
6 product that has been “prepared, packed, or held under insanitary
7 conditions whereby it may have become contaminated with filth, or
8 whereby it may have been rendered injurious to health”).

9 Foster has not and cannot argue that preventative
10 measures taken to avoid the risk of an Insured Event are covered
11 under the Policy. Nor has Foster cited authority articulating a
12 strong public policy against an insurance agreement like the one
13 in this case that covers certain events, but does not cover costs
14 incurred to prevent those very events. See generally Int’l
15 Techs. Mktg., Inc. v. Verint Sys., Ltd., Civ. No. 1:15-2457 GHW,
16 2016 WL 344977, at *7 (S.D.N.Y. Jan. 27, 2016) (“Where an
17 agreement is unambiguous, as it is here, its reasonableness is
18 beside the mark. Although plaintiff may regret the terms that it
19 plainly agreed to, [a]bsent some violation of law or
20 transgression of a strong public policy, the parties to a
21 contract are basically free to make whatever agreement they wish,
22 no matter how unwise it might appear to a third party.” (internal
23 citation and quotation marks omitted)).³ Even assuming that the

24
25 ³ In the order granting Foster’s motion for summary
26 judgment, the court relied on public policy when interpreting the
27 language of the Policy and rejecting defendant’s argument that a
28 product must first be put into commerce and injure someone before
triggering coverage. (See Jan. 20, 2016 Am. Order at 11:14-
12:3.) The court did so in the context of interpreting what the
plaintiff had to show in order to prove that a product “would

1 closure to fumigate was in the best interest of the public or a
2 good business decision, public policy cannot be used to re-write
3 the terms of a policy under the circumstances of this case.

4 Accordingly, because there was no evidence that chicken
5 produced after the NOS was placed in abeyance would lead to
6 bodily injury or sickness, the court finds that the second
7 voluntary closure was not an Insured Event of Accidental
8 Contamination.

9 B. Loss Under the Policy

10 Under New York law, "the insured has the burden of
11 proving that the claimed loss falls within the scope of the
12 policy." Atl. Cas. Ins. Co. v. Value Waterproofing, Inc., 918 F.
13 Supp. 2d 243, 257 (S.D.N.Y. 2013). To carry this burden,
14 plaintiff must put forth credible evidence and cannot rely on
15 mere speculation, conjecture, or unfounded assumptions.

16 In this case, both parties sought to prove the
17 coverable loss under the Policy through expert witnesses. After
18 hearing the testimony of both experts, the court finds that in
19 general defendant's expert, Michael Diliberto III, provided more
20 credible and reliable calculations and analyses of the claimed
21 losses in this case. For example, Diliberto relied on generally
22 accepted accounting principles (GAAP), which provide a tangible
23 means for understanding and evaluating the principles and methods
24 he utilized. (Cf. Policy § 7.G(iv) ("[I]n determining the amount
25 of any covered Loss the Underwriters shall apply standard

26 lead to" bodily injury or sickness. There was no credible
27 evidence at trial that Foster or the USDA thought the chicken
28 produced after the NOS was placed in abeyance "would lead to"
bodily injury or sickness.

1 accounting principles as recognized by the relevant regulatory
2 authorities in the Insured's jurisdiction.".) Foster's expert
3 Ned S. Barnes, on the other hand, indicated that he utilized only
4 "commonly accepted accounting principles," which are not as
5 defined as GAAP and thus give the court less confidence in or
6 understanding of the basis for his opinions. (Ex. 271 at 5.)

7 The testimony at trial also revealed that Barnes almost
8 entirely accepted the calculations Foster's Chief Financial
9 Officer provided him and did not meaningfully test the
10 reliability of her calculations. While it became clear during
11 discovery that the parties hotly disputed whether losses incurred
12 from the second shutdown were covered under the Policy, and
13 Diliberto explicitly addressed this issue and provided
14 alternative calculations that excluded those losses in his expert
15 report, Foster never requested Barnes to offer alternative
16 calculations based on this significant distinction. For all of
17 these reasons and after observing both experts testify during
18 trial, the court gives greater weight to the calculations and
19 opinions proffered by Diliberto.

20 Foster is entitled to seek only those losses covered by
21 the Policy, which the Policy defines in relevant part as
22 "reasonable and necessary expenses incurred by the Insured . . .
23 and which arise solely and directly out of [the] Insured Event."
24 (Policy § 2.) "Solely" means "without another" and "to the
25 exclusion of all else." Merriam-Webster Online Dictionary,
26 <http://www.merriam-webster.com> (last visited Feb. 2, 2016).
27 Directly means "in a direct manner" and "in immediate physical
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1 contact." Id.

2 Although the court has found that the Insured Event
3 concluded when the NOS was placed in abeyance, Foster argues that
4 it is still entitled to recover losses sustained during the
5 second shutdown because the second shutdown itself arose solely
6 and directly out of the Insured Event. The court will first
7 address this argument and then consider the specific losses
8 Foster seeks.

9 1. The Second Voluntary Shutdown Did Not Arise Solely
10 and Directly Out of the Insured Event

11 To be covered under the Policy, Foster's decision to
12 voluntarily cease operations on January 12 must arise "solely and
13 directly" out of "the NOS and the conditions described in it."
14 (Jan. 20, 2016 Am. Order at 16:9-11 (emphasis added).) Foster
15 attempts to suggest that any losses would be covered if they
16 arose solely and directly out of the "NOS or the unsanitary
17 conditions of the Facility described therein." (Pl.'s Post-Tr.
18 Brief at 8:5-6 (emphasis added).) The court's January 20, 2016
19 Amended Order makes clear that, absent the FSIS's finding in the
20 NOS that the chicken would lead to bodily injury or sickness, the
21 unsanitary conditions described in the NOS could not have
22 amounted to Accidental Contamination under the Policy. (See Jan.
23 20, 2016 Am. Order at 11:5-13:22.) Foster therefore cannot
24 simply extract the unsanitary conditions described in the NOS and
25 broadly treat the cockroach infestation as the Insured Event.

26 For the reasons previously discussed, the NOS did not
27 require Foster to cease operations on January 12 and the FSIS's
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1 Notice of Abeyance was not dependent on Foster's decision to
2 voluntarily cease operations. Nor was the FSIS's decision to
3 place the NOS in abeyance conditioned upon Foster's commitment to
4 undertake any efforts, such as fumigation, that were not
5 identified in the Verification Plan. Because neither the NOS nor
6 the Abeyance Notice required Foster to cease operations on
7 January 12, it is hard to imagine how Foster's voluntary and
8 independent decision to cease operations can be considered to
9 have arisen solely and directly out of the Insured Event.

10 Foster nonetheless argues that its voluntary shutdown
11 and the fumigation "were necessary to . . . comply with the
12 federal regulations, as required and directed by the FSIS in the
13 NOS." (Pl.'s Post-Trial Br. at 10:5-7.) In the Abeyance Notice,
14 the USDA reminded Foster of its independent responsibility to
15 ensure that its facility complied with sanitary regulations:

16 You are reminded that as an operator of a federally
17 inspected facility, you are expected to comply with
18 FSIS regulations and to take appropriate actions to
19 prevent the production or shipment of contaminated or
20 adulterated product. The regulations require
21 establishments to take appropriate action(s) when
either the establishment or FSIS identifies regulatory
non-compliance or that the plant's sanitation, HACCP
or other systems may be ineffective.

22 (Abeyance Notice at 4 (emphasis added).) This warning simply
23 reiterates the existing regulations that governed Foster as an
24 operator of a federally inspected facility.

25 Foster acknowledges that it is governed by the Poultry
26 Products Inspection Act, which requires that Foster maintain its
27 facilities "in accordance with such sanitary practices, as are
28 required by regulations promulgated by the Secretary for the

1 purpose of preventing the entry into or flow or movement in
2 commerce or burdensome effect upon commerce, of poultry products
3 which are adulterated." 21 U.S.C. § 456(a); see also 21 U.S.C. §
4 458(a)(2)(A) ("No person shall . . . sell . . . any poultry
5 products which are capable of use as human food and are
6 adulterated or misbranded at the time of such sale . . .").

7 Even in the absence of the NOS, Foster was required to maintain
8 its facility in a sanitary condition and was prohibited from
9 selling chicken it believed was adulterated. That the NOS
10 reminded Foster of its obligation to comply with existing laws
11 and regulations that governed it regardless of the NOS cannot
12 establish that Foster's decision to cease operations arose solely
13 and directly out of the NOS.

14 Although the NOS was undoubtedly a factor leading to
15 Foster's decision to voluntarily cease operations, additional
16 evidence at trial confirmed that it was not the sole factor. For
17 example, there was substantial testimony from which the court
18 infers that, by January 12, Foster realized the infestation was
19 much worse than it originally believed and that its pest control
20 operator, Orkin, was not performing adequately. The evidence at
21 trial showed that Foster was concerned about the possibility of
22 another government shutdown if the USDA discovered the extent of
23 the infestation. Not only was the NOS and cockroach infestation
24 receiving media attention, the evidence at trial showed that at
25 the time it decided to voluntarily cease operations, Foster was
26 still recovering from the damage it suffered as a result of the
27 unrelated Public Health Alert from October 7, 2013. The court
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1 finds that Foster made the deliberate and calculated business
2 decision to voluntarily cease operations in an effort to repair
3 and preserve its brand.

4 This business decision is reflected in Foster's
5 numerous press releases and communications that repeatedly
6 emphasized that its decision was "voluntary" and that Foster was
7 "choosing to dedicate additional time to ensuring its
8 preventative plan is fully realized with the most effective
9 technology and treatments available." (Ex. 209 (emphasis
10 added).) These communications with the public also reflect a
11 conscious effort to emphasize Foster's family values in the hopes
12 of saving and rebuilding the brand's image. (See, e.g., id.
13 ("Foster Farms President Ron Foster said, 'On behalf of my
14 family, I made a commitment to making this right Foster
15 Farms is a company that strives for excellence.'"); Ex. 211 at 2
16 ("On behalf of the company and the thousands of good, dedicated
17 people in our Central Valley workforce, I want to assure you that
18 we are fully committed to making this right.").)

19 Foster's communications to its employees, customers,
20 and public during the second shutdown also show that Foster was
21 striving to do more than what the government required. For
22 example, Foster explained it was ceasing operations to "further
23 expand our USDA-approved safe manufacturing procedures and
24 monitoring systems" and was using the time to "properly implement
25 new measures" to ensure "the most stringent and effective
26 treatment protocols in place." (Ex. 212; accord Exs. 209, 211 at
27 2 (providing the same explanation in the January 12 press release
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1 to the public and notices to customers).) In a January 13 email,
2 Foster's Senior Vice President of Human Resources explained that,
3 "[o]ut of an abundance of caution," Foster decided to "initiate[]
4 an intense remediation" to ensure the "facility would exceed
5 sanitary standards approved by the USDA." (Ex. 212 at 3
6 (emphasis added).) It is hard to believe that Foster felt
7 compelled to shut down and engage in significantly more extreme
8 methods in response to the NOS when it repeatedly emphasized that
9 it was choosing to go above and beyond what was required.

10 There was also evidence and suggestions from both sides
11 that it was not simply the two cockroaches found on January 12
12 that led to the voluntary closure, but the "many" other
13 cockroaches found that day that were not reported to the USDA.
14 The testimony gave rise to the inference that Foster elected to
15 voluntarily shut down before the government or the public
16 realized the extent of the infestation at the Livingston
17 facility.

18 While the NOS and Notice of Abeyance were undoubtedly
19 looming over Foster when it decided to cease operations on
20 January 12, the court finds that its concern for doing the least
21 damage to its brand while eradicating the facility-wide
22 infestation was the key consideration leading to its decision to
23 voluntarily cease operations. Accordingly, Foster has not
24 carried its burden of proving that the second shutdown arose
25 solely and directly out of the NOS and conditions described in
26 it.

27 2. Items of Loss Foster Seeks Under the Policy
28

1 Foster seeks loss under the Policy for "Recall
2 Expenses," "Loss of Gross Profit," and "Increased Cost of
3 Working." The court will address each category of loss in turn.

4 a. Recall Expenses

5 The Policy provides coverage for Recall Expenses, which
6 it defines in relevant part as:

7 The following costs and expenses reasonably and
8 necessarily incurred by the Insured arising solely and
9 directly out of an Insured Event for the purpose of or
10 in connection with recalling, withdrawing, reworking,
11 destroying or replacing Contaminated Products:

11 i) expenses of communications including . . . public
12 relations specialist;

12 ii) transportation costs in recalling and / or
13 withdrawing Contaminated Products;

14 vii) costs incurred by the Insured for the physical
15 examination, reworking, relabeling, and / or
16 destruction and disposal of Contaminated Products,
17 including the destruction and disposal of packaging
18 and labeling materials that cannot be reused.

18 (Policy § 4.Q.) Foster seeks and defendant does not dispute the
19 award of Recall Expenses in the amount of **\$11,733** in landfill
20 fees to dispose of the chicken produced on January 7 and 8 and
21 **\$7,500** in trucking fees to move that chicken to the landfill.

22 Foster also seeks \$74,791 in public relations ("PR")
23 expenses and introduced the itemized invoice from its PR firm.
24 The invoice describes the numerous tasks the firm completed in
25 response to the "LIVINGSTON PLANT SHUTDOWN: JANUARY 8-22, 2014."
26 (Ex. 100.) While the invoice reflects a total of 443.5 hours,
27 the firm charged the lump sum of \$74,791 for those hours without
28 attributing the time spent to the tasks described in the invoice

1 or indicating when the discrete tasks were completed. It is
2 therefore impossible for the court to distinguish the PR expenses
3 that arose solely and directly out of the Insured Event from
4 those that were incurred, at least in part, from the second
5 shutdown. Diliberto opines that only \$14,958 arose solely and
6 directly out of the first shutdown and the remaining \$59,833 are
7 attributable to the second shutdown, which he calculated "based
8 on a pro-rata share of the monthly invoice." (Ex. 267 at 5.)
9 The amount Diliberto attributes to the first shut down is
10 approximately 20% of the total PR expenses.

11 The court does not doubt that Foster would have
12 continued to incur PR expenses after the NOS was held in abeyance
13 even if Foster never voluntarily ceased operations because the
14 public concern over the NOS would have continued past the
15 Abeyance Notice. Nonetheless, while the court believes
16 attributing 20% of the total PR expenses may be a low estimate,
17 Diliberto was the only witness who undertook to isolate PR
18 expenses that arose solely and directly out of the Insured Event.
19 Neither Foster nor its expert attempted to distinguish which
20 charges arose solely and directly out of the Insured Event or
21 requested the PR firm to delineate tasks between the Insured
22 Event and voluntary shutdown. Because Foster has the burden of
23 proof and the only evidence before the court is that the PR
24 expenses arising solely and directly out of the Insured Event are
25 limited to **\$14,958**, the court will award Foster that amount.

26 b. Loss of Gross Profit

27 "Loss of Gross Profit" under the Policy includes the
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1 loss "incurred as a result of an actual and ascertainable
2 reduction in the Insured's sales revenue caused solely and
3 directly by an Insured Event." (Policy § 4.J.) In calculating
4 Loss of Gross Profit, the Policy provides:

5
6 iii) Loss of Gross Profit shall be assessed by the
7 Underwriters based on an analysis of the profits
8 generated by the Contaminated Products, and other
9 Insured Products, which lost sales as a direct result
of the Insured Event, during each month of the twelve
months prior to the Insured Event, and taking into
account:-

10 a) the reasonable projection of the future
11 probability of such Contaminated Products and other
12 affected Insured Products had no Insured Event
occurred, and

13 b) all material changes in market conditions of
14 any nature whatsoever, including but not limited to
15 changes in population, consumer tastes, seasonal
16 variations and competitive environment, which would
17 have affected the future marketing of and profits
generated by the Contaminated Products or other
affected Insured Products.

18 iv) in determining the amount of any covered Loss the
19 Underwriters shall apply standard accounting
20 principles as recognized by the relevant regulatory
authorities in the Insured's jurisdiction.

21 (Id. § 7.G(iii)-(iv).)

22 1. Destroyed Chicken

23 It is undisputed that Foster's inability to sell the
24 1.3 million pounds of chicken that the USDA refused to approve
25 for sale arose solely and directly out of the Insured Event. The
26 loss attributed to this chicken is \$536,352 for the chicken sent
27 to the landfill; \$504,434 for the chicken processed in the
28 rendering plant; and \$6,914 for rendered chicken that had to be

1 sent to the landfill. While Diliberto does not dispute those
2 claimed values, he excluded them from his calculations because he
3 did not believe they came within any of the Policy's definitions
4 of Loss. (See Ex. 267 at 9.) However, defendant concedes and
5 the court agrees that it would be reasonable to conclude that the
6 cost of the 1.3 million pounds of chicken is an element of
7 "revenue that would have been reasonably projected" under the
8 Policy's definition of Loss of Gross Profit. The court will
9 therefore award Foster **\$1,047,700⁴** in loss of gross profit based
10 on the 1.3 million pounds of chicken that did not receive the
11 USDA's marks of inspection pursuant to the NOS.

12 2. Downgraded Product

13 According to the evidence at trial, Foster produces
14 organic and conventional chicken and is able to sell organic
15 chicken at a higher profit margin. While the Livingston facility
16 was not processing chicken in January, Foster elected to process
17 organic chicken as conventional chicken.

18 The reason Foster elected to process organic chicken as
19 conventional chicken while the Livingston facility was not
20 operating was not entirely clear at trial. Dr. O'Connor
21 testified that only the Livingston facility was certified to
22 process organic chicken, thus organic chicken processed at the
23 Cherry and Belgravia facilities could not be certified as
24 organic. Other testimony suggested that processing organic

25
26 ⁴ Although Diliberto's trial exhibit and defendant's
27 post-trial briefing indicates the amount is \$1,047,650 (see Ex.
28 298; Def.'s Resp. Post-Trial Br. at 5:11), the court based the
total on the amounts itemized in Diliberto's expert report, (see
Ex. 267 at 9).

1 chicken is a slower process and requires that the organic chicken
2 be entirely segregated from conventional chicken during
3 processing. Because processing organic chicken for sale as
4 organic would have decreased production, witnesses explained that
5 Foster comingled the organic and conventional chicken in order to
6 process the greatest quantity of chicken in the shortest amount
7 of time. When called as a rebuttal witness, Foster's Chief
8 Financial Officer, Caryn Doyle, explained for the first time that
9 Foster might have had to euthanize birds if it slowed down
10 production in order to process organic chicken.

11 Despite the apparently inconsistent reasons provided,
12 none of the evidence suggested that it was an unreasonable
13 business decision to process the organic chicken as conventional
14 chicken or that doing so did not mitigate Foster's damages. If
15 the lost revenue from processing and selling organic chicken as
16 conventional chicken arose solely and directly out of the Insured
17 Event, the court finds that the revenue lost from doing so would
18 be recoverable as a loss of gross profit under the Policy.
19 Barnes opined that downgrading the organic chicken and processing
20 it as conventional chicken caused Foster to lose \$866,381 in lost
21 revenue, which he calculated based on the difference between the
22 sales value of the product had it been produced as organic and
23 the actual sales value for conventional chicken.

24 The court cannot determine from the evidence presented
25 at trial, however, what amount of organic chicken was downgraded
26 to conventional solely and directly as a result of the Insured
27 Event. Not only is it possible that all or most of the chicken
28

1 was downgraded during the second shutdown, Barnes also indicates
2 that "Foster incurred similar losses on downgraded organic
3 product at the Livingston facility in the period after the
4 facility resumed operation." (Ex. 271 at 9.) Diliberto opined
5 that, with the exception of \$3,726 arising solely and directly
6 out of the Insured Event, the remainder of the claimed loss is
7 attributable to the second shutdown "based on the overall
8 duration of the shutdown" and thus is not covered under the
9 Policy. (Ex. 267 at 5.) Because Foster did not submit any
10 evidence challenging this allocation, the court will award
11 plaintiff only **\$3,726** for its claimed loss of gross profit
12 resulting from downgrading its organic chicken.

13 3. Unfilled Orders

14 Barnes opines that as a result of both shutdowns,
15 Foster was unable to fill a substantial number of firm orders for
16 chicken. Diliberto explained at trial and in his report why he
17 believes Barnes' calculations significantly overestimate the loss
18 of gross profit from unfilled orders, which were primarily based
19 on additional labor savings that Barnes did not consider in his
20 calculations. (See id. at 12-13.) After these adjustments,
21 Diliberto calculates that the loss of gross revenue from unfilled
22 orders is \$1,276,397 and attributes \$346,164 of that amount as
23 arising solely and directly out of the Insured Event, with the
24 remainder attributable at least in part to the second shutdown.
25 Because the court finds that Diliberto's calculations are more
26 reliable, the court will award plaintiff **\$346,164** in loss of
27 gross profit based on unfilled orders.

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4. Customer Claims and Credits

Foster also seeks loss of gross profit in the amount of \$264,569 for customer credits and claims resulting from the shutdowns. Diliberto accepted the claimed valuation of the customer claims, but opined that only \$54,241 arose solely and directly out of the Insured Event, with the remaining attributable at least in part to the second shutdown. Foster did not undermine the accuracy of this allocation. The court will therefore award Foster **\$54,241** in loss of gross profit for customer claims and credits.

5. Sales Ads

Foster seeks \$42,804 in loss of gross profit attributable to the incremental volume of sales that Foster expected to achieve from a number of specific ad programs that it had booked, but had to cancel because of the shutdowns. Foster's Vice President of Retail Sales, Kevin Mooney, explained at trial that Foster canceled these promotional ads because it could not supply the necessary product without the ability to process at the Livingston facility. While Mooney's testimony sufficiently established that Foster canceled ads because of its limited ability to process chicken as a result of the shutdowns, there was no testimony or evidence showing that the necessity to cancel those ads arose solely and directly out of the Insured Event and not the second shutdown. Diliberto does not dispute the claim calculation, but opines that these losses were not covered because there was no documentation showing that the cancelled ads were related to the shutdowns or when these ads were created or

1 cancelled. Because plaintiff did not carry its burden on this
2 issue, the court cannot award it loss of gross profit
3 attributable to any canceled ads.

4 6. Commodity Sales

5 Foster also seeks \$512,082 for loss of gross profit
6 incurred as result of certain birds that would have been utilized
7 to fill customer orders but were redirected to the commodity
8 market. (Ex. 270 at 15.) A loss of gross profit based on having
9 to sell chicken on the commodity market is consistent with the
10 undisputed evidence at trial that chicken sold on the commodity
11 market is sold for significantly less per pound than chicken sold
12 on the retail market. (See Jan. 13-14, 2016 Tr. at 14:14-18,
13 109:17-18.) Diliberto explained at trial that he nonetheless
14 excluded these losses because he did not believe there were
15 adequate records to support them, and the court finds this
16 testimony credible.

17 Moreover, Mooney repeatedly testified that Foster
18 resorts to the commodity market only when it has "excess product"
19 that it otherwise could not sell on the retail market. (Id. at
20 11:1-12, 14:7-13.) Mooney also explained, however, that one of
21 the leading problems from both shutdowns was that Foster was not
22 able to process enough chicken and had to short customers.

23 Although he referred to potential excess product, none
24 of Mooney's testimony is consistent with commodity sales arising
25 solely and directly out of the Insured Event. While he testified
26 that Foster had a "surplus" of chicken after losing the Ralphs
27 business, the sales to Ralphs were not that substantial and
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1 Mooney explained that Foster offered discounts "to move the
2 product and avoid it going to the commodity market." (Id. at
3 42:13-18 (emphasis added).) He also testified that Foster
4 continued to offer discounts in January and early February of
5 2014 because it was still trying to move the excess product it
6 had after Kroger canceled its business because of the Public
7 Health Alert in October 2013 without giving Foster the customary
8 12-week cancellation time. (Id. at 26:17-23, 41:7-14.)

9 Not only is it inconsistent for Foster to have incurred
10 significant losses from having to sell excess chicken on the
11 commodity market at the same time it was having to short
12 customers, the evidence suggests that any excess Foster had was a
13 result of canceled orders from the earlier Public Health Alert,
14 not the Insured Event. Foster has thus failed to carry its
15 burden to show that any commodity sales resulted in an "actual
16 and ascertainable" loss of gross profit that arose solely and
17 directly out of the Insured Event. (See Policy § 4.J.)

18 7. Winco's Early Exit

19 Foster also seeks over \$1 million as a result of
20 Winco's alleged decision to cease ordering certain chicken
21 products sooner than it had agreed because of the NOS. Jonathan
22 Foster, who handled Foster's account with Winco, testified that
23 Winco had decided before the Insured Event to discontinue its
24 "ValBest" line of product with Foster, in part due to the
25 packaging format Foster offered. Jonathan Foster testified,
26 however, that Winco had agreed to a 12-week exit of the business
27 before the NOS. Mooney explained that the dynamics of the live
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1 chicken business require about a 12-week lead time before Foster
2 can fulfill a significant new business or withdraw a contracted
3 business, and thus it was standard for customers to commit to a
4 12-week exit of the business. (Jan. 13-14, 2016 Tr. at 15:21-
5 16:4, 17:7-17:12.)

6 Despite Jonathan Foster's credible testimony that Winco
7 had previously committed to a 12-week exit, he testified that
8 when the NOS was issued on January 8, Winco's representative
9 informed him that it would no longer commit to the 12-week exit
10 and would cease doing business with Foster within 10 days. (See
11 Ex. 274 at 2 (Jan. 9, 2014 email) ("[W]e will be moving forward
12 with the transition to Sanderson Farms In light of the
13 last days events we feel that it is imperative that we do so as
14 quickly as possible and plan on making that change effective
15 1/19.")) Based on Winco's non-hearsay statements evidencing its
16 intent to provide a 12-week exit and then retracting that
17 commitment in light of the NOS, the court finds it more likely
18 than not that Foster's loss of 9 weeks of committed sales from
19 Winco arose solely and directly out of the Insured Event.

20 While Diliberto does not dispute the total pounds
21 attributable to Winco's early exit, he contends that the profit
22 margin used to calculate the loss was inflated. At trial,
23 however, Doyle testified in rebuttal that the reduced variable
24 margin that Diliberto relied on accounted for a credit Foster
25 applied to the Winco account in period 13.⁵ The credit was for
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27 ⁵ Foster does not account for its sales by month, but
28 utilizes 13 periods per year. Period 13 thus included the credit
issued in December.

1 chicken Winco destroyed after the Public Health Alert and not for
2 discounted pricing of chicken sold in December 2013 or January
3 2014. Doyle explained that considering that credit in
4 calculating Foster's actual variable margins artificially lowered
5 the resulting variable margin.

6 The court finds Doyle's undisputed testimony on this
7 question credible. A substantial credit to Winco in period 13 is
8 also consistent with Diliberto's report, which notes that
9 Foster's prices were about 23% lower for period 13 than the
10 prices Barnes used in his calculations and the actual variable
11 margin for that period showed a net loss of 14.74%. (Ex. 267 at
12 14.) His schedules are also consistent with a credit in period
13 13 as he computes the standard variable margin as a loss of
14 \$245,113 in period 13, versus standard variable margins as gains
15 of \$295,017 in period 11, \$270,524 in period 12, and \$329,506 in
16 period 1 of 2014. (Ex. 269 at Schedule 11; see also Ex. 51
17 (showing Foster's calculation of the loss of gross profit on the
18 Winco claim).) The court therefore finds that Diliberto's
19 calculation of the loss of gross profit from Winco's early exit
20 is not reliable and will award plaintiff the loss of gross
21 profit that Barnes calculated of **\$1,107,550** based on Winco's
22 early exit.

23 8. Kroger Business

24 Plaintiff also seeks \$2,577,625 in loss of gross profit
25 attributable to its loss of sales to the Kroger "banners." The
26 undisputed evidence at trial was that the Kroger banners of Food
27 4 Less, Foods Co, and Fry's ceased ordering chicken from Foster
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1 after the Public Health Alert and had not resumed orders before
2 the Insured Event. Foster nonetheless contends that, absent the
3 "shutdowns and cockroach infestation," those stores would have
4 resumed doing business again with Foster. The evidence Foster
5 submitted in support of this claim is far too speculative and
6 cannot sustain its burden of proving its loss by a preponderance
7 of the evidence.

8 In response to the "tremendous" media coverage from the
9 Public Health Alert and the significant impact it had on Foster's
10 business, Mooney met "with every single customer numerous times"
11 in the months following the Public Health Alert trying to regain
12 lost business. (Jan. 13-14, 2016 Tr. at 23:7-9, 25:17.) When
13 the NOS was issued on January 8, Mooney was actually visiting
14 Kroger's headquarters in Cincinnati, Ohio, and gave a "two-hour
15 presentation . . . about the success of [Foster's] brand at
16 Ralphs, the reintroduction at Ralphs and also the progress that
17 [Foster] was making in the plants regarding salmonella." (Id. at
18 28:19-23.) Mooney was also meeting with Food 4 Less and Foods Co
19 during that time, which were headquartered in Compton,
20 California, and "retain[ed] independent decision-making" from
21 Kroger. (Id. at 21:21-24, 27:25-28:15.)

22 Mooney testified that before the issuance of the NOS,
23 he had been making "positive inroads" toward regaining Food 4
24 Less, Foods Co, and Fry's and was "optimistic" they would start
25 purchasing from Foster again. (Id. at 31:22-32:-13.) He thought
26 Foster had been making "good progress at Ralphs" with the limited
27 return of some products in December and that the return to Ralphs
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1 "was leading hopefully to other good things." (Id. at 34:5-7.)
2 All of Mooney's beliefs about the prospect of regaining these
3 Kroger banners was based on what he was "hoping" or "expecting."
4 (See id. at 31:22-25, 32:11-13, 34:5-7, 47:6-19.)

5 The court does not question that Mooney genuinely hoped
6 and even expected Kroger to return. As a good salesman, he had
7 to hold these beliefs to effectively do his job and convince
8 Kroger that it should return to Foster. Foster, however, offered
9 no evidence elevating Mooney's beliefs to anything more than mere
10 conjecture. His optimism about the success of his efforts and
11 the brand he represented cannot carry Foster's burden to prove it
12 was more likely than not that Food 4 Less's, Foods Co's, and
13 Fry's decisions not to return arose solely and directly out of
14 the Insured Event.

15 If Kroger really intended to return to Foster, the
16 court also would have expected Mooney to be discussing pricing
17 and quantities at the January 8 meeting in Cincinnati, not simply
18 making a presentation about all the efforts Foster had undergone
19 to address the salmonella problem. In light of Mooney's own
20 testimony that a 12-week lead time is usually necessary for
21 "significant new business," it is also reasonable to infer that
22 Kroger would have indicated its intent to return well in advance
23 of even placing its first order.⁶ (See id. at 15:21-16:4.)

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25 ⁶ Mooney testified that he did not take Foods Co and Food
26 4 Less out of Foster's sales forecasting, thus lead time might
27 not have been necessary for those companies. He also testified,
28 however, that he left them in the forecasting because he was
"optimistic [Foster was] going to regain that business," not
because either company indicated it was going to start placing
orders. (Id. at 75:7-24.) At most, Kroger informed him that

1 Given what was at stake in this case, the court is
2 surprised and frankly unimpressed that Foster did not call a
3 single representative from Kroger to shed light on Kroger's
4 actual intentions. It is undisputed that Kroger ceased doing
5 business with Foster because of the Public Health Alert and it is
6 just as likely that it had not and would not have regained faith
7 in Foster even in the absence of the Insured Event. A plaintiff
8 cannot carry its burden to prove "actual and ascertainable" loss
9 by a preponderance of the evidence with speculation and optimism.
10 Accordingly, because Foster has failed to carry its burden of
11 showing that any loss of gross profit from Fry's, Food 4 Less,
12 and Foods Co arose solely and directly out of the Insured Event,
13 Foster is not entitled to recover any of that loss under the
14 Policy.

15 Unlike the other Kroger banners, Ralphs had started
16 placing limited orders in December 2013 and January 2014 before
17 the Insured Event. (See *id.* at 30:8-9.) Nonetheless, its orders
18 were not yet regular or predictable and Mooney's optimistic
19 expectations as to what Ralphs would have done in the future are
20 similarly speculative. Although Mooney testified that Ralphs
21 ceased ordering from Foster immediately after the NOS, (*id.* at
22 30:10-16, 30:21-31:3, 34:3-5), he also testified that Kroger
23 pulled Ralphs because Foster could not assure Kroger that it
24 would not short Ralphs, (see *id.* at 29:17-22 ("And that was one
25 of the biggest issues with Kroger, was by not having Livingston

26 "the rest of the business was still yet to be determined," (*id.*
27 at 75:17), and the evidence was that Foods Co and Food 4 Less
28 made their own independent decisions at that time, (*id.* at 21:21-
24, 27:25-28:15).

1 on board, we couldn't promise Kroger that we wouldn't short
2 Ralphs, because we needed to treat all of the customers fairly.
3 And when they heard that, they kind of blew up, and that's why
4 they pulled us again from Ralphs.")). He further testified that
5 it was difficult for him to differentiate between the loss of
6 sales due to the NOS versus the second shutdown because the
7 customers were "just concerned about the media and the fact that
8 we had to short orders and then redirect orders." (Id. at 39:22-
9 40:10.) The court finds it unlikely that Kroger's concerns about
10 Ralphs being shorted would have been as significant if Foster had
11 not imposed the longer voluntary shutdown. In light of Ralphs'
12 sporadic orders before the Insured Event, Mooney's optimistic but
13 speculative beliefs about future orders, and Kroger's concerns
14 about Ralphs being shorted, the court cannot find that any loss
15 of gross profit from Ralphs arose solely and directly out of the
16 Insured Event.

17 9. Albertsons Business

18 Foster also seeks a loss of gross profits in the amount
19 of \$8,170 based on lost sales to Albertsons. There was very
20 limited evidence and testimony about Albertsons at trial, but
21 Jonathan Foster testified that Albertsons ceased purchasing
22 organic birds from Foster as a result of the "NOS and Facility
23 shutdown." (Pl.'s Post-Trial Br. at 21:18-19.) This testimony
24 is insufficient because it fails to identify any loss arising
25 solely and directly out of the Insured Event, as opposed to the
26 voluntary shutdown. From his review of the records, Diliberto
27 also explained that Albertsons "ultimately changed its supplier
28

1 of organic fresh chicken later in 2014 after the Livingston
2 shutdowns" and thus was still ordering right after the NOS. (Ex.
3 268 at 11.) The court therefore finds that Foster has not
4 carried its burden to show that Albertsons' decision to cease
5 ordering organic chicken from Foster arose solely and directly
6 out of any limited ability Foster had to process organic chicken
7 during the relatively short Insured Event.

8 10. Incremental Labor Costs

9 Foster next seeks over \$3 million for incremental labor
10 costs incurred to process and package as much product as possible
11 at the Cherry and Belgravia facilities during both the Insured
12 Event and the second shutdown. The court agrees with Foster that
13 incremental labor costs can constitute a loss of gross profit
14 under the Policy because they cause "an actual and ascertainable
15 reduction in the Insured's sales revenue."⁷ (Policy § 4.J.)

16 As a threshold matter, Foster is not entitled to a
17 majority of its claimed incremental labor costs because they were
18 incurred as a result of the second shutdown and did not arise
19 solely and directly out of the Insured Event. Even after setting

20
21 ⁷ The incremental labor costs might logically seem to
22 come under "Increased Costs of Working," which are the
23 "reasonable and necessary costs, excess of the ordinary cost of
24 conducting business had the Insured Event not happened"
25 (Policy § 4.F.) Among the limitations the Policy places on
26 "Increased Costs of Working," however, the Policy requires that
27 such labor costs result in "additional expense of subcontracting
28 the manufacturing of Insured Products to a third party during the
restoration of the property." (Id. § 4.F(iii) (emphasis added).)
Although the testimony at trial revealed that there was not a
third party Foster could have used that was within a
geographically feasible range to have mitigated Foster's losses,
the court cannot simply ignore this express and unambiguous
limitation in the Policy.

1 aside the sum attributable to the second shutdown, the parties
2 dispute the proper calculation of the incremental labor costs on
3 numerous grounds. After considering the testimony at trial and
4 opinions of both experts on this issue, the court finds that
5 Diliberto provided the most credible and reliable calculation of
6 incremental labor costs and will therefore award plaintiff loss
7 of gross profit attributable to incremental labor costs in the
8 amount of **\$11,457**, which is broken down as \$4,638 for incremental
9 overtime labor by Foster employees at Belgravia and \$6,819 for
10 incremental overtime labor by USDA employees that Foster
11 compensated at all three facilities. (See Ex. 267 at 18.)

12 c. Increased Cost of Working

13 As "Increased Cost of Working," the Policy covers:

14 The following reasonable and necessary costs, excess
15 of the ordinary costs of conducting business had the
16 Insured Event not happened, to restore only the
17 Insured's property(ies) where the Insured Event
18 happened in order to resume operations and which are
19 devoted exclusively to the purpose of reducing Loss:

- 20 (i) cleaning and /or repairing machinery and property;
21

22 (Policy § 4.F(iii).) Although Foster seeks substantial losses
23 for remediation and clean-up expenses and supplies, Diliberto
24 testified and explained at trial how most of these costs were
25 incurred during the second shutdown. (See Ex. 267 at 18-20; see
26 also Ex. 71 (detailing remediation services provided after the
27 Insured Event).) Of those costs requested, Diliberto opined that
28 only \$19,309 arose solely and directly out of the Insured Event,
and plaintiff did not produce any evidence to dispute this

1 allocation or sufficiently undermine the credibility of
2 Diliberto's reasons for excluding the remainder.

3 In his report, Diliberto excluded all pest control and
4 fumigation costs because he did not have a "clear understanding
5 of them" and correctly opined that most of the costs were
6 incurred during the voluntary shutdown. The court agrees with
7 this assessment for all of the invoices, except the invoice of
8 \$82,060 for Buzz Off Bugs Pest Control ("Buzz Off"). (Ex. 75 at
9 8-9)

10 The testimony at trial was that Buzz Off was providing
11 services in response to the Insured Event and the invoice from
12 that company itemized services by day. Foster also identified
13 Buzz Off and Orkin as the service team in its Verification Plan.
14 Even if Foster did not voluntarily cease operations and implement
15 remediation efforts greater than what the USDA found sufficient
16 to assure the USDA that the chicken was not adulterated, Foster
17 would have still continued to incur pest control services under
18 the Verification Plan approved in the Abeyance Notice. The
19 evidence also showed that a separate pest control company was
20 employed to fumigate the facility. Thus the court finds it more
21 likely than not that the invoice from Buzz Off did not include
22 costs that went above and beyond the Verification Plan. Foster
23 has thus carried its burden of proving that the remediation costs
24 of \$82,060, (Ex. 75 at 8-9), billed by Buzz Off arose solely and
25 directly out of the Insured Event.

26 Foster also seeks \$46,744 in increased costs of
27 utilities at Livingston and laboratory fees of \$48,884. Not only
28

1 does Diliberto attribute all of these costs to the second
2 shutdown, (see Ex. 267 at 20), the court was not persuaded that
3 any of these costs were in "excess of the ordinary costs of
4 conducting business had the Insured Event not happened," (Policy
5 § 4.F). With the remaining losses Foster attributes to Increased
6 Cost of Working, such as security costs incurred at Livingston,
7 the court adopts Diliberto's assessments as to why those costs
8 are not recoverable under the Policy.

9 The court will therefore award Foster **\$101,369** in
10 "Increased Cost of Working" for supplies and pest control
11 services that arose solely and directly out of the Insured Event.

12 III. Conclusion

13 For the reasons stated herein, the court hereby finds
14 for Foster on its breach of contract claim and finds that Foster
15 suffered Loss in the amount of \$2,706,398.00 covered by the
16 Policy.

17 This matter is set for oral argument on April 4, 2016
18 at 1:30 p.m. for the limited purpose of allowing the parties to
19 address the remaining issues of (1) whether Foster is entitled to
20 prejudgment interest; (2) how the \$2 million retention under the
21 Policy should be treated; (3) whether defendant is entitled to
22 any offset from Foster's settlement with Orkin; and, if so, (4)
23 the amount of such offset.

24 IT IS SO ORDERED.

25 Dated: February 11, 2016



26 **WILLIAM B. SHUBB**
27 **UNITED STATES DISTRICT JUDGE**
28